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Admission of Expert Testimony on Eyewitness Identification

For years, commentators have argued that jurors may be incapable of assessing the accuracy of eyewitness identifications. Expert testimony on the subject of eyewitness reliability may provide a remedy for this problem. But while scholars insist that such testimony gives the jury essential information, appellate courts routinely have upheld its exclusion.

In *People v. McDonald*,[1] the California Supreme Court became the second in the nation to hold such an exclusion an abuse of discretion, and the first to articulate a fact-specific methodology for future appellate review. This Comment attempts to discern upon which grounds trial judges may exclude such testimony after *McDonald*. Part I discusses the basic split between scholars and courts in their treatment of this problem. Part II summarizes the Supreme Court's opinion. It traces the path of the *McDonald* court's reasoning, which rejects prior case law to conclude that, in some cases, it may be impermissible to exclude the proffered testimony of an eyewitness expert.[2] Part III analyzes the policy concerns and the specific rule of admission articulated by the court, interpreting *McDonald* through the California Evidence Code. The Comment concludes that, while such an interpretation proves helpful in eliminating some of the vagaries and inconsistencies of the opinion, further clarification will be necessary to effectuate the court's policy of not "opening the floodgates" to eyewitness experts.

I
THE LEGAL BACKGROUND: CRITICAL INSISTENCE AND JUDICIAL OBSTINACY

McDonald was decided against a background of longstanding controversy. This Part first highlights the case for admission of expert testimony on eyewitness identification, and emphasizes how traditional safeguards may be inadequate to protect defendants from false identifications. The discussion then turns to three cases which form the judicial

1. 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984).

2. In this Comment the term "eyewitness expert" will sometimes be used to denote a witness who plans to testify on how various factors may have affected the reliability of an eyewitness identification. It is *not* intended to describe someone who would testify about psychological defects of a particular witness, such as mental illness or pathological tendencies to lie.

backdrop of *McDonald*, and reveals a general reluctance by the courts toward admitting this sort of testimony.

A. The Case for Expert Testimony

1. Inadequacy of Traditional Safeguards

Eyewitness identification has long been criticized as inherently unreliable.[3] The annals of justice are rife with cases of people wrongly sent to prison on the accusation of a mistaken eyewitness.[4] In recognition of this problem,[5] the United States Supreme Court has announced that such testimony must be excluded where admission would violate due process. The Court thus has mandated exclusion where counsel was absent at an identification proceeding,[6] or where identification procedures were so "unnecessarily suggestive"[7] as to create a substantial likelihood of a misidentification.[8]

Due process is but one aspect of the overall problem of eyewitness unreliability. A mistaken identification may result from any number of deficiencies in an observer's perception, memory, or recall. While police procedures may affect these psychological processes, they are not the only potential source of distortion. More sweeping safeguards are necessary to protect defendants from wrongful accusations and convictions. In this context, requirements of corroboration, cross-examination, and jury instructions have often been proposed as alternative remedies to expert testimony on eyewitness reliability. However, the following discussion will demonstrate that these devices are either inadequate or improper means of providing the necessary safeguards.

One device which would directly protect defendants from wrongful accusations would be a rule excluding eyewitness testimony that fails to meet a threshold standard of reliability. For example, commentators often have argued for a requirement of corroboration.[9] This proposal,

3. *See, e.g.*, J. MARSHALL, LAW AND PSYCHOLOGY IN CONFLICT 81 (1966) ("a witness may testify to a substantial proportion of 'facts' which are not facts at all. . ."); Stewart, *Perception, Memory and Hearsay: a Criticism of the Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 10 ("A number of studies . . . demonstrate the substantial degree of perceptual and memory error in recounting the types of events that frequently are the subject of litigation.")

4. *See, e.g.*, E. BORCHARD, CONVICTING THE INNOCENT 74-79, 277-80 (1932). *See generally*, E. BLOCK, THE VINDICATORS (1963); J. FRANK & B. FRANK, NOT GUILTY (1957).

5. United States v. Wade, 388 U.S. 218, 228 (1967) (acknowledging that "the annals of criminal law are rife with instances of mistaken identification" and "[t]he identification of strangers is proverbially untrustworthy").

6. *See, e.g.*, United States v. Ash, 413 U.S. 300 (1973); Kirby v. Illinois, 406 U.S. 682 (1972); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967).

7. Stovall v. Denno, 388 U.S. 293, 302 (1967).

8. Manson v. Braithwaite 432 U.S. 98 (1977); Neil v. Biggers, 409 U.S. 188 (1972).

9. *See, e.g.*, Goldstein, *The Fallibility of the Eyewitness: Psychological Evidence*, in PSYCHOLOGY IN THE LEGAL PROCESS 223 (B. Sales ed. 1977) (advocating exclusion whenever eyewitness

however, suffers from a serious drawback: uncorroborated eyewitness identifications are usually relevant,[10] and may be accurate in any particular case. Where such identifications *are* accurate, exclusion always would result in unjust aquittals, since by definition the prosecution could offer no other evidence to establish identity. Because of this danger, no modern court has adopted such a requirement.

The criminal justice system can thus do little to directly shield innocent defendants from unreliable accusations. However, it may take steps to ensure that factfinders take such unreliability into account. Cross-examination is the normal way to uncover weaknesses in a witness's perception and memory. These weaknesses generally fall into two categories: infirmities peculiar to a particular witness (for example, the witness has poor vision or memory), and those arising from the environment of the crime (for example, the witness was three blocks away). In either case, if cross-examination is to be effective, the jury must draw a commonsensical inference as to the reliability of the eyewitness, once testimony has shown the circumstances surrounding the identification.[11]

Where the jury does not draw this inference, or worse, where its collective common sense leads to an incorrect inference, there is little an attorney can do. It would be ineffectual to suggest, either during cross-examination or closing argument, that the jury draw a counterintuitive conclusion. There would be no evidence in the record to support such a suggestion. Even if the court were to permit it, the jury probably would dismiss it as the unfounded conjecture of a zealous advocate.

This is not a hypothetical problem. It has long been suspected that juror intuition alone may be an inadequate gauge of the reliability of eyewitness identifications. This suspicion has increasing empirical support.[12]

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testimony is the only evidence presented); P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 188-193 (1965) (would exclude whenever all identifications were obtained in "an unduly suggestive manner"). Lord Devlin's recommendations for judicial reform in Britain include a requirement of corroboration in the absence of "exceptional" circumstances. REPORT TO THE SECRETARY OF STATE FOR THE HOME DEPARTMENT OF THE DEPARTMENTAL COMMITTEE ON EVIDENCE OF IDENTIFICATION IN CRIMINAL CASES 149-50 (1976). One such circumstance well may be where the witness was acquainted with the defendant prior to the commission of the crime. *See* P. WALL, *supra*, at 191.

The concept of corroboration plays a significant role in *McDonald*'s rules for admission of expert testimony. *See infra* text accompanying notes 134-52.

10. In 1982, voter-approved Proposition 8 altered the California Constitution, which now forbids the exclusion of any relevant evidence offered in criminal proceedings, subject to the rules of hearsay, privilege, prejudice, and character or sexual conduct. CAL. CONST. art. I §28(d). It is unclear, absent further judicial construction, how Proposition 8 affects the analysis developed in this Comment.

11. Cross-examination is generally limited to matters within the scope of direct examination. *See* CAL. EVID. CODE §773(a) (West 1966). It is the jury's duty, therefore, to bring its outside experience to bear on those matters—in other words, to draw inferences.)

12. Researchers have discerned two specific aspects of this problem. One is that jurors display a tendency to overbelieve witnesses. *See* E. LOFTUS, EYEWITNESS IDENTIFICATION 8-19 (1979); P.

Yet courts have routinely assumed that effective cross-examination alone permits jurors to draw all necessary inferences concerning eyewitness reliability without external guidance.[13]

A first step away from exclusive reliance on cross-examination might be the use of jury instructions that summarize studies on the reliability of eyewitnesses. The case for such instructions seems compelling. The judiciary could develop them and scrutinize their use. They would be easy to administer. Moreover, they would not have the adversarial taint of similar comments from counsel.[14] Indeed, they might prove as effective as expert testimony on the same subject—at far less cost.

Unfortunately, this sort of jury instruction has yet to find a place in the courtroom. In *United States v. Telfaire*,[15] the leading case on this topic, the United States Court of Appeals for the District of Columbia Circuit endorsed an instruction that goes no further than to direct the attention of the jury to specific factors in the record which might have led to misidentification. Remarks about the probable effect of those factors on the eyewitness's reliability are notably absent.[16] California requires even less detail than *Telfaire* in its instructions on eyewitness fallibility.[17]

It is unclear why courts have not incorporated results of eyewitness

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WALL, *supra* note 9, at 19-23; Brigham & Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 19 (1983); Wells, Lindsay & Ferguson, *Accuracy, Confidence, and Juror Perceptions in Eyewitness Testimony*, 64 J. APPLIED PSYCHOLOGY 440-48 (1979). *Contra* Wells, *Applied Eyewitness Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOLOGY 1546, 1551 (1978) ("[T]here is no empirical evidence to support the assumption that jurors and judges are overbelieving of witnesses.")

Jurors also appear to be misinformed about how specific factors may affect eyewitness reliability. *See* E. LOFTUS, *supra*, at 171-77; Deffenbacher & Loftus, *Do Jurors Share a Common Understanding Concerning Eyewitness Behavior?*, 6 LAW & HUM. BEHAV. 15 (1982); Wells, *How adequate is human intuition for judging eyewitness testimony?*, in EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 256 (G. Wells & E. Loftus eds. 1984).

13. *See, e.g.*, United States v. Amaral, 488 F.2d 1148, 1153 (9th Cir. 1973); United States v. Fosher, 449 F. Supp. 76, 77 (D. Mass. 1978); Criglow v. State, 183 Ark. 407, 409-10, 36 S.W.2d 400, 401-02 (1931); People v. Lawson, 37 Colo. App. 442, 457, 551 P.2d 206, 209 (1976); Middleton v. United States, 401 A.2d 109, 130 (D.C. 1979); State v. Warren, 230 Kan. 385, 395, 635 P.2d 1236, 1243 (1981) ("vigorous cross-examination," along with "proper cautionary instructions" is sufficient.)

