No. 15-50

IN THE

Supreme Court of the United States

DARRILL M. HENRY,

Petitioner,

—v.—

STATE OF LOUISIANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE LOUISIANA COURT OF APPEAL, FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

SHERRY WATTERS
Counsel of Record
LA. APPELLATE PROJECT
P.O. Box 58769
New Orleans, Louisiana 70158
(504) 723-0284
sherrywatters@yahoo.com

JAMES L. BROCHIN
JAREN JANGHORBANI
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

BARRY C. SCHECK
KAREN NEWIRTH
INNOCENCE PROJECT, INC.
40 Worth Street, Suite 701
New York, New York 10013
(212) 364-5340

Counsel for Petitioner

October 8, 2015

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IN THE SUPREME COURT
OF THE UNITED STATES

No. 15-50

DARRILL M. HENRY,
Petitioner,

—vs.—

STATE OF LOUISIANA,
Respondent,

On Petition for Writ of Certiorari
to the Louisiana Court of Appeal, Fourth Circuit

REPLY BRIEF FOR THE PETITIONER

Faced with a constitutional challenge to a rule of law it has long championed, Respondent does an about face and argues for the first time in this case that Louisiana actually does not have a per se ban on eyewitness expert testimony. This argument is impossible to square with the numerous times Respondent has taken precisely the opposite position, ignores a long line of Louisiana precedent dating back to 1982, and amounts to an effective concession that this ban does not pass constitutional muster.

Respondent's other arguments fall similarly short of the mark. Although Respondent argues that Petitioner failed to preserve his claims that Louisiana's per se ban violated his Sixth and Fourteenth Amendment rights, Petitioner, in fact, made these claims before the Louisiana courts on at least four separate occasions.

Its argument that Petitioner's expert "might still have been" excluded in one of the overwhelming majority of jurisdictions without a per se ban misses the point. Although courts that follow the majority rule may or may not admit eyewitness expert testimony in any given case, the rule in Louisiana means that trial courts can *never* allow the admission of such testimony, regardless of how helpful, reliable, or relevant that evidence may be.

Accordingly, the court should grant this petition to resolve this split among the nation's courts over this issue.[1]

ARGUMENT

I. Louisiana Courts Impose a Per Se Ban on the Admission of Eyewitness Expert Testimony

Respondent argues that Louisiana does not, in fact, impose a per se ban on the admission of eyewitness expert testimony. (Resp. Br. 19–23.)

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[1] Citations to "Pet. Br. __" refer to pages in Petitioner's Petition for Certiorari and "Pet. App. __" to pages of the appendix to that petition, filed in this Court on July 9, 2015; "Supp. App. __" to pages of the supplemental appendix filed herewith; "Resp. Br. __" to pages of Respondent's Brief in Opposition and "Resp. App. __" to Respondent's Appendix, filed in this Court on September 24, 2015.

This claim is simply wrong, *as Respondent itself has argued previously*. The very office that now claims otherwise has consistently maintained that there is a per se ban on expert testimony in Louisiana. Indeed, in this very case, Respondent reiterated its long-held position on eyewitness experts before the trial court and the Court of Appeal: "[I]t is undisputed that . . . expert testimony on eyewitness identification has been uniformly barred . . . on the occasions the issue has been raised." (Supp. App. 2a–3a.) Most recently in *State* v. *Lambert*, Respondent, citing the Louisiana Supreme Court's denial of *certiorari* in *this* case, argued: "'Until the Louisiana legislature enacts legislation that overrules *Stucke* and *Young*, expert testimony on eye witness identification is not admissible . . . .'" (Supp. App. 14a (quoting *State* v. *Henry*, 164 So.3d 831 (2015) (Clark, J., concurring)).)

Respondent's arguments have proven successful. Each time the issue of eyewitness expert testimony has been raised, such testimony has been "uniformly barred," or, in the rare instances where such testimony was permitted, it was later excluded by the appellate courts. *State* v. *Young*, 35 So.3d 1042, 1047, 1050 (La. 2010) (citing *State* v. *Stucke*, 419 So.2d 939 (La. 1982)).[2] *See State* v. *Coleman*, 486 So.2d 995, 1000 (La. 1986); *State* v. *Gurley*, 565 So.2d 1055, 1057–58 (La. 1990); *State* v. *Higgins*, 898 So.2d 1219, 1239–40 (La. 2005). And, as Respondent acknowledged in *State* v. *Lee*,

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[2] The only case in which eyewitness expert testimony was admitted and not rejected on appeal was *State* v. *Chapman*, 436 So.2d 451 (La. 1983). However, the Louisiana Supreme Court in *Chapman* was not asked to review the decision to permit such testimony, and the trial court allowed the expert testimony *prior* to *Stucke*. *Id.* at 451, 453.

"If any doubt previously existed regarding the [in]admissibility of expert testimony in the field of eyewitness identifications, that doubt was surely eviscerated by *Young*." (Supp. App. 9a.) Respondent's new argument to the contrary does not change the law.

The recent denials of certiorari by the Louisiana Supreme Court in this case and in *State* v. *Lee* reaffirm the categorical exclusion of this type of evidence.[3] *Henry*, 164 So.3d at 831 ("Expert testimony regarding eyewitness identification is inadmissible . . . .") (Clark, J., concurring); *Lee*, 169 So.3d 350, 350–51 (La. 2015) (same) (Clark, J., concurring and Crichton, J., concurring).[4] It is therefore no surprise that Respondent cites no post-*Young* cases in which an eyewitness expert was admitted and not later rejected by the appellate courts. There are none.[5]

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[3] Respondent's focus on the Court of Appeal opinion in *Lee* is misleading. (Resp. Br. 22–23.) The majority in *Lee* only "assume[d], *arguendo*, there was no *per se* bar to the admissibility of such eyewitness identification expert testimony." *Lee*, No. 2014-K-1335, at *5 (La. App. 4 Cir. Mar. 24, 2015) (unpub.). Indeed, Judge Landrieu in her dissent acknowledged that the "[t]he majority holds that . . . expert testimony on the subject of eyewitness identifications . . . is barred by *State* v. *Young*." *Id.* at *6.

[4] Respondent's suggestion that only Justices Crichton and Clark have explicitly understood *Young* as establishing a bright-line rule of inadmissibility is belied by *Young* itself. (Resp. Br. 23.) Justice Guidry, writing for the *majority* held: "[W]e decline to overrule our decision in *Stucke* barring the admissibility of eyewitness [expert] identification testimony." 35 So.3d at 1050. Justice Johnson also acknowledged in concurrence that this is the majority view: "I disagree with the *majority's* finding that [*Stucke*] serves as a complete bar . . . ." *Id.* at 1051 (emphasis added).

