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Irreconcilable Differences: Resolving Conflicts in Florida's Eyewitness Identification Jurisprudence

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IRRECONCILABLE DIFFERENCES: RESOLVING CONFLICTS IN FLORIDA'S EYEWITNESS IDENTIFICATION JURISPRUDENCE

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I. INTRODUCTION

Twenty-five years ago, Florida excluded expert witness testimony on the factors contributing to unreliable identifications because the testimony was not beyond the commonsense of jurors.[1] That decision was wrong. Thirty years of study show eyewitness identifications are fallible, factors contributing to unreliability are not matters of commonsense, and cross-examination along with jury instructions inadequately improve jurors' assessments of eyewitness accuracy.

Admissibility of expert testimony is a matter of constitutional importance. Accused individuals have the right to present witnesses in their defense. Disallowing the presentation of expert testimony about the factors affecting reliability of eyewitness identifications impedes defendants' rights to due process of law under the Florida and United States Constitutions. Expert testimony is essential to the defense theory of mistaken identification and ascertaining guilt or innocence.

Recent research has shown that mistaken identification is the leading cause of wrongful convictions. As of this writing, there have been 235 DNA-exonerations.[2] The Innocence Project has identified eyewitness misidentification as the "single greatest cause of wrongful convictions nationwide, playing a role in more than 75 percent of convictions overturned through DNA testing."[3]

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1. Johnson v. State, 438 So. 2d 774, 777 (Fla. 1983) Johnson alleged police lineup was unnecessarily suggestive because he was the only one with a suntan, blond hair, and a lighter blue inmate uniform. Johnson's expert witness would have explained both common problems in lineup identifications and general factors affecting witness accuracy as well as the suggestive nature of the lineup. *Id.* at 777.

2. The Innocence Project, *Facts on Post-Conviction DNA Exonerations*, http://www.innocenceproject.org/Content/351.php (last visited Apr. 18, 2009).

3. The Innocence Project, *Eyewitness Misidentification*, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited Apr. 18, 2009) (Exonerations have been won in 33 states; 17 of 235 people have served time on death row; average time

Continuing to exclude expert testimony in Florida is improper for three reasons. First, it violates defendants' constitutional right to due process and the presentation of their defense. Second, it is inconsistent with scientific principles and statutory law on admissibility of expert testimony. Third, it is an abuse of discretion to exclude relevant, critical, and reliable evidence that supports theories of defense.

Florida law on the admissibility of eyewitness-identification testimony conflicts with constitutional principles, science, statutory interpretation, and applied standards of appellate review. Florida law remains unsettled with precedent and empirical evidence portending its admissibility. The following article reviews the conflicts that plague Florida law stating the case for admitting expert testimony when it supports the defense theory of mistaken identification.

II. FLORIDA LAW: THE CONFLICTS

First, Florida law conflicts with the 1973 decision by the Supreme Court in *Chambers v. Mississippi*,[4] which held that criminal defendants have the constitutional right to present their defense.[5] Barring expert testimony on mistaken identifications violates the principles of *Chambers*. Second, Florida decisions about eyewitness-expert testimony conflict with one another and well-settled scientific principles.[6] Third, Florida decisions have essentially conveyed unbridled discretion to trial judges to exclude eyewitness-identification testimony, as compared with the limited discretion for excluding evidence that even indirectly raises reasonable doubt.

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served by exonerees is 12 years; and the average age of exonerees at the time of their wrongful conviction was 26).

4. 410 U.S. 284, 302, (1973).

5. *Compare Chambers*, 410 U.S. 284 (1973) (exclusion of critical testimonial evidence and refusal by the State to allow Chambers to cross-examine the witness denied him a fair trial and due process) *and Johnson, supra* note 1.

6. *Compare Johnson*, 438 So. 2d 774 (Fla. 1983) (excluding expert testimony on common problems of lineup identification and general factors affecting witness), *and* McMullen v. State, 714 So. 2d 368 (Fla. 1998) (holding that admissibility of expert testimony regarding the reliability of eyewitness testimony is to be left to the sound discretion of the trial judge), *and* Simmons v. State, 934 So. 2d 1100, 1120 (Fla. 2006) (holding that showing only one photo and one vehicle to witness was unduly suggestive identification method; witness's independent recollection of victim and defendant vehicle at time of crime provided basis for her identification uninfluenced by suggestive procedure was not per se inadmissible).

A. *Conflict I: Constitutional Principles*

1. Early history of excluding witnesses

In *United States v. Reid*,[7] a Virginia law that barred an un-acquitted co-defendant from testifying for the defense was narrowed by *Logan v. United States*[8] and *Benson v. United States*,[9] and reversed by *Rosen v. United States*.[10] In *Reid*, the Court relied on the rules of evidence and the common law to exclude witnesses because the Judiciary Act of 1789 adopted state laws disqualifying witnesses.[11] In *Logan*, the Court reversed the exclusion of a defense witness because the Governor pardoned the witness.[12] The Court reasoned the witness was no longer subject to disqualification under common law, and therefore, competent to testify.[13] Between the *Reid*, *Logan*, and *Benson* decisions, the Fourteenth Amendment to the United States Constitution was ratified to protect individuals from being deprived of life, liberty, and property without due process of law. Congress also passed a number of statutes enforcing due process.[14] Two of those statutes relied on by the Court in *Benson*, prohibited excluding witnesses at trial based on race,[15] and permitting criminal defendants to testify at their own request. In *Benson*, the Court confronted whether Benson's wife was competent to testify against him, not for him. Although the reasons Benson's wife was excluded were the same as in *Reid*: (1) that common law excluded witnesses interested in the proceedings, and (2) the witness was a party to the record; the Benson Court perfunctorily dismissed *Reid*, and revisited the question "in light of general authority and sound reason."[16] The Court rejected the former reasons as irrational and decided Benson's wife was competent to testify against him.[17] *Reid* was explicitly overruled in *Rosen*.[18]

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7. 53 U.S. 361 (1851).

8. 144 U.S. 263 (1892).

9. 146 U.S. 325 (1892) (defendant's wife testimony was admissible because the defendant had suggested she need not testify unless she so desired).

10. 245 U.S. 467 (1918) (the competency of the witness should be determined by the jury).

11. *Reid*, 53 U.S. 361.

12. *Logan*, 144 U.S. at 303.

