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PALMER, J., with whom NORCOTT and VERTEFEUILLE, Js., join, concurring. Although I agree with the majority that the murder conviction of the defendant, J'Veil Outing, must be affirmed, I disagree with the majority's refusal to reconsider and overrule this court's precedent concerning the admissibility of expert testimony on the reliability of eyewitness identifications. Beginning with *State* v. *Kemp*, 199 Conn. 473, 476–77, 507 A.2d 1387 (1986), this court consistently has concluded that expert testimony on the fallibility of eyewitness identifications is unnecessary and, therefore, inadmissible because it is a subject within the ken of the average juror. Although our holding in *Kemp* and its progeny have been thoroughly discredited by empirical studies, and although eyewitness identification testimony, while highly convincing, is notoriously unreliable, the majority sidesteps the issue of the continued viability of our precedent in this area, even though neither party contends that we should avoid addressing this extremely important issue. In sum, the majority's refusal to address the issue is indefensible, first, because *Kemp* and its progeny authorize our trial courts to reject expert testimony on the reliability of eyewitness identifications for a reason that we now *know* is wholly insupportable and, second, because, as a result of those cases, criminal defendants are being denied their right to challenge meaningfully the reliability of eyewitness identification testimony. I therefore cannot join that portion of the opinion of the majority in which it declines to reach the merits of the defendant's claim that the trial court improperly precluded him from introducing into evidence, at the hearing on his motion to suppress eyewitness identification testimony, certain expert testimony concerning the reliability of such identifications.[1] Because, however, the trial court's denial of the defendant's request to introduce that expert testimony constituted harmless error, I concur in the result that the majority reaches.

The following facts, which are set forth generally in the majority opinion, are particularly relevant to this issue. Prior to trial, the defendant filed a motion to suppress the eyewitness identification testimony of two witnesses, Nadine Crimley and Ray Caple. The defendant informed the court and the state that he intended to present the testimony of Jennifer Dysart, an acknowledged expert on eyewitness identifications, for purposes of his motion to suppress and at trial. In testimony proffered by the defendant in connection with his motion to suppress, Dysart opined that, generally: (1) the perpetrator's use of a disguise, including a hat, can impair a witness' ability to make an accurate identification—the "disguise effect"; (2) a witness is more likely to identify a person as the perpetrator if the witness

believes that the perpetrator looks familiar—a phenomenon known as "unconscious transference"; (3) when the perpetrator carries a weapon, a witness tends to focus on the weapon rather than on the perpetrator, thereby reducing the likelihood of an accurate identification—the "weapons focus effect"; (4) a witness' confidence in his or her identification bears little or no relation to the accuracy of that identification; (5) a witness under stress when observing the commission of a crime is less likely to identify the perpetrator accurately; and (6) witness collaboration can adversely affect the accuracy of an eyewitness identification.[2] The state objected to Dysart's proffered testimony, claiming, inter alia, that it was inadmissible in light of this court's determination in *State* v. *Kemp*, supra, 199 Conn. 477, and *State* v. *McClendon*, 248 Conn. 572, 586, 730 A.2d 1107 (1999), that such testimony generally is within the common knowledge and experience of the average person and, therefore, would not aid the fact finder in evaluating the identification evidence.

The trial court agreed to allow Dysart to testify at the suppression hearing on several issues relating to the manner in which the police had administered the photographic identification procedure in the present case.[3] The court also permitted Dysart to testify about the theory of unconscious transference. In express reliance on *Kemp* and *McClendon*, however, the court sustained the state's objection with respect to any testimony by Dysart concerning her opinion that the reliability of an identification can be adversely affected by witness stress, witness collaboration, the perpetrator's use of a disguise or a weapon, and that the witness' confidence in the accuracy of the identification bears little or no relation to the accuracy of the identification. The court explained that, as this court had determined in *Kemp* and *McClendon*, the excluded testimony was unnecessary because it fell "within the realm . . . of common sense and . . . experience."[4] After considering that portion of Dysart's testimony that it previously had found to be admissible, the trial court denied the defendant's motion to suppress the evidence establishing that Crimley and Caple initially had identified the defendant as the perpetrator.

I turn next to the principles that govern the resolution of the defendant's claim, beginning with the applicable standard of review. "[T]he trial court has wide discretion in ruling on the admissibility of expert testimony and, unless that discretion has been abused or the ruling involves a clear misconception of the law, the trial court's decision will not be disturbed. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did. . . .

"This court recently articulated the test for the admission of expert testimony, which is deeply rooted in

common law. Expert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues. . . . In other words, [i]n order to render an expert opinion the witness must be qualified to do so and there must be a factual basis for the opinion. . . .

"It is well settled that [t]he true test of the admissibility of [expert] testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue. . . . Implicit in this standard is the requirement . . . that the expert's knowledge or experience must be directly applicable to the matter specifically in issue." (Citations omitted; internal quotation marks omitted.) *Sullivan* v. *Metro-North Commuter Railroad Co.*, 292 Conn. 150, 157–59, 971 A.2d 676 (2009); see also Conn. Evid. Code § 7-2.[5]

"Beyond these general requirements regarding the admissibility of expert testimony, [t]here is a further hurdle to the admissibility of expert testimony when that testimony is based on . . . scientific [evidence]. In those situations, the scientific evidence that forms the basis for the expert's opinion must undergo a validity assessment to ensure reliability. *State* v. *Porter*, [241 Conn. 57, 68–69, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998)]. In *Porter*, this court followed . . . *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and held that scientific evidence should be subjected to a flexible test, with differing factors that are applied on a case-by-case basis, to determine the reliability of the scientific evidence. . . . Following *State* v. *Porter*, supra, 81–84, scientific evidence, and expert testimony based thereon, usually is to be evaluated under a threshold admissibility standard assessing the reliability of the methodology underlying the evidence and whether the evidence at issue is, in fact, derived from and based [on] that methodology . . . which has been referred to as the fit requirement." (Citations omitted; internal quotation marks omitted.) *Maher* v. *Quest Diagnostics, Inc.*, 269 Conn. 154, 168, 847 A.2d 978 (2004).

With respect to the admissibility of expert testimony on the reliability of eyewitness identifications, this court first addressed the issue nearly twenty-five years ago in *State* v. *Kemp*, supra, 199 Conn. 473. In *Kemp*, the defendants, Harold Kemp and Robert Kemp, who

had been charged in connection with the armed robbery of an army and navy surplus store; see id., 474; sought to introduce the expert trial testimony of Robert Buckhout, "a psychologist and recognized authority on the factors [that] affect the accuracy of identifications." Id., 475. The Kemps offered Buckhout's testimony for the purpose of impeaching the reliability of several witnesses who had identified them as the robbers. In particular, Buckhout was prepared to explain to the jury that: "(1) stress, particularly stress during an incident involving violence by a weapon, may decrease the reliability of the identification; (2) memory is not a recording device [that] accurately records an event and does not change over time; (3) the identification process is affected by post-event information learned by a witness; (4) and the level of certainty demonstrated by a person does not reflect a corresponding level of accuracy." (Internal quotation marks omitted.) Id. After an evidentiary hearing outside the jury's presence, the trial court denied the Kemps' request to present Buckhout's testimony. Id.

Following their convictions, the Kemps appealed to this court, claiming, inter alia, that the trial court improperly had precluded Buckhout's testimony. Id. We concluded that the trial court, like courts in other jurisdictions, properly had done so; see id., 476; because "the reliability of eyewitness identification is within the knowledge of jurors and expert testimony generally would not assist them in determining the question." Id., 477. We further explained that "[s]uch testimony is also disfavored because . . . it invades the province of the jury to determine what weight or effect it wishes to give to eyewitness testimony." (Internal quotation marks omitted.) Id. Although we acknowledged that, "in many cases the determination of guilt or innocence depends in large part on the credibility assigned to eyewitness identifications, and that in many instances identifications may be unreliable"; id., 478; we also observed that "[t]his does not mean that a criminal defendant is without protection." Id. We explained, in particular, that due process permits the use of such identifications only if they meet a minimum reliability threshold and, further, that "[t]he weaknesses of identifications can be explored on cross-examination and during counsel's final arguments to the jury." Id. We stated that, because the "reliability of the identifications [could] be adequately questioned by such means and the jury [was] capable of understanding the reasons why they may be unreliable, the introduction of expert testimony would [have been] a superfluous attempt to put the gloss of expertise, like a bit of frosting, [on] inferences [that] lay persons were equally capable of drawing from the evidence." (Internal quotation marks omitted.) Id., 478–79. We also observed that the trial court, in its jury instructions, had "emphasized the critical nature of the [eyewitness] identifications [at issue]

and reviewed various factors [that] might affect their reliability, including delay, performance under stress and inaccuracy of prior descriptions." Id., 479 n.3. Noting that defense counsel had been afforded "ample opportunity to question the witnesses who identified [the Kemps] and [thereby] expose any weaknesses of the identifications"; id., 479; we concluded that "[t]he trial court properly [had] excluded the proffered expert testimony on the basis that it would not have aided the jury in its deliberations." Id.

