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Through the Lens of Federal Evidence Rule 403: An Examination of Eyewitness Identification Expert Testimony Admissibility in the Federal Circuit Courts

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I. Introduction

"Better that ten guilty men escape, than that one innocent suffer."[1]

In 1981 Julius Ruffin was found guilty of rape and sodomy in a Virginia court.[2] A white female nursing student was the victim of a rape, and Ruffin, an African-American male, worked at the same Virginia Hospital as the victim.[3] At trial, the victim testified she was certain that Ruffin was the perpetrator.[4] Ruffin's girlfriend testified he was with her the night in question, but the scientific testing performed on the semen sample displayed a high probability that Ruffin was a match.[5] Despite Ruffin's proclamations of his innocence and an alibi witness, after two hung jury trials Ruffin was sentenced to life in prison.[6] In 2003, DNA testing

1. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 289 (William Draper Lewis ed., The Lawbook Exchange 2008) (1795).

2. The Innocence Project, *Know the Cases on Post-Conviction DNA Exonerations: Profile of Julius Ruffin*, http://www.innocenceproject.org/Content/250.php (last visited Mar. 23, 2011) (describing the case profile on Julius Ruffin out of Virginia) (on file with the Washington and Lee Law Review); *see also* The Mid-Atlantic Innocence Project, *Case Profile on Julius Ruffin*, http://www.exonerate.org/case-profiles/julius-ruffin/ (last visited Mar. 23, 2011) (providing a detailed description of Julius Ruffin's story and the events leading up to his wrongful incarceration) (on file with the Washington and Lee Law Review).

3. *See supra* note 2 (describing the wrongful conviction and exoneration of Julius Ruffin).

4. The victim was attacked at her apartment. Weeks later she saw Ruffin walking onto an elevator in the Medical School where she was a nurse and Ruffin was a maintenance worker. She immediately called the police and identified Ruffin as her assailant. *Id.*

5. *Id.*

6. *Id*.

exonerated Ruffin.[7] An innocent man spent twenty-one years in prison based almost entirely on one erroneous eyewitness identification.[8]

"[T]here is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'"[9] Over the last twenty years, researchers have made significant scientific advances that bring to light the reliability problems inherent in eyewitness identifications.[10] This research reveals that many of the factors affecting eyewitness identification reliability are counterintuitive and many jurors' assumptions about how memories are created are actively wrong.[11] One study estimated that half of all wrongful convictions result from false identifications.[12] Despite this, jurors often find eyewitness testimony very convincing and most believe that it is reliable.[13]

However, Federal Evidence Rule 403[14] grants federal judges wide discretionary power to exclude eyewitness identification expert testimony highlighting these reliability issues. It is thus important to examine the purpose and language of the federal rule that judges are using to block this now well-established body of research from coming into our nation's

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7. *Id.*

8. *Id.* ("Not only was Ruffin excluded, but another incarcerated man, in prison for rape, was linked to the sample.").

9. Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (quoting ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 19 (1979)).

10. The Supreme Court has held that identifications which occur under questionable circumstances should not be admitted at trial. *See* Manson v. Brathwaite, 432 U.S. 98, 114 (1977) ("[R]eliability is the linchpin in determining the admissibility of identification testimony. . . ."). "[T]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *Id.* at 119 (Marshall, J., dissenting) (quoting United States v. Wade, 388 U.S. 218, 228 (1967)).

11. *See* United States v. Downing, 753 F.2d 1224, 1231 (3d Cir. 1985) (finding that "factors bearing on eyewitness identifications may be known only to jurors, or may be imperfectly understood by many, or may be contrary to the intuitive beliefs of most" (quoting People v. McDonald, 690 P.2d 709, 720 (Cal. 1984))).

12. Elizabeth F. Loftus, *Ten Years in the Life of an Expert Witness*, 10 LAW & HUM. BEHAV. 241, 243 (1986).

13. PATRICK M. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 19 (1965); *see also Watkins*, 449 U.S. at 352 (Brennan, J., dissenting) ("[M]uch eyewitness identification evidence has a powerful impact on juries. Juries seem most receptive to, and not inclined to discredit, testimony of a witness who states that he saw the defendant commit the crime."); *Manson*, 432 U.S. at 120 (Marshall, J., dissenting) ("[J]uries unfortunately are often unduly receptive to [identification] evidence . . . .").

14. FED. R. EVID. 403 ("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.").

courtrooms. Is Federal Evidence Rule 403 being used as a weapon against the admissibility of eyewitness expert testimony?

This Note will begin by briefly summarizing the recent scientific findings in the area of eyewitness identification.[15] This overview will focus principally on the counterintuitive weak correlation between eyewitness confidence and accuracy.[16] Additionally, the eyewitness identification section will conclusively demonstrate that the "alternatives" to eyewitness identification expert testimony are unacceptable and ineffective.[17] An analysis of the purpose and history behind Federal Evidence Rule 403[18] will then set the stage for an in-depth examination of the current federal circuit court split regarding the admission of eyewitness identification expert testimony.[19] This Note divides the current treatment of eyewitness expert testimony in the federal circuit courts into three categories: the Majority Approach,[20] the Progressive Minority,[21] and the Per Se Inadmissible Approach.[22] The analysis then delves deeper into how each of the three approaches uses Federal Evidence Rule 403 to exclude eyewitness identification expert testimony.[23] Part V of this Note advocates for reform in the area of Federal Evidence Rule 403 and eyewitness identification expert testimony admissibility.[24] This Note proposes and assesses both a legislative solution[25] in the form of a specialized relevance rule and a judicial solution[26] in the form of the global adoption of the Progressive Minority approach. After analyzing the strengths and weaknesses of each

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15. *See infra* Part II (summarizing the recent scientific findings that are often the subject of an eyewitness identification expert's testimony).

16. *See infra* Part II.B (expanding on the weak confidence-accuracy correlation and confidence malleability).

17. *See infra* Part II.C (describing the ineffectiveness of cross-examination and jury instructions as alternatives to eyewitness expert testimony).

18. *See infra* Part III (examining Federal Evidence Rule 403's legislative history and purpose).

19. *See infra* Part IV (summarizing the current federal circuit court split regarding the admission of eyewitness identification expert testimony and dividing the approaches into three categories).

20. *Infra* Part IV.B.

21. *Infra* Part IV.C.

22. *Infra* Part IV.D.

23. *Infra* Part IV.E.

24. *See infra* Part V.A–C (describing potential solutions to this problem and making a recommendation as to which solution is the best).

25. *Infra* Part V.B.

26. *Infra* Part V.A.

alternative, this Note will demonstrate that the legislative solution is the superior alternative.[27] In the area of eyewitness identification expert testimony admissibility, the time has come for a limitation on the unfettered discretion given to federal judges under Federal Evidence Rule 403.

II. Eyewitness Identification Expert Testimony

A. General Overview

Eyewitness misidentification is the leading cause of wrongful convictions in the United States.[28] Studies reveal that today nearly 80,000 suspects continue to be targeted every year based on eyewitness identification with a roughly forty percent rate of misidentification.[29] However, despite decades of research consistently revealing the inherent unreliability of eyewitness identification,[30] federal courts remain hostile towards expert testimony explaining the unreliability of eyewitness identifications.[31]

Expert testimony on eyewitness identification attempts to reveal to the jury the complex psychological issues pertaining to perception and memory which contribute to the unreliability of eyewitness

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27. *Infra* Part V.C.

28. The Innocence Project, *Fact Sheet on Post-Conviction DNA Exonerations*, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Mar. 23, 2011) (finding that "Eyewitness [m]isidentification [t]estimony was a factor in 74 percent of post-conviction DNA exoneration cases in the U.S.") (on file with the Washington and Lee Law Review).

29. *See* Henry Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2 FED. CT. L. REV. 2, 4 (2007) (describing the overwhelming amount of research and data indicating that erroneous eyewitness identification is the leading cause of wrongful convictions); A.G. Goldstein, J.E. Chance & G.R. Schneller, *Frequency of Eyewitness Identification in Criminal Cases: A Survey of Prosecutors*, 27 BULL. PSYCHOL. SOC'Y 71, 74 (Jan. 1989) (same).

30. *See* Loftus, *supra* note 12, at 243 (citing a 1983 Ohio State University doctoral dissertation explaining that erroneous eyewitness identification is the most common reason for the conviction of innocent people). *See generally* HADYN D. ELLIS, PRACTICAL ASPECTS OF FACE MEMORY IN EYEWITNESS TESTIMONY 12–13 (Gary L. Wells & Elizabeth F. Loftus eds., 1984); ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 21 (1979); A. DANIEL YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY 57 (1979).

31. *See infra* Part IV.B (explaining that the majority approach in the federal circuit courts is to regularly exclude eyewitness identification expert testimony); *see also* Fradella, *supra* note 29, at 4 ("[T]his article is devoted to explaining why courts must change their traditional hostility to expert testimony on the unreliability of eyewitness testimony.").

identifications. This expert testimony is extremely important because the scientific research on memory and eyewitness identification is "quite counterintuitive and hardly commonsensical."[32] A common fear regarding eyewitness expert testimony is that it will "usurp the role of the jury" and the expert will merely attempt to judge the credibility of a particular witness.[33] However, the eyewitness expert is not brought in to judge the accuracy or believability of a particular eyewitness; rather the expert provides the jury with critical information about the scientific findings in this area with which jurors can then make a more informed decision.[34] Eyewitness identification experts can potentially testify about numerous factors affecting the reliability of eyewitness identification including suggestive line-up procedures,[35] the weak confidence-accuracy correlation,[36] the exposure duration,[37] cross-racial identification,[38] weapon

32. *See* Fradella, *supra* note 29, at 24 (citing Edward Stein, *The Admissibility of Expert Testimony About Cognitive Science Research on Eyewitness Identification*, *in* 2 LAW, PROBABILITY & RISK 295, 300 (2003)).

33. *See, e.g.*, *infra* notes 181–83 and accompanying text (describing how the *Smithers* district court felt eyewitness expert testimony would "invade the province of the jury" and thus should be excluded).

34. *See* Fradella, *supra* note 29, at 23 ("The function of the expert here is not to say to the jury—'you should believe or not believe the eyewitness.'").

35. *See, e.g.*, S. Sporer, S. Penrod, D. Read & B. Cutler, *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 PSYCHOL. BULL. No. 3 315, 316 (1995) (describing how police instructions can influence a witness's willingness to make an identification and the likelihood the witness identifies a particular person). Additionally, the more members of a lineup that closely resemble the suspect, the more likely the identification will be accurate. *Id.*

36. *See infra* Part II.B (summarizing the confidence accuracy correlation).

37. *See, e.g.*, Sporer et al., *supra* note 35, at 316 ("The less time an eyewitness has to observe an event, the less well he or she will remember it.").

38. Generally, cross-racial identifications are less reliable than same race identifications. *See, e.g.*, Fradella, *supra* note 29, at 14 ("The result of cross-racial bias is a higher rate of false positive identifications, especially when a Caucasian eyewitness identifies an African-American suspect."); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 79 (2008) ("Social science studies have long shown that cross-racial identifications are particularly error prone."); Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 PSYCHOL. PUB. POL'Y & L. 230, 231 (2001) ("[A] Black innocent suspect has a 56% greater chance of being misidentified by a White eyewitness than by a Black eyewitness."); *see also* The Innocence Project, *Fact Sheet on Post-Conviction DNA Exonerations*, http://www.innocence project.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Mar. 23, 2011) (finding that "[e]yewitness [m]isidentification [t]estimony was a factor in 74 percent of post-conviction DNA exoneration cases in the U.S.") (on file with the Washington and Lee Law Review). The project also noted that at least 40% of the eyewitness identifications involved a cross-racial identification. *Id.*

focus,[39] the impact of "double identification,"[40] the effect of "post event information" on an eyewitness,[41] event violence, the "relation-back" effect,[42] and the stress level of the eyewitness, among many others.[43] For the narrow purposes of this Note, I will expand only on the findings in the area of the confidence-accuracy correlation. This Note focuses on the confidence-accuracy correlation for two important reasons. First, it is one of most striking topics of eyewitness expert testimony because it is extremely counterintuitive. Second, unlike many other areas of eyewitness

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39. *See, e.g.*, United States v. Mathis, 264 F.3d 321, 333–34 (3d Cir. 2001) (explaining that the "presence of a dangerous weapon can weaken one's ability to recall other aspects of a remembered scene, including individuals present therein"). Because most people are not exposed to deadly weapons very often there is "a survival instinct that draws one's attention to potentially threatening objects" and makes recalling a particular individual more difficult. *Id.* at 338.