The courts seem to found this assumption more on tradition than logic. *See, e.g., Amaral*, 488 F.2d 1148, 1153 (9th Cir. 1973) ("Our legal system places primary reliance for the ascertainment of truth on the 'test of cross examination.' ")

14. *See* Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 957 (1984).

15. 469 F.2d 552 (D.C. Cir. 1972).

16. Under *Telfaire*, the jury is instructed that it should consider whether the eyewitness had the "capacity and adequate opportunity to observe the offender," whether "the strength of the identification, and the circumstances under which the identification was made" indicate "the identification . . . was the product of his own recollection," whether the witness has made inconsistent identifications, and whether the witness is credible. *Id.* at 558-59.

17. *See, e.g.*, People v. West, 139 Cal. App. 3d 606, 608-10, 189 Cal. Rptr. 36, 38 (1983);

studies into jury instructions. It may be because this would require judicial notice of particular empirical findings. While courts certainly may take notice of the *existence* of studies, it is not clear that they may instruct the jury about their *contents*, without encroaching on the prosecution's right to cross-examine.[18] For this reason, the proper method for making the jury aware of psychological research on eyewitness testimony, at least under traditional rules of evidence, appears to be testimony of those familiar with such studies.

2. *The Role of the Expert—A Tutor for the Jury*

Unlike other expert witnesses, who assess particular evidence in the record, experts on eyewitness identification attempt to bolster the jury's own ability to assess the evidence. In order to carry out this informative function, their testimony need only relate the results of studies, the methodologies involved, and, perhaps, some general comments on the applicability of those studies to the "real world."[19] The eyewitness expert thus more resembles a judge giving jury instructions than a psychiatrist commenting on the credibility of a particular defendant. This distinction is important; some courts holding such testimony inadmissible apparently have ignored it.[20]

The expert need not comment on the reliability of any particular eyewitness. Indeed, should he attempt to do so, a judge would be well within her discretion to cut off his testimony. In fact, because he lacks familiarity with the particulars of the case, he is probably less qualified than the jury to consider the weight to be given the account of a specific eyewitness.

People v. Kelley, 75 Cal. App. 3d 672, 679, 142 Cal. Rptr. 457, 461 (1977); People v. Guzman, 47 Cal. App. 3d 380, 386-87 & n.1, 121 Cal. Rptr. 69, 72-73 & n.1 (1975).

18. The Evidence Code allows the court to take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." CAL. EVID. CODE §§ 452(h), 454(a)(1) (West 1966). This provision is designed to cover matters "of such wide acceptance that to submit them to the jury would be to risk irrational findings." *Id.*, official comment.

In People v. Acherd, 3 Cal. 3d 615, 477 P.2d 421, 91 Cal. Rptr. 397 (1970), the supreme court ruled that the trial judge erred in consulting doctors outside the courtroom about the effects of insulin. The court recognized that, while the judge permissibly could have consulted textbooks concerning the nature of the properties of insulin, "the extrajudicial inquiry by the judge gave no opportunity to counsel to examine or cross-examine the experts with whom he spoke." *Id.* at 637-38, 477 P.2d 421, 444, 91 Cal. Rptr. 397, 420. Judicial recognition of studies on eyewitness identification similarly would deprive the prosecution of an opportunity to cross-examine.

19. It is difficult to discern from the case law which is the most appropriate testimonial subject matter. When a judge or appellate court reviews an offer of such testimony, the expert obviously has not yet taken the stand. The court is thus generally concerned with *whether* he should be allowed to do so, rather than *what* he should be allowed to say.

20. *See, e.g.* People v. Johnson, 38 Cal. App. 3d 1, 7, 112 Cal. Rptr. 834, 837 (1974); Porter v. State, 94 Nev. 142, 146-47, 576 P.2d 275, 278-79 (1978); State v. Barry, 25 Wash. App. 751, 757, 611 P.2d 1262, 1267 (1980).

In fulfilling its tutoring function, eyewitness-expert testimony typically focuses on two major subject areas: how the processes of perception, memory, and retrieval of information work in general, and how specific circumstances surrounding an identification at issue may have affected its accuracy. It would seem impossible to articulate a rule defining when exclusion of the first area of testimony would constitute an abuse of discretion,[21] since such testimony would be informative at any trial involving eyewitness identification. Accordingly, this Comment focuses on testimony about how specific factors may have affected the reliability of an identification.[22]

Research has disclosed that, as a general proposition, we are much less able to differentiate members of other races than members of our own.[23] Many people are unaware of the magnitude, or even the existence, of this cross-racial effect.[24] "They all look alike to me" may seem no more than a maxim perpetrated by bigotry. Yet neither racial prejudice, nor lack of contact with the other race, appears to have any effect on the accuracy of cross-racial identifications.[25] A recent survey indicates that this lack of correlation runs contrary to the intuition of most lay persons.[26]

Another common topic of expert testimony is how stress can affect the reliability of an identification. The complex role stress plays in identification is summarized in what is known as the Yerkes-Dodson law. This law states, in essence, that while moderate stress may sharpen perception, sustained high stress causes a dramatic decline in accuracy.[27]

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21. This was to comprise a substantial part of the expert's testimony in *McDonald*.

22. The body of research and commentary on eyewitness identification is substantial and growing. Little purpose would be served in summarizing all of these materials here. The following discussion focuses on only three of the many factors which might affect eyewitness reliability, in order to demonstrate how courts can apply *McDonald*. For further reference, the interested reader may turn to any of the books and articles by authors working in the field which have appeared in the last decade. *See, e.g.*, E. LOFTUS, *supra* note 12; EVALUATING WITNESS EVIDENCE: RECENT PSYCHOLOGICAL RESEARCH AND NEW PERSPECTIVES (S. Lloyd-Bostock & B. Clifford eds. 1983); EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES (G. Wells & E. Loftus eds. 1984); Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969 (1977).

23. For a comprehensive discussion of reasearch in this field, see Johnson, *supra* note 14.

24. *Id.* at 947-49.

25. *Id.* at 943-46.

26. *See* Rahaim & Brodsky, *Empirical Evidence Versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy*, 7 LAW & PSYCHOLOGY REV. 1, 13 (1982). The *McDonald* court was especially concerned that jurors might erroneously believe bigotry and interracial contacts to be valid correlates of reliability. *See* 37 Cal. 3d at 368, 690 P.2d at 720-21, 208 Cal. Rptr. at 247-48.

27. *See* E. LOFTUS, *supra* note 12, at 33. Professor Loftus also notes that stress may generate "weapon focus"—which causes a threatened witness to pay more attention to a brandished gun or knife than the person who is brandishing it. *Id.* at 35-36. It should be noted that there is some question as to how well the Yerkes-Dodson Law really applies outside the laboratory. *See* A. YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY 52 (1979).

While most people probably are aware of the former effect, many probably are ignorant of the latter.[28]

A third subject commonly addressed by eyewitness experts is the absence of correlation between eyewitness confidence and accuracy. Most people wonld give more weight to an identification when the eyewitness appears certain.[29] Yet, after surveying extensive research,[30] Professors Wells and Murray concluded that "the empirical evidence does not support the idea that eyewitness confidence is a valid measure of eyewitness accuracy under ecologically valid conditions."[31] As Professor Loftus warns, "one should not take high confidence as any absolute gnarantee of anything."[32]

The foregoing findings are all the more striking because they are counterintuitive. Thus, incorrect commonsense inferences concerning these factors may well contribute to overconfidence in eyewitness testimony.[33] Such misplaced credence increases the danger of wrongful conviction. Insofar as expert testimony may diminish this potential for injustice to a greater extent than traditional safeguards,[34] the case for admission is clear.

B. The Judicial Reaction

Despite the demonstrated merits of eyewitness-expert testimony, its exclusion is common.[35] In the dozens of published opinions reviewing decisions to exclude, courts almost uniformly have upheld what they

28. *See* E. LOFTUS, *supra* note 12, at 173-74.

29. Even the Supreme Court has listed confidence as a factor to be considered in determining whether an identification is sufficiently reliable to meet *Wade* due process standards. *See* Manson v. Brathwaite, 432 U.S. 98, 114 (1977); Neil v. Biggers, 409 U.S. 188, 199 (1972).

30. More than thirty studies have been published concerning this phenomonon. *See* Wells & Murray, *Eyewitness confidence*, in EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 155, 161 (G. Wells & E. Loftus eds. 1984).

31. *Id* at 168-69.

32. E. LOFTUS, *supra* note 12, at 101. *See generally* P. WALL, *supra* note 9, at 15-16.

33. It appears that some of this overbelief is not attributable to mere misunderstanding of factors. For example, a study by Professor Loftus indicated that even juror awareness of the fact that an eyewituess had 20/400 vision did little to alter belief in that witness's testimony. *See* E. LOFTUS, *supra* note 12, at 10. On the other hand, there is some evidence that eyewitness-expert testimony increases the amount of time jurors deliberate. *See supra* note 22. Thus, such testimony may affect overbelief caused by blind acceptance as well.

34. Recent studies indicate that eyewituess-expert testimony may generate sucli positive effects. *See* Hosch, Beek & McIntyre, *The Influence of Expert Testimony Regarding Eyewitness Accuracy on Jury Decisions*, 4 LAW & HUM. BEHAV. 287 (1980); Loftus, *Impact of Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 65 J. APPLIED PSYCHOLOGY 9 (1980); Wells, Lindsay, & Tousingnant, *Effects of Expert Psychological Advice on Human Performance in Judging the Validity of Eyewitness Testimony*, 4 LAW & HUM. BEHAV. 275 (1980).

