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REPEATING, YET EVADING REVIEW: ADMITTING RELIABLE EXPERT TESTIMONY IN CRIMINAL CASES STILL DEPENDS UPON WHO IS ASKING

Wes R. Porter*

A trial court must find that the proponent of expert witness testimony has set forth adequate evidence that the testimony is based upon reliable methods and will be helpful to the trier of fact.¹ Much has been written regarding the reliability prong² since the Supreme Court's decision in *Daubert v. Merrell Dow Pharm.*,³ yet a severe prejudice to the criminally accused persists today in some trial courts' analyses of the often overlooked helpfulness prong. Despite the straight-forward articulation of helpfulness, described as "fit" or mere relevance, some trial courts apply the helpfulness prong differently depending upon whether the expert testimony is offered by a criminal defendant or the government.⁴ Reviewing courts must afford great deference to these decisions so steeped in the facts of the case.⁵ After discussing the stark contrast between admissibility determinations excluding

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¹ Fed. R. Evid. 702 (2009). Rule 702 embodies "three distinct substantive restrictions on the admission of expert testimony: qualifications, reliability, and fit." *Elcock v. Kmart Corp.*, 233 F.3d 734, 741 (3d Cir. 2000); *see generally* *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 592-94 (1993) (discussing factors that may be considered in assessing scientific reliability); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141-42 (1997).

² The majority of the appellate decisions and scholarly comments related to expert testimony, particularly since the Court's 1993 decision in *Daubert* have centered on reliability.

³ 509 U.S. 579 (1993).

⁴ *See* Fed. R. Evid. 702 (Rule 702's fit requirement admits "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue"); *see Daubert*, 509 U.S. at 587-88 (referencing the "liberal" federal rules of evidence and "the basic standard of relevance").

⁵ Abuse of discretion is the governing standard of review in expert witness cases. *See Gen. Elec. Co.*, 522 U.S. at 141-42. "Decisions concerning the admissibility of expert testimony 'lie within the broad discretion of the trial court' and will not be reversed on appeal unless there has been an abuse of that discretion." *Jenkins v. Arkansas Power & Light Co.*, 140 F.3d 1161, 1165 (8th Cir. 1998).

the defendant's expert testimony about eyewitness identifications and admitting expert testimony from law enforcement witnesses, this article will analyze the reoccurring issue through the lens of the reviewing courts.⁶

One of the unfortunate truths in criminal litigation is that trial courts frequently admit testimony from the government's experts and exclude the defendant's proposed expert testimony.⁷ Almost ten years ago, Professor D. Michael Risinger wrote that he feared that the criminal defendant would not be protected from conviction by the exclusion of "undependable expert testimony" because "prosecution [expert] witnesses almost always allowed to testify," yet the defendant's proffered expert testimony was, and still is, "rejected in a majority of cases."⁸ Professor Risinger's article surveyed weaker government experts who had been allowed through the trial courts' gates⁹ relative to the defendant's experts that were kept out.¹⁰ Most prophetically, Professor Risinger observed that while defense experts, at that time, were often not permitted to testify regarding eyewitness testimony, police officers and other law enforcement officials testified "concerning the general way criminal schemes and enterprises operate."¹¹

Despite the scientific advances in the field of witness identification and ten more years of post-*Daubert* guidance, the disparate trial court rulings continue today. Some trial courts still exclude experts with reliable information about witness identifications and admit testimony from law enforcement officers covering irrelevant, unhelpful and unfairly prejudicial topics derived from their inherent bias. It begs the questions explored in this article: Why? What reasoning and by what specific language do trial courts reach these irreconcilable results? Can reviewing court remedy this fundamental injustice that prejudices the criminal defendant?

⁶ See *infra* Sections II and III; Fed. R. Evid. 401 & 402. "[A]ny doubts regarding the admissibility of expert testimony should be resolved in favor of admission." *Probatter Sports, LLC v. Joyner Tech., Inc.*, 2007 WL 3285799 *4 (N.D. Iowa 2007) (citing *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 758 (8th Cir. 2006)); "[T]he rejection of expert testimony is the exception rather than the rule." *Robinson v. GEICO General Ins. Co.*, 447 F.3d 1096, 1100 (8th Cir. 2006); see *In re TMI Litigation*, 193 F.3d 613, 670 (3d Cir. 1999) (quoting *Daubert*, 509 U.S. at 591) (emphasizing that "[t]his requirement [of 'fit'] is one of relevance and expert evidence which does not relate to an issue in the case is not helpful"). The Supreme Court recognized that the "fit" requirement "goes primarily to relevance," but it obviously did not intend the second prong of Rule 702 to be merely a reiteration of the general relevancy requirement of Rule 402. *Daubert*, 509 U.S. at 591. Rule 702 set forth the "helpfulness" standard which requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility. Fed. R. Evid. 702; *Daubert*, 509 U.S. at 591-92.

⁷ D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?* 64 ALB. L. REV. 99 (2000) (hereinafter "*Navigating*") (collecting statistics about reported post-*Daubert* cases including in federal criminal cases). As of 2000, the date of his article, Professor Risinger noted that the government typically survived challenges to its expert testimony and the criminal defendant's expert testimony was excluded as much as 66% of the time. *Id.* at 109-110.

⁸ See *id.* at 100, 132.

⁹ See *id.* at 112-21 (discussing "syndrome" experts such as those who testify about Rape Trauma Syndrome and Post Traumatic Stress Syndrome); *id.* at 121-24 (intoxication test of horizontal gaze nystagmus experts); *id.* at 135-39 (bite-mark experts); *id.* at 139-42 (handwriting experts).

¹⁰ See *id.* at 134-35 (referencing false identification expert in comparison law enforcement experts).

¹¹ See *id.* at 132.

The last great hope for the accused who are short-changed in their bids to present expert testimony is two-fold: first, to create a trial record that fully elucidates the ways in which the trial court “exercised its discretion;” and, second, to successfully argue for appellate courts to review *de novo* a lower court’s compliance with the *Daubert* framework¹² or a record that demonstrates unfair treatment.

As distinguished from Professor Risinger’s article and the work of other scholars,¹³ this article has removed the reliability prong from its analysis, and focuses instead on courts’ treatment of qualified experts employing reliable methods under the helpfulness prong. By isolating helpfulness,¹⁴ the prejudice to the accused becomes more vivid and the need for more robust appellate review more urgent. This article first explores the language and reasoning articulated by some trial courts in reaching the paradoxical admissibility determinations. This article discusses how egregiously divergent admissibility determinations depend on whether the government or the criminal defendant proposes the expert testimony. To illustrate this contention, this article profiles witness identification expert testimony typically offered by the defendant as compared to expert testimony from law enforcement witnesses for the government. This article then describes the way in which the disparate admissibility determinations by the trial court escape meaningful review. Lastly, this article discusses the possible avenues to a more fruitful appellate review through more appropriate standards of review and importing other trial courts’ *Daubert* analysis.

I. Expert Testimony Is Different

Trial courts treat expert testimony, and decisions related to its admissibility, differently. A professional witness permitted to educate and opine on helpful topics and issues long has carried great weight with the jury. Expert testimony, since the origins of our adversary system, contributes a badge of legitimacy and an aura of independent, unbiased support to a party’s case presentation.¹⁵ In terms of constructing a defense and refuting the government’s theory of prosecution, testimony from an expert can be invaluable to a criminal defendant. Admissibility decisions governing expert testimony enjoy greater attention and a heightened standard of scrutiny from trial courts under Rule 702, *Daubert* and its progeny. This includes the helpfulness prong.

¹² See *United States v. Hall*, 165 F.3d 1095, 1105 (7th Cir. 1999).

¹³ See Elizabeth L. DeCoux, *The Admission of Unreliable Expert Testimony Offered by the Prosecution: What’s Wrong with Daubert and How to Make it Right*, 2007 UTAH L. REV. 131 (discussing the reliability prong of *Daubert* and trial courts’ role in “shaping” methodology while focusing on the government’s experts testifying about bite-marks and future dangerousness in sentencing).

¹⁴ This article does not discuss reliability determinations or the application of *Daubert*, *Kubmo Tire* and its progeny. The discussion here, instead, assumes a qualified expert testifying based on reliable methods. Even in states that do not follow *Daubert*, some form of relevance is incorporated into the trial court’s admissibility determinations.

¹⁵ While a defendant may have some defense to criminal charges levied by the government, a defense can truly benefit from the teachings and opinions of a professional witness. Compare *United States v. Rincon*, 28 F.3d 921, 926 (9th Cir. 1994) (excluding the witness identification expert *because of* the “powerful nature of expert testimony”) with *United States v. Mathis*, 264 F.3d 321, 338-39 (3d Cir. 2001) (holding that there is “no suggestion, however, that such an aura of reliability [of the expert testimony] was unwarranted in this case”) (citing *Daubert*, 509 U.S. at 592, 594).