40. *See, e.g.*, *id.* at 333–34 (explaining "'double identification' as a problem in determining whether one's memory derives from one of two or more possible visual exposures to an object"). "[S]uch post-event information can become incorporated with the original memory, creating an inaccurately 'remembered' association between the image and its source." *Id.*

41. *See, e.g.*, Peter Cohen, *How Shall They Be Known?* Daubert v. Merrell Dow Pharmaceuticals *and Eyewitness Identification*, 16 PACE L. REV. 237, 246 (1996) (explaining that access to facts after an occurrence can, under some circumstances, "change a witness's memory and even cause nonexistent details to become incorporated into a previously acquired memory"); Fiona Gabbert et al., *Memory Conformity: Can Eyewitnesses Influence Each Other's Memories For An Event?*, 17 APPLIED COGN. PSYCHOL. 533, 540 (2003) (finding that when witnesses discuss events with one another, shared false recollections can result); Elizabeth Loftus, *Eyewitness Testimony and Event Perception*, 8 U. BRIDGEPORT L. REV. 7, 9–10 (1987) (same).

An experiment conducted by Elizabeth Loftus also illustrates the way that "post-event information" can actually change one's memory of an event. *Loftus*, *supra* note 41, at 9–10. Two groups of witnesses were shown a film in which a car made a right-hand turn without stopping at a stop sign and caused a multicar accident. *Id.* After the film the first question for one group was, "How fast was car A going when it ran the stop sign?" *Id.* The first question for the second group was, "How fast was car A going when it turned right?" *Id.* The last question for both groups was whether they actually saw a stop sign. *Id.* 53% of the first group reported they had seen a stop sign; only 35% of the second group responded that they had seen the sign. *Id.* This suggests that the use of the words "stop sign" increased the likelihood the sign would be recalled later on. *Id.* Thus, mentioning an object that does exist will enhance the likelihood that a person will later tell you that he saw that object. *Id.*

42. *See, e.g.*, *Mathis*, 264 F.3d at 341 (explaining the "relation back" effect refers to the fact that "once a witness makes an identification, he or she will tend to stick with that initial choice at subsequent photographic arrays or lineups, even if it was erroneous").

43. *See, e.g.*, Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL. PUB. POL'Y & L. 817, 825 (1995) (listing a variety of factors which could potentially have an impact on the reliability of an eyewitness identification).

expert testimony, the confidence-accuracy correlation is relevant every time an eyewitness takes the stand.

B. A Closer Look at the Weak Correlation Between Confidence and Accuracy

"Eyewitness testimony is likely to be believed by jurors, especially when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all."[44] Common intuition tells us that the more confident an eyewitness is in their testimony the more likely it is that the witness is accurate in their identification. And in fact, jurors habitually accord more weight to a witness who testifies with confidence than to one who does not.[45] However, in this area "intuition is belied by scientific research," which reveals that in actuality there is an extremely weak correlation between witness confidence and accuracy.[46]

One court recently noted that the confidence-accuracy correlation is at best 25%, and this already weak correlation can easily drop to zero if combined with other factors such as a short duration of interaction or poor lighting at the identification scene, both of which weaken an identification.[47] Beyond the initial weak correlation between confidence and accuracy, confidence is a poor predictor of accuracy because a

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44. Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (quoting ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 19 (1979)).

45. *See, e.g.*, Penrod & Cutler, *supra* note 43, at 825 ("A major source of juror unreliability is reliance on witness confidence, a dubious indicator of eyewitness accuracy even when measured at the time an identification is made."); *Sowders*, 449 U.S. at 352 (Brennan, J., dissenting) (noting that eyewitness identification evidence has a powerful impact on juries, especially when the witness is confident the defendant is the perpetrator); ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 9, 19 (1979) (canvassing statistical and psychological evidence supporting her conclusion that an eyewitness identification is "overwhelmingly influential," particularly when the witness is confident that their identification is correct).

46. *See* United States v. Smith, 621 F. Supp. 2d. 1207, 1218 (M.D. Ala. 2009) (describing the lack of correlation between eyewitness confidence and accuracy and stating that "[i]n an instance such as this, where intuition is belied by scientific research, testimony from an expert may be of great assistance to a jury").

47. *See* United States v. Mathis, 264 F.3d 321, 334 (3d Cir. 2001) (noting that the eyewitness expert in the case testified that "the correspondence between confidence and accuracy is, at best, about 25 percent," and that when conditions attending the recalled memories are poor, "the relation between confidence and [accurate] memory is zero").

witness's confidence is very malleable.[48] For example, the information a witness gains throughout the investigation of a crime, through depositions and pre-trial preparation, can significantly boost his or her confidence.[49] Thus a witness may have a much higher level of confidence when testifying at trial than at the time of the initial identification.[50] This phenomenon makes complete sense intuitively. Just like any presentation for work or school, a speaker feels much more confident and comfortable after hours of preparation and positive feedback from co-workers or family than the day the speaker received the assignment. However, in the eyewitness identification context, unlike the average work presentation, it is not possible for time and preparation to increase the accuracy or knowledge of the witness. Jurors often believe that they will be able to differentiate the genuine and authentic confidence from the manufactured.[51] But this "confidence" has the same affect on jurors whether it is contrived and practiced or whether it is natural.[52]

Another factor which contributes to confidence malleability and can affect a witness's confidence level is known as the "feedback factor."[53] Studies show that witnesses who were told that another witness identified the same suspect were significantly more confident than witnesses who were given no feedback.[54] Additionally, witnesses who were given negative feedback and told a co-witness did *not* identify the same suspect

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48. *See* Penrod & Cutler, *supra* note 43, at 830 ("Given that confidence, when measured immediately after the identification, is a modest predictor of accuracy, reductions in reliability may render it utterly useless as an indicator of the accuracy of a witness's identification."). Additionally, it was further noted that studies have revealed "witnesses who were questioned repeatedly grew more confident about the accuracy of details in their reports." *Id.* at 827.

49. *See id.* at 827–30 ("These communications could have the unintended effects of increasing witness confidence, reducing the diagnosticity of any confidence statements made to the jury by the eyewitness, and elevating conviction rates.").

50. *See id* at 827–28 ("A simple instruction to rehearse the witnesses' account, sample questions that might be asked by a cross-examiner, and warnings that the cross-examiner will look for inconsistencies in the testimony are sufficient to inflate the witnesses' confidence in his or her memory.").

51. *Id.*

52. *See id.* at 827 *(*"[W]hen cross-examined, the briefed witnesses were significantly more confident about their identifications than were unbriefed witnesses and were believed more often by the jurors.").

53. *See, e.g.*, *id.* at 829.

54. *See* Penrod & Cutler, *supra* note 43, at 828–29 (noting that the study revealed the "highest confidence levels obtained from witnesses who believed their co-witness had identified the same individual").

were considerably less confident than those who were given no feedback.[55] This could occur at the police station if an officer gives an eyewitness this type of feedback after making their initial identification.[56] Suddenly, an identification made by an initially hesitant and uncertain eyewitness becomes the "correct answer" in their mind and the witness's confidence soars. Even if effective police practices are able to prevent this type of feedback from occurring at the stationhouse, the witness is just as likely to get this type of feedback information from his attorney.[57] The true danger of the "feedback factor" is how difficult it is to prevent because it can occur at any stage or level of litigation through many potential sources.[58]

In summary, the weak confidence-accuracy correlation is clearly an area where the scientific research is not within the common knowledge of the jury, and thus the topic has become one of the most frequently testified about by eyewitness identification experts.[59] This lack of correlation between confidence and accuracy is strong evidence of the serious need for eyewitness identification expert testimony in our nation's courtrooms. The confidence-accuracy correlation is not a topic within the ken of the average juror and can be relevant any time an eyewitness takes the stand. Contrary to the current widespread belief that eyewitness expert testimony is a rare remedy, testimony on the confidence-accuracy correlation is always going to be helpful and informative to a jury.[60]

The eyewitness in Julius Ruffin's case stopped dead in her tracks when she saw Ruffin walk onto an elevator in the hospital where she worked.[61] It was weeks after the initial rape and though she had been through dozens of

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55. *See id.* at 829 ("The lowest confidence levels were found among witnesses who were told that the co-witness had indicated that the perpetrator was not in the array and among witnesses who were initially told that the co-witness identified someone else.").

56. *See, e.g.*, Penrod & Cutler, *supra* note 43, at 829–30 (noting a concern that police and attorneys will have an incentive to manipulate their witnesses' confidence).

57. *Id.*

58. *See id.* at 830 ("It is perhaps just as likely, if not more likely, that witnesses are the recipients of information provided to them by other witnesses (who may have made their own identifications) and even the news media.").

59. *See id.* at 825 ("Research on the weak confidence accuracy relation is regarded as a reliable basis for expert testimony by 87% of the respondents and was the second most common issue about which experts had, in fact, testified.").

60. *See supra* Part IV.B (describing the Majority Approach's current hostility towards eyewitness expert testimony).

61. *See* The Mid-Atlantic Innocence Project, *Case Profile on Julius Ruffin*, http://www.exonerate.org/case-profiles/julius-ruffin/ (last visited Mar. 23, 2011) (describing Julius Ruffin's story and the events leading up to his wrongful incarceration) (on file with the Washington and Lee Law Review).

suspect photos, she had been unable to identify her perpetrator.[62] But when she saw Julius Ruffin that day she was *certain* that he was her attacker.[63] The victim proclaimed this genuine certainty to the jury that found Ruffin guilty and sentenced an innocent man to life in prison.[64] There is little to no correlation between eyewitness confidence and accuracy,[65] but Julius Ruffin's exoneration makes that seemingly simple statement much more powerful and shines a light on the importance of expert testimony.[66]

C. Alternatives to Eyewitness Identification Expert Testimony?

Many courts believe that expert testimony is not the only effective means of relaying the dangers of eyewitness testimony to the jury. Most commonly, courts reason that jury instructions and cross-examination effectively highlight any reliability problems in an eyewitness's testimony.[67]

Cross-examination is thought to be an effective alternative to expert testimony because both are tools that emphasize the potential unreliability or lack of credibility of a particular eyewitness.[68] However, as noted earlier, expert testimony on eyewitness identification does not simply assess

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62. *Id.*

63. *Id.*

64. *Id.*

65. *See supra* notes 47–48 (explaining the weak correlation between eyewitness confidence and accuracy).

66. In addition to highlighting the confidence-accuracy correlation, Julius Ruffin could have also benefited from expert testimony on the effects of cross-racial identification. *See supra* note 38 and accompanying text (explaining that cross-racial identifications are generally less reliable). The phenomenon of "double identification" would have also been relevant to Ruffin's case. The victim and Ruffin both worked in the same hospital and thus she may have seen him before and "remembered" his face but attached it to the wrong situation. *See supra* note 40 and accompanying text (explaining that double identification is a problem in determining whether a memory derives from one of two or more possible visual exposures to a person).

67. *See, e.g.*, United States v. Downing, 753 F.2d 1224, 1230 (3d Cir. 1985) (noting that cross-examination and jury instructions are common arguments against admitting expert testimony); *see also e.g.*, Penrod & Cutler, *supra* note 43, at 825 (noting expert testimony, judicial instructions, and cross-examination are the most commonly used tools to assist jurors in assessing evidence).

68. *See, e.g.*, United States v. McGinnis, 201 F. App'x 246, 249 (5th Cir. 2006) ("It goes without saying that cross-examination serves a critical function, enabling jurors to appreciate discrepancies in testimony."); United States v. Hall, 165 F.3d 1095, 1107 (7th Cir. 1999) ("[A]ny weaknesses in eyewitness identification testimony ordinarily can be exposed through careful cross-examination of the eyewitnesses.").

the credibility of a particular eyewitness.[69] The complex psychological issues pertaining to perception and memory that contribute to the unreliability of eyewitness identifications cannot be adequately explained to a jury through cross-examination.[70] Numerous studies reveal that cross-examination is an ineffective means of informing jurors about eyewitness identification reliability issues.[71] In particular, studies have shown cross-examination is particularly ineffective at increasing juror sensitivity to the lack of correlation between witness confidence and accuracy.[72] It is also important to emphasize the difference between the inherent unreliability of eyewitness identification generally and the credibility of an individual witness. An eyewitness can be completely genuine and truly believe that he or she is making a correct identification and yet still be mistaken. The victim and eyewitness in Julius Ruffin's case is a perfect example of a genuine but mistaken eyewitness. The credibility and character of a witness are distinct from the inherent memory and perception problems that can affect an eyewitness's accuracy. Thus, cross-examination is an ineffective alternative to eyewitness identification expert testimony.

Additionally, jury instructions are an unacceptable alternative to eyewitness expert testimony. Research indicates that jury instructions are not effective at "integrating awareness" of the reliability problems with eyewitness testimony or at increasing general skepticism to eyewitness testimony.[73] In particular, jury instructions do not effectively desensitize the jurors to the weak confidence-accuracy correlation.[74] This was found to be true regardless of the timing of the jury instructions.[75] Jury instructions

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69. *Supra* note 34 and accompanying text.