Approximately thirteen years after our decision in *Kemp*, this court, in *State* v. *McClendon*, supra, 248 Conn. 572, had occasion to revisit the issue that we had addressed in *Kemp*. In *McClendon*, a jury found the defendant, Charles McClendon, guilty of felony murder and robbery stemming from the fatal shooting of two men during the robbery of a moving company. Id., 574–75. McClendon's conviction was predicated in large measure on the out-of-court and in-court identifications of McClendon as the perpetrator by an employee of the moving company. See id., 577. On appeal to the Appellate Court, McClendon claimed that the trial court improperly had precluded him from presenting the testimony of Michael Leippe, a psychologist with expertise in the subject of eyewitness identification and memory retention. *State* v. *McClendon*, 45 Conn. App. 658, 666–67, 697 A.2d 1143 (1997). The Appellate Court rejected McClendon's claim, concluding, in reliance on *Kemp*, that the trial court reasonably had determined that the proffered expert testimony "was within the general knowledge of the jurors and that it would not aid them to resolve the issues at hand." Id., 667.

Upon our granting of McClendon's petition for certification to appeal, we agreed with the Appellate Court that the trial court properly had excluded Leippe's testimony. *State* v. *McClendon*, supra, 248 Conn. 585. In doing so, we explained that Leippe would have testified, "among other things, that the confidence of an eyewitness does not correlate to the accuracy of observation, that variables such as lighting, stress and time to observe have an impact on accuracy, that leading questions and the repetition of testimony can increase an eyewitness' confidence but not accuracy, that people remember faces best when they analyze many features and characteristics of the face rather than just one, that misleading police questions can alter memories, and that the most accurate descriptions are given immediately after a crime." Id., 586–87. We concluded that "Leippe's [proffered] testimony support[ed] the trial court's decision that his conclusions were nothing outside the common experience of mankind." (Internal quotation marks omitted.) Id., 586. We also explained, as we had in *Kemp*, that any weaknesses in eyewitness identifications may be probed on cross-examination and highlighted during argument to the jury, both of which had been done at length by McClendon's counsel.

Id., 588. We further noted that the trial court had "instructed the jury to consider the potential unreliability of eyewitnesses, with specific reference to the conditions under which the witnesses viewed the perpetrator, the distance between them, and the length of time between the incident and the witnesses' description." Id., 587.

Finally, we declined McClendon's invitation to follow the rationale pertaining to the admissibility of expert testimony on eyewitness identifications that the Arizona Supreme Court previously had adopted in *State* v. *Chapple*, 135 Ariz. 281, 660 P.2d 1208 (1983). In *Chapple*, the court concluded that, under the facts of that case, the trial judge had abused his discretion in precluding the defendant, Dolan Chapple, from adducing expert testimony that eyewitnesses generally experience a rapid "forgetting curve" following the initial identification, "that stress causes inaccuracy of perception with subsequent distortion of recall," that eyewitnesses are affected by "unconscious transfer," that they "frequently incorporate into their identifications inaccurate information gained subsequent to the event and confused with the event," and that there is "no relationship between the confidence [with] which a witness has in his or her identification and the actual accuracy of that identification." (Internal quotation marks omitted.) Id., 293–94. In reaching its determination, the Arizona Supreme Court, after observing that "the law has long recognized the inherent danger in eyewitness [identification] testimony"; id., 293; explained that it could not "assume that the average juror would be aware of the variables concerning identification and memory about which [the expert] was qualified to testify." Id., 294. The court stated further that "[d]epriving [the] jurors of the benefit of scientific research on eyewitness [identification] testimony force[d] them to search for the truth without full knowledge and opportunity to evaluate the strength of the evidence. In short, this deprivation prevent[ed] [the] jurors from having the best possible degree of understanding the subject toward which the law of evidence strives." (Internal quotation marks omitted.) Id. In *McClendon*, however, we rejected the analysis in *Chapple* in favor of the analysis that we previously had employed in *Kemp*.[6] *State* v. *McClendon*, supra, 248 Conn. 589.

Research reveals that the courts of this state routinely have relied on the rationale that we employed in *Kemp* and *McClendon* in rejecting the claim that a defendant was entitled to present expert testimony concerning the reliability of eyewitness identifications. See, e.g., *State* v. *Monteeth*, 208 Conn. 202, 210 n.5, 544 A.2d 1199 (1988); *State* v. *Boscarino*, 204 Conn. 714, 733–34, 529 A.2d 1260 (1987); *State* v. *Elliott*, 8 Conn. App. 566, 571–72, 513 A.2d 1285, cert. denied, 201 Conn. 813, 517 A.2d 630 (1986); *Velasco* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket

No. TSR-CV05-4000321-S (August 13, 2008), aff'd, 119 Conn. App. 164, 987 A.2d 1031, cert. denied, 297 Conn. 901, 994 A.2d 1284 (2010); *Kennedy* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. TSR-CV06-4000972-S (April 29, 2008); cf. *State* v. *Manson*, 118 Conn. App. 538, 550–51, 984 A.2d 1099 (2009) (concluding that trial court properly had precluded expert testimony on reliability of eyewitness identifications because that testimony was not relevant to case but noting that trial court also had found that negative effect of stress on memory and absence of relationship between witness' degree of certainty in identification and accuracy of that identification were factors not generally within knowledge of jurors), cert. denied, 295 Conn. 902, 988 A.2d 878 (2010); *State* v. *Kelly*, Superior Court, judicial district of Ansonia-Milford, Docket No. CR07-61742 (January 16, 2009) (relying on *Kemp* in excluding certain testimony of expert witness on accuracy of eyewitness identifications but permitting other testimony of expert on ground that it would aid jury). It is true, of course, that neither *Kemp* nor its progeny purports to erect a per se bar to the admission of expert testimony on the reliability of eyewitness identifications. Understandably, however, courts consistently have barred the use of such expert testimony in reliance on the reasoning employed in *Kemp* because, according to *Kemp*, the substance of that testimony is known to the average juror, the testimony would encroach unduly on the jury's responsibility to determine what weight to give the eyewitness testimony, and other means, including cross-examination and closing argument of counsel, are sufficient to apprise jurors of any potential weakness in the particular eyewitness identification at issue. See *State* v. *Kemp*, supra, 199 Conn. 477–78. Thus, although our cases upholding the exclusion of such expert testimony have done so, as in *Kemp*, on the ground that the exclusion did not constitute an abuse of discretion, in each and every one of those cases, our reasons for approving the exclusion reflect the view that such evidence is not of a kind that meets the test for admissibility as expert testimony. Indeed, as one habeas court recently observed in rejecting a petitioner's claim that his trial counsel had rendered ineffective assistance for failing to present expert testimony on the reliability of eyewitness identifications, "[e]ven [as of 2008], there [was] no appellate case law in Connecticut authorizing the admission of such testimony." *Velasco* v. *Commissioner of Correction*, supra; accord *Kennedy* v. *Commissioner of Correction*, supra; see also *Velasco* v. *Commissioner of Correction*, supra (observing in footnote that issue of admissibility of expert testimony on reliability of eyewitness identifications was before this court in present case). For the reasons that follow, however, it is clear that our treatment of the issue in *Kemp* and *McClendon*, even if defensible at one time, no longer represents the proper analysis.[7]

It is true, of course, that courts long have recognized the inherent danger in eyewitness testimony.[8] Indeed, more than forty years ago, the United States Supreme Court observed that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. [United States Supreme Court] Justice [Felix] Frankfurter once said: 'What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure.' " *United States* v. *Wade*, 388 U.S. 218, 228, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967); see also *State* v. *Ledbetter*, 275 Conn. 534, 577, 881 A.2d 290 (2005) ("courts are not blind to the inherent risks of relying on eyewitness identification"), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006); *State* v. *Tatum*, 219 Conn. 721, 733, 595 A.2d 322 (1991) ("[t]he dangers of misidentification are well known and have been widely recognized throughout the United States"). Moreover, United States Supreme Court Justice William J. Brennan, Jr., observed nearly three decades ago: "[D]espite its inherent unreliability, much eyewitness identification evidence has a powerful impact on juries. Juries seem most receptive to, and not inclined to discredit, testimony of a witness who states that he saw the defendant commit the crime.