Several other reasons may exist for the heightened scrutiny and, consequently, may explain why criminal defendants fall victim to disparate admissibility determinations by some trial courts.¹⁶ First, trial courts were labeled as gatekeepers by the Court in *Daubert*,¹⁷ and some trial courts seem to confuse their role with the label, which applies to the reliability prong not discussed in this article.¹⁸ Trial courts have always been the “evidentiary gatekeepers” and *Daubert* merely incorporated a familiar relevance component into its test. Second, some trial courts misapprehend “helpfulness” to apply more generally to the criminal process, and deny the accused reliable expert testimony, in an effort to encourage plea bargaining.¹⁹ Third, as explored here, some trial courts seem to engage in unwelcome protectionism²⁰ and impose subjective value judgments when considering the admissibility of reliable expert testimony.²¹ The judicial protectionism described in this article prejudices the accused and compromises justice as well as the public’s perception of the criminal justice system.²²

II. Excluding Reliable Expert Testimony From the Defendant

Trial courts employ the legal reasoning and language profiled below to effect seemingly pre-determined admissibility decisions to exclude the defendant’s expert testimony. Some trial courts, in so doing, insert their subjective value judgments about the defendant’s case, theory of the defense or the proposed expert’s contribution (or disruption) to the trial. The false identification experts profiled below illustrate but one example of the raised admissibility hurdle that some courts reserve for the criminal defendant.

¹⁶ The problems discussed herein are not universal, but rather the product of some lower court decisions and reflective of a circuit split. See *infra* note 40.

¹⁷ *Daubert*, 509 U.S. at 589 n.7; see also Leslie Morsek, *Get On Board for the Ride of Your Life! The Ups, the Downs, the Twists, and the Turns of the Applicability of the “Gatekeeper” Function to Scientific and Non-Scientific Expert Evidence: Kubmo’s Expansion of Daubert*, 34 AKRON L. REV. 689 (2001).

¹⁸ *Daubert*, 509 U.S. at 593-95; see also *United States v. Brien*, 59 F.3d 274, 277 (1st Cir. 1995) (excluding the defendant’s expert testimony under *Daubert*’s reliability prong when he failed to provide the trial court support for the opinion).

¹⁹ See generally Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059 (Nov. 1976).

²⁰ Judicial protectionism, as used throughout this note, occurs when a trial court injects subjective value judgments into its decision making and protects an image of the trial as it is, at least in the court’s view, supposed to proceed.

²¹ See *Porter v. Whitehall Labs., Inc.*, 9 F.3d 607, 614 (7th Cir. 1993) (holding that when deciding the reliability prong, the district court must “must rule out ‘subjective belief’” of the expert witness). Interestingly, the Seventh Circuit upheld the trial court’s exclusion of an identification expert, stating simply that “expert testimony relating to eyewitness identification is strongly disfavored” and injected its own subjective belief in the determination. See *United States v. Hall*, 165 F.3d 1095, 1105 (7th Cir. 1999).

²² See *infra* Section V: The Cry for DeNovo Review in Limited Circumstances and, in the Alternative, Uncovering Abuse in Trial Courts’ Discretion (discussing how trial courts’ irreconcilable admissibility determinations escape meaningful review and evade public knowledge when even findings of error lay buried beneath the harmless error standard).

A. Early Trial Courts Considering Witness Identification Experts

Trial courts initially considered expert testimony about false identification more than 20 years ago.²³ The prosecution must establish identity, and it is among the earliest foundations of our criminal justice system that the prosecution typically relies on eyewitness testimony. The first courts to consider testimony about witness identifications easily dismissed it as either not “generally accepted” under *Frye v. United States*²⁴ or, more applicable to the discussion here, as invasive to the jury’s exclusive role to assess witness credibility.²⁵ The former was a reliability issue; the latter fell under the helpfulness prong. Partially based upon a value judgment about the defendant and the defendant’s case, the earlier trial courts seem to have been unwilling to allow the testimony of an expert, such as a psychologist or physician, to convolute the otherwise straight-forward issue of identity and the historic importance of eyewitness testimony.²⁶

Under the reliability prong, like other novel expert testimony, the research and empirical evidence related to witness identifications developed. Psychologists, studies and legal scholars gradually exposed the fallibility of witness identifications.²⁷ The seminal event which brought the witness identification discussion to the forefront was the advent of DNA testing, particularly during post-conviction review.²⁸ As one commentator observed, “the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single

²³ See *United States v. Ameral*, 488 F.2d 1148 (9th Cir. 1973)(excluding the testimony as not necessary); *but see United v. Downing*, 753 F.2d 1224, 1226 (3d Cir. 1985)(recognizing nearly 25 years ago that Rule 702 may permit “testimony concerning the reliability of eyewitness identifications”).

²⁴ Some states continue to follow *Frye*: Arizona, California, District of Columbia, Florida, Illinois, Kansas, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New York, North Dakota, Pennsylvania and Washington. Other states have not outright rejected *Frye*, yet apply *Daubert* factors (so-called hybrid states): Alabama, Hawaii, Massachusetts, Nevada, New Hampshire and New Jersey. Other states have created their own tests: Georgia, Utah, Virginia and Wisconsin. See, e.g., *Hamilton-King v. HNTB Georgia, Inc.*, 2009 WL 737044 (Ga. Ct. App. 2009) (rejecting *Daubert*). The rest of the states follow *Daubert*.

²⁵ The jury is the judge of witness credibility at trial, a role that trial courts are careful not to permit invasion. See *State v. McCutcheon*, 781 P.2d 31 (Ariz. 1989) (excluding expert testimony because the real purpose would have been to attack credibility of specific witness); cf. *Mathis*, 264 F.3d at 338 (rejecting the government’s argument that false identification testimony might usurp the jury’s role as judge of witness credibility).

²⁶ Also, these early courts did not use outcome-determinative language discussed in this article; instead, the *Frye* standard of reliability that applied at the time, the state of the research in the field and the legitimate concerns of usurping the jury’s role as arbiter of credibility were sound legal determinations. This unwillingness may be explained, at least in large part, by reference to the principles underlying the later-devised reliability prong in *Daubert*.

²⁷ University of California at Irvine Law Professor Elizabeth Loftus is one of the nation’s leading experts on memory. Her experiments reveal how a memory can be altered by suggestions and events after it was original formed. She was recently interviewed about the unreliability of eyewitness identifications on CBS’s 60 Minutes. See <http://www.cbsnews.com/video/watch/?id=4852677n>.

²⁸ Studies about conviction reversals due to DNA indicate that a significant percentage involved an eyewitness identification that turned out to be false. See Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271, 1273 (2005) (footnotes omitted). McMurtrie observes that “[r]esearch over the past thirty years has shown that expert testimony on memory and eyewitness identification is the only legal safeguard that is effective in sensitizing jurors to eyewitness errors.” *Id.* at 1276. Studies have shown that erroneous identification accounted for as much as eighty-five percent of the convictions of those individuals later exonerated by DNA testing. *Id.* at 1275 n.17.

factor – perhaps it is responsible for more such errors than all other factors combined.”²⁹ False identification by an eyewitness was described as the single greatest cause of wrongful convictions, playing a role in more than 75% of convictions overturned through DNA testing, according to the Innocence Project.³⁰

Trailing science, courts began to recognize the sea change with respect to false identification expert testimony and its reliability and general acceptance in the field.³¹ Scholars have noted that expert testimony concerning the fallibility of eyewitness identification is firmly rooted in experimental foundation, psychological research on human perception and memory and impressive peer review literature.³² Specifically, a qualified expert witness in the field of eyewitness identifications may testify about the limitations of cross-racial identifications,³³ human perceptions in “high stress environments,” “weapon focus” and whether the witness was subsequently exposed to memory-altering “post-event” information or reassurances by investigators. Further, expert witnesses have testified that the process on an out-of-court identification, including those in error, serve to create or reinforce memory,³⁴ that the degree of confidence in the identification bears little relation to its accuracy³⁵ and that identifications favor the closest resemblance to our memory among the options available, whether or not the perpetrator was included among the selections.

²⁹ Patrick Wall, *Eye-Witness Identification in Criminal Cases*, at 26 (1965) (his doctoral thesis).

³⁰ Innocence Project, *Eyewitness reforms gain momentum nationwide*, Apr. 20, 2007, available at <http://www.innocenceproject.org/Content/525.php>; see also Justice for All Act of 2004, 42 U.S.C. § 14136 (2006).

³¹ See *United States v. Downing*, 753 F.2d 1224, 1226 (3d Cir. 1985) (holding that Rule 702 may permit “testimony concerning reliability of eyewitness identifications”).