70. *Supra* note 32 and accompanying text.

71. *See, e.g.*, Penrod & Cutler, *supra* note 43, at 819–20 (noting a study concluded that cross-examination of a witness by an experienced attorney did not aid the jury in determining accurate from inaccurate witnesses).

72. *Id.*

73. *See, e.g.*, Penrod & Cutler, *supra* note 43, at 834 (noting that because jurors often find jury instructions so confusing, the instructions actually have the adverse effect of *decreasing* juror sensitivity to eyewitness reliability issues); *see also e.g.,* Ferensic v. Birkett, 501 F.3d 469, 481 (6th Cir. 2007) ("We agree with the district court that 'other means' of attacking eyewitness identifications do not effectively substitute for expert testimony on their inherent unreliability.").

74. *See supra* Part II.B (describing the weak correlation between eyewitness confidence and accuracy); *see also e.g.*, Penrod & Cutler, *supra* note 43, at 833 (surmising that the results of their study indicated that the jury instruction did not enhance skepticism or sensitization and did not desensitize jurors to witness confidence).

75. *See* Penrod & Cutler, *supra* note 43, at 833–34 (explaining that *when* the jury was given the instructions did not make a significant difference on the overall effectiveness).

are equally ineffective whether given right before the eyewitness takes the stand or at the conclusion of the trial.[76] Thus, when jury instructions are not combined with testimony from an eyewitness expert, the instructions do not provide an effective safeguard against mistaken identification.

In summary, both cross examination and judicial instructions to the jury are ineffective mechanisms for informing the jury about eyewitness identification reliability issues. Thus, this Note concludes that the "alternatives" to eyewitness identification expert testimony currently used in courtrooms across the country are unacceptable solutions and do not combat the inherent unreliability of eyewitness identifications.[77]

III. Federal Evidence Rule 403

A. Overview—History and Purpose

Federal Evidence Rule 403[78] is meant to be a liberal rule which does not allow exclusion of evidence if the evils of its admission are equal to its probative value or even if they just slightly outweigh the probative value. Federal Evidence Rule 403 states: "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."[79] It is important to first note that Rule 403 allows for exclusion of otherwise relevant evidence.[80] Exclusion under Rule 403 requires the trial judge to find on balance that the probative[81] value of the

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76. *Id.*

77. To date, no court has held that eyewitness identifications are per se inadmissible, and this Note does not argue for a per se exclusion of eyewitness testimony. Despite the inherent unreliability of eyewitness identifications, identifications are sometimes correct. Procedural fairness to the victim requires the justice system respect the right of the eyewitness to testify if the testimony passes the necessary evidence relevance rules. However, juror education and the admission of eyewitness identification expert testimony is a necessary and essential component to eyewitness testimony.

78. FED. R. EVID. 403.

79. *Id.*

80. *See id.* at advisory committee's note ("[C]ertain circumstances call for the exclusion of evidence which is of unquestioned relevance.").

81. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401 (stating that evidence is "probative" if it has some tendency to make a fact more or less probable). "A brick is not a wall" and evidence will be probative if it contributes just one brick to the wall of proof built

evidence is "substantially outweighed."[82] Additionally, Rule 403 only allows exclusion of evidence which is "unfairly" prejudicial; evidence which is merely prejudicial will not be sufficient.[83]

Courts reviewing the legislative history of Federal Evidence Rule 403 have concluded that the evidence rule offers an "extraordinary remedy [to be used] sparingly."[84] Congress intended that judges would invoke this "drastic remedy" infrequently and only when absolutely necessary.[85] This rule places the trial judge in a "gatekeeper" role and grants judges an incredible amount of discretion.[86] The congressional debates over the proposed federal rules of evidence reveal that many in Congress and the practicing bar were concerned that Federal Evidence Rule 403 granted judges too much discretion and undue power.[87] To pacify some of the opposition to Rule 403, Congress attempted to structure the language to grant judges "structured discretion."[88] Unlike many other Federal Evidence

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by a party. *Id.* at advisory committee's note (quoting McCormick § 152).

82. FED. R. EVID. 403 (emphasis added).

83. *See id.* at advisory committee's note ("'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.").

84. *See, e.g.*, United States v. Dodds, 347 F.3d 893, 897 (11th Cir. 2003) (stating that Rule 403 is "'an extraordinary remedy which the district court should invoke sparingly,' and '[t]he balance . . . should be struck in favor of admissibility'" (quoting United States v. Elkins, 885 F.2d 775, 784 (11th Cir. 1989))).

85. *See* Edward Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 906 (1998) (noting Congress's purpose in enacting Rule 403 and arguing the rule should be interpreted narrowly so as not to improperly resurrect the common law rules of evidence).

86. *See id.* at 905 ("The concept of prejudice permits a judge to safeguard the integrity of the fact-finding process."). It is the judge's role under Rule 403 to protect the "integrity of the fact-finding process." *Id.* at 894.

87. *See* C. Wright & K. Graham, *Statutory History: Rule 403*, 22 FED. PRAC. & PROC. EVID. § 5211 (1st ed. 2009) ("The concept of mandatory exclusion for prejudice was taken from a New Jersey proposal and was apparently intended to mollify critics who had attacked earlier reform proposals for an excessive use of discretion."). "During Congressional consideration, Rule 403 was labeled 'controversial.'" *Id.*; *see also* WEINSTEIN & BERGER, 1 WEINSTEIN'S EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES 403–13 (Bender 1975) (describing the motivation for the original Rule 403; a commentary by Judge Weinstein, a member of the Advisory Committee).

88. Wright & Graham, *supra* note 87, at §5211; *see also* Imwinkelried, *supra* note 85, at 893–94 ("[R]ule 403 lists several factors that a judge may balance against the probative value of the evidence. Unlike many lists in article IV of the Federal Rules, the list in rule 403 does not begin with the language, 'such as.' On its face, the list purports to be exhaustive.").

Rules, Rule 403 sets out an exhaustive list of factors with which the judge can balance against the probative value of the evidence.[89]

The legislative history of Federal Evidence Rule 403 reveals that Congress clearly attempted to have the language limit a judge's discretionary power by prescribing a list of factors and a balancing procedure which must be conducted. However, the reality is that a trial judge's decision to exclude evidence under Federal Evidence Rule 403 is reviewed for abuse of discretion and is very rarely reversed.[90] Although courts recognize that Rule 403 offers a remedy to be used "sparingly," it continues to be a frequently used tool for the exclusion of eyewitness identification expert testimony in a majority of the federal circuits.[91] The appellate courts have been using the grant of discretion under Rule 403 as a "magic elixir to resolve all issues of admissibility."[92]

B. "Cocktail Rulings"—Rule 403, Rule 702 and the Daubert *Standard*

In the context of eyewitness identification expert testimony admissibility, it is important to understand how Federal Evidence Rule 403 interacts with the other evidence rules governing the admissibility of expert

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89. *Id.*; *see also* FED. R. EVID. 403 advisory committee's note ("The rule does not enumerate surprise as a ground for exclusion . . . ."). Thus since the text omits any mention of surprise, the "judge cannot consider surprise in the rule 403 balancing process. That statement would be a *non sequitur* unless the list in rule 403 is exclusive." Imwinkelried, *supra* note 85, at 893–94.

90. Abuse of discretion review can act as "a virtual shield from reversal." ROGER PARK ET AL., EVIDENCE LAW § 12.01, 540–41 & n.6 (1998); *see also e.g.*, U.S. v. Dodds, 347 F.3d 893, 897 (2003) ("This Court reviews a district court's evidentiary rulings for a clear abuse of discretion."); Wright & Graham, *supra* note 87, at § 5211 ("[A]ny grant of discretion carries with it a limited immunity from appellate review. That is, the trial judge will be reversed only where he has abused his discretion or refused to exercise it."). *But see* Old Chief v. United States, 519 U.S. 172 (1997) (holding that the admission of a prior conviction was unfairly prejudicial and it was an abuse of discretion under Rule 403 for the trial court to admit testimony regarding the conviction when the defendant had agreed to a stipulation); United States v. Cooper, 591 F.3d 582, 589–90 (7th Cir. 2010) (holding that it was an abuse of discretion for a trial judge to omit a Rule 403 balancing analysis altogether when an objection was made by the defendant).

91. *See infra* Part IV.B and Part IV.E.2 (describing the majority approach and their treatment of Federal Evidence Rule 403).

92. *See* Wright & Graham, *supra* note 87 ("Seldom have the appellate courts insisted on the careful balancing envisaged by Rule 403; instead, they rely on a sloppy, free-floating conception of discretion as a magic elixir to resolve all issues of admissibility.").

testimony. Federal Evidence Rule 702[93] governs the admissibility of expert testimony in the federal courts. Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[94]

Additionally, Rule 702 provides that an expert witness must be properly qualified, must testify about a topic that is beyond the ken of the average juror, must have an adequate factual basis for her opinion, and the expert's testimony must be the product of relevant and reliable methods.[95] In *Daubert v. Merrell Dow Pharmaceuticals*,[96] the Supreme Court directed the lower courts to conduct a two-step test in determining the admissibility of expert testimony. First, the court must determine whether the expert's testimony reflects valid and reliable "scientific knowledge" and "whether that reasoning or methodology properly can be applied to the facts in issue."[97] Second, the court moves on to the "fit" prong and must ask whether the testimony is relevant to the task at hand and whether it will serve to aid the trier of fact.[98] A common argument for exclusion of eyewitness identification expert testimony in the federal courts is that it would not be of assistance to the jury because the information is within the "ordinary knowledge of most lay jurors" and thus would not satisfy Rule 702 or the "fit" prong of *Daubert*.[99]

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93. FED. R. EVID. 702.

94. *Id.*

95. *Id.*

96. *See* Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) (articulating a two-step test that trial courts must use in determining whether evidence and expert testimony is admissible).

97. *Id.* at 592–94 (noting a court should address "whether the theory or technique has been subjected to peer review and publication," and whether it has achieved general acceptance in the particular scientific community).

98. *Id.*

99. *See, e.g.*, *infra* Part IV.D (explaining that the Eleventh Circuit has determined that eyewitness expert testimony is per se inadmissible in large part because the jury can weigh the issues through common-sense evaluation); *see also* United States v. Smith, 122 F.3d 1355, 1359 (11th Cir. 1997) (holding "that a district court does not abuse it [sic] discretion in excluding such testimony.").

It is important to understand the exclusion analysis frequently proffered under Rule 702 and *Daubert* because those arguments often overlap with the arguments given under Rule 403. For example, a court may find that eyewitness expert testimony is within the ken of the average juror and thus will not assist the juror under Rule 702. As a consequence, any expert testimony allowed in would "usurp the role of the jury" and would also be unduly prejudicial under Rule 403. I refer to this common overlapping analysis as "cocktail rulings."[100] The analysis is muddled further by the fact that the courts regularly cite both Rule 702 and 403 for the decision to exclude, often without specifically enumerating a separate analysis under each rule.[101] The appellate courts are then left to parse vague records, often assuming an acceptable reason for exclusion and then avoiding any further problem by deferring to the trials court's discretion. This has created enormous inconsistency in the federal courts. Not only are the federal courts split in how they treat eyewitness expert testimony generally and the amount of deference they are willing to grant,[102] but deferral to these "cocktail rulings" allows conflicting decisions and reasoning in the lower courts to stand. We are left with an unpredictable, standardless deferral to the trial judge's discretion that has created a deep dissension among the lower courts regarding how eyewitness expert testimony should be treated. Thus, an exclusion of eyewitness identification expert testimony under Federal Evidence Rule 403 is often intertwined with Rule 702 and the *Daubert* analysis, and it is important to highlight their relationship.[103]

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100. The federal courts often exclude eyewitness expert testimony under multiple rules (702, 703, 704 and 403 for example) with the exclusion analysis under each thrown together like different types of alcohol in a cocktail.

101. *See, e.g.*, United States v. Smithers, 212 F.3d 306, 313–18 (6th Cir. 2000) (noting the district court held the expert testimony was within the jurors' "common knowledge" under Federal Evidence Rule 702 and would cause "delay" under Federal Evidence Rule 403); United States v. Curry, 977 F.2d 1042, 1050–51 (7th Cir. 1992) (noting that the district court excluded the expert testimony under Federal Evidence Rule 702 because the testimony would not be helpful for the jury, which was "generally aware of the problems with identification" and because the testimony would be unduly confusing and a waste of time under Federal Evidence Rule 403).

102. *See infra* Part IV (describing the current federal circuit court split).