13. *Id.*

14. *Benson*, 146 U.S. at 336. ("By Congress, in July, 1864, (Rev. St. § 858) it was enacted that. . .no witness shall be excluded in any action on account of color. . ." an act permitting the defendant in criminal cases to testify at

15. *Benson*, 146 U.S. at 336

16. *Benson*, 146 U.S. at 335.

17. *Id.* at 327.

In *Rosen*, over defense objection, the testimony of Rosen's co-defendant, Broder, was offered against him.[19] Broder and Rosen both were charged with conspiring to buy and receive checks and letters stolen from the postal service.[20] Broder had entered a guilty plea and later called as a witness to testify against Rosen.[21] Rosen argued, relying on *Reid*, that Broder, a convicted forger, was disqualified from testifying because the law of New York in 1789 would have excluded him as incompetent.[22] Relying on trends in courts and legislative bodies that removed constraints on witness competency, the Court concluded the common law rule no longer applied:

> Satisfied as we are that the legislation and the very great weight of judicial authority which have developed in support of this modern rule, especially as applied to the competency of witnesses convicted of crime, proceed upon sound principle, we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here, and that the ruling of the lower courts on this first claim of error should be approved.[23]

2. The Sixth Amendment and confronting witnesses

The Sixth Amendment was not at issue in *Rosen*.[24] Rosen was trying to exclude his co-defendant from testifying against him. The first time the Supreme Court addressed whether the right of defendants under the Sixth Amendment to have a compulsory process for obtaining witnesses in their favor was fundamental to a fair trial was in *Washington v. Texas*.[25] In *Washington*, the Supreme Court held Washington's right to present witnesses was violated when the trial court excluded Fuller, a co-defendant, and the person who shot and killed the victim from testifying.[26] Fuller would have testified that he took the gun from Washington, Washington tried to convince him not to shoot anyone, and Washington ran away before the shooting.[27] The trial judge excluded this plainly relevant and material testimony because Texas law prohibited charged or convicted co-defendants from

18. Rosen v. United States, 245 U.S. 467 (1918).
19. *Rosen*, 245 U.S. at 468
20. *Id.*
21. *Id.*
22. *Rosen*, 245 U.S. at 468.
23. *Rosen*, 245 U.S. at 471.
24. *Id.* at 471.
25. 388 U.S. 14, 17 (1967).
26. *Washington*, 388 U.S. at 23.
27. *Id.* at 16.

testifying for one another.[28] The Court struck the law because it conflicted with the Sixth Amendment and the most basic ingredients of due process:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.[29]

In *Chambers*, it wasn't a co-defendant that was excluded from trial but several witnesses willing to testify that someone, other than the defendant, confessed to his crimes.[30] Their testimony was excluded on the grounds of hearsay.[31] The Court interpreted the Sixth and Fourteenth Amendments,[32] holding that the minimum standard of due process required for all criminal defendants is to have the opportunity to present their defense with fair and reliable evidence, submitted in compliance with the rules of procedure and evidence.[33] Although the testimony was hearsay, it was the number of witnesses along with corroborating evidence that demonstrated the reliability of the hearsay confessions. Minimal due process includes the right to call witnesses:

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross examination witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. Mr. Justice Black, writing for the Court in In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed.2d 682 (1948), identified these rights as among the minimum essentials of a fair trial:
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> 'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence; and these

28. *Id.* at 17.

29. *Id.* at 19.

30. *Chambers*, 410 U.S. 284, 298 (Chambers was refused the opportunity to introduce testimony of three witnesses whom would have testified another person named himself as the murderer on three separate occasions).

31. *Id.* at 293.

32. The federal constitution, like Florida's constitution, protects due process: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. IV, § 1. And, the Sixth Amendment affords criminal defendants the right to call witnesses: "In all criminal prosecutions, the accused shall have the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." U.S. CONST. amend. VI.

33. *Chambers*, 410 U.S. at 302.

> rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.[34]

The *Chambers* court cautioned against the use of procedure to thwart the admission of evidence. Rules of procedure and evidence should not be applied "mechanistically to defeat the ends of justice."[35] Weighty interests of the accused prevail over arbitrary and disproportionate rules of procedure and evidence.[36] In *Green v. Georgia*,[37] the Court held that despite its hearsay-nature, relevant, competent evidence that the co-defendant admitted he, not the defendant, had killed the victim was admissible at sentencing. Due process commanded its admission. The Court found in *Rock v. Arkansas*,[38] that Arkansas's per se rule excluding hypnotically refreshed testimony for the purpose of preventing the defendant from testifying on his own behalf was unconstitutional as a violation of due process and the right to present a defense. Also, in *Crane v. Kentucky*,[39] the Court found Crane was denied a "meaningful opportunity to present a complete defense" when the trial court did not allow testimony about the physical and psychological circumstances surrounding his confession to the police. The way the police extracted the confession was relevant to its reliability, and as the only evidence supporting his conviction; it was essential.

The Supreme Court has yet to address whether excluding any expert from testifying for criminal defendants violates due process of law, the right to compulsory process of witnesses and the right to present a defense. Precedent, however, suggests that when reliable and critical to the defense theory of misidentification, experts are essential to due process and should not be mechanistically excluded. In non-expert and two expert cases, Florida courts have held, relying on *Chambers*,[40] that the right to present a defense when that evidence is critical and relevant to determining guilt and justice overrides Florida's rules of procedure.[41]

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34. *Chambers*, 410 U.S. at 294.

35. *Chambers*, 410 U.S. at 302.

36. United States v. Scheffer, 523 U.S. 303, 308 (1998) (quoted in Rock v. Arkansas, 483 U.S. 44, 56 (1987))

37. 442 U.S. 95, 97 (1979).

38. 483 U.S. 44 (1987).

39. 476 U.S. 683 (1986).

40. *Chambers*, 410 U.S. 284 (1973).

41. Garcia v. State, 816 So. 2d 554, 564-5 (Fla. 2002); Story v. State, 589 So. 2d 939, 943 (Fla. 2d Dist. Ct. App. 1991), (citing Washington v. Texas, 388 U.S. 14 (1967)); Jenkins v. State, 872 So. 2d 388 (Fla. 4th Dist. Ct. App. 2004) (citing Chambers v. Mississippi, 410 U.S. 284, 302 (1973)).