35. On tlie otlier liand, deeisious to exclude are by no means uniiversal. Dr. Robert Buckout reports that lie has testified on eyewitness reliability in over 60 cases. Jolinson, *supra* note 14, at 964 n. 179. Dr. Elizabeth Loftus filed an uffidavit in *McDonald* stating she has so testified more than 34 times. *McDonald*, 37 Cal. 3d at 365 n. 10, 690 P.2d at 718 n.10, 208 Cal. Rptr. at 245 n.10.

viewed as the trial court's reasonable exercise of discretion.[36] Rather than embarking on an overview of these cases, the following discussion will focus only on those three opinions essential to an understanding of *McDonald*. The first, *United States v. Amaral*,[37] set the standard of review for decisions excluding eyewitness-expert testimony. The next, *People v. Johnson*,[38] provided the framework for the *McDonald* court's analysis. The final case, *State v. Chapple*,[39] was the sole precedent for *McDonald*'s holding that exclusion of testimony concerning eyewitness reliability can be an abuse of discretion.

1. United States v. Amaral

United States v. Amaral[40] was the first case to develop general guidelines for admission of expert testimony concerning eyewitness reliability. Under *Amaral*, the defense must establish a four-point foundation for admission: (1) the witness must be a qualified expert; (2) the testimony must conform to a generally accepted explanatory theory; (3) its probative value must outweigh its potentially prejudicial effect; and (4) it must pertain to a "proper subject."[41]

Subsequent judicial attention has focused on the "proper subject" requirement. Courts have interpreted this requirement in two ways. Under one trend of thought, expert testimony concerns an "improper subject" when it usurps the jury's function of assessing the credibility of eyewitnesses.[42] The *Amaral* trial court justified exclusion on this ground, fearing that the proffered testimony would "take from the jury their own determination as to what weight or effect to give to the evidence of the eye-witness."[43]

The Court of Appeals for the Ninth Circuit affirmed, but for a different reason. It found that "effective cross-examination is adequate to reveal any inconsistencies or deficiencies in the eye-witness testimony."[44] This statement encapsulates the second interpretation courts have given

36. For a recent compilation, see Commonwealth v. Francis, 390 Mass. 89, 92, 453 N.E.2d 1204, 1207 (1983).

37. 488 F.2d 1148 (9th Cir. 1973).

38. 38 Cal. App. 3d 1, 112 Cal. Rptr. 834 (1974).

39. 135 Ariz. 281, 660 P.2d 1208 (1983).

40. 488 F.2d 1148 (9th Cir. 1973).

41. *Id.* at 1153.

42. *See, e.g.* United States v. Brown, 540 F.2d 1048, 1054 (10th Cir. 1976), *cert. denied*, 429 U.S. 1100; United States v. Brown, 501 F.2d 146, 150 (9th Cir. 1974), *rev'd on other grounds sub nom.* United States v. Nobles, 422 U.S. 225 (1975); Jones v. State, 232 Ga. 762, 763-66, 208 S.E.2d 850, 853-54 (1974); State v. Ammons, 208 Neb. 812, 814-15, 305 N.W.2d 812, 815 (1981).

43. 488 F.2d at 1153.

44. *Id.* The court did not reach the issues of whether the testimony would have conformed to a generally accepted explanatory theory, or whether it would have been unduly prejudicial. *Id.* at 1153-54.

to the "proper subject" requirement.[45] In essence, that interpretation permits exclusion whenever the court feels that effective cross-examination would enable the jury to ascertain fully the reliability of an eyewitness. As opposed to the "invading the province of the jury" interpretation, which bars testimony as impermissible, this "within the ken of the jury" interpretation excludes it as unnecessary.

Several circuit[46] and state[47] courts have expressly followed *Amaral.* Nevertheless, commentators have recognized a weakness in the case: it does not set a specific standard for admission of this particular type of evidence.[48] *Amaral* simply tells trial judges to apply general rules concerning admission of expert testimony to their analysis of eyewitness experts. Indeed, courts have used *Amaral* in support of decisions excluding expert testimony on entirely unrelated subjects. [49] This lack of specific guidance becomes even more apparent given that, had the case never been written, every one of its four factors could be derived from the Federal Rules of Evidence.[50] Nevertheless, the influence of *Amaral* remains pervasive.

2. People v. Johnson

The first California case to review exclusion of eyewitness-expert testimony was *People v. Johnson.*[51] The defendants had offered a psychologist's testimony on "the distorting effects of excitement and fear on perception and recollection."[52] The court of appeal affirmed exclusion. It first decided that the California Evidence Code left the decision to exclude within the trial judge's discretion.[53] The court then observed

45. *See, e.g.*, United States v. Thevis, 665 F.2d 616, 641-42 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1982); United States v. Fosher, 590 F.2d 381, 383 (1st Cir. 1979); Dyas v. United States, 376 A.2d 827, 832 (D.C.), *cert. denied*, 434 U.S. 973 (1977); State v. Hoisington, 104 Idaho 153, 165, 657 P.2d 17, 29 (1983), State v. Porraro, 121 R.I. 882, 404 A.2d 465, 471 (1979).

46. *See, e.g.*, United States v. Purham, 725 F.2d 450, 454 (8th Cir. 1984); United States v. Thevis, 665 F.2d 616, 641-42 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1982); United States v. Fosher, 590 F.2d 381, 383 (1st Cir. 1979); United States v. Brown, 501 F.2d 146 (9th Cir. 1974), *rev'd on other grounds sub nom.* United States v. Nobles, 422 U.S. 225 (1975).

47. *See, e.g.*, State v. Warren, 230 Kan. 385, 393-94, 635 P.2d 1236, 1242-43 (1981); Porter v. State, 94 Nev. 142, 150, 576 P.2d 275, 281 (1978); ; State v. Porraro, 121 R.I. 882, 889, 404 A.2d 465, 471 (1979); State v. Barry, 25 Wash. App. 751, 757, 611 P.2d 1262, 1267 (1980).

48. *See* Loftus, *Expert Testimony on the Eyewitness*, in EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 273, 276-77 (G. Wells & E. Loftus eds. 1984); Note, *supra* note 22, at 1014.

49. *See, e.g.*, United States v. Kennedy, 714 F.2d 968, 974 (9th Cir. 1983), *cert. denied* 104 S.Ct. 1305 (1984) (karate expert); United States v. Fleishman, 684 F.2d 1329, 1336 (9th Cir.), *cert. denied* 459 U.S. 1044 (handwriting expert); United States v. Booth, 669 F.2d 1231, 1240 (9th Cir. 1981) (fingerprint expert).

50. *See* FED. R. EVID. 403, 702-703. *But see* FED. R. EVID. 704 (rejecting the "province of the jury" interpretation of *Amaral*'s "proper subject" requirement).

51. 38 Cal. App. 3d 1, 112 Cal. Rptr. 834 (1974).

52. *Id.* at 6, 112 Cal. Rptr. at 837.

53. *Id.*

that "[i]n cases not involving sex offenses California courts usually reject attempts to impeach a witness by means of psychiatric testimony."[54] The court felt such testimony was inadmissible unless it related to an "emotional disturbance or psychological 'abnormality.' "[55] Otherwise, the court feared, the testimony would invade the jury's province of evaluating the credibility of witnesses.[56] Having found no evidence of such an abnormality in the record, the court held that the trial judge had not abused his discretion in barring admission.

California courts have continued to uphold rulings excluding eyewitness experts,[57] and on two occasions specifically have reaffirmed *Johnson*.[58] The *McDonald* court thus faced a substantial block of California precedent supporting the routine exclusion of eyewitness-expert testimony. It is not surprising that the court went to great lengths to disapprove *Johnson* and its progeny.

3. State v. Chapple

In *State v. Chapple*,[59] the Arizona Supreme Court became the first in the nation to rule that a judge abused his discretion in excluding expert testimony concerning eyewitness reliability. Emphasizing that the "within the ken of the juror" interpretation of *Amaral*'s "proper subject" requirement "would correctly permit preclusion of such testimony in the great majority of cases,"[60] the court nevertheless held that the trial court erred.

A close reading of the opinion suggests that the decision turned not

54. *Id.* at 7, 112 Cal. Rptr. at 837, *citing* People v. Russel, 69 Cal. 2d 187, 443 P.2d 794, 70 Cal. Rptr. 210, *cert. denied*, 393 U.S. 864 (1968); Ballard v. Superior Court, 64 Cal.2d 159, 410 P.2d 838, 49 Cal. Rptr. 302, (1966).

55. 38 Cal. App. 3d at 7, 112 Cal. Rptr. at 837.

56. *Id.*

57. People v. Bradley, 115 Cal. App. 3d 744, 171 Cal. Rptr. 487 (1981); People v. Hurley, 95 Cal. App. 3d 895, 157 Cal. Rptr. 364 (1979); People v. Brooks, 51 Cal. App. 3d 602, 124 Cal. Rptr. 492 (1975), *cert. denied*, 424 U.S. 970 (1976); People v. Guzman, 47 Cal. App. 3d 380, 121 Cal. Rptr. 69 (1975).

Two more recent decisions represent a new trend. In People v. Plasencia, 140 Cal. App. 3d 853, 189 Cal. Rptr. 804 (1983), the court of appeal, after an extensive treatment of the issue, upheld exclusion. The supreme court, by an order dated January 3, 1985, retransferred the case to the court of appeal for reconsideration in light of *McDonald*.

In People v. Jackson, 164 Cal. App. 3d 224, 210 Cal. Rptr. 680 (1985), the court of appeal applied *McDonald* for the first time, concluding that exclusion of eyewitness-expert testimony constituted an abuse of discretion. *Id.* at 242, 210 Cal. Rptr. at 691. However, the court found this error to be harmless. *Id.* at 247, 210 Cal. Rptr. at 694. For a more comprehensive discussion of this case, see *infra* note 170.

58. *Brooks*, 51 Cal. App. 3d at 608, 124 Cal. Rptr. at 495; *Guzman*, 47 Cal. App. 3d at 385, 121 Cal. Rptr. at 71.

