

## Turning a Blind Eye to Justice: Kansas Courts Must Integrate Scientific Research Regarding Eyewitness Testimony into the Courtroom\*

### I. INTRODUCTION

In a cemetery in Seattle, Washington, there lies a headstone that reads:

*Steve G. Titus  
1949–1985  
He fought for his day in court,  
he was used, deceived, betrayed  
and denied justice even in death.<sup>1</sup>*

The justice system betrayed Steve Titus in the spring of 1981 when a jury wrongfully convicted him of first degree rape. The jury, unwarned of the potential shortcomings of eyewitness testimony, relied on an inaccurate eyewitness identification to convict Titus.

On October 12, 1980, around 6:45 in the evening, seventeen-year-old Nancy Von Roper was kidnapped, driven down a narrow dirt road to a pile of rotting wood, assaulted, and raped.<sup>2</sup> She said her attacker was wearing a three-piece suit and driving a royal blue Chevette with a temporary license plate displayed in the back window.<sup>3</sup> When Ms. Von Roper's attacker finished with her, he drove back up the muddy road, leaving perfectly preserved tire marks.<sup>4</sup> After interviewing Ms. Von

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1. ELIZABETH J. LOFTUS & KATHERINE KETCHAM, WITNESS FOR THE DEFENSE: THE ACCUSED, THE EYEWITNESS, AND THE EXPERT WHO PUTS MEMORY ON TRIAL 60 (1991). In this book, Loftus describes the stories of several wrongfully convicted men, including the story of Steve Titus. She explains his story in detail—how inaccurate eyewitness testimony was responsible for his wrongful conviction, how he was exonerated and shortly thereafter passed away, and what is written on his headstone in a Seattle cemetery.

2. *Id.* at 34–35.

3. *Id.* at 35.

4. *Id.*

Roper and investigating the scene, Detective Ronald Parker took charge of the investigation.<sup>5</sup> At about 1:20 in the morning, Detective Parker noticed a light blue Chevette in a parking lot.<sup>6</sup> When Titus and his fiancée came out of a restaurant and got into the Chevette, Detective Parker followed and stopped them.<sup>7</sup>

Soon afterwards, Titus was arrested and charged with rape. His car matched the description Ms. Von Roper had given, and he had a temporary license plate sitting in the back window.<sup>8</sup> Titus knew he was innocent; he had made phone calls from his house at 6:30 and 7:00 that evening.<sup>9</sup> Since Ms. Von Roper was kidnapped at 6:45,<sup>10</sup> there was no way he could be guilty. He insisted that he did not even own a three-piece suit.<sup>11</sup> Titus's car was scrutinized. The tire marks in the mud did not match his tires.<sup>12</sup> His seats were made out of vinyl, not the velveteen Ms. Von Roper had described.<sup>13</sup> There were no hair fibers, fingerprints, or clothes samples that matched Ms. Von Roper.<sup>14</sup>

All this evidence in Titus's favor carried little weight. His accuser, Nancy Von Roper, had selected him from a photomontage and later identified him in court as her rapist.<sup>15</sup> In the spring of 1981, this eyewitness identification persuaded the jury to convict Titus of first degree rape in spite of strong evidence of Titus's innocence.<sup>16</sup> Only later would the jury learn Titus had been wrongfully accused, wrongfully identified, and wrongfully convicted.

As Steve Titus's story illustrates, juries tend to rely heavily upon eyewitness identification. In fact, juries tend to give more weight to eyewitness identifications than virtually all other forms of evidence.<sup>17</sup> Eyewitness testimony persuades more powerfully than any other evidence and has the power to determine the fate of defendants almost single-handedly. Juries must therefore be properly informed on how to

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5. *Id.*

6. *Id.*

7. *Id.* at 36.

8. *Id.* at 35–36.

9. *Id.* at 36.

10. *Id.* at 34.

11. *Id.* at 41.

12. *Id.* at 44.

13. *Id.* at 41.

14. *Id.* at 40–41.

15. *Id.*

16. *See id.* at 43, 47 (stating that his trial began in February 1981 and that he was convicted before April 1981).

17. Jennifer L. Overbeck, *Beyond Admissibility: A Practical Look at the Use of Eyewitness Expert Testimony in the Federal Courts*, 80 N.Y.U. L. REV. 1895, 1898 (2005).

evaluate eyewitness identification. To better evaluate eyewitness identifications, juries need a framework in which to place the information they hear at trial. This framework should be based on scientific research about factors that affect the accuracy of eyewitness identification.

Throughout the past century, psychological research has built a wealth of evidence demonstrating multiple problems with the accuracy of eyewitness identification.<sup>18</sup> Within the past several years, over 200 wrongfully convicted individuals have been exonerated.<sup>19</sup> The recent exonerations stand as powerful testimony to the problems with eyewitness identification. Eyewitness identification “was the largest single factor contributing to the conviction of these innocent people.”<sup>20</sup> Mistaken eyewitness identification contributed to seventy-five percent of these wrongful convictions.<sup>21</sup> After the exoneration of over 200 wrongfully convicted individuals, courts throughout the nation have slowly begun to take notice of and incorporate evidence regarding potential inaccuracy of eyewitness identification.<sup>22</sup>

Kansas must do a better job of incorporating this science into the courtroom. In Kansas, expert testimony regarding eyewitness identification is inadmissible.<sup>23</sup> Kansas judges have the discretion to instruct the jury to consider several factors surrounding the eyewitness identification in question.<sup>24</sup> However, Kansas Pattern Jury Instruction (PIK) 52.20<sup>25</sup> is incomplete and inaccurate as currently written. Kansas should amend PIK 52.20 to align it with scientific research. Expert testimony regarding how variables like race, other memories, and post-event information affect the accuracy of eyewitness identification should be admissible. Researchers have termed these variables “own-race bias,” “unconscious transference,” and the “feedback factor.” Own-race bias describes the scientifically demonstrated phenomenon which makes it more difficult for a witness to accurately identify someone of a different

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18. Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 277 (2003).

19. Innocence Project Eyewitness Identification Reform, <http://www.innocenceproject.org/Content/165.php> (last visited Feb. 11, 2008).

20. Wells & Olson, *supra* note 18, at 277.

21. Innocence Project Eyewitness Identification Reform, *supra* note 19.

22. Richard A. Wise & Martin A. Safter, *What U.S. Judges Know and Believe About Eyewitness Testimony*, 18 APPLIED COGNITIVE PSYCHOL. 427, 427 (2004) (stating that “[u]ntil recently . . . eyewitness research has had relatively little impact on the U.S. criminal justice system”).

23. *See, e.g., State v. Criqui*, 77 P.3d 1008 (Kan. 2003) (“expert testimony regarding eyewitness identification evidence . . . found to be inadmissible”).

24. *State v. Gaines*, 926 P.2d 641, 649 (Kan. 1996).

25. PIK Crim.3d 52.20.

race.<sup>26</sup> Unconscious transference occurs when a witness unintentionally transposes the details of one memory into another memory.<sup>27</sup> The feedback factor occurs when witnesses subconsciously conform their memories of an event to what they hear about the event afterwards.<sup>28</sup> Expert testimony should be admitted when own-race bias, unconscious transference, or the feedback factor is relevant to a case. Most jurors do not understand these factors, and these factors can dramatically affect the accuracy of eyewitness identification.

In this Comment, I advocate for change in the current status of Kansas law regarding the admissibility of expert witness testimony on eyewitness identification accuracy. In Section II, I will explain the different stages in which the brain stores information, and the categorization of variables that affect memory accuracy. I will trace the history of research and law regarding eyewitness identification accuracy and introduce studies that have been conducted on the four “material” phenomena—own-race bias, unconscious transference, after-acquired experiences, and the feedback factor. In Section III, I will explain why the Kansas Jury Instructions are insufficient to guard against false eyewitness identifications and prevent wrongful convictions. I will provide a more in-depth explanation of relevant studies, and argue that appropriate attention to the results of these studies requires changing PIK 52.20 and allowing courts to admit general, relevant expert witness testimony regarding these phenomena.

## II. BACKGROUND

### A. *Eyewitnesses and Memory*

Memory has three important stages: acquisition, retention, and retrieval.<sup>29</sup> Acquisition is the first stage. A witness perceives an event, and the human mind stores the information in a “memory system.”<sup>30</sup>

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26. See John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207, 211 (2001) (describing the phenomenon and stating that “empirical study of cross-racial IDs has shown that eyewitnesses have difficulty identifying members of another race”).

27. See Francis A. Gilligan et al., *The Theory of “Unconscious Transference”: The Latest Threat to the Shield Laws Protecting the Privacy of Victims of Sex Offenses*, 38 B.C. L. REV. 107, 108–09 (1996) (describing an example of unconscious transference).

28. Jeffrey S. Neuschatz et al., *The Mitigating Effects of Suspicion on Post-Identification Feedback and on Retrospective Eyewitness Memory*, 31 LAW & HUM. BEHAV. 231, 232 (2007).

29. ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL 10 (3d ed., Lexus Law Publishing 1996) (1987).

30. *Id.*

Retention is the stage when the brain stores event information, before witnesses attempt to recall the information.<sup>31</sup> Retrieval is the final stage, when the witness tries to recall the information about an event.<sup>32</sup> Variables that affect different stages of the memory process all carry the potential to influence the accuracy of a memory.