3. Florida and the right to present a defense

The right to call witnesses and present a defense is fundamental to Florida law:

> Our country is committed to the doctrine that no matter what the crime one may be charged with he is entitled to a fair and impartial trial by a jury of his peers. Such a trial contemplates counsel to look after his defense, compulsory attendance of witnesses, if need be, and a reasonable time in the light of all the prevailing circumstances to investigate, properly prepare, and present his defense. When less than this is given, the spirit and purpose of the law is defeated.[42]

In *Garcia*[43] the excluded testimony of a co-defendant's prior testimony was an unconstitutional application of hearsay that would "mechanistically . . . defeat the ends of justice."[44] The First District Court of Appeal noted that the state's evidence rules must yield, under some circumstances, to greater constitutional principles.[45] Although the written confession did not satisfy the formal requirements of admissibility, excluding the third-party confession denied Curtis the right to a fair trial.[46] In *Mateo v. State*,[47] excluding audio recordings that supported Mateo's theory of defense that jail officials lied about his charges because they were biased against him as wrong. He had the right to play the recordings to support his theory.

In two cases, the First District Court of Appeal held that excluding expert witnesses was reversible error. In *State v. Clements*,[48] it was error to exclude expert testimony on the effects of alcohol in a driving under the influence case. The defense was entitled to introduce an expert who could contradicted the state's argument that drinking four sixteen-ounce beers, over a four-hour period, impaired the normal fac-

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42. FLA. CONST. art. 1 § 9 ensures due process because "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself[,]" and protects criminal defendants right to call witnesses, FLA. CONST. art. 1 § 16(a); *See* Price v. State, 295 So. 2d 338, (Fla. 4th Dist. Ct. App. 1974) "In all criminal prosecutions the accused . . . shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both . . . ."

43. *Garcia*, 816 So. 2d 554, 564-5 (Fla. 2002).

44. *Id.* at 565 (the testimony was subjected to cross-examination by the state and exonerated Garcia).

45. Curtis v. State, 876 So. 2d 13, 19-20 (Fla. 1st Dist. Ct. App. 2004) (reversing a murder conviction because the trial judge mechanistically applied the rules of evidence to exclude the written confession of someone other than the defendant).

46. *Id.* at 23 (declarant was available to testify).

47. 932 So. 2d 376 (Fla. 2d Dist. Ct. App. 2006).

48. 968 So. 2d 59 (Fla. 1st Dist. Ct. App. 2007).

ulties of an average social drinker of Clement's weight.[49] The expert testimony should have been admitted because Clement had a constitutional right to present witnesses in his own defense and the evidence was relevant and it tended to establish reasonable doubt.[50]

Again in *Boyer,* reversible error was found where expert testimony about factors that contribute to false confessions was excluded.[51] The individual was recognized as an expert. He was excluded because the trial court found his testimony would not assist, but might confuse the jury:

> The court concluded that if Dr. Ofshe testified that false confessions were obtained when certain tactics or techniques of interrogation were present, the State, in rebuttal, would introduce expert testimony that true confessions were obtained also when the same tactics and techniques were present. The court determined such testimony would lead the jury to speculate to reach a decision it could have made without such testimony.[52]

The *Boyer* Court found that false-confession testimony should not be excluded simply because some jurors may have some beliefs about a subject.[53] The question then becomes whether those beliefs are correct.[54] It is the jury's decision, once educated about the phenomenon of false confessions, to decide the weight of that testimony.[55] The error was not harmless because the expert testimony "went to the heart" of Boyer's case.[56]

Evidence that supports a defense theory or raises reasonable doubt is typically admitted.[57] Expert testimony, when it assists the jury in understanding a defendant's theory, tends to raise reasonable doubt. Therefore, scientific evidence on the fallibility of eyewitness identification that supports the defense theory of mistaken identification and raises reasonable doubt should be admitted.

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49. *Clements*, 968 So. 2d 59.

50. *Id.* at 60.

51. 825 So. 2d 418 (Fla. 1st Dist. Ct. App. 2002).

52. *Id.* at 419.

53. *Boyer*, 825 So. 2d at 419, *relying* United States v. Hall, 93 F.3d 1337, 1342 (7th Cir. 1996).

54. *Boyer*, 825 So. 2d at 419; United States v. Hall, 93 F.3d at 1345.

55. *Boyer*, 825 So. 2d at 420 (citing United States v. Hall, 93 F.3d at 1344-5).

56. *Boyer*, 825 So. 2d at 420.

57. *Clements*, 968 So. 2d at 60-1 (quoting Vannier v. State, 714 So. 2d 470, 472 (Fla. 4th Dist. Ct. App. 1998)) (citing Rivera v. State, 561 So. 2d 536, 539 (Fla. 1990)).

B. *Conflict II: Eyewitness-identification testimony (1) assists the jury, and (2) satisfies scientific principles*[58]

Scientific expert testimony must (1) aid the jury and (2) be based on scientific principles that are sufficiently established and generally accepted in the particular field that it belongs.[59] Eyewitness identification satisfies this standard. Yet, Florida decisions continue to apply the outdated reasoning of *Johnson*[60] that eyewitness-identification testimony is not helpful to jurors. The next section provides an overview of the science of eyewitness identifications and the following section explores the conflicted application of these scientific principles by Florida courts.

1. The Science

Mistaken identification occurs because witness and victim memories are fallible and police strategies exacerbate memory flaws. Today, expert witnesses, when they are excluded from testifying about factors that contribute to mistaken identification, are excluded for the following reasons: (1) Judges think the research findings are not scientifically sound, (2) Judges think the research findings are not beyond the common knowledge of jurors, and (3) Judges believe traditional cross-examination and instructions to the jury are sufficient to identify weaknesses in identification testimony.[61] None of these reasons are valid.

2. 80% of prominent eyewitness identification researchers agree . . .

In 1989, Kassin, Ellsworth, & Smith surveyed sixty-three prominent eyewitness-identification researchers and found general acceptance among the scientists of some findings as reliable for courtroom testimony, including the effect of exposure time, lineup instructions, wording of questions, and accuracy-confidence correl-

58. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) Florida continues to use the Frye standard to test the admissibility of scientific evidence.