[5] Courts outside Louisiana, treatises, and academic literature have recognized Louisiana's categorical ban. *E.g.*,

II. Petitioner Properly Preserved His Constitutional Arguments

Respondent asserts that Petitioner did not properly preserve his Sixth and Fourteenth Amendment claims in Louisiana state court. (Resp. Br. 24–25.) Not so.

Petitioner asserted his Sixth and Fourteenth Amendment claims on no fewer than four occasions. In the trial court, Petitioner argued that "[f]ailure to allow this testimony will deny [him] due process, the right to present a defense, his right of confrontation and a fair trial under the Louisiana and United States constitutions." (Resp. App. 11–12.) He again raised these constitutional rights during the hearing on his motion for a new trial. (Pet. App. 188a.) Petitioner also articulated these arguments in his brief to the Louisiana Court of Appeal: "[T]he Constitution guarantees . . . defendants a 'meaningful opportunity to present a complete defense,' including the right to confront witnesses and engage in cross examination to test Respondent's evidence." (Supp. App. 19a (citing the Fifth, Sixth and Fourteenth Amendments; *Crane* v. *Kentucky*, 476 U.S. 683 (1986); *California* v. *Trombetta*, 467 U.S. 479 (1984); *In re Oliver*, 333 U.S. 257 (1948); *Chambers* v. *Mississippi*, 410 U.S. 284 (1973)).) Finally, in his application for certiorari to the Louisiana Supreme Court, Petitioner argued that

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State v. *Carr*, 331 P.3d 544, 689 (Kan. 2014); *Commonwealth* v. *Walker*, 92 A.3d 766, 775 (Pa. 2014); Bobby Marzine Harges & Russell L. Jones, La. Prac. Evid. Art. 702, Cmt. (2015); 19 La. Civ. L. Treatise, Evid. & Proof § 11.5 n.2 (2d ed. 2015); 1 La. Civ. L. Treatise, Civ. Proc. § 11:7 n.109 (2d ed. 2014); Matthew S. Foster, *I'll Believe It When You See It*, 60 Loy. L. Rev. 857, 905 (2014).

"[t]he denial of the experts' testimony violated [his] right to confront Respondent's case and to present a defense." (Appl. for Writ of Cert. with Mem. in Supp. 9 & n.10 (citing the Sixth and Fourteenth Amendments and decisions by this Court interpreting those provisions).)

Respondent cites *Howell* v. *Mississippi*, 543 U.S. 440 (2005), to bolster its argument that Petitioner did not preserve his Sixth and Fourteenth Amendment claims. In *Howell*, this Court explained that a party must adequately articulate his claim and cite "the federal source of law on which he relies or a case deciding such a claim on federal grounds." *Id.* at 444 (internal citation omitted). Unlike the petitioner in *Howell*, Petitioner did just that.

Indeed, Petitioner more plainly preserved his claims than the petitioner in *Taylor* v. *Illinois*, 484 U.S. 400 (1988), whom the Court held had successfully preserved his claim. In *Taylor*, the petitioner articulated for the first time in a petition for rehearing in an appellate court that his claim was based on the Compulsory Process Clause. *Id.* at 406 n.9. Even then, instead of citing directly to this Court's decisions, the petitioner cited a state appellate decision that quoted two of this Court's decisions. *Id.* This Court concluded that the petitioner's "reliance on the Sixth Amendment was clear" and held that the constitutional question was sufficiently preserved. *Id.*; *see also Lilly* v. *Virginia*, 527 U.S. 116, 123 (1999). There can be no doubt that, under this Court's precedents, Petitioner's claims were sufficiently preserved, because he invoked his constitutional rights at every stage of the process.

III. Courts Across the Country Have Recognized the Importance of Eyewitness Expert Testimony

In an attempt to minimize the severity of its per se rule, Respondent weakly asserts that the expert testimony at issue here "might still have been excluded" in other states. (Resp. Br. 25–26.) But that is not the issue. The relevant issue is that Louisiana has established an unconstitutional rule that excludes any eyewitness expert testimony, no matter how helpful, reliable, or relevant. Indeed, in *Young*, the trial court conducted a hearing to consider whether to admit the proffered eyewitness expert testimony, and concluded that it *was* relevant, reliable, and helpful to the jury. The Louisiana Supreme Court nevertheless reversed, holding that the testimony should have been excluded. *Young*, 35 So.3d at 1045–46, 50.

Respondent focuses its attack on Petitioner's expert on the issue of clothing bias, arguing that this factor was not well accepted as a subject for expert testimony at the time of Petitioner's trial. Not only is this assertion incorrect, but Respondent ignores other topics on which Petitioner proffered testimony.

Respondent suggests that other states would exclude testimony on clothing bias because it is "common knowledge that one may mistake a person for someone else who is similarly dressed." (Resp. Br. 26 (internal citation omitted).) The phenomenon of clothing bias is not so simple. Clothing can act as a cue that alters a witness's memory of events, and this effect can be significant. *See* R.C.L. Lindsay et al., *Do the Clothes Make the Man?: An Exploration of the Effect of Lineup Attire*

on Eyewitness Identification Accuracy, 19 Can. J. Behav. Sci. 463, 471 (1987) (finding that, if the "suspect was the only person in the lineup wearing clothing similar to that of the criminal, the rate of false identifications was substantially increased"). For this reason, courts have recognized that experts can aid jurors in understanding clothing bias. *See, e.g.*, *In re L.C.*, 92 A.3d 290, 294–96, 300–01 (D.C. 2014) (trial court erred in excluding expert testimony on clothing bias and by "summarily concluding that the proffered expert testimony was not beyond the ken of the average layperson"); *see also State* v. *Henderson*, 27 A.3d 872, 903 (N.J. 2011).[6]

Additionally, Petitioner's expert would have testified about other law enforcement practices, known as system variables, which can render eyewitness testimony unreliable. *See, e.g.*, *Henderson*, 27 A.3d at 896–903 (recognizing negative impact of "system variables" on eyewitness testimony); *State* v. *Lawson*, 291 P.3d 674, 705–11 (Or. 2012); *cf. Commonwealth* v. *Christie*, 98 S.W.3d 485, 490–91 (Ky. 2002) (reversing conviction where trial court excluded expert on impact of suggestive identification procedures). In particular, Petitioner's expert would have testified about the suggestiveness of the identification procedures and relevant system variables, including the need for a "double-blind" identification procedure[7] and the "mugshot

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[6] Ms. Davis, one of the eyewitnesses in Petitioner's case, acknowledged that she made her choice based on the clothing of the men in the array. (R-1806.)