59. 135 Ariz. 281, 660 P.2d 1208 (1983).

60. *Id.* at 296, 660 P.2d at 1220.

so much on the facts,[61] as on the way the expert planned to analyze those facts. In contrast to *Amaral* and *Johnson*, the testimony in *Chapple* would have set out six factors which might have affected the memory and perception of various eyewitnesses.[62] Unlike the *Amaral* court,[63] the *Chapple* court refused to assume that the jury would have been adequately aware of these factors without the expert's assistance.[64]

Until *McDonald*, *Chapple* stood as the lone exception to the judicial trend set by *Amaral* and *Johnson*. In light of the strong case for eyewitness-expert testimony outlined above, this pattern of judicial resistance seems perplexing. Perhaps the courts' unanimity has resulted more from momentum than reason. A judge who now wants to support a decision to exclude may find solace in a long string of citations. Some courts continue to adopt this approach.[65] Yet precedent alone cannot take the place of reasoning. The *McDonald* court recognized this, and focused on the established merits of eyewitness-expert testimony, rather than blindly relying on legal doctrine.

II
PEOPLE V. MCDONALD

A. The Trial

One late afternoon in August 1979, a black man shot and killed Jose Esparza in downtown Long Beach. Eddie Bobby McDonald was arrested in connection with the incident, then tried for robbery and murder. Although the prosecution and the defense together took less than six hours to present their cases, the jury deliberated for nearly 20 hours before reaching a verdict.[66] McDonald was found guilty and sentenced to death.

The People's case comprised solely eyewitness testimony. The supreme court found that testimony less than compelling. One witness had twice been unable to pick the defendant's picture out of a photographic lineup. Two others could not choose between his photograph

61. A dissenting justice was "unable to distinguish the case at bench from the wealth of cases where identification is in issue. *Id.* at 303, 660 P.2d at 1227 (Hays, J., dissenting).

62. The expert was prepared to testify about the effects of stress on perception, how memory fades over time, the phenomena of "uncouscious transfer" and "assimilation of post-event information," the tendency of conversations between witnesses to reinforce their confidence, and the absence of a relatiouship betweeu confidence and accuracy. *Id.* at 294, 660 P.2d at 1221.

63. United States v. Amaral, 488 F.2d 1148, 1153 (9th Cir. 1973).

64. *Chapple*, 135 Ariz. at 297-98, 660 P.2d at 1221.

65. *See, e.g.*, State v. Galloway, 275 N.W.2d 736, 741 (Iowa 1979) (Reynoldson, concurring); Commonwealth v. Francis, 453 N.E.2d 1204, 1207-08 (Mass. 1983).

66. The *McDonald* court found this significant, seemingly because it indicated the case was close and that Dr. Shomer's testimony thus might have affected the outcome. *McDonald*, 37 Cal.3d at 376 n.23, 690 P.2d at 727, 208 Cal. Rptr. at 253.

and that of another black man.[67] Most based their identifications on "similarities" or "resemblances" between the killer and McDonald.[68] On cross-examination, one witness attempted to bolster his identification with the statement, "I know his race. He was a Negro."[69] Finally, the eighth prosecution witness, herself a black, turned on her sponsor and testified that McDonald definitely was not the murderer.[70]

The accused made various attempts to discredit the prosecution's eyewitnesses. Four people testified that they saw or spoke with McDonald in Alabama, where he purportedly was visiting relatives, on the day of the killing.[71] Several witnesses described facial characteristics of the defendant which differed from descriptions given by prosecution witnesses.[72] Finally, the defense offered the testimony of a psychologist, Dr. Robert Shomer. Shomer intended to discuss the processes of perception and recall, and would have attempted to dispel some common lay misconceptions about the reliability of eyewitness identifications.[73]

The prosecution objected to this offer on the sole ground that it would "usurp the jury's function."[74] The trial judge, applying the reasoning of *People v. Johnson*,[75] agreed that in the absence of "psychological defects" such testimony was inadmissible. After protest by the defense, the judge gave three further grounds for his ruling: a cautionary instruction to the jury would sufficiently alert them to potential unreliability of the eyewitnesses; Dr. Shomer's testimony might confuse the jury; and, finally, the foundation of his testimony was "not . . . scientific enough at this point in time."[76]

B. The Appeal

The trial judge's exclusionary ruling came before the supreme court on automatic appeal.[77] The high court began its analysis by taking note of cases which recognized the unreliability of eyewitness testimony, and by citing recent commentary favoring the admission of eyewitness-expert testimony.[78] Significantly, the court confined its review of the near-uni-

67. *Id* at 356-58, 690 P.2d at 711-14, 208 Cal. Rptr. at 238-41.

68. *Id.*

69. *Id.* at 358 n.2, 690 P.2d at 713 n.2, 208 Cal. Rptr. at 240 n.2.

70. *Id.* at 358, 690 P.2d at 713-14, 208 Cal. Rptr. at 240-41.

71. *Id.* at 360, 690 P.2d at 714-15, 208 Cal. Rptr. at 241-42.

72. *Id.*

73. *Id.* at 361-62, 690 P.2d at 715-16, 208 Cal. Rptr. at 242-43. His testimony would have focused on the unreliability of cross-racial identifications. *Id.*

74. *Id.* at 362, 690 P.2d at 716, 208 Cal. Rptr. at 243.

75. 38 Cal. App. 3d 1, 6-7, 112 Cal. Rptr. 834, 837.

76. *McDonald*, 37 Cal. 3d at 363, 690 P.2d at 717, 208 Cal. Rptr. at 244.

77. The supreme court has initial appellate jurisdiction over capital cases. CAL. CONST. art VI, § 11; CAL. PEN. CODE § 1239(b) (West Supp. 1985)

78. *McDonald*, 37 Cal. 3d at 363-65, 690 P.2d at 716-18, 208 Cal. Rptr. at 243-45.

form precedent to a single paragraph.[79]

The court next proceeded to dismantle systematically the case which lay at the foundation of the trial judge's ruling, *People v. Johnson*.[80] It began by criticizing *Johnsons*'s interpretation of two sections in the California Evidence Code. *Johnson* had held that section 780, which allows the jury to consider any matter which might bear upon the truthfulness of testimony,[81] did not necessarily cover the testimony concerning another witness's "capacity."[82] The supreme court recognized a basic fallacy in this reasoning. Dr. Shomer would not have discussed the psychological capacity of any *particular* witness. Rather, he would have explained how the reliability of identifications in general are altered in circumstances such as those that confronted the witness. Such testimony, in the *McDonald* court's opinion, clearly fell within the parameters of section 780.[83]

The *Johnson* court also had determined that section 801 of the Evidence Code[84] "limits expert testimony to subjects beyond the range of common experience."[85] The supreme court found this reading of section 801 in error for two reasons. First, that section applies only to opinion testimony, whereas much of Dr. Shomer's proposed testimony "would have related primarily to matters of fact: the *contents* of eyewitness identification studies."[86] Second, by its own terms, section 801 simply requires that the proferred testimony assist the trier of fact. "It will be excluded only when it would add nothing at all to the jury's common fund of information . . . ."[87] The court thought that recent scholarship indicated Dr. Shomer's testimony would have related to factors which "may be known only to some jurors, or may be imperfectly understood by many, or may be contrary to the intuitive beliefs of most."[88] For this

79. *Id.* at 365, 690 P.2d at 718-19, 208 Cal. Rptr. at 245-46.

80. 38 Cal. App. 3d 1, 112 Cal. Rptr. 834 (1974).

81. Section 780 (West 1966) provides in part:

> Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:
>
> . . . .
>
> (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.

82. *Johnson*, 38 Cal. App. 3d at 6, 112 Cal. Rptr. at 839.

83. *McDonald*, 37 Cal. 3d at 366, 690 P.2d at 719, 208 Cal. Rptr. at 246.

84. Section 801 (West 1966) provides in relevant part: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . ."

85. *Johnson*, 38 Cal. App. 3d at 6-7, 112 Cal. Rptr. at 839-840.

86. *Id.* (emphasis in original). But see *infra* note 155 for a criticism of this approach.

87. *Id.* at 366, 690 P.2d at 719, 208 Cal. Rptr. at 246.

88. *Id.* at 367-68, 690 P.2d at 720-21, 208 Cal. Rptr. at 247-48.

reason, his testimony came within the purview of section 801.

The court next rejected *Johnson*'s prerequisite to admission of "an emotional disturbance or psychological 'abnormality.' "[89] It found this factor "totally irrelevant" to the value of expert testimony on eyewitness fallibility.[90] The cases from which *Johnson* had inferred this requirement dealt with psychiatric testimony designed to attack the truth-telling ability of a witness. Dr. Shomer, on the other hand, would not have addressed the ability or willingness of any particular witness to speak truthfully. Rather, his testimony would have helped the jury to assess more accurately the *reliability* of eyewitness identifications.[91]

The *McDonald* court went on to disapprove *Johnson*'s ultimate rationale, which permitted exclusion under the theory that "the testimony would take over the jury's task of determining the weight and credibility of the witness's testimony."[92] The court recognized that this basis for exclusion had been sharply criticized, that it made little sense as a matter of logic, and that it had been expressly abolished by statute in California.[93] These reasons alone would have been enough to dispose of the issue. The court, however, went further. It found that the testimony could not have infringed on the province of the jury, since Dr. Shomer had nothing whatsoever to say about the credibility of any particular witness.[94] This second ground is significant, since it applies even in those jurisdictions which continue to recognize the "invade the province" rule.[95]

The trial judge in *McDonald* had not relied exclusively on *Johnson*. Accordingly, the supreme court examined and rejected each of his additional grounds for exclusion. The court first concluded that standard jury instructions, which the judge had proposed to give in lieu of the expert's testimony, simply could not convey the same sort of data that Dr. Shomer's testimony would have provided.[96]

In addition, the court found that the trial judge should not have excluded the testimony as too confusing. The judge instead could have minimized the danger of confusion by limiting the presentation of evidence, or by giving carefully drafted instructions.[97]

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89. *Johnson*, 38 Cal. App. 3d at 7, 112 Cal. Rptr. at 837.