59. State v. Sercey, 825 So. 2d 959 (Fla. 1st Dist. Ct. App. 2002).

60. Johnson v. State, 438 So. 2d 774, 777 (Fla. 1983).

61. Michael Leippe, The case for expert testimony about eyewitness memory, 1(4) PSCHYOL. PUB. POL'Y & L 909 (1995). Leippe identified two other grounds for excluding expert testimony: (1) usurping the role of the jury, and (2) the testimony is more prejudicial than probative. The first has been largely abandoned by the courts as a reason for exclusion as long as experts do not testify about the credibility or accuracy of a particular witness. *Id.* at 922. The second is not Florida's reason for excluding expert testimony.

ation.[62] In 2001, Kassin, along with three other researchers, Tubb, Hosch and Memon, published findings from a new and revised survey of sixty-fout prominent researchers (not necessarily the same individuals from the first study) on their perceptions of the reliability of eyewitness-identification-research findings.[63] Similar to the 1989 findings, researchers overwhelmingly agreed on the reliability of expert testimony for the following reasons: the wording of questions can affect eyewitness testimony (98%), lineup instructions by police can influence eyewitness willingness to identify a subject (98%), attitudes and expectations may affect eyewitnesses perception and memory of events (92%), eyewitness confidence does not predict accuracy (the accuracy-confidence correlation) (87%), memory loss is greatest right after an event, and then levels off (the forgetting curve) (83%), the less exposure time an eyewitness has of an event, the less likely it will be remembered (81%), and eyewitnesses may identify, as a culprit, an individual they have seen in another situation or context (unconscious transference[64])(81%).[65]

There was little consensus, however, on some factors: "effects of color perception in monochromatic light (63%), observer training (61%), high levels of stress (60%), the accuracy of hypnotically-refreshed testimony (45%) and event violence (37%)."[66] Two factors were found to be more reliable in 2001 than 1989: (1) 87% of experts agreed the weapon-focus effect was reliable, as compared with only 57% in 1989, and (2) 91% agreed that hypnotic-suggestibility effects were reliable, as compared with only 69% in 1989.[67]

Kassin et al. also examined 13 new eyewitness phenomena not studied in 1989. Six were viewed by at least 80% of the experts as reliable for court testimony:

> [E]yewitness confidence is malleable and influenced by factors unrelated to accuracy (96%), that exposure to mug shots of a suspect increases the likelihood of his or her selection from a subsequent lineup (95%), that young children are more vulnerable than adults to suggestion and other social influences (94%), that alcohol impairs eyewitness performance (90%), that eyewitnesses find it relatively

62. Kassin et al., *The General Acceptance of Psychological Research on Eyewitness Testimony*, 44 AM. PSYCHOL. 1089 (1989).

63. Kassin et al., *On The "General Acceptance" of Eyewitness Testimony Research: A New Survey of The Experts*, 56 AM. PSYCHOL. 405 (2001).

64. Deborah Davis et al., *Unconscious Transference Can Be An Instance Of Change Blindness*, 22 APPLIED COGNITIVE PSYCHOL. 605 (2008).

65. Kassin et al., *supra* note 63 at 410.

66. *Id.*

67. *Id.*

> difficult to identify members of a race other than their own (90%) and that the risk of false identification is increased by the use of a simultaneous as opposed to sequential presentation format (81%).[68]

Two-thirds of the experts thought the following three items were sufficiently reliable: "[I]dentification accuracy is increased by having foils that match the witness's description of the culprit (71%), that young children are less accurate witnesses than adults (70%), and that the memories people recover from childhood are often false or distorted in some way (68%)."[69]

The remaining four items were deemed not reliable by most experts: (1) elderly witnesses are less accurate than younger adults, (2) identification speed is predictive of accuracy, (3) it is possible to differentiate between true and false memories, and (4) traumatic experiences can be repressed for many years and then recovered.[70]

3. Beyond the common knowledge[71]

Although some factors influencing mistaken identification may be common knowledge, most are not. Experts surveyed in Kassin showed that most believed the findings about reduced exposure time and the affect of alcohol intoxication were commonsense. But most[72] agreed that testimony is necessary and beneficial to educate jurors on nonintuitive factors.[73]

Surveys and experimental studies demonstrate that psychological research on the factors influencing eyewitness identification and testimony are beyond commonsense. In several studies, jurors were unable to identify the variables most affecting identifications and they overestimated eyewitness accuracy.[74] In a review of the literature,

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68. *Id.* at 410-11.

69. *Id.* at 411.

70. *Id.*

71. *See* Leippe, *supra* note 61.

72. Kassin et al., *supra* note 63 (75% or more agreed).

73. Kassin et al., *supra* note 63, at 412 (e.g., wording of questions, confidence malleability, mug-shot-induced bias, post-event information, hypnotic suggestibility, accuracy-confidence, presentation format, unconscious transference, false-childhood memories, and event violence).

74. J.C. Brigham & R.K. Bothwell, *The Ability Of Prospective Jurors To Estimate The Accuracy Of Eyewitness Identification*, 7 LAW. & HUM. BEHAV.19 (1983) (awareness of the unreliability of eyewitness identification was not common knowledge among sample of registered voters); Deffenbacher & Loftus, *Do Jurors Share a Common Understanding of Eyewitness Behavior?* 6 LAW. & HUM. BEHAV.15 (1982) (college students and Washington D.C. citizens under-estimated problems associated with the reliability of identifications, particularly cross-racial identifications); R.C.L. Lindsay et al., *Mock Jurors Belief of Accurate and Inaccurate Eyewitnesses: A Replication*, 13 LAW. & HUM. BEHAV. 333 (1989)

Leippe identified the following factors affecting identifications as unrecognized by non-experts: (1) cross-racial identification bias, (2) weapon focus, (3) prior identification from a mug shot, (4) status of the witness, and (5) the confidence-accuracy relationship.[75] In other research, respondents mistakenly believed eyewitness confidence was correlated with accurate identification[76] and cross-racial identifications were not more suspect.[77] McAuliff and Kovera found respondents were less likely than experts to understand the consequences of witness suggestibility.[78] And Schmechel, O'Toole, Easterly and Loftus[79] surveyed potential jurors in the District of Columbia and found they misunderstood how memory functions and they did not understand the effects of particular factors.

4. Traditional safeguards, not guarding

Empirical studies demonstrate that traditional methods cross-examination, jury instructions and argument – do not counteract mistaken identifications. Staged-crime and eyewitness identification studies show that questioning does little to "shake" the confidence of

(undergraduate mock jurors failed to distinguish between accurate and inaccurate eyewitnesses, cross-examined by experienced and inexperienced defense lawyers); R.C.L. Lindsay et al., *Can People Detect Eyewitness Identification Accuracy Within and Between Situations?*, 66 J. APPLIED PSYCHOL. 79 (1981) (mock jurors "over-believed" witnesses in low-accuracy-witness scenarios); Wells & Leippe, *How Do the Triers of Fact Infer the Accuracy of Eyewitness Identification? Using Memory for Peripheral Detail Can be Misleading*, 66 J. APPLIED PSYCHOL. 682 (1981) (mock jurors incorrectly assumed a positive correlation between accurate identification and memory of peripheral details); G. Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identifications*, 64 J. APPLIED PSYCHOL. 440 (1979) (mock jurors unable to distinguish between accurate and inaccurate witness identifications).