" '[E]yewitness testimony is likely to be believed by jurors, especially when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all. All the evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says "That's the one!"' " *Watkins* v. *Sowders*, 449 U.S. 341, 352, 101 S. Ct. 654, 66 L. Ed. 2d 549 (1981) (Brennan, J., dissenting); see also *Kampshoff* v. *Smith*, 698 F.2d 581, 585 (2d Cir. 1983) ("There can be no reasonable doubt that inaccurate eyewitness testimony may be one of the most prejudicial features of a criminal trial. Juries, naturally desirous to punish a vicious crime, may well be unschooled in the effects that the subtle compound of suggestion, anxiety, and forgetfulness in the face of the need to recall often has on witnesses. Accordingly, doubts over the strength of the evidence of a defendant's guilt may be resolved on the basis of the eyewitness' seeming certainty when he points to the defendant and exclaims with conviction that veils all doubt, '[T]hat's the man!' "). It is not surprising, therefore, that "[i]n recent years, extensive studies have supported a conclusion that eyewitness misidentification is the single greatest source of wrongful convictions in the United States." *State* v. *Wright*, 147 Idaho

150, 157, 206 P.3d 856 (App. 2009). Despite this long-standing recognition of the inherent unreliability of eyewitness identifications, courts frequently have rebuffed defense efforts to introduce expert testimony on the subject.

"Over the last decade, there have been extensive studies on the issue of identification evidence, research that is now impossible . . . to ignore." *State* v. *Dubose*, 285 Wis. 2d 143, 162, 699 N.W.2d 582 (2005). These studies, which "detail the extensive amount of behavioral science research in this area"; *State* v. *Copeland*, 226 S.W.3d 287, 299 (Tenn. 2007); are found in "literally hundreds of articles in scholarly, legal, and scientific journals on the subject of eyewitness testimony." Id. In fact, according to a recent law review article, there have been more than 2000 studies concerning eyewitness identification; R. Schmechel et al., "Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence," 46 Jurimetrics 177, 180 (2006); see also *State* v. *Dubose*, supra, 162 ("there have been extensive studies on the issue of identification evidence"); a number that one court has characterized as "far exceeding the research on most mental health evidence . . . ." *State* v. *Wright*, supra, 147 Idaho 157; see also *United States* v. *Smith*, 621 F. Sup. 2d 1207, 1212–13 (M.D. Ala. 2009) ("[n]umerous studies have been done under controlled conditions assessing the factors that influence eyewitnesses in accordance with generally accepted practice in the behavioral science community done independent[ly] of any litigation" [internal quotation marks omitted]). Furthermore, "researchers are nearly unanimous on the reliability of these studies' findings regarding factors that contribute to eyewitness misidentification."[9] *State* v. *Wright*, supra, 157. Thus, "[t]he scientific evidence [concerning the fallibility of eyewitness identifications] . . . is voluminous, comprehensive and consistent. It is . . . reported in . . . hundreds of peer-reviewed studies and meta-analyses . . . . The soundness and reliability of that evidence are indisputable. . . .

"The science abundantly demonstrates the many vagaries of memory encoding, storage and retrieval; the malleability of memory; the contaminating effects of extrinsic information; the influence of police interview techniques and identification procedures; and the many other factors that bear on the reliability of eyewitness identifications. . . . The wide recognition of the science by social scientists, forensic experts, law enforcement agencies, law reform groups, legislatures and courts powerfully confirms its soundness. . . . The scientific findings, in short, are reliable, definitive and unquestionably fit for use in the courtroom." (Citations omitted.) G. Gaulkin, Report of the Special Master, *State* v. *Henderson*, New Jersey Supreme Court, Docket No. A-8-08 (June 10, 2010) pp. 72–73, available at http://www.judiciary.state.nj.us/pressrel/HENDERSON

%20FINAL%20BRIEF%20.PDF%20(00621142).PDF (last visited August 18, 2010); see *State* v. *Henderson*, Docket No. A-8-08, 2009 N.J. LEXIS 45, *3 (N.J. February 26, 2009) (court remanded case to trial court for development of record to determine whether existing test for assessing reliability of eyewitness identification evidence is still valid in light of recent scientific evidence and studies). In fact, this court recently has endorsed the use of these studies by our trial courts in connection with the determination of whether a particular eyewitness identification procedure was conducted in an unnecessarily suggestive manner. See *State* v. *Ledbetter*, supra, 275 Conn. 575; see also *State* v. *Marquez*, 291 Conn. 122, 155 and n.31, 967 A.2d 56, cert. denied, U.S. , 130 S. Ct. 237, 175 L. Ed. 2d 163 (2009).

These studies establish, first, "that eyewitness memory is much more malleable and susceptible to error than is generally realized"; R. Wise, K. Dauphinais & M. Safer, "A Tripartite Solution to Eyewitness Error," 97 J. Crim. L. & Criminology 807, 812 (2007); second, that many different factors can adversely affect the reliability of eyewitness identifications and, third, that the average person either is not aware of these factors or does not appreciate the extent to which they may play a role in undermining the accuracy of identifications. For example, it is widely accepted that (1) there exists at best only a weak correlation between a witness' confidence in his or her identification and the accuracy of the identification,[10] (2) when a weapon is involved, the reliability of the identification is diminished by the witness' focus on the weapon,[11] (3) a high level of stress at the time of the witness' observations may render the witness less able to retain an accurate perception and memory of the events,[12] (4) cross-racial identifications are considerably less accurate than same-race identifications,[13] (5) the fact that a perpetrator was wearing a hat or hood may negatively impact the witness' ability to identify the perpetrator,[14] (6) the identification of the perpetrator by the witness may be less reliable unless a double-blind, sequential identification procedure is used,[15] (7) a witness may develop unwarranted confidence in his or her identification if he or she is privy to postevent or postidentification information relating to the event or to the identification,[16] and (8) the accuracy of an eyewitness identification may be adversely affected by unconscious transference, which occurs when a person seen in one situation or context is confused with or recalled as a person seen in another situation or context.[17] It bears emphasis that these examples are illustrative rather than exhaustive.

Presently, courts often permit expert testimony on any factor that may be shown to reduce or undermine the accuracy of eyewitness identifications if that factor bears on the particular identification at issue. Courts allow such expert testimony to be admitted because it

has been established, contrary to our conclusion in *Kemp* and *McClendon*, that most of those factors are not within the common knowledge and experience of jurors. In fact, a great many of them are counterintuitive. See, e.g., *United States* v. *Brownlee*, 454 F.3d 131, 142 (3d Cir. 2006) ("while science has firmly established the inherent unreliability of human perception and memory . . . this reality is outside the jury's common knowledge, and often contradicts jurors' commonsense understandings" [citations omitted; internal quotation marks omitted]); *United States* v. *Smithers*, 212 F.3d 306, 312 n.1 (6th Cir. 2000) ("because many of the factors affecting eyewitness impressions are counter-intuitive, many jurors' assumptions about how memories are created are actively wrong"); *United States* v. *Smithers*, supra, 316 ("There is no question that many aspects of perception and memory are not within the common experience of most jurors, and . . . many factors that affect memory are counter-intuitive"); H. Fradella, "Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony," 2 Fed Cts. L. Rev. 1, 24 (2007) ("[t]he scientific research on memory, generally, and eyewitness identification in particular are quite counterintuitive and hardly commonsensical" [internal quotation marks omitted]); G. Gaulkin, supra, p. 48 ("[s]tudies examining whether and to what extent jurors [or potential jurors] know or correctly intuit the findings reported in the eyewitness identification literature report that laypersons are largely unfamiliar with those findings and often hold beliefs to the contrary"); see also G. Gaulkin, supra, p. 49 (studies demonstrate that laypersons "underestimate the importance of proven indicators of [eyewitness] accuracy," "tend to rely heavily on factors that the research finds are not good indicators of accuracy," and "tend to overestimate witness accuracy rates").