[7] A double-blind procedure is one in which the administrator of the photo array is unaware of the identity of the suspect or the suspect's position in the photo array.

commitment effect."[8] (*See* Resp. App. 9–11; Pet. App. 70a; Pet. App. 188a–89a; Supp. App. 19a.)

This is precisely the kind of testimony courts around the country regularly permit. *See, e.g.*, *Commonwealth* v. *Silva-Santiago*, 906 N.E.2d 299, 307–08 (Mass. 2009) (admitting expert testimony on double-blind procedures); *State* v. *Holmes*, No. 11050100172, 2012 WL 4097296, at *11 (Del. Super. Ct. 2012) (admitting expert testimony on the mugshot commitment effect).

Here, the detective's awareness of Petitioner's photo in the arrays, together with the effects of clothing bias, the mugshot commitment effect, and other system variables—as Petitioner's expert would have explained—cast serious doubt on the reliability of the eyewitness identifications, however

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Otherwise, the administrator can, even unconsciously, suggest to the witness which individual to choose. *See Henderson*, 27 A.3d at 896; National Academy of Sciences, *Identifying the Culprit: Assessing Eyewitness Identification* 24–27, 106–07 (2014), *available at* http://www.nap.edu/download.php?record_id=18891# ("NAS Report") ("Even when lineup administrators scrupulously avoid comments that could identify which person is the suspect, unintended body gestures, facial expressions, or other nonverbal cues have the potential to inform the witness of [the suspect's] location in the lineup or photo array.").

[8] The "mugshot commitment effect" is a psychological phenomenon in which individuals will, having once identified a suspect, continue to identify that suspect whether or not it is the person they actually saw. When the "initial line-up procedure is unfair and suggestive"—as Petitioner submits was the case here—the mugshot commitment effect explains why it is likely that a "mistaken identification will be inexorably carried through all future identifications." (Resp. App. 10.)

well-intentioned the detective.[9] Importantly, the dangers of these practices are generally not known to jurors; thus, expert testimony is critical to the defendant's ability to present a defense of misidentification. (*See* Pet. Br. 15); *Walker*, 92 A.3d at 785; *State* v. *Guilbert*, 49 A.3d 705, 731 (Conn. 2012).

IV. Louisiana's Per Se Ban Is Arbitrary and Disproportionate to the Purposes It Purports to Serve

Respondent also argues that the Constitution affords states and the federal government "broad latitude" to "establish rules excluding evidence from criminal trials." (Resp. Br. 27.) But this Court has made clear that "[t]his latitude . . . has limits." *Holmes* v. *South Carolina*, 547 U.S. 319, 324–25 (2006). The Constitution—and the Sixth Amendment in particular—allow defendants to present witnesses on their behalf, a protection that is violated "by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of a priori categories." *Washington* v. *Texas*, 388 U.S. 14, 22 (1967); *see also Crane*, 476 U.S. at 691. Louisiana's per se ban is precisely such a rule.

Respondent also attempts to justify its ban by contending that eyewitness expert testimony would not be helpful to the trier of fact. (Resp. Br. 28.) But numerous courts have held otherwise,

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[9] Respondent claims that Ms. Garcia never saw a picture of Petitioner prior to her identification, but the record is clear that she did see a composite sketch of the perpetrator. (Resp. Br. 16 n.6.) In any event, the factual issues Respondent raises are inconsequential to the constitutional issues presented and have no bearing on whether this Court should grant the petition.

citing extensive scientific research. *See* (Pet. Br. 22); *e.g.*, *Walker*, 92 A.3d at 788; *Guilbert*, 49 A.3d at 723; *State* v. *Clopten*, 223 P.3d 1103, 1108 (Utah 2009); *State* v. *Copeland*, 226 S.W.3d 287, 300 (Tenn. 2007); *United States* v. *Smithers*, 212 F.3d 306, 312 n.1, 316 (6th Cir. 2000); *see also* NAS Report 111 (explaining that experts are necessary in certain cases because "many scientifically established aspects of eyewitness memory are counterintuitive and may defy expectations"). Moreover, this Court has recognized that jurors are more than capable of hearing all relevant evidence and making credibility determinations themselves. *See Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595–96 (1993).

Respondent also argues that eyewitness expert testimony is "particularly unnecessary in a case such as this involving multiple eyewitnesses," (*see* Resp. Br. 29), quoting the Seventh Circuit's decision in *United States* v. *Bartlett*. That proposition is simply inaccurate.[10] Of the 236 DNA exonerations stemming from convictions involving mistaken identifications, at least 61 (26 percent) involved multiple witnesses misidentifying the same innocent person.[11] Indeed, recent research suggests that multiple errors are common in

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[10] The Seventh Circuit does admit eyewitness expert evidence: "Expert evidence can help jurors evaluate whether their beliefs about the reliability of eyewitness testimony are correct. . . . [E]vidence that there is no relation between certitude and accuracy may have a powerful effect." *Bartlett*, 567 F.3d 901, 906 (7th Cir. 2009).

[11] Innocence Project, *The Cases: DNA Exoneree Profiles*, http://www.innocenceproject.org/cases-false-imprisonment/front-page#c10=published&b_start=0&c4=Exonerated+by+DNA (last visited Oct. 8, 2015).

wrongful conviction cases, with one error often corrupting other pieces of evidence. *See* Saul M. Kassin et al., *Confessions that Corrupt: Evidence from the DNA Exoneration Case Files*, 23 Psychol. Sci. 41, 42–43 (2012).[12]

Respondent further argues that cross-examination and jury instructions can adequately address the unreliability of eyewitness identifications. (Resp. Br. 29–30.) Again, this assertion flies in the face of overwhelming scientific research and judicial authority explaining that such measures are not sufficient to prevent jury confusion. (*See* Pet. Br. 20–22 (discussing shortcomings of cross-examination and jury instructions)); *see also generally* Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identification, and the Limits of Cross-Examination*, 36 Stetson L. Rev. 727 (2007); *Perry* v. *New Hampshire*, 132 S. Ct. 716 (2012) (Sotomayor, J., dissenting) (suggestive circumstances can "jeopardize the defendant's basic right to subject his accuser to meaningful cross-examination"); *Walker*, 92 A.3d at 786; *Clopten*, 223 P.3d at 1110–11; *Copeland*, 226 S.W.3d at 300.