103. *See, e.g.*, United States v. Murray, 103 F.3d 310, 319 (3d Cir. 1997) (noting that when district courts fail to explain their rulings under Rule 403, "we are able to perform this balancing here" but some cases may require a remand or new trial). *But see* United States v. Mathis, 264 F.3d 321, 339–40 (3d Cir. 2001) (reversing a district court's decision to exclude eyewitness testimony based on Rules 403 and 702 and noting that the district court's reasoning under Rule 403 was too conclusory).

C. The Specialized Relevance Rules

It is also important to understand the specialized relevance rules and how they relate to Federal Evidence Rule 403. A specialized relevance rule reflects Congress's judgment that, as a matter of law, the evidence it governs fails a Federal Evidence Rule 403 balancing test.[104] The five specialized relevance rules deal with evidence of low probative power.[105] For example, Federal Evidence Rule 411 declares evidence that one party has liability insurance is not admissible to show "the person acted negligently or otherwise wrongfully."[106] The specialized relevance rules not only reflect a congressional declaration of the relevancy of particular evidence, but they also reflect public policy concerns.[107] In the case of Rule 411, exclusion of liability insurance information encourages people to get insurance and avoids a windfall for the opponent of an insured party.[108] Most of the specialized relevance rules share a similar structure and *prohibit only certain uses* of the evidence they govern but permit all other uses.[109] However, Rule 410 is different in that it prohibits guilty plea evidence *for all purposes* and specifies only two circumstances where admissibility is proper.[110]

Specialized relevance rules are significant because they are congressional determinations that in certain situations the courts do not have discretion to conduct a balancing test under Federal Evidence Rule 403. In limited situations Congress has found a legislative solution necessary to cure important public policy issues with regard to relevance and Rule 403. The structure of the specialized relevance rule is a potential solution for the massive problem with eyewitness identification expert testimony admissibility.[111] It may be time for public policy and procedural

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104. Federal Evidence Rules 407–11 are known as the "specialized relevance rules." *See, e.g.*, MUELLER & KIRKPATRICK, EVIDENCE § 4.11 at 183 n.8 (3d. ed. 2003) (describing the specialized relevance rules).

105. *Id.*

106. FED. R. EVID. 411.

107. *See generally* MUELLER & KIRKPATRICK, *supra* note 104; GEORGE FISHER, EVIDENCE 90–92 (2d ed. 2008).

108. *See* FED. R. EVID. 411 advisory committee notes ("Knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds.").

109. FED. R. EVID. 407–09 and 411; *supra* note 107 and accompanying text.

110. FED. R. EVID. 410.

111. *See infra* Part V.A (describing a specialized relevance rule that could serve as a potential solution for eyewitness identification expert testimony admissibility).

justice to limit judicial discretion to exclude eyewitness expert testimony under Federal Evidence Rule 403.[112]

D. Summary of Federal Evidence Rule 403

As summarized above, Federal Evidence Rule 403 is a powerful tool which grants trial judges a tremendous amount of discretion. An examination of the legislative history and purpose behind Rule 403 revealed that the rule was intended to be used "sparingly" to combat only extreme evils that substantially outweigh the probative value of the evidence.[113] However, the limited appellate review for Rule 403 exclusions has in many ways nullified any parameters which Congress may have intended to place on judicial discretion.[114] In the context of this Note, this gap between the purpose of the rule and the reality of how it is exercised is significant when research reveals that Rule 403 is one of the most commonly cited sources for the exclusion of eyewitness identification expert testimony.[115]

IV. Circuit Split

As noted in Part III, Federal Evidence Rule 403 states that "[a]lthough 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."[116] Thus, it is within the trial court's discretion to exclude otherwise relevant and admissible expert testimony.[117] Rule 403 allows trial judges to exclude the expert testimony if the probative value is outweighed by the danger of confusing the jury, delaying the trial, or causing unfair prejudice.[118]

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112. *Id.*

113. *See supra* notes 84, 86 and accompanying text (examining the legislative history behind Rule 403).

114. *See supra* note 90 and accompanying text (noting that a trial judge's decision is reviewed for abuse of discretion under Rule 403 and is rarely reversed).

115. *See infra* Part IV.E (examining the current federal circuit split in the admission of eyewitness identification expert testimony).

116. FED. R. EVID. 403.

117. FED. R. EVID. 403.

118. *See* FED. R. EVID. 403 advisory committee's note ("Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission.").

Due to this large grant of judicial discretion, the circuits have split on whether the admission of eyewitness identification expert testimony can violate Rule 403.[119] The majority of circuits have held that eyewitness identification expert testimony should not be admissible under Federal Evidence Rule 403.[120] These circuits reason that the expert testimony might usurp the jury's role of determining witness credibility, thus causing jurors to be confused and misled as to their roles as the finders of fact.[121] The Third and Sixth Circuits, referred to in this Note as the Progressive Minority, have ruled that eyewitness identification expert testimony comports with Rule 403.[122] These circuits explain that as long as the experts employ "reliable scientific expertise" to pertinent aspects of the human mind and body, the experts should be "welcomed" by the federal courts.[123]

A. Overview

The treatment of expert testimony regarding eyewitness identification by the federal circuit courts has experienced dramatic changes over the last thirty years and is still evolving today.[124] In the 1970s and early 1980s,

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119. *See, e.g.*, United States v. Smith, 621 F. Supp. 2d 1207, 1219–20 (M.D. Ala. 2009) (noting a circuit split regarding whether eyewitness-identification expert testimony violates Federal Evidence Rule 403).

120. *See* United States v. Lumpkin, 192 F.3d 280, 289 (2d Cir. 1999) (holding a district court was within its discretion to exclude an expert who "would effectively have inserted his own view of the officer's credibility for that of the jurors, thereby usurping their role"); *see also* United States v. Kime, 99 F.3d 870, 884 (8th Cir. 1996) (applying a deferential standard to conclude that "the district court properly recognized the very real danger that the proffered expert testimony could either confuse the jury or cause it to substitute the expert's credibility assessment for its own"); United States v. Curry, 977 F.2d 1042, 1052 (7th Cir. 1992) ("[T]he district court's decision to exclude Dr. Loftus' testimony was a proper exercise of its discretion, whether under Rule 702 or Rule 403.").

121. *Supra* note 120 and accompanying text.

122. *See* United States v. Mathis, 264 F.3d 321, 339–40 (3d Cir. 2001) (reversing a district court's decision to exclude eyewitness testimony based on Rules 403 and 702); *see also* United States v. Smith, 736 F.2d 1103, 1107 (6th Cir. 1984) (concluding that a trial court erred in excluding an eyewitness-identification expert under Rule 403); United States v. Smithers, 212 F.3d 306, 316 (6th Cir. 2000) (finding that eyewitness-identification expert testimony did not violate Rule 403's prohibition against evidence that invites unjustified "delay").

123. *See, e.g.*, *Mathis*, 264 F.3d at 340 ("[E]xperts who apply reliable scientific expertise to juridically pertinent aspects of the human mind and body should generally, absent explicable reasons to the contrary, be welcomed by federal courts, not turned away.").

124. *See, e.g.*, *Smithers*, 212 F.3d at 311 (noting that the treatment of eyewitness

courts were uniformly resistant towards eyewitness experts.[125] The concerns commonly noted by the federal courts included the view that the weaknesses inherent in eyewitness identification were within the common knowledge of the jury,[126] such expert testimony did not possess general acceptance in the scientific community,[127] any weaknesses in an eyewitnesses' identification could be revealed effectively through cross-examination,[128] and the admission of eyewitness expert testimony would be unduly prejudicial.[129] Though most of the above concerns still have a strong presence in the courts today, in the mid to late 1980s there was a strong shift towards acknowledging the scientific validity of eyewitness expert testimony and the study of the psychological factors which influence the memory process.[130]

Today, a majority of the federal circuits take a "discretionary approach"[131] and defer to district courts' decisions on whether to admit

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identification expert testimony has experienced changes that coincide with the growth in modern scientific studies that highlight the problems with eyewitness identification); United States v. Downing, 753 F.2d 1224, 1232 (3d Cir. 1985) ("Judicial resistance to the introduction of this kind of expert testimony is understandable given its innovativeness and the fear of trial delay spawned by the spectre of the creation of a cottage industry of forensic psychologists.").

125. *See, e.g.*, *Smithers*, 212 F.3d at 311 (explaining that defense attorneys began to bring expert eyewitness testimony into the courtroom in the early 1970s but that the courts were still very skeptical about admitting such testimony); United States v. Harris, 995 F.2d 532, 534 (4th Cir. 1993) (noting that "[u]ntil fairly recently, most, if not all, courts excluded expert psychological testimony on the validity of eyewitness identification").

126. *See, e.g.*, United States v. Purham, 725 F.2d 450, 454 (8th Cir. 1984) (finding that the question is within the expertise of jurors).

127. *See, e.g.*, United States v. Sims, 617 F.2d 1371, 1375 (9th Cir. 1980) (finding no general acceptance in the scientific community).

128. *See, e.g.*, United States v. Thevis, 665 F.2d 616, 641 (5th Cir. 1982) (reasoning that the eyewitness identification was adequately addressed through cross-examination); United States v. Amaral, 488 F.2d 1148, 1153 (9th Cir. 1973) (holding that the district court did not err in excluding expert testimony regarding eyewitness identification because cross-examination was sufficient to reveal any weaknesses in the identifications).

129. *See, e.g.*, United States v. Fosher, 590 F.2d 381, 383 (1st Cir. 1979) (ruling that the testimony would be prejudicial).

130. *See, e.g.*, United States v. Moore, 786 F.2d 1308, 1313 (5th Cir. 1986) (finding that "[i]n a case in which the sole testimony is casual eyewitness identification, expert testimony regarding the accuracy of that identification is admissible and properly may be encouraged "); United States v. Downing, 753 F.2d 1224, 1232 (3d Cir. 1985) (reasoning that "expert testimony on eyewitness perception and memory [should] be admitted at least in some circumstances"); United States v. Smith, 736 F.2d 1103, 1107 (6th Cir. 1984) ("The day may have arrived, therefore, when Dr. Fulero's testimony can be said to conform to a generally accepted explanatory theory.").

131. *See* McMullen v. State, 714 So.2d 368, 370–71 (Fla. 1998) (dividing the various

expert testimony on eyewitness identification.[132] However, within this general majority model of respecting the discretion of the lower courts, some circuits clearly tend to favor or disfavor the admittance of eyewitness expert testimony. The approaches currently taken by the circuit courts can be grouped into three categories.[133] First, there is the majority approach which tends to favor or presume exclusion of eyewitness expert testimony in all but the most "narrow" of circumstances.[134] Second, a small group of

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jurisdictional approaches on this issue into categories, "discretionary" and "prohibitory," and explaining that the discretionary approach is the majority view on both the federal and state level). The Florida Supreme Court described the discretionary approach as granting trial court discretion as to whether to admit such testimony. *Id.* at 370.

132. *See, e.g.*, United States v. Rodriguez-Berrios, 573 F.3d 55, 71–72 (1st Cir. 2006) ("[W]e have consistently maintained that the admission of such testimony is a matter of case-by-case discretion and have refused to adopt such a blanket rule for its admission or exclusion."); United States v. Martin, 391 F.3d 949, 954 (8th Cir. 2004) (reviewing the lower court's exclusion of eyewitness expert testimony for abuse of discretion); United States v. Lumpkin, 192 F.3d 280, 288–89 (2d Cir. 1999) ("A decision to exclude expert testimony rests soundly with the discretion of the trial court and shall be sustained unless 'manifestly erroneous.'"); United States v. Hall, 165 F.3d 1095, 1104–06 (7th Cir. 1999) (finding that the district court's preclusion of the eyewitness expert evidence was a proper exercise of discretion whether under Rule 702 or 403); United States v. Smith, 156 F.3d 1046, 1052–54 (10th Cir. 1998) (finding the district court did not abuse their discretion in refusing to admit the expert testimony); United States v. Rincon, 28 F.3d 921, 926 (9th Cir. 1994) ("Given the powerful nature of expert testimony, coupled with its potential to mislead the jury, we cannot say that the district court erred in concluding that the proffered evidence would not assist the trier of fact and that it was likely to mislead the jury."); United States v. Harris, 995 F.2d 532, 534–35 (4th Cir. 1993) (affirming the district court's exclusion of eyewitness identification expert testimony and noting that most circuits eschew a per se rule about admissibility for a discretionary approach); *but see* United States v. Brownlee, 454 F.3d 131, 141–44 (3d Cir. 2006) (reversing the district court for abuse of discretion in refusing to allow eyewitness expert testimony).

133. *See, e.g.*, United States v. Smith, 621 F. Supp. 2d. 1207, 1219–20 (M.D. Ala. 2009) (noting a circuit split regarding whether eyewitness-identification expert testimony violates Federal Evidence Rule 403); *McMullen*, 714 So. 2d at 370–71 (describing the federal circuit court split and grouping the circuit's approaches in terms of "discretionary" or "prohibitory").