For example, most people believe that the more confidence that an eyewitness demonstrates in his identification, the more likely it is that the identification is accurate. Similarly, the average person is likely to think that an eyewitness who had been held at gunpoint or otherwise placed in fear is likely to have been acutely observant of the unfolding events and, as a consequence, more accurate in his identification. In fact, neither of these beliefs is true. See, e.g., *United States* v. *Moore*, 786 F.2d 1308, 1312 (5th Cir. 1986) ("Expert testimony on eyewitness reliability is not simply a recitation of facts available through common knowledge. Indeed, the conclusions of the psychological studies are largely *counter-intuitive*, and serve to explode common myths about an individual's capacity for perception . . . . For example, it is commonly believed that the accuracy of a witness' recollection increases with the certainty of the witness. In fact, the data reveal no correlation between witness certainty and accuracy. Similarly, it is commonly believed that witnesses

remember better when they are under stress. The data indicate that the opposite is true. The studies also show that a group consensus among witnesses as to an alleged criminal's identity is far more likely to be inaccurate than is an individual identification. This is because of the effect of the feedback factor, which serves to reinforce mistaken identifications." [Citation omitted; emphasis in original; internal quotation marks omitted.]); *People* v. *McDonald*, 37 Cal. 3d 351, 362, 690 P.2d 709, 208 Cal. Rptr. 236 (1984) ("empirical research has undermined a number of widespread lay beliefs about the psychology of eyewitness identification, e.g., that the accuracy of a [witness'] recollection increases with his certainty, that accuracy is also improved by stress, that cross-racial factors are not significant, and that the reliability of an identification is unaffected by the presence of a weapon or violence at the scene"), overruled in part on other grounds by *People* v. *Mendoza*, 23 Cal. 4th 896, 4 P.3d 265, 98 Cal. Rptr. 2d 431 (2000); *Johnson* v. *State*, 272 Ga. 254, 256 n.2, 526 S.E.2d 549 (2000) (importance of expert testimony on reliability of eyewitness identifications especially great when it "involves issues which are 'counter-intuitive' or 'contrary to common wisdom' . . . such as the absence of an expected correlation between the witness' expression of confidence in the identification and actual accuracy, or the impairment effect acute stress or the presence of a weapon may have on accuracy"); *People* v. *Abney*, 13 N.Y.3d 251, 268, 918 N.E.2d 486, 889 N.Y.S.2d 890 (2009) (counterintuitive that accuracy of eyewitness identification may be adversely affected by, inter alia, event stress, weapon focus, cross-racial identification and witness confidence). Indeed, it has been demonstrated that one of these counterintuitive factors, namely, the weak correlation between confidence and accuracy, "is the most powerful single determinant of whether or not observers of that testimony will believe that the eyewitness made an accurate identification . . . ." (Citations omitted.) G. Wells et al., "Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads," 22 Law & Hum. Behav. 603, 620 (1998). Thus, "[a]lthough research has convincingly demonstrated the weaknesses inherent in eyewitness identification, jurors are, for the most part, unaware of these problems. People simply do not accurately understand the deleterious effects that certain variables can have on the accuracy of the memory processes of an honest eyewitness. . . . Moreover, the common knowledge that people do possess often runs contrary to documented research findings."[18] (Citations omitted; internal quotation marks omitted.) *State* v. *Copeland*, supra, 226 S.W.3d 300; accord *State* v. *Butterfield*, 27 P.3d 1133, 1146 (Utah 2001).

Consequently, there is a growing consensus among both federal and state courts that the methods traditionally employed for challenging the accuracy of eyewit-

ness identifications are largely ineffective and inadequate. First, the method most commonly relied on, cross-examination, is not a satisfactory substitute for expert testimony, in part, because most eyewitnesses who express confidence in the accuracy of their identification sincerely believe that that confidence is warranted. "[B]ecause eyewitnesses may express almost absolute certainty about identifications that are inaccurate, research shows the effectiveness of cross-examination is badly hampered. Cross-examination will often expose a lie or half-truth, but may be far less effective when witnesses, although mistaken, believe that what they say is true. In addition . . . eyewitnesses are likely to use their expectations, personal experience, biases, and prejudices to fill in the gaps created by imperfect memory. . . . Because it is unlikely that witnesses will be aware that this process has occurred, they may express far more confidence in the identification than is warranted." (Citation omitted; internal quotation marks omitted.) *State* v. *Clopten*, 223 P.3d 1103, 1110 (Utah 2009). Moreover, "[e]ven if cross-examination reveals flaws in the identification, expert testimony may still be needed to assist the jury. Cross-examination might show, for example, that the perpetrator was a different race than the eyewitness and was also wearing a disguise. Without the assistance of expert testimony, a jury may have difficulty assessing the import of those factors in gauging the reliability of the identification." Id.; see also *Ferensic* v. *Birkett*, 501 F.3d 469, 481–82 (6th Cir. 2007) (cross-examination of eyewitness not effective substitute for expert testimony on reliability of eyewitness identifications); *Benn* v. *United States*, 978 A.2d 1257, 1279 (D.C. 2009) (cross-examination generally not adequate substitute for expert testimony because "the information that an expert can provide about research studies is different in nature and cannot be elicited from a lay witness during cross-examination"); *State* v. *Copeland*, supra, 226 S.W.3d 300 (research indicates that cross-examination is insufficient to educate jurors on problems with eyewitness identifications).

Similarly, jury instructions generally are inadequate to apprise the jury of the potential weaknesses of eyewitness testimony. See, e.g., *Ferensic* v. *Birkett*, supra, 501 F.3d 481–82; *State* v. *Copeland*, supra, 226 S.W.3d 300. "Trial courts . . . have often tried to remedy the possibility of mistaken identification by giving cautionary instructions to the jury. . . . [I]t seemed logical that this measure would substantially enhance a jury's ability to evaluate eyewitness accuracy." (Citations omitted.) *State* v. *Clopten*, supra, 223 P.3d 1100. "Subsequent research, however, has shown that a cautionary instruction does little to help a jury spot a mistaken identification. While this result seems counterintuitive, commentators and social scientists advance a number of convincing explanations. First, instructions given at

the end of what might be a long and fatiguing trial, and buried in an overall charge by the court, are unlikely to have much effect on the minds of [the jurors]. . . . Second, instructions may come too late to alter [a juror's] opinion of a witness whose testimony might have been heard days before. Third, [and perhaps most importantly] even the best cautionary instructions tend to touch only generally on the empirical evidence. The judge may explain that certain factors are known to influence perception and memory, but will not explain how this occurs or to what extent." (Citation omitted; internal quotation marks omitted.) Id., 1110–11; see also H. Fradella, supra, 2 Fed. Cts. L. Rev. 25 ("Jury instructions do not explain the complexities about perception and memory in a way a properly qualified person can. Expert testimony . . . can do that far better than being told the results of scientific research in a conclusory manner by a judge . . . especially since jury instructions are given far too late in a trial to help jurors evaluate relevant eyewitness testimony with information beyond their common knowledge." [Internal quotation marks omitted.]); R. Wise, K. Dauphinais & M. Safer, supra, 97 J. Crim. L. & Criminology 833 ("[J]ury instructions lack the flexibility and specificity of expert testimony. . . . [J]udges' instructions do not serve as an effective safeguard against mistaken identifications and convictions and . . . expert testimony is therefore more effective than judges' instructions as a safeguard." [Internal quotation marks omitted.]). Consequently, jury instructions, standing alone, are not a sufficient protection against mistaken identifications.

Defense counsel's closing argument to the jury also does not suffice to render expert testimony unnecessary. Unsupported by expert testimony, argument by counsel on the deficiencies of eyewitness identifications is likely to be viewed by the jury as little more than partisan advocacy lacking a firm basis in science or fact. See, e.g., *Ferensic* v. *Birkett*, supra, 501 F.3d 482 ("The significance of [the proffered expert] testimony cannot be overstated. Without it, the jury ha[s] no basis beyond defense counsel's word to suspect the inherent unreliability of the [eyewitnesses'] identifications."). Moreover, it stands to reason that the effectiveness of argument to the jury will be greatly diminished when the subject of that argument is a factor that has been found to affect adversely the accuracy of an identification but that is counterintuitive; without expert testimony, such argument may well appeal to the jury as particularly weak or suspect. Thus, expert testimony on the pitfalls of eyewitness identifications, no less than any other expert testimony that is likely to assist the jury in its understanding of a key fact or issue in a case, should not be barred merely because defense counsel has the right, during closing argument, to explain why, in the defendant's view, the identification was not trustworthy.