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[12] Of fourteen individuals from Louisiana who have been exonerated through DNA evidence, thirteen were convicted, in part, because of eyewitness identifications, and three involved multiple eyewitnesses. *See supra* n.11.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SHERRY WATTERS
Counsel of Record
LA. APPELLATE PROJECT
P.O. Box 58769
New Orleans, Louisiana 70158
(504) 723-0284
sherrywatters@yahoo.com

JAMES L. BROCHIN
JAREN JANGHORBANI
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

BARRY C. SCHECK
KAREN NEWIRTH
INNOCENCE PROJECT, INC.
40 Worth Street, Suite 701
New York, New York 10013
(212) 364-5340

Counsel for Petitioner

APPENDIX

IN THE
FOURTH CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA

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COURT OF APPEAL
FOURTH CIRCUIT
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/s/ Danielle Schott
CLERK OF COURT

NO. **2013-KA-0059**

STATE OF LOUISIANA,
Appellee

VERSUS

DARRIL M. HENRY,
Appellant

ON APPEAL FROM THE CRIMINAL
DISTRICT COURT
FOR THE PARISH OF ORLEANS
SECTION **"L"**
CASE NO. **451-696**
HON. DENNIS WALDRON,
JUDGE PRO TEM. PRESIDING

ORIGINAL BRIEF OF THE STATE OF LOUISIANA, APPELLEE

LEON A. CANNIZZARO, JR.
District Attorney
Parish of Orleans

KYLE C. DALY
Bar No. 32844
Assistant District Attorney
Parish of Orleans
Counsel of Record

619 S. White St.
New Orleans, LA 70119
Phone: (504) 571-2944
Facsimile: (504) 571-2928
E-Mail: kdaly@orleansda.com

EXCERPT

B. The trial court court's properly excluded the testimony of the defense's proffered expert regarding eyewitness identifications.

The trial court did not abuse its discretion when it followed longstanding precedent that prohibits expert testimony regarding eyewitness identifications. "[I]t is undisputed that the admissibility of expert testimony on eyewitness identification has been uniformly barred by the [the Louisiana Supreme Court] on the occasions the issue has

been raised." *State v. Young*, 35 So.3d 1042, 1047 (La. 4/5/10). This is because there is "a compelling concern that a potentially persuasive expert testifying as to the generalities of the inaccuracies and unreliability of eyewitness observations, that are already within a juror's common knowledge and experience, will greatly influence the jury more than the evidence presented at trial."

The Appellant avers that the purpose of the testimony of its proposed expert regarding eyewitness identifications was not to "refute the eyewitness's credibility" at trial, but "to address the defense's burden in regard to the photographic line-up procedure, i.e., to show that the procedure was suggestive, and also that the *procedure* created a substantial likelihood of misidentification." *Appellant's Brief,* p. 29 (emphasis in original). However, the record indicates that trial counsel's intent was not to introduce the expert testimony for the purpose of meeting his burden at the hearing on the motion to suppress identification, but for the express purpose of casting doubt on the validity of the identifications of the eyewitnesses at trial. The defense's motion in limine requesting the court to admit such testimony was filed *after* the numerous preliminary hearings and *after* the court had already ruled the identifications admissible. More importantly, the motion explicitly stated that the "expert's testimony is required to educate the jury . . . " *See* Rec., Vol. 2, p. 431. The trial court did not abuse its discretion when it prevented the defense from backdooring testimony into the trial that has long been deemed inadmissible.

IN THE
FOURTH CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA

NO. _____

STATE OF LOUISIANA

VERSUS

CHRISTOPHER LEE

APPLICATION FOR
WRIT OF SUPERVISORY REVIEW AND/OR
WRIT OF MANDAMUS
TO REVIEW THE RULING OF
THE HONORABLE ARTHUR HUNTER,
JUDGE PRESIDING,
CASE NO. **500-034**, SECTION **"K"**
CRIMINAL DISTRICT COURT FOR THE
PARISH OF ORLEANS

ORIGINAL WRIT APPLICATION OF THE
STATE OF LOUISIANA,
APPLICANT

******Proceedings Have Been Stayed by the Trial Court******

LEON A. CANNIZZARO, JR.
District Attorney
Parish of Orleans

KYLE DALY, Bar No. 32844
Assistant District Attorney
Parish of Orleans

619 South White Street
New Orleans, LA 70119
(504) 571-2944 (t)
(504) 571-2928 (f)
kdaly@orleansda.com

EXCERPT

I. Because the Louisiana Supreme Court has expressly forbid the admission of expert testimony in the field of eyewitness identifications, the trial court's ruling admitting such testimony was in error.

"[A] trial judge is not at liberty to ignore the controlling jurisprudence of superior courts." *State v. Bertrand,* 2008-2215 (La. 3/17/09), 6 So. 3d 738, 743. "A trial court necessarily abuses its discretion if its ruling is based on an erroneous view of the law. Thus, if a trial court in exercising its discretion bases its ruling upon an erroneous view or application of the law, its ruling is not entitled to [] deference." *State v. Hayes,* 2010-1538 (La. App. 4 Cir. 9/1/11), 75 So. 3d 8, 15, *writ denied,* 2011-2144 (La. 3/2/12), 83 So. 3d 1043.

In *State v. Young,* 2009-1177 (La. 4/5/10), 35 So. 3d 1042, 1043, the defendant was charged with first degree murder for shooting two people in a restaurant parking lot. The surviving victim told police that she and the deceased were shot during an armed robbery perpetrated by a black male and provided a description of the gunman's physical features. *Id.* The shooting was additionally observed by an independent eyewitness. *Id.* Police developed the defendant as a suspect, and both the surviving victim and the witness identified the defendant in photo arrays. *Id* at 1043-44.

Prior to trial, *Young* moved the court to admit expert testimony regarding factors that may affect an eyewitness identification and, over the objection of the State, a *Daubert* hearing was conducted. The trial court heard from the defense's proffered expert, a psychology professor, who reviewed the police reports and testified that the case presented various issues including "cross-race identification, gun focus, the effects of stress, estimates of confidence, and the impact of identification protocol on the outcome." *Id.* at 1046. "Relying on its gatekeeping function articulated in *Daubert* and *Foret,* the court stated that the proposed testimony would be relevant in the event the State utilized eyewitness identifications at trial." *Id*. The appellate court affirmed, but the Louisiana Supreme Court reversed, stating:

> This Court is cognizant of the ongoing legal debate over the admissibility of expert psychological testimony on the validity of eyewitness identification. Generally, criminal defendants suggest jurors are ignorant of the alleged inadequacies of

eyewitness testimony. Their proposed remedy is to allow qualified cognitive and memory experts to essentially educate jurors on the factors allegedly outside of the common experience that contribute to unreliability and inaccuracies in eyewitness testimony. These factors would include observations involving significant stress, weapon focus, cross-race identification, identification based on time delays, and psychological phenomena, such as the feedback factor and unconscious transference, among others.