75. Leippe, *supra* note 61, 919-921 (citing Deffenbacher & Loftus for the factor "status of the witness;" for example, police are no better at identifications than untrained witnesses).

76. Robert K. Bothwell et al., *Correlation of Eyewitness Accuracy and Confidence: Optimality Hypothesis Revisited*, 72 J. APPLIED PSYCHOL. 691 (1987); Siegfried Ludwig Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 PSYCHOL. BULL. 315, 319 (1995).

77. J.C. Brigham & R.K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 LAW. & HUM. BEHAV. 19 (1983).

78. Bradley McAuliff & Margaret Bull, *Estimating the Effects of Misleading Information on Witness Accuracy: Can Experts Tell Jurors Something They Don't Already Know?*, 21 J. APPLIED COGNITIVE PSYCHOL. 849 (2007).

79. Richard S. Schmechel et al., *Beyond The Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177 (2006) (For example, stress and weapons effect the reliability of identifications).

eyewitnesses.[80] Other studies show that lawyers are unfamiliar with factors that influence identifications.[81] In two studies, lawyers were found insensitive to bias in line-up presentations, resulting in their inability to educate juries.[82] Cross-examining witnesses rarely influenced juror verdicts, except when the witness was a child who gave inconsistent statements.[83] However, in a study of 300 participants, Berman and Cutler found that when the inconsistencies in testimony involved on the stand or on the stand and pretrial statements, participants were less likely to convict and found witness identification less effective.[84] The marginal effectiveness of cross-examining witnesses is tempered by the likelihood that many witnesses do not make inconsistent statements and most do not lie. They are mistaken and their identifications are inaccurate. Cross-examining those witnesses does not provide jurors with information about the factors affecting mistaken-identifications.[85]

Jury instructions are typically incomplete, confuse jurors and do not improve the quality of decisions.[86] Instructions are also not intended as teaching tools to educate jurors about evaluating eyewitness testimony so they are largely ineffective.[87]

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80. R.C.L. Lindsay et al., *Mock-Juror Belief of Accurate and Inaccurate Eyewitnesses: A Replication and Extension*, 13 LAW. & HUM. BEHAV. 333 (1989); M.R. Leippe & A. Romanczyk, *Reactions to Child (Versus Adult) Eyewitnesses: The Influence Of Jurors' Preconceptions And Witness Behavior*, 13 LAW. & HUM. BEHAV. 103 (1989); G.L. Berman et al., *Effects Of Inconsistent Eyewitness Statements of Mock-Jurors' Evaluations of the Eyewitness Perceptions of Defendant Culpability and Verdicts*, 19 LAW. & HUM. BEHAV. 79 (1995).

81. V. Stinson et al., *How Effective is the Presence-of-Counsel Safeguard? Attorney Perceptions of Suggestiveness, Fairness, and Correctability of Biased Lineup Procedures*, 81 J. APPLIED PSYCHOL. 64 (1996).

82. *Id.*; *See* Gary L. Wells, *What do we Know About Eyewitness Identification?* 48 AM. PSYCHOL. 553 (1993).

83. R.C.L. Lindsay et al., *Mock-Juror Evaluations of Eyewitness Testimony: A Test of Metamemory Hypotheses*, 16 J. APPLIED SOC. PSYCHOL. 447 (1986).

84. Garrett L. Berman & Brian L. Cutler, *Effects of Inconsistencies in Eyewitness Testimony on Mock-Juror Decision Making*, 81 J. APPLIED PSYCHOL. 170 (1996).

85. Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 PSYCHOL. PUB. POL'Y & L. 909, 923-4 (1995).

86. *Id.*; Brian L. Cutler et al., *Nonadversarial Methods of Sensitizing Jurors to Eyewitness Evidence*, 20 J. APPLIED SOC. PSYCHOL. 1197 (1990); E. Greene, *Judge's Instructions on Eyewitness Testimony: Evaluation and Revision*, 18 J. APPLIED SOC. PSYCHOL. 252 (1988).

87. Leippe, *supra* note 61 at 17.

5. Florida cases must resolve its conflicted treatment of this science

Eyewitness-identification testimony is scientific. Research dates to the 1900s and modern empirically based research began in the 1970s.[88] Special training in psychology, methodology and science is required to conduct research and eyewitness-identification findings have been subjected to peer-review. The research is generally accepted in the scientific community;[89] and testimony on the factors influencing misidentification is helpful to jurors.

Yet, in 1983, eyewitness-identification experts in Florida were precluded from testifying because the Florida Supreme Court held that testimony was not beyond the knowledge of jurors, it was commonsense.[90] Fifteen years later, in *McMullen*,[91] the court seemingly receded from that per se exclusion, leaving the admissibility of eyewitness testimony in the sound discretion of the trial courts. *Johnson* was not overruled.

McMullen was a case where identity of the perpetrator was the sole issue, with no other evidence placing him at the crime scene. Under those circumstances, the court found excluding expert testimony on eyewitness-identification was not error.[92] No Florida appellate court to date has found that excluding eyewitness testimony is an abuse of discretion and many of the decisions rely on *Johnson* upholding the exclusion of testimony, reinvigorating its faulty reasoning that testimony is not helpful to juries.[93]

In 2006, the Florida Supreme Court, in *Simmons v. State*,[94] reviewed homicide, kidnapping and sexual battery convictions. Among other evidence, the state introduced several witnesses who placed Simmons with the victim. The trial judge excluded expert testimony advanced by Simmons on the psychological factors contributing to erroneous witness identifications when police use suggestive techniques. The court held that there was no abuse of discretion. The Florida Su-

88. Gary L. Wells et al., *Eyewitness Evidence: Improving its Probative Value*, 7 PSYCHOL. SC. in the PUB. INT. 45 (2006).

89. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

90. Johnson v. State, 438 So. 2d 774 (1983). And, in three cases, following Johnson, the Florida Supreme Court upheld trial court decisions excluding eyewitness- identification testimony (Espinosa v. State, 589 So. 2d 887 (Fla. 1991); Lewis v. State, 572 So. 2d 903 (Fla. 1990) and Hooper v. State, 476 So. 2d 1253 (Fla. 1985)), and in one case, upheld the trial judge's decision to admit, but limit, an expert's testimony on the topic. (Rogers v. State, 511 So. 2d 526 (Fla. 1987)).

