ZARELLA, J., with whom McLACHLAN, J., joins, concurring in the judgment. I agree with the majority that expert testimony may assist the jury in understanding certain factors that may affect the reliability of eyewitness identifications. I further agree that, to the extent this court concluded in *State* v. *Kemp*, 199 Conn. 473, 477, 507 A.2d 1387 (1986), and *State* v. *McClendon*, 248 Conn. 572, 586, 730 A.2d 1107 (1999), that expert testimony regarding such factors is "disfavored" because they are within the common knowledge of the average juror, *Kemp* and *McClendon* should be overruled. The majority, however, does not simply remove expert testimony from its "disfavored" status, thus leaving trial courts free to admit the proffered testimony in the exercise of their discretion. Rather, the majority elevates expert testimony to a preferred status by suggesting that it is presumptively admissible except when the trial court intends to give focused jury instructions, the eyewitness was familiar with the defendant before the commission of the crime, or the testimony fails to satisfy the same threshold reliability and relevance requirements that are applied to any other expert testimony, including expert testimony based on scientific evidence.[1] I agree with the majority that expert testimony may be precluded in these circumstances. Indeed, I believe that focused jury instructions are the best method for assisting juries in understanding the factors that may affect the reliability of eyewitness identifications and that trial courts should be encouraged to give such instructions in all cases involving eyewitness identifications where specific issues have been raised regarding their unreliability. See, e.g., *State* v. *Henderson*, 208 N.J. 208, 296, 298, 27 A.3d 872 (2011) (directing trial courts to give enhanced jury instructions "to guide juries about the various factors that may affect the reliability of an eyewitness identification in a particular case" but leaving discretion with trial court as to when during trial to give instructions and whether to allow expert testimony). I do not agree, however, with the majority's presumption that expert testimony is otherwise admissible because such a presumption fails to recognize the value of cross-examination and closing argument as a means of bringing reliability issues to the jury's attention and does not allow consideration of strong corroborating evidence of the defendant's guilt, thus interfering with a trial court's broad discretion in determining whether expert testimony is admissible based on the totality of the circumstances.

In addition, I disagree with the majority that the trial court abused its discretion in precluding the expert testimony in this case but that the error was nonetheless harmless. The majority's harmless error analysis relies in part on its determination that the jury instructions

were "adequate," a ground on which the majority states that expert testimony may be precluded but that it deemed insufficient in concluding that the trial court had abused its discretion. Thus, the majority's inconsistent treatment of the jury instructions in its abuse of discretion and harmless error analysis is likely to bewilder many courts and cause unnecessary confusion. Indeed, some courts may feel compelled to admit expert testimony as a precautionary measure, regardless of whether they intend to give focused jury instructions, merely to avoid appellate review. Accordingly, although I agree with the majority that *Kemp* and *McClendon* should be overruled and that expert testimony should be restored to its rightful place as one of several tools available to assist juries in assessing the reliability of eyewitness identifications, my disagreement with other portions of the majority's analysis in part I of the opinion[2] leaves me no other choice but to respectfully concur in the judgment.

I

In removing expert testimony from the "disfavored" status to which it was consigned in *Kemp* and *McClendon*, the majority concludes that such testimony is presumptively admissible subject to the specified exceptions. I disagree for two reasons. First, the majority repeats the same mistake made by this court in *Kemp* and *McClendon* of relegating certain methods, namely, cross-examination and closing argument, to a "disfavored" status without acknowledging that both may be used with devastating effect in challenging a potentially unreliable identification. The majority's presumption in favor of expert testimony also is inconsistent with the recent decision of the United States Supreme Court in *Perry* v. *New Hampshire*, U.S. , 132 S. Ct. 716, 728–30, 181 L. Ed. 2d 694 (2012), which implicitly endorsed a more balanced approach when it concluded that cross-examination, opening and closing argument, expert testimony and jury instructions all have value in guarding against an unfair trial by assisting juries in assessing the trustworthiness of an eyewitness identification.

In *Perry*, the United States Supreme Court determined that the fallibility of eyewitness evidence, in the absence of improper state conduct, did not warrant a due process rule that would require a trial court to screen the evidence for reliability before allowing the jury to assess its creditworthiness. Id., 728, 730. In explaining its reasons for reaching this conclusion, the court noted that juries traditionally determine the reliability of evidence and that other protections are built into our adversarial system that caution juries against placing undue weight on eyewitness testimony of questionable reliability. Id., 728–30. These protections include (1) the defendant's right to confront the witness, (2) the defendant's right to the effective assistance of

counsel, who can expose flaws in the eyewitness' testimony during cross-examination and focus the jury's attention on the fallibility of the testimony during opening and closing arguments, (3) eyewitness specific jury instructions warning the jury to take care in appraising identification evidence, (4) the constitutional requirement that the government prove the defendant's guilt beyond a reasonable doubt, (5) rules of evidence permitting trial judges to exclude relevant evidence if its probative value is substantially outweighed by its prejudicial impact or potential for misleading the jury, and, lastly, (6) expert testimony in appropriate cases on the hazards of eyewitness identification evidence. Id. Giving no particular weight to any of these methods, the court then examined the evidence and concluded that, among the safeguards at work in the petitioner's trial were a statement by his attorney during opening argument cautioning the jury as to the vulnerability of the disputed eyewitness identification, his attorney's effective cross-examination of the eyewitness and another witness, his attorney's frequent reference during cross-examination to the weaknesses of the identification, and the trial court's lengthy jury instructions on identification testimony and the factors that the jury should consider in evaluating that testimony. Id., 729–30.

The more balanced approach described in *Perry* is necessary because eyewitness identifications are made in widely differing circumstances, and a variety of potentially effective methods are available for bringing reliability issues to a jury's attention. Thus, each case should be considered on its own facts, and trial courts should be allowed broad discretion in deciding whether any particular combination of methods, including closing argument, cross-examination and jury instructions, both before and after an eyewitness has testified, as well as at the close of the evidence, is sufficient to assist juries in assessing the reliability of an eyewitness identification without expert testimony. In other words, although cross-examination and closing argument, in and of themselves, may be inadequate to bring the unreliability of an eyewitness identification to the jury's attention, trial courts should be allowed to consider the totality of the circumstances in deciding whether to admit or preclude expert testimony.[3] Accordingly, to the extent the majority concludes that expert testimony is presumptively admissible unless the trial court gives focused jury instructions, the eyewitness was familiar with the defendant before the commission of the crime or the proposed testimony otherwise fails the test for the admission of expert testimony, the majority goes too far and repeats the mistake made in *Kemp* and *McClendon* of unnecessarily limiting the trial court's discretion.