134. *See, e.g.*, United States v. Bartlett, 567 F.3d 901, 906–07 (7th Cir. 2009) (affirming the exclusion of eyewitness expert testimony because there were multiple witnesses who identified the defendant and some of the witnesses knew the defendant well and were not strangers to him); United States v. Villiard, 186 F.3d 893, 895 (8th Cir. 1999) (finding no abuse of discretion in denying expert eyewitness identification testimony because the government's case did not rest exclusively on uncorroborated eyewitness testimony); United States v. Smith, 156 F.3d 1046, 1053–54 (10th Cir. 1998) (refusing to find "narrow circumstances" existed for there were five eyewitnesses and not just one); United States v. Harris, 995 F.2d 532, 535 (4th Cir. 1993) ("The narrow circumstances held sufficient to support the introduction of expert testimony have varied but have included such problems as cross-racial identification, identification after a long delay, identification after observation under stress, and [such] psychological phenomena as the feedback factor and

circuits takes a more progressive approach and generally favors admission and recognizes the importance of eyewitness identification expert testimony.[135] Third, the Eleventh Circuit is the last remaining circuit to mandate a per se rule of exclusion for eyewitness identification expert testimony.[136]

B. The Majority Approach

The Majority Approach contains almost all of the circuits and routinely excludes expert testimony on eyewitness identification.[137] These circuits have recently begun to accept the scientific validity of eyewitness identification experts and the importance of admitting expert testimony in certain limited circumstances.[138] However, most of the circuits taking the Majority Approach still generally disfavor admission and narrowly define the situations where admission may be necessary.[139] For example, the

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unconscious transference.").

135. *See, e.g.*, United States v. Mathis, 264 F.3d 321, 339–40 (3d Cir. 2001) (examining an eyewitness expert's methods and "welcom[ing]" such testimony); United States v. Smithers, 212 F.3d 306, 311–18 (6th Cir. 2000) (finding that a district court erred in not admitting eyewitness-identification expert testimony); *Moore*, 786 F.2d at 1313 (5th Cir. 1986) (finding that, under some circumstances, eyewitness-identification expert testimony "properly may be encouraged"); *Smith*, 736 F.2d at 1107 (6th Cir. 1984) ("The day may have arrived, therefore, when Dr. Fulero's testimony can be said to conform to a generally accepted explanatory theory.").

136. *See* United States v. Smith, 122 F.3d 1355, 1359 (11th Cir. 1997) (finding that "a district court does not abuse its discretion when it excludes expert testimony on eyewitness identification"); *see also* United States v. Holloway, 971 F.2d 675, 679 (11th Cir. 1992) (describing the "established rule" of the Eleventh Circuit that eyewitness identification expert testimony was not admissible); United States v. Benitez, 741 F.2d 1312, 1315 (11th Cir. 1984) ("[Defendant's] contention that the district court incorrectly excluded expert testimony concerning identification also lacks merit because such testimony is not admissible in this circuit."). *But see* Smith, 621 F. Supp. 2d. at 1214 (questioning the Eleventh Circuit's per se exclusion rule and noting that "[n]either *Smith* nor *Thevis* addressed . . . whether a district court abuses its discretion by admitting this evidence pursuant to the analysis required by Rule 702 and *Daubert*").

137. For purposes of this analysis I have included the First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits in this grouping.

138. *See supra* note 132 and accompanying text (listing cases that have acknowledged "narrow circumstances" where admissibility would be necessary but nevertheless distinguished their factual situation and excluded the expert testimony).

139. *See, e.g.*, United States v. Hall, 165 F.3d 1095, 1104 (7th Cir. 1999) ("This Court has a long line of cases which reflect our disfavor of expert testimony on the reliability of eyewitness identification."); United States v. Kime, 99 F.3d 870, 885 (8th Cir. 1996) (stating that the Eighth Circuit is "especially hesitant to find an abuse of discretion" in denying

Fourth Circuit, in *United States v. Harris*,[140] defined "narrow circumstances" as including "such problems as cross-racial identification, identification after a long delay, identification after observation under stress, and psychological phenomena such as the feedback factor and unconscious transference."[141] However, the court's application of this definition to the facts at hand illuminates the tendency of the circuits in this group to distinguish their cases from the "narrow circumstance" if at all possible. *Harris* dealt with a bank robbery and three bank employees who served as witnesses identifying the defendant.[142] The defendant admitted he was in the bank earlier that day, and thus the witnesses were testifying both that they saw the defendant earlier that day and that he robbed the bank.[143] The defendant argued that the expert's testimony regarding cross-racial identifications[144] and memory in stressful situations would be particularly relevant; however, the court did not find the argument persuasive. The court stated that since one of the three eyewitnesses was also African-American, the cross-racial identification issue was effectively eliminated for the other two Caucasian witnesses.[145] The court also stated that because the eyewitnesses claimed to have seen the defendant in the bank earlier that day, the stress factor of the identification during the later bank robbery was no longer an issue.[146] Lastly, the court used a common theory[147] for

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eyewitness expert testimony); United States v. Alexander, 816 F.2d 164, 167 (5th Cir. 1987) (noting eyewitness expert testimony is generally inadmissible except when the case depends primarily on eyewitness identification).

140. *See* United States v. Harris, 995 F.2d 532, 534–36 (4th Cir. 1993) (affirming the exclusion of expert testimony by the district court and noting that except under narrow circumstances "[t]his type of evidence, almost by definition, can be of no assistance to a jury").

141. *Id.* at 535.

142. *Id*. at 533.

143. *Id.*

144. *See supra* note 38 (summarizing scientific findings in the area of cross-racial identifications).

145. *See Harris*, 995 F.2d at 536 ("Race did not play a role in these identifications—while Harris is black, Watkins is also black, and her testimony was almost identical to that of Dean and White.").

146. *See id.* ("All of these identifications happened over five to twenty minute intervals, and none occurred under circumstances that could be deemed stressful, *except Dean's confrontation with the robber*." (emphasis added)).

147. *See also, e.g.*, United States v. McGinnis, 201 F. App'x 246, 249 (5th Cir. 2006) ("It goes without saying that cross-examination serves a critical function, enabling jurors to appreciate discrepancies in testimony."); United States v. Hall, 165 F.3d 1095, 1107 (7th Cir. 1999) ("[A]ny weaknesses in eyewitness identification testimony ordinarily can be exposed through careful cross-examination of the eyewitnesses.").

keeping eyewitness expert testimony out stating that "any discrepancies in these testimonies were brought out or could have been brought out on cross-examination."[148]

The Majority Approach commonly denies the admission of eyewitness expert testimony if there is *any* corroborating evidence other than the eyewitness identification. For example, the Seventh Circuit stated that "[g]enerally speaking, the existence of corroborating evidence undercuts the need, except in the *most compelling cases*, for expert testimony on eyewitness identifications."[149] The Fifth Circuit also takes a strong position and notes that except "in a case in which the *sole testimony* is casual eyewitness identification," expert testimony regarding the accuracy of that identification is not to be encouraged.[150] Additionally, the Eighth Circuit is "*especially hesitant*" to admit eyewitness expert testimony unless the case rests "exclusively on uncorroborated eyewitness testimony."[151] The above examples demonstrate that the admission of eyewitness identification expert testimony is easy to avoid if circuits take an extreme position on when an eyewitness identification expert will be needed.

In summary, the majority of circuits generally do not allow eyewitness expert testimony unless the entire case against the defendant rests solely on an uncorroborated eyewitness. These circuits tend to avoid and disfavor eyewitness expert testimony for fear that admittance will accomplish nothing other "than to muddy the waters."[152] In the case of Julius Ruffin, eyewitness expert testimony would have almost certainly been excluded under the Majority Approach. Although the victim was the only eyewitness to testify at trial, there was additional corroborating DNA evidence.[153] The scientific testing performed on the semen sample displayed that only 8% of all African-American men could be a potential match, and Ruffin was in that limited group.[154] Under the Majority Approach, this limited corroborating evidence would have been sufficient to differentiate the

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148. United States v. Harris, 995 F.2d 532, 536 (4th Cir. 1993).

149. *Hall*, 165 F.3d at 1107 (emphasis added).

150. *McGinnis*, 201 F. App'x at 249 (emphasis added).

151. *See* United States v. Villiard, 186 F.3d 893, 895 (8th Cir. 1999) (emphasis added) (finding no abuse of discretion in denying expert eyewitness identification testimony because the government's case did not rest exclusively on uncorroborated eyewitness testimony).

152. *See* United States v. Serna, 799 F.2d 842, 850 (2d Cir. 1986) (stating that the eyewitness identification expert testimony would do nothing other than "muddy the waters").

153. *Supra* note 2 and accompanying text.

154. *Id.*

"narrow circumstances" where eyewitness expert testimony must be respected.

C. The Progressive Minority

The Progressive Minority, consisting of the Third and the Sixth Circuits, leads the way in recognizing the potential value in eyewitness identification expert testimony. The progressive approach of these circuits is exemplified by their refusal to accept many of the common reasonings given by the other circuits as a basis for rejection. In *United States v. Downing*,[155] the Sixth Circuit addressed several lines of reasoning given by other courts in the past for exclusion of eyewitness identification expert testimony. The Court found the notions of cross-examination, common sense, usurping the role of the jury, and undue confusion to be unpersuasive arguments for exclusion.[156] The Court disavowed skepticism towards eyewitness expert testimony as a matter of principal and stated that, rather, the "admission depends upon the 'fit,' i.e., upon a specific proffer showing that scientific research has established that particular features of the eyewitness identifications involved may have impaired the accuracy of those identifications."[157] The *Downing* case set the stage for the liberal view that the Third and Sixth Circuits would cultivate over the next twenty years.

Recently, in *United States v. Brownlee*,[158] the Third Circuit noted that expert testimony should have been admitted because "'witnesses oftentimes profess considerable confidence in erroneous identifications,' and expert testimony was the only method of imparting the knowledge concerning confidence-accuracy correlation to the jury."[159] *Brownlee* reversed even a limited exclusion of expert testimony and recognized the importance of confidence-accuracy testimony when the defense rested on the reliability of the government's four eyewitnesses.[160]

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155. *See* United States v. Downing, 753 F.2d 1224, 1230 (3d Cir. 1985) (holding "the liberal standard of admissibility mandated by Rule 702").

156. *See id.* at 1229–30 ("We have serious doubts about whether the conclusion reached by these courts is consistent with the liberal standard of admissibility mandated by Rule 702.").

157. *Id.* at 1226.

158. *See* United States v. Brownlee, 454 F.3d 131, 144 (3d Cir. 2006) (holding that it was wrong to exclude expert testimony regarding the correlation between confidence and accuracy when the defense's case rested on the reliability of the government's witnesses).

159. *Id.*

160. *See id.* ("[W]e hold it was wrong to exclude expert testimony regarding the

The Sixth Circuit stated that expert testimony is important because eyewitness identification expert testimony "inform[s] the jury of *why* the eyewitnesses' identifications were inherently unreliable" and, thus, provides a "scientific, professional perspective that no one else [can] offer to the jury."[161] In the Sixth Circuit's view, the significance of an expert's testimony "cannot be overstated" because, without it, a jury has "no basis beyond defense counsel's word to suspect the inherent unreliability" of an eyewitness identification.[162] The inherent unreliability of eyewitness identifications is not common knowledge and thus it is the exact situation where expert testimony is needed. As the court itself neatly stated in *United States v. Smithers*,[163] there is an inherent "dichotomy between eyewitness errors and jurors' reliance on eyewitness testimony, therefore this Circuit has held that expert testimony on the subject of eyewitness identification is admissible."[164] Thus, the Progressive Minority recognizes the importance of eyewitness identification expert testimony and generally favors admission.

In the case of Julius Ruffin, eyewitness identification expert testimony would have most likely been admitted under the Progressive Minority approach.[165] Given that the government's case rested almost entirely on one eyewitness identification, this is the exact circumstance where the Progressive Minority has found expert testimony to be important. However, it is important to emphasize that although the Progressive Minority tends to favor admission, it does not have a per se admissible approach. Thus, Ruffin would not have been guaranteed eyewitness expert testimony. If a lower court found the corroborating DNA evidence in Ruffin's case to be sufficient to overcome the "narrow circumstances" described in *Downing*, there is a strong chance the appellate court would

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reliability of the very eyewitness identification evidence on which Brownlee was convicted, and remand the case for a new trial.").

161. *See* Ferensic v. Birkett, 501 F.3d 469, 477–80 (6th Cir. 2007) (holding that the exclusion of the defense eyewitness identification expert impermissibly interfered with the defendant's constitutional right to present a defense).

162. *Id.* at 482.

