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# REVISITING EXPERT TESTIMONY ON THE RELIABILITY OF EYEWITNESS IDENTIFICATION:

## A CALL FOR A DETERMINATION OF WHETHER IT OFFERS COMMON KNOWLEDGE

*Jeremy C. Bucci*<sup>1</sup>

The vast majority of cases dealing with expert testimony on the reliability of eyewitness identification have excluded such testimony largely because it does not offer assistance to the trier of fact in acquiring relevant knowledge that is outside the scope of common knowledge.<sup>2</sup> This

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<sup>1</sup> Jeremy C. Bucci is an Assistant District Attorney of the Suffolk County District Attorney's Office. This article represents the opinion and legal conclusions of its author and not necessarily those of the Suffolk County District Attorney's Office. Thanks to John P. Zanini, Joseph Ditkoff, and Amanda Lovell for their contributions to this piece.

<sup>2</sup> *United States v. Smith*, 122 F.3d 1355, 1359 (11th Cir. 1997) (holding *inter alia* expert testimony on reliability of eyewitness identification would not assist jury); *United States v. Daniels*, 64 F.3d 311, 315 (7th Cir. 1995) (upholding denial of funds for expert eyewitness testimony because evidence does not aid jury) (citing *United States v. Larkin*, 978 F.2d 964, 971 (7th Cir. 1992) (holding potential hazards of eyewitness identification generally understood by juries); *United States v. Hudson*, 884 F.2d 1016, 1024 (7th Cir. 1989) (holding difficulties of eyewitness identification understood by juries)); *United States v. Harris*, 995 F.2d 532, 534 (4th Cir. 1993) (upholding exclusion of expert eyewitness testimony as within common knowledge of jurors); *United States v. Serna*, 799 F.2d 842, 850 (2d Cir. 1986) (holding expert testimony on eyewitness identification properly excluded where testimony coincided with common sense); *United States v. Thevis*, 665 F.2d 616, 641 (5th Cir. Unit B 1982) (holding jury can employ common-sense evaluation of reliability of eyewitness testimony without an expert); *United States v. Fosher*, 590 F.2d 381, 383-84 (1st Cir. 1979) (stating expert testimony on eyewitness identification would not assist jury); *United States v. Brown*, 540 F.2d 1048, 1053-54 (10th Cir. 1976) (upholding trial court's exclusion of expert testimony on reliability of eyewitness identification); *United States v. Brown*, 501 F.2d 146, 150-51 (9th Cir. 1974) (upholding trial court's exclusion of expert testimony on reliability of eyewitness identification), *rev'd on other grounds sub nom.* *United States v. Nobles*, 422 U.S. 225 (1975); *United States v. Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973) (upholding trial court's exclusion of expert testimony on reliability of eyewitness identification); *United States v. Collins*, 395 F. Supp. 629, 637 (M.D. Pa.), *aff'd*, 523 F.2d 1051 (3rd Cir. 1975) (stating proffered testimony would not materially assist jury); *Criglow v. State*, 36 S.W.2d 400, 401 (Ark. 1931) (ruling exclusion of expert testimony proper where jury capable of forming conclusion from evidence); *People v. Lawson*, 551 P.2d 206, 209 (Cal. 1976) (holding expert testimony within scope of jury's common knowledge); *State v. Kemp*, 507 A.2d 1387 (Conn. 1986) (holding expert testimony within ken of jury); *Dyas v. United States*, 376 A.2d 827, 832 (D.C. 1976)

article argues that trial courts should be proscribed from admitting expert testimony on a subject matter that has previously been adjudicated a matter of common knowledge.<sup>3</sup>

In Massachusetts, trial judges continue to have discretion to admit or exclude expert testimony on the reliability of eyewitness identifications.<sup>4</sup> Other jurisdictions exclude expert testimony on the reliability of eyewitness identifications per se.<sup>5</sup> There are also a few