A totality of the circumstances approach is justified on several grounds. Although the majority makes somewhat contradictory statements on the matter, I agree

with its observation that "[t]he defendant makes no claim—and there is no basis for such a claim—that the impropriety was of constitutional magnitude."[4] Footnote 45 of the majority opinion. Thus, the preclusion of expert testimony on the reliability of an eyewitness identification is not a constitutional violation; see, e.g., *Buell* v. *Mitchell*, 274 F.3d 337, 357–58 (6th Cir. 2001) (habeas petitioner does not have constitutional right to present expert testimony on reliability of eyewitness identification); *Burwell* v. *Superintendent of Fishkill Correctional Facility*, United States District Court, Docket No. 06 Civ. 787 (JFK) (S.D.N.Y. July 10, 2008) ("[n]o [United States] Supreme Court decision has held that the exclusion of expert testimony on the reliability of eyewitness identifications violates a defendant's constitutional rights"); *Smith* v. *Booker*, United States District Court, Docket No. 05-CV-40291-FL (E.D. Mich. November 14, 2006) (habeas petitioner was not deprived of his constitutional right to fair trial when trial court declined to assign him expert in eyewitness identifications); and defendants are not entitled to have experts testify on their behalf, even in the absence of focused jury instructions.

Moreover, there is no consensus among other jurisdictions that expert testimony is necessarily the best method, other than focused jury instructions, for bringing the potential unreliability of an eyewitness identification to a jury's attention. Although expert testimony may be helpful to a jury in some circumstances, such testimony, like cross-examination and closing argument, is subject to its own imperfections and deficiencies. These include that it may (1) be unfocused and rambling, (2) involve dueling experts employed to emphasize differing interpretations of the current research, thereby confusing jurors, (3) significantly increase the cost of litigation, (4) extend the length of the trial, and (5) inadvertently invade the province of the jury by stating an opinion on the credibility of the eyewitness.[5] See, e.g., *State* v. *Henderson*, supra, 208 N.J. 298 (citing less need for expert testimony when trial court gives enhanced jury instructions because instructions are "focused and concise, authoritative . . . [neutral], and cost-free . . . [and] they avoid possible confusion to jurors created by dueling experts; and they eliminate the risk of an expert invading the jury's role or opining on an eyewitness' credibility"); see also C. Sheehan, note, "Making the Jurors the 'Experts': The Case for Eyewitness Identification Jury Instructions," 52 B.C. L. Rev. 651, 674–77 (2011) (expert testimony is subject to various pitfalls, including potentially prejudicial effect, disproportionate benefit to affluent defendants and tendency to increase length and cost of criminal trials by producing " 'battle of the experts' ").

I also disagree with the majority that a defendant should be allowed to present expert testimony on eye-

witness identifications even when there is strong corroborating evidence of the defendant's guilt. The majority states that, "[a]lthough some 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 when the eyewitness' testimony is corroborated by other evidence of the defendant's guilt . . . we do not believe that a defendant should be precluded from presenting such testimony merely because the state has presented other evidence of guilt that the jury reasonably could credit. Broadly speaking, when the identity of the perpetrator is disputed and the state seeks to use eyewitness testimony to identify the defendant as the perpetrator, the defendant should be permitted to adduce relevant expert testimony on the fallibility of the eyewitness' identification, at least in the absence of an adequate substitute for the testimony, such as comprehensive focused jury instructions." (Citations omitted.) In contrast, I believe that trial courts should be allowed to consider substantial corroborating evidence when determining whether to admit expert testimony because, in cases in which the record contains such evidence, the importance of expert testimony is correspondingly diminished and would be an unnecessary distraction to the jury. See, e.g., *United States* v. *Crotteau*, 218 F.3d 826, 833 (7th Cir. 2000) ("when there is corroborating evidence, expert testimony regarding the reliability of eyewitness identification is not necessary"); *United States* v. *Moore*, 786 F.2d 1308, 1313 (5th Cir. 1986) (trial court did not abuse its discretion in excluding expert testimony on reliability of eyewitness identifications because other evidence of guilt was "overwhelming"); *Commonwealth* v. *Watson*, 455 Mass. 246, 258, 915 N.E.2d 1052 (2009) ("[when] there is additional evidence to corroborate an [eyewitness'] identification, a judge does not overstep the bounds of discretion in excluding expert testimony"); *People* v. *LeGrand*, 8 N.Y.3d 449, 459, 867 N.E.2d 374, 835 N.Y.S.2d 523 (2007) ("[i]n the event that sufficient corroborating evidence is found to exist, an exercise of discretion excluding eyewitness expert testimony would not be fatal to a jury verdict convicting [a] defendant"); *People* v. *Young*, 7 N.Y.3d 40, 45, 850 N.E.2d 623, 817 N.Y.S.2d 576 (2006) (corroborating evidence "was strong enough for the trial court reasonably to conclude that the expert's testimony would be of minor importance"). But cf. *Johnson* v. *State*, 272 Ga. 254, 257, 526 S.E.2d 549 (2000) ("[when] eyewitness identification of the defendant is a key element of the [s]tate's case *and there is no substantial corroboration of that identification by other evidence*, trial courts may not exclude expert testimony without carefully weighing whether the evidence would assist the jury in assessing the reliability of eyewitness testimony and whether expert . . . testimony [on eyewitness identifications] is the only effective way to reveal any weakness in an eyewitness

identification" [emphasis added]); *State* v. *Wright*, 147 Idaho 150, 158, 206 P.3d 856 (App. 2009) ("[w]hen an eyewitness identification of the defendant is a key element of the prosecution's case but *is not substantially corroborated by evidence giving it independent reliability*, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony" [emphasis added; internal quotation marks omitted]). Thus, for example, when the state introduces uncontested DNA evidence as well as an eyewitness identification linking the defendant to the crime, there generally is no need for expert testimony on the reliability of the identification. The corroborative value of DNA evidence, which has been used on numerous occasions to exonerate defendants who have been wrongfully convicted on the strength of an eyewitness identification; see, e.g., E. Connors et al., Office of Justice Programs, United States Dept. of Justice, "Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial" (June 1996) pp. 2, 15; is such that expert testimony would be of little value. The majority, however, fails to recognize that when strong corroborating evidence is consistent with an eyewitness identification, expert testimony would be not only time consuming and costly, but potentially confusing rather than helpful to the jury.