Unquestionably, eyewitness identifications can be imperfect. However, upon review, the touted advances in the social sciences regarding the validity of eyewitness identifications do not render obsolete the underlying premise for which such evidence was held to be inadmissible in *Stucke*. There is still a compelling concern that a potentially persuasive expert testifying as to the generalities of the inaccuracies and unreliability of eyewitness observations, that are already within a juror's common knowledge and experience, will greatly influence the jury more than the evidence presented at trial. By merely being labeled as a specialist in eyewitness identifications, an expert has the broad ability to mislead a jury through the "education" process into believing a certain factor in an eyewitness identification makes that identification less reliable than it truly is. Moreover, expert

testimony on eyewitness identifications can be more prejudicial than probative because it focuses on the things that produce error without reference to those factors that improve the accuracy of identifications. The expert testimony presumes a misidentification, in the absence of presenting factors which support the validity of the identification. This fosters a disbelief of eyewitnesses by jurors.

This Court has long been reluctant to allow experts to offer opinions on the credibility of another witness for fear of the expert invading what is considered the exclusive province of the jury. Moreover, the concept of promoting battles of experts over whether the testimony of every witness is truthful and reliable is not desirable. These considerations are especially compelling in cases involving eyewitness identifications where any alleged deficiencies could easily be highlighted through effective cross-examination and artfully crafted jury instructions.

With this in mind, **we decline to overrule our decision in *Stucke* barring the admissibility of eyewitness identification testimony. We conclude the district court erred in finding the proposed testimony satisfied the standard for admission of expert testimony under Louisiana Code of Evidence article 702. The testimony will not assist the jury in its deliberations.**

Id. at 1049-50 (internal citations omitted) (boldface added).

In the instant case, as in *Young,* the testimony of an expert in psychology pertaining to factors that may affect the accuracy of the witnesses' identifications of either defendant is barred. The trial court's reliance on Chief Justice Johnson's concurring opinion in *Young,* which has no precedential effect, was clear error. *See Forum for Equal. PAC v. McKeithen,* 2004-2477 (La. *1119/05),* 893 So. 2d 715, 722, n. 14 (noting the concurring opinion by former Chief Justice Calogero was "not binding."); Ryan M. Moore, *I Concur! Do I Matter?: Developing A Framework for Determining the Precedential Influence of Concurring Opinions,* 84 Temp. L. Rev. 743, 744 (2012) ("Despite their prevalence, concurring opinions written by a single appellate-level jurist are not considered binding upon lower courts and have almost no dispositive impact upon the law on which they speak."). If any doubt previously existed regarding the admissibility of expert testimony in the field of eyewitness identifications, that doubt was surely eviscerated by *Young*. *See Young,* 35 So.3d at 1051 ("I disagree with the majority's finding that *State v. Stucke* serves as a complete bar to the admission of expert testimony regarding eyewitness identification.") (Johnson, *C.I.,* concurring) (internal citation omitted).

Christopher Lee has preserved this issue for appeal and is free to petition the Louisiana Supreme Court to revisit *Young* in the event that he is ultimately convicted. *See* La. Sup. Ct. R. X(1)(a)(3). However, the trial court had no authority to ignore the majority's binding opinion in *Young*. As such, its

ruling admitting expert testimony in the field of eyewitness identification must be reversed.

CONCLUSION AND PRAYER

Considering the foregoing, the State respectfully requests that this Honorable Court grant the State's writ application and reverse the trial court's ruling.

Respectfully submitted,

/s/ Kyle C. Daly
Kyle C. Daly
Assistant District Attorney

3IN THE
FOURTH CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA

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COURT OF APPEAL
FOURTH CIRCUIT
FILED
2015 AUG 5 PM 3:39
DANIELLE SCHOTT
CLERK OF COURT

NO. 2015-KA-0629

STATE OF LOUISIANA

Appellee

VERSUS

JOSEPH LAMBERT

Appellant

ON APPEAL FROM HIS CONVICTION AND
SENTENCE IN THE CRIMINAL DISTRICT
COURT FOR THE PARISH OF ORLEANS
SECTION "E," CASE NO. 519-880
HON. KEVA LANDRUM-JOHNSON
PRESIDING

ORIGINAL BRIEF OF THE STATE OF LOUISIANA, APPELLEE

LEON A. CANNIZZARO, JR.
DISTRICT ATTORNEY
PARISH OF ORLEANS

MITHUN KAMATH
La. Bar No. 32074
DONNA ANDRIEU
La. Bar No. 26441
Assistant District Attorneys
Parish of Orleans

619 South White Street
New Orleans, Louisiana 70119
Telephone: (504) 571-2933
Facsimile: (504) 571-2928
mkamath@orleansda.com

EXCERPT

II. The trial court properly excluded the testimony of the defendant's proffered expert regarding eyewitness identifications.

The trial court here followed longstanding precedent, beginning *with State v. Stucke*, 419 So.2d 939 (La. 1982), that prohibits expert testimony regarding eyewitness identifications. "[I]t is undisputed that the admissibility of expert testimony on eyewitness identification has been uniformly barred by the [the Louisiana Supreme Court] on the occasions the issue has been raised."

State v. Young, 09-1177, p. 9 (La. 4/5/10), 35 So.3d 1042, 1047. This is because there is "a compelling concern that a potentially persuasive expert testifying as to the generalities of the inaccuracies and unreliability of eyewitness observations, that are already within a juror's common knowledge and experience, will greatly influence the jury more than the evidence presented at trial." *Id.* at 12-13, 1050. *Young* further delineated as a basis for the prohibition that expert testimony on eyewitness identifications can be more prejudicial than probative because it focuses on the things that produce error without reference to those factors that improve the accuracy of identifications; i.e. expert testimony presumes a misidentification, in the absence of presenting factors which support the validity of the identification. *Id.* at 13-14, 1049-50.