90. *McDonald*, 37 Cal. 3d at 370, 690 P.2d at 722, 208 Cal. Rptr. at 249.

91. *Id.*

92. *Johnson*, 38 Cal. App. 3d at 7, 112 Cal. Rptr. at 837.

93. *See* CAL. EVID. CODE § 805 (West 1966) ("Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.").

94. *McDonald*, 37 Cal. 3d at 371, 690 P.2d at 723, 208 Cal. Rptr. at 250.

95. *See* Johnson, *supra* note 8, at 970-71.

96. *McDonald*, 37 Cal. 3d at 372, 690 P.2d at 723, 208 Cal. Rptr. at 250.

97. *Id.*

Finally, the court addressed the trial judge's implied application of the *Kelly-Frye* rule,[98] which requires a showing of general acceptance in the scientific community for any novel method of scientific proof.[99] According to the court, the *Kelly-Frye* rule was designed to prevent the jury from ascribing "an inordinately high degree of certainty to proof derived from an apparently 'scientific' mechanism, instrument, or procedure."[100] It never had been applied in California to bar the introduction of psychiatric or psychological testimony, since "jurors may temper their acceptance of [this] testimony with a healthy skepticism born of their knowledge that all human beings are fallible."[101]

Having found no basis in law for exclusion of Dr. Shomer's testimony, the court went on to determine that the record did not support the trial judge's exercise of discretion in the particular circumstances of the case.[102] At this point, *State v. Chapple*[103] provided a valuable reference. As in *Chapple*, "the accuracy of the eyewitness identifications was a crucial issue, and the exclusion of [the expert's] testimony 'undercut the entire evidentiary basis' of the defendant's arguments on that issue."[104] The court concluded that the jury might have acquitted had the testimony been admitted. It thereby found prejudicial error, and reversed.

III

INTERPRETING *McDONALD*—POLICY AND PRACTICE

The *Chapple* court expressly limited its holding to the facts before it.[105] *McDonald* takes a different approach. After emphasizing that the "usual case" will call for deference to the trial judge, the opinion articulates a specific rule for admission.

> When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony.[106]

98. *Id.* at 372-73, 690 P.2d at 723-24, 208 Cal. Rptr. at 250-51.

99. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); People v. Kelly, 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976). A comprehensive account of the rocky history of this rule may be found in Gianelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States *a Half-Century Later*, 80 COLUM. L. REV. 1197 (1980).

100. *McDonald*, 37 Cal. 3d at 372, 690 P.2d at 724, 208 Cal. Rptr. at 251.

101. *Id.* at 372, 690 P.2d at 723, 208 Cal. Rptr. at 251.

102. *Id.* at 376, 690 P.2d at 726, 208 Cal. Rptr. at 253.

103. 135 Ariz. 281, 660 P.2d 1208 (1983).

104. *McDonald*, 37 Cal. 3d at 375, 690 P.2d at 725, 208 Cal. Rptr. at 252.

105. *Chapple*, 135 Ariz. at 296, 660 P.2d at 1223.

106. *McDonald*, 37 Cal. 3d at 377, 690 P.2d at 727, 208 Cal. Rptr. at 254.

This Part brings into focus some of the difficulties which may arise in applying this rule, and seeks to develop guidelines for its interpretation. The Part begins with a review of the conflicting policy concerns underlying *McDonald*'s discussion of the eyewitness-expert issue, and goes on to suggest how trial judges might weigh these concerns when applying the rule. Next, an attempt is made to resolve some of the ambiguities inherent in the operative terms of the rule itself. This Comment concludes that *McDonald* actually provides little concrete guidance for trial judges. Thus, there is critical need for judicial elaboration on the rule.

A. Policy Concerns

The *McDonald* court recognized a basic flaw in the way courts have approached the admission of testimony concerning eyewitness reliability. Under the guise of exercising their discretion, trial judges often have excluded such testimony based on their own conclusions of law, instead of considering the specific equities of the case before them. Consider, for example, the "invading the province of the jury" rule applied in *Johnson*.[107] Once a judge characterizes expert testimony as commentary on credibility, this rule calls for exclusion as a matter of law. This exclusion is *categorical*—no reference to the record need be made. Factors such as potential eyewitness error, probable juror misapprehension, and expert qualifications are never considered.

The "beyond the ken of the juror" rule[108] seems to avoid this error, since these three factors all appear vital to any determination of a jury's capability to evaluate eyewitness testimony without expert assistance. But courts applying this rule have tended either to assume the jury is fully equipped to assess eyewitness reliability, or have taken for granted that cross-examination would be adequate to fill any gaps.[109] Neither of these assumptions is a factual determination. Instead, both are legal conclusions about the usefulness of this category of expert testimony.

McDonald makes it clear that this sort of formulaic decisionmaking no longer can be considered an exercise of discretion. In the words of the court, such rulings are "unsupported by the law."[110] Having so held, however, the court confronted a new problem: delineating the actual boundaries of a judge's discretion to exclude. In pursuing this goal, the opinion develops a split personality. On the one hand, it elucidates guidelines which seem to compel admission of expert testimony in most

107. 38 Cal. App. 3d at 7, 112 Cal. Rptr. at 837.

108. *See supra* text accompanying note 44.

109. *See supra* text accompanying note 13.

110. *McDonald*, 37 Cal. 3d at 376, 690 P.2d at 726, 208 Cal. Rptr. at 253.

cases.[111] On the other hand, it expresses the expectation "that such evidence will not often be needed, and in the usual case," will be subject to exclusion.[112] Any interpretation of *McDonald* must come to terms with this apparent rift.

This ambivalence results primarily from the court's attempt to balance conflicting policy concerns. The possibility that eyewitness-expert testimony may help to prevent the conviction of innocent defendants suggests that it routinely should be admitted. On the other hand, judicial resources are not unlimited. Overuse of expert testimony clogs already backlogged court calendars. Moreover, calling in psychologists to testify entails large costs. Where the defendant is indigent, he may be entitled to a court-appointed expert,[113] which burdens the taxpayer.[114]

The following discussion attempts to establish how the trial judge should weigh these concerns when ruling on admission. It concludes that while the judge may take administrative concerns into account through her *approach* to the admission decision, the policy of protecting the innocent must normally control her *application* of the rules of evidence.

1. Administrative Efficiency

The *McDonald* court implicitly recognized the danger of administrative burdens when it expressed its intention not to "open the floodgates" to unnecessary expert testimony.[115] The court's metaphor

111. *See infra* text accompanying notes 129-65.

112. *McDonald*, 37 Cal. 3d at 377, 690 P.2d at 727, 208 Cal. Rptr. at 254.

113. An indigent defendant who can demonstrate the need for an expert to assist in the preparation of her defense is constitutionally entitled to have one appointed by the court. In re Ochse, 38 Cal. 2d 230, 231, 238 P.2d 561, 561 (1951); Torres v. Municipal Court, 50 Cal. App. 3d 778, 784-85, 123 Cal. Rptr. 553, 556 (1975). Whether the facts of the case demonstrate such a need is a decision left to the discretion of the appointing judge. Collins v. Superior Court, 74 Cal. App. 3d 47, 52, 141 Cal. Rptr. 273, 275 (1977); Torres v. Municipal Court, 50 Cal. App. 3d at 784, 123 Cal. Rptr. at 556; *see* Ballard v. Superior Court, 64 Cal. 2d 159, 177, 410 P.2d 838, 49 Cal. Rptr. 302 (1966) (discretion to order a psychiatric examination).

It would be irrational and unfair to the defense to appoint an expert and later bar admission of that expert's testimony. Therefore, although not required by statute, a judge should look to the rules of admission for her standard of appointment. Where appointment of an eyewitness expert is at issue, *McDonald* should control.

In People v. Hurley, 95 Cal. App. 3d 895, 157 Cal. Rptr. 364 (1979), the court of appeal upheld the trial court's refusal to appoint an expert on eyewitness fallibility. The court found the defense had failed to produce any studies, or provide any coherent arguments, as to why cross-examination would not have been adequate to attack the identifications. Moreover, there was no offer of proof as to what specific assistance the expert could have provided. *Id.* at 899, 157 Cal. Rptr. at 161. Under *McDonald*, either of these grounds probably would be sufficient to justify exclusion. *See infra* text accompanying notes 153-69.

The general procedure for appointment is set forth in CAL. EVID. CODE § 730 (West Supp. 1985). There is a special statute for appointment in capital cases. CAL. PENAL CODE § 987.9 (West Supp. 1985).

114. *See* CAL. EVID. CODE § 731(a) (West Supp.1985).

115. *McDonald*, 37 Cal. 3d at 377, 690 P.2d at 727, 208 Cal. Rptr. at 254.

certainly conjures up the sort of exigency that would demand attention in any ruling on admission. However, that same general language conceals the fact that a trial judge could never justify exclusion on this ground. During any particular trial, "flooding" is preventable. In contrast, trial judges are not empowered to consider this conceru at the level of analysis where it is most pressing.

In any individual trial, a protracted "battle of the experts" certainly is conceivable.[116] However, California law grants judges express authority to limit both the parameters of testimony[117] as well as the number of expert witnesses that either party may call.[118] Proper exercise of this authority should effectively dam any flood of testimony at its source. Since it is the trial judge herself who has final say over whether a flood will occur, it would be unjustifiable for her to exclude on the basis that one might occur.

There is, on the other hand, a real potential for "flooding" of the entire court *system* under a permissive rule of admission. Such a rule broadens the range of cases in which expert testimony is admissible. This sets the stage for two collateral effects. First, defense attorneys, realizing that attempts to introduce such testimony will meet with greater success, might increase their recruitment and use of experts. Second, more psychologists may represent themselves as qualified and available to testify in this capacity. Consequently, there well could be more offers of eyewitness-expert testimony, leading to an increased burden on the courts.