In addition, there is no reason to prohibit an expert from testifying on the problems of eyewitness identifications on the ground that such testimony infringes on the responsibility of the jury to evaluate witness credibility, that it will confuse the jurors or that jurors are likely to place too much emphasis on the expert's opinion. Any such expert would not be permitted to opine about the credibility or accuracy of the eyewitness testimony itself; that determination is solely within the province of the jury. Rather, the expert testimony presumably would cover those factors that have been found to have an adverse effect on the reliability of eyewitness identifications generally and that are relevant to the particular eyewitness identification at issue. Although the expert testimony is designed to assist the jury in ascertaining the extent to which the jury should credit the eyewitness testimony, there is no material difference between it and expert testimony on battered woman syndrome; see, e.g., *State* v. *Borrelli*, 227 Conn. 153, 174, 629 A.2d 1105 (1993) ("[The] expert testimony was properly admitted to assist the jury in understanding, not whether [the victim] was a credible witness on the witness stand, but whether her conduct . . . was consistent with the pattern and profile of a battered woman. . . . [Such] expert testimony [does] not invade the province of the jury in determining the credibility of witnesses." [Citation omitted; internal quotation marks omitted.]); or on the manner in which victims of child sexual abuse often react to that abuse.[19] See, e.g., *State* v. *Iban C.*, 275 Conn. 624, 635, 881 A.2d 1005 (2005) ("[I]n cases that involve allegations of sexual abuse of children . . . expert testimony of reactions and behaviors common to victims of sexual abuse is admissible. . . . Such evidence assists a jury in its determination of the victim's credibility by explaining the typical consequences of the trauma of sexual abuse on a child. . . . It is not permissible, however, for an expert to testify as to his opinion of whether a victim in a particular case is credible or whether a particular victim's claims are truthful." [Citations omitted; internal quotation marks omitted.]). Finally, "[a]s is true of all expert testimony, the jury remains free to reject it entirely after considering the expert's opinion, reasons, qualifications, and credibility." *People* v. *McDonald*, supra, 37 Cal. 3d 371. There simply is no reason to think, therefore, that the jury will treat such testimony differently from any other expert testimony that meets the standard for admissibility under our rules of evidence.[20]

It is true, of course, that permitting expert testimony on the reliability of eyewitness identifications in any given case may result in a somewhat longer trial. This fact alone, however, is not a basis for excluding such testimony, which generally will be highly relevant, and perhaps crucial, to the defense. See, e.g., *United States* v. *Brownlee*, supra, 454 F.3d 144 ("[i]t would seem

anomalous to hold that the probative value of expert opinion offered to show the unreliability of eyewitness testimony so wastes time or confuses the issue that it cannot be considered even when the putative effect is to vitiate the [primary] evidence offered by the government" [internal quotation marks omitted]); *State* v. *Chapple*, supra, 135 Ariz. 295 ("the problem of time is not present in [a] case [involving expert testimony on the reliability of eyewitness identifications] . . . since time spent on the crucial issue of the case cannot be considered as 'undue' loss of time"); *People* v. *McDonald*, supra, 37 Cal. 3d 372 ("[e]vidence that is relevant to the prime theory of the defense cannot be excluded in wholesale fashion merely because the trial would be simpler without it"). Moreover, the trial court "retains discretion to place reasonable limitations on the expert's testimony to avoid overwhelming the jury or unduly burdening the court, [as] long as these limitations are consistent with the requirements of the defense." *Benn* v. *United States*, supra, 978 A.2d 1262; see also id., 1275 (any reasonable "concern [that] a trial judge may have that admission of expert testimony [on the reliability of eyewitness identifications] could confuse or overwhelm the jury is more appropriately dealt with, not by exclusion, but by placing reasonable limitations on the expert's testimony and instructing the jurors that they—and only they—are the ultimate fact finders"). In fact, a contrary conclusion might well infringe on the defendant's constitutional right to present a defense, depending on the facts of the case. See, e.g., *Washington* v. *Schriver*, 255 F.3d 45, 56–57 (2d Cir. 2001) (constitutional right to present meaningful defense may be implicated by improper exclusion of expert testimony).

Thus, as the District of Columbia Court of Appeals recently observed, "[a]lthough the admission of expert testimony falls within the discretion of the trial [court] . . . because the right to confront witnesses and to present a defense are constitutionally protected, [i]n exercising its discretion, the trial court must be guided by the principles that the defense should be free to introduce appropriate expert testimony. Not only is the defendant entitled to present a defense, but that defense should not be put at a disadvantage in the use of scientific evidence comparable to that permitted to the government. Fairness dictates a balanced judicial approach in permitting use in criminal trials of expert testimony concerning subtle psychological factors that might affect witnesses. The defense should be permitted to present expert testimony on the unreliability of eyewitness testimony in appropriate cases, just as the government is allowed in appropriate cases to introduce expert evidence to explain the failure of government witnesses to promptly identify or accuse an attacker in order to build a case for the prosecution." (Internal quotation marks omitted.) *Benn* v. *United States*, supra, 978 A.2d

1269–70; see also H. Fradella, supra, 2 Fed. Cts. L. Rev. 25 ("[I]t should be recognized that expert testimony on the unreliability of certain eyewitness identifications adds to the length and expense of trial. However, a defendant's right to a fair trial should trump those concerns, as no conviction should be based [on] common misconceptions regarding the alleged reliability of what someone saw with their own eyes. Taking the time to educate a jury on the biases and errors involved in eyewitness identification is worth the time, especially since expert testimony about eyewitness identification improves juror functioning.").

The pressing need to reconsider the analytical underpinnings of our decisions in *Kemp* and *McClendon* is bolstered by recent evidence confirming what long has been suspected, that is, that there exists a direct correlation between eyewitness testimony and wrongful convictions. "In addition to the experimental literature, cases of proven wrongful convictions of innocent people have consistently shown that mistaken eyewitness identification is responsible for more of these wrongful convictions than all other causes combined . . . ." (Citations omitted.) G. Wells et al., supra, 22 Law & Hum. Behav. 605. In fact, studies of DNA exonerations have demonstrated that mistaken eyewitness identifications were involved in between 64 and 86 percent of all wrongful convictions. See, e.g., J. McMurtrie, "The Role of the Social Sciences in Preventing Wrongful Convictions," 42 Am. Crim. L. Rev. 1271, 1275 n.17 (2005) (citing to studies revealing that erroneous identifications have accounted for up to 86 percent of convictions of persons ultimately exonerated by DNA testing); S. Gross et al., "Exonerations in the United States: 1989 Through 2003," 95 J. Crim. L. & Criminology 523, 542 (2005) (citing study demonstrating that 64 percent of wrongful convictions involved at least one erroneous eyewitness identification). These findings, and the other extensive research that has occurred over the last thirty years, have "shown that expert testimony on memory and eyewitness identification is the only legal safeguard that is effective in sensitizing jurors to eyewitness errors."[21] J. McMurtrie, supra, 1276; see also R. Wise, K. Dauphinais & M. Safer, supra, 97 J. Crim. L. & Criminology 819 ("expert eyewitness testimony . . . is the only traditional legal safeguard that has shown any efficacy in mitigating eyewitness error"); cf. B. Garrett, "Judging Innocence," 108 Colum. L. Rev. 55, 81 (2008) ("most exonerees had no successful basis for challenging what we now know to be incorrect eyewitness identifications").

Even though eyewitness testimony is "often hopelessly unreliable"; (internal quotation marks omitted) *State* v. *Dubose*, supra, 285 Wis. 2d 162; accord *Commonwealth* v. *Vardinski*, 438 Mass. 444, 450, 780 N.E.2d 1278 (2003); jurors frequently rely on that testimony as powerful evidence of guilt. See, e.g., *Watkins* v. *Sow-*

ders, supra, 449 U.S. 352 (Brennan, J., dissenting). In large measure, this is so because jurors are unaware of many of the factors that adversely affect the accuracy of eyewitness identifications, including, of course, those factors that are counterintuitive. See *United States* v. *Smithers*, supra, 212 F.3d 312 n.1; see also *United States* v. *Downing*, 753 F.2d 1224, 1230–32 (3d Cir. 1985). Moreover, as recent studies have confirmed, "[t]his ignorance can lead to devastating results." *United States* v. *Smithers*, supra, 312 n.1. It is abundantly clear, therefore, that the ability of a defendant to mount an effective challenge to the accuracy of eyewitness testimony is a matter of paramount importance and essential to the fair administration of justice. In light of the results of the research on eyewitness identifications, it now is apparent that, generally, expert testimony is an appropriate method for challenging the shortcomings of those identifications. "[T]he law will always lag behind the sciences to some degree because of the need for solid scientific consensus before the law incorporates its teachings. . . . Appellate courts have a responsibility to look forward, and a legal concept's longevity should not be extended when it is established that it is no longer appropriate." (Citation omitted; internal quotation marks omitted.) *Brodes* v. *State*, 279 Ga. 435, 442, 614 S.E.2d 766 (2005). Contrary to our analysis and conclusion in *Kemp* and *McClendon*, therefore, there is absolutely no reason why courts should bar a qualified expert from testifying about the factors that tend to weaken or undermine the reliability of eyewitness identifications when the factors about which the expert is prepared to testify are relevant to the particular identification involved. Insofar as *Kemp* and *McClendon* are inconsistent with this conclusion, I would overrule them.