Unlike the majority, I am persuaded by the logic in *Patterson*, in which the District of Columbia Court of Appeals stated that, "under some, but not all circumstances, [expert] testimony should be admitted when the jury requires assistance in deciding the verity of an identification. But, this issue, in discrete cases, must be tested on whether it was an erroneous exercise of discretion exercised *under all circumstances present*, not under a rule that such testimony must always be admitted because jurors are not fit to decide the issue unaided by expert testimony. When other evidence points to the verity of a victim's identification of the accused, such as the victim's depiction of the gun in a sketch immediately after the crime and the . . . recovery of a gun [by the police] in the motel matching that description, that evidence is a legitimate consideration for the trial judge in exercising judgment on whether to exclude such expert testimony. Life experiences are sufficient and a trial judge must be vested with discretion to sort out the various situations where experts may illuminate the question."[6] (Emphasis added.) *Patterson* v. *United States*, supra, 37 A.3d 238.

In sum, I agree that expert testimony may be warranted when the trial court does not intend to give focused jury instructions, the eyewitness was unfamiliar with the defendant before the commission of the

crime, and the proposed testimony satisfies the applicable reliability and relevance requirements. I nonetheless believe that other methods are also effective in bringing the potential unreliability of an eyewitness identification to the attention of the jury and that trial courts, in deciding whether to admit or preclude expert testimony, should be allowed to consider under a totality of the circumstances analysis how those methods have been used in the case at hand and whether there is substantial corroborating evidence of the defendant's guilt. Accordingly, to the extent this view is inconsistent with that of the majority, I disagree with the majority's analysis and conclusions.

II

I also disagree with the majority that the trial court in the present case abused its discretion in precluding expert testimony regarding the identification made by Scott Lang, the only eyewitness who was unfamiliar with the defendant before the shooting. The trial court had valid reasons for precluding the testimony and instructed the jury as to the factors that might affect the reliability of the identification. Furthermore, the majority's harmless error analysis relies on reasoning that is inconsistent with its newly established rule as to when expert testimony is admissible. Accordingly, I believe the majority opinion will lead to much confusion among trial courts regarding the extent of their discretion to preclude expert testimony on eyewitness identifications.

The principle that trial courts have broad discretion in ruling on evidentiary matters is deeply rooted in our jurisprudence. "It is axiomatic that [t]he trial court's ruling on the admissibility of evidence is entitled to great deference. . . . In this regard, the trial court is vested with wide discretion in determining the admissibility of evidence . . . . Accordingly, [t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . Furthermore, [i]n determining whether there has been an abuse of discretion, every reasonable presumption should be made in favor of the correctness of the trial court's ruling, and we will upset that ruling only for a manifest abuse of discretion. . . . Despite this deferential standard, the trial court's discretion is not absolute. . . . Thus, [i]n reviewing a claim of abuse of discretion, we have stated that [d]iscretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors." (Citations omitted; internal quotation marks omitted.) *State* v. *Jacobson*, 283 Conn. 618, 626–27, 930 A.2d 628 (2007).

Mindful of these principles, I first discuss whether the trial court in the present case properly precluded the expert testimony under *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998). I then examine whether the expert testimony, even if admissible under *Porter*, was properly precluded under a totality of the circumstances analysis. I conclude by explaining why I disagree with the majority's reasoning as applied to the facts of the present case.

A

The following additional facts are relevant to a consideration of this issue. The trial court conducted a *Porter* hearing following the state's presentation of evidence. During the hearing, Charles A. Morgan III, a forensic psychiatrist and the defendant's expert witness, testified that the scientific evidence he intended to discuss was based on research involving military personnel. Morgan explained that his principle interest was post-traumatic stress disorder and that, although he had published more than forty peer reviewed papers during his career, he was not one of the primary researchers in the field of eyewitness memory, and only two of his recently published papers, in 2004 and 2007, had examined the accuracy of eyewitness identifications in relation to high stress events. The subjects of both studies were active duty military personnel enrolled in survival school training to prepare for being held as prisoners of war. The subjects were placed in isolation, exposed to high stress interrogations in a well lighted room for more than thirty minutes and were in some cases threatened with physical punishment, pushed around, slapped and struck. Approximately forty-eight hours later, they were asked to identify their interrogators. The studies found, among other things, that the accuracy of an identification was lower when the level of stress was higher and that there was no relationship between a subject's confidence in the identification and its accuracy. Morgan testified that the 2004 study had been published in a peer reviewed journal, the 2007 study replicating the earlier study was about to be published at the time of the defendant's trial, and a third study had been submitted but not yet accepted for publication. On cross-examination, Morgan added that he had testified regarding the accuracy of eyewitness memory only three other times, one of which was in the context of a war crimes trial in The Hague, Netherlands, and another in the context of a claim involving post-traumatic stress disorder, which was the focus of most of his work and the bulk of his publications. In response to detailed questioning by the court, Morgan further explained that the memory of a person like Lang, the only eyewitness to observe the shooting other than William Robinson, the victim, might be subject to unknown variables, such as intoxication,

the effect of which had not yet been studied, and that, although the military subjects in Morgan's study had not experienced the same kind of stress as Lang, the high level of stress in both situations would have the same effect on memory. Morgan also stated, upon being asked whether "misattribution" or "retrofitting" was a concept within the common knowledge of jurors, that he did not know of any scientific data indicating the level of understanding in the general population regarding these concepts and the effect of misinformation on memory. When the court asked why Morgan's testimony would be more helpful than a jury instruction, Morgan indicated that a jury instruction, if followed, also could be "very helpful . . . ."

The trial court then considered the relevance and reliability of the expert testimony. Although the court initially concluded that Morgan had a special skill or knowledge, it questioned whether post-traumatic stress studies involving military personnel were applicable to civilians. The court also concluded that the substance of Morgan's testimony on the factors that might affect reliability was within the common knowledge of the average juror, had been adequately addressed by direct and cross-examination of the witnesses and would be further discussed during closing arguments. In this regard, the court specifically concluded that (1) jurors have knowledge that stress, particularly during an incident of violence, has an effect on the reliability of an eyewitness identification, (2) the effect of a time lapse between when a witness sees an event and when the witness reports it to the police had been, and would continue to be, addressed by cross-examination and summation, (3) the effect of postevent information on an identification had been raised in the questioning of several witnesses and was within the common knowledge of the jurors, and (4) the effect of the level of certainty of several eyewitnesses had been alluded to during cross-examination. The court observed that it had wide discretion in ruling on the matter and would be required to weigh and balance whether the proposed testimony would overpower other factors that the jury needed to consider with respect to the identification procedure, such as whether to credit or discredit, in whole or in part, the testimony of various witnesses. The court further concluded that Morgan's theories had been insufficiently tested, had no known or potential rate of error and were not generally accepted within the scientific community, which Morgan appeared to acknowledge. The court emphasized that it did not believe that the results of studies in a military setting could be properly applied in a civilian setting and that it was not satisfied that anything other than a jury instruction was necessary in the present case. After noting that the *Porter* standard for admitting scientific testimony was flexible, the court concluded that Morgan's testimony would not assist the jury inasmuch as

it was neither relevant, because of its military subjects, nor reliable from a scientific standpoint. The court stated that it had prepared jury instructions that the parties would have the opportunity to review and then proceeded to grant the motion to preclude Morgan's testimony.