Nevertheless, trial judges are powerless to rely on this consideration as a ground for exclusion. In California, all relevant evidence is admissible uuless a statute provides otherwise.[119] There is no statute which would permit a judge to exclude relevant evidence whenever she felt that admission of that evidence in similar cases would place an undue burden on the court system. Her province is limited to applying statutory evidence law to the facts of the case before her.

This is not to say that *McDonald*'s concern about opened floodgates is empty rhetoric. Although trial judges cannot *rely* on administrative burdens as a basis for exclusion, they may certainly *approach* the ruling on admission with these considerations in mind. Specifically, the judge should apply the *McDonald* rule conservatively, seeking to exclude the testimony whenever such a decision would be within the range of her

116. Commentators have expressed differing views on the plausibility of this threat. *Cf., e.g.*, Johnson, *supra* note 14 at 973 ("battle of the experts" unlikely when the cross-racial factor is at issue); Note, *supra* note 22, at 1027 (battles may occur).

117. *See* CAL. EVID. CODE §§ 352, 801, 803 (West 1966).

118. CAL. EVID. CODE § 723 (West 1966).

119. CAL. EVID. CODE § 351 (West 1966).

discretion. The rest of this Comment therefore attempts to elucidate the boundaries of that discretion.

2. *Preventing Wrongful Convictions*

The *McDonald* court was also concerned with preventing the conviction of mistakenly identified defendants. Instances of such convictions are well documented.[120] If we accept the premise, as *McDonald* does, that some of these convictions are attributable to flaws in our jury system, we should welcome any effort to remedy those defects.

A judge can apply this policy directly in interpreting the rules of evidence. The extent to which an expert's testimony might help prevent a wrongful conviction has direct bearing on whether that testimony is objectionable as irrelevant,[121] cumulative,[122] speculative,[123] or unhelpful.[124] Because expert tutoring on eyewitness evaluation probably makes for better informed jurors,[125] none of these objections seems to carry much weight, and this policy should prevail.

The next Section will consider how trial judges can apply this general policy framework to the specific terminology of the *McDonald* rule, while at the same time respecting the statutory limitations on their power to exclude evidence.

B. McDonald—*On Its Own Terms*

McDonald essentially holds that an expert may testify whenever he can contribute significant information about a "key" eyewitness identification that is not "independently reliable." The expert's contribution is more significant, the greater the possibility that specific[126] factors not within the ken of the jurors may have affected the reliability of the eyewitness. The eyewitness identification is more key when the case is close and the prosecution has little other evidence to offer.[127]

This much is apparent as a matter of intuition. There are, however, two reasons why it is necessary to further define the rule's terms. First, it is unclear where the border lies between cases where admission is

120. *See supra* note 4.

121. CAL. EVID. CODE § 350 (West 1966).

122. CAL. EVID. CODE § 352 (West 1966).

123. *See* CAL. EVID. CODE §§ 801(b), 803 (West 1966).

124. *See* CAL. EVID. CODE § 801(a) (West 1966).

125. One survey concludes that while the effects of expert testimony on verdicts are uncertain, such testimony decidedly tends to alter jurors' beliefs and increase their deliberation time. Hosch, *A Comparison of Three Studies of the Influence of Expert Testimony on Jurors*, 4 LAW & HUM. BEHAV. 297, 300-01 (1980).

126. It appears that general testimony on the processes of perception, memory, and recall, offered alone, would not fall within the rule. This makes sense, as the rule could otherwise form no basis for discretionary exclusion of such testimony. *See supra* text accompanying note 21.

127. *See McDonald*, 37 Cal. 3d at 375-76, 690 P.2d at 726, 208 Cal. Rptr. at 253.

mandatory, and those in which the judge retains discretion to exclude. Second, the rule does not mention which provisions in the California Evidence Code would justify exclusion. This silence is significant, since judges can make only those rulings the statute permits.[128] The rest of this Section attacks these deficiencies by separating the rule into its two operative clauses—the "key element" and the "ken of the jury" tests—so as to scrutinize each independently.

1. The Key Element Test

McDonald requires the judge to make specific findings as to whether a challenged identification is key, and how strongly it is corroborated.[129] There is little case support for this requirement.[130] Rather, the court seems to have extracted it from both arguments set forth in the litigants' briefs,[131] and critical commentary on the issue.[132] This aspect of the rule thus is landmark precedent, warranting closer scrutiny.

In applying the rule, the trial judge first must determine whether the eyewitness identification played a key role in the prosecution's case. If so, she may only exclude eyewitness-expert testimony if the identification was so corroborated as to be independently reliable. Two polar cases come to mind. At one end of the spectrum, identification might be based solely on the testimony of a single eyewitness. Since there is no corroboration, the expert must be allowed to testify, assuming he has something to say about relevant specific psychological factors. At the other pole,

128. *See* CAL. EVID. CODE § 351 (West 1966).

129. By a memorandum order, the court deleted former footnote 25, which would have ordered the judge to render her admission decision after the prosecution made its case. *McDonald*, 37 Cal. 3d 611a (1984). Thus it remains open to the judge to pass on admissibility at a pretrial in limine session, or whenever else the defense may request.

130. In Ballard v. Superior Court, 64 Cal. 2d 159, 49 Cal. Rptr. 302, 410 P.2d 838 (1966), the supreme court articulated some of the factors that should go into a decision to order the psychiatric examination of a prosecutrix in a sex crime case. Among other things, "[s]uch necessity would generally arise only if little or no corroboration supported the charge . . . ." *Id.* at 177, 49 Cal. Rptr. at 320, 410 P.2d at 859. *McDonald* makes no supporting reference to *Ballard*, and indeed states that its standard for acceptance of psychiatric testimony on credibility "has nothing to do with" *Ballard*. *McDonald*, 37 Cal. 3d at 370, 208 Cal. Rptr. at 249, 690 P.2d at 722.

The clearest judicial articulation of a corroboration requirement in the eyewitness-expert context came in dictum from the Alaska Court of Appeals. State v. Contreras, 674 P.2d 792, 822 (Alaska 1983) (exclusion may constitute abuse of discretion where identification is "weak and uncorroborated or sharply disputed"); *see also* State v. Chapple, 135 Ariz. 281, 295, 660 P.2d 1208, 1222 (1983) (citing as one of the factors favoring admission that "[t]he facts were close and one of the key factual disputes to be resolved involved the accuracy of the eyewitness identification").

131. *See* Appellant's Opening Brief at 112 & n. 50 (attempts to distinguish between earlier California appellate cases on the basis of the amount of corroboration behind the disputed identification).

132. *See* Note, *supra* note 22, at 1024 ("If so much evidence corroborates the identification that it plays only a supporting role in the prosecution's case, the expert testimony would add little of consequence to the ultimate disposition of the case and merely would waste trial time.") *Id.* (footnote omitted).

the issue of identity might be *conceded*.[133] Here, any eyewitness identification, and thus any expert testimony pertaining to eyewitness reliability, would be irrelevant. The Evidence Code would compel exclusion.[134]

Between these poles are cases where the eyewitness's testimony is both relevant and corroborated. In these situations, application of the the key-element clause proves more difficult, because the considerations bearing on admissibility depend on the prosecution's method of corroboration. The prosecution can corroborate an identification either directly, by showing some acquaintance between the eyewitness and the defendant, or indirectly, by simply introducing more evidence to implicate the defendant. Indirect corroboration includes both the testimony of other eyewitnesses, and any other evidence which links the defendant to the crime. As will be shown, the key-element clause yields different results under each corroboration method.

a. The Acquainted Witness

Where the prosecution establishes that the eyewitness and the defendant were not strangers at the time of the crime, the *McDonald* rule clearly permits exclusion. The acquaintance lends an independent reliability to the identification—that is, a reliability not related to the strength of the rest of the prosecution's case. The judge could base her decision to exclude under the Evidence Code either on a failure to establish that the expert's studies are relevant,[135] or on the impropriety of reliance on those studies as the basis for expert opinion.[136] Studies on eyewitness capacity uniformly refer to the responsive characteristics of witnesses who are unfamiliar with the person they are to identify; they have little proven bearing in a case where the witness has had some prior relationship with the defendant.

It is unclear how extensive this prior relationship must have been before the court may find sufficient corroboration to support exclusion.[137] Nevertheless, appellate courts are no better equipped than trial courts to make this determination; indeed, the trial judge is in a much better position to evaluate the significance of the prior acquaintance.

133. *See* People v. Jackson, 164 Cal. App. 3d 224, 242, 210 Cal. Rptr. 680, 691 (1985) (applying *McDonald*); *see also* United States v. Collins, 395 F. Supp. 629, 636 (M.D. Pa.), *aff'd*, 523 F.2d 1051 (3d Cir. 1975), *cert. denied*, 423 U.S. 1060 (1976) (expert testimony excluded because, among other things, self-defense was the only disputed issue at trial).

134. *See* CAL. EVID. CODE § 350 (West 1966).

135. *See id.*

136. *See* CAL. EVID. CODE §§ 801(b), 803 (West 1966).

137. In People v. Bradley, 115 Cal. App. 3d, 171 Cal. Rptr. 487 (1981), the eyewitness was a cab driver who testified that he had seen the defendant twenty times prior to the crime, and had given him several rides. *Id.* at 748, 171 Cal. Rptr. at 489. This would be a perfect case for deference to the trial judge's determination on sufficiency of corroboration.