Factors that affect memory accuracy can be separated into two categories—system variables and estimator variables.<sup>33</sup> System variables affect the witness because they can be manipulated before or at trial.<sup>34</sup> For instance, law enforcement and the justice system have some control over how law enforcement conducts a lineup, how much witnesses discuss among themselves, and questions a prosecutor or defense attorney asks the witness. Estimator variables are not malleable and include the witness's race, how frightened the witness was when the alleged crime occurred, and what opportunity the witness had to view the suspect during the incident.<sup>35</sup>

System and estimator variables have different impacts on a witness's ability to correctly identify the perpetrator. Thus, research about them should play different roles in law enforcement and the judicial system. Research on system variables should instigate change in post-event interviews, lineups, and suspect questioning to prevent a witness's memory from being tainted by external evidence. Estimator variables affect the reliability of an eyewitness identification, so research on estimator variables is valuable in helping a jury determine the accuracy of a witness's testimony.

## *B. Eyewitness Identification Research*

### 1. History of Eyewitness Identification Research

Skepticism of eyewitness testimony accuracy can be traced back thousands of years. Scholars dating back to ancient Greece questioned the accuracy of eyewitness testimony,<sup>36</sup> and throughout the centuries,

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31. *Id.*

32. *Id.*

33. Wells & Olson, *supra* note 18, at 279. Dr. Gary L. Wells is the leading scholar on memory categorization. He is attributed with the modern categorization of memory into system and estimator variables. Colin G. Tredoux et al., *Eyewitness Identification*, *ENCYCLOPEDIA APPLIED PSYCHOL.* 875, 876 (2004).

34. *Id.*

35. *Id.* at 279–80.

36. Scott Woller, *Rethinking the Role of Expert Testimony Regarding the Reliability of Eyewitness Identifications in New York*, 48 *N.Y.L. SCH. L. REV.* 323, 338 (2003) (“Have sight and

scholars and scientists have continued to question memory accuracy. At the turn of the twentieth century, Professor Hugo Munsterberg broke new ground in the area of eyewitness testimony research. The majority of researchers and scholars view Munsterberg's work as the "first major application of behavioral science methods and theories to eyewitness evidence in this country."<sup>37</sup> Munsterberg explained, "justice would less often miscarry if all who are to weigh evidence were more conscious of the treachery of human memory."<sup>38</sup> Professor Munsterberg sparked both controversy and further research when he published the theory that fact finders, especially juries, were under-informed to make decisions regarding the reliability of eyewitness testimony.<sup>39</sup>

Scientists challenged and continued to build on Munsterberg's research, and a select few emerged as well-respected experts in the field of memory accuracy. In 1932, a scientist named Sir Frederick Bartlett researched memory by studying British citizens' memories of Native Americans.<sup>40</sup> His research revealed that memory is not a videotape, but is reconfigured in three ways.<sup>41</sup> Memories become shorter and abbreviated as time passes, details of memories are lost over time, and personal belief about circumstances and culture impact how the mind remembers events.<sup>42</sup> Reid Hastie, a well-known researcher in the 1980s, studied juries and their perspective of eyewitness identifications. Hastie's work indicates that jurors misunderstand many factors that affect eyewitness accuracy.<sup>43</sup> He concluded that juror misconceptions about eyewitness accuracy, combined with potentially inaccurate identifications, pose a serious threat to justice.<sup>44</sup>

Today, Dr. Elizabeth Loftus is the most recognized expert on eyewitness testimony.<sup>45</sup> She has participated in many criminal trials where eyewitness identification played a major role in the case against

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hearing in them? Are they not, as the poets are always telling us, inaccurate witnesses?" (citing Robert J. Hallisey, *Experts on Eyewitness Testimony in Court—A Short Historical Perspective*, 39 HOW. L.J. 237, 237 (1995) (quoting PLATO, PORTRAIT OF SOCRATES, BEING THE APOLOGY, CRITO, AND PHAEDO OF PLATO (R.W. Livingston ed., Oxford Univ. Press 1938)))).

37. Hallisey, *supra* note 36, at 242.

38. *Id.* (citing HUGO MUNSTERBURG, ON THE WITNESS STAND 19 (1923)).

39. *Id.* at 238.

40. Matthew J. Sharps et al., *Eyewitness Memory in Context: Toward a Systematic Understanding of Eyewitness Evidence*, 16 FORENSIC EXAMINER 20, 22 (2007).

41. *Id.*

42. *Id.*

43. Hallisey, *supra* note 36, at 257–58 (citing Vicki L. Smith et al., *Eyewitness Accuracy and Confidence: Within—Versus Between—Subjects Correlations*, 74 J. APPLIED PSYCHOL. 356 (1989)).

44. *Id.*

45. *Id.* at 245.

the defendant.<sup>46</sup> Research has led Dr. Loftus to conclude that, depending on the circumstances, eyewitness identification can be highly unreliable and riddled with error.<sup>47</sup> Her research also demonstrates that juries hold misconceptions about eyewitness testimony.<sup>48</sup> She petitions courts to admit expert testimony regarding eyewitness identification.<sup>49</sup> Following in the footsteps of Dr. Loftus and Hastie, researchers continue to discover that juries overestimate the accuracy of eyewitness identification.<sup>50</sup>

Scientists study juries and eyewitness memory in many different ways. They stage crimes, conduct surveys, and perform “prediction” studies.<sup>51</sup> Scientists staging crimes often expose one group of participants to an event and then question them about what happened.<sup>52</sup> Another group of participants, who did not observe the event, are then asked to distinguish between accurate and inaccurate answers.<sup>53</sup> This tests the factors surrounding eyewitness accuracy and the ability of jurors to identify accurate testimony. Researchers performing “prediction” studies describe eyewitness identifications to laypersons acting as jurors.<sup>54</sup> The “jurors” are then asked to determine if the identifications were accurate and predict the outcome of the trial.<sup>55</sup> In the variety of studies, specific variables have consistently emerged that impact eyewitness identification accuracy.

## 2. Documented Phenomena Affecting Accuracy of Eyewitness Identification

### a. Own-Race Bias

Studies demonstrate that eyewitnesses can more accurately distinguish between and identify faces of their own race.<sup>56</sup> This

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46. LOFTUS & KETCHAM, *supra* note 1, at xiii.

47. See LOFTUS & DOYLE, *supra* note 29, at 1 (“‘creative memory’ of these eyewitnesses is not usual”).

48. *Id.* at 6–8.

49. See *generally id.* at 274–98 (discussing the potential benefits to expert testimony regarding eyewitness identification).

50. Wells & Olson, *supra* note 18, at 284–85.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 280–81; Rutledge, *supra* note 26, at 211.

phenomenon is called own-race bias.<sup>57</sup> Scientists have conducted extensive research on own-race bias.<sup>58</sup> This research has been conducted in many different settings, including laboratory research and real world contexts.<sup>59</sup> In laboratory research, study subjects view racially diverse photographs.<sup>60</sup> Scientists later test to see which faces the subjects can correctly identify.<sup>61</sup> One famous laboratory study in the 1960s produced convincing evidence of own-race bias.<sup>62</sup> In the study, conducted by Roy S. Malpass and Jerome Kravitz, white participants could identify white faces much more easily than black faces.<sup>63</sup>

Researchers also study own-race bias by observing real-life situations. One such study, conducted by John C. Brigham, sent participants of different races into convenience stores to interact with the store clerks.<sup>64</sup> Brigham later questioned the convenience store clerks to discover which races the clerks could most accurately identify.<sup>65</sup> The study indicated the clear presence of own-race bias among the clerks who attempted to identify a suspect.<sup>66</sup> Although much speculation surrounds why own-race bias occurs,<sup>67</sup> the cumulative studies clearly indicate that own-race bias exists and can powerfully impact the accuracy of eyewitness identification.

#### b. Unconscious Transference

Unconscious transference is a term coined by Glanville Williams<sup>68</sup> “to refer to the phenomenon in which a person seen in one situation is confused with or recalled as a person seen in a second situation.”<sup>69</sup> An example of unconscious transference is the classic “sailor” case. A ticket

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57. Rutledge, *supra* note 26, at 211.

58. Wells & Olson, *supra* note 18, at 280–81.

59. Jody E. Frampton, *Can a Jury Believe My Eyes, and Should Courts Let Experts Tell Them Why Not: The Admissibility of Expert Testimony on Cross-Racial Eyewitness Identification in New York After People v. Young*, 27 PACE L. REV. 433, 438 (2007).

60. LOFTUS & DOYLE, *supra* note 29, at 86.

61. *Id.*

62. Roy S. Malpass & Jerome Kravitz, *Recognition for Faces of Own and Other Race*, 13 J. PERSONALITY & SOC. PSYCHOL. 330, 333 (1969).

63. LOFTUS & DOYLE, *supra* note 29, at 86 (citing Malpass & Kravitz, *supra* note 62, at 330–34).

64. John C. Brigham et al., *Accuracy of Eyewitness Identifications in a Field Setting*, 42 J. PERSONALITY & SOC. PSYCHOL. 673, 675–76 (1982).