Thereafter, the parties reviewed the proposed jury instructions, and defense counsel requested that the instruction concerning the effect of stress on an eyewitness identification when a weapon is used include a statement that stress in this circumstance decreases reliability. The court indicated that it was not inclined to add the proposed language but that defense counsel could object after the instruction was given. The following day, defense counsel asked the court if it had made the requested change. The court responded that, although it had not used the language that counsel had suggested, it had added the word "impact" so that the instruction now read: "[Y]ou should also consider a witness' physical and emotional condition such as stress during an incident where a weapon was used since that may impact on the reliability of an identification." Defense counsel did not object to the revised instruction. After the court gave the jury instructions, defense counsel took exception to only one instruction unrelated to the instructions on eyewitness testimony. When the court inquired as to whether counsel had any further objections, he replied in the negative.

In light of the trial court's concerns that Morgan's research lacked scientific rigor, was not generally accepted within the scientific community, was conducted in a military setting and might not be applicable to a civilian population, I would conclude that the trial court did not abuse its discretion in precluding Morgan's testimony under *Porter* because it did not decide the matter "so arbitrarily as to vitiate logic" and did not base its conclusion "on improper or irrelevant factors." (Internal quotation marks omitted.) *State* v. *Jacobson*, supra, 283 Conn. 627. To the contrary, the factors that the trial court considered in deciding whether to admit the testimony were exactly those factors that it should have considered under a *Porter* analysis. Morgan himself acknowledged that his expertise was in the area of post-traumatic stress disorder, that he was not a primary researcher in the field of, and had not done extensive research on, the accuracy of eyewitness memory, that many variables other than stress that had not been studied might affect accuracy, that the military subjects of his studies had not experienced the same type of stress as Lang and that there was no scientific data indicating the level of understanding in the general population regarding the effect of misinformation on memory and retrofitting. Morgan also conceded that a jury instruction "could be very helpful . . . ." Moreover, "[i]t is well established that [i]t is within the province of the trial court, when sitting as the fact finder,

to weigh the evidence presented and determine the credibility and effect to be given the evidence. . . . Credibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom." (Internal quotation marks omitted.) *Gianetti* v. *Norwalk Hospital*, 304 Conn. 754, 772–73, 43 A.3d 567 (2012). Accordingly, the trial court properly exercised its broad discretion in concluding that Morgan's research on military subjects had no relevance in the present context under the criteria established in *Porter* and would not be helpful to the jury.[7]

B

Even assuming that the trial court improperly determined under *Porter* that Morgan's testimony did not satisfy the requirements of reliability and relevance, the court properly precluded his testimony under a totality of the circumstances analysis because at least three other factors, all of which were noted by the court, served to bring the potential unreliability of Lang's eyewitness identification to the jury's attention. These included questions raised by counsel during the direct and cross-examination of Lang, defense counsel's closing argument and the court's intended jury instructions.

With respect to the first factor, both the assistant state's attorney (prosecutor) on direct examination and defense counsel on cross-examination questioned Lang regarding the possible effect of his past drinking problems on his judgment and memory, the alleged inconsistencies between his testimony at trial and his description of the shooting to the police, and the effect of his seeing the defendant's photograph in the newspaper on the accuracy of his identification. For example, the prosecutor elicited testimony from Lang on direct examination that, in the year following the shooting, he voluntarily entered a treatment facility after an arrest for operating a motor vehicle while under the influence of alcohol and that a form that he completed in connection with his admission indicated that he had an impaired memory, poor judgment and poor insight. The prosecutor also queried Lang on direct and redirect examination as to whether his identification of the defendant had been influenced by seeing the defendant's photograph in the newspaper. On cross-examination, defense counsel attacked the certainty of Lang's identification by asking if he recalled telling the police that he did not recognize the shooter or the victim. Defense counsel also elicited testimony that Lang had a history of driving under the influence in the years

before the shooting, that he had consumed two beers just before the shooting and that he could not recall whether there was a cast on the shooter's left hand even though the two men were "shoulder to shoulder" at the time of the shooting. Defense counsel further questioned discrepancies in Lang's testimony regarding how the shooter had exited the building, the gun used in the shooting and his recollection of how many days after the shooting he had seen the defendant's photograph in the newspaper. In addition, defense counsel asked Lang about the effect of the photograph on his identification and why he had told the police that he recognized the defendant from the photograph if he was so certain on the night of the shooting that the defendant was the perpetrator.

With respect to the second factor, two defense attorneys addressed the unreliability of Lang's eyewitness identification during closing argument, as the trial court had anticipated. The defense specifically argued that eyewitness identifications are suspect because of the passage of time between an event and its recollection, the effect of stress on memory when a weapon is used and the effect of postevent information such as media coverage on memory, all of which were deemed important in the present case.[8]

With respect to the third factor, the court gave jury instructions referring to issues of particular significance that served to guide the jurors in assessing the reliability of Lang's identification.[9] These included instructions to consider (1) "the opportunity and ability of the witness to observe the perpetrator at the time of the event and to make an accurate identification later," (2) "whether the witness had adequate opportunity to observe the perpetrator [which may] be affected by such matters as the length of time available to make the observation, the distance between the witness and the perpetrator, the lighting conditions at the time of the offense, whether the witness had known or seen the person in the past, and whether anything distracted the attention of the witness," (3) "[the] witness' physical and emotional condition, such as stress during an incident where a weapon was used, since that may impact on the reliability of an identification," (4) "postevent information, such as media coverage, [or] talking to or listening to others about who was the perpetrator," (5) "that memory can change over time and that the level of certainty indicated by a person may not always reflect a corresponding level of accuracy of an identification." All of these issues also were raised during defense counsel's cross-examination and closing argument. Moreover, defense counsel was apparently satisfied with the instructions because he made no objection after they were given. Accordingly, although the jury instructions were not extremely detailed, and thus barely adequate, they provided a sufficient ground on which to preclude Morgan's testimony when considered together with

defense counsel's cross-examination and closing argument.

Finally, admission of Morgan's testimony was unnecessary because there was strong corroborating evidence of the defendant's guilt, including the testimony of the victim that the defendant was the shooter, the testimony of another witness that he saw the defendant running out of the bar immediately after the shooting, evidence that the gun used in the shooting was the same gun that the defendant used in two related shootings shortly thereafter, and the defendant's subsequent flight from the country, all of which was before the court when it granted the motion to preclude Morgan's testimony.[10]

In reviewing this claim, the court must be mindful that "[t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a *clear* abuse of the court's discretion." (Emphasis added; internal quotation marks omitted.) *State* v. *Jacobson*, supra, 283 Conn. 626. Thus, "[i]n determining whether there has been an abuse of discretion, every reasonable presumption should be made in favor of the correctness of the trial court's ruling, and we will upset that ruling only for a manifest abuse of discretion." (Internal quotation marks omitted.) Id., 626–27. Accordingly, following Connecticut's well established law on the trial court's discretion in making evidentiary rulings, I am unable to comprehend how the majority can conclude that the trial court abused its discretion in precluding Morgan's testimony.