163. *See* United States v. Smithers, 212 F.3d 306, 313 (6th Cir. 2000) (reversing the district court and holding that the district court should have conducted a hearing under *Daubert* and analyzed the evidence to determine whether the expert's proffered testimony reflected scientific knowledge, and whether the testimony was relevant and would have aided the trier of fact).

164. *Id.* at 312.

165. *See supra* note 2 (describing the case against Julius Ruffin).

have deferred to the trial judge's discretion.[166] The Progressive Minority has made significant strides towards respecting eyewitness identification expert testimony; however, the trend remains unpredictable given the strong deference to trial courts' decisions.

D. Per Se Inadmissible Approach

The Eleventh Circuit stands alone in its approach and takes an extreme position against eyewitness identification expert testimony, holding that such testimony is per se inadmissible. In *United States v. Holloway*,[167] the appellant argued that the refusal to admit eyewitness identification testimony was in error. The court dismissed the argument stating simply that "[t]he established rule of this circuit is that such testimony is not admissible."[168] The Eleventh Circuit reasons that eyewitness identification expert testimony is merely "marginally relevant psychological evidence" and problems of perception and memory are more "adequately addressed in cross-examination" or "through common-sense evaluation."[169]

Recently, in *United States v. Smith*,[170] the defendant argued that the new standard announced in *Daubert v. Merrell Dow Pharmaceuticals*[171] conflicted with the Eleventh Circuit's per se inadmissibility approach.[172]

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166. United States v. Downing, 753 F.2d 1224, 1230 (3d Cir. 1985).

167. *See* United States v. Holloway, 971 F.2d 675, 679 (11th Cir. 1992) (stating that the established rule of the Eleventh Circuit is to exclude eyewitness identification expert testimony).

168. *Id.* at 679; *see also* United States v. Benitez, 741 F.2d 1312, 1315–16 (11th Cir. 1984) (stating that the defendant's "contention that the district court incorrectly excluded expert testimony concerning identification also lacks merit because such testimony is not admissible in this circuit").

169. *See* United States v. Thevis, 665 F.2d 616, 641 (5th Cir. 1982) (refusing to admit eyewitness identification expert testimony and stating that "[t]o admit such testimony in effect would permit the proponent's witness to comment on the weight and credibility of opponents' witnesses and open the door to a barrage of marginally relevant psychological evidence").

170. *See* United States v. Smith, 122 F.3d 1355 (11th Cir. 1997) (reaffirming earlier precedent creating a per se rule of inadmissibility).

171. *See* Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 592 (1993) (articulating a two-step test that trial courts must use in determining whether evidence and expert testimony is admissible). First, the court must determine whether the expert's testimony reflects valid and reliable "scientific knowledge," and "whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592–93. Second, the court must ask whether the expert testimony is "fit." For this the court must look at whether the testimony is relevant to the task at hand and whether it will serve to aid the trier of fact. *Id.*

172. *See Smith*, 122 F.3d at 1358 ("Smith argues that *Daubert* 'lower[ed] the standard

The court stated that it need not even address the argument because under *Daubert*, expert testimony that does not assist the finder of fact can be excluded.[173] Thus, the Eleventh Circuit has evaded the issue of whether this per se inadmissibility rule really holds up under *Daubert* and instead merely confirmed that it is not an abuse of discretion for the district court to find that eyewitness identification expert testimony is not admissible because it does not aid the jury in any way.[174]

However, dissension is growing in the Eleventh Circuit, and the lower courts have recently attempted to address the unanswered issue about whether the per se rule of inadmissibility should remain in effect. In *United States v. Smith*,[175] the district court admitted eyewitness identification expert testimony.[176] The court stated that it felt a "per se proscription against all eyewitness-identification expert testimony is irreconcilable with the United States Supreme Court's decision in *Daubert*."[177]

Though recent district court cases out of the Eleventh Circuit have begun to question this hostile position, the per se exclusion rule and precedents finding no value in eyewitness expert testimony still remain the law and shape the approach taken in the Eleventh Circuit today. In the case of Julius Ruffin,[178] this antiquated approach would strip him of any chance to admit eyewitness expert testimony. Ruffin's case perfectly demonstrates the extreme dangers inherent in the Eleventh Circuit's approach. Without even the limited "narrow circumstances" respect given to eyewitness expert testimony by the Majority Approach,[179] the Eleventh Circuit leaves an

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for admissibility of expert evidence' and thus opened the door for admitting expert testimony regarding eyewitness reliability.").

173. *Id.* at 1359.

174. *See id.* at 1359 ("*Thevis* held that expert testimony regarding eyewitness reliability does not assist the jury, and we conclude that that holding is in harmony with *Daubert.* Therefore, it is as true after *Daubert* as it was before that a district court does not abuse it discretion in excluding such testimony.").

175. *See* United States v. Smith, 621 F. Supp. 2d. 1207, 1219–20 (M.D. Ala. 2009) (affirming the admission of eyewitness identification expert testimony at trial and rejecting the government's motion to exclude).

176. *Id.*

177. *See id.* at 1211 (stating that *Daubert* "eschewed such categorical prohibitions of entire classes of expert *conclusions*; in determining whether to admit testimony, the Court stated, the focus 'must be solely on principles and methodology, not on the conclusions that they generate'" (quoting Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 595 (1993))).

178. *See supra* note 2 and accompanying text (describing the Julius Ruffin case).

179. *See, e.g.*, *supra* Part IV.B (explaining that the majority approach recognizes that in certain narrow circumstances, particularly when eyewitness testimony is the sole evidence

innocent man with no safeguard against an eyewitness who points at him and says, "He is the one!"

E. The Circuit Split and Federal Evidence Rule 403

Now that the general approaches currently taken in the federal circuit courts with regard to eyewitness identification expert testimony admissibility have been examined, this Note will delve into a closer examination regarding how the circuits are treating attempts to exclude eyewitness expert testimony using Federal Evidence Rule 403. In particular, this section will highlight the differences between the Progressive Minority's and the Majority Approach's treatment of Federal Evidence Rule 403.

1. The Progressive Minority and Rule 403

In *United States v. Smithers*[180] the respondent argued that eyewitness identification expert testimony should not be admitted because it was within the common knowledge of the jury, it would invade the province of the jury, and admittance would cause "delay" under Federal Evidence Rule 403.[181] First, the district court stated that "a jury can fully understand" its "obligation to be somewhat skeptical of eyewitness testimony."[182] The Sixth Circuit dismissed this argument as not only contrary to the scientific evidence showing jurors are "unduly receptive" rather than skeptical towards eyewitness testimony, but also because this reasoning would lead to a virtual per se exclusion of eyewitness identification expert testimony.[183]

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against a defendant, expert testimony may be appropriate).

180. *See* United States v. Smithers, 212 F.3d 306, 313 (6th Cir. 2000) (reversing the district court and holding that the district court should have conducted a hearing under *Daubert* and analyzed the evidence to determine whether the expert's proffered testimony reflected scientific knowledge, and whether the testimony was relevant and would have aided the trier of fact).

181. *See* FED. R. EVID. 403 ("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." (emphasis added)).

182. *Smithers*, 212 F.3d at 315.

183. *See id.* at 316 ("[A]ccepting the district court's analysis that all jurors are aware of their obligation to be skeptical would lead to absurd results: expert testimony on eyewitness identification would *never* be admissible.").

Second, the government argued that admittance of the testimony would have invaded the jury's province.[184] The court conceded that it would be inappropriate for an expert to testify as to what the witness did or did not see.[185] However, the court stated that the "proper solution would have been to excise the inappropriate portion of the proffer rather than to exclude all of the testimony" because the general testimony regarding the perception and memory of eyewitnesses is "relevant and helpful to the jury."[186] Third, the court addressed the argument that the expert testimony should be excluded under Federal Evidence Rule 403 because it would cause "delay."[187] The *Smithers* court first noted that "'in reviewing a 403 balancing, the court must look at the evidence in the light most favorable to the proponent, maximizing its probative value and minimizing its prejudicial effect.'"[188] After noting that "delay" under Federal Evidence Rule 403 did not refer to the late submission of motions, the court further stated that it found no evidence indicating that the government did not have sufficient notice of the expert testimony.[189] The Sixth Circuit stated that as a general proposition it is not appropriate to exclude important eyewitness identification testimony based on its "supposed tardiness."[190] A defendant's Sixth Amendment right to an effective defense should outweigh a discovery sanction.[191]

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184. *Id.* at 317 n.3. The court dismissed the dissent's attempt to bolster this argument by stating that cross-examination and jury instructions should be the tools to discredit eyewitness testimony. *Id* at 316. The court highlighted inconsistent procedural logic in this argument for the dissent did not sufficiently explain "why cross-examination and jury instructions can serve these goals for eyewitness testimony, but not for expert testimony." *Id.* at 316.

185. *Id.* at 317 n.3.

186. *Id.*

187. *See id.* at 316 (noting that "'delay' [in Rule 403] does not connote delay in the submission of motions or proffers; rather, it encompasses the prolonging of the length of the trial, and can be read properly in conjunction with the other exclusionary factors: 'waste of time, or needless presentation of cumulative evidence'").

188. *Id.* at 313 (quoting United States v. Smith, 736 F.2d 1103, 1107 (6th Cir. 1984)).

189. *See id.* at 317 ("First, the Defendant filed his ten-page motion *in limine* requesting a ruling on this issue a full month before trial . . . . Thus, it is impossible to say that either the court or the government did not have adequate notice of the issue.").

190. *Id.*

191. *See id.* ("'The defendant's Sixth Amendment right to an effective defense will usually outweigh the interest served by pretrial discovery orders.'" (quoting United States v. Collins, No. 87-5077, 1988 WL 4434, at *2 (6th Cir. Jan. 25, 1988))).

United States v. Downing[192] is a seminal case out of the Third Circuit that, at the time, marked a dramatic change in attitude towards eyewitness expert testimony, and it is a case that continues to define the Progressive Minority approach even today. In *Downing*, the sole evidence against the defendant was eyewitness testimony and his sole defense was mistaken identity.[193] The *Downing* court conducted a Federal Evidence Rule 403 balancing test with regard to the eyewitness identification expert testimony. The court conceded that it was possible for eyewitness expert testimony to "mislead" or "confuse" the jury and noted that "[t]he danger that scientific evidence will mislead the jury might be greater, for example, where the jury is not presented with the data on which the expert relies, but must instead accept the expert's assertions as to the accuracy of his conclusions."[194] However, the Third Circuit also emphasized the importance of eyewitness identification expert testimony, especially where the eyewitness evidence is the only evidence offered by the government.[195] The court stated it would be illogical to hold that the admission of the expert testimony would so waste time or confuse the jury that it cannot be considered "even when its putative effect is to vitiate the only (eyewitness) evidence offered by the government."[196] The court dismissed the fearful argument that these eyewitness experts will be asked to testify in every case with an eyewitness creating a "battle of the experts" problem which misleads the jury and creates a prejudicial effect.[197] The court stated that the district court has discretion to limit the number of experts who can testify and the length of their testimony.[198] However, the court stated that if the eyewitness testimony is highly probative, the parties are entitled to present the expert, regardless of whether it adds to the length of the trial.[199] "[P]resumably such evidence will add clarity and enhance the truth-seeking function of the trial, thereby offsetting the disadvantage of delay."[200]

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192. *See* United States v. Downing, 753 F.2d 1224, 1230 (3d Cir. 1985) (noting "the liberal standard of admissibility mandated by Rule 702").

193. *Id.* at 1244.

194. *Id.* at 1239.

195. *See id*. at 1243 ("The availability of Rule 403 is especially significant when there is evidence of a defendant's guilt other than eyewitness evidence, e.g., fingerprints, or other physical evidence.").

196. *Id.* at 1243.

197. *Id.* at 1243 n.27.

198. *Id.*

199. *Id.*

200. *Id.*

In summary, the Progressive Minority will normally not tolerate exclusion of relevant eyewitness expert testimony under Federal Evidence Rule 403. The Third and Sixth Circuits have begun to place limitations on and provide restrictive guidance for when and how courts should use Federal Evidence Rule 403 to exclude eyewitness identification expert testimony. In the Sixth Circuit, an exclusion of eyewitness expert testimony based on the idea that the expert testimony usurps the role of the jury as fact-finder is an argument that is not accepted.[201] The significant steps taken by the Progressive Minority towards limiting judicial discretion in the area of eyewitness expert testimony exclusion are very important. By limiting judicial discretion to exclude eyewitness expert testimony under Rule 403, these progressive circuits are beginning to treat Rule 403 exclusion as the "extreme remedy" it is intended to be.[202] It *is* possible for a court to abuse its discretion when conducting a Rule 403 balancing test, and the Progressive Minority has begun to take a stand against the improper exclusion of eyewitness identification expert testimony.

