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THE COURT OF APPEALS SHOULD ABANDON THE CORROBORATION RULE GOVERNING THE ADMISSIBILITY OF EXPERT-IDENTIFICATION TESTIMONY

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INTRODUCTION

In New York, an illogical and arbitrary common-law rule of evidence, the corroboration rule, governs the admissibility of expert testimony on the reliability of eyewitness identification. On one hand, the New York Court of Appeals has correctly held that expert testimony regarding the factors that undermine an identification's reliability (the identification's cross-racial nature, for example) can provide "valuable" assistance to a jury.[1] But on the other hand, the Court has repeatedly held that a trial court can bar that expert testimony if it determines that the eyewitness identification is corroborated by "accura[te]" evidence.[2] This is so, the theory goes, because corroboration renders expert-identification testimony less "importan[t]" and renders it "reasonable" for a judge to conclude that the identification was accurate.[3] Even testimony offered by a witness with an obvious motive to lie (for example, a murder accomplice's inculpatory testimony offered in exchange for a highly beneficial plea deal) suffices to bar an identification expert.[4]

As shown below, the corroboration rule impairs the fact-finding process, violating the fundamental rule that jurors, not courts, assess the reliability and weight of the evidence. Under the corroboration approach, courts usurp the jury's power to resolve classic questions of fact: the identification's reliability, the weight of the expert's testimony, and the strength of the so-called corroboration. In every other area of our law, these classic factual questions are reserved for the jury. The corroboration rule is an anomaly.

This Article proposes a change in the law. The Court of Appeals should abandon its corroboration approach and instead hold, as the Connecticut and District of Columbia high courts have held,[5] that the apparent strength of the prosecution's case is irrelevant to the admissibility of expert testimony challenging that case.

At its most fundamental level, the corroboration bar improperly conflates the weight of the expert's testimony with its relevancy.[6] To be sure, evidence corroborating the identification—that is, evidence proving the

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[1] *E.g.*, People v. Young, 7 N.Y.3d 40, 45 (2006).

[2] People v. McCullough, 27 N.Y.3d 1158, 1161-62 (2016); *see also* People v. Santiago, 17 N.Y.3d 661, 668-73 (2011); People v. Abney, 13 N.Y.3d 251, 266-69 (2009); People v. LeGrand, 8 N.Y.3d 449, 456 (2007); *Young*, 7 N.Y.3d at 44-46; People v. Lee, 96 N.Y.2d 157, 163 (2001).

[3] *Young*, 7 N.Y.3d at 46.

[4] *McCullough*, 27 N.Y.3d at 1161-62 (majority opinion), 1169-70 (Rivera, J., dissenting).

[5] *In re* L.C., 92 A.3d 290, 297-99 (D.C. 2014); State v. Guilbert, 49 A.3d 705, 738 & n.44 (Conn. 2012).

[6] *See infra* Section II(a).

defendant committed the offense—may increase the identification's reliability and, in turn, decrease the importance of an expert's counter-testimony. But the identification's accuracy and the apparent importance of the defense expert's testimony are quintessential jury questions that go to the weight, not admissibility, of expert-identification testimony.[7] The corroboration rule similarly ignores that it is the jury's prerogative to determine whether the purported corroboration is accurate and thus reinforces the identification's reliability.[8] Judges cannot make that call.

The anomalous corroboration rule creates serious doctrinal inconsistencies. No other class of experts—and certainly no prosecution experts—are barred because the adversary's case seems strong.[9] The corroboration rule also leads to arbitrary and unpredictable results, requiring courts to determine whether the purported corroboration seems reliable enough to bar expert-identification testimony.[10] As a result, appellate decisions in this arena often look like summation battles, with judges debating, in fine detail, the corroboration's reliability. That battle should be reserved for the jury.

Common law aside, the corroboration rule violates the constitutional right to present a complete defense under *Holmes v. South Carolina*[11] and the Sixth Amendment's guarantee of the right to call witnesses in one's "favor."[12] Like the common law, the Constitution prohibits courts from blocking material defense evidence because a judge finds the government's evidence reliable or strong.