C

In reaching the opposite conclusion, the majority's abuse of discretion analysis is subject to several serious flaws. Of these, the most striking is that the majority disregards the trial court's reasons for precluding the expert testimony under *Porter*. The majority explains that the trial court abused its discretion because Lang did not know the shooter, he had seen the defendant's photograph in a newspaper before identifying him as the shooter and the other eyewitness who observed the shooting and who previously was acquainted with the defendant gave inconsistent testimony as to whether the defendant was the shooter. The majority also states elsewhere in its opinion, without any supporting analysis, that the jury instructions did "not suffice" because they were too broad. The majority thus concludes that Morgan's testimony would have been helpful to the jury. This reasoning, however, is completely inconsistent with the responsibility of a reviewing court to determine, under abuse of discretion principles, whether the trial court properly precluded testimony on the basis of the applicable requirements for assessing scientific methodology under *Porter*[11] and with the majority's conclusion under a harmless error analysis that the jury instructions were adequate.

The majority then compounds these errors by concluding that the trial court's decision was harmless because (1) the court gave an adequate jury instruction regarding the potential weaknesses of the eyewitness identification, (2) there was strong, corroborating evidence that the defendant was the shooter, (3) defense counsel was able to cross-examine the witness, and (4) defense counsel was able to present argument on the reliability and credibility of the eyewitness testimony. Ironically, these are the very reasons why the majority should have concluded that the trial court did not abuse its discretion in the first place, thus making a harmless error analysis unnecessary.[12]

Furthermore, a close examination of the majority's reasoning shows that it contains many contradictions, beginning with its treatment of the jury instructions. Specifically, the majority concludes that the trial court's jury instructions were insufficient in determining that the court abused its discretion but then concludes that the instructions were adequate to justify preclusion of the expert testimony under a harmless error analysis. The majority also concludes that strong corroborating evidence of guilt should not prevent a defendant from presenting expert testimony on eyewitness identifications but then relies in part on strong corroborating evidence[13] to justify preclusion of the testimony under a harmless error analysis. The majority finally concludes that cross-examination is not highly effective in exposing sincere but mistaken beliefs and that closing argument is likely to be viewed as little more than partisan rhetoric, but then relies in part on cross-examination and closing argument by the defense to justify preclusion of the expert testimony under a harmless error analysis. Faced with these baffling contradictions, trial courts are left to ponder the meaning of a decision that implicitly finds jury instructions, cross-examination, closing argument and corroborating evidence insufficient to support the trial court's decision to preclude expert testimony under an abuse of discretion analysis but sufficient to protect against reversal under a harmless error analysis.

Contrary to the majority, I believe that trial courts should be allowed to consider cross-examination, closing argument, jury instructions and whether there is strong corroborating evidence of the defendant's guilt in deciding whether expert testimony would be necessary and helpful to the jury under a totality of the circumstances analysis. Accordingly, I do not agree that the trial court in the present case abused its discretion in precluding Morgan's testimony.

For the foregoing reasons, I respectfully concur in the judgment.

[1] As the majority notes, the threshold reliability and relevance requirements that are applied to the admission of expert testimony generally are: "(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." (Internal quotation marks omitted.) *State* v. *Beavers*, 290 Conn. 386, 414, 963 A.2d 956 (2009). When scientific evidence forms the basis for an expert's opinion, however, the court must conduct a validity assessment to ensure reliability under *State* v. *Porter*, 241 Conn. 57, 68, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), which requires, inter alia, that the scientific testimony be derived from, and based on, a scientifically reliable methodology. See id., 61, 68.

[2] I fully agree with the majority's analysis in part II of the opinion regarding the defendant's motion for a mistrial.

[3] The majority claims that my characterization of *Perry* as endorsing a "more balanced approach" is inaccurate because the question before the court was not the comparative value of the various methods of challenging the accuracy of eyewitness identification testimony. See footnote 31 of the majority opinion. The majority, however, misses my point. In describing the various methods as "safeguards built into our adversary system," the court in *Perry* recognized that, *when considered as a group*, such methods are sufficient to bring the jury's attention to the potential unreliability of eyewitness identifications and to guard against an unfair trial. *Perry* v. *New Hampshire*, supra, 132 S. Ct. 728 (stating that "other safeguards built into our adversary system . . . caution juries against placing undue weight on eyewitness testimony of questionable reliability"). Thus, the court concluded that, because many of these safeguards were at work in the petitioner's trial, including defense counsel's opening argument, her highly effective cross-examination of the eyewitness, her focus on the weaknesses of the eyewitness' testimony during cross-examination, and the trial court's instructions to the jury, the introduction of the eyewitness testimony in that case did not render the trial fundamentally unfair. Id., 729–30. I maintain that this is a more balanced approach than that adopted by the majority because the majority not only diminishes the importance of cross-examination and closing argument but portrays them as uniformly ineffective. The majority's approach is thus completely at odds with the United States Supreme Court's express recognition of cross-examination, opening and closing argument and jury instructions as effective methods for challenging the reliability of eyewitness identifications, both as a matter of general principle and in the case before it. Moreover, even if the court had considered the comparative value of the various methods and deemed one or more methods superior to the others, its unequivocal recognition that each has value is in diametric opposition to the conclusion of the majority in the present case.