Hence, a reversal based on reevaluation of that claim normally would be inappropriate.

b. Indirect Corroboration Through other Eyewitness Testimony

Corroboration may also be achieved through the testimony of other eyewitnesses. Such testimony alone probably would not provide the kind of independent support *McDonald* requires. The account of a second eyewitness may be just as inaccurate as that of the first. Indeed, the *Chapple* court permitted the admission of expert testimony on how two eyewitnesses may *reinforce* each other's mistakes.[138] Moreover, *McDonald* held the corroborative testimony of seven witnesses insufficient to satisfy its own standard of reliability.[139] It is likely, then, that a decision to exclude would be unjustified where the only corroboration consists of the testimony of other eyewitnesses.[140]

c. Other Indirect Corroboration—Smoking Gun Evidence

A final type of corroboration consists of the proverbial smoking gun: circumstantial evidence such as fingerprints, airline tickets, marked money, or hidden camera photographs.[141] The key-element clause implies that whenever such circumstantial evidence so strongly implicates the defendant that an eyewitness identification seems definitely accurate, or alternatively, reduces the significance of the identification to the point where it is no longer key, the judge retains discretion to exclude expert testimony on the reliability of the identification. On the other hand, the clause provides no standard for determining what level of corroboration is sufficient. In fact, interpreting the clause terms in a manner consistent with common sense and the Evidence Code seems to leave the judge with no basis whatsoever for exclusion in smoking gun cases.

The clause appears to contemplate two categories of key-element identifications: those which are so strongly corroborated that they attain independent reliability, and those which are not. However, independently reliable key elements cannot exist in the smoking gun context. As a matter of fairness, a finding of independent reliability should mean that the corroborative evidence bolsters the eyewitness identification to the point where the expert's testimony could not raise a reasonable doubt as

138. State v. Chapple, 135 Ariz. 281, 284, 660 P.2d 1208, 1221 (1983).

139. The court of appeal has relied on this reasoning to find such corroboration insufficient to meet the *McDonald* standard. People v. Jackson, 164 Cal. App. 3d 224, 242, 210 Cal. Rptr. 680, 691 (1985).

140. Of course, if a corroborating eyewitness had a prior relationship with the defendant, exactly the opposite would be true. This corroboration would provide independent reliability.

141. In People v. Jackson, 164 Cal. App. 3d 224, 210 Cal. Rptr. 680 (1985), the court of appeal considered one such category of smoking gun evidence, holding indicia of a pattern of crime insufficient to meet *McDonald*'s corroboration requirement. *Id.* at 242, 210 Cal. Rptr. at 691.

to identity. Underlying this finding would have to be the assumption that the corroborative evidence alone is strong enough to establish identity. If the eyewitness is superfluous to the determination of identity, how "key" can his testimony be?

Because the operative terms preclude one another, the test becomes a tautology. More precisely, where smoking gun evidence is involved, a key identification *is* one that is not corroborated substantially enough to have independent reliability. Therefore, once a judge determines that the identification is a key element, analysis under this test terminates. Assuming the second part of the rule also is satisfied,[142] admission of the expert testimony will be mandatory.

Of course, it remains for the judge to determine whether the identification is a key element. In order to approach this decision, the judge first should realize that exclusion of testimony concerning a nonkey identification would only be justified if permitted by statute.[143] The only provision in the Evidence Code that allows a judge to weigh the relative importance of evidence in a decision to admit is section 352.[144] That provision grants the judge discretion to exclude evidence if its probative value[145] is substantially outweighed by any of four countervailing factors. In the context of expert testimony, these factors are: (1) the potential for confusion of issues; (2) the possibility that the expert may mislead the jury; (3) the likelihood that the testimony will consume an undue amount of time; and (4) the danger of undue prejudice to the prosecution.

The key-element clause makes no mention of section 352, nor of these four factors. Moreover, *McDonald* actually disapproves the first three as grounds for exclusion.[146] The only countervailing factor left for

142. *See infra* text accompanying notes 153-69.

143. *See* CAL. EVID. CODE § 351 (West 1966).

144. *Id.* § 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

145. Notice that the § 352 "fit" is not perfect here. The probative value of the expert's testimony is not the same as the keyness of the identification about which he would testify.

146. First, the opinion holds that judges would be unjustified in excluding to prevent potential confusion of the issues, since "any excess in the quantity or complexity of such testimony can be controlled by the court's power to limit the presentation of evidence." 37 Cal. 3d at 372, 690 P.2d at 723, 208 Cal. Rptr. at 250. Thus, there appears to be little room left for the consideration of this policy factor.

Second, the opinion discounts the potential for misleading the jury in its discussion of the *Kelley-Frye* standard. *See supra* notes 98-101 and accompanying text. *Kelley-Frye*, according to the court, has the "salutory purpose of preventing the jury from being misled by unproven or ultimately unsound scientific methods." *McDonald*, 37 Cal. 3d at 373, 690 P.2d at 724, 208 Cal. Rptr. at 251 (quoting People v. Shirley, 31 Cal. 3d 18, 53, 641 P.2d 775, 795, 181 Cal. Rptr. 243, 264 (1982)). The court found that "it would be ironic to exclude such testimony on *Kelley-Frye* grounds on the theory that jurors tend to be unduly unpressed by it, when jurors are far more likely to be unduly impressed by the eyewitness testimony itself." *Id.* at 373, 690 P.2d at 724, 208 Cal. Rptr. at 251.

consideration, if the key-element test does in fact incorporate section 352, is the danger of undue prejudice to the prosecution. There is always a real chance that, regardless of any protective actions taken by the judge,[147] the jury will draw conclusions that are not supported by the evidence. At least one scholar has concluded that the results of studies on eyewitness fallibility, when taken at face value, do not lend themselves to commonsense interpretation.[148] Were a jury to misinterpret these studies, develop unreasonable doubts about the reliability of an eyewitness identification, and thereby acquit a guilty defendant, the prosecution would suffer unjust prejudice.

Yet this analysis presents a problem. In order for the judge to conclude that an acquittal would be unjustified, she would have to make a preliminary determination that the identification is accurate. Such judicial factfinding is clearly outside the judge's province,[149] and is tantamount to a directed affirmative finding on an element, which is never permitted in criminal trials.[150] For this reason, a judge should not use the undue prejudice rule of section 352 to exclude eyewitness-expert testimony in smoking gun cases.

Section 352 is the only statutory provision in which the keyness of evidence has any bearing on its admissibility. Yet, under *McDonald*, it appears that section 352 cannot apply against offers of expert testimony on eyewitness fallibility. Thus, where an eyewitness identification is corroborated by smoking gun evidence, the first clause in the *McDonald* rule

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This passage implies that the probative value of the expert's testimony, namely the extent to which it may counter juror misconceptions, always will outweigh any danger that the jury will misapprehend that testimony. Again, the strength of the court's argument effectively removes the judge's discretion to weigh these factors under § 352.

McDonald finally rejects the argument that such testimony would consume too much time, citing to the *Chapple* court's observation that "time spent on the crucial issue of the case can not be considered as 'undue' loss of time." *Id.* at 375 n.21, 690 P.2d at 725 n.21, 208 Cal. Rptr. at 252 n.21 (quoting *Chapple*, 135 Ariz. at 295, 660 P.2d at 1222). Since identity remains a crucial issue whenever it is not conceded, the court here holds another of § 352's policy considerations legally inapplicable to this category of evidence.

147. *See supra* notes 117-18 and accompanying text.

148. Professor Wells points out that even a factor generating a strong differential rate of identification error in isolation may have a very small incremental effect on the reliability of real-world identifications, where many other factors operate concurrently. Wells, *supra* note 12, at 1555. *But cf.* E. LOFTUS, *supra* note 12, at 200-01 (noting that an expert's testimony can be limited to the nature of, rather than the magnitude of, various factors). It is unclear how a jury's deliberations will differ when presented with general, as opposed to statistical, information.

149. *See* CAL. EVID. CODE § 312 (West 1966); *see also* United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1976) ("The trial judge is . . . barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused."); People v. Hartung, 101 Cal. App. 2d 292, 293-95, 22 P.2d 614, 614-16 (1950).

150. *See* United Bhd. of Carpenters v. United States, 330 U.S. 335, 408 (1947); People v. Ramirez, 163 Cal. App. 2d 590, 593, 329 P.2d 499, 501 (1958).

provides no statutory grounds upon which a trial judge may rest a decision to exclude the expert testimony.

The foregoing analysis indicates that the key-element clause only permits exclusion where at least one eyewitness had some prior acquaintance with the defendant. This seems just. Allowing a judge to bar admission simply because she believes that an eyewitness identification is unimportant would deprive the defendant of the right to present relevant evidence, with no countervailing policy justification. Moreover, such a rule would disregard the proper framework for balancing the conflicting general considerations of administrative burdens and unjust convictions.[151] As long as there is any reason to believe that the expert might secure a justified acquittal for the defendant, administrative concerns favoring exclusion simply should not come into play.

Still, this interpretation seems to upset the court's expectation that, "in the usual case the appellate court will continue to defer to the trial court's discretion in this matter."[152] As the following discussion indicates, however, the latter half of the *McDonald* rule may provide grounds for more extensive exercise of that discretion.

2. *Factors Within the Ken of the Jury*

The second clause of the *McDonald* rule mandates admission only if the defense's qualified[153] expert can relate specific factors about the reliability of a particular identification which are not likely to be fully known or understood by the jury.[154] The origins of this requirement are less obscure than those of the key-element clause. The Evidence Code limits experts to testimony that may assist the trier of fact,[155] and courts have often held that eyewitness-expert testimony does not cover a "proper

151. *See supra* text accompanying notes 115-24.

152. *McDonald*, 37 Cal. 3d at 377, 690 P.2d at 727, 208 Cal. Rptr. at 254 (footnote omitted).

153. Of the four criteria for admissibility established in *Amaral*, *McDonald* expressly retains only the requirement of a qualified expert. Because the court expressly did not pass on the qualifications of Dr. Shomer, *Id.* at 375 n.22, 690 P.2d at 726 n.22, 208 Cal. Rptr. at 253 n.22, there is little in the opinion itself to indicate what sort of qualifications might satisfy this criterion. Most commentators would require the witness to have an advanced degree in a relevant field of psychology. *See, e.g.*, Johnson, *supra* note 14, at 966; Note, *supra* note 22, at 1014-16.

154. *McDonald*, 37 Cal. 3d at 377, 690 P.2d at 727, 208 Cal. Rptr. at 254.