³² Mark S. Brodin, *Behavioral Science Evidence in the Age of Daubert: Reflections of a Skeptic*, 73 U. CIN. L. REV. 867, 889-90 (2005) (footnotes omitted). Scientifically tested studies, subject to peer review, have identified legitimate areas of concern. See *Downing*, 753 F.2d at 1277 n.29 (citing Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 LAW & HUM. BEHAV. 185, 190 (1990) (concluding that jurors were insensitive to many factors that influence eyewitness memory and give disproportionate weight to the confidence of the witness); Timothy P. O’Toole, et al., *District of Columbia Public Defender Eyewitness Reliability Survey*, *Champion* 28-32 (Apr. 2005) (finding, in a survey of approximately 1,000 potential jurors, that they overestimate the reliability of cross-racial identification); Gary Wells, et al., *Eyewitness Identification Procedures: Recommendations For Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 619-20 (1998); Richard A. Wise & Martin A. Safer, *A Survey of Judges’ Knowledge and Beliefs About Eyewitness Testimony*, 40 CT. REV. 6, 8-14 (2003) (finding that judges had limited understanding regarding eyewitness accuracy and confidence and with studies indicating that half or more of all wrongful felony conviction are due to eyewitness misidentification).

³³ See *United States v. Jernigan*, 492 F.3d 1050, 1054 (9th Cir. 2007) (finding identifications to be far less accurate when witnesses are identifying perpetrators of a different race); *United States v. Norwood*, 939 F. Supp 1132, 1137 (D.N.J. 1996) (district court weighing in favor of cross-racial identification expert testimony, as well as weapon focus and stress).

³⁴ *State v. Raff*, 2007 WL 5129727 (Cal. Super.) (expert declaration) (describing that “[r]esearch also demonstrates that witnesses tend to become increasingly committed to their identification over time. Witnesses want to appear consistent with what they have said before. One study found that eyewitnesses who publicly stated their choices stayed with even incorrect choices, 78 percent of the time”).

³⁵ See *United States v. Mathias*, 264 F.3d 321, 337-38 (3d Cir. 2001) (concluding that the government’s argument to exclude the expert testimony about witness identifications “cannot succeed”); cf. *United States v. Brownlee*, 454 F.3d 131 (3d Cir. 2006) (finding that the trial court improperly excluded testimony concerning the relationship between the eyewitness’s confidence in the identification and the accuracy of that identification).

Critically, courts have recognized that witness identification has been shown to be utterly counter-intuitive.³⁶ Studies demonstrate that average lay persons, such as jurors, not only are not familiar with the concepts at the core of these areas of expert testimony but, if left on their own, instinctively arrive at the contrary assumptions.³⁷ For example, a juror considering testimony from an eye-witness at trial mistakenly believes that high stress makes perception and memory more acute and that a witness who proclaims “100% confidence” during an identification of a criminal defendant translates to a more reliable identification. A qualified expert witness offering testimony based upon the reliable methods can only serve to “assist the trier of fact” under these circumstances by presenting the empirical evidence and information that states otherwise. Yet, as discussed below, some trial courts hold close to the notions that jurors can do it on their own³⁸ or admitting the expert testimony will unduly prejudice *the government*.

While there may be meaningful debate about the reliability of some novel areas of expert testimony, the admissibility of reliable expert testimony about witness identifications, however, should be beyond debate in prosecutions including eyewitness identification evidence.³⁹ Still, however, some trial courts exclude expert testimony about eyewitness identifications from qualified witnesses offering testimony based upon reliable science under the helpfulness prong. Reviewing courts typically affirm the decisions as *not* an abuse of the trial court’s discretion.⁴⁰ Reviewing courts

³⁶ State v. McClendon, 730 A.2d 1107, 1124 n.12 (Conn. 1999) (Berdon, J., dissenting) (“[B]ecause many of the empirical findings [regarding false identifications] . . . are highly counterintuitive, I fail to understand how defense counsel could effectively impeach an eyewitness’s identification during closing argument without recourse to expert testimony.”)

³⁷ See Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2006 FED. CTS. L. REV. 3 (discussing the misconceptions of jurors call for expert testimony, particularly when eye witness testimony is portrayed as “gospel to jurors”); Richard S. Schmechel, Timothy P. O’Toole, Catharine Easterly, Elizabeth F. Loftus, *Beyond The Ken? Testing Jurors’ Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177, 214 (2006) (demonstrating how jurors misunderstand how memory generally works and how particular factors, such as the effects of stress or the use of a weapon and affect the accuracy of eyewitness testimony); see also United States v. Smith, 621 F. Supp. 2d 1207, 1209-10 (M.D. Ala. 2009) (summarizing the research and developments in eyewitness identification expert testimony).

³⁸ See *infra* Section III.C.2 (discussing when expert testimony is “beyond the ken” of the jury’s understanding).

³⁹ Similar to other types of expert witnesses, who might testify about the flaws of a computerized filing system or the proper interpretation of satellite photographs, experts who apply reliable scientific expertise to pertinent aspects of the human mind and body should generally be welcomed by courts, not turned away.

⁴⁰ Compare United States v. Mathias, 264 F.3d 321, 339-40 (3d Cir. 2001) (calling witness identification expert testimony “welcome”); United States v. Smithers, 212 F.3d 306, 311-12 & n.1 (6th Cir. 2000) (describing a judicial trend toward, and an empirically supported need for, accepting expert testimony about eyewitness identification); United States v. Brien, 59 F.3d 274, 276-77 (1st Cir. 1995) (holding that the identification expert testimony “assist[s]” the trier of fact; “and quite possibly an expert such as a psychologist familiar with identification problems could give the jury background information about the mechanism of memory, types of errors, error rates, and other information not commonly possessed by the jury-information that may even be at odds with what a judge or juror might expect”) with United States v. Martin, 391 F.3d 949 (8th Cir. 2004) (affirming the trial court’s decision to exclude false identification expert testimony); United States v. Smith, 132 F.3d 1355, 1359 (excluding expert testimony on witness identifications); see also United States v. Kime, 99 F.3d 870, 883 (8th Cir. 1996) (excluding expert testimony about witness identifications on the ground that the testimony “fail[ed] to qualify as ‘scientific knowledge’ under *Daubert’s* first prong”).

typically affirm decisions to deny a criminal defendant attempting to enlist the assistance of experts to testify about eyewitness identifications.⁴¹

B. The Reasoning and Language Used to Exclude

Some trial courts equip themselves with several arrows in the quiver of outcome-determinative language. The judicial reasoning justifying exclusion includes that the proposed expert witness' testimony about witness identifications usurps the jury's role, is within the common understanding of the ordinary juror,⁴² can be adequately addressed by cross-examination,⁴³ causes undue prejudice or confusion to the jury⁴⁴ and is not necessary *because of* the ample other evidence of guilt.⁴⁵ For a standard described as relevance in Rules 401 and 402, the above represents the heightened attention to the helpfulness prong and the significant effort taken by some trial courts to disinvite a defendant's expert to trial.

1. Usurpation of the jury's role of judging credibility

No witness, including an expert qualified in the relevant field, may invade the jury's exclusive role as judge of witness credibility. An expert witness, thus, cannot extend the testimony about witness identification to include whether or not an eyewitness *in the case* should be believed or not. Short of an opinion that a witness should, or should not, be believed, the expert testimony simply does not usurp the jury's exclusive role in judging credibility. Today, most expert witnesses, including those testifying about witness identification, carefully craft their disclosures and opinions to "assist the jury" more generally and to steer clear of any opinion about another trial witness.⁴⁶

Yet, for the criminal defendant seeking to incorporate expert testimony related to witness identifications offered against him at trial, some trial courts contort the usurpation argument.⁴⁷ Some trial courts blindly maintain that even general expert testimony about witness identification invades the province of the jury because it relates to the jury's role in judging credibility.⁴⁸ Merely

⁴¹ See, e.g., *United States v. Daniels*, 64 F.3d 311, 315 (7th Cir. 1995); *United States v. Larkin*, 978 F.2d 964, 971 (7th Cir. 1992).

⁴² See *People v. Johnson*, 759 N.Y.S.2d 260 (4th Dep't 2003)(finding witness identification was not beyond the ken of the ordinary juror); *but see infra* Section III (discussing law enforcement experts permitted to testify about ordinary topics).

⁴³ See Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727 (2007) (exploring how ineffective cross examination is in the false identification context).

⁴⁴ Fed. R. Evid. 403.

⁴⁵ Forecasting that any error would be harmless. See, e.g., *Martin*, 391 F.3d at 954; *Kime*, 99 F.3d at 883.

⁴⁶ See e.g., *United States v. Houser*, 36 M.J. 392, 400 (C.M.A. 1993)(rape trauma expert made it clear that her testimony was to give a framework within which to consider the arguments made by the defense in the context of what happens in some rape cases, but she would not usurp the role of the fact finder. Specifically, in order to avoid confusing the jury, she testified that she was seeking to aid the court members, but they had to determine whether an offense was committed).

⁴⁷ See *Martin*, 391 F.3d at 954 (describing the expert's testimony as related "only to the general reliability of eyewitness identifications" and then excluding it).