[4] The majority states in another part of its opinion that a rule that does not permit a defendant to adduce relevant expert testimony on the fallibility of eyewitness identifications, in the absence of an "adequate substitute," such as "focused" jury instructions, "would unfairly restrict the defendant's opportunity to mount a defense"; text accompanying footnote 44 of the majority opinion; and "would impermissibly infringe on a defendant's constitutionally protected right to present a defense." Footnote 44 of the majority opinion, citing *Patterson* v. *United States*, 37 A.3d 230, 250 (D.C. 2012) (Glickman, J., concurring in the result), and *Holmes* v. *South Carolina*, 547 U.S. 319, 321, 330, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). The cases that the majority cites in support of this conclusion, however, are inapposite. In *Holmes*, the issue regarding the defendant's constitutional rights had nothing to do with the admissibility of expert testimony on eyewitness identifications but with the applicability of an evidentiary rule precluding the admission of evidence of a third party's guilt when the prosecution had introduced forensic evidence that, if believed, strongly supported the defendant's guilt. *Holmes* v. *South Carolina*, supra, 321. The majority's reliance on comments made by the concurring judge in *Patterson* is also misplaced because the court in *Patterson* expressly rejected them. The concurring judge stated that "a rule of evidence permitting the trial judge to bar a defendant from introducing relevant and otherwise admissible expert testimony [on the fallibility of eyewitness identification testimony] merely because the judge perceives the prosecution's proffered opposing evidence to be strong would raise a serious constitutional question" concerning "the defendant's . . . right to a meaningful opportunity to present a complete defense." *Patterson* v. *United States*, supra, 250 (Glickman, J., concurring in the result). The majority in *Patterson*, however, determined that "[r]ulings excluding (or admitting) evidence ordinarily are within the ambit of the trial court's discretion and are subject to review only for abuse of that discretion under the . . . standard of harmlessness. . . . It is the rare case in which a trial court's application of a rule of evidence is so

erroneous and unfair as to deprive a defendant of a meaningful opportunity to present a complete defense. . . .

"[A] defendant must demonstrate that the excluded evidence was important to his defense in order to show that the error was of constitutional magnitude. . . . [I]t must be reasonably probable (and not merely possible) that the jury would have harbored a reasonable doubt regarding the defendant's guilt if the evidence had [been admitted]. . . . This standard is less demanding than the preponderance-of-the-evidence test. . . . The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." (Citations omitted; internal quotation marks omitted.) Id., 240–41. The majority in *Patterson* then determined that the defendant had not been denied a meaningful opportunity to present a defense because other defense witnesses had presented strong, corroborating evidence of his innocence, the trial court had not prevented the defense from arguing that the eyewitness had misidentified him, defense counsel had conducted ample cross-examination of the eyewitness during which her ability to observe the face of her assailant was questioned, and defense counsel had argued, during closing argument, that stranger identification was less reliable and that the eyewitness did not have enough time to observe the defendant because he had been focusing on the gun. Id., 241. The majority thus concluded: "We find it highly probable that the trial court's ruling did not influence the jury's verdict; we see no reasonable probability that the expert's testimony would have engendered an otherwise-nonexistent reasonable doubt of [the defendant's] guilt in the [jurors'] minds." (Internal quotation marks omitted.) Id. Accordingly, it is the reasoning of the majority in *Patterson* for which that case should be cited, not the reasoning of the concurring judge, which was rejected by the majority and has no persuasive value.

[5] Just as experts are not allowed to intrude on the province of the jury by vouching for the credibility of witnesses, this court should not prevent trial courts from exercising their discretion to exclude expert testimony that might challenge the credibility of a witness on a basis on which the jury does not need assistance in exercising its duty as the fact finder. See *State* v. *Iban C.*, 275 Conn. 624, 634, 881 A.2d 1005 (2005) ("[e]xpert witnesses cannot be permitted to invade the province of the jury by testifying as to the credibility of a particular witness or the truthfulness of a particular witness' claims").

[6] The majority disagrees in principle with this conclusion yet appears to agree that uncontested DNA evidence would render expert testimony unnecessary, which merely proves my point that trial courts should be allowed to consider strong corroborating evidence when deciding whether to admit expert testimony, as is the case in many other jurisdictions. See footnote 44 of the majority opinion. The majority also concludes that trial courts should not be allowed to consider strong corroborating evidence of a defendant's guilt because "the law of evidence does not grant trial courts the liberty to decide what evidence is admissible *based*, *either in whole or in part*, *on the strength of the state's case*." (Emphasis in original.) Id. I do not suggest, however, that trial courts should be allowed to decide whether expert testimony is admissible on the basis of the strength of the state's case; rather, trial courts should decide that issue on the basis of whether the evidence would be helpful to the jury. See *Sullivan* v. *Metro-North Commuter Railroad Co.*, 292 Conn. 150, 158, 971 A.2d 676 (2009) ("[e]xpert testimony should be admitted when . . . the testimony would be helpful to the court or jury in considering the issues" [internal quotation marks omitted]); see also Conn. Code Evid. § 4-3 ("[r]elevant evidence may be excluded if its probative value is outweighed by the danger of . . . undue delay, waste of time or needless presentation of cumulative evidence"). Thus, if the jury has been apprised of the potential unreliability of the eyewitness testimony by means of a thorough cross-examination of the witness, an effective opening or closing argument and jury instructions that address potential weaknesses in the eyewitness identification, as was the case in *Perry* v. *New Hampshire*, supra, 132 S. Ct. 729–30, and if there is also strong corroborating evidence of the defendant's guilt, expert testimony would not necessarily be helpful because it could lead to a "battle of the experts," confuse the jury and waste valuable time and judicial resources. Viewed from this standpoint, allowing trial courts to consider strong corroborating evidence is entirely consistent with their discretion to exclude relevant evidence that would not be helpful to the jury. See footnote 12 of this opinion. In fact, the majority agrees that, to the extent I mean to "sing a

paean to . . . the Connecticut Code of Evidence, then we gladly lend our voices." Footnote 49 of the majority opinion. Accordingly, the majority ties itself up in inexplicable knots in attempting to explain its position while straining to refute mine.

[7] The majority disagrees with this conclusion on three grounds. See footnote 43 of the majority opinion. First, it claims that I mischaracterize the basis for Morgan's testimony and give the "inaccurate impression" that the testimony "would have [been based] exclusively on Morgan's own research, when in fact it is undisputed that Morgan was qualified to testify on the basis of his general expertise on the science of eyewitness identifications." Id. The transcript, however, clearly establishes that, far from testifying in a vacuum on the "general" science of eyewitness identifications, Morgan planned and was expected to testify on his studies with military personnel. This is clear from the trial court's *repeated* questions to Morgan regarding why his studies would be relevant and helpful to the jury in understanding the experience of the witness in the present case, who observed the shooting at close range while inside the bar. Indeed, the trial court specifically asked Morgan: "If it's relevant, why can't I tell them that? Why can't I give an instruction on that rather than . . . your telling them about studies of military survival people?" Morgan did not dispute the court's characterization of his proffered testimony. Moreover, to the extent the majority suggests that the court could have precluded Morgan from testifying about his military studies and allowed him to testify about "everything else"; footnote 43 of the majority opinion; defense counsel did not request that Morgan be limited to testifying about scientific findings unrelated to his military studies following the trial court's ruling. In addition, the majority fails to recognize that the military studies were inextricably tied to Morgan's qualifications as an expert witness and necessarily would have been brought to light when those qualifications were established. Thus, it is the majority that distorts the issue by suggesting that Morgan would not have testified about his studies involving military personnel. Finally, even if Morgan also had testified regarding scientific findings from other sources, it was well within the trial court's discretion to conclude that his testimony, as a whole, would have been confusing to the jury, especially in light of Morgan's concession that there was no scientific evidence establishing that the concept of retrofitting was not within the common knowledge of the jurors.