This court has stood by *Stucke* and *Young* on several occasions, including cases in which it has upheld homicide convictions. See, e.g., *State v. Gurley*, 565 So.2d 1055 (La. App. 4 Cir. 1990), *writ denied*, 575 So.2d 386 (La. 1991); *State v. Henry*, 13-0059 (La. App. 4 Cir. 8/6/14), 147 So.3d 1143, *writ denied*, 14-1869 (La. 4/10/15), 164 So.3d 831 (Mem.). The prosecution in *Henry*, "[f]or all intents and purposes,... [was] based exclusively on eyewitness identification," as the defendant claims to be the case here. *Henry*, at p. 31, 1161 (Tobias, J., concurring). As noted, the Louisiana Supreme Court denied writs in *Henry*, with Justice Clark summing up the grounds for the ban on expert testimony regarding eyewitness identifications in his concurrence as follows:

> Until the Louisiana legislature enacts legislation that overrules *Stucke* and *Young*, expert testimony on eye witness identification is not admissible, even in a capital murder case, for the same reasons expressed by this Court in *Young*. Those reasons include: (1) Such expert testimony can be more prejudicial than probative because it focuses on the things that produce error without reference to the factors which support the validity of identification, thus, fostering a disbelief of eyewitnesses by jurors; (2) allowing experts to offer opinions on the credibility of another witness invades what is considered the exclusive province of the jurors; (3) the concept of promoting battles of experts over whether the testimony of every witness is truthful and reliable is not desirable; and (4) such expert testimony does not satisfy the standard articulated under La. C.E. art. 702. *Young*, 09-1177, pp. 13-14, 35 So.3d at 1050.

supra at 1, 831-32 (Clark, J., concurring).

The Court most recently reinforced its jurisprudence on this issue less than two months ago in *State v. Lee*, 15-0899 (La. 6/19/15), --- So.3d --- (Mem), with Justice Crichton's concurrence again listing the reasons for the prohibition and Justice Clark's concurrence making reference to and even citing cases from other jurisdictions, both federal and state, that disallow the expert testimony at issue here.

In the instant case, the defendant asserts in various places in his brief that he intended to call an expert to the stand for the following disparate but related reasons: to "testify that the procedures used in the show up line-up was [sic] suggestive and unreliable;" to "provide the jury with scientific information as to the problems with memory, stress, the influences of police, and the suggestiveness of the show-up, one on one procedure;" and to "explain the suggestiveness of the line-up and the identification process used in this particular case." Defendant's Original Brief, pp. 9, 13, 15. Moreover, the record indicates that the defendant's intent was to "help the jury understand certain factors that have proven to affect the reliability of eye witness identifications, which [would] further allow the jury to evaluate whether or not those factors were present in this case and if so, whether or not those factors affected the reliability of identification of Mr. Lambert" and to "explain to the jury the system and estimator factors that have an affect [sic] on the reliability of eyewitness identification and how specific system and estimator factor [sic] present in this case should be taken into consideration by the jury when evaluating the reliability and accuracy of testimony." Rec., Vol. 2, pp. 254, 261.

The defendant is being disingenuous with his claim that the role of his expert was to testify to the supposed suggestiveness of the identification in the instant case. First, his motion to suppress identification had already been heard and subsequently denied at a preliminary hearing on June 26, 2014, while his motion to permit defense to call an expert witness on the matter was not

filed until November 17, 2014. Rec., Vol. 6, Motions Tr. 6/26/14, p. 51; Rec., Vol 1, p. 64. Second, the defendant's expert, to be clear, was not a witness to the armed robbery of Damien Brown that took place on February 13, 2014.

The expert, almost by definition, would have been explaining to the jury "the generalities of the inaccuracies and unreliability of eyewitness observations," as prohibited by *Young*, *supra* at 12-13, 1050, and as a result would have been "invad[ing] the field of ... [the] education of men" as prohibited by this court in *Henry*, *supra* at 26, 1158 (citing *Stucke*, *supra* at 945).

As illustrated above, the *per se* or bright-line rule regarding the inadmissibility of expert testimony on eyewitness identifications, and the rationale behind it, have been repeated *ad nauseum* by the Louisiana Supreme Court and this court. The trial court here relied on this precedent in ruling that the defendant's expert could not take the stand to testify about eyewitness identifications, thereby back-dooring testimony into the trial that has long been deemed inadmissible.

Accordingly, this assignment of error lacks merit.

FOURTH CIRCUIT COURT OF APPEALS

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COURT OF APPEAL
FOURTH CIRCUIT
FILED
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NO. 2013-KA-00059

STATE OF LOUISIANA

VERSUS

DARRILL M. HENRY

Appeal from the Criminal District Court
No.451-696, Section "L", Parish of Orleans,
Honorable Dennis Waldron, Judge Pro Tem.

ORIGINAL BRIEF ON BEHALF OF
DEFENDANT-APPELLANT

Submitted by:

SHERRY WATTERS Bar No. 1638
ATTORNEY FOR DEFENDANT
LOUISIANA APPELLATE PROJECT
P.O. BOX 58769
NEW ORLEANS, LA. 70158-8769
(504)723-0284; fax 599-0931
sherrywatters@yahoo.com

EXCERPT

Prohibited the Defense: No Expert on Identification Procedure Allowed

Detective Harbin was allowed to testify to the jury that he had reviewed the line-ups for suggestiveness and found them suitable to use (Tr. 756). His testimony was about the photo choice and positions. He discounted the "clothing and hair issues." Yet the defense was prevented from rebutting the testimony and calling an expert witness to testify that the procedures used in compiling and showing the line-ups were suggestive and could create a substantial likelihood of misidentification.

Darrill Henry filed a Motion to Use the Expert Witness, included the factual basis, and attached the expert's curricula vitae (R. 429-468). It was denied. The defense continued to make the motion and included it as a ground in the Motion for New Trial (Motion Hearing 20-22). It was reversible error to deny the motions and deny Mr. Henry his constitutional right to present his defense, particularly where there was no corroboration or support for the tainted, suggestive, unreliable identifications.

The jurisprudence on the use of experts in regard to identifications pertains to either the qualifications of the experts or the use of experts to refute the eyewitnesses' credibility. Those were not the purposes of the defense expert in this case. Darrill Henry's expert was to address the defense's burden in regard to the photographic line-up procedure, i.e. to show that the procedure was suggestive, and also that the *procedure* created a substantial likelihood of misidentification. The

expert would not be commenting on the testimony or credibility of the eye witnesses. The expert would be testifying as to the police procedures used in this case and the influence of those procedures on the outcome.