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(holding expert testimony would not assist jury); *Nelson v. State*, 362 So.2d 1017, 1021 (Fla. 1978) (holding factors impacting reliability of eyewitness identification matter of common knowledge); *State v. Hoisington*, 657 P.2d 17, 29 (Idaho 1983) (same); *People v. Enis*, 564 N.E.2d 1155 (Ill. 1990) (ruling no abuse of discretion in excluding eyewitness expert testimony); *State v. Gaines*, 926 P.2d 641, 649 (Kan. 1996) (stating expert testimony on reliability of eyewitness identification not admissible); *State v. Warren*, 635 P.2d 1236, 1241-42 (Kan. 1981) (excluding expert testimony because subject within ken of ordinary jury); *State v. Stucke*, 419 So. 2d 939, 945 (La. 1982) (holding proffered expert testimony would not assist jury); *State v. Rich*, 549 A.2d 742, 743 (Me. 1988) (excluding expert testimony because testimony not beyond common knowledge of ordinary juror); *State v. Fernald*, 397 A.2d 194, 197 (Me. 1979) (excluding expert because jury capable of making intelligent assessment of reliability); *Commonwealth v. Kent K.*, 427 Mass. 754, 762 (1998) (determining proffered expert eyewitness testimony concerned elementary topic); *Commonwealth v. Ashley*, 427 Mass. 620, 624 (1998) (holding expert's opinions concerned matters average juror familiar with); *Commonwealth v. Santoli*, 424 Mass. 837, 841 (1997) (ruling expert eyewitness testimony within general realm of jurors' knowledge); *Commonwealth v. Walker*, 421 Mass. 90, 96 (1995) (concluding cross-racial identifications was not a topic that required expert testimony); *Commonwealth v. Francis*, 390 Mass. 89, 101 (1983) (holding juries generally understand and able to apply variables effecting eyewitnesses to concrete circumstances); *Commonwealth v. Middleton*, 6 Mass. App. Ct. 902 (1978) (holding trial judge properly excluded expert eyewitness testimony because not outside common knowledge) (rescript); *State v. Miles*, 585 N.W.2d 368, 371 (1998) (excluding expert testimony because jury knowledgeable of factors effecting eyewitness identification); *State v. Helterbride*, 301 N.W.2d 545, 547 (Minn. 1980) (stating expert testimony must assist jury); *People v. Kelley*, 631 N.Y.S.2d 926, 927 (N.Y. App. Div. 1995) (holding subject of reliability of eyewitness identification does not pertain to matters outside common knowledge); *Commonwealth v. Simmons*, 662 A.2d 621 (Pa. 1995) (holding ordinary jurors can assess credibility of eyewitnesses without expert testimony); *State v. Martinez*, 774 A.2d 15, 19 (R.I. 2001) (upholding denial of funds for eyewitness expert because would not assist jury); *State v. Porraro*, 404 A.2d 465, 471 (R.I. 1979) (holding no abuse of discretion excluding expert testimony as subject not beyond ken of jury); *State v. Onorato*, 453 A.2d 393, 395-96 (Vt. 1982) (holding expert testimony not admissible where circumstances surrounding identification were within common experience of jurors); *State v. Blair*, 473 N.W.2d 566, 571 (Wis. 1991) (affirming trial court's decision to exclude expert testimony because not outside common knowledge of jurors).

<sup>3</sup> *But see Canavan's Case*, 432 Mass. 304, 311 (2000) (discussing shortcomings of de novo review of scientific testimony).

<sup>4</sup> *Santoli*, 424 Mass. at 838 (holding admissibility of expert testimony on eyewitnesses within trial judge's discretion not matter of right); *Francis*, 390 Mass. at 98-101 (holding expert testimony on eyewitnesses discretionary); *Commonwealth v. Hyatt*, 419 Mass. 815, 818 (1995) (holding admissibility of expert testimony on eyewitnesses within trial judge's discretion); *Walker*, 421 Mass. at 96 (holding expert testimony on eyewitnesses not matter of right but discretion of trial judge).

<sup>5</sup> *See, e.g., United States v. Holloway*, 971 F.2d 675 (11th Cir. 1992) (holding expert

jurisdictions where appellate courts have ruled that trial courts abused their discretion by excluding such testimony.<sup>6</sup> In Massachusetts, this discretionary power persists despite court rulings that this evidence is within the scope of common knowledge of the average person.<sup>7</sup>

## I. COMMON KNOWLEDGE IN COURT

There is a wide variety of information that Massachusetts courts have termed “common knowledge.”<sup>8</sup> For the purposes of this paper, common knowledge is defined as the collective body of information that can, at any given time, be expected of any competent juror.<sup>9</sup>

As would be expected, some of the information that is now considered common knowledge would not have been considered common

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testimony on eyewitness identification per se inadmissible).