The Court of Appeals should abandon the corroboration rule and instead hold that the testimony of a qualified expert on eyewitness identifications is admissible if it satisfies the traditional standards governing all other classes of expert testimony: (1) it is relevant; (2) its subject matter is beyond a jury's common knowledge; and (3) it is generally accepted as reliable.[13] The existence of corroborative evidence is irrelevant to the admissibility analysis.

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[7] *See infra* Section II(a)-(c).

[8] *See infra* Section II(b).

[9] *See infra* Section II(f).

[10] *See infra* Section II(g).

[11] 547 U.S. 319 (2006) (striking down a rule of evidence that barred the defense from presenting exculpatory evidence on the grounds that the prosecution's case was strong).

[12] U.S. CONST. amend. VI.

[13] *See* People v. Wesley, 83 N.Y.2d 417, 422 (1994) (discussing the *Frye* standards for reliability as applied to DNA expert testimony); People v. Taylor, 75 N.Y.2d 277, 288 (1990) (discussing standards for determining if an expert on rape trauma syndrome will be helpful to the jury); De Long v. Cty. of Erie, 60 N.Y.2d 296, 307 (1983) (discussing when an expert is appropriate); People v. Allweiss, 48 N.Y.2d 40, 50 (1979) (synthesizing a framework for determining whether an expert may testify); MICHAEL M. MARTIN & DANIEL J. CAPRA, NEW YORK EVIDENCE HANDBOOK § 7.2 (3d ed. 2017).

I. AN ERA OF HOSTILITY TO IDENTIFICATION EXPERTS GIVES WAY TO A MISGUIDED CORROBORATION STANDARD

Eyewitness testimony is "overwhelmingly influential."[14] "[T]here 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!'"[15] The sheer number of convictions obtained in cases where a stranger's identification was critical evidence confirms that jurors trust eyewitness identifications.[16] Polling data confirms the same point.[17]

But because memory is unreliable and malleable, eyewitnesses often get it wrong.[18] In the last few decades, state and federal prosecutors have convicted thousands of innocent people. In a significant number of those cases, eyewitness identifications—later discovered to be inaccurate—played a major role at the trial.[19] For instance, of the 300-plus individuals exonerated by DNA evidence since 1989, identifications played a role in at least 69% of those cases.[20]

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[14] Watkins v. Sowders, 449 U.S. 341, 352 n.4 (1981) (Brennan, J., dissenting) (internal quotation marks and citations omitted).

[15] *Id.* at 352.

[16] *See* Alvin G. Goldstein et al., *Frequency of Eyewitness Identification in Criminal Cases: A Survey of Prosecutors*, 27 BULL. PSYCHONOMIC SOC'Y 71, 71 (1989) ("[A]ssuming approximately 2,570,000 arrests in the U.S. each year, about 77,000 individuals are suspects in cases in which the only critical evidence is eyewitness identification."); *see* Bryan Scott Ryan, *Alleviating Own-Race Bias in Cross-Racial Identifications*, 8 WASH. U. JURIS. REV. 115, 120-22, 122 n.30 (2015).

[17] In one survey, 38% of participants responded that the phrase "I never forget a face" applied "very well" to them, while 44% believed the same regarding the phrase "I have an excellent memory." Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177, 207 tbl.3 (2006). Also, 18% of that survey's participants believed that eyewitness identifications were "very reliable," while 15% believed they were "not very reliable" or "unreliable." *Id.* at 207 tbl.4a. When told to assume that the "eyewitness has no motivation to lie" and "genuinely believes" in the accuracy of their identification, 25% of participants said they considered eyewitness testimony to be "very reliable," while only 11% said they were "not very reliable" or "unreliable." *Id.* at 207 tbl.4b.

[18] *E.g.*, Young v. State, 374 P.3d 395, 428 (Alaska 2016) ("[W]hile 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.'") (quoting United States v. Brownlee, 454 F.3d 131, 142 (3d Cir. 2006)); *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://perma.cc/UF55-GQCH (last visited January 15, 2021) (noting that 69% of DNA exonerations involve eyewitness misidentification).

[19] *See* People v. Boone, 30 N.Y.3d 521, 527-28 (2017) (citing INNOCENCE PROJECT, *supra* note 18).

[20] INNOCENCE PROJECT, *supra* note 18.

Scientists have grappled with this problem, isolating numerous factors that bear on the reliability of an eyewitness identification.[21] As the Connecticut Supreme Court has explained, "The extensive and comprehensive scientific research, as reflected in hundreds of peer reviewed studies and meta-analyses, convincingly demonstrates the fallibility of eyewitness identification testimony and pinpoints an array of variables that are most likely to lead to a mistaken identification."[22] For example, studies confirm a weak correlation between an eyewitness's confidence (such as a witness expressing absolute certainty about their identification) and accuracy.[23] And as eyewitnesses who "exude supreme confidence" believe they are right, they "will not display the demeanor of the dishonest or biased witness," thus making it difficult to expose the truth through cross-examination.[24]

Scientists have also established, though simulation studies and statistical analysis, that the following factors diminish an identification's reliability:

- the presence of a weapon (due to the tendency to focus on the weapon instead of the suspect's appearance);
- high stress;
- cross-racial bias (the suspect is a different race than the witness);
- the passage of a brief period of time (as little as a few hours);
- unconscious transference (a person seen in one context is confused with a person seen in another);
- the failure to ensure that the person administering a lineup (or other procedure) is unaware of the suspect's identity (i.e., "double blind");
- the failure to inform the witness that the suspect may or may not be in the lineup and that the witness need not identify someone; and

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[21] Margaret A. Hagen & Sou Hee (Sophie) Yang, *Criminal Defendants Have a Due Process Right to an Expert on Eyewitness Reliability: Why the Court Was Wrong in* Perry v. New Hampshire *(2012)*, 26 S. CAL. INTERDISC. L.J. 47, 130 app. A (2016); *see, e.g.*, People v. LeGrand, 8 N.Y.3d 449, 453-55 (2007); State v. Guilbert, 49 A.3d 705, 721 (Conn. 2012).

[22] *Guilbert*, 49 A.3d at 721 (footnotes omitted).

[23] Schmechel et al., *supra* note 17, at 198; People v. Santiago, 17 N.Y.3d 661, 672 (2011).

[24] *Boone*, 30 N.Y.3d at 531 (quoting State v. Henderson, 27 A.3d 872, 889 (N.J. 2011)).

- contamination through exposure to post-crime information (e.g., a witness reads that the suspect had black hair and incorporates that description into their memory, even if they did not actually observe black hair).[25]

While this scientific research enjoys wide consensus, these findings are "largely unfamiliar to the average person" and actually "counterintuitive."[26] Polling studies have confirmed that people routinely believe, for instance, that an expression of confidence is strongly related to accuracy or that a weapon's presence *increases* identification accuracy.[27] Many jurors similarly don't know that stress or cross-racial distinctions undermine identification accuracy.[28]

Jurors can thus benefit from expert testimony regarding the impact that certain factors have (or don't have) on an identification's accuracy. Since the verdict will have a monumental impact on the accused, simple fairness requires jurors to have access to relevant testimony that will help them assess damaging testimony.[29] But in New York, jurors rarely hear such testimony because whenever the government has some evidence corroborating the identification, the trial court can block an identification expert.

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The Court of Appeals has long held that a qualified expert's testimony is admissible if it is: (1) relevant (as with all evidence); (2) helpful

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[25] *E.g.*, *id.* at 528-29 (cross-racial bias); *Guilbert*, 49 A.3d at 721-23 (stress, weapon focus, cross-racial identification, diminished memory, absence of double-blind procedure, access to post-event or post-identification information about the event or identification, unconscious transference); *Henderson*, 27 A.3d at 904-10 (stress, weapon focus, duration, distance and lighting, cross-racial bias, influence of private actors, speed of identification); John C. Brigham et al., *The Influence of Race on Eyewitness Memory*, *in* 2 HANDBOOK OF EYEWITNESS PSYCHOLOGY 257 (R. C. L. Lindsay et al. eds., 2014) (cross-racial bias); Jonathan M. Fawcett et al., *Looking Down the Barrel of a Gun: What Do We Know About the Weapon Focus Effect?*, 5 J. APPLIED RES. MEMORY & COGNITION 257, 258 (2016) (weapon focus); Saul M. Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, 56 AM. PSYCHOLOGIST 405 (2001) (surveying psychologists about 30 different eyewitness phenomena).

[26] *Guilbert*, 49 A.3d at 723; *id.* at 720 ("[There is] widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror."); *see* Third Circuit Task Force on Eyewitness Identifications, *2019 Report of the United States Court of Appeals for the Third Circuit Task Force on Eyewitness Identifications*, 92 TEMP. L. REV. 1, 23 (2019).

[27] Schmechel et al., *supra* note 17, at 184, 196-97.

[28] *Id.* at 197, 200.

[29] Benn v. United States, 978 A.2d 1257, 1274 (D.C. 2009) ("Expert testimony can therefore be critical in helping to confirm—or undermine—a juror's 'near certitude' of . . . guilt when the prosecution's case is grounded on the identification of eyewitnesses, and in furthering the truth-seeking purpose of a trial.").

to the jury—that is, it would inform the jury of something they "would not ordinarily be expected to know already" (i.e., the helpfulness standard);[30] and (3) generally accepted as reliable by the relevant scientific community (i.e., the *Frye* standard).[31]

Applying these standards, New York courts have, for decades now, ratified expert testimony in hundreds of contexts, finding that such testimony would help clarify a material factual question.[32] Nevertheless, throughout the 1990s, New York appellate courts routinely rejected expert testimony regarding eyewitness identifications, concluding that the subject matter was within a jury's common knowledge.[33] A "position of skepticism and hostility" dominated; "one opinion after another displayed a distinct distaste for such testimony."[34]

But in 2001, the Court of Appeals formally ended the categorical bar to expert-identification testimony in *People v. Lee*.[35] Unfortunately, *Lee* effectively paved the way for New York courts to continue the trend of precluding such testimony under an illogical corroboration rule.[36]

Lee considered whether the trial court had erred in blocking a concededly relevant expert on numerous identification factors, including cross-racial identification, stress, and confidence.[37] Applying the helpfulness standard, the Court held that expert-identification testimony would aid the jury because the subject is beyond the jurors' common knowledge.[38] As the Court explained, jurors are unaware of the "psychological studies regarding the accuracy of an identification."[39] And as the Court confirmed a few years later, factors such as the cross-racial effect, stress, and the relationship between eyewitness confidence and accuracy are "counter-intuitive," or "at least not so obvious or well known that ordinary jurors would not benefit from hearing them."[40]

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[30] People v. Young, 7 N.Y.3d 40, 45 (2006); People v. Taylor, 75 N.Y.2d 277, 288 (1990).

[31] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); *see also* People v. Wesley, 83 N.Y.2d 417, 422-23 (1994), De Long v. Cty. of Erie, 60 N.Y.2d 296, 307 (1983); People v. Allweiss, 48 N.Y.2d 40, 50 (1979).

[32] MARTIN & CAPRA, *supra* note 13, at § 7.2.2.

[33] *E.g.*, People v. Mooney, 76 N.Y.2d 827, 832 (1990) (Kaye, J., dissenting); People v. Gibbs, 550 N.Y.S.2d 400, 400 (App. Div. 1990); People v. Knighton, 560 N.Y.S.2d 514, 516 (App. Div. 1990).

[34] 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 206.5 (8th ed. 2020).

[35] 96 N.Y.2d 157, 160 (2001).

[36] *Id.* at 163.

[37] *Id.* at 161.

[38] *Id.* at 162.

[39] *Id.*; *see also* People v. LeGrand, 8 N.Y.3d 449, 455 (2007).

[40] People v. Young, 7 N.Y.3d 40, 45 (2006).

As for the *Frye*-general-acceptance standard, *Lee* held that expert-identification testimony is not, as a categorical matter, barred by *Frye*.[41] Instead, when novel testimony is at issue, courts must conduct a hearing to determine whether the testimony is generally accepted as reliable (the *Lee* trial court had not done so because it rejected the expert on other grounds).[42]

Having held that the helpfulness and *Frye* standards did not bar the relevant expert testimony, *Lee* should have found the testimony admissible under longstanding common-law rules.[43] Instead, apparently forging a compromise between a categorical bar and the traditional relevancy standard, the Court injected an artificial limitation on identification experts.[44] Under *Lee* and its progeny, a trial court can—unlike with *every* other class of expert testimony—reject an otherwise admissible and relevant identification expert if the judge believes the identification is corroborated by evidence bearing "strong indicia of accuracy."[45] Under this standard, so long as a judge finds that some accurate evidence, beyond the identification, proves the identity element of the offense, the accused cannot challenge the identification with expert testimony.

In applying this corroboration rule, the Court of Appeals has set a low bar, finding that even readily assailable evidence justifies expert preclusion:

- an accomplice-cooperator's testimony against a defendant accused of shooting a man in a barbershop (offered in exchange for a favorable plea deal);[46]
- a robbery defendant's possession of a stolen vehicle months after a gunpoint theft of that vehicle;[47] and

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[41] *Lee*, 96 N.Y.2d at 162-63.

[42] *Id.*

[43] *E.g.*, People v. Taylor, 75 N.Y.2d 277, 287-88 (1990); People v. Allweiss, 48 N.Y.2d 40, 50 (1979).

[44] Unfortunately, a few other state supreme courts have similarly chosen a middle ground between a relevancy standard and a categorical bar, i.e., a corroboration rule. *See* People v. McDonald, 690 P.2d 709, 727 (Cal. 1984) (en banc); Johnson v. State, 526 S.E.2d 549, 552-53 (Ga. 2000); State v. DuBray, 77 P.3d 247, 255 (Mont. 2003). These decisions adopt a corroboration rule without explaining why the law of evidence permits it.

[45] People v. Santiago, 17 N.Y.3d 661, 671 (2011); *see also* People v. McCullough, 27 N.Y.3d 1158, 1168 (2016); People v. Abney, 13 N.Y.3d 251, 266-68 (2009); People v. LeGrand, 8 N.Y.3d 449, 456 (2007) ("The trial court should weigh defendant's request to admit expert testimony against factors 'such as the centrality of the identification issue and the existence of corroborating evidence.'") (quoting *Lee*, 96 N.Y.2d at 163); *Young*, 7 N.Y.3d at 45-46.

[46] *McCullough*, 27 N.Y.3d at 1163 (Rivera, J., dissenting).

[47] *Lee*, 96 N.Y.2d at 160-61.

- testimony that a robbery defendant gave the stolen property to two acquaintances days after the robbery.[48]

These cases are just a sample of the dozens of appellate decisions affirming the denial of an expert on corroboration grounds.[49]

The Court of Appeals has attempted to justify its corroboration rule with a few sentences of conclusory analysis.[50] *Lee*, which introduced the rule, stated that corroboration is a "relevant factor" without explaining why.[51] The Court later reinforced the corroboration rule in *Young*, where the complainant identified the defendant even though the suspect had obscured his face with a scarf (revealing only his eyes, forehead, and part of his nose).[52] *Young* recognized that the proffered expert testimony regarding eyewitness confidence and cross-racial identification "[c]ertainly . . . could have been valuable to a juror."[53] The Court even held that the proffered testimony was "counter-intuitive," so the jury would benefit from hearing it.[54] Nevertheless, the trial court had the discretion to bar this helpful testimony because the identification was corroborated: the defendant's acquaintances testified that a month after the robbery, he gave them binoculars and gloves, the same property taken from a car parked outside the robbery location.[55] This corroborative evidence, the Court held, justified expert preclusion for three related reasons: (1) it rendered it "reasonable" for the "trial court to conclude" that the "identification was quite unlikely to be mistaken"; (2) it "significantly diminishe[d]" the expert testimony's "importance"; and (3) it rendered the expert testimony an "unnecessary distraction."[56] The Court did not attempt to explain why a court can usurp the jury's fact-finding role by (1) *crediting* the corroboration (before the

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[48] *Young*, 7 N.Y.3d at 46.

[49] *E.g.*, People v. Saunders, 111 N.Y.S.3d 445, 452 (App. Div. 2019) (holding that the voice identification of a masked perpetrator was corroborated by the perpetrator's "threatening Facebook message" to the victim's sister and blood-stained money in his possession); People v. Smith, 869 N.Y.S.2d 88, 89 (App. Div. 2008) (finding "consciousness-of-guilt evidence and partially incriminating statements to the police" were sufficient to corroborate defendant's guilt); *see also* People v. Granger, 997 N.Y.S.2d 466 (App. Div. 2014); People v. Page, 964 N.Y.S.2d 339 (App. Div. 2013); People v. Rodriguez, 949 N.Y.S.2d 441 (App. Div. 2012); People v. Munnerlyn, 937 N.Y.S.2d 858 (App. Div. 2012); People v. Perez, 925 N.Y.S.2d 501 (App. Div. 2011); People v. Fernandez, 910 N.Y.S.2d 140 (App. Div. 2010).

[50] *McCullough*, 27 N.Y.3d at 1161-62; People v. Oddone, 22 N.Y.3d 369, 379-80 (2013); *Young*, 7 N.Y.3d at 46; *Lee*, 96 N.Y.2d at 163.

[51] *Lee*, 96 N.Y.2d at 163.

[52] *Young*, 7 N.Y.3d at 46 (Smith, J., dissenting).

[53] *Id.* at 45 (majority opinion).

[54] *Id.*

[55] *Id.* at 43, 45.

[56] *Id.* at 46.

jury does so) and then (2) assessing whether this credited evidence renders the identification accurate and expert testimony "[un]importan[t]."[57] Nor did the Court explain why a testimony's apparent "importance"—not its *relevancy*—controls.

In *People v. Oddone*, the Court of Appeals offered new and internally inconsistent justifications for its corroboration rule.[58] In dicta, the Court stated that expert-identification testimony is "collateral" because it "advis[es] the jury on how to evaluate the testimony of fact witnesses."[59] Two sentences later, the Court explicitly recognized that judges do not "normally exclude relevant evidence merely because the case against the defendant is strong."[60] Nevertheless, the Court explained that New York trial courts can do just that: "[T]he overall strength of the [government's] case is important [to the analysis] because where the eyewitness testimony is not crucial, expert testimony about the collateral issue of eyewitness reliability can be a harmful distraction."[61]

Three years later in *People v. McCullough*,[62] the Court again tinkered with the corroboration rule's underlying doctrinal justification. *McCullough* involved a robbery and murder in a barbershop. The government alleged that after McCullough and two co-defendants entered the barbershop, McCullough tried to lock the door.[63] The group then ordered the eyewitness and the murder victim to drop to the ground, demanded money and drugs, and struck them with pistols.[64] After they took $200 from the murder victim, one man (not McCullough) purportedly shot the victim, killing him.[65] The co-defendants and the shooter fled, but the shooter returned and placed a gun over the eyewitness's head, producing a clicking sound (no shots were fired).[66] After that, the group purportedly entered a car and drove off.[67]

The accomplice getaway driver testified against McCullough at trial. He claimed that he dropped McCullough and the co-defendants off by the barbershop before the shooting, drove off with them moments later, and later saw the group with guns and money.[68] The accomplice initially

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[57] *Id.*
[58] 22 N.Y.3d 369 (2013).
[59] *Id.* at 379.
[60] *Id.*
[61] *Id.*
[62] 27 N.Y.3d 1158 (2016).
[63] *Id.* at 1159-60.
[64] *Id.* at 1164 (Rivera, J., dissenting).
[65] *Id.*
[66] *Id.*
[67] *Id.* at 1160 (majority opinion).
[68] *Id.* at 1163 (Rivera, J., dissenting).

failed to select McCullough from a photo array a month after the crimes.[69] But, indicted for murder and facing a sentence of at least 25 years to life, the accomplice later changed his tune, testifying against McCullough in exchange for a robbery plea and a 10-year-flat sentence.[70] Also at trial, the eyewitness, a stranger to McCullough, identified McCullough as "the last man to enter the barbershop."[71]

The trial court blocked an identification expert because it found that the eyewitness's identification was corroborated by the accomplice's testimony.[72] McCullough was convicted of murder and sentenced to 25 years to life in prison.

In a 4-3 decision, the Court of Appeals affirmed the trial court's decision.[73] The Court held that corroboration is one of the "factors for trial courts to consider in determining whether expert testimony on eye-witness identification 'would aid a lay jury in reaching a verdict.'"[74] In doing so, the Court introduced a new theory: The helpfulness analysis, which governs all expert testimony, does not merely consider whether the expert will assist the jury by teaching it something it may not already know.[75] Instead, it also considers the strength of the adversary's evidence. *McCullough* did not cite a single case adopting that theory.

McCullough then held, in conclusory fashion, that given the accomplice's testimony, the "trial court was entitled to reject the expert testimony after balancing the probative value of the evidence against its prejudicial or otherwise harmful effects."[76] Again, the Court did not explain how the trial court had "balanced" anything; indeed, the trial court had barred the expert solely on corroboration grounds and did no balancing at all.[77]

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Ultimately, *Lee* and its progeny hold that a court can bar expert-identification testimony if the identification is not the *only* evidence against the accused. The theory is that corroboration enhances the eyewitness

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[69] *Id.* at 1169.

[70] *Id.* at 1165.

[71] *Id.* at 1164.

[72] *Id.* at 1160 n.* (majority opinion) ("The expert was expected to testify as to how the level of violence, the length of the incident and the presence of a weapon could influence an eyewitness's ability to make an identification.").

[73] *Id.* at 1161-62.

[74] *Id.* at 1161 (quoting People v. Lee, 96 N.Y.2d 157, 162 (2001)).

[75] *See, e.g.*, People v. Young, 7 N.Y.3d 40, 45 (2006).

[76] *McCullough*, 27 N.Y.3d at 1161.

[77] *Id.*

identification's reliability and diminishes the importance of any expert testimony challenging that identification.[78]

As established below, this line of cases asks the wrong questions, ignores settled common-law doctrine, usurps the jury's fact-finding function, and violates the Constitution. The Court of Appeals should abandon its judge-made corroboration approach.

II. THE COMMON-LAW CORROBORATION RULE SHOULD BE DISCARDED

A. The corroboration rule ignores the relevancy standard.

It is longstanding public policy that jurors should have access to all the relevant evidence so they can best determine the truth.[79] The Court of Appeals has thus repeatedly "reaffirmed the well-established rules that evidence is relevant if it has any tendency in reason to prove any material fact and that all relevant evidence is admissible at trial unless admission violates some exclusionary rule."[80] Questions regarding the weight, importance, and reliability of the evidence are reserved for the jury.[81]

The corroboration rule ignores the relevancy standard. Instead of simply assessing whether expert testimony is relevant to the identification's reliability, the corroboration rule additionally requires a court to consider whether, given the purported corroboration, the identification is "unlikely to be mistaken," thus diminishing the importance of responsive expert testimony.[82] But no common-law doctrine authorizes a trial court to preclude relevant defense testimony on corroboration grounds.[83] The governing inquiry is relevancy, not "importance," and certainly not importance given the adversary's evidence. As the Connecticut Supreme Court held in rejecting a corroboration rule, "the law of evidence does not

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[78] People v. Oddone, 22 N.Y.3d 369, 379 (2013); *Young*, 7 N.Y.3d at 46; *Lee*, 96 N.Y.2d at 163.

[79] People v. Buie, 86 N.Y.2d 501, 509 (1995); Sackler v. Sackler, 15 N.Y.2d 40, 44 (1964).

[80] People v. Alvino, 71 N.Y.2d 233, 241 (1987); *see also* People v. Scarola, 71 N.Y.2d 769, 777 (1988).

[81] *E.g.*, Perry v. New Hampshire, 565 U.S. 228, 245 (2012) ("[T]he jury, not the judge, traditionally determines the reliability of evidence."); People v. Marte, 12 N.Y.3d 583, 589 (2009) ("[O]ur system relies on juries to assess the reliability of eyewitnesses, aided by cross-examination, by the arguments of counsel, and by whatever other evidence supports or contradicts the witnesses' testimony."); People v. Drake, 7 N.Y.3d 28, 34 (2006); People v. Batashure, 75 