155. CAL. EVID. CODE § 801(a) (West 1966). The court's statement that § 801(a) does not apply to much eyewitness-expert testimony, *see supra* text accompanying note 86, is probably overbroad. That section is intended to cover all "opinions, inferences, conclusions, and other subjective statements made by a witness." CAL. EVID. CODE § 801(a) Law Revision Commission Comment (West 1966). While testimony as to specific studies might escape the scope of this definition, a straight recounting of those studies would have little relevance in a trial setting. Rather, for studies to make any sense to the jury, the expert must summarize their findings and draw generalizations in the form of hypotheses about eyewitness reliability. While these may not be "opinions," they are certainly inferences or conclusions. *See, e.g.*, Johnson, *supra* note 9, at 941-43 (inferences may need to be drawn to give studies relating to cross-racial errors external validity).

subject" unless the jury might misjudge an eyewitness's reliability in its absence.[156]

The clause probably provides two distinct grounds upon which a trial judge may exclude expert testimony. First, she may bar admission if she finds that the defense has failed to establish probable juror misconception concerning the effects of factors about which the expert intends to testify. Second, she may determine that the facts would not give rise to those misconceptions in any case.

The first ground focuses on the general subject matter of the expert testimony. According to *McDonald*, the defense initially should be required to show that people misapprehend the effect specific factors may have on reliability.[157] If the judge believes that the subject of the expert's testimony is common knowledge, she should demand empirical data establishing that it is not. She should disregard an opinion by the expert himself on this matter.[158] In some cases, the defense may not be able to make the required showing.[159]

Once the defense produces some minimal amount of data in support of probable juror misconception, however, the judge should end her inquiry and consider this burden satisfied. Some critics call for additional research in the area of juror beliefs before according judicial recognition to these studies.[160] Yet the studies themselves have yielded fairly consistent results. Furthermore, *McDonald* rejects the wait-and-see attitude these critics have adopted.[161] Thus, the threshold for satisfaction of this burden should be set very low—if the judge should choose to impose this burden at all.

The second stage of inquiry involves determining whether the studies on probable juror ignorance apply to the facts of the case. In other words, the defense should be required to show that the jury could not appraise the effect of certain factors on reliability from *the particular circumstances of the identification*.[162] For some factors, such as stress and

156. *See supra* note 44 and accompanying text. *But see supra* text accompanying note 109.

157. *McDonald*, 37 Cal. 3d at 377, 690 P.2d at 727, 208 Cal. Rptr. at 254.

158. *See* CAL. EVID. CODE §§ 801 (b), 803 (West 1966).

159. On the other hand, a trial court might be compelled to take judicial notice of the existence of a particular factor, where an appellate court has done so earlier in a published opinion. *See, e.g., McDonald*, 37 Cal. 3d at 368-69, 690 P.2d at 720-21, 208 Cal. Rptr. at 247-48 (noting the cross-racial phenomenon and confideuce-accuracy relationship).

160. *See, e.g.*, Egeth & McCloskey, *Expert testimony about eyewitness behavior: Is it safe and effective?*, in EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 283 (G. Wells & E. Loftus eds. 1984); *Eyewitness Testimony: What Can a Psychologist Tell a Jury?*, 38 AM. PSYCHOLOGIST 550 (1983); *see also* Wells, *supra* note 12, at 1551-55 (suggesting both that research is lacking and that existing research may have produced skewed results).

161. *McDonald*, 37 Cal. 3d at 369 n.15, 690 P.2d at 721 n.15, 208 Cal. Rptr. at 248 n.15.

162. This is essentially a restatement of the "beyond the ken" interpretation of the "proper subject" requirement. *See supra* text accompanying note 44.

confidence, such a showing at times will be impossible. With respect to other factors, however, such as the cross-racial phenomenon, this rationale leaves little room for exclusion.

Stress appears to affect observers in a counter-intuitive fashion only at high levels.[163] Where an eyewitness experiences only a short period of moderate stress,[164] studies suggest just what common sense indicates: that attentiveness probably increases.[165] An expert could do little more than reaffirm this common-sense notion.[166] In such a case, the beyond-the-ken clause would not apply, and *McDonald* would permit exclusion of the testimony.

A similar analysis applies to confidence levels. Expert testimony on this topic aims to provide the jury with some degree of educated skepticism toward assertions of confidence.[167] Often, however, cross-examination would be just as effective. This might be the case, for example, where the eyewitness states he is confident about his identification, despite the fact that his view of the crime was obstructed, or that he expressed reservations during an earlier lineup. While it is possible that the jury might discount the confidence factor differently if the expert testified, it would seem difficult, if not impossible, for the defense to establish this as a likelihood.[168]

These limitations are important, since observation of a crime always involves some stress, and since every witness possesses some degree of confidence. Without this foundation for exclusion, there would be admissible subject matter for expert testimony in *any* case involving eyewitness identification. The floodgates would be jammed open.

Nevertheless, some factors do not seem subject to exclusion under this approach. The cross-racial phenomenon[169] is a good example. Cross-examination can do little to expose the phenomenon. In fact, some lines of questioning may exacerbate the jury's misconceptions about reliability—for example, attempts to establish that the eyewitness is a bigot or that he has had few social contacts with the defendant's race. Neither of these facts appears to have any bearing on the accuracy of cross-racial

163. This is the Yerkes-Dodson Law. *See supra* note 27 and accompanying text.

164. This might be the case, for example, where the eyewitness was not an actual or potential crime victim.

165. *See* E. LOFTUS, *supra* note 12, at 33.

166. In State v. Onorato, 142 Vt. 99, 453 A.2d 393 (1982), the court adopted this approach, rejecting an offer of expert testimony on the effects of stress where the eyewitness observations occurred *before* the witnesses could have been subjected to severe stress. *Id.* at 104-05, 435 A.2d at 396.

167. *See supra* notes 27-28 and accompanying text.

168. *McDonald* requires just this likelihood that the jury needs the expert's testimony to understand the operation of the factors about which he would testify. 37 Cal. 3d at 377, 690 P.2d at 727, 208 Cal. Rptr. at 254.

169. *See supra* text accompanying notes 23-26.

identifications. However, each would probably influence the jury's assessment of the eyewitness's identification. Thus, once the defense has established as a general proposition that jurors are ignorant of this factor, and that a cross-racial barrier exists, the factor's application to the particular case follows automatically.

To summarize, in light of the ineffectiveness of the key-element clause as a basis for exclusion, this interpretation of the "ken of the jury" clause secures for the trial judge a last bastion of true discretion for barring expert testimony she feels is unnecessary for a just resolution of the case. Thus, if only to a limited extent, *McDonald*'s desire to maintain the judge's right to exclude in the "usual case" is realized.[170]

CONCLUSION

The *McDonald* rule is a bold attempt to structure the jurisdictional boundaries of the trial judge. Unfortunately, some of its terms do not

170. As this issue went to press, the California Court of Appeal had its first opportunity to clarify the scope of the *McDonald* rule. In People v. Jackson, 164 Cal. App. 3d 224, 210 Cal. Rptr. 680 (1985), the defendant had been convicted of various felonies involving ten separate incidents and fourteen different victims. On appeal, he contended the trial judge had erred in excluding expert testimony on cross-racial identification, weapons focus (an observer's tendency to pay more attention to a weapon than to an assailant), and stress. The court found that eyewitness testimony had been a key element in the prosecution of several counts, that there was no "independent corroboration" for these charges, and that the subject matter of the expert's testimony would have paralleled that at issue in *McDonald*. *Id.* at 242, 210 Cal. Rptr. at 691. To this point, the court's analysis closely paralleled that set forth in this Comment.

The court went on to hold that the exclusion constituted harmless error. Under *McDonald*, "[a]n error that unpairs the jury's determination of an issue that is both critical and closely balanced will rarely be harmless." *McDonald*, 37 Cal. 3d at 377, 690 P.2d at 726, 208 Cal. Rptr. at 253. Applying this standard, the court found *McDonald* distinguishable. Jackson had no alibi. His accusers allegedly saw him over an extended period of time, at close proximity, in well-lighted places. Furthermore, according to the court, some of the evidence pertaining to the charges where identity was not at issue indirectly implicated Jackson in the charges where it was. 164 Cal. App. 3d at 244, 210 Cal. Rptr. at 692. Finally, the trial judge allowed Jackson's attorney to include in his argument "those matters relating to the reliability of eyewitness identification that would have been testified to by the expert witness." *Id.* at 247, 210 Cal. Rptr. at 694.

Each factor in the court's application of the harmless error standard has some troublesome aspects. If reversal under *McDonald* may turn on whether or not a defendant has an alibi, exclusion would be warranted whenever the expert's testimony represented the defendant's sole line of defense. Second, where the conditions of an identification lend reliability, the prosecution can bring that point out to put the expert's testimony in its proper context. Third, where corroborative evidence is not strong enough to satisfy the key-element rule, using it to justify a harmless error ruling seems inconsistent. Finally, as noted at text accompanying note 12, *supra*, the jury might not treat an attorney's recital of eyewitness-reliability data with the same degree of deference they would that of an expert in the field.

There is a more fundamental problem with the holding. A ruling of harmless error seems unreasonable and unfair where the error stems from the cutting off of a criminal defendant's acknowledged right to present evidence.

In any case, trial courts cannot rely on *Jackson*'s novel reasoning. Harmless error is error nonetheless. Thus, even if *Jackson* limits *McDonald*'s application at the appellate level, the supreme court's enigmatic rule remains a thorny obstacle for the trial judge.

lend themselves to easy application. This Comment has developed guidelines for interpretation of those terms, based on the Evidence Code and general policy considerations. It suggests that only one of the two clauses in the rule may be fairly interpreted to provide the judge with general discretion to exclude the testimony of eyewitness experts. Although this framework should prove helpful in understanding the case, it cannot be definitive. The permissive terms of the *McDonald* rule contradict its restrictive tone. The result is an ambiguity that can finally be resolved only through judicial clarification. Considering the number of cases which feature this sort of expert testimony, the opportunity for such clarification should be ample.

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