⁴⁸ See *United States v. Smith*, 122 F.3d 1355, 1357-60 (11th Cir. 1997); *United States v. Hall*, 165 F.3d 1095, 1103-08 (7th Cir. 1999); *United States v. Kime*, 99 F.3d 870, 883-85 (8th Cir. 1996); *United States v. Ginn*, 87 F.3d 367, 370 (9th Cir. 1996); *United States v. Brien*, 59 F.3d 274, 275-78 (1st Cir. 1995).

relating to the jury's role, however, cannot be the standard. There are federal rules of evidence *intended* to bear on the issues of witness credibility and, ultimately, to assist the trier of fact in their decisions about witness credibility.⁴⁹ Conversely, other trial courts, also under the helpfulness prong, exclude the testimony because it is "not sufficiently tailored to the facts of the case."⁵⁰ It is difficult to rationalize how testimony, even general testimony, about the inherent problems of eyewitness testimony is not *relevant*, or does not "fit," in a prosecution that presents testimony about an eyewitness identification of the defendant.

These trial courts place the criminal defendant in an untenable position between respecting the jury's role as the judge of witness credibility and offering expert testimony sufficiently tailored to the instant case. If the expert witness' testimony relates to the identification at issue in the case, then it is a usurpation of the jury's role (damned if you do); if the expert testimony generally applies to witness identifications, then they are not sufficiently tailored and, thus, not helpful (damned if you don't).

2. Not beyond the ken of the ordinary juror

Some trial courts have found that jurors do not need assistance with eyewitness testimony and identification of the defendant. These trial courts claim that the issues common to identification testimony, such as weapon focus, cross-racial limitations and post-event contamination, are not "beyond the ken of the ordinary juror."⁵¹ Stated differently, because the jury is capable of determining the strength of the witness' identification on its own, expert testimony would not be "helpful." It is difficult to comport this judicial reasoning with the discussion above about jurors' counter-intuitive assumptions about eyewitness identifications.⁵² The research and empirical evidence supports a clear *need* for expert testimony to prevent jury misconceptions and

⁴⁹ See Fed. R. Evid. 607-609 (Article VI), where all the modes of impeachment of witnesses, opinions and reputation as to a witness' character for truthfulness and prior convictions can be used by the jury in fulfilling their role of evaluate the credibility of witnesses. Thus, a witness who heard that a witness has a poor reputation for truthfulness and a witness' felony conviction for assault are admissible to assist the jury in accessing the witness' credibility, yet testimony from a qualified expert witness about reliable information about identifications is excluded by some trial courts.

⁵⁰ See *People v. Radcliffe*, 743 N.Y.S.2d 229 (N.Y. Super. 2002)(describing how trial courts should correlate proffered expert testimony with the facts of the case to demonstrate its helpfulness); cf. *United States v. Sutherland*, 191 Fed. Appx. 737, 740-41 (10th Cir. 2006)(unpublished)(admitting the government's law enforcement expert despite a failure narrowly tailor the testimony to the particular case).

⁵¹ See generally Richard A. Wise & Martin A. Safer, *A Survey of Judges' Knowledge and Beliefs About Eyewitness Testimony*, 40 CT. REV. 6 (2003); but see *United States v. Davis*, 457 F.3d 817 (8th Cir. 2006) (finding that the jury did not need expert testimony explaining the details of sentencing procedures to understand that the government's witnesses might have an incentive to incriminate a co-defendant). *Davis* is a good example of when a jury truly understands the subject of the testimony and expert testimony would not be helpful.

⁵² See *supra* notes 47-48; see also Richard S. Schmechel, Timothy P. O'Toole, Catharine Easterly, Elizabeth F. Loftus, *Beyond The Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177, 214 (2006)(demonstrating that jurors misunderstand how memory generally works and how the effects of stress or a weapon affect the accuracy of eyewitness testimony).

misassumptions.⁵³ Expert testimony about eyewitness identification should be admitted *because* the jury *cannot* do it alone.

There are clear-cut instances in which expert testimony offers educational information outside of a lay person's common knowledge. With closer proposed expert witness testimony, the trial court is faced with an unenviable task of accessing the collective knowledge and cognitive abilities of a group of laypersons whom the court likely has not met. Because helpfulness is on par with relevance, trial courts should resolve these issues in favor of admitting the testimony. Some trial courts, however, do not admit the testimony when the defendant is the proponent of the evidence. At the very least, a consistent standard should apply to the government and the criminal defendant and reviewing courts should not be powerless to correct any inequities.

3. Adequately addressed by the judicial process

Some trial courts also have found that expert testimony about witness identifications is not necessary because the judicial process can adequately substitute for the expert testimony. These courts often refer specifically to cross-examination and jury instructions.⁵⁴ In the eyewitness identification context, some trial courts believe that it is sufficient for the defendant to cross examine *the eyewitness*, a layperson, who, like the jurors, lacks any understanding of the limitations of his own identification and testimony.⁵⁵ The criminal defendant may not present expert testimony from a qualified witness based upon reliable scientific evidence *because* of the "opportunity" to cross examine a lay witness is held sufficient to protect his rights.⁵⁶ Even the appellate courts finding the above logic erroneous inevitably find the error harmless.

Only very rarely do courts exclude otherwise probative and reliable testimony on the grounds that the proponent's right to cross examine another witness is sufficient. What is most perplexing about excluding the defendant's expert on this basis is that expert testimony too is a part of the judicial process and equally rooted in the early formation of the criminal justice system. There

⁵³ See *supra* notes 47-51; cf. *People v. Austin*, 833 N.Y.S.2d 325 (4th Dep't 2007) (finding expert testimony on identifications not helpful when four of the identifying witnesses knew defendant for many years).

⁵⁴ *United States v. Bellamy*, 26 Fed. Appx. 250 (4th Cir. 2002); *United States v. Smith*, 122 F.3d 1355 (11th Cir. 1997), *reh'g and suggestion for reh'g en banc denied*, 124 F.3d 223 (11th Cir. 1997). "Jurors using common sense and their faculties of observation can judge the credibility of an eyewitness identification, especially since deficiencies or inconsistencies in an eyewitness's testimony can be brought out with skillful cross-examination." *United States v. Harris*, 995 F.2d 532, 535 (4th Cir. 1993).

⁵⁵ The line of questioning on cross examination unassisted by the information involved in the expert testimony may appear like this:

Q: You do understand that because the perpetrator had a gun, studies say that your identification may be less accurate?

A: No, I don't understand that.

⁵⁶ For a good example of a cross examination incorporating many of the issues surrounding witness identification, see generally *State v. White*, 2007 WL 5248507 (Cal. Super.) (expert trial testimony).

is no support for a trial court's finding that the opportunity for cross-examination trumps the ability to present expert testimony. The criminal defendant would certainly choose differently.⁵⁷

Appellate courts also reference the trial courts' jury instructions as justification for the exclusion of the defendant's expert testimony about eyewitness identifications.⁵⁸ The only evidentiary finding that resembles witness exclusion on account of other evidence is when evidence is deemed a "needless presentation of cumulative evidence" under Rule 403.⁵⁹ Even then, the trial court excludes the proposed evidence because the court evaluated other, similar evidence *already before the jury*. Here, trial courts have excluded an expert witness on account of the mere *ability to cross examine* a percipient witness at trial or because of the court's instructions to the jury. Exclusion on the basis of other aspects of the criminal trial is aberrant judicial behavior underlying a decision supposedly governed by the liberal standard of relevance.

4. Unfair prejudice and confusion of the issues

The helpfulness prong of the *Daubert* test also implicates Rule 403 considerations.⁶⁰ That is, a trial court may exclude reliable and helpful expert testimony from a qualified witness if the testimony's probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."⁶¹ The Court in *Daubert* commented "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of that risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses."⁶² States not following *Daubert* also rely on 403 considerations to exclude expert testimony about eyewitness identification.⁶³

Some trial courts have excluded the defendant's reliable witness identification expert testimony reasoning that its admission will cause unfair prejudice *to the government*.⁶⁴ There are several

⁵⁷ See *United States v. Locascio*, 6 F.3d 924, 939 (2d Cir. 1993). Rule 702, however, requires only that an expert have "some specialized knowledge that will assist the trier of fact." There is no requirement that prohibits a government agent from testifying as an expert merely because an accomplice witness, another part of the judicial process, is also available. *Id.*

⁵⁸ See *United States v. Rincon*, 28 F.3d 921, 925-26 (9th Cir. 1994). "The district court instructed the jury to consider whether: (1) the eyewitness had the capacity and adequate opportunity to observe the offender based upon the length of time for observation as well as the conditions of observation; (2) the identification was the product of the eyewitness's own recollection or was the result of subsequent influence or suggestiveness; (3) the eyewitness has made inconsistent identifications; and (4) the eyewitness was credible. . . . Finally, it permitted the jury to consider, as a factor bearing upon the reliability of the eyewitness testimony, the length of time which may have elapsed between the occurrence of the crime and the eyewitness's identification." *Id.*

⁵⁹ Under Rule 403, the district court has discretion to exclude evidence that is unfairly prejudicial where its effect is merely cumulative. FED. R. EVID. 403; see e.g., *United States v. Rose*, 104 F.3d 1408, 1414 (1st Cir. 1997).