91. McMullen v. State, 714 So. 2d 368 (Fla. 1998).

92. *Id.*

93. Green v. State, 975 So. 2d 1090 (Fla. 2008).

94. 934 So. 2d 1100 (Fla. 2006).

preme Court relied on *Johnson* and *McMullen* for the principle that excluding expert-testimony on matters within the common knowledge of jurors is within the sound discretion of the trial judge.[95] A year later, in *Frances v. State*[96] and citing *Johnson* and *Simmons*, the Florida Supreme Court again held no abuse of discretion by the trial court for excluding expert testimony because the matters did not require special knowledge or experience.

Citing *Simmons*, the Fifth District Court of Appeal in *Pietri v. State*[97] excluded expert witness testimony because the testimony amounted to common knowledge, and it did not require any special knowledge to understand the unreliability factors in identification cases. Pietri was convicted of burglary in a case where a police officer testified about a description, which was given to her by a child victim, concerning a man breaking into a man's house.[98] The expert would have testified about the factors that may have influenced the ability of the child-victim to make an accurate identification.[99] Applying Florida law, the *Pietri* court found no error:

> Applying the law established by our Supreme Court in *Johnson v. State* [citations omitted] and confirmed in *McMullen v. State*, [citations omitted], and *Simmons v. State*, [citations omitted] we find no error. As in those cases, the facts to be established by the expert in the present case amounted to testimony concerning the general problems associated with witness identification, and common factors that could lead to a false identification. In the context of the present case, these matters did not require special knowledge, and the testimony was properly excluded.[100]

In 2008, the Florida Supreme Court in *Green v. State*[101] held a trial court did not err by denying an evidentiary hearing on the ineffectiveness of counsel for failing to retain an expert to challenge cross-racial identification:

> First, the record conclusively shows that Green is not entitled to relief based on his claim that counsel was ineffective for failing to retain an expert witness on cross-racial identification. It is unlikely that such testimony would have been admitted. *See Johnson v.*

95. *Id.* at 1116-17.

96. 970 So. 2d 806, 814 (Fla. 2007).

97. 935 So. 2d 85 (Fla. 5th. Dist. Ct. App. 2006).

98. *Id.*

99. *Id.* at 85 (for example, the expert witness would have testified to her age, lighting, passage of time, and the character of the photo-lineup).

100. *Pietri*, 935 So. 2d at 85-6. In a footnote to this paragraph, the Court noted, "The expert in McMullen and Simmons is the same person whose testimony was proffered by the appellant in the present case."

101. 975 So. 2d 1080 (Fla. 2008).

> *State*, [citations omitted] (holding that the trial court did not abuse its discretion in refusing to allow a professor of psychology to testify as an expert witness in the field of eyewitness identification). *See also McMullen v. State*,[citations omitted] ("Johnson could be interpreted as a per se rule of inadmissibility of this type of testimony.")[102]

The holding "that a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony"[103] has been debunked by research dating to 1983. Furthermore, Justice Pariente, concurring in *Simmons*,[104] highlighted the contradictions of the holdings in *Johnson*, *Green* and *Pietri*, by her compelling argument that *Johnson* should not be interpreted as barring expert testimony on eyewitness identification because that testimony clearly helps juries: "It is now clear that such testimony can assist the jury in assessing guilt in certain cases, especially where, as some courts have recognized, the only inculpatory evidence is eyewitness testimony."[105] Justice Pariente found that research conducted since 1983, demonstrated that eyewitness-identification testimony was not a matter of commonsense, and in some instances the findings contradicted commonsense.[106] As illustrated by the accuracy-certainty example: "research shows that a witness' degree of certainty correlates weakly, at best, with the accuracy of the identification."[107] Pariente found that difficulty in cross-racial identifications is well established by research.[108] Many believe that error-rates of misidentification are similar, when in fact there is a higher degree of inaccuracy in cross-racial identifications.[109]

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102. *Id.* at 1107.

103. Johnson v. State, 438 So. 2d 774 (Fla. 1983).

104. *Simmons*, 934 So. 2d at 1124-26 (Fla. 2006) (Pariente, J., concurring) (interpreting Johnson as not barring expert testimony on eyewitness identification).

105. *Id.*

106. *Id.* at 1124.

107. *Simmons*, 934 So. 2d at 1124 (Pariente, J., concurring), (citing ELIZABETH LOFTUS & JAMES DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 3-12, at 67) (3rd ed. 1997) ("The consensus of the literature that deals with [whether eyewitness confidence is an indication of eyewitness accuracy] seems to indicate that eyewitness confidence is not a very good indicator of eyewitness accuracy."); *See also*, GARY L. WELLS, EYEWITNESS IDENTIFICATIONS: SCIENTIFIC STATUS, IN SCIENCE IN THE LAW: SOCIAL AND BEHAVIORAL SCIENCE ISSUES 391, 412 (David L. Faigman et al. eds., 2002).

108. *Simmons*, 934 So. 2d at 1124.

109. *Id.* (citing Loftus & Doyle, *supra*, § 4-9, at 86; Wells, *supra*, at 404). A 2002 report by the Illinois Governor's Commission on Capital Punishment reflects "[t]he fallibility of eyewitness testimony has become increasingly well-documented in both academic literature and in courts of law." Report of the Governor's Commission on Capital Punishment 31

Contradictions in Florida law on admitting or abusing discretion by excluding eyewitness identification testimony must be resolved. In order to resolve the inconsistencies, Florida courts must: (1) apply scientific standards to eyewitness-identification experts, (2) employ constitutional standards on defendants' right to present their theories of defense, and (3) overrule *Johnson* and *McMullen* to the extent that those decisions are interpreted as barring eyewitness identifications as not helpful to juries.

C. *Conflict III: Discretion in sheep's clothing*

Despite Justice Pariente's observations that fallibility of eyewitness identification is well documented by science and some courts,[110] appellate courts remain unwilling to find discretion abused when that expert testimony is excluded. According to a recent study, a national trend. In 2006, Benton et al.,[111] found little difference between courts adopting the prohibitory as compared to the discretionary approach to the admission of eyewitness-identification testimony. Although the majority of courts adopted the discretionary approach, the analysis uncovered that many courts really applied per se exclusion[112] and called it discretionary:

(2002), available at http://state.il.us/defender/report.pdf. See similarly, the North Carolina Actual Innocence Commission organized by Chief Justice I. Beverly Lake Jr., of the North Carolina Supreme Court "chose eyewitness identification as its first topic of study because research has identified misidentification as the leading factor in the wrongful conviction of those exonerated nationally by DNA evidence." Christine C. Mumma, *The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined by a Common Cause*, 52 DRAKE L. REV. 647, 652 (2004).