The Constitution guarantees criminal defendants a 'meaningful opportunity to present a complete defense,'[19] including the right to confront witnesses and engage in cross examination to test the State's evidence.[20] The right is guaranteed by the Sixth and Fourteenth Amendments,[21] Louisiana Constitution of 1974, Article l, Section 16, and L.S.A.-R.S. 15:273. Cross-examination and confrontation involves discrediting a witness's perceptions and memory as well as his veracity.[22]

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[19] *Crane v. Kentucky,* 476 U.S. 683, 690, 90 L. Ed. 2d 636,106 S. Ct. 2142 (1986), quoting *California v. Trombetta,* 467 U.S. 479, 485, 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984) and *In re Oliver,* 333 U.S. 257 at 273, 92 L. Ed. 2d 682, 68 S. Ct. 499; La. Const, Art. 1, Section 16; U.S. Constitution, Am. 5 and 6; *State v. Souby* 332 So.2d 252 (La. 1976); *State v. Keller* 231 So.2d 354 (La. 1970).

[20] *Chambers v. Mississippi* 410 U.S. 824, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); La. Const., Art. 1, Section 16; U.S. Constitution, Am. 5 and 6; *State v. Souby* 332 So.2d 252 (La. 1976); *State v. Keller* 231 So.2d 354 (La. 1970); *State v. Ludwig,* 423 So. 2d 1073 (La. 1982).

[21] *State v. Casey,* 99-0023 (La. 1/26/00), 775 So. 2d 1022, 1037, *cert. denied, Casey v. Louisiana,* 531 U.S. 840, 121 S. Ct. 104, 148 L. Ed. 2d 62 (2000); *Davis v. Alaska,* 415 U.S. 308, 317, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974); *Washington v. Texas* 338 U.S. 14, 87 S. Ct. 1920, 1923, 18 L.Ed. 2d 1019 (1967); *State v. Van Winkle,* 94-0947, (La. 6/30/95), 658 So. 2d 198, 201-202.

[22] Davis, supra; State ex rel. Nicholas v. State 520 So.2d 377, 381 (La. 1988); *State v. Draughn,* 05-1825 (La. 1/17/07), 950 So. 2d 583, 615-16, *cert. denied, Draughn v. Louisiana,* 552 U.S. 1012, 128 S. Ct. 537, 169 L. Ed. 2d 377 (2007).

The purpose of Darrill Henry's expert was to confront and rebut the testimony of Detective Harbin as to his opinion of the integrity and lack of suggestiveness of the line-ups he made and the line-up procedure he used. The expert was not being offered to attack the credibility of Ms Garcia or Ms Davis. The denial of this witness' testimony violated Darrill Henry's right to confrontation and to present a defense. The Louisiana Supreme Court has held that "[c]onfrontation means more than being allowed to confront the witnesses physically. Cross-examination has been termed "the principal means by which believability and truthfulness of testimony are tested."[23]

As a general matter, under *La.C.E. art. 702,* "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify . . . in the form of an opinion or otherwise."[24] "[E]xpert testimony, while not limited to matters of science, art or skill, cannot invade the field of common knowledge, experience and education of men." *Stucke, 419 So. 2d at 945. Foret* and *Daubert* require district courts to perform a "gatekeeping" function to "ensure that any and all scientific testimony or

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[23] *State v. Robinson,* 2001-0273 p. 6 (La. 5/17/02), 817 So. 2d 1131, 1135, citing *Davis v. Alaska,* 415 U.S. 308, 315-316, 94 S.Ct. 1105, 1110, 39 L.Ed. 2d 347 (1974).

[24] *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 590, 113 S. Ct. 2786, 2795, 125 L.Ed.2d 469 (1993).*

evidence admitted is not only relevant, but reliable."[25]

The denial of the defense's expert in this case was not based on a finding that the expert was not qualified,[26] as occured in *Stucke,* where the unqualified expert was presented to testify on the reliability of eyewitness identification.[27] The decision in *Stucke* was rendered over a decade

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[25] *Id., 509 U.S. at 589, 113 S.Ct. at 2795.* In addressing the issue of reliability, *Daubert* articulated the following nonexclusive factors to be considered by district courts in determining the admissibility of expert testimony: (1) The "testability" of the scientific theory or technique; (2) Whether the theory or technique has been subjected to peer review and publication; (3) The known or potential rate of error; and (4) Whether the methodology is generally accepted in the scientific community. *Cheairs, 03-0680 at 7, 861 So. 2d at 541.* See also *Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 147, 119 S.Ct. 1167, 1174, 143 L. Ed. 2d 238 (1999).*

[26] The "trial judge is vested with wide discretion in determining the competence of an expert witness. Competence of an expert witness is a question of fact to be determined within the sound discretion of the trial judge; her rulings on the qualifications of expert witnesses will not be disturbed in the absence of manifest error." *State v. Stucke, 419 So. 2d 939, 944 (La. 1982)* (citing *State v. Drew, 360 So. 2d 500 (La. 1978)).*

[27] *Stucke, 419 So. 2d at 945.* In *Stucke,* the defendant called an experimental psychologist to "enlighten the jury as to the *quality* of the victim's identification so that the jury would have a standard against which they could make an evaluation of the victim's identification." *Id., 419 So. 2d at 944. see also State v. Ford, 608 So. 2d 1058, 1060-1061 (La. App. 1st Cir. 1992)*; *State v. Velez, 588 So. 2d 116, 134 (La. App. 3 Cir. 1991)*; See also *State v. Gurley, 565 So.2d 1055, 1057-1058 (La.App. 4th Cir.1990),* writ denied,*575 So. 2d 386 (La.1991)*; *State v. Coleman, 486 So.2d 995, 1000 (La.App. 2d Cir.),* writ denied,*493 So. 2d 634 (La.1986).*

prior to the *Daubert and Foret* decisions and before the enactment of the Code of Evidence. Scientific advances in the study of eyewitness identifications since *Stucke* indicate the probative value of the admission of expert testimony on the subject, when properly admitted, outweighs any prejudicial effect on the jury's decision-making process.

The *Stucke* case is not a complete bar to the admission of expert testimony regarding eyewitness identification. The *Stucke* decision must be examined in light of the provisions of the Louisiana Code of Evidence regarding expert testimony. The admissibility of expert witness testimony should be made on a case by case basis, depending on its purpose, and in the interest of justice.[28]

In *Higgins,* the Court determined the proposed expert testimony was unnecessary to explain to the jury his findings that intoxication greatly increases the likelihood of false identification, as that is within the common knowledge of jurors. Under those circumstances, it would impinge on the province of the jury to use an expert and the prejudicial impact of such evidence would substantially outweigh its probative value.[29] Those concerns do not apply in this case where there was substantial probative value of the expert as to the police procedures used in the identification procedure.