⁶⁰ *SEC v. Peters*, 978 F.2d 1162, 1171 (10th Cir. 1992).

⁶¹ FED. R. EVID. 403.

⁶² *Daubert*, 509 U.S. at 595.

⁶³ See *People v. Sanders*, 905 P.2d 420, 434-35 (Cal. 1995) (excluding the expert testimony on the grounds of, *inter alia*, Rule 403 considerations under the *Kelly-Frye* test).

⁶⁴ See, e.g., *United States v. Kime*, 99 F.3d 870, 884 (8th Cir. 1996) (holding that there was a "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

concerns with trial courts' findings that the high probative value of the false identification expert's testimony, discussed above in Section II.A, is somehow outweighed by the danger of unfair prejudice to the government. First, in the criminal trial and because of the government's burden of proof, trial courts more regularly evaluate prejudice befallen on the accused under Rule 403. Second and more specific to the false identification discussion, reliable expert testimony that informs jurors that their collective instincts and assumptions with respect to certain of the government's evidence might be misplaced cannot prejudice *the government unfairly*. No party, especially the government in a criminal case, is unduly prejudiced when a trial court admits testimony or evidence from its adversary that refutes a fact of consequence, promotes the proper weighing of evidence and assists the jury with its key duty of judging witness credibility. Finally, as argued herein, the only true unfair prejudice within a trial court's purview when considering expert testimony about witness identification belongs to the *accused* and *that prejudice* must be redressed by appellate courts.

Also under Rule 403, some trial courts exclude false identification expert testimony on the grounds that it will confuse issues for the jury.⁶⁵ Evaluating the potential confusion that may rise to the level of exclusion amidst the more overarching confusion lay persons experience when they become jurors is no small task. Yet, when jurors instinctively believe one way and an expert witness purports to testify that their assumptions and beliefs are in error, this cannot constitute the kind of confusion that the rules of evidence were designed to prevent. Trial courts determining the admissibility of information that educates jurors and dispels their common misconceptions, to the extent governed by Rule 403, should err on the side of inclusion. When the expert testimony is admitted, not only does the jury better understand a fact of consequence, the eyewitness identification, but the expert testimony assists them with, as opposed to usurps from them, their most basic role of accessing witness credibility.

5. Foreshadowing Harmless Error, Trial Courts Weigh "Other Evidence of Guilt"

For some trial courts, the criminal defendant's *right* to offer expert testimony turns on the other evidence of guilt in the case.⁶⁶ These trial courts evaluate the government's evidence *in limine* (i.e. *before trial*) to consider the "importance" of the eyewitness identification that the defendant's false identification expert proposes to address.⁶⁷ If the government's eyewitness identification is, for

own"); *United States v. Curry*, 977 F.2d 1042, 1052 (7th Cir. 1992) (holding that an exclusion of the expert testimony was "a proper exercise of its discretion, whether under Rule 702 or Rule 403."); *cf. Buscaglia v. United States*, 25 F.3d 530, 532-33 (7th Cir. 1994) (finding that the trial court committed clear error by excluding expert testimony under Rule 403 in a bench trial).

⁶⁵ *See United States v. Rincon*, 28 F.3d 921, 925-26 (9th Cir. 1994) (holding that "given the powerful nature of expert testimony, coupled with its potential to mislead the jury, we cannot say 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").

⁶⁶ *See, e.g. United States v. Rodriguez-Berrios*, 445 F. Supp. 2d 190, 192-93 (D.P.R. 2006) (weighing other evidence of guilt when deciding admissibility at the trial court level). The reasoning is common on appeal and not unique to admissibility decisions concerning expert testimony or the eyewitness identification expert. *See, e.g., United States v. Alexander*, 816 F.2d 164 (5th Cir. 1987) (reversing as clearly erroneous the decision to exclude testimony on photographic comparison where entire case turned on photographic identification).

⁶⁷ *Rodriguez-Berrios*, 445 F. Supp. 2d at 192-93 ("having considered the importance to the government's case"); *see also Evans v. State*, 581 S.E.2d 676 (Ga. Ct. App. 2003).

instance, corroborated by multiple eyewitness identifications, physical evidence, a confession or, ironically, the government's expert testimony probative of identity such as a DNA or fingerprint expert, then the defendant may not be entitled to his reliable expert testimony about the eyewitness identification.⁶⁸ The timing of this judicial inquiry ignores that other identifications could suffer from the same issues that an expert witness would refute during his trial testimony. Further, as it relates to other evidence, a confession may later be excluded as unreliable⁶⁹ and the government's other identity evidence, such as fingerprints and handwriting, may be substantively refuted at trial as well.⁷⁰

This ground for excluding the defendant's proffered expert testimony strains logic and cannot possibly comport with an admissibility determination under the liberal standard of relevance. Someone unfamiliar with the American criminal justice system mistakenly may believe that a trial court might favor a criminal defendant *more* in trials where *greater evidence* of guilt has been offered against him. Not so in this context. Here, to the contrary, some trial courts exclude reliable expert witness testimony about witness identifications *because* of the strength of the government's *other evidence of guilt* to be adduced at trial.

The criminal defendant, extending the logic of these trial courts, only enjoys the right to offer reliable expert testimony from a qualified witness on the issue of eyewitness identification if it is the only, or most important, evidence of guilt.⁷¹ As the judicial reasoning follows, the criminal defendant shall not be permitted to offer expert testimony helpful to the jury unless it can be used to break the only (or best) strand of evidence supporting his guilt. Because trial courts treat expert testimony differently, a trial court's weighing other evidence of guilt in rendering an admissibility decision has not given pause to reviewing courts.⁷²

⁶⁸ See, e.g., *United States v. Carter*, No. 01 CR 783, 2003 WL 22682360 (N.D. Ill). "In this case, the facts do not create an unusual or compelling situation in which the aid of an expert witness is required. . . . However, identification testimony will not be the only evidence that the government offers . . . the government intends to introduce corroborating evidence which links Carter to the getaway car used in the robbery." *Id.* at 6.

⁶⁹ See Eugene R. Milhizer, *Confessions After Connelly: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 TEMP. L. REV. 1 (Spring 2008); Richard A. Leo, *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Tenty-First Century*, 2006 WIS. L. REV. 479.

⁷⁰ See *United States v. Crisp*, 324 F.3d 261 (4th Cir. 2003) (discussing the merits of defendant's challenges to the government's fingerprint and handwriting evidence and expert testimony).

⁷¹ It is improper for a trial court when determining admissibility of expert testimony to conduct an analysis similar to that of an appellate court's harmless error test. Compare *Carter*, 2003 WL 22682360 at *6 (N.D. Ill)(considering the strength of the government's other evidence *pretrial*) with *United States v. Smithers*, 212 F.3d 306, 317 (6th Cir. 2000)("[E]xpert testimony should be admitted ... when there is no other inculpatory evidence presented against the Defendant with the exception of a small number of eyewitness identifications."); *United States v. Moore*, 786 F.2d 1308, 1313 (5th Cir.1986) ("[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.").

⁷² See *infra* Section V.B. *Requiring a Better Record for Abuse*.

III. Admitting Expert Testimony from Law Enforcement Witnesses

The 2000 Amendments to the Rule 702 added “specialized knowledge” to the previous categories of “scientific and technical” knowledge. A witness’ qualifications to offer specialized knowledge may be based entirely on training and experience, without the need for education, research, and more traditional distinctions, associated with an expert. Accordingly, any witness may be capable of presenting specialized knowledge on a topic acquired through the training and experience of their profession, trade or hobby. A trial court typically dismisses a challenge to a witness’ qualification to testify as an expert, particularly when offering specialized knowledge, as an argument that goes to weight and not admissibility.

Law enforcement witnesses, based upon their experience investigating criminal cases and other skills, do develop specialized knowledge that could assist a jury in understanding issues in a criminal case. For instance, law enforcement witnesses may define, translate or provide context to other evidence or testimony in the case. Law enforcement witnesses testify about the meaning of testimony and evidence not familiar to the jury in the context of the crime alleged.⁷³ For instance, an ordinary person may attach little meaning to hundreds of small, plastic bags and several scales recovered from the defendant’s residence.⁷⁴ Under *Daubert*, a witness qualified based upon his experience and specialized knowledge about drug evidence is reliable and helpful to the jury.

Unfortunately, there are other, more problematic, varieties of expert testimony from law enforcement witnesses. Law enforcement witnesses far too often have a role in the criminal case and, thus, an obvious interest in its outcome. It is when the specialized knowledge of the law enforcement expert derives from that unique bias that the trial court must protect the criminal defendant from the so-called expert testimony. Some trial courts instead roll over. This explains why Professor Risinger feared that “criminal defendants would not be protected from . . . undependable expert testimony”⁷⁵ and why testimony from law enforcement witnesses “almost always allowed to testify” may be some of the best evidence of a “true systematic bias.”⁷⁶

⁷³ See *United States v. Lopez-Lopez*, 282 F.3d 1 (1st Cir. 2002)(upholding the trial court decision admitting expert testimony that drug importation operations use GPS to facilitate air drops and boat to boat transfers and use cell phones to enable boat to ground communication).