The majority also claims that I rely on "outdated assumptions about the efficacy of the traditional methods of challenging eyewitness identifications . . . ." Id. I disagree for the reasons previously stated. See footnote 3 of this opinion. The United States Supreme Court in *Perry* recently reaffirmed in clear and unambiguous language the value of cross-examination, opening and closing argument and jury instructions as a means of bringing the potential inaccuracy of eyewitness identifications to the attention of the jury, especially when all three methods are used in combination and thus have a reinforcing effect. See *Perry* v. *New Hampshire*, supra, 132 S. Ct. 728–30.

Third, the majority claims that my view regarding the positive value of cross-examination and closing argument is "at odds" with my conclusion that trial courts should be encouraged to give focused jury instructions in all cases involving eyewitness identifications. Footnote 43 of the majority opinion. The majority, however, is unable to appreciate that a totality of the circumstances approach recognizes the multiple ways in which parties and the court may address reliability issues and that merely because the trial court gives focused jury instructions does not mean that other methods do not also have value in informing the jury or reinforcing the information given to the jury in the trial court's instructions. Accordingly, none of the grounds on which the majority disagrees with my analysis is persuasive.

[8] Defense counsel argued as follows: "Now, eyewitness identification testimony—obviously, when you get into the jury deliberation room, you're going to have to think about that and talk about it. We know, I believe, that our brains, our memories, don't work like camcorders or video cassette recorders because, if they did, we probably all would have gotten [100] percent in geometry because you could then put the camcorder on the data, when you're given the test, replay it, and you'd get everything correct. Our brains simply don't work that way.

"The way our brains work is you have to form what you see, and the circumstances under which you form are very important—whether you're under a lot of stress, how much time you have. Secondly, after you get that memory, you'll store it in your mind until you have to . . . recall it; that's another stage. While you're storing it, things that happen are very important,

like media, like a picture in the newspaper, like a photograph of someone in the newspaper.

"In between the time that you've created a memory and when you're asked to recall what you saw, what happens in between that time is very important and really very critical in this case, in particular with this eyewitness testimony because, when all three of the eyewitnesses—Scott Lang, Lashon Baldwin, and Jackie Gomez—were called, when they were asked by the police to recall, they all referred to the newspaper article [in] The New London Day.

"The judge is going to charge you about the law on this, and, in your deliberations, it's going to be very important for you to listen closely. I believe he's going to charge you that stress during an incident when a weapon is used may impact on [identification]; that's the law that you should consider.

"Secondly, postevent information such as media coverage—that identification may be affected by posted information such as media coverage, that, certainly, your identification may or may not reflect on accuracy, so you need to consider all that.

"I'm going to [go] through them one at a time. . . . Lang was in [the bar at which the shooting occurred], and a traumatic and stressful event occurred. There was a shooting, and he wanted to get out of there as fast as he could. It happened in a matter of seconds. There was stress, he had been drinking a little bit; we don't know how much. That happens on October 8 [2004].

"While that memory or what he saw is in his brain, The New London Day publishes this article . . . 'New London Man Suspect in Bank Street Bar.' They put a photograph of [the defendant] in the newspaper, and they say the police want him. That's not like a photo[graphic] lineup. It's highly suggestive that [the defendant]—when you read this in the paper—that [the defendant] is the guy that did this.

"So that's what happens while the memory is in . . . Lang's brain, and he's storing it there. When he's asked to recall it by the police on October 19, he says, 'I recognize the guy in the paper as the guy I saw fire the gun.' So his identification is tainted by that fact alone; that's our position.

"Secondly, [there are] other problems with his testimony, and I'll go through them briefly. Was he really honest as a witness? I asked him if he had a drinking problem in 2003 and 2005, kind of before the event and after this incident. He said 'no, I didn't have a drinking problem in 2003.' Well, the document that was introduced into evidence showed that he had been [an] inpatient for five days in 2003, and when I showed him that, he said he had a driving problem or something. I don't know, if you have to go inpatient, I think it's a little bit more than a driving problem.

"On this little draft that . . . Lang made when he gave the statement, he's wrong about the doors if you believe the state police detective . . . and that's why I asked him that question, 'which way do the doors go.' I think, after looking at the video, [the detective] said they swing in and they don't swing out, so Lang was a little bit wrong on that little issue.

"As [the prosecutor] said, two people—[a physician at the hospital where the victim was taken and one of the responding officers]—said there was no stipple on [the victim's] wound, and Lang said that the gun had to be between one and two feet [from the victim]. So that's a little thing, but, again, it's not consistent. If the gun was within one or two feet, there would be stipple.

"I think, aside from the newspaper article, that affects your recollection. Lang said that the shooter went out the back door, and nobody testified that they saw [the defendant] go out the back door. [Lang] also said that the shooter had a purpose, a real purpose. I don't know if you picked up on that, but his statement is actually in evidence and you can read it. He said, '[w]hat really struck me that night was his intentions, the shooter. This guy came right in, shoved me out of the way, and shot this guy right in the face. There was no hesitation, no indecision. He just walked right up to him and shot him in the face.'

"That, from our position, is completely inconsistent. I mean, it's consistent with someone who has a motive to shoot [the victim] for some reason, but it's completely inconsistent with someone who doesn't have a motive. So, I mean, you can read that and maybe infer that whoever did the shooting had a motive, but we don't know about a motive in this trial based on the evidence."

[9] The court's full instruction was as follows: "With respect to any of the crimes charged, the state must prove beyond a reasonable doubt that the defendant is the person who committed the alleged crime being considered.

Identification is an essential element of any crime charged. Identification is a question of fact for you to decide, taking into consideration all of the evidence. The identification of the defendant by a single witness as the one involved in the commission of a crime is in and of itself sufficient to justify a conviction provided that you are satisfied beyond a reasonable doubt of the identity of the defendant as the one who committed the crime in question as well as all of the other essential elements of that alleged crime.

"You should consider all the facts and circumstances which existed at the time of the observation of the perpetrator. The value of identification testimony depends upon the opportunity and ability of the witness to observe the perpetrator at the time of the event and to make an accurate identification later.

"In appraising identification testimony, you should take into account whether the witness had adequate opportunity to observe the perpetrator. This may be affected by such matters as the length of time available to make the observation, the distance between the witness and the perpetrator, the lighting conditions at the time of the offense, whether the witness had known or seen the person in the past, and whether anything distracted the attention of the witness.