In the present case, the trial court concluded that Dysart qualified as an expert on the reliability of eyewitness identifications and, further, that her testimony was admissible with respect to several of the factors that she had determined were relevant to the eyewitness identifications at issue. The court, however, declined to consider Dysart's proffered testimony on several additional factors that also tend to detract from the reliability of eyewitness identifications, specifically, the perpetrator's use of a disguise, stress, the perpetrator's use of a weapon, the lack of a correlation between confidence and accuracy, and witness collaboration.[22] The court rejected that testimony on the ground that it was commonly known and, therefore, would not have aided the court in evaluating the eyewitness testimony. Because I would conclude, contrary to this court's determination in *Kemp* and *McClendon*, that such testimony is not inadmissible for that reason, I also would conclude that the trial court should not have rejected it on that ground.

The majority elects not to consider the merits of

the defendant's claim because "[i]t is not this court's practice to overrule cases when it would have no effect on the case at hand." This assertion is incorrect. Although we sometimes decline to consider whether prior precedent should be overruled when doing so will not affect the result of the case on appeal, we have not hesitated to reconsider and to overrule or modify prior precedent, even if doing so is not outcome determinative, when, as in the present case, there is reason to do so. See, e.g., *State* v. *DeJesus*, 288 Conn. 418, 470–76, 953 A.2d 45 (2008) (modifying prior precedent concerning admissibility of prior misconduct evidence in recognizing propensity exception in sexual assault cases but concluding that trial court's impropriety in admitting that evidence for purpose of demonstrating common plan and scheme was harmless); *State* v. *Griffin*, 253 Conn. 195, 209–10, 749 A.2d 1192 (2000) (disapproving future use of two inference jury instruction, despite this court's previous approval of instruction, but rejecting defendant's claim of entitlement to new trial on basis of trial court's use of instruction); *State* v. *Malave*, 250 Conn. 722, 738, 743, 737 A.2d 442 (1999) (abandoning missing witness rule in criminal cases but concluding that application of rule in that case constituted harmless error); *State* v. *Schiappa*, 248 Conn. 132, 168, 175–77, 728 A.2d 466 (prohibiting future use of charge that requirement of proof beyond reasonable doubt is "a rule of law . . . made to protect the innocent and not the guilty," despite this court's prior approval of charge, but concluding that instruction was harmless), cert. denied, 528 U.S. 862, 120 S. Ct. 152, 145 L. Ed. 2d 129 (1999); *State* v. *Troupe*, 237 Conn. 284, 303–306, 677 A.2d 917 (1996) (modifying prior precedent concerning constancy of accusation rule without applying new rule to case on appeal); *State* v. *Patterson*, 230 Conn. 385, 390, 645 A.2d 535 (1994) (concluding that trial judge must be present for voir dire proceedings in all future criminal cases even though defendant in that case had waived that right); *State* v. *DeFreitas*, 179 Conn. 431, 449, 426 A.2d 799 (1980) (overruling prior precedent barring defendant from introducing certain hearsay evidence but concluding that trial court's reliance on that prior precedent was harmless). Because we now know that *Kemp* was wrongly decided, that its holding has resulted in, and continues to result in, the improper exclusion of important evidence on the unreliability of eyewitness identifications, and that eyewitness misidentifications account for the bulk of wrongful convictions, it is entirely appropriate for us to take this opportunity to overrule *Kemp*; indeed, under the circumstances, it is our duty to do so. Apparently, however, the majority intends to address the issue only if a case arises in which the trial court's reliance on *Kemp* is outcome determinative. In light of the importance of the issue, and because there is no telling when such a case will arise, there simply is no justification for the majority to await that case. Indeed, because it is so

clear that *Kemp* was wrongly decided, it is imperative that we address the issue now, lest our trial courts continue to be misguided by *Kemp* for the foreseeable future.

The majority also defends its decision to dodge the issue of whether *Kemp* should be overruled on the ground that *Kemp* involved the admissibility of expert testimony on eyewitness identifications in the context of a jury trial, whereas the present case involves the admissibility of such testimony in the context of a suppression hearing in which the court is the fact finder, and on the ground that "the proper use of this expert testimony calls into question the soundness of the test set forth by the United States Supreme Court" in *Neil* v. *Biggers*, 409 U.S. 188, 199–200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), because, in *Biggers*, the court identified the "level of certainty demonstrated by the witness" at the identification procedure as one of the many factors that may be relevant to the determination of the reliability of the identification. Neither of these grounds is persuasive. With respect to the first ground, the trial court relied exclusively on *Kemp* and *McClendon* in rejecting Dysart's proffered testimony and, in fact, quoted extensively from both cases. Thus, the majority's wholly unsupported assertion to the contrary notwithstanding, the claim of the defendant in the present case does not implicate "issues" or "concerns" that are "different" from those that would be implicated if that same claim had been raised at trial. Indeed, the majority is unable to identify even one such different issue or concern. With respect to the second ground, there simply is no conflict between the court's analysis in *Biggers* and the right of a defendant to adduce expert testimony concerning the reliability of eyewitness identifications. Of course, trial courts are free to instruct the jury in accordance with the factors identified in *Biggers*, including the level of certainty exhibited by the identifying witness. Expert testimony concerning the limited nature of the nexus between witness certainty and the accuracy of his or her identification would serve only to place that particular factor in its proper context.

For the reasons set forth by the majority, however, the trial court's failure to consider the proffered testimony was harmless. Nevertheless, this court has an obligation to reconsider and overrule *Kemp* because its holding is invalid and because its application results in evidentiary rulings that deprive defendants of a fair opportunity to demonstrate the weaknesses inherent in eyewitness identifications, evidence that results in more wrongful convictions than any other evidence.

Accordingly, I concur in the result that the majority reaches with respect to its affirmance of the defendant's murder conviction.

[1] I agree with the majority opinion in all other respects.

[2] Dysart also testified about certain problems with the manner in which the police had conducted the photographic identification procedures pursuant to

which Crimley and Caple had made their out-of-court identifications of the defendant.

[3] In particular, the court permitted Dysart to testify about the simultaneous presentation of photographs, police instructions to the witnesses and the double-blind administration of the identification procedure.

[4] As the majority has explained, the trial court stated that it wanted "to make it clear for the record, whatever [the court is] ruling [on] here with respect to topics or admissibility is . . . only with respect to the motion . . . to suppress, where the court is both the finder of fact and the . . . ruler on the legal issues." The trial court further stated that, "[o]bviously, there may be . . . some arguments that need not be repeated, if and when that testimony is offered at trial. But [the court] just want[s] the record to be clear that, at this point, [it is] only ruling on admissibility, as to the hearing before [it]." I agree with the majority that this statement by the court was sufficient to alert the defense that, if it wished to adduce testimony by Dysart at trial, it was required to raise the issue at the time of trial. The defense failed to do so, however. Consequently, I also agree with the majority that the defendant is not entitled to review of his claim, first, because it is unpreserved and, second, because the defense may have opted against having Dysart testify at trial for tactical reasons.

[5] Section 7-2 of the Connecticut Code of Evidence provides: "A witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue."

[6] We also rejected the contention that the case was controlled by our decision in *State* v. *Barletta*, 238 Conn. 313, 321, 680 A.2d 1284 (1996), in which we had concluded that it was an abuse of discretion for the trial court to preclude testimony from an expert concerning the effects of cocaine use on the cognitive abilities of an eyewitness to a crime. *State* v. *McClendon*, supra, 248 Conn. 589. We dismissed the contention on the basis that the expert testimony in *Barletta* was a "far cry from Leippe's proposed testimony" in *McClendon*. Id. Thus, we concluded that our decision in *Barletta* had no effect on the continued validity of *Kemp*. Id.