65. *Id.*

66. LOFTUS & DOYLE, *supra* note 29, at 87–88.

67. See discussion *infra* Part III.A.3.

68. Gilligan et al., *supra* note 27, at 111.

69. LOFTUS & DOYLE, *supra* note 29, at 89.

agent working at a railroad station is robbed, and when called upon to identify the robber in a lineup, the ticket agent identifies a sailor. As it turns out, the sailor has a very strong alibi.<sup>70</sup> When asked why he identified the sailor, the ticket agent said, “His face looked very familiar.”<sup>71</sup> Unconscious transference occurs when a witness’s memory is weak or lacks detail.<sup>72</sup> This lack of detail causes gaps that are vulnerable to being filled with memories of other events.<sup>73</sup> One study revealed that “transference subjects—subjects with prior exposure to an innocent person”—were three times more likely to incorrectly identify the innocent person than the control subjects who had not previously seen the innocent person.<sup>74</sup> Unconscious transference has been linked to both the misidentification of suspects and the wrongful conviction of defendants.<sup>75</sup>

c. After-Acquired Experiences and the Feedback Factor

After-acquired experiences and the feedback factor expose an eyewitness to information about an incident after the incident has occurred. The feedback factor is one specific type of after-acquired experience. After-acquired experiences can have an impact on memory accuracy when they occur during the retention stage in memory (after the memory is acquired, and before it is retrieved).<sup>76</sup> The information a witness is exposed to during this retention stage can inadvertently manipulate the witness’s memory of what took place during the incident.

After-acquired experiences manifest themselves in many different circumstances and through different mediums. Scientists perform fairly simple studies to learn the amount of influence after-acquired experiences have on memories. For instance, scientists will show study participants a video and then discuss it.<sup>77</sup> When talking about the video, the scientists mention details (like barns, roads, etc.) that were not

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70. *Id.* at 88.

71. *Id.* at 88–89.

72. Gilligan et al., *supra* note 27, at 112.

73. *Id.*

74. *Id.* at 110 (citing David J. Ross et al., *Unconscious Transference and Lineup Identification: Toward a Memory Blending Approach*, in *ADULT EYEWITNESS TESTIMONY: CURRENT TRENDS AND DEVELOPMENTS* 80, 96 (David F. Ross et al. eds., 1994)).

75. *Id.* at 107 (citing Felice J. Levine & June Louin Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U. PA. L. REV. 1079, 1081 (1973)).

76. See *supra* note 31 and accompanying text.

77. LOFTUS & DOYLE, *supra* note 29, at 54.

actually present.<sup>78</sup> Later, when asked about those details, many study participants incorrectly remember those details being present in the video.<sup>79</sup> Likewise, when a witness communicates with counsel, law enforcement, or other witnesses about the incident, certain details become subconsciously created and concreted in their minds.

The feedback factor is one type of after-acquired experience and occurs when an eyewitness receives feedback regarding a lineup identification. Wells and Bradfield conducted studies in 1998 and 1999 that demonstrated how post-identification feedback not only increases eyewitness's confidence of their accuracy, but also affects how witnesses remember an actual crime or event.<sup>80</sup> The researchers played a video for participants, asked the participants to identify the perpetrator in the video, and gave the participants subtle feedback about the identifications.<sup>81</sup> People who received positive feedback reported having a good view of the crime and being confident about their identification, while people with negative feedback reported having a worse view of the perpetrator and lower confidence in their identification.<sup>82</sup>

### C. Admissibility of Expert Eyewitness Identification Research

#### 1. Responses to Expert Eyewitness Identification Research

Courts have responded to the research on eyewitness identification in varying ways. Some welcome expert testimony. Others admit expert testimony according to the court's discretion. Still others give jury instructions. In the late 1990's, because of the development of forensic DNA testing, the criminal justice system began to take notice of and incorporate eyewitness testimony research into the courtroom.<sup>83</sup> The majority of states admit expert testimony at the trial court's discretion.<sup>84</sup> Kansas continues to treat expert testimony as *per se* inadmissible.<sup>85</sup> In an

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78. *Id.*

79. *Id.*

80. Neuschatz et al., *supra* note 28, at 231–32.

81. *Id.*

82. *Id.*

83. Wells & Olson, *supra* note 18, at 278.

84. McMullen v. State, 714 So.2d 368, 370 (Fla. 1998) (“An overwhelming majority of both federal and states courts . . . [have adopted a] ‘discretionary view,’ which provides that the admission of expert testimony regarding eyewitness identification is in the discretion of the trial judge.”).

85. *See, e.g.*, State v. Reynolds, 639 P.2d 461, 463 (Kan. 1982) (“cautionary instruction, along with cross-examination and defense advocacy . . . adequately protect[s] the defendant”).

effort to remind the jury to consider certain variables that could affect identification accuracy, a group of states have created jury instructions patterned after *United States v. Telfaire*.<sup>86</sup> The *Telfaire* instructions encourage the jury to consider factors that might affect the accuracy of the eyewitness identification.<sup>87</sup> The factors encompass two issues: 1) the basic factors surrounding the incident, such as the witness's opportunity to observe, and 2) the circumstances surrounding the identification, such as the witness's certainty and the existence of any inconsistent identifications.<sup>88</sup> California has built on the foundation of *Telfaire*, using the instructions as a baseline and including additional factors the jury should consider.<sup>89</sup> Some states only allow cross-examination and do not provide jury instructions or expert testimony, reasoning that even jury instructions invade the province of the jury and are thus improper.<sup>90</sup> Currently, the federal courts and most state courts place expert witness testimony regarding eyewitness identification within the discretion of the trial court.<sup>91</sup> However, Kansas is not one of these states. In Kansas, expert testimony regarding eyewitness identification is *per se* inadmissible.<sup>92</sup>

## 2. Federal Rules Regarding Expert Testimony

For many years, the federal courts admitted expert testimony only if the science the expert relied on was "sufficiently established to have gained general acceptance in the particular field in which it belongs."<sup>93</sup> This test was commonly known as the *Frye* general acceptance test.<sup>94</sup> However, the Supreme Court overturned this rule in *Daubert v. Merrell Dow Pharmaceuticals*.<sup>95</sup> *Daubert* held that *Frye* had been superseded by Federal Rule of Evidence 702.<sup>96</sup> Rule 702 was subsequently amended in

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86. 469 F.2d 552 (D.C. Cir. 1972).

87. *Id.* at 558.

88. *Id.*

89. See JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS 315 (2007) (indicating the jury should also consider whether the witness and defendant are of different races).

90. See, e.g., *Lewis v. State*, 363 N.E.2d 1230, 1230-31 (Ind. 1977) ("court did not err in refusing to give . . . instruction").

91. *Id.*

92. See *State v. Reynolds*, 639 P.2d 461, 463 (Kan. 1982) ("cautionary instruction, along with cross-examination and defense advocacy . . . adequately protect[s] the defendant").

93. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (abrogated by *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 587 (1993)).

94. See, e.g., *State v. Garcia*, 144 P.3d 684, 693 (Kan. 2006) (applying the *Frye* test).

95. 509 U.S. 579, 587 (1993).

96. *Id.* at 587-88.

2000 to codify *Daubert* and its interpretation of the law.<sup>97</sup> Rule 702 currently requires that an expert's knowledge be scientific, technical, or otherwise specialized, that the knowledge assist the trier of fact, and that the expert be qualified "by knowledge, skill, experience, training or education."<sup>98</sup>

### 3. The Admissibility of Expert Testimony in Kansas

#### a. Expert Testimony in Kansas

Kansas courts purport to operate on the presumption that "it is fundamental to a fair trial that the accused be afforded the opportunity to present his or her theory of defense to the charge so the jury may properly weigh the evidence and reach its verdict."<sup>99</sup> However, the current rules prohibiting expert testimony regarding eyewitness accuracy deprive defendants of the opportunity to present important theories of defense. Without expert testimony, jurors cannot understand pertinent information regarding eyewitness accuracy.

#### i. Statutory Law

Kansas statutes provide the framework for admitting expert testimony. Section 60-456(b) of the Kansas Statutes requires that expert testimony be 1) "based on facts or data perceived by or personally known or made known to the witness at the hearing," and 2) "within the scope of the special knowledge, skill, experience, or training possessed by the witness."<sup>100</sup> The first requirement is generally interpreted to require that the testimony be sufficiently relevant and address the specific facts of the case.<sup>101</sup> The second requirement is straightforward—the witness must have knowledge or special skill and be relying on that knowledge or skill.<sup>102</sup> Additionally, section 60-457 gives a judge the option to require an examination of the data upon which the expert relies.<sup>103</sup> The expert testimony must be based on "reasonably accurate data," not just

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97. See, e.g., Camille L. Fletcher, *Repressed Memories: Do Triggering Methods Contribute to Witness Testimony Reliability?*, 13 WASH. U. J.L. & POL'Y 335, 347 n.93 (2003).

98. FED. R. EVID. 702.

99. *State v. Humphrey*, 845 P.2d 592, 600 (Kan. 1992).

100. KAN. STAT. ANN. § 60-456(b)(1)–(2) (2005).

101. Mark D. Hinderks & Steve Leben, *On the Admissibility of Expert Testimony in Kansas*, 66 J. KAN. B. ASS'N 24, 26 (1997).