⁷⁴ See *United States v. Pina*, 138 Fed. Appx. 336 (1st Cir. 2005)(unpublished opinion)(admitting testimony from a police officer that scales, packages of cash and sandwich baggies are “consistent with [drug] distribution”). These witnesses also translate code words and other jargon familiar to participants and investigators only. The one area that appellate courts have limited law enforcement witnesses is when interpreting “ordinary words” or describing evidence in a criminal case that needs no accompanying explanation. See *United States v. Londono Tabarez*, 121 Fed. Appx. 882, No. 02-1558 (2d Cir. 2005) (unpublished opinion) (finding harmless error when the trial court permitted an agent called to translate meaning of “drug code” but also other language used in defendants’ taped conversations). In *Londono Tabarez*, the witness, among other things, testified about the meaning of ordinary expressions within average juror’s understanding, such as “bring it up here” and “pain in the neck” and the Second Circuit found harmless error. There is likely no specialized knowledge that can assist a jury in understanding some words and phrases or law enforcement is not in any better position to translate. They have the same meaning in the drug context as they do elsewhere in life, or they are not “code words” at all. See also *United States v. Cruz*, 363 F.3d 187, 196-97 (2d Cir. 2004)(reversing a conviction where the agent testified about the meaning of “watching somebody’s back” as used by defendant).

⁷⁵ *Navigating*, *supra* note 7, at 100.

⁷⁶ *Navigating*, *supra* note 7, at 132-35.

Most applicable here, the other varieties of expert testimony from law enforcement best exemplifies a trial court's disparate treatment of the government and the criminal defendant under the helpfulness prong. The reliability prong does not apply neatly to expert testimony from a witness offering "specialized knowledge" predominantly gained from experience. For this reason, some trial courts have found that *Daubert* does not apply to non-scientific witnesses such as law enforcement witnesses.⁷⁷ Other courts do not reference *Daubert* or other reliability factors in deciding admissibility of specialized knowledge experts.⁷⁸ All that lies between irrelevant, unhelpful and unfairly prejudicial "expert" testimony from a law enforcement witness and the jury's ears, may be the helpfulness prong. As distinguished from the many arrows reserved for false identification expert testimony discussed above, trial courts clear the path for law enforcement witnesses regardless of the nature of the testimony or the bias from which it is based.⁷⁹

Law enforcement witnesses present several other problems for the criminal defendant. Even before they are permitted to testify as experts, jurors place enhanced reliability and credibility in testimony offered by law enforcement witnesses.⁸⁰ Law enforcement experts also create complications involving inadequate disclosure, testimony in the form of legal conclusions and unfair surprise at trial.⁸¹ If there were a time to require more from a proponent of expert testimony, then a trial court should require more from the government presenting expert testimony from a law enforcement witness. But they do not.

1. Excludable testimony offered by law enforcement experts

The prosecution may present expert testimony from law enforcement officers in several common, yet impermissible, factual scenarios. Law enforcement officers serving as experts commonly testify about modus operandi or the criminal "profiling" of the defendant.⁸² Prosecutors

⁷⁷ See, e.g. *United States v. Plunk*, 153 F.3d 1011, 1017 (9th Cir. 1998) (holding that *Daubert* does not apply to non-scientific expert testimony from a law enforcement officer); *United States v. Griffith*, 118 F.3d 318, 320-22 (5th Cir. 1997) (same).

⁷⁸ See, e.g. *United States v. Santana*, 150 F.3d 860, 863 (8th Cir. 1998) (glossing over reliability and admitting expert testimony from a law enforcement witness); *United States v. Taylor*, 18 F.3d 55, 59 (2d Cir. 1994) (same).

⁷⁹ See D. Michael Risinger & Jeffrey L. Loop, *Three Card Monte, Monty Hall, Modus Operandi and 'Offender Profiling': Some Lessons of Modern Cognitive Science for the Law of Evidence*, 24 *CARDOZO L. REV.* 193 (2003).

⁸⁰ The standard jury instruction read, but not necessarily obeyed, reads as, "[t]he testimony of law enforcement officers must be weighed by the same standards you apply to every other witness. The testimony of law enforcement witnesses should not be given any greater or lesser weight merely because of their jobs." Defendant's Requested Preliminary Jury Instructions ¶ 20, Office of the Ohio Public Defender, available at http://www.opd.ohio.gov/RC_DP_MotionsManual/235950_RqstdPrelimJryInstrcts.doc (last visited Jan. 13, 2010).

⁸¹ *Navigating*, *supra* note 7, at 131-35 (using the terms "summerizational" or "educational" experts in discussing both law enforcement and false identification experts).

⁸² The Sixth Circuit has specifically held that law enforcement officers can give opinion testimony regarding a whether a defendant's conduct is indicative of intent, because law enforcement officers have specific knowledge beyond that of an average layman regarding the methods and techniques employed in an area of criminal activity. See *United States v. Combs*, 369 F.3d 925, 940 (6th Cir. 2004) (citing *United States v. Pearce*, 912 F.2d 159, 163 (6th Cir.1990)).

also improperly call law enforcement witnesses to summarize the investigation or the trial itself.⁸³ Some trial courts regularly permit law enforcement experts, therefore, to offer testimony that classifies the defendant, his actions or the evidence against him.

Trial courts have admitted, and reviewing courts upheld, testimony by a trained police officer explaining “that a defendant’s activities were consistent with a common criminal *modus operandi*.”⁸⁴ Criminal profiling, on the other hand, is an investigative tool used to develop leads and not a hard science or sufficiently reliable for expert testimony.⁸⁵ Unreliable and unhelpful criminal profiling can be difficult to distinguish from law enforcement expert testimony about *modos operandi*, particularly in gang⁸⁶ and drug offenses.⁸⁷ An appellate court affirming the trial courts decision to admit the expert testimony described that the *modus operandi* “evidence helps the jury to understand complex criminal activities and alerts it to the possibility that combinations of seemingly innocuous events may indicate criminal behavior.”⁸⁸ For example, law enforcement experts testify that the defendant has the characteristics of a child molester⁸⁹ or that the defendant’s operation in a fraud trial has all the “hallmarks of a ponzi scheme.”⁹⁰

⁸³ See generally *United States v. Grinage*, 390 F.3d 746, 750 (2d Cir. 2004) (explaining that jurors were not “helped” by opinion testimony that informed them “what was in the evidence” and “what inferences to draw from it”);

⁸⁴ Courts disfavor profiling as “substantive evidence of guilt.” *United States v. McDonald*, 933 F.2d 1519, 1521 (10th Cir. 1991). Yet, even in other contexts, courts have acknowledged the “fine line between potentially improper profile evidence and acceptable specialized testimony.” *United States v. Becker*, 230 F.3d 1224, 1231 (10th Cir. 2000); see also *United States v. Webb*, 115 F.3d 711, 713 (9th Cir. 1997); *United States v. Cross*, 928 F.2d 1030, 1050 (11th Cir. 1991).

⁸⁵ See James Aaron George, *Offender Profiling and Expert Testimony: Scientifically Valid or Glorified results*, 61 VAND. L. REV. 221 (2008) (arguing against the admissibility of expert testimony concerning true criminal profiling).

⁸⁶ Gang cases demonstrate the problem. See generally *United States v. Feliciano*, 223 F.3d 102 (2d Cir. 2000) (upholding the trial court’s decision to permit a government expert to explain, at the defendant’s RICO trial, the defendant’s gang was involved in narcotics trafficking, a “racketeering activity”); see also *People v. Martinez*, 113 Cal. Rptr. 3d 49, 58 (2003) (permitting expert testimony that a gang ordinarily will exact revenge upon a gang member who reveals gang confidences – as the defendant did here); *People v. Killebrew*, 126 Cal. Rptr. 2d 876 (2002) (holding as improper testimony from an expert on criminal street gangs, that when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun for their protection).

⁸⁷ Trial courts also permit improper profiling evidence in drug cases. See, e.g., *United States v. Parra*, 402 F.3d 752 (7th Cir. 2005) (upholding expert testimony about the defendant’s *modos operandi*); *United States v. Correa*, 402 F.3d 752 (7th Cir. 2005) (upholding the admission of expert testimony on drug trafficking and “counter-surveillance techniques”); *United States v. Gwynn*, No. 03-4293 (4th Cir. 2003) (unpublished); but see *United States v. Barrera Medina*, No. 03-10455 (9th Cir. 2005) (unpublished) (finding harmless error when the trial court admitted testimony by law enforcement officer on use of weapons and counter surveillance by drug traffickers); *People v. Duvarado*, 2004 WL 2458585 at *16 (Cal. Ct. App.). Some prosecutors push the boundaries of *modus operandi* opinions including in cases when such opinion do not relate to the charges. See, e.g., *United States v. Pineda Torres*, 287 F.3d 860 (9th Cir. 2002) (reversing the trial court’s decision to admit testimony from customs agent about the *modus operandi* of drug trafficking organizations in a possession with intent to distribute case and when conspiracy is not charged).