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[28] *State v. Chapman, 436 So.2d 451, 453 (La. 1983)*

[29] *Stucke, 419 So. 2d at 945* (quoting *3 Am.Jur.2d, Expert and Opinion Evidence, § 21*; *227 Cal. App. 2d 87, 38 Cal. Rptr. 431, 100 A.L.R.2d 1421*; *356 Ill. 144, 190 N.E. 301, 92 A.L.R. 1223)*; *See State v. Ammons, 208 Neb. 797, 305 N.W.2d 812, 814 (1981)*; *also Ford, 608 So. 2d at 1061*; *see generally* Elizabeth Loftus, Eyewitness Testimony Civil and Criminal (1997).

In this case, Ms Garcia and Ms Davis indicated some problems and reluctance in making identifications. After the line-ups were concocted to meet their requests, they were focused on Mr. Henry's photo. Later they came to believe that the identification was correct by messages they received from the officers, the media, and the court process. Even the learned trial judge remarked that he had no basis to disbelieve the "two good citizens." (Motion for New Trial p. 20-22). Without an expert to show a mistake in the identification, caused by the suggestiveness, all that the jury had to gauge the testimony was their credibility. These two witnesses were credible. But they had been influenced and were wrong.

If the defense had been allowed to present the expert testimony as to the suggestiveness of the photo choice and line-up procedures, the jurors and the court would have had evidence that explained how the line-up may have corrupted the opinions of the "two good citizens." They could have chosen to believe the expert or believe the detective. But Darrill Henry had the constitutional right to present evidence and allow the jurors to make the choice.

In *State v. Young* 2009-1177 (La. 04/05/10); 35 So. 3d 1042, the witness was close to the robbery, her statement was taken immediately and she identified Young from a photographic lineup. Two weeks later, the lineup was shown to the victim who also identified Young. The victim in *Young* had not seen any suspects in news coverage. The district court found no evidence that the line-up procedure was impermissibly suggestive. The facts of *Young* did not create the suggestive situation

that occurred here. The purpose of the expert testimony in *Young* was not the purpose of the expert here, where suggestiveness of the line-up was at issue.

In *Young,* the defense offered expert testimony on factors that might affect the *reliability* of the State's eyewitness identifications. At a hearing regarding the expert's credentials and the scope of his testimony,[30] the district court accepted the defense witness as an expert and ruled that the expert could give testimony on the *Manson* factors of reliability, particular to the case, based on his review of the police reports. The Louisiana Supreme Court reversed, finding that the district court erred in allowing the introduction of the testimony of the defendant's expert as to the *general factors* contributing to a misidentification. Three judges filed concurrent opinions. The Court said the expert testimony, under the facts of that case, would not aid the jury in its deliberations and, instead, was inclined to be more prejudicial than probative in value.

In the case at bar, the State opposed the use of expert testimony, citing jurisprudence disallowing expert testimony on the reliability of eyewitness testimony. There was no *Daubert* hearing. This is the rare instance in which the "'specialized knowledge' of an expert in the form of opinion evidence would assist the jury in deciding the question of identity," *Stucke, 419 So. 2d at 951* (Lemmon, J., concurring). Post-*Stucke* decisions from other jurisdictions have held expert evidence

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[30] *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct 2786, 125 L. Ed. 2d 469 (1993),* adopted in *State v. Foret, 628 So. 2d 1116, 1121 (La. 1993)*

on the general deficiencies of eyewitness identifications to be admissible under some circumstances.[31]

The expert testimony in this case was offered to explain the suggestiveness of the line-ups and the identification process used in this particular case. The witness would directly rebut the detective's claim that the line-up was not suggestive. The expert was not offered to testify on the *Manson* factors of reliability, which may be more generally within common knowledge.[32] The decision in *Young* is not controlling, as the Court only addressed experts who would testify about the "generalities of the inaccuracies and unreliability."[33]

Two of the three concurring judges in *Young* agreed with the prohibition of expert testimony only under the specific facts of that case, emphasizing that the eyewitness identification in *Young* was corroborated by other evidence. Some jurisdictions which allow expert testimony on

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[31] *Echavarria v. State, 108 Nev. 734, 839 P.2d 589 (Nev. 1992)*; *United States v. Rincon, 28 F.3d 921 (9th Cir. 1994)*; *United States v. Smith, 156 F.3d 1046 (10th Cir. 1998).*

[32] *La.C.E. art. 403* states: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.

[33] Including significant stress, weapon focus, cross-race identification, identification based on time delays, and psychological phenomena, such as the feedback factor and unconscious transference, etc." Feedback factor" is the effect of post-event information on the memory of the event, including discussions among witnesses that may unconsciously reinforce mistaken identifications. "Unconscious transference" allows a person toremembera face but not the circumstances under which the person saw the face. *See United States v. Langan, 263 F.3d 613, 621 (6th Cir. 2001).*

eyewitness identification have held that it is not admissible when there is substantial evidence of corroboration.[34] In this case, as set forth in the first Argument, there was no corroboration of any identification. The detective admitted that there was no evidence that connected Darrill Henry to the scene, to Ms Watts or to Ms Gex (Tr. 853-4, 871-3, 1204-5).

Another distinguishing factor in the outcome of *Young*, was that the expert was presented by the defense to give opinions on the credibility of another witness. The Court said that credibility was the exclusive province of the jury. In the case at bar, the expert was not being presented to give an opinion on the credibility of Ms Davis or Ms Garcia. He was being presented to rebut the testimony of the detective as to the suggestiveness of the photos and procedures that were used on Ms Davis and Ms Garcia.

It was error for the district court to prevent Darrill Henry's defense and exclude his expert witness who would have rebutted the testimony of Detective Harbin in regard to the suggestiveness of the identification. Under the particular facts of this case, where the suggestiveness of the line-up and the procedures created the only evidence against Darrill Henry, the error was not harmless. Without the line-ups, the State had no case. Without the expert testimony, Darrill Henry could

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[34] *See, e.g., U.S. v. Martin, 391 F.3d 949 (8th Cir. 2004)*; *U.S. v. Crotteau, 218 F.3d 826 (7th Cir. 2000)*; *Manley v. State, 284 Ga. 840, 672 S.E.2d 654 (Ga. 2009)*; *People v. Goodwillie, 147 Cal.App. 4th 695, 54 Cal. Rptr. 3d 601 (2007)*; *People v. Jones, 30 Cal.4th 1084, 1112, 135 Cal. Rptr. 2d 370, 70 P.3d 359 (2003)*; *People v. McDonald, 37 Cal.3d 351, 208 Cal. Rptr. 236, 690 P.2d 709 (1984).*

not show that the line-ups were suggestive and tainted, corrupted the identifications, creating a substantial likelihood of misidentification. The convictions must be reversed.