102. *Id.*

103. KAN. STAT. ANN. § 60-457 (2005).

“unsupported assumption, theoretical speculation, or conclusory allegations.”<sup>104</sup> In accordance with section 60-456, an expert may give testimony as long as that expert does not opine about the credibility of a certain witness or evidence.<sup>105</sup>

ii. Case Law

Although the federal courts rejected the *Frye* test, which allows experts to testify only to evidence that is generally accepted in the scientific community, Kansas courts continue to subject expert testimony to that standard.<sup>106</sup> Kansas has adopted a rule of evidence parallel to federal rule 702,<sup>107</sup> but unlike the federal courts, “subsequent cases in Kansas have not addressed the superseding effect of the statutory rules enacted in Kansas.”<sup>108</sup> Therefore, until Kansas addresses its precedent, expert testimony is admissible only if it comports with the *Frye* test. Kansas courts have ruled that expert testimony regarding eyewitness identification is inadmissible. Expert testimony, they assert, is unnecessary because defendants can sufficiently critique eyewitness identifications through jury instructions and cross-examination.<sup>109</sup>

Currently, Kansas law does not allow expert testimony regarding eyewitness identification, but it does allow judges to give a jury instruction on specific eyewitness identification factors when necessary. This current law is the product of recent evolution in Kansas case law. In the late 1970s and early 1980s, courts could admit expert testimony based on their discretion.<sup>110</sup> However, expert testimony could only be admitted if it assisted the jury.<sup>111</sup> In 1981, the Kansas Supreme Court expressed its concern over the potential unreliability of eyewitness identification in *State v. Warren*.<sup>112</sup> However, the *Warren* court decided

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104. *Olathe Mfg., Inc. v. Browning Mfg.*, 915 P.2d 86, 106 (Kan. 1996).

105. *State v. Smallwood*, 955 P.2d 1209, 1214 (Kan. 1998).

106. *See, e.g., State v. Garcia*, 144 P.3d 684, 693 (Kan. 2006) (noting its approval of the *Frye* test).

107. *See Hinderks & Leben, supra* note 101, at 28 (explaining how KAN. STAT. ANN. 60-456(b) is parallel to rule 702 of the Federal Rules of Evidence).

108. *Id.* at n.28 (noting that Kansas continues to apply the *Frye* test, and there is no indication that Kansas courts view section 60-456(b) of the Kansas Statutes as having superseded this application).

109. *See, e.g., State v. Willis*, 731 P.2d 287, 292 (Kan. 1987). Although many Kansas cases dealing specifically with eyewitness expert testimony do not mention *Frye*, it is the general rule and framework from which they operate.

110. *State v. Reed*, 601 P.2d 1125, 1126 (Kan. 1979).

111. *Id.* at 1127.

112. 635 P.2d 1236, 1239–41 (Kan. 1981).

that expert testimony was not the “answer to the problem” because eyewitness identification shortcomings could be revealed through “vigorous” cross-examination and a cautionary jury instruction.<sup>113</sup> As a result of *Warren*, PIK 52.20, patterned after *Telfaire*, was instituted.<sup>114</sup> Later cases interpret *Warren* to stand for the proposition that eyewitness testimony is generally inadmissible in Kansas courts.<sup>115</sup> In 1987, the defendant in *State v. Willis* asked the court to expand PIK 52.20 to encompass several factors he believed were relevant to his false identification.<sup>116</sup> Willis requested that the court include jury instructions encouraging the jury to consider the phenomena of own-race bias, unconscious transference, after-acquired experience, and the feedback factor.<sup>117</sup> The court rejected the defendant’s request, saying that these factors were not self-explanatory, and the jury would need expert testimony to understand them.<sup>118</sup> The court refused to admit expert testimony or expand PIK 52.20 to include the requested factors.<sup>119</sup> The most recent Kansas case to analyze this issue, *State v. Gaines*, held that PIK 52.20 and cross-examination are sufficient safeguards against inaccurate eyewitness identifications.<sup>120</sup> The court insisted expert testimony regarding eyewitness identification was unnecessary and inadmissible at trial.<sup>121</sup>

#### b. Kansas Jury Instructions

Kansas courts have adopted jury instructions patterned after *Telfaire*.<sup>122</sup> According to PIK 52.20, a Kansas judge who doubts the accuracy of an eyewitness identification in a case can instruct the jury to consider any of the following factors: 1) The opportunity the witness had to observe the suspect; 2) the emotional state of the witness at the time of the crime; 3) whether the witness had seen the defendant before the crime; 4) whether a significant amount of time elapsed between the alleged crime and the later identification; 5) whether the witness ever

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113. *Id.* at 1243.

114. *State v. Gaines*, 926 P.2d 641, 647 (Kan. 1996).

115. *See, e.g.*, *State v. Reynolds*, 639 P.2d 461, 463 (Kan. 1982), *Gaines*, 926 P.2d at 647.

116. 731 P.2d 287, 290–93 (Kan. 1987).

117. *Id.* at 292.

118. *Id.*

119. *Id.*

120. 926 P.2d at 647.

121. *Id.*

122. *See* PIK Crim.3d 52.20 (listing the factors that the jury may consider when a case involves eyewitness identification).

failed to identify the defendant or ever made an inconsistent identification; 6) the degree of certainty the witness demonstrated when the witness identified the suspect; and 7) whether there are any other circumstances that may have affected the accuracy of the eyewitness identification.<sup>123</sup>

Kansas courts should be lauded for taking a step in the early 1980s to warn juries about factors that can affect the reliability of an eyewitness identification.<sup>124</sup> PIK 52.20 was created to protect defendants from conviction based on mistaken eyewitness identification.<sup>125</sup> However, as science has developed, it has revealed areas in which PIK 52.20 is incomplete and inaccurate.

### III. ANALYSIS

Although Kansas courts claim PIK 52.20 is a sufficient safeguard against inaccurate eyewitness testimony, PIK 52.20 does not afford a defendant the fundamental fairness of presenting “his or her theory of defense to the charge so the jury may properly weigh the evidence and reach its verdict.”<sup>126</sup> Kansas Jury Instruction 52.20 contains errors and is incomplete, and Kansas courts should take the following action: 1) Factor six, regarding a witness’s confidence, should be removed because science has shown little correlation between confidence and accuracy; 2) Expert testimony should be admitted on factor two because laypersons do not accurately understand the impact of stress on a witness; and 3) Expert testimony should be allowed when there is evidence that own-race bias, unconscious transference, after-acquired experience, or the feedback factor has affected an eyewitness identification. Studies have shown these factors impact the accuracy of eyewitness testimony. A jury must be exposed to these factors to be able to justly determine the facts of a case. Expert testimony should only be admitted when an individual factor appears to be present in a particular case, and the testimony should be restricted to a general explanation of scientific research; experts should not be permitted to opine about the credibility of any witness.

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123. *Id.*

124. Kansas Pattern Instruction 52.20 was created and instituted as a result of *Warren*, a case in which the court expressed grave concern over potentially inaccurate identifications. *State v. Warren*, 635 P.2d 1236, 1244 (Kan. 1981). The *Gaines* court tracked the history of Kansas Pattern Instruction 52.20, attributing the *Warren* court with its creation. *Gaines*, 926 P.2d at 647.

125. *Id.*

126. *State v. Humphrey*, 845 P.2d 592, 595 (Kan. 1992).

A. *The Kansas Jury Instructions Are Insufficient to Educate a Jury and Enable It to Make an Informed Decision About the Accuracy of Eyewitness Identification*

Two factors already present in the jury instruction should be amended—factor six should be removed, and factor two should be further explained. Factor six indicates that a jury should consider the degree of certainty the witness demonstrated while making the eyewitness identification.<sup>127</sup> This instruction implies a correlation between the witness's degree of certainty and the accuracy of the eyewitness identification. Surprisingly, scientific studies demonstrate there is little correlation between eyewitnesses' confidence levels and identification accuracy.<sup>128</sup> Because the jury instruction implies a correlation that science has demonstrated does not exist, the court should not instruct the jury to consider the eyewitness's confidence. Therefore, factor six should be removed from PIK 52.20.

Factor two instructs the jury to consider the emotional state of the witness at the time of the crime.<sup>129</sup> People generally believe that witnesses under stress pay more attention to their circumstances and remember faces more accurately.<sup>130</sup> However, the exact opposite is true.<sup>131</sup> Studies have demonstrated that witnesses are less able to perceive and remember details of an event when they experience very high levels of stress.<sup>132</sup> This misconception should be explained to juries; otherwise, they will continue to decide cases based on erroneous assumptions.

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127. PIK Crim. 3d 52.20.

128. See *False Identification: New Research Seeks to Inoculate Eyewitnesses Against Errors*, NATIONAL SCIENCE FOUNDATION, Jan. 3, 1997, [http://www.nsf.gov/news/news\\_summ.jsp?cntn\\_id=101831](http://www.nsf.gov/news/news_summ.jsp?cntn_id=101831) ("An objective question 'How certain are you that the person you identified is the person you saw commit the crime?' elicits a similar response regardless of whether the eyewitness' memory is accurate or not."); Neil Brewer, et al., *The Confidence-Accuracy Relationship in Eyewitness Identification: The Effects of Reflection and Disconfirmation on Correlation and Calibration*, 8 J. EXPERIMENTAL PSYCHOL. APPLIED 44, 44–45 (2002) (stating, "The outcomes of empirical studies, review, and meta-analyses have converged on the conclusion that the confidence-accuracy relationship for eyewitness identification is weak, with average confidence-accuracy correlations generally estimated between little more than 0 and .29.").