<sup>6</sup> See *State v. Chapple*, 660 P.2d 1208, 1220-24 (Ariz. 1983) (holding trial court erred in excluding expert eyewitness evidence where testimony would have benefited jury); *People v. McDonald*, 690 P.2d 709, 711 (Cal. 1984) (holding on proper showing expert eyewitness testimony admissible). See also *United States v. Hines*, No. 97-CR-10336-NG (D. Mass. June 10, 1999) (allowing expert testimony on eyewitness identification). In *Hines* a United States District Court judge in Massachusetts allowed expert testimony on the reliability of eyewitness identification over the objection of the government, stating that, “[c]ommon sense inferences [about the reliability of eyewitness testimony] may well be way off the mark.” *Id.*

<sup>7</sup> *Kent*, 427 Mass. at 762 (reiterating judge’s discretion to exclude expert testimony on reliability of eyewitness identification); *Ashley*, 427 Mass. at 624 (finding no abuse of discretion where judge excluded expert testimony); *Santoli*, 424 Mass. at 844 (holding judge acted within discretion where expert testimony excluded); *Walker*, 421 Mass. at 96 (finding no abuse of discretion where judge excluded expert testimony on eyewitness identification); *Francis*, 390 Mass. at 101 (holding judge could properly exclude expert testimony on eyewitness identification); *Middleton*, 6 Mass. App. Ct. at 902 (discerning no abuse of discretion where judge excluded expert eyewitness testimony).

<sup>8</sup> See *Commonwealth v. Milo M.*, 433 Mass. 149, 156-57 (2001) (holding highly publicized school shootings matter of common knowledge); *Town of Plymouth v. Civil Service Comm’n*, 426 Mass. 1, 5 (1997) (holding tobacco smoking identified as contributing risk factor for hypertension and heart disease common knowledge); *Commonwealth v. Stowell*, 389 Mass. 171, 175 (1983) (taking judicial notice that adultery generally destructive to marital relationship); *Commonwealth v. Kingsbury*, 378 Mass. 751, 754 (1979) (allowing jurors to use general knowledge to infer whether crime occurred after dark); *Commonwealth v. Fitzgerald*, 376 Mass. 402 (1978) (recognizing atmosphere of fear exists in particular housing projects); *Commonwealth v. McColl*, 375 Mass. 316 (1978) (allowing jury to use common knowledge that not all criminals insane); *Commonwealth v. 707 Main Corp.*, 371 Mass. 374, 384 (1976) (holding views of average people appropriate norm for deciding whether matter “appeals to prurient interest”).

<sup>9</sup> BLACK’S LAW DICTIONARY 275, 276 (6th ed. 1998). Common knowledge has been defined as: (1) “Information widely shared by substantial number of people,” (2) “It is knowledge that every intelligent person has, and includes matters of learning, experience, history, and facts of which judicial notice may be taken.” *Id. Kingsbury*, 378 Mass. at 754-55. “[T]he right of a court to take judicial notice of subjects of common knowledge is substantially the same as the right of jurors to rely on their common knowledge.” *Id.*

knowledge in generations past.<sup>10</sup> There is also knowledge that was once a matter of common knowledge but can no longer fairly be considered as such.<sup>11</sup> Indeed, Massachusetts courts have recognized the fluid nature of common knowledge.<sup>12</sup>

In both federal and state courts, expert testimony is admissible only when it is both relevant to the facts at issue in the case and offers information beyond the scope of common knowledge.<sup>13</sup> The United States

<sup>10</sup> See *Plymouth v. Civil Service Comm'n*, 426 Mass. at 5 (holding tobacco smoking identified as contributing risk factor for hypertension and heart disease common knowledge). One of the best examples of scientific information becoming common knowledge is our current understanding of the effects of tobacco and its direct correlation with various cancers and increased risks of heart disease and hypertension. *Id.*

<sup>11</sup> *Victor v. Nebraska*, 511 U.S. 1, 13-14 (1994) "Moral certainty" standing alone might no longer be recognized by jurors to mean proof beyond a reasonable doubt: "[w]ords and phrases can change meaning over time . . . ." *Id.*

<sup>12</sup> See, e.g., *Francis*, 390 Mass. at 99.

The line between common experience and knowledge and matters known only to experts varies with time and circumstances. At any one time, the transition from one type of knowledge to the other is often gradual and cannot be defined precisely. Indeed, there are matters generally within the common experience of lay people that have specialized aspects known only to experts.

*Id.* See also LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE (Seventh Ed.), § 2.8.2 at 35.

It should be noted that questions involving scientific or technological facts are constantly moving from the realm of the unknown or debatable to the realm of the accepted and established, but in some instances the reverse occurs. What facts of generalized knowledge are judicially noticeable thus depends on the state of knowledge more than it does on questions of stare decisis or precedent.