2. The Majority Approach and Rule 403

In direct contrast to the views of the Progressive Minority, many of the circuits in the Majority Approach believe that eyewitness expert testimony can often be excluded under Federal Evidence Rule 403 for causing undue confusion, wasting time, usurping the role of the jury, or being unduly prejudicial.[203] These circuits stand firmly behind the claim that the balancing of prejudice and probative value under Rule 403 rests within the sound discretion of the trial court.[204] Thus, under the Majority Approach, a

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201. *See, e.g.*, Ferensic v. Birkett, 501 F.3d 469, 480 (6th Cir. 2007) (concluding that the exclusion of the eyewitness identification expert testimony was not proper and denied the defendant his Sixth Amendment right to present a defense); United States v. Smithers, 212 F.3d 306, 313 (6th Cir. 2000) (noting that because of the existence of a dichotomy between the inherent unreliability of eyewitnesses and jurors' reliance on eyewitness testimony, this is the exact situation where expert testimony is needed).

202. *See supra* Part III.A (describing the legislative history and purpose of Federal Evidence Rule 403).

203. *See, e.g.*, United States v. Curry, 977 F.2d 1042, 1051–52 (7th Cir. 1992) (affirming an exclusion of eyewitness identification expert testimony under Federal Evidence Rule 403 as unduly confusing and prejudicial to the jury); United States v. Serna, 799 F.2d 842, 850 (2d Cir. 1986) (affirming an exclusion of eyewitness identification expert testimony under Federal Evidence Rule 403).

204. *See, e.g.*, United States v. Kime, 99 F.3d 870, 883 (8th Cir. 1996) ("[E]xclusion of expert testimony is a matter committed to the sound judicial discretion of the trial judge . . . ."); United States v. Fosher, 590 F.2d 381, 383 (1st Cir. 1979) ("The balancing of

large amount of eyewitness identification expert testimony is excluded under this seemingly impenetrable blanket of Federal Evidence Rule 403.

In *United States v. Fosher*,[205] the government's case rested almost entirely on two eyewitnesses who purported to see the defendant in the area of the crime at the time the bank robbery occurred.[206] The trial court excluded the testimony under Federal Evidence Rule 403 because the court feared the testimony would create a substantial danger of undue prejudice and confusion because of its "aura of special reliability and trustworthiness."[207] The First Circuit affirmed this exclusion and added that the trial court has the discretion to "avoid imposing upon the parties the time and expense involved in a battle of experts."[208]

United States v. Serna[209] is another example of an appellate court deferring to the "broad grant of discretion" given to trial judges under Rule 403 and excluding the eyewitness expert testimony.[210] The court concluded that the proffered expert testimony would consist of nothing other than "general pronouncements about the lack of reliability of eyewitness identification" and noted that the expert knew nothing about the particular factual circumstances surrounding this particular identification.[211] Thus, in

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prejudice and probative value under FED. R. EVID. 403 rests with the sound discretion of the trial court.").

205. *See Fosher*, 590 F.2d at 383–84 (affirming the trial court's exclusion of eyewitness expert testimony as a decision that is within the lower court's "sound discretion").

206. *Id.* at 382.

207. *Id.*

208. *Id.* at 383–84. *Compare Fosher*, 590 F.2d at 384 (stating that it is within the court's discretion to avoid a battle of the experts), *with* United States v. Downing, 753 F.2d 1224, 1243 n.27 (3d Cir. 1985) (dismissing the "battle of the experts" concern and stating that highly probative expert testimony must be admitted regardless of the length it may add to the trial).

209. *See* United States v. Serna, 799 F.2d 842, 850 (2d Cir. 1986) (affirming an exclusion of eyewitness identification expert testimony under Federal Evidence Rule 403).

210. *See id.* at 850 ("A trial judge is accorded broad discretion in admitting or excluding expert testimony under FED. R. EVID. 702 and in excluding testimony under FED. R. EVID. 403 because of the danger of jury confusion or unfair prejudice.").

211. *Id.* at 850. *Compare Serna*, 799 F.2d at 850 (stating that a "general pronouncements about the lack of reliability of eyewitness identification" are not enough and specifically noting that the expert knew nothing about the specific circumstances of that particular identification), *with* United States v. Smithers, 212 F.3d 306, 317 n.3 (6th Cir. 2000) (stating that it would be inappropriate for an expert to testify as to what the witness did or did not see and that general testimony regarding the perception and memory of eyewitnesses is "relevant and helpful to the jury").

the Second Circuit's opinion, eyewitness identification expert testimony would do nothing other than "muddy the waters."[212]

Recently, in *United States v. White*,[213] the Fourth Circuit affirmed an exclusion of eyewitness expert testimony under Federal Evidence Rule 403 because portions of the testimony were likely to confuse the jury, while other portions were within the common knowledge of the jury.[214] Specifically, the court rejected testimony concerning the lack of correlation between confidence and accuracy under Federal Evidence Rule 403 because it could not be quantified and thus would be more likely to confuse the jury.[215]

The Eighth Circuit has noted that Federal Evidence Rules 702 and 403 provide for exclusion of "evidence which wastes time," such as "opinions which would merely tell the jury what result to reach."[216] The court noted that because there is a "very real danger" that eyewitness identification expert testimony could confuse the jury or "cause it to substitute the expert's credibility assessment for its own," it is often properly excluded under Federal Evidence Rule 403.[217]

In summary, a majority of the circuit courts currently permit eyewitness expert testimony to be excluded under Federal Evidence Rule 403. Most of the circuits have no pattern or clear guidance for when or how Rule 403 should be used to exclude eyewitness expert testimony. Thus, we are left with a plethora of contradictory holdings and a Majority Approach without a solid stance on how Federal Evidence Rule 403 should be used. The majority of circuits have placed no limitation on Rule 403 balancing with regard to the admission or exclusion of eyewitness identification expert testimony. As a result, exclusion under Rule 403 has been permitted for undue confusion, waste of time, usurping the role of the jury, or for

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212. *Serna*, 799 F.2d at 850.

213. *See* United States v. White, 309 F. App'x 772, 775 (4th Cir. 2009) (affirming an exclusion of eyewitness identification expert testimony under Federal Evidence Rules 702 and 403).

214. *See id.* (noting that mug shot recognition effect appears to be within the scope of the jurors' common knowledge).

215. *See id.* (noting additionally that the length of time the eyewitness was exposed to the defendant negated the confidence accuracy correlation).

216. *See* United States v. Kime, 99 F.3d 870, 884 (8th Cir. 1996) (affirming an exclusion of eyewitness expert testimony).

217. *See id.* ("Given the powerful nature of expert testimony, coupled with its potential to mislead the jury, we cannot say that the district court erred in concluding that the proffered evidence would not assist the trier of fact and that it was likely to mislead the jury.").

being unduly prejudicial. The Majority Approach is in direct contrast with the original purpose of Rule 403 as a remedy to be used only "sparingly."[218] Eyewitness identification expert testimony should not be treated any differently than other types of expert testimony. If the expert testimony meets the requirements of Rule 702, it should be routinely admitted in all but the most extreme circumstances. However, a majority of the federal circuit courts are currently using Federal Evidence Rule 403 as a weapon to block the admission of essential eyewitness identification expert testimony.

F. Circuit Split Summary

Currently, the Federal Circuit takes three distinct approaches regarding the admission of eyewitness identification expert testimony. The majority of circuits routinely exclude expert testimony on eyewitness identification.[219] The Third and the Sixth Circuits lead the Progressive Minority and generally recognize the potential value in eyewitness identification expert testimony.[220] And last, the Eleventh Circuit continues to stand its ground and holds that as a rule, eyewitness identification expert testimony is inadmissible.[221]

Federal Evidence Rule 403 has detrimentally contributed to the problem of eyewitness identification expert testimony exclusion in a majority of the federal circuit courts today.[222] The limited purpose of Rule 403 and its intended use as an "extreme" remedy have been abandoned.[223] Even the circuits that have attempted to place some limitations on the exclusion of eyewitness expert testimony continue to allow virtually unfettered discretion to exclude eyewitness expert testimony under Federal Evidence Rule 403.[224] Given the limited appellate review and the lack of

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218. *See supra* Part III.A (describing Rule 403 as an "extreme" remedy to be used only "sparingly").

219. *See supra* Part IV.B (describing the "majority approach" of the federal circuits with regard to eyewitness identification admissibility).

220. *See supra* Part IV.C (describing the Progressive Minority and the approach of the Third and Sixth Circuits).

221. *See supra* Part IV.D (describing the per se inadmissibility approach of the Eleventh Circuit).

222. *See supra* Part IV.E (analyzing how federal circuits treat exclusion of eyewitness identification expert testimony under Federal Evidence Rule 403).

223. *Supra* Part III.A.

224. *See supra* Part IV.E.1 (describing how the Progressive Minority still generally allows a Rule 403 exclusion of eyewitness identification expert testimony).

guidance for the lower courts on when they should admit or exclude eyewitness expert testimony, a new solution is needed.

V. Potential Solutions and Recommendation

Eyewitness identification expert testimony is the only effective means of educating the jury about the inherent reliability problems with eyewitness identifications.[225] Numerous studies have found that cross-examination and jury instructions are inadequate alternatives to eyewitness identification expert testimony.[226] Cross-examination does not effectively increase juror awareness of the reliability problems intrinsic in eyewitness testimony.[227] Similarly, jury instructions do not sufficiently increase juror sensitivity to the memory and perception issues of eyewitness testimony, and in fact, have a tendency to confuse the jury and make them *less* receptive to potential reliability issues.[228] Eyewitness expert testimony should be routinely admitted whenever an eyewitness takes the stand. To achieve this, a solution which aims to combat the problem of eyewitness identification expert testimony exclusion under Federal Evidence Rule 403 is needed. Thus, this Note now analyzes the potential parameters which could be placed on the admission of expert testimony in this area and the respective value of each alternative.

A. Judicial Solution: Global Adoption of the Progressive Minority Approach

The first potential solution is a global adoption by all the circuit courts of the Progressive Minority's approach to eyewitness identification expert testimony. The Progressive Minority recognizes the importance of eyewitness identification expert testimony and as a general rule tends to

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225. *See, e.g.*, Harmon M. Hosch et al., *Influence of Expert Testimony Regarding Eyewitness Accuracy on Jury Decisions,* 4 LAW & HUM. BEHAV. 287, 294 (1980) (concluding that numerous studies conducted on the impact of eyewitness expert testimony on juries have revealed that the presentation of expert testimony significantly influences the jurors' beliefs about memory accuracy).

226. *See supra* Part II.C (describing cross-examination and jury instructions as unacceptable alternatives to eyewitness identification expert testimony).

227. *Id.*

228. *Id.*

favor admission.[229] In particular, this approach has held that eyewitness expert testimony should be "presumptively admissible" when the state's case is based primarily on eyewitness testimony.[230] In terms of Federal Evidence Rule 403, the *Downing* court gave specific guidance as to how the balancing test should be conducted with regard to eyewitness identification expert testimony.[231] The Progressive Minority emphasized the importance of eyewitness identification expert testimony in enhancing the "truth-seeking function of the trial," especially where eyewitness evidence is the only evidence proffered by the government.[232] Specifically, "usurping the role of the jury" and avoiding a "battle of the experts" have been declared unacceptable reasons for a Rule 403 exclusion.[233] The Progressive Minority also discourages exclusion under Federal Evidence Rule 403 for "confusion" or "delay" where eyewitness identification is the only evidence.[234]

This solution is a significant improvement on the Majority Approach's general distaste for eyewitness identification expert testimony admissibility and blanket deference to Rule 403 exclusions. One of the main strengths in the Progressive Minority's approach is that it has begun to address the multiple avenues for eyewitness expert testimony exclusion. Not only have the circuits declared their general acceptance of the scientific validity and importance of eyewitness expert testimony under Rule 702, but they have also begun to place limitations on the Rule 403 exclusion avenue. However, this approach still has problems. Although the *Downing* court noted the potential value in eyewitness expert testimony, it also specifically stated that in certain situations exclusion under Rule 403 is still possible if the probative value is outweighed by other dangers.[235] Additionally, expert

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229. *See supra* Part IV.C (describing the "progressive minority" and the approach of the Third and Sixth Circuits).

230. United States v. Smithers, 212 F.3d 306, 313 (6th Cir. 2000).

231. *See Smithers*, 212 F.3d at 313 (noting the importance of expert testimony on eyewitness reliability, particularly when the state's case is based primarily on eyewitness testimony); United States v. Downing, 753 F.2d 1224, 1230 (3d Cir. 1985) (noting "the liberal standard of admissibility mandated by Rule 702").

232. *Downing*, 753 F.2d at 1243 ("The availability of Rule 403 is especially significant when there is evidence of a defendant's guilt other than eyewitness evidence, e.g., fingerprints, or other physical evidence.").

233. *Id.* at 1243 n.27.