129. PIK Crim.3d 52.20.

130. LOFTUS & DOYLE, *supra* note 29, at 6 (stating it is a common misconception that "[w]itnesses remember the details of violent events better than those of nonviolent ones").

131. *Id.*

132. *Id.* at 26–29.

1. Because There Is Little Correlation Between a Witness's Confidence and the Accuracy of the Witness's Testimony, Factor Six of the PIK 52.20 Should Be Removed

Factor six of PIK 52.20 instructs the jury to consider “[t]he degree of certainty demonstrated by the witness at the time of any identification of the accused.”<sup>133</sup> Judges generally believe there is a correlation between a witness's confidence and the accuracy of that witness's testimony,<sup>134</sup> so it is not surprising judges instruct juries to consider witness confidence as a factor. Research investigating judges' perspectives on the confidence-accuracy correlation revealed that sixty-eight percent of judges said they agreed with the statement that “[a]t trial, an eyewitness's confidence is a good predictor of his or her accuracy in identifying the defendant as the perpetrator of the crime.”<sup>135</sup> Another study showed about the same amount of jurors, sixty-two percent, believe there is a strong relationship between confidence and accuracy.<sup>136</sup> Experts, however, have a very different opinion—eyewitness confidence is not a good indicator of identification accuracy. Empirical evidence has convinced experts that there is no strong correlation between eyewitness accuracy and eyewitness confidence. In a recent study, seventy-three percent of eyewitness testimony researchers reported they would have been willing to testify under oath that confidence is not a good indicator of eyewitness identification accuracy.<sup>137</sup>

The National Science Foundation has begun to support expert testimony research, and its research has produced the same results—eyewitness confidence is not a good indicator of identification accuracy. Gary Wells conducted National Science Foundation funded research. He and his colleagues staged crimes in offices and stores and then asked witnesses, under varied conditions, to identify the perpetrators.<sup>138</sup> Wells found the question, “How certain are you that the person you identified is

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133. PIK Crim.3d. 52.20.

134. Wise & Safter, *supra* note 22, at 430–32.

135. *Id.*

136. Tanja Rapus Benton et al., *Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges, and Law Enforcement to Eyewitness Experts*, 20 APPLIED COGNITIVE PSYCHOL. 115, 120 (2006) (showing that only thirty-eight percent of jurors agree with experts that there is little confidence-accuracy correlation).

137. Brewer et al., *supra* note 128, at 44.

138. *False Identification: New Research Seeks to Inoculate Eyewitnesses Against Errors*, *supra* note 128.

the person you saw commit the crime?” often receives the same answer regardless of the accuracy of the eyewitness identification.<sup>139</sup>

In another study, Neil Brewer and his colleagues played a video of a credit card theft for 944 participants.<sup>140</sup> After attempting to identify the perpetrator in a photograph lineup, the participants answered a variety of questions to indicate how confident they were in their identification.<sup>141</sup> The study revealed, “the [c]onfidence-accuracy correlations were weak and did not differ across conditions.”<sup>142</sup>

Numerous empirical studies, reviews, and meta-analyses like these have been conducted, leading researchers to conclude confidence is not a good indicator of identification accuracy.<sup>143</sup> A variety of factors can skew eyewitness confidence, including the feedback a witness receives from law enforcement after making a lineup identification.<sup>144</sup> For example, researchers know that eyewitnesses’ confidence levels can be manipulated by telling witnesses they identified the correct suspect after a lineup.<sup>145</sup>

Kansas courts should remove factor six from PIK 52.20 because the lack of a confidence-accuracy correlation is well-documented. Factor six currently encourages juries to associate witness certainty with witness credibility and accuracy. The court should remove factor six from PIK 52.20 because research has repeatedly proven that confidence is not a good indicator of accuracy.

## 2. Expert Testimony Regarding Factor Two of PIK 52.20 Should Be Admissible Because Laypersons Do Not Correctly Understand the Impact of Stress on an Eyewitness Identification

Expert testimony should be admitted on factor two of PIK 52.20 because the impact of stress on eyewitness testimony is counterintuitive. Factor two instructs the jury to consider “[t]he emotional state of the witness at the time including that which might be caused by the use of a weapon or a threat of violence.”<sup>146</sup> This factor requires expert

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139. *Id.*

140. Brewer et al., *supra* note 128, at 47–48.

141. *Id.* at 47–48.

142. *Id.* at 44.

143. *Id.* at 44–45 (mentioning studies performed by Bothwell, Deffenbacher, & Brigham in 1987, Cutler, Penrod & Martens in 1987, and Sporer, Penrod, Read, & Cutler in 1995).

144. See *infra* Part III.A.3.c (discussing after-acquired experience and the feedback factor).

145. *False Identification: New Research Seeks to Inoculate Eyewitnesses Against Errors*, *supra* note 128.

146. PIK Crim.3d. 52.20.

explanation because the effects of stress on eyewitness identification are not only beyond a jury's knowledge; they are contrary to general opinion. Most jurors believe that extreme stress causes witnesses to pay more attention than usual, enabling them to have detailed memories and make more accurate identifications.<sup>147</sup> However, thirty years of independent studies and meta-analyses have revealed that "high levels of stress negatively impact" witnesses' memories of crime details and witnesses' ability to correctly identify the perpetrator.<sup>148</sup>

Although some conflicting research exists,<sup>149</sup> the studies and research that have accurately simulated real-life crime scenes demonstrate that high levels of stress adversely affect memory and identification accuracy. Some studies conducted in the mid-1980s showed that when witnesses are exposed to high levels of stress, their memory is more accurate than those who experience normal stress.<sup>150</sup> These studies were conducted mostly in laboratories where witnesses were shown pictures depicting gruesome or violent scenes.<sup>151</sup> The studies did not create any motivation for self-preservation, because the witnesses had nothing at stake; they were simply analyzing pictures.

Twenty-two studies in the past several years have imposed real-life stress on the eyewitnesses.<sup>152</sup> The studies either staged crimes or imposed stress by, for example, threatening the eyewitness.<sup>153</sup> According to a meta-analytic review of this research, the studies consistently revealed that "the adverse effect of heightened stress on eyewitness memory was statistically reliable."<sup>154</sup> Research that simulated crime scene stress on study participants demonstrates that high stress leads to less accurate identifications. Over 450 studies have been conducted analyzing different variables on eyewitness identifications,<sup>155</sup> and the general consensus is clear—high levels of stress adversely affect eyewitness identification accuracy.<sup>156</sup>

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147. LOFTUS & DOYLE, *supra* note 29, at 6 (stating a common misconception is that "[w]itnesses remember the details of violent events better than those of nonviolent events").

148. Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Testimony*, 28 LAW & HUM. BEHAV. 687, 687 (2004).

149. See *supra* notes 146–47 and accompanying text.

150. Deffenbacher et al., *supra* note 148, at 690 (mentioning studies performed by Burke, Heuer & Reisberg in 1992, Christianson in 1984, Christianson, Hoffman & Loftus in 1991, and Safer, Christianson, Autry, and Osterlund in 1998).

151. *Id.*

152. Tactics like staging crimes have been questioned for their ethics.

153. Deffenbacher et al., *supra* note 148, at 697.

154. *Id.*

155. *Id.* at 693.

156. *Id.* at 687.

It is unjust to instruct the jury to consider the witness's stress level, because juries interpret a high stress level as suggesting accuracy when it actually indicates inaccuracy. The average jury has only common knowledge, and common knowledge supports the erroneous conclusion that stressful situations heighten witnesses' ability to remember and identify. Science supports the opposite conclusion. Because the effects of stress on eyewitness memory and identification have proven to be counterintuitive, expert testimony regarding this factor should be admissible at trial.

3. Expert Testimony Should Be Admissible on the Issues of Own-Race Bias, Unconscious Transference, After-Acquired Experience, and the Feedback Factor, Because These Phenomena Are Outside the Realm of Common Knowledge

PIK 52.20 omits several important variables that a jury should consider when determining the accuracy of eyewitness identifications—own-race bias, unconscious transference, after-acquired experience, and the feedback factor. In *State v. Willis*,<sup>157</sup> the defendant petitioned the court to allow evidence on these four factors.<sup>158</sup> The court rejected the defendant's request, holding that the jury would not understand the phenomena if they were simply included in jury instructions; evidence like this would require expert testimony.<sup>159</sup> Because Kansas courts do not allow expert testimony regarding eyewitness identification, the court refused to present the jury with any scientific testimony about these factors.<sup>160</sup>

Years of research have demonstrated these phenomena are legitimate and can have powerful effects on eyewitness identification accuracy. Because these phenomena are scientific and outside the realm of common knowledge, a jury needs expert testimony to understand their effect on eyewitness identification accuracy. Therefore, the jury must be exposed to these factors in order to make sufficiently informed decisions.

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157. 731 P.2d 287 (1987).

158. *Id.* at 292.