"You should also consider a witness' physical and emotional condition, such as stress during an incident where a weapon was used, since that may impact on the reliability of an identification. That identification may be affected by postevent information, such as media coverage, talking to or listening to others about who was the perpetrator, that memory can change over time and that the level of certainty indicated by a person may not always reflect a corresponding level of accuracy of [the] identification.

"In short, you must consider the totality of the circumstances affecting the identification of the defendant as the perpetrator of the alleged crime that you are considering. Remember, you must be satisfied beyond a reasonable doubt of the identity of the defendant as the one who committed the alleged crime being considered as well as all other essential elements of that alleged crime."

[10] The court was able to consider what amounted to the entire evidentiary record at the *Porter* hearing. The only matters considered after the hearing and before the court instructed the jury were the defendant's motion for a mistrial and the minor testimony of Detective Keith Crandall, a witness for the state who was briefly queried regarding a form prepared in conjunction with a statement that he had taken from another witness at police headquarters in New London. Following that testimony, the defendant exercised his constitutional right not to testify and called no witnesses.

[11] The majority states that a defendant who seeks to introduce expert testimony, even on one or more variables that satisfy the *Porter* requirement that the proffered testimony must be based on scientifically valid methodology, "must satisfy the trial court that the witness is qualified to testify as an expert and that the proffered testimony is relevant to a disputed issue in the case, such that the testimony will assist the jury in resolving that issue." The majority, however, did not examine the trial court's reasoning to determine whether it properly concluded that Morgan's studies on military personnel did not satisfy the reliability and relevance requirements applicable to scientific studies and that it would not have been helpful to the jury.

[12] The majority contends that I confuse the standard for harmless error analysis with the standard for evidentiary admissibility, which focuses on whether the evidence is relevant, and that I "would effectively collapse these two standards by permitting a trial court to exclude otherwise admissible expert testimony after considering 'the totality of circumstances,' " which would function as "an additional tier of review beyond the *Porter* test . . . ." Footnote 49 of the majority opinion. The majority continues to misunderstand my analysis and adopts a position that is clearly inconsistent with *Perry* because it focuses exclusively on the principle that relevant evidence is admissible without acknowledging that the trial court nonetheless may exclude relevant evidence under certain circumstances and in the exercise of its discretion.

As previously noted in this opinion, as well as in the text of the majority opinion, the test for the admission of expert testimony requires, inter alia, a determination that "the testimony would be helpful to the court or jury in considering the issues." (Internal quotation marks omitted.) *Sullivan* v. *Metro-North Commuter Railroad Co.*, supra, 292 Conn. 158; see also Conn. Code Evid. § 7-2 ("[a] witness qualified as an expert . . . 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 under-

standing the evidence" [emphasis added]). If the trial court determines that the proffered testimony would not be helpful to the jury, the testimony may be excluded. Section 4-3 of the Connecticut Code of Evidence further recognizes the trial court's authority to exclude relevant evidence when its probative value is outweighed by factors such as confusion of the issues or its tendency to mislead the jury; e.g., *Farrell* v. *St. Vincent's Hospital*, 203 Conn. 554, 563, 525 A.2d 954 (1987); or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. See, e.g., *State* v. *Parris*, 219 Conn. 283, 293, 592 A.2d 943 (1991); *State* v. *DeMatteo*, 186 Conn. 696, 702–703, 442 A.2d 915 (1982); *Hydro-Centrifugals, Inc.* v. *Crawford Laundry Co.*, 110 Conn. 49, 54–55, 147 A. 31 (1929). "Appellate courts wisely have reposed in the trial court considerable discretion in applying this balancing test. Unless there is a clear abuse of this discretion, no error is committed." (Internal quotation marks omitted.) *Farrell* v. *St. Vincent's Hospital*, supra, 563. Moreover, trial courts exercise this discretion in weighing and balancing the factors that affect the possible inadmissibility of relevant evidence on a daily basis.

In addition, other jurisdictions and commentators have noted that expert testimony may increase the length and cost of trials by producing a "battle of the experts" that is confusing instead of helpful to the jury. (Internal quotation marks omitted.) C. Sheehan, supra, 52 B.C. L. Rev. 675; see, e.g., *State* v. *Henderson*, supra, 208 N.J. 298. Accordingly, when a trial court applies a totality of the circumstances analysis and determines that other methods have been sufficient to bring the potential unreliability of an eyewitness identification to the attention of the jury, it acts well within its discretion in precluding expert testimony on the ground of undue delay, waste of time, needless presentation of cumulative evidence or jury confusion. Such grounds lie wholly within Connecticut's existing legal framework for the admission of relevant evidence and have nothing to do with the standard for harmless error analysis, pursuant to which a trial court reviews the record to determine whether the exclusion of otherwise admissible evidence probably affected the verdict. See, e.g., *State* v. *Orr*, 291 Conn. 642, 663, 969 A.2d 750 (2009). Consequently, the majority's claim that a totality of the circumstances approach "would impose an unprecedented distortion on the law of scientific evidence in this state, subjecting expert testimony on eyewitness identifications to an additional tier of review beyond the *Porter* test"; footnote 49 of the majority opinion; is based on a gross misunderstanding of Connecticut law.

To the extent the majority also claims that my suggestion that trial courts should be encouraged to give focused jury instructions in all cases in which the reliability of an eyewitness identification has become an issue is "an implicit acknowledgment that juries always should be presumed to be ignorant of the key scientific facts pertaining to the fallibility of eyewitness identifications . . . that cross-examination and closing argument do not suffice to bring to light," I strongly disagree. Footnote 32 of the majority opinion. Trial courts have discretion to determine, on the basis of the evidence, whether the proffered testimony is within the common knowledge of the jurors and whether to give a focused jury instruction in lieu of expert testimony because a trial judge is a figure of authority and is in a position to give instructions that are neutral, cost-free, avoid the possible confusion "created by dueling experts," and "eliminate the risk of an expert invading the jury's role or opining on an eyewitness' credibility." *State* v. *Henderson*, supra, 208 N.J. 298. The fact that I would encourage focused jury instructions in such cases merely suggests that jury instructions are the best method, but not the only method, for bringing the unreliability of an eyewitness identification to the attention of the jury.

[13] The strong corroborating evidence on which the majority relies was that several witnesses who knew the defendant placed him near the bar shortly before the shooting, another eyewitness previously acquainted with the defendant identified him as the shooter, the gun used in the shooting was used in two other shootings by the defendant a short time later, the defendant fled to New York on the day of the shootings, and the defendant did not deny his involvement in the shooting. The majority also notes that "defense counsel introduced into evidence still photographs taken from a video recording depicting the defendant several hours before the shootings that were entirely consistent with [the eyewitness'] description of [the shooter] as wearing 'a black quilted jacket, possibly North Face.' " Footnote 47 of the majority opinion.