110. *Simmons*, 943 So. 2d at 59-64. Justice Pariente cited many research studies and the 2002 report by the Illinois Governor's Commission on Capital Punishment and North Carolina's Chief Justice I. Beverly Lake, Jr., where she chose eyewitness identification as the first topic to study because misidentification is the leading factor in wrongful convictions. Additionally, Justice Pariente cited decisions from the Sixth Circuit Court of Appeals and the Georgia Supreme Court concluding that eyewitness identification testimony should not be excluded when it is a "key element" of the state's case and there is little corroboration of the identification.

111. Tanja Rapus Benton et al., *On the Admissibility of Expert Testimony on Eyewitness Identification: A Legal and Scientific Evaluation*, 2 TENN. J.L. & POL'Y 392 (2006). *See also* Thomas Dillickrath, *Evidence of Innocence Offered by the Criminal Defendant, Not So Fast: Expert Testimony on Eyewitness Identification, Admissibility and Alternatives*, 55 U. MIAMI L. REV. 1059 (2001); Jennifer Overbeck, *Beyond Admissibility: A Practical Look at the Use of Eyewitness Expert Testimony in the Federal Courts*, 80 N.Y.U. L. Rev. 1895 (2005).

112. Since the publication of Benton, McDonnell, Thomas, Ross & HonerKamp (2006), the Tennessee Supreme Court reversed its decision barring eyewitness-identification testimony. State v. Copeland, 226 S.W.3d 287, 299 (Tenn. 2007). Noting, "times have changed," the court reversed its prior decision because hundreds of scholarly, legal, and scientific articles and books support the view that eyewitness-identification testimony is not

> While it initially may appear that courts are turning away from [the prohibitory] approach to adopt the approach of the majority in a discretionary view, our analysis reveals that many courts are using the "discretionary" approach as a guise, but are basically still operating in a manner that is nearly per se exclusionary.[113]

Florida is one of those courts that applied *per se* exclusion and called it discretionary.[114] By upholding decisions that exclude experts, even where no other evidence of guilt exists, reasoning that testimony is unnecessary to assist juries amounts to per se exclusion.[115] In addition, these decisions conflict with the way Florida courts treat the exclusion of other types of evidence under the same standard.

Relevant and reliable evidence is typically admitted at trial. Expert testimony is admitted, particularly to prove identity. Some examples include handwriting analysis, hair-comparison,[116] DNA,[117] and fingerprint evidence. According to Charles W. Ehrhardt, EHRHARDT'S FLORIDA EVIDENCE §702.2 (2008), court decisions reflect that experts may testify about subjects, even when jurors may have some understanding of an issue. In *Boyer v. State*,[118] the First District Court of Appeal held a trial judge abused discretion by excluding expert testimony on false-confession phenomena on the basis that it was not helpful to the jury: "Even though the jury may have beliefs about the subject, the question is whether those beliefs are correct."[119] In two other cases, trial courts were found to abuse discretion by excluding expert testimony that (1) explained how fibers are released from clothes and dispersed during a traffic accident[120] and (2) interpreted the damage to a car and victim injuries.[121]

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based on commonsense. *Id.* The *Copeland* court also rejected the view that cross-examination or jury instructions — without expert testimony — were sufficient to educate juries. *Id.* The only safeguard against mistaken identification was expert testimony. *Id.*

113. Benton, *supra* note 111.

114. Benton, *supra* note 111, at 406.

115. Evidence scholar, Charles Ehrhardt questions under what circumstance eyewitness-identification testimony would be admitted: "From the McMullen decision it is unclear when, if ever, expert testimony regarding this subject would be admissible." CHARLES EHRHARDT, EHRHARDT'S FLORIDA EVIDENCE, §702.2 n. 4 (2008 Edition).

116. Jackson v. State, 511 So. 2d 1047, 1049 (Fla. 2d Dist. Ct. App. 1987).

117. *See e.g.*, Darling v. State, 808 So. 2d 145 (Fla. 2002) (DNA expert qualified to testify).

118. *Boyer*, 825 So. 2d at 418-19 (Fla. 1st Dist. Ct. App. 2002).

119. *Id.*

120. Barfield v. State, 880 So. 2d 768 (Fla. 2d Dist. Ct. App. 2004).

121. Mathieu v. Schnitzer, 559 So. 2d 1244, 1245 (Fla. 4th Dist. Ct. App.1990).

Florida courts admit expert testimony based on the following: (1) serology,[122] (2) blood-spatter evidence,[123] (3) effect of alcohol,[124] (4) forced-intercourse injuries,[125] (5) disclosure rates of child-sex-abuse victims,[126] and (6) symptoms of child-abuse victims.[127] Police officers also regularly testify as experts in drug-identification cases involving marijuana and cocaine.[128]

Facts that are well known and not helpful to the jury are inadmissible. On that basis, courts have excluded expert testimony that an elderly woman, approached by a gun-toting man would be terrified[129] and identifying the aggressor in a fight.[130] The subject of eyewitness-identification, however, involves facts that are not well known, and in some instances, counterintuitive to common knowledge (e.g., that eyewitness confidence is not correlated with accuracy of the identification).

In eyewitness-identification cases, Justices Pariente, in *Simmons*, and Anstead, in *McMullen*, have encouraged and urged trial courts to either admit this testimony or truly exercise their discretion:

> Accordingly, I encourage trial courts to truly exercise their discretion as to the admission of this testimony. Trial judges should consider, as they do with other expert testimony, whether the testimony would assist the jury, i.e., whether it would introduce relevant considerations as to accuracy that could not otherwise be brought to light via cross-examination, jury instructions, or the jurors' commonsense. As the research demonstrates and courts increasingly recognize, expert testimony in this area can be a pow-

122. Campbell v. State, 571 So. 2d 415 (Fla. 1990) (overruled in part) (for example, when a knife with a bloody handle hits bone, the grip may slip").

123. Grossman v. State, 525 So. 2d 833, 837 (Fla. 1988) (overruled in part) (for example, spatters that come from a high velocity weapon).

124. Calandra v. State, 727 So. 2d 1028, 1029 (Fla. 4th Dist. Ct. App. 1999).

125. Russell v. State, 576 So. 2d 389, 392 (Fla. 1st Dist. Ct. App. 1991), *rev. denied,* 587 So.2d 1329 (Fla. 1991).

126. Quintero v. State, 889 So. 2d 1013 (Fla. 1st Dist. Ct. App. 2004) (for example, victims do not initially fully disclose in 67% to 70% of cases).

127. Ward v. State, 519 So. 2d 1082, 1083 (Fla. 1st Dist. Ct. App. 1988) (for example, psychological testimony that symptoms were "consistent with those displayed by victims of child abuse").

128. *See, e.g.*, Brooks v. State, 762 So. 2d 879 (Fla. 2000) (cocaine); Pama v. State, 552 So. 2d 309, 311 (Fla. 2d Dist. Ct. App. 1989) (marijuana); Sinclair v. State, 995 So. 2d 552, 2008 WL 4057841 (Fla. 3rd. Dist. App. 2008) (cocaine). For a review and critique of this trend, see Michael D. Blanchard & Gabriel J. Chin, *Identifying the Enemy in the War on Drugs: A Critique of the Developing Rule Permitting Visual Identification of Indescript White Powder in Narcotics Transactions*, 47 AM. U. L. REV. 557 (1998).

129. Jordan v. State, 694 So. 2d 708, 717 (Fla. 1997).

130. Smith v. Hooligan's Pub & Oyster Bar, Ltd., 753 So. 2d 596, 600 (Fla. 3rd Dist. Ct. App. 2000).

> erful tool in helping the criminal justice system achieve its goal of convicting the guilty while acquitting the innocent.[131]

Obviously, cajoling hasn't worked. Moreover, it is time that appellate courts resolve the conflicts in its application of the abuse of discretion standard. When evidence is excluded that supports the defense theory, Florida courts generally find the trial court abused discretion. But, not when the trial courts exclude eyewitness-identification expert testimony.

"Where evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission."[132] The Second District Court of Appeal in *Corley v. State*[133] held that the fingerprints found at the scene of a homicide, that did not belong to neither the victim nor the defendant, was admissible to support the defense theory that someone else committed the crime. The Florida Supreme Court mimicked that holding in *Watts v. State*.[134] In *Watts*, the Florida Supreme Court reversed Watts' conviction for robbery because the trial judge excluded fingerprints from someone other than the defendant.[135] The *Watts* Court reasoned that the fingerprints should have been admitted because they supported the defense theory that someone else committed the robbery.[136] The Second District Court of Appeal in *Story v. State*[137] held that the trial court abused its discretion when it excluded testimony that employees of defendant engaged in fraud because that evidence tended to prove that Story did not have the specific intent to commit theft. She was unaware of her employees' fraud, and she had the constitutional right to present that defense.[138]

Trial courts do not have unlimited discretion to exclude testimony when that testimony supports the defense's theory.[139] In *Jacobs v. State*,[140] the Fourth District Court of Appeal reversed the trial

131. *Simmons*, 934 So. 2d at 1126 (concurring).

132. Rivera v. State, 561 So. 2d 536, 539 (Fla. 1990) (citing Moreno v. State, 418 So. 2d 1223, 1225 (Fla. 3rd Dist Ct. App. 1982)). *See also* Corley v. State, 335 So. 2d 849 (Fla. 2d Dist. Ct. App. 1976); Story v. State, 589 So. 2d 939, 942 (Fla. 2d Dist. Ct. App. 1991); Watts v. State, 354 So. 2d 145 (Fla. 2d Dist. Ct. App. 1978).

133. *Corley*, 335 So. 2d at 850.

134. *Watts*, 354 So. 2d at 145-6.

135. *Id.*

136. *Id.*

137. *Story*, 589 So. 2d at 942-3 (Fla. 2d Dist. Ct. App. 1991).

138. *Id.*

139. *See* Docekal v. State, 929 So. 2d 1139, 1142 (Fla. 5th Dist. Ct. App. 2006) (holding the trial court erred by prohibiting cross-examination "when the facts sought to be elicited are germane to that witness' testimony and plausibly relevant to the theory of defense").

140. 962 So. 2d 934, 936 (Fla. 4th Dist. Ct. App. 2007).

court's decision excluding evidence that tended to support Jacob's defense that he was insane at the time he killed his wife. The evidence, which amounted to telephone calls, messages, hand-written notes, and 9-1-1 calls, did tend to support Jacob's claim.[141] The trial court's view of that evidence was irrelevant; however, the evidence should have been admitted because it tended to support the defendant's theory.

The same is true for the limits placed on excluding expert testimony. In *Boyer v. State*,[142] the First District Court of Appeal held that a defense psychology expert on false confessions should have been permitted to testify because the evidence was relevant and *Frye* was satisfied. It was the jury's decision to determine the weight given to the testimony.[143] Excluding the expert was not harmless because his testimony "went to the heart" of Boyer's defense.[144] Moreover, the Fourth District Court of Appeal, in *Anderson v. State*,[145] reversed the trial court's decision to exclude testimony by a telemarketing expert, in a racketeering and fraud case, on the ground that scripts and false names were common practice in legitimate telemarketing. The Fourth District Court of Appeal's discretion was abused when it found the telemarketing information was not helpful to the jury: "An ordinary person, unfamiliar with industry practices, would not know that scripts and false names are generally an accepted practice in the telemarketing field."[146] The error was not harmless because the jury was left with only the negative impression of the scripts and false names, which could lead to believing he actively participated in the fraud.[147]

III. Conclusion

Eyewitness-identification testimony is relevant and scientific. The testimony goes directly to the heart of the defense theory of mistaken identification. Furthermore, the sound discretion of the trial court is abused when essential, critical and reliable evidence supporting the defense theory and raising reasonable doubt is excluded. Florida law conflicts with constitutional principles, science, and its own decisions on applying the standards of review for admitting or ex-

141. *Id.* at 935.
142. *Boyer*, 825 So. 2d at 418-19 (Fla. 1st Dist. Ct. App. 2002).
143. *Id.* at 420.
144. *Id. But cf.* Beltran v. State, 700 So. 2d 132, 133 (Fla. 4th Dist. Ct. App. 1997).
145. 786 So. 2d 6, 8 (Fla. 4th Dist. Ct. App. 2000).
146. *Id.* at 7.
147. *Id.*

cluding evidence. Florida must resolve these inconsistencies to preserve a defendant's constitutional rights. Trial courts should admit eyewitness-identification testimony when it is relevant, or risk reversal by appellate courts when it is excluded.