159. *Id.*

160. *Id.*

a. Own-Race Bias

Psychologists are confident that own-race bias affects eyewitness identification accuracy.<sup>161</sup> The Malpass and Kravitz photograph study in the 1960s confirmed that witnesses identify individuals of the same race more accurately than they do individuals of different races.<sup>162</sup> The white subjects in their study from Howard University, for example, were two to three times more likely to make a false identification when trying to identify a black face as they were when trying to identify a white face.<sup>163</sup> John C. Brigham and his colleagues conducted real-life situational research by sending two participants, one black and one white, to a convenience store.<sup>164</sup> The two participants interacted with the store clerk for several minutes and performed memorable actions like paying for cigarettes completely with pennies.<sup>165</sup> At first, Brigham returned twenty-four hours later to ask the clerk to identify the subjects.<sup>166</sup> But the clerks were only able to correctly identify the participants 7.8% of the time, so Brigham began returning with a photographic lineup two hours after the participants left.<sup>167</sup> After controlling some of the variables, Brigham and his colleagues found that white clerks misidentified black participants 54.8% of the time, while white clerks misidentified white participants only 34.9% of the time.<sup>168</sup> Empirical evidence has convinced many state courts outside of Kansas that it is more difficult to identify members of a different race.<sup>169</sup>

It is unclear why own-race bias occurs. Research indicates that own-race bias is not due to racial prejudice or the ability of individual minds

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161. Saul M. Kassin, *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, 56 AM. PSYCHOL. 405, 411–12 (2001) (including tables containing the results of their research that showed that experts generally agree that cross-race bias affects eyewitness testimony).

162. Malpass & Kravitz, *supra* note 62, at 333.

163. LOFTUS & DOYLE, *supra* note 29, at 86 (citing Malpass & Kravitz, *supra* note 62, at 330–34).

164. Brigham et al., *supra* note 64, at 675–76.

165. *Id.*

166. *Id.* at 676.

167. *Id.*

168. *Id.* at 678.

169. See, e.g., State v. Cromedy, 727 A.2d 457, 467–68 (N.J. 1999) (“there is an impressive consistency in results showing that problems exist with cross-racial eyewitness identification”); People v. Palmer, 154 C.A.3d 79, 85–89 (1984); State v. Long, 721 P.2d 483, 495 (Utah 1986) (“given the . . . deep and generally unperceived flaws in [eyewitness testimony] to convict a defendant on such evidence without advising the jury of the factors that should be considered in evaluating it could well deny the defendant due process of law”).

to remember details.<sup>170</sup> Some researchers speculate people are more likely “to guess at the identity of a criminal in a cross-race identification than they are when a same-race identification takes place.”<sup>171</sup> Dr. Loftus, the leading expert on eyewitness identification and memory, supports the theory that the human mind processes images of faces within a race differently than faces of different races.<sup>172</sup> Other research indicates a possible correlation between the amount of interracial contact and the ability to identify faces of that race.<sup>173</sup> At this time, no hypothesis has proven conclusive.

Regardless of why own-race bias occurs, research has demonstrated that this phenomenon has the potential to dramatically affect the accuracy of an eyewitness identification. The jury should be informed about own-race bias when making a decision that involves the life and future of a defendant. If a jury is not exposed to the idea of, and science behind, own-race bias, it will not be able to accurately weigh the testimony it hears.

Expert testimony is necessary to properly educate and enable the jury to make an appropriate decision after weighing all of the facts and variables involved. The jury needs to be informed of own-race bias. This could be accomplished through jury instructions or expert testimony, but expert testimony is a more favorable option. A jury instruction is not a sufficient means to explain own-race bias; jury instructions are too broad and open-ended. Unless a jury knows the research behind own-race bias, it will not understand that own-race bias is a proven phenomenon. Without knowing it is a proven phenomenon, a jury will not understand how to apply a jury instruction to consider “race” to the case in question. Because this information is important, and a jury instruction is insufficient to educate the jury, expert testimony on own-race bias should be admissible.

#### b. Unconscious Transference

Unconscious transference is a subclass of the broader idea of transference seen in psychology. Psychologists often observe emotional transference when anger towards one person is passed onto another

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170. LOFTUS & DOYLE, *supra* note 29, at 87–88.

171. *Id.* at 88.

172. *Id.*

173. *But see* Frampton, *supra* note 59, at 438 n.29 (discussing a case that produced evidence that this hypothesis may not be correct).

unrelated and faultless person.<sup>174</sup> Unconscious transference affects the accuracy of eyewitness identification when witnesses transfer certain details from one memory into another memory.<sup>175</sup> This occurs when specific details of the memory are weak or fuzzy.<sup>176</sup> Gaps in the memory may occur if, in the acquisition stage, it is difficult for the eyewitness to perceive details. This is especially true during crimes that induce high stress. The high stress levels cause victims to narrow their focus on, for example, a weapon, opening a safe, or planning a route of escape.<sup>177</sup>

A long retention phase may also cause gaps in memory. During a long retention stage, a memory can “decay,” leaving opportunity for familiar details to replace the original details.<sup>178</sup> Unconscious transference of memory applies only to situations where the details filling in the gaps occur in a similar context or event.<sup>179</sup> For instance, unconscious transference can occur if the accused and the real perpetrator look somewhat alike, and the witness has seen both of them come through her checkout line.

Although some information regarding unconscious transference can probably be elicited through cross-examining a witness, the jury will not have a context in which to analyze any cross-examination unless expert testimony is admitted. The cross-examining attorney may ask about past events,<sup>180</sup> and the attorney may even be able to imply that the witness is confusing two people who look familiar. However, most jury members do not understand how gaps in memory are filled with details from other memories. In the face of an eyewitness identification, cross-examination attempting to elicit evidence of unconscious transference, or implying that unconscious transference might have occurred, will not be very persuasive. Therefore, a jury needs to understand the basic theory of unconscious transference in order to accurately interpret the cross-examination and evidence the defense presents.

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174. Gilligan et al., *supra* note 27, at 115–16.

175. *Id.*

176. *Id.* at 112.

177. *Id.* at 113.

178. *Id.* at 112.

179. *Id.* at 114.

180. In many sex cases, the cross-examining attorney cannot ask about past sexual experiences of the victim because victims are statutorily protected. *See, e.g., State v. Jackson*, 177 P.3d 419, 423 (Kan. Ct. App. 2008) (limiting admissibility of evidence regarding victim’s prior sexual experiences).

c. After-Acquired Experience and the Feedback Factor

i. After-Acquired Experiences

After-acquired experiences occur in many ways. For instance, if an eyewitness to an accident later hears on television that the driver was drunk, she may superimpose visions of reckless driving on her memory, even though she did not perceive that at the scene.<sup>181</sup> In one study of after-acquired experiences, subjects viewed a video in which there was no barn. Half of the subjects were asked, “How fast was the sports car going when it passed the barn?” More than seventeen percent of participants later remembered a barn in the video.<sup>182</sup> Studies like this reveal that memory is malleable and vulnerable to certain stimuli during the retention stage.

ii. Feedback Factor

Many after-acquired experiences are difficult to control. It is unrealistic to assume a witness will go into isolation after an event and not watch television or discuss the event with other witnesses. However, the feedback that comes from communications with law enforcement is easier to control and, because it affects witness memory, it should be controlled.

Studies conducted in 1998 and 1999 by Wells and Bradfield revealed that post-identification feedback not only increases eyewitness's confidence of their accuracy, but also affects how the witnesses remember the actual crime or event.<sup>183</sup> Study subjects watched a security camera video of a crime and attempted to identify the perpetrator in a photograph lineup.<sup>184</sup> The real perpetrator's photograph was not in the lineup, so all the identifications were mistaken.<sup>185</sup> After each witness made an identification, the administering officer gave three kinds of feedback—“You got him,” “Sorry, it was another guy,” or no feedback at all.<sup>186</sup> When the eyewitnesses were later asked about their opportunity to observe the incident, those who received positive feedback recalled having a better view, having paid more attention, remembering the scene

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181. LOFTUS & DOYLE, *supra* note 29, at 54.

182. *Id.*

183. Neuschatz et al., *supra* note 28, at 232.

184. *Id.*

185. *Id.*

186. *Id.*

very well, and having made their identifications easily.<sup>187</sup> The eyewitnesses who received disconfirming feedback reported having had a worse opportunity to view the crime scene, having paid less attention, and having had a more difficult time making the identification.<sup>188</sup> Wells and Bradfield hypothesize that because eyewitnesses do not think about how good their view of the perpetrator is at the time of the event, they rely on post-event factors to determine this.<sup>189</sup> Therefore, if good feedback is given after the lineup identification, witnesses will testify at trial that they are very confident the defendant is the perpetrator.

iii. Expert Testimony Is Necessary Because Safeguards Cannot Completely Protect Witnesses from After-Acquired Experiences and Feedback

Post-identification experiences, including feedback, affect witnesses' memories and confidence levels, and juries need expert testimony to understand the mechanics of memory. Expert testimony on the feedback factor should only be admitted if there is reason to believe the eyewitness received feedback during or after the identification.