⁸⁸ See *Webb*, 115 F.3d at 714.

⁸⁹ See, e.g., *United States v. Forrest*, 429 F.3d 73 (4th Cir. 2005) (upholding the trial court decision to allow a law enforcement expert’s testimony in a child exploitation trial that the defendant meets the general profile of a child molester including that they are often authority figures like police officers, they often have their victims spend the night, they take photos of their victim and they are often apprehended only after someone else finds pictures).

⁹⁰ See, e.g., *United States v. Long*, 300 Fed. Appx. 804 (11th Cir. 2008) (upholding the admission of expert testimony that defendant’s operation of payday loan company bore “the hallmarks of a Ponzi scheme”).

As clear as it may seem that this type of testimony from a law enforcement expert is not helpful, potentially invasive of the jury's role of deciding guilt, extremely prejudicial and highly likely to cause confusion of issues for the jury, trial courts simply are not weighing helpfulness the same way. Trial courts rarely discuss the same concepts or use the same language featured in the false identification expert discussion above. Expert testimony offered *against* the criminal defendant should encounter similar judicial scrutiny and protection from undue prejudice and confusion. Trial courts must not sleep at the gates particularly when considering testimony from law enforcement experts already given a pass through the reliability prong.

2. Helpfulness abandoned

Testimony from law enforcement may be based on specialized knowledge, it may be presented through a professional with expert qualifications, it may be based upon extensive experience and training and it may derive from reliable methods. However, to ask the questions posed to the defendant's expert, how can testimony that unfairly characterizes the defendant into a "guilty" association help the jury?⁹¹ When trial courts permit a law enforcement expert to classify the defendant as part of a group or as having engaged in associative activity, it increases the likelihood of conviction through his association with that group or activity. How can this testimony *not* invade the jury's province of deciding guilt? How can it *not* unfairly prejudice the defendant against whom it is offered?

The federal rules of evidence specifically provide for exceptions and provisions to be applied in the criminal context or, more specifically to the criminal defendant or the government. Nowhere do the federal rules reference a different relevance standard under Rules 401 and 402 for the government. Nor do the rules reference a different helpfulness prong under Rule 702 for the government. While trial courts can and do render inconsistent evidentiary determinations, particularly in different jurisdictions, here, the determinations more systematically favor the government and prejudice the accused.

To contrast expert witnesses on eyewitness identification, sometimes excluded under helpfulness, provide juries with scientific knowledge based upon years of advances in research and objectively reliable methods that refutes the jury's common assumption on the topic. Profiling testimony by the "law enforcement expert," commonly admitted under helpfulness, is based exclusively on the witness' experience, bias and interest in the case. It does not follow that information about the fallibility of eyewitness identifications is *less helpful* to the trier of fact than profiling testimony calling the defendant a "drug dealer" or opining that his operation had all the hallmarks of a Ponzi scheme. Worse yet, the irreconcilable determinations follow suit on appeal.

⁹¹ See *supra* Section III.C.1 (discussing that expert testimony about witness identifications is excluded as not "beyond the ken of the ordinary juror"); cf. *United States v. Tapia-Ortiz*, 23 F.3d 738, 741 (2d Cir. 1994) (affirming the admissibility of a law enforcement witness's expert testimony regarding, inter alia, "the technique of using codes with beepers to signal the identity of the caller, and the use of cash and nicknames or false names by drug traffickers"). Thus, jurors do not sufficiently understand that drug dealers use false names, but they do understand on their own the counter-intuitive assumptions, misconceptions and fallibility of eyewitness identifications.

IV. Admissibility Decisions on Expert Testimony Escape, and Will Continue to Escape, Meaningful Review

Trial courts' disparate evidentiary determinations governing reliable expert testimony remain insulated from meaningful review and public perception. The highly deferential "abuse of discretion" standard of review and the grand safety net of harmless error serve to protect decisions on expert testimony based upon who was asking. A principal purpose of appellate review is to provide guidance in future cases by resolving legal questions of importance beyond their role in the specific case. The appellate decisions in the areas discussed above provide, and will continue to provide, little to no assistance to the criminal defendant proposing expert testimony in his case. As discussed in Part V, the reviewing courts should conduct *de novo* review in certain, limited circumstances and, for his contribution, the criminal defendant can compose a trial record that allows reviewing courts to understand the issues discussed in this article.

A. Abuse of Discretion Standard

The standard for appellate review for almost all decisions regarding expert testimony is abuse of discretion. Abuse of discretion governs trial court decisions about the qualifications of the expert, the reliability of the expert's methods and its helpfulness.⁹² The abuse of discretion standard is the most deferential to a trial court's rulings.⁹³ This standard is so deferential that the appellate court must uphold the trial court's decision if it was correct under any theory of law applicable to the case, "even if the trial court gave an incorrect reason for its decision."⁹⁴ Even if the trial court does not specifically state the reasons for its decision, the appellate court "must assume the trial court had a correct reason in mind, as long as any reasoning supports the trial court's decision." The standard of review itself explains how the unfair admissibility determination survives so often on appeal.

A look at the lower court decisions rooted in helpfulness reveals that, like other relevance decisions, they are not often disturbed on appeal.⁹⁵ The inequity carries forward through the appeal: that is, decisions to admit the government's expert testimony are not disturbed as an abuse of discretion and reviewing courts affirm decisions to exclude the defendant's expert testimony as *not* an abuse of discretion.⁹⁶ The prejudice to the defendant discussed in this article may persist *because* these decisions by trial courts are left to their discretion.

⁹² Court reviews for abuse of discretion the admission and exclusion of expert opinion testimony, whether based on: (1) the qualifications of the expert; (2) the proponent's failure to demonstrate reliability under Fed. R. Evid. 702, *Daubert* and other reliability tests used in some states; or (3) admissibility, fit or relevance, including "prejudice, confusion, or waste of time" under Fed. R. Evid. 403. *United States v. Adams*, 271 F.3d 1236, 1243 (10th Cir. 2001).

⁹³ *See United States v. Morales*, 108 F.3d 1031, 1035 (9th Cir. 1997) (en banc).

⁹⁴ *Jones v. State*, 982 S.W.2d 386, 389 (Tex. Ct. Crim. App. 1998).

⁹⁵ *See infra* Section VI.B (discussing the criminal defendant's role in providing a clearer record of abuse); *cf. Campbell v. People*, 814 P.2d 1 (Colo. 1991) (reversing the state trial court who failed to admit the defendant's expert testimony concerning witness identification).

⁹⁶ *Navigating, supra* note 7, at 104-10 (surveying both district court and circuit court cases and concluding similarly poor results for the criminal defendant).

B. The Harmless Error Veil

Harmless error presents an additional, and often more substantial, hurdle for the criminal defendant looking beyond the trial court for relief.⁹⁷ “Any error, defect, irregularity or variance which does not affect substantial rights” shall be disregarded as harmless.⁹⁸ In practice, the harmless error analysis denigrates a finding of error to a mere procedural footnote, wherein no relief is afforded to the accused in the instant case or, for that matter, to a similarly situated defendant before the same trial court.⁹⁹ The bidirectional nature of harmless error equates to the criminal defendant likely to be run over in both directions. So infrequently do reviewing courts find error with respect to expert testimony that then calling it harmless muffles any noise of judicial protectionism or the subjective value judgments about the defendant and his case.¹⁰⁰

The best plea against the current rate of harmless error findings in the area of expert witness testimony is that *this* error should not so readily be deemed harmless to the defendant. As discussed above, trial courts treat expert testimony and admissibility decisions about expert testimony differently. Appellate courts should consider the weight of such testimony in its harmless error analysis. Whether he was not permitted his own expert or forced to endure the presentation of an impermissible government witness, the error concerns a critical aspect of the trial and a witness who likely was afforded, or could have been afforded, great attention and weight by the jury. Whether robbed of his opportunity to present expert testimony or convicted by an impermissible government expert’s testimony, there should be more findings than currently reflected in published decisions that the trial courts’ admissibility decision affected the criminal defendant’s “substantial rights.”

V. The Cry for De Novo Review in Limited Circumstances and, in the Alternative, Uncovering Abuse in Trial Courts’ Discretion

Appellate courts are capable of remedying the larger problem of incongruous admissibility determinations and the injustice for criminal defendants. Reviewing courts only access abuse within the trial record in a specific case, as opposed to a disparate impact analysis including other trial court decisions admitting government experts.¹⁰¹ This article presents two options. First, in the limited circumstances, the criminal defendant should be entitled to the less deferential standard of *de novo*

⁹⁷ An appellate court may “hesitate to step in” because even if it were error to exclude the expert’s testimony, such error was “harmless” to the defendant. *See Hamling v. United States*, 418 U.S. 87, 135 (1974). A reviewing court will likely not be able to conclude that “it is more probable than not the [exclusion] affected the verdict.” *United States v. Rasheed*, 663 F.2d 843 (9th Cir. 1982).