234. *Id.*

235. *Id.* at 1239 ("The danger that scientific evidence will mislead the jury might be greater, for example, where the jury is not presented with the data on which the expert relies, but must instead accept the expert's assertions as to the accuracy of his conclusions.").

testimony is only presumptively admissible when eyewitness testimony is the main thrust of the government's case. This passive approach still grants trial judges a tremendous amount of discretion if there is any corroborating evidence in the facts of their case to determine whether they feel admission is appropriate. The appellate courts will continue to find a potential abuse of discretion under Federal Evidence Rule 403 only if the trial court excluded expert testimony when the government's proffered evidence is solely eyewitness testimony. The Progressive Minority has begun to affect change at the appellate level, but the discretion granted at the trial level is a significant impediment to the potential for any real and uniform change. A much stronger solution is needed in order to attempt true reform in the area of eyewitness identification expert testimony admissibility.

B. Legislative Solution: Specialized Relevance Rule

A specialized relevance rule reflects Congress's judgment that, as a matter of law, the evidence it governs fails a Federal Evidence Rule 403 balancing test.[236] As discussed earlier in this Note, specialized relevance rules are congressional proclamations that public policy concerns warrant a limit to judicial discretion under Rule 403 for a narrow category of evidence.[237] A solution is to take the idea of creating a rule limiting judicial discretion under Rule 403 and apply it to the eyewitness identification expert testimony situation. The current specialized relevance rules proclaim that in certain situations the evidence *fails* a Rule 403 balancing test. An effective specialized relevance rule in the eyewitness identification context would invert this model and state that in most situations eyewitness identification expert testimony *succeeds* a 403 balancing test. To demonstrate the idea, I have drafted an example:

> Federal Evidence Rule ***
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> Expert testimony proffered to highlight the inherent reliability issues present in eyewitness identification is NOT, in any criminal proceeding, to be excluded under Federal Evidence Rule 403 as:
>
> Unduly prejudicial;
>
> Confusing; or

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236. *See supra* Part III.C (describing the specialized relevance rules and how they interact with Rule 403).

237. *Id.*

> Misleading.
>
> However, such expert testimony may be excluded under Rule 403 in limited circumstances for undue delay or waste of time when, due to testimony from multiple experts, the proffered testimony becomes cumulative or needless.

The above rule would remove the discretion currently granted to trial judges to determine that eyewitness identification expert testimony is "unduly prejudicial," "confusing," or "misleading."[238]

This is a strong solution that would have the immediate and resolute effect of limiting judicial discretion to exclude eyewitness expert testimony under Federal Evidence Rule 403. Erroneous eyewitness identification has had a negative effect on both perceived and actual procedural justice in the federal courts. Public policy calls for this necessary legislative action. This specialized relevance rule should not be seen as drastic because it is not ratifying extreme change or permitting a result which would have previously been disallowed under Rule 403. In fact the proposed rule is merely enacting the result that should be reached under a proper Rule 403 balancing test. The scientific validity of eyewitness expert testimony and the social science revealing the fallibility of eyewitness testimony is virtually universally accepted.[239] Additionally, studies demonstrate that eyewitness expert testimony is the only effective mechanism by which to inform the jury of these findings. Thus, there is no need for eyewitness expert testimony to ever be excluded under Rule 403 for undue prejudice, confusion of issues, or misleading the jury. Additionally, if multiple eyewitness experts testify, the proposed specialized relevance rule would continue to allow judges to exclude expert testimony that becomes needless or cumulative and merely wastes time. This proposed rule is necessary not because Rule 403 is flawed, but because the federal courts habitually condone eyewitness expert testimony exclusions justified under flawed balancing analyses.

An argument can be made that this legislative solution is merely a small reform in the area of Federal Evidence Rule 403 and will not significantly affect eyewitness expert testimony admissibility under Rule 702 and *Daubert*. Though Rule 403 is a significant part of the exclusion problem, most eyewitness expert testimony is also excluded under Rule 702 and similar "cocktail rulings."[240] Courts will still be free to hold that

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238. FED. R. EVID. 403.

239. *See supra* Part II (describing the social science behind eyewitness identifications).

240. *See supra* Part III.B (describing "cocktail rulings" as rulings that combine

eyewitness expert testimony is within the common knowledge of the jury and therefore it does not "assist the trier of fact."[241] Though there is truth in this argument, I do not believe it outweighs the potential value in the proposed rule. The Progressive Minority has already planted the seeds of change and recognizes the importance of eyewitness expert testimony under Rule 702.[242] Additionally, even the Majority Approach has conceded that in narrow circumstances where the government's case rests solely on eyewitness testimony the admission of expert testimony may be necessary.[243] The proposed specialized relevance rule will not only limit judicial discretion to exclude eyewitness testimony under Rule 403, but it also has the potential to create a powerful ripple effect that will push the majority of circuits to adopt the Progressive Minority approach. The proposed specialized relevance rule is not just a necessary limitation to judicial discretion, it is a congressional proclamation that eyewitness expert testimony has value and that a significant problem existed that warranted legislative action.

C. Recommendation

I recommend that Congress adopt a specialized relevance rule addressing eyewitness identification expert testimony exclusion under Federal Evidence Rule 403 such as the one proffered in the previous section.[244] This is the superior solution for a variety of reasons. First, it combats the problem of the virtually unfettered discretion currently granted to trial judges. Given that the majority of appellate courts are currently unwilling to reverse an exclusion of eyewitness expert testimony, except in the most egregious situations, this is a necessary solution.[245] The social science in this area has grown exponentially in recent years, revealing conclusively that erroneous eyewitness identification is the most common

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exclusions under Rule 403, 702 and other evidence rules).

241. FED. R. EVID. 702; *see supra* Part IV.B (describing circuits that have held expert testimony is common knowledge and does not assist the jury).

242. *Supra* Part IV.C.

243. *Supra* Part IV.B.

244. *See supra* Part V.B (proposing a legislative solution and drafting a new specialized relevance rule).

245. *See supra* Part IV.B (describing "the majority approach" and noting that most federal circuits take a "discretionary approach" and almost always defer to the district court's decision on whether to admit expert testimony on eyewitness identification).

reason for innocent people being convicted.[246] It is no longer acceptable to allow judges to make policy determinations based on whether they personally believe this type of expert testimony is valuable. A specialized relevance rule will begin to combat judicial discretion at the ground level. The Progressive Minority approach, while recognizing the importance of eyewitness expert testimony, does not guarantee its admission and still allows for exclusion in the federal district courts. A specialized relevance rule, in contrast, will create immediate uniformity in the lower courts with respect to the exclusion of eyewitness expert testimony under Federal Evidence Rule 403. A solution which enacts reform from the ground up is a stronger and more powerful way to affect change.

Second, this solution continues to allow for the relevancy of eyewitness expert testimony as it pertains to the facts of each particular case to be examined under Federal Evidence Rule 702 and the *Daubert* two-step analysis.[247] Thus, under Rule 702 it is still possible to limit the scope of the eyewitness expert's testimony as it relates to the facts of the case.[248] For example, in a case with a white defendant and a white eyewitness, Rule 702 could exclude expert testimony regarding cross-racial identification[249] because it does not "assist the finder of fact."[250] The proposed specialized relevance rule is limited and defines the narrow situations where it is appropriate or inappropriate to exclude eyewitness identification expert testimony under Federal Evidence Rule 403. However, by keeping the existing structure of Rule 702 and the *Daubert* standard intact, this solution has retained a limited amount of discretion and flexibility to exclude or

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246. *See* The Innocence Project, *Fact Sheet on Post-Conviction DNA Exonerations*, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Mar. 23, 2011) (finding that "Eyewitness [m]isidentification [t]estimony was a factor in 74 percent of post-conviction DNA exoneration cases in the U.S.") (on file with the Washington and Lee Law Review).

247. *See supra* Part III.B (describing Federal Evidence Rule 702 and the *Daubert* standard and their relationship to Federal Evidence Rule 403).

248. FED. R. EVID. 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

249. *See supra* note 38 (describing the problems inherent in cross-racial identifications).

250. FED. R. EVID. 702.

narrow the scope of eyewitness expert testimony if it is not relevant to a particular case.

Third, this solution is in accordance with the legislative history and purpose of Federal Evidence Rule 403.[251] Courts have almost uniformly concluded that Congress intended exclusion under Rule 403 to be an "exceptional, extraordinary remedy" to be used "sparingly."[252] Rule 403 delineated a confined set of circumstances where exclusion would be appropriate.[253] The Federal Evidence Rule used language such as "undue" and "substantially outweigh" to emphasize that generally the balancing test should favor admission.[254] Federal Evidence Rule 403 was never meant to give a carte blanche of discretion to federal judges, especially where the availability of alternative means of proof have been demonstrated to be ineffective.[255]

And last, a specialized relevance rule, though limited to Rule 403, has the potential to provide broader guidance to the federal circuit courts in that it will be a congressional determination that eyewitness identification expert testimony is valuable. Like many areas of reform in our country's past, often it is Congress who must take the first step and proclaim that the time has come to acknowledge a problem exists and define the parameters of a solution. After Congress takes the first step, the federal courts will begin to feel more comfortable accepting eyewitness identification expert testimony generally. The proposed specialized relevance rule has the potential to lead the circuit courts that currently disfavor eyewitness expert testimony admission to adopt the Progressive Minority approach. A legislative determination that eyewitness identification expert testimony is

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251. *See supra* Part III.A (analyzing the legislative history and purpose behind Rule 403).

252. *See* Imwinkelried, *supra* note 85, at 906 (noting Congress' purpose in enacting Rule 403 and arguing the rule should be interpreted narrowly so as not to improperly resurrect the common law rules of evidence). "Congress intended that judges would invoke this drastic remedy sparingly and infrequently." *Id.*; *see also supra* Part III.A (analyzing the legislative history and purpose behind Federal Evidence Rule 403).

253. *See supra* Part III.A (noting that the legislative history of Rule 403 reveals the language of the rule was drafted to limit judicial discretion by narrowing exclusion to a confined set of circumstances).

254. *Supra* Part III.A.

255. *See* FED. R. EVID. 403 advisory committee notes ("In reaching a decision whether to exclude on the grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. The availability of other means of proof may also be an appropriate factor."); *see also supra* Part II.C (describing cross-examination and jury instructions as ineffective alternatives to eyewitness expert testimony).

important can affect widespread change and shift the trend to one where eyewitness expert testimony is presumptively admissible.

VI. Conclusion

An examination of the admissibility of eyewitness identification expert testimony through the lens of Federal Evidence Rule 403 has revealed a disturbing trend in the federal circuit courts to use this "extreme" remedy to block a now well-established body of social science from our nation's courtrooms. The story of Julius Ruffin represents thousands of similar cases which play out across our country every day.[256] Mr. Ruffin was rare and lucky in the sense that he had DNA in the system and was eventually exonerated. This is not true of many defendants who are trapped by a web of circumstantial evidence and a confident but mistaken eyewitness who took the stand and said, "He is the one!"

Today, a majority of federal circuit courts continues to disfavor the admission of eyewitness identification expert testimony.[257] Given the years of social science evidence emphasizing the reliability problems inherent in eyewitness identifications and the statistics tracking the growing number of exonerations based on erroneous eyewitness identifications, it is no longer tolerable to accept this trend. The Progressive Minority has taken noble steps towards reform and recognizes the general importance of eyewitness expert testimony admissibility.[258] However, this passive acceptance of expert testimony at the appellate level is not enough to combat the problem of excess judicial discretion and hostility towards eyewitness expert testimony that has seeped deep into the federal district courts.[259]

This Note recommends a legislative solution that limits judicial discretion to exclude eyewitness expert testimony under Rule 403.[260] The proposed specialized relevance rule will prohibit unnecessary and erroneous exclusion of eyewitness expert testimony under Rule 403. However, this solution has the power to ignite a change that will extend much further than

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256. *See supra* note 2 (describing the wrongful conviction and exoneration of Julius Ruffin).

257. *See supra* Part IV.B (describing the majority approach towards eyewitness expert testimony admission in the federal circuit courts).

258. *See supra* Part IV.C (describing the Progressive Minority approach).

259. *See supra* Part V.A (describing the strengths of the Progressive Minority's approach but noting that weaknesses still remain).

260. *See supra* Part V.B–C (describing and recommending a new specialized relevance rule).

eyewitness expert testimony exclusion under Rule 403. This legislative proclamation valuing eyewitness expert testimony will send a message to the federal circuit courts that the Progressive Minority is on the right track. This proposed legislative solution is an attempt to begin to solve a problem that has eroded and polluted our justice system for years. A specialized relevance rule limiting the discretion of federal district court judges to exclude eyewitness expert testimony is a foundational repair that has the strength to support and ignite a universal trend of routine eyewitness expert testimony admissibility.