Some scholars and individuals in law enforcement argue against the admission of expert testimony on this issue, admitting the effects that post-event information has on memory, but calling for changes in the law enforcement process instead of admission of expert testimony.<sup>190</sup> Although after-acquired experiences are system variables and can be somewhat controlled, the system is not perfectly controlled, nor will it ever be. Witnesses will continue to discuss cases among themselves before litigation begins. They will watch television and listen to radio reports, exposing themselves to after-acquired experiences. Safeguards should be implemented to decrease feedback from law enforcement during lineups and identifications. However, the presence of safeguards does not ensure that law enforcement personnel will always abide by those safeguards. Law enforcement, scholars, and members of the judiciary must take steps to protect witnesses from post-event feedback. Until sufficient safeguards are implemented and, afterwards, when the safeguards fail to protect witness memory, witnesses will continue to

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187. *Id.*

188. *Id.*

189. *Id.*

190. Deborah Bartolomey, *Cross-Racial Identification Testimony and What Not to Do About It: A Comment on the Cross-Racial Jury Charge and Cross-Racial Expert Identification Testimony*, 7 PSYCHOL. PUB. POL'Y & L. 247, 247 (2001).

have after-acquired experiences and receive feedback. When circumstances indicate an eyewitness has received after-acquired experiences like the feedback factor, the court should admit expert testimony to educate the jury on the scientifically demonstrated effects of these phenomena.

*B. Cross-Examination Does Not Sufficiently Guard Against Inaccurate Eyewitness Identification, Because Juries Need Expert Testimony to Understand How Material Phenomena Affect Eyewitness Testimony*

1. Expert Testimony Does Not Invade the Province of the Jury

One of the most common reasons judges give for excluding expert testimony on the potential inaccuracy of eyewitness identification is that such expert testimony invades the province of the jury.<sup>191</sup> Judges and prosecutors often claim that expert testimony regarding the inaccuracy of eyewitness identification does not assist the jury because it is common sense that a witness's testimony could be inaccurate.<sup>192</sup> However, decades of research indicates that common knowledge is limited regarding memory malleability and its potential inaccuracy.<sup>193</sup> Studies reveal that there is a vast difference between what jurors believe about eyewitness memory and what experts have concluded based on research.<sup>194</sup> Surveys and studies demonstrate little correlation (less than fifty percent) between the opinions of lay persons and the opinions of experts regarding variables that affect the accuracy of eyewitness testimony.<sup>195</sup> In a study conducted by Professor Tanja Rapus Benton of the University of Tennessee, jurors disagreed with experts on eighty-seven percent of issues regarding factors that affect eyewitness accuracy.<sup>196</sup> Professor Rapus Benton surveyed 205 participants,

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191. See Wise & Safter, *supra* note 22, at 439 (explaining that judges believe "the subject matter is already within the knowledge of the jurors"); see also *State v. Coley*, 32 S.W.3d 831, 833–34 (Tenn. 2000) ("Eyewitness testimony has no scientific or technical underpinnings which would be outside the common understanding of the jury; therefore, expert testimony is not necessary to help jurors 'understand' the eyewitness's testimony.") (overruled by *State v. Copeland*, 226 S.W.3d 287, 307 (Tenn. 2007)).

192. Benton et al., *supra* note 136, at 116.

193. *Id.*

194. See *id.* (mentioning studies conducted by Brigham & Wolfskeil in 1983, Deffenbacher & Loftus in 1982, Durham & Dane in 1999, Loftus in 1979, McConkey & Roche in 1989, Noon & Hollin in 1987, and Rahaim & Brodsky and Yarmey & Jones in 1983).

195. Wells & Olson, *supra* note 18, at 284.

196. Benton et al., *supra* note 136, at 115.

including jurors, judges, and law enforcement.<sup>197</sup> He compared their answers to answers provided by experts.<sup>198</sup> The survey indicated that ninety percent of experts believed that own-race bias affected eyewitness identification, while only forty-seven percent of jurors thought so.<sup>199</sup> Eighty-seven percent of experts agreed there is no strong correlation between accuracy and confidence; only thirty-eight percent of jurors thought so.<sup>200</sup> Eighty-one percent of experts reported that unconscious transference affects eyewitness memory and identification, yet only thirty percent of jurors thought so.<sup>201</sup>

In past years, Kansas courts have excluded expert testimony on eyewitness identification on the basis that such testimony invades the province of the jury. Although this argument was presented in early Kansas cases<sup>202</sup> and throughout the United States,<sup>203</sup> *Willis*, a more recent Kansas Supreme Court case, does not support this reasoning. In *Willis*, the court examined issues like the feedback factor, own-race bias, unconscious transference, and after-acquired experience.<sup>204</sup> It concluded that testimony on these factors would not invade the province of the jury.<sup>205</sup> In fact, the court refused to give a jury instruction on any of the material phenomena because it concluded they were outside the province of the jury and would have required expert explanation.<sup>206</sup> Without expert testimony, the court said, the jury would not understand, or know how to apply, the factors.<sup>207</sup> Since *Willis*, science on the feedback factor, own-race bias, unconscious transference, and after-acquired experience has developed and continues to indicate that these factors influence memory accuracy. As *Willis* explained, these issues are too complicated for the jury alone to make sense of them. The phenomena are outside common knowledge and the province of the jury. Expert testimony does not invade the province of the jury and should be admissible in the interest of justice.

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197. *Id.* at 118.

198. *Id.*

199. *Id.* at 120.

200. *Id.*

201. *Id.*

202. *See, e.g.*, *State v. Reed*, 601 P.2d 1125, 1128 (Kan. 1979) (discussing reasons to exclude expert testimony on eyewitness identification).

203. *See, e.g.*, *State v. Coley*, 32 S.W.3d 831, 833–34 (Tenn. 2000) (discussing reasons why expert testimony on eyewitness identification should be excluded) (overruled by *State v. Copeland*, 226 S.W.3d 287, 307 (Tenn. 2007)).

204. *State v. Willis*, 731 P.2d 287 (Kan. 1987).

205. *Id.* at 292.

206. *Id.*

207. *Id.*

2. Because Expert Testimony Regarding Eyewitness Identification Does Not Invade the Province of the Jury, Cross-Examination Is Not Sufficient to Expose Weaknesses in Eyewitness Testimony

A jury will not understand the information elicited in cross-examination without a framework within which to process that information. Laypersons would not understand the meaning of own-race bias or unconscious transference without expert testimony, as *Willis* explained. If the jury does not understand the phenomena these terms represent, it will not understand how the information elicited from cross-examination affects the accuracy of eyewitness testimony. For example, a cross-examining attorney may ask an eyewitness, “But you are Caucasian, and the defendant is African-American, correct?” Without understanding own-race bias, the jury will not naturally associate racial differences with a weakened ability to make an accurate identification. The attorney may even ask a follow-up question: “Isn’t it harder for you to distinguish between the faces of African-Americans than it is for you to distinguish between the faces of Caucasians like yourself?” Regardless of the witness’s answer, the jury does not know the answer to this question—the jury has no framework with which to view the cross-examination. The jury does not know whether it is generally more difficult for individuals of one race to identify individuals of another race. Expert testimony gives a jury a framework through which it can sort and understand information elicited in cross-examination. Without such a framework, cross-examination cannot demonstrate weaknesses in eyewitness identification because the cross-examining attorney will be attempting to demonstrate the presence of a phenomena the jury does not even know exists.

Logically, the idea that cross-examination is sufficient to reveal inaccurate identifications must follow the assumption that the jury already has everything it needs to judge the accuracy and credibility of a witness. So, if expert testimony regarding eyewitness identification invades the province of the jury—if it is all common sense—then cross-examination should be able to present the jury with all of the information required to make an educated decision. However, according to *Willis*, juries do not naturally know about factors like own-race bias, unconscious transference, and after-acquired experience; these factors require expert explanation.<sup>208</sup> Therefore, these factors do not interfere with the province of the jury, because they are not common sense.

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208. *Id.*

Research indicates that cross-examination may not be as effective as some courts believe, and because the material phenomena are generally unknown or misunderstood, “ordinary cross-examination will never elicit facts from which the jury can infer the impairment.”<sup>209</sup>

Furthermore, research has demonstrated that cross-examination, in the face of a confident eyewitness, is not very effective. A National Science Foundation study revealed that if the eyewitness believes what she is saying, cross-examination often fails to present an accurate recollection of the event.<sup>210</sup> Because eyewitness identifications are such powerful pieces of evidence, cross-examination will often seem like grasping for straws in a defensive manner. Offering expert testimony, on the other hand, would enable a defendant to present information in an offensive manner.

C. *Expert Testimony Regarding the Accuracy of Eyewitness Identification Should Be Admitted Because It Is Based on Science That Is Generally Accepted in the Community*

The *Frye* test establishes that an expert can only testify to science that is generally accepted in the scientific community in which it was conducted.<sup>211</sup> Although the federal courts have rejected *Frye* because it disallows potentially important novel science,<sup>212</sup> Kansas continues to apply the *Frye* test.<sup>213</sup> Therefore, in Kansas, experts can only testify to science that meets the “general acceptance” test.<sup>214</sup> Some members of the legal community accuse eyewitness research of being junk science. Some critique the studies that create a controlled environment and isolate variables in order to analyze them.<sup>215</sup> These critics argue that isolated variables in a controlled environment cannot parallel real-life circumstances, and thus the results of these studies should not be applied to real-life scenarios.<sup>216</sup> Others involved in the legal community criticize field studies and crime simulations, saying this research lacks a

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209. Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 953 (1984).