*Id.*

<sup>13</sup> See generally *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (holding *Daubert's* requirements apply to all expert testimony); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 593 (1993) (holding expert testimony must assist trier of fact); *Amaral*, 488 F.2d at 1152 (admitting expert testimony depends on whether jury will receive "appreciable help" from testimony) (citing 7 WIGMORE, EVIDENCE § 1923 (3d ed. 1940)); *Canavan's Case*, 432 Mass. at 316 (holding *Lanigan's* requirements apply to all experts and medical causation outside knowledge of ordinary layman); *Commonwealth v. Lanigan*, 419 Mass. 15, 25 (1994) (holding evidence must assist trier of fact). See also Jason G. Duncan, *A Pig's Breakfast: Judicial Gatekeeping for Scientific and Specialized Expert Testimony*, 6 SUFFOLK J. TRIAL & APP. ADVOC. 21 (2001) (offering broad overview of standard used in admitting expert testimony). Incidentally, the Supreme Judicial Court has called into question the reliability of the methods used by "experts" in the field of eyewitness analysis, suggesting that these techniques may be in the same company as hypnotically enhanced testimony and polygraph evidence. *Francis*, 390 Mass. at 101. "We have been particularly concerned that juries not be distracted in their fact-finding function by extraneous information having an aura of scientific credibility." *Id.*, citing *Commonwealth v. Kater*, 388 Mass. 519 (1983) (rejecting hypnotically enhanced "memory" evidence); *Commonwealth v. Vitello*, 376 Mass. 426 (1978) (rejecting polygraph evidence). See also *People v. Johnson*, 23 Cal. Rptr. 2d 703, 711 (Cal. Ct.

Supreme Court has held that expert testimony is excludable where: 1) all the primary facts can be accurately and intelligibly described to the jury and 2) the jury is as capable of comprehending the facts and drawing correct conclusions as the witnesses who possess special training, experience, or observation of the topic under investigation.<sup>14</sup> Likewise, in Massachusetts, expert testimony is subject to exclusion where the topic is within the common knowledge or common experience of the jury.<sup>15</sup>

## II. INTRODUCING CONSISTENCY INTO EXPERT TESTIMONY FOR FAIRNESS SAKE

Introducing a principle of consistency would demand that if the Supreme Judicial Court has determined that something is a matter of common knowledge, parties in all future cases involving the same issues would be precluded from offering expert testimony to prove those same.<sup>16</sup> Absent reviewing the collective common knowledge of every jury, courts should make a determination about whether the factors influencing the reliability of eyewitness identifications are a matter of common knowledge for the average juror.<sup>17</sup> Additionally, a separate determination should be

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App.1993) (holding trial judge properly exercised discretion excluding expert testimony). In a decision upholding the exclusion of other expert evidence, the California Court of Appeals criticized expert evidence on the reliability of eyewitness identifications:

The expert witness is the only kind of witness who is permitted to reflect, opine, and pontificate, in language as conclusory as he may wish....Once we recognize the expert witness for what he is, an unusually privileged interloper, it becomes apparent why we must limit just how far the interloping may go. A witness cut loose from time-tested rules of evidence to engage in purely personal, idiosyncratic speculation offends legal tradition quite as much as the tradition of science. Unleashing such an expert in court is not just unfair, it is inimical to the pursuit of truth. The expert whose testimony is not firmly anchored in some broader body of objective learning is just another lawyer, masquerading as a pundit.

*Id.*, quoting Peter Huber, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM* (2d ed. 1993) at 204.

<sup>14</sup> *Salem v. United States*, 370 U.S. 31, 35 (1962) (holding expert testimony excludable where jury capable of drawing correct conclusions) (quoting, *United States Smelting Co. v. Parry*, 166 F. 407, 411, 415 (8th Cir. 1909) (holding expert testimony excludable where jury capable of drawing correct conclusions)).

<sup>15</sup> *Francis*, 390 Mass at 98.

<sup>16</sup> *But see Canavan's Case*, 432 Mass. at 311 (discussing shortcomings of de novo review of scientific testimony); LIACOS, *HANDBOOK OF MASSACHUSETTS EVIDENCE* (Seventh Ed.), § 2.8.2 at 35 *supra* at note 13.

<sup>17</sup> *See Amaral*, 488 F.2d at 1152-53 (holding judge must determine whether expert testimony within full understanding of average man). *Id.*, quoting *Farris v. Interstate Circuit*, 116 F.2d 409, 412 (5th Cir. 1941) (holding judge must determine whether expert testimony within full understanding of average man). *See also Rich*, 549 A.2d at 743 (excluding expert testimony not beyond common knowledge of ordinary juror); *Ashley*, 427

made for bench trials where a judge is presented with expert testimony on the reliability of eyewitness identification because it is likely a foregone conclusion that judges are acutely aware of the issues surrounding eyewitness identification.<sup>18</sup> Once a determination is made about what is common knowledge for the average juror concerning eyewitness identifications, that determination should remain static and subject to change only where it can be shown that such information is no longer within the average juror's common knowledge.<sup>19</sup>

### III. CONCLUSION

The problem with the system as it currently exists is each trial judge makes his/her own determination about what is and is not common knowledge.<sup>20</sup> Thus, under the current system, the answer to the question, "Is this information common knowledge?" depends entirely on which judge hears a case. Pragmatically, this paradigm fails to ensure litigants equal justice under the laws.

The possibilities with respect to what is or is not common knowledge about eyewitness testimony are finite and definitive: (1) the variables that can effect eyewitness identification are a matter of common knowledge for everyone; (2) the variables effecting eyewitness identification are well established but are not a matter of common knowledge for jurors; or (3) the variables effecting eyewitness identification are not scientifically established. No matter what determination is ultimately made regarding the state of knowledge concerning eyewitness identification, there is never a need for expert testimony on this topic.

If the variables that effect the reliability of eyewitness identification are a matter of common knowledge, then expert testimony would not offer appreciable assistance and the testimony should be inadmissible per se.<sup>21</sup> If the variables that can affect the reliability of eyewitness identification

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Mass. at 624 (holding expert's opinions concerned common knowledge that average juror familiar with).

<sup>18</sup> See *Commonwealth v. Jones*, 362 Mass. 497, 502 (1972) (noting issues of reliability of eyewitnesses within common knowledge of judge)

<sup>19</sup> See *supra* at note 16.

<sup>20</sup> Robert J. Hallisey, *Experts on Eyewitness Testimony in Court - A Short Historical Perspective*, 39 *How. L.J.* 237, 240 (1995). "Different judges can have different views on what is and is not common knowledge." *Id.*

<sup>21</sup> See *Commonwealth v. Avellar*, 416 Mass. 409, 417 (1993) (holding appreciable assistance standard for admission of expert testimony); *Commonwealth v. Fournier*, 372 Mass. 346, 350 (1977) (holding expert testimony must offer appreciable assistance); *Commonwealth v. Boyd*, 367 Mass. 169, 182 (1975) (establishing expert testimony must offer appreciable assistance to trier of fact). *But see Canavan's Case*, 432 Mass. at 311 (discussing shortcomings of de novo review of scientific testimony).

are not common knowledge but are scientifically established, cross-examination, closing arguments, and a jury instruction can suffice.<sup>22</sup> If there are no cognizable principles regarding the reliability of eyewitness identification, then expert testimony on the subject should be excluded *per se*.<sup>23</sup>

Judging from the case law, the reality is that the factors influencing eyewitness testimony are common knowledge. Indeed, courts have long acknowledged that eyewitnesses make mistakes.<sup>24</sup> Most courts, however, have decided that the reliability of eyewitness identifications is a topic that jurors understand as a matter of common knowledge.<sup>25</sup> This debate, having intensified over the last three decades, has a somewhat simple solution.<sup>26</sup>

Even proponents of expert testimony on the topic agree that a carefully crafted jury instruction could help to remind juries of the factors involved in identification testimony.<sup>27</sup> Indeed, in Massachusetts, the Supreme Judicial Court has started down this road.<sup>28</sup> From a purely logical

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<sup>22</sup> *Thevis*, 665 F.2d at 641. “[T]he problems of perception and memory can be adequately addressed in cross-examination.” *Id.* *Santoli*, 424 Mass. at 845 (acknowledging jury instruction could serve to sufficiently educate jurors about principles effecting eyewitness identification); *Hyatt*, 419 Mass. at 818-19 (holding jury instruction could sufficiently educate jurors about eyewitness identification); *Commonwealth v. Pressley*, 390 Mass. 617, 619-620 (1983) (holding fairness compels mistaken identification instruction in certain situations); *Commonwealth v. Rodriguez*, 378 Mass. 296, 310-311 (1979) (holding mistaken identification instruction proper in certain situations).

<sup>23</sup> See *Lanigan*, 419 Mass. at 25 (excluding expert testimony where it cannot offer relevant and reliable basis for conclusions).

<sup>24</sup> *United States v. Wade*, 388 U.S. 218, 228 (1967) “The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.” *Id.* *Francis*, 390 Mass. at 100. “One of the most troublesome problems in the administration of criminal justice is the possibility that eyewitness identification testimony is wrong . . .” *Id.*

<sup>25</sup> See *supra* note 2.

<sup>26</sup> See Gary L. Wells and Elizabeth F. Loftus, *Eyewitness Testimony: Psychological Perspectives* (1985) (detailing spectrum of concerns surrounding eyewitness testimony from several authors). The debate has also occasionally received attention from the mainstream media. See Atul Gawande, *Under Suspicion*, *NEW YORKER*, Jan. 8, 2001, at 50 (discussing various aspects of eyewitness identification procedures with quotes from Gary Wells).

<sup>27</sup> Jack B. Weinstein, Book Review, 81 *COLUM. L. REV.* 441, 454 (1981) (citing ELIZABETH LOFTUS, *EXPERT TESTIMONY* 187 (1979)).

<sup>28</sup> See *Pressley*, 390 Mass. at 619-620 (holding fairness compels mistaken identification instruction in certain situations); *Rodriguez*, 378 Mass. at 310-311 (holding mistaken identification instruction should be given in certain cases). See also *Santoli*, 424 Mass. at 845 (1997) (recognizing that jury instruction may be better than expert testimony eventually). “[W]e recognize that a principle concerning eyewitness identifications may become so generally accepted that, rather than have expert testimony on the point, a standard jury instruction stating that principle would be appropriate.” *Id.* (citing *Hyatt*, 419 Mass. at 818-819 (noting jury instructions considered appropriate alternative to expert testimony)).

perspective, one can deduce that jury instructions would likely import the following benefits: first, they save time, and second, they allow for simple explanations of the relevant considerations that jurors should weigh. A jury instruction, however, carries with it none of the “adversarial taint” that expert testimony inevitably does.<sup>29</sup>

Instead of allowing for the admitted disparate treatment of these types of cases, courts should strive to administer justice with as much equity as possible.<sup>30</sup> Expert testimony on the reliability of eyewitness identification likely will never offer dispositive criteria to determine the actual accuracy of a witness’s identification. In the future, however, it may actually be possible to discover with absolute certainty the accuracy of a witness’s identification. When this technology becomes available, however, it is likely that these matters will be disposed of pre-trial and never make it to court. Indeed, where a witness’s identification can be shown to be absolutely inaccurate, the matter should never even be brought before the courts at all. In the interim, the courts should consider the benefits of a legal system where justice is administered equally by laws and not based upon which judge is hearing a case or which attorney appears on the defendant’s behalf.

The integrity of our justice system depends on consistency and predictability. Therefore, unless the factors that affect the reliability of eyewitness identification are determined by the courts to be outside the scope of what is common knowledge, expert testimony on the subject

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<sup>29</sup> See Christopher Walters, *Admission of Expert Testimony on Eyewitness Identification*, 73 CAL. L. REV. 1402, 1405 (1985) (identifying one advantage of jury instructions as absence of adversarial taint). See also *Amaral*, 488 F.2d at 1152 (holding expert testimony properly excluded where it is likely to confuse or mislead). “Scientific or expert testimony [is] particularly . . . danger[ous] because of its aura of special reliability and trustworthiness.” *Id.*

<sup>30</sup> *Santoli*, 424 Mass. at 843-844. The Massachusetts Supreme Judicial Court has recognized this weakness in the current system stating:

We grant that the rule to which we adhere may result in disparate treatment in similar cases. That is inherent in any grant of discretion to trial judges. Appellate courts have done little to guide the exercise of discretion in this area, except that a few courts have stated that some evidence corroborating the eyewitness identification is required if the expert testimony is to be excluded. The absence of appellate guidelines will likely persist unless and until learning about the reliability of eyewitness identifications becomes more developed.

*Id.*

At least one other perspective has been argued to address disparate treatment among identification cases. See Thomas Dillickrath, *Evidence of Innocence by the Criminal Defendant, Not So Fast: Expert Testimony on Eyewitness Identification: Admissibility and Alternatives*, 55 U. MIAMI L. REV. 1059, 1100 (2001) (arguing general disallowance of expert testimony with narrow exceptions for admission preferred approach).

should be excluded per se because it fails to offer appreciable assistance in assessing the credibility of identifications.