⁹⁸ Fed. R. Crim. P. 52(a); *see e.g.* *United States v. Wacker*, 72 F.3d 1453, 1473 (10th Cir. 1995) (concluding that an error is deemed harmless “unless it had a substantial influence on the outcome or leaves one in grave doubt as to whether it had such effect”) (internal quotation marks and citation omitted).

⁹⁹ *See generally* *State v. Garcia*, 2002 WL 1874535 at *17 (Ohio Ct. App.) (finding the trial court’s error in admitting a law enforcement witness, who concluded for the jury in an arson case that the fire was result of an arson, was harmless).

¹⁰⁰ Appellate courts review the exclusion of the defendant’s expert not based upon whether the exclusion affected the defendant’s case, but whether it affected his guilty verdict. *See Hall*, 165 F.3d at 1107-08 (discussing other “corroborating evidence” implicating the defendant as the perpetrator); *Kime*, 99 F.3d at 885 (same).

¹⁰¹ *See infra* Section VI.B (advocating that the criminal defendant supplement the record with respect to the helpfulness prong with information from other cases *decided by the same trial court*).

review. Second, when confronted with the more bleak abuse of discretion standard, the criminal defendant should do more at the trial court level in assembling a trial record reflective of the inequities profiled in this article and borrowed from other courts' findings.

A. De Novo Review in Limited Circumstances

A *de novo* standard of review allows the appellate court to revisit the trial court's decision independently on the entire trial record related to the proposed expert testimony. The reviewing court conducts an independent analysis, forms its own conclusions and compares its findings with the trial courts findings in determining error.¹⁰² Reviewing courts should engage in *de novo* review in two limited circumstances.

The first instance, provided for in the law, requires the reviewing court to expand or actually utilize a threshold inquiry under *Daubert*. That is, a reviewing court first undertakes a *de novo* review of whether the trial court "followed the standard set forth in *Daubert*."¹⁰³ The second limited circumstance for the heightened review, not currently provided for but proposed here, is warranted in circumstances where the criminal defendant can demonstrate that the trial court applied different admissibility standards related to expert testimony for the government and the defendant. This heightened standard of review should be available when the accused can make such a showing on the trial record, when the disparate standards and findings occurred in the same case or in other cases decided by the same trial court.

1. The *de novo* review already in place

Seldom cited, the *de novo* standard of review already has a place in the appellate analysis of expert witness testimony. When a party challenges the acceptance or rejection of expert scientific testimony on appeal, reviewing courts is supposed to first undertake a *de novo* review of whether the district court properly followed the framework set forth in *Daubert*.¹⁰⁴ Not a lot of meaning, however, has been attributed to "following the framework" language or to the analysis on appeal. Most appellate courts find that the trial court cited the Court's case in *Daubert* enough to satisfy the issue.

As the proponent of excluded expert testimony, the criminal defendant is entitled to judicial findings addressing both the reliability and helpfulness prong. This is fundamental to "following the framework" in *Daubert*. Many trial courts, however, like proponents themselves, conflate the issues of reliability and admissibility. Some appellate courts, although failing to cite *de novo* review, have exercised their independent judgment and remanded to the trial court to make findings in concert

¹⁰² In *de novo* review, the appellate court must review the record in light of its own independent judgment without giving special weight to the prior decision.

¹⁰³ See *United States v. Hall*, 165 F.3d 1095, 1101 (7th Cir. 1999).

¹⁰⁴ See *id.*

with the two-prong test set forth in *Daubert*.¹⁰⁵ One note of progress in the last ten years is that trial courts more often recognize the need to conduct hearings and articulate findings concerning expert witness testimony and under *Daubert*.

2. *De novo* review in other limited circumstances

The proposal for heightened review in certain other circumstances is also required. Because the trial court likely treated the expert witness testimony differently and afforded it more weight in the admissibility determination, appellate courts should not permit trial courts to decide an evidentiary issue related to it one way for the government and another for the criminal defendant. If, within the trial record, there is sufficient evidence that the trial court has applied different standards for the government and the criminal defendant under *Daubert* and Rule 702, then the reviewing court should be able to review the defendant's claim *de novo*.

Critics will argue that appellate courts cannot review every admissibility determination related to expert testimony *de novo*. The limited circumstances of the proposal include when *the same trial court* allowed in the government's expert testimony and excluded the defendant's using inconsistent reasoning. The appellate courts will not be bogged down with revisiting all admissibility decisions about experts. Only when a trial record contains competent evidence that *the same trial court* may have applied the *Daubert* standard disparately will the standard of review shift. In these limited instances, the reviewing court should review and compare the entire *Daubert* inquiry independently.

As discussed below, a more full trial record also should permit citations, transcripts and written findings of the instant trial court's analysis of government expert testimony *in other cases*. Trial courts conducting analysis under *Daubert* and Rule 702 regularly draw upon guidance of other trial courts' consideration of similar issues. Typically in the reliability prong, trial courts will adopt the reasoning and *even the factual findings* with respect to a *Daubert* factor as used in a case passing on the specific expert or type of expert testimony at issue. A criminal defendant would also be well served by incorporating prior helpfulness determinations by the same trial court for review on appeal.

B. Requiring a Better Record for Abuse

The abuse of discretion standard has never been especially friendly to defendants in terms of relief. Evidentiary determinations about expert witness testimony are no exception. Professor Risinger, in his article, laid some blame with the criminal defense bar. Today, with more than 16 years of post-*Daubert* cases, some trial courts seem to be more to blame. Defendants, however, should demand from the trial courts findings that comport with the *Daubert* and Rule 702 analysis and compose a more thorough trial record that incorporates other determinations by the same trial court in other cases.

¹⁰⁵ *United States v. Amador-Galvan*, 9 F.3d 1414, 1417-18 (9th Cir. 1993) (declining to decide issue related to *Daubert* until the trial court made findings on reliability *and* admissibility).

The Third Circuit's decision in *United States v. Mathis*¹⁰⁶ is instructive. The *Mathis* Court remanded requiring the trial court to support its findings, including its treatment of the helpfulness prong, with substance, not conclusions.

We find it difficult to accord the customary degree of deference to the District Court's discretion in this case because the District Court explained its ruling with little more than a series of conclusions:

[T]his testimony has the probability of confusing and misleading the jury. . . . [T]here is a probability that there will be unfair prejudice here. The aura of reliability that's attached to an expert witness, I believe, is significant. Listening to this expert, it seems to me, that the testimony itself has the potential, if not controlling probability of confusing the jury. . . . [Sergeant Gubbei's] testimony is, I think, clear. Whether the jury accepts it or not, how the jury accepts it is clearly within their province. I do not see how this evidence will do anything, other than to confuse and mislead the jury.¹⁰⁷

Trial courts tend to address the *Daubert* framework and the helpfulness prong like the lower court in *Mathis* if not urged by the proponent of the expert testimony, the government in *Mathis*.

The criminal defendant, through his presentation in support of the expert testimony, can prompt an appellate court to demand more. A proponent's presentation should mirror the two prongs of the test: reliability and helpfulness. A trial court rendering *Daubert* determinations is accustomed to litigants who reference, borrow and adopt repeatedly from outside the immediate case before the court. The reliability prong, for example, may be met with research, empirical data, commissioned studies and countless findings *by other trial courts*. Trial court decisions similarly incorporate the work of litigants in other cases. There is no reason that the criminal defendant cannot similarly draw upon other trial court determinations in support of his helpfulness arguments. As advocated here, criminal defendants should reference, borrow and adopt from expert witness determinations made *by the same trial court in other cases*. The criminal defendant may benefit from including language and standards used by the same trial court in other cases *considering the admissibility of government experts*, particularly law enforcement witnesses.

With a more developed record, a criminal defendant will be in a better position to demonstrate the way a single trial court exercises its discretion in the important area of expert witness testimony. Hopefully, this wider view of the trial court's inquiry may provide an easier path to an abuse of discretion finding when appropriate. It may be that, as a collateral benefit, the trial courts exercising judicial protectionism and injecting their subjective value judgments into their

¹⁰⁶ 264 F.3d 321 (3d. Cir. 2001).

¹⁰⁷ *Id.* at 338.

determinations change course when confronted with this type of trial record. If left unchanged, then government's experts, especially those offering mere specialized knowledge, will continue to parade into court to testify, while expert witnesses proposed by the criminal defendant, including those professionals presenting reliable and necessary information to the jury, will remain on the outside looking in. The appellate courts can, and should, cure this injustice for the accused in the critical area of expert witness testimony. For now, the problem is repeating, yet evading review.