210. *False Identification: New Research Seeks to Inoculate Eyewitnesses Against Errors*, *supra* note 128.

211. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

212. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 579–81 (1993).

213. *See, e.g., State v. Shively*, 999 P.2d 952 (Kan. 2000) (“[T]he party seeking to admit scientific evidence has the burden of satisfying the *Frye* test.”).

214. *Id.* at 955.

215. Sharps et al., *supra* note 40, at 21.

216. *Id.* at 22.

controlled environment in which some variables can be held constant while others are studied.<sup>217</sup>

Matthew J. Sharps, a psychologist, was a critic of eyewitness identification research for all of the reasons explained above. He and his colleagues set out to conduct a study with research that would be both contextually valid and controlled. They studied 149 women and 49 men.<sup>218</sup> They exposed these research subjects to a controlled crime scene for ten to twenty minutes.<sup>219</sup> Sharps and his colleagues then asked the subjects a series of questions about the “criminal” and the crime scene.<sup>220</sup> They then asked the subjects to identify the “criminal” from a lineup.<sup>221</sup> Seventy percent of the subjects were able to accurately describe the “criminal,” but only a shocking ten percent were able to correctly identify him in a lineup.<sup>222</sup>

Sharp’s study is an important, recent study that reflects the possible inaccuracy of eyewitness identification, but it is not the only study that should be considered. The hundreds of studies performed over the past century about eyewitness identification provide an in-depth look at the issue of eyewitness identification accuracy. They are significant and persuasive, and have even gained acceptance, endorsement, and funding from the National Science Foundation.<sup>223</sup> The cumulative results of these studies demonstrate that both estimator and system variables influence memory accuracy. These results are generally accepted among researchers and the psychology community at large. The science meets the *Frye* standards and indicates expert testimony regarding eyewitness identification should be admissible in certain cases. A jury still need not believe an expert or believe in the science the expert offers, but that is an issue of credibility, not admissibility. Because eyewitness identification research is commonly accepted throughout the psychology field in which it is performed, it meets the *Frye* test. Therefore, courts should admit expert testimony regarding eyewitness identification reliability when the expert testimony is relevant to a particular case.

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217. *Id.*

218. *Id.* at 23.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 24–25.

223. Rutledge, *supra* note 26, at 221.

#### D. Standards for Expert Testimony

##### 1. Experts Should Be Allowed to Testify, in a General Manner, to Factors That Are Relevant to the Case

Because experts may not offer opinions about the reliability of a specific witness,<sup>224</sup> courts should only permit expert witnesses to testify generally about scientific research, not to opine about whether a specific identification is accurate. In order to meet relevancy requirements,<sup>225</sup> Kansas courts should only admit expert testimony on factors pertinent to a specific case. For example, if the crime was non-violent and the witness was not emotionally involved, the expert should not be allowed to testify on the effects of high level stress on the reliability of eyewitness identification.

Because Kansas statutes require that all evidence be relevant,<sup>226</sup> but do not allow experts to opine about the credibility of witnesses, experts should be allowed to educate the jury by discussing the results of research on the accuracy of eyewitness testimony. A recent Kansas case reflects this balance between generality and relevance in expert testimony.<sup>227</sup>

In *State v. Criqui*, the court held that an expert can testify generally on relevant topics.<sup>228</sup> In *Criqui*, the defendant wanted to admit expert testimony that included: 1) The proper and improper techniques for interviewing a child involved in a sexual abuse case; 2) How certain procedures and techniques could adversely affect the reliability and accuracy of the witness's statements; 3) The problems that the expert witness perceived with the interviewing techniques that were used in the case; 4) How those problems affected the reliability and accuracy of the witness's statements; and 5) That the witness's statements needed to be viewed with caution.<sup>229</sup>

The trial court excluded all of the testimony.<sup>230</sup> The Kansas Court of Appeals found the trial court did not err in excluding the following: 1)

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224. *State v. Humphrey*, 36 P.3d 844, 851 (Kan. Ct. App. 2001).

225. Section 60-456(b)(1) of the Kansas Statutes requires an expert opinion to be "based on facts or data perceived by or personally made known to the witness at the hearing."

226. See KAN. STAT. ANN. § 60-445 ("[T]he judge may . . . exclude evidence if . . . its probative value is significantly outweighed by the risk that [it will] unfairly or harmfully surprise [the other] party.").

227. *State v. Criqui*, No. 88388, 2003 WL 22119226, at \*4 (Kan. Ct. App. Sept. 12, 2003).

228. *Id.*

229. *Criqui*, 2003 WL 22119226, at \*4.

230. *Id.* at \*5.

problems the expert found with the interviewing techniques in the case; and 2) how the interview techniques directly affected the reliability of the witness's testimony.<sup>231</sup> However, the court of appeals found the trial court erred in excluding expert testimony on the general proper and improper interviewing techniques and explained how, generally, certain factors could adversely affect the reliability and accuracy of the testimony.<sup>232</sup>

Similarly, expert testimony about the general factors surrounding an eyewitness identification should be admissible. However, the court should not permit an expert to speak directly to how factors in the case at hand affected or might have affected a specific witness's testimony. The court should permit an expert to explain the phenomena of own-race bias, unconscious transference, and the feedback factor, and how each phenomenon can affect eyewitness identification accuracy. In keeping with the relevance requirements, for instance, if the witness and suspect are of the same race, no testimony about own-race bias should be admitted; furthermore, unless there is evidence of unconscious transference, no testimony about unconscious transference should be admitted.

2. To Protect the System from Abuse, Courts Should Require Defendants to Produce Credible Evidence of a Phenomenon in the Case Before an Expert Can Testify

Although several hundred people have been exonerated in recent years, law enforcement and prosecutors have obtained thousands of presumably rightful convictions. Many of those convictions undoubtedly involved accurate eyewitness identifications. Even the studies discussed in this Comment include a percentage of accurate eyewitness identifications. This critique of eyewitness identification accuracy does not ignore the diligent work by law enforcement to utilize accurate eyewitness testimony in rightfully convicting guilty defendants. Once Kansas courts afford the opportunity to defendants to present expert testimony, the system will be vulnerable to abuse. Therefore, safeguards must be implemented to protect the law enforcement process.

Because of the danger of abuse, courts should require defendants to meet a high threshold of relevancy before allowing expert testimony on a specific phenomenon. For instance, the defendant must be able to

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231. *Id.*

232. *Id.*

produce strong evidence of a witness's after-acquired experience or unconscious transference before an expert would be allowed to testify. Mere speculation, without support, that a phenomenon occurred and affected eyewitness testimony should not be sufficient. The exact showing a defendant must make would serve as ample material for a separate comment. This Comment simply states that the standard should be reasonably high to protect the system from abuse. It should also be acknowledged that requiring the defendant to meet a reasonably high standard will require extra time and has the potential to extend the length of trials. However, in the ever-enduring struggle to protect the innocent and convict the guilty, a consideration of time should not stand as an obstacle to the pursuit of justice.

#### IV. CONCLUSION

Steve Titus, a young man in the prime of his life, was robbed of his reputation, fiancée, freedom, and innocence when he was unjustly condemned to prison for a first-degree rape he did not commit. He served another man's sentence. In May 1981, after the true perpetrator of the crime was found, all charges were dropped against Steve Titus, and he was released to regain his life.<sup>233</sup> However, he never regained his life—his reputation was forever tainted, his fiancée was gone, and his innocence was robbed throughout his time in prison.<sup>234</sup> Steve Titus went on to sue the state for his wrongful conviction, but he never saw justice.<sup>235</sup> At thirty-five, eleven days before he was to meet the Port of Seattle in court, Steve Titus died of a heart attack.<sup>236</sup>

Sadly, Steve Titus is joined by hundreds of other innocent people undeservedly condemned to prison for crimes they did not commit. "Compared to how many people are rightly convicted," someone told me, "it really is a small number of people who are wrongly convicted." But justice in the United States demands that "it is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned."<sup>237</sup>

PIK 52.20 is an incomplete response to the problem of inaccurate eyewitness testimony. Factor six, regarding witness confidence, should be removed, because science has shown that witness confidence is a poor

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233. LOFTUS & KETCHAM, *supra* note 1, at 47–51.

234. *Id.* at 51.

235. *Id.* at 59.

236. *Id.* at 60.

237. *Furman v. Georgia*, 408 U.S. 238, 367 n.158 (1972) (quoting Justice Douglas).

indicator of accuracy. Expert testimony regarding how heightened stress has a counterintuitive affect on eyewitness memory should be admissible. Expert testimony should be admissible in Kansas on the well-documented factors of own-race bias, unconscious transference, after-acquired experience, and the feedback factor because these phenomena carry great potential to manipulate eyewitness identification accuracy. The court should only admit expert testimony on these factors when there is evidence they are relevant to a particular case. Furthermore, the court should permit experts to testify generally to how the phenomena can affect the accuracy of eyewitness identifications; the court should not allow an expert to opine on a specific witness's credibility. This can be accomplished by statute or by the Kansas Supreme Court's acknowledgment of science and overturning of precedent. The mechanics of how this is accomplished are not important, but a change in Kansas law is necessary.