[7] I note that the Appellate Court recently has observed that "the assertion in *State* v. *Kemp*, supra, 199 Conn. 477, that 'the reliability of eyewitness identification is within the knowledge of jurors and expert testimony generally would not assist them in determining the question' may have been true in 1986, when *Kemp* was decided, but it seems dubious today in light of significant research developments in the area. . . . [C]ourts seem to be having difficulty keeping up with, and adapting to, the changing landscape in this area. See *State* v. *Marquez*, 291 Conn. 122, 168–85, 967 A.2d 56 (2009) (*Katz*, *J.*, concurring); id., 185–214 (*Palmer*, *J.*, concurring)." *Velasco* v. *Commissioner of Correction*, supra, 119 Conn. App. 173 n.4. Of course, in contrast to this court, the Appellate Court lacked authority to overrule *Kemp* despite its dubious underpinnings.

[8] These dangers are generally limited to eyewitness identifications of strangers or persons with whom the eyewitness is not very familiar. Although there may be exceptions, for obvious reasons, the identification of a person who is well known to the eyewitness does not give rise to the same risk of misidentification as the identification of a person who is not well known to the eyewitness.

[9] See, e.g., *Ferensic* v. *Birkett*, 501 F.3d 469, 482 (6th Cir. 2007) ("expert testimony on eyewitness identifications . . . is now universally recognized as scientifically valid and of aid [to] the trier of fact for admissibility purposes" [internal quotation marks omitted]); *United States* v. *Moore*, 786 F.2d 1308, 1312 (5th Cir. 1986) ("This court accepts the modern conclusion that the admission of expert testimony regarding eyewitness identifications is proper . . . . We cannot say [that] such scientific data [are] inadequate or contradictory. The scientific validity of the studies confirming the many weaknesses of eyewitness identification cannot be seriously questioned at this point." [Internal quotation marks omitted.]); *United States* v. *Downing*, 753 F.2d 1224, 1242 and n.23 (3d Cir. 1985) (noting "the proliferation of empirical research demonstrating the pitfalls of eyewitness identification" and "the [impressive] consistency of the results of these studies," and agreeing that "the science of eyewitness perception has achieved the level of exactness, methodology and reliability of any psychological research" [internal quotation marks omitted]); *United States* v. *Feliciano*, United States District Court, Docket No. CR-08-0932-01 (D. Ariz. November 5, 2009) ("[t]he

degree of acceptance [of the scientific data on the reliability of eyewitness identifications] within the scientific community . . . is substantial"); *People* v. *McDonald*, 37 Cal. 3d 351, 364–65, 690 P.2d 709, 208 Cal. Rptr. 236 (1984) ("[E]mpirical studies of the psychological factors affecting eyewitness identification have proliferated, and reports of their results have appeared at an ever-accelerating pace in the professional literature of the behavioral and social sciences. . . . The consistency of the results of these studies is impressive, and the courts can no longer remain oblivious to their implications for the administration of justice." [Citations omitted.]), overruled in part on other grounds by *People* v. *Mendoza*, 23 Cal. 4th 896, 4 P.3d 265, 98 Cal. Rptr. 2d 431 (2000); *Brodes* v. *State*, 279 Ga. 435, 440–41, 614 S.E.2d 766 (2005) (scientific validity of research studies concerning unreliability of eyewitness identifications is well established); *People* v. *Legrand*, 8 N.Y.3d 449, 455, 867 N.E.2d 374, 835 N.Y.S.2d 523 (2007) ("[E]xpert psychological testimony on eyewitness identification [is] sufficiently reliable to be admitted, and the vast majority of academic commentators have urged its acceptance. . . . [P]sychological research data [are] by now abundant, and the findings based [on the data] concerning cognitive factors that may affect identification are quite uniform and well documented . . . ." [Internal quotation marks omitted.]); *State* v. *Copeland*, supra, 226 S.W.3d 299 ("[s]cientifically tested studies, subject to peer review, have identified legitimate areas of concern" in area of eyewitness identification); *State* v. *Clopten*, 223 P.3d 1103, 1108 (Utah 2009) ("empirical research has convincingly established that expert testimony is necessary in many cases to explain the possibility of mistaken eyewitness identification").

[10] See, e.g., *United States* v. *Williams*, 522 F.3d 809, 811 (7th Cir. 2008); *United States* v. *Brownlee*, 454 F.3d 131, 143–44 (3d Cir. 2006); *United States* v. *Stevens*, 935 F.2d 1380, 1400 (3d Cir. 1991); *United States* v. *Moore*, 786 F.2d 1308, 1312 (5th Cir. 1986); *People* v. *McDonald*, 37 Cal. 3d 351, 369, 690 P.2d 709, 208 Cal. Rptr. 236 (1984), overruled in part on other grounds by *People* v. *Mendoza*, 23 Cal. 4th 896, 4 P.3d 265, 98 Cal. Rptr. 2d 431 (2000); *Johnson* v. *State*, 272 Ga. 254, 256 n.2, 526 S.E.2d 549 (2000); *People* v. *Young*, 7 N.Y.3d 40, 43, 45, 850 N.E.2d 623, 817 N.Y.S.2d 576 (2006); see also *State* v. *Ledbetter*, supra, 275 Conn. 576 ("the correlation between witness confidence and accuracy tends to be weak, and witness confidence can be manipulated").

[11] See, e.g., *United States* v. *Brownlee*, 454 F.3d 131, 136–37 (3d Cir. 2006); *United States* v. *Smith*, 736 F.2d 1103, 1106 (6th Cir.), cert. denied, 469 U.S. 868, 105 S. Ct. 213, 83 L. Ed. 2d 143 (1984); *United States* v. *Lester*, 254 F. Sup. 2d 602, 612–13 (E.D. Va. 2003); *People* v. *Cornwell*, 37 Cal. 4th 50, 78, 80, 117 P.3d 622, 33 Cal. Rptr. 3d 1 (2005), overruled in part on other grounds by *People* v. *Doolin*, 45 Cal. 4th 390, 198 P.3d 11, 87 Cal. Rptr. 3d 209 (2009); *Benn* v. *United States*, 978 A.2d 1257, 1271 (D.C. 2009); *Commonwealth* v. *Christie*, 98 S.W.3d 485, 490 (Ky. 2002).

[12] See, e.g., *United States* v. *Downing*, 753 F.2d 1224, 1231–32 (3d Cir. 1985); *United States* v. *Smith*, supra, 621 F. Sup. 2d 1216; *State* v. *Chapple*, supra, 135 Ariz. 294; *Brodes* v. *State*, 279 Ga. 435, 438, 614 S.E.2d 766 (2005); *People* v. *Young*, 7 N.Y.3d 40, 43, 850 N.E.2d 623, 817 N.Y.S.2d 576 (2006); *State* v. *Bradley*, 181 Ohio App. 3d 40, 44, 907 N.E.2d 1205, review denied, 122 Ohio St. 3d 1480, 910 N.E.2d 478 (2009).

[13] See, e.g., *United States* v. *Rodriguez-Felix*, 450 F.3d 1117, 1124 n.8 (10th Cir.), cert. denied, 549 U.S. 968, 127 S. Ct. 420, 166 L. Ed. 2d 297 (2006); *United States* v. *Harris*, 995 F.2d 532, 535 (4th Cir. 1993); *United States* v. *Smith*, supra, 621 F. Sup. 2d 1215; *United States* v. *Graves*, 465 F. Sup. 2d 450, 456 (E.D. Pa. 2006); *United States* v. *Lester*, 254 F. Sup. 2d 602, 613 (E.D. Va. 2005); *People* v. *McDonald*, 37 Cal. 3d 351, 368, 690 P.2d 709, 208 Cal. Rptr. 236 (1984), overruled in part on other grounds by *People* v. *Mendoza*, 23 Cal. 4th 896, 4 P.3d 265, 98 Cal. Rptr. 2d 431 (2000); *People* v. *Abney*, 13 N.Y.3d 251, 259–60, 918 N.E.2d 486, 889 N.Y.S.2d 890 (2009); *State* v. *Copeland*, supra, 226 S.W.3d 302.

It is noteworthy that cross-racial identifications have been characterized as "particularly suspect." *United States* v. *Jernigan*, 492 F.3d 1050, 1054 (9th Cir. 2007); see also G. Gaulkin, supra, p. 48 ("Several meta-analyses published over the past [twenty] years consistently show that other-race recognition is poorer than same-race recognition. . . . One of these studies, reviewing [thirty-nine] research articles involving 5000 witness/participants, found that a mistaken identification was 1.56 times more likely in other-race conditions, and participants were 2.2 times as likely to accurately identify own-race faces as [opposed to] other-race faces."). In light of this fact, it is especially troubling that this court previously has "rejected the

notion of special treatment for defendants in cross-racial identification situations"; *State* v. *Porter*, supra, 241 Conn. 134–35 n.80; explaining, in particular, that "the mere fact that a defendant is of a different race than a witness does not entitle the defendant to a special instruction on eyewitness identification at trial." Id., citing *State* v. *Cerilli*, 222 Conn. 556, 571–72, 610 A.2d 1130 (1992). To the extent that these statements indicate that the problems inherent in cross-racial identifications are not a proper subject for expert testimony, this court should disavow any such suggestion in light of the myriad of scientific studies and case law recognizing that cross-racial identifications are significantly less reliable than same-race identifications. The majority's refusal to address the issue is most unfortunate in light of the opportunity to do so in the present case.

[14] See, e.g., *United States* v. *Feliciano*, United States District Court, Docket No. CR-08-0932-01 (D. Ariz. November 5, 2009); *Sturgeon* v. *Quarterman*, 615 F. Sup. 2d 546, 568 (S.D. Tex. 2009).

[15] See, e.g., *Davis* v. *Cline*, United States District Court, Docket No. 06-3127-KHV (D. Kan. May 24, 2007) (double-blind and sequential identification procedures); *United States* v. *Graves*, 465 F. Sup. 2d 450, 455 (E.D. Pa. 2006) (sequential identification procedure); *Brown* v. *State*, Alaska Court of Appeals, Docket Nos. A-8586 and A-9108 (August 2, 2006) (double-blind and sequential identification procedures); *State* v. *Pearce*, 146 Idaho 241, 246–47, 259, 192 P.3d 1065 (2008) (double-blind identification procedure); *Commonwealth* v. *Silva-Santiago*, 453 Mass. 782, 791, 906 N.E.2d 299 (2009) (double-blind and sequential identification procedures); *People* v. *Williams*, 14 Misc. 3d 571, 582–83, 830 N.Y.S.2d 452 (2006) (double-blind and sequential identification procedures); *Stephenson* v. *State*, 226 S.W.3d 622, 626 (Tex. App. 2007) (sequential identification procedure); *State* v. *Shomberg*, 288 Wis. 2d 1, 13, 709 N.W.2d 370 (2006) (sequential identification procedure).

[16] See, e.g., *United States* v. *Brownlee*, 454 F.3d 131, 137 (3d Cir. 2006); *United States* v. *Smith*, supra, 621 F. Sup. 2d 1216–17; *Brown* v. *State*, Alaska Court of Appeals, Docket Nos. A-8586 and A-9108 (August 2, 2006); *State* v. *Chapple*, supra, 135 Ariz. 294; *Benn* v. *United States*, 978 A.2d 1257, 1271 n.50 (D.C. 2009).

[17] See, e.g., *United States* v. *Harris*, 995 F.2d 532, 535 (4th Cir. 1993); *United States* v. *Smith*, 736 F.2d 1103, 1106 (6th Cir.), cert. denied, 469 U.S. 868, 105 S. Ct. 213, 83 L. Ed. 2d 143 (1984); *State* v. *Chapple*, supra, 135 Ariz. 294.

[18] Furthermore, to the extent that jurors may have some general knowledge or familiarity with one or more of the deficiencies of eyewitness identifications, "experts may testify even when jurors are not wholly ignorant about the subject of the testimony. . . . [I]f . . . [total ignorance] were the test, little expert opinion testimony would ever be heard. . . .

"Rather, the pertinent question is whether, even if jurors have some knowledge of the subject matter, expert opinion testimony would assist the jury." (Citations omitted; internal quotation marks omitted.) *People* v. *Prince*, 40 Cal. 4th 1179, 1222, 156 P.3d 1015, 57 Cal. Rptr. 3d 543 (2007), cert. denied, 552 U.S. 1106, 128 S. Ct. 887, 169 L. Ed. 2d 742 (2008); see also *State* v. *Clopten*, 223 P.3d 1103, 1109 (Utah 2009) (expert testimony on reliability of eyewitness identifications performs beneficial function even when it assists jurors by quantifying that which they already may know).

[19] Thus, expert testimony on the reliability of eyewitness identifications "does not seek to take over the jury's task of judging credibility: [such testimony] does not tell the jury that any particular witness is or is not truthful or accurate in his identification of the defendant. Rather, it informs the jury of certain factors that may affect such an identification in a typical case; and to the extent that it may refer to the particular circumstances of the identification before the jury, such testimony is limited to explaining the potential effects of those circumstances on the powers of observation and recollection of a typical eyewitness. The jurors retain both the power and the duty to judge the credibility and weight of all testimony in the case, as they are told [in] a standard instruction." *People* v. *McDonald*, supra, 37 Cal. 3d 370–71; see also *Benn* v. *United States*, supra, 978 A.2d 1274 (expert testimony on reliability of eyewitness identifications does not usurp function of jury).

[20] As one commentator on eyewitness identifications recently has observed in discussing two of the reasons that courts most frequently have given for precluding such expert testimony, namely, that the testimony addresses an issue that falls within the common knowledge of jurors and that it intrudes unduly on the province of the jury to assess witness credibility: "Courts that accept this reasoning appear to give jurors both too much credit, and

not enough. Such reasoning ignores scientific research showing that jurors have limited knowledge of eyewitness factors and that the effect of many factors on eyewitness accuracy is not a matter of common sense. It also reflects concern that wily experts will induce naive and susceptible jurors to reject eyewitness testimony that is reliable. Furthermore, it ignores jurors' tendenc[ies] to be skeptical of experts, especially defense experts, whose testimony goes against what they consider simple common sense." R. Wise, C. Fishman & M. Safer, "How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case," 42 Conn. L. Rev. 435, 453–54 (2009). For these reasons, the argument, accepted by several courts, that expert testimony on the reliability of eyewitness identifications "intrudes too much on the traditional province of the jury to assess witness credibility"; *United States* v. *Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999); simply is not persuasive.

[21] I note that some appellate courts have concluded that it is not an abuse of discretion for a trial court to exclude otherwise admissible expert testimony on the reliability of eyewitness identifications if the eyewitness' testimony is corroborated by other evidence of the defendant's guilt. See, e.g., *United States* v. *Moore*, supra, 786 F.2d 1312–13; *State* v. *Wright*, supra, 147 Idaho 158; *People* v. *Young*, 7 N.Y.3d 40, 45–46, 850 N.E.2d 623, 817 N.Y.S.2d 576 (2006). This view apparently is predicated on the belief that, in such circumstances, the trial court reasonably could have concluded that the eyewitness testimony was "quite unlikely to be mistaken, and that [the expert's] testimony would be an unnecessary distraction for the jury." *People* v. *Young*, supra, 46. As a general matter, however, I see no reason why a defendant should be precluded from presenting otherwise admissible expert testimony on the reliability of eyewitness identifications merely because the state's case is not predicated solely on eyewitness testimony. In my view, a contrary conclusion would put the defendant at an unfair disadvantage with respect to his ability to challenge the identification evidence specifically and the state's case generally. Of course, the trial court retains broad discretion concerning the admissibility of expert testimony, including expert testimony on the reliability of eyewitness identifications, and there may be cases in which the court reasonably determines that, under the circumstances presented, the testimony of an expert on eyewitness identifications simply is unnecessary. For example, some factors affecting the reliability of eyewitness identifications may be so well-known that cross-examination and appropriate jury instructions will suffice to protect against any genuine risk of misidentification. See, e.g., *United States* v. *Rodriguez-Berrios*, 573 F.3d 55, 71–72 (1st Cir. 2009), cert. denied, U.S. , 130 S. Ct. 1300, 175 L. Ed. 2d 1076 (2010). I also can conceive of the exceptional case in which the state's evidence linking the defendant to the crime, wholly apart from any eyewitness identification testimony, is so overwhelming that there is no reasonable possibility that the defendant could demonstrate any harm or prejudice arising out of his inability to adduce expert testimony on the reliability of eyewitness identifications. Generally speaking, however, the defendant should be entitled to present such expert testimony, and the trial court remains free to take appropriate measures to ensure both that the testimony is properly tailored to the facts of the case and that it is not unduly burdensome, confusing or distracting.

[22] I acknowledge that Dysart's testimony might have had little or no bearing on the reliability of Caple's identification of the defendant because Caple had known the defendant for more than three years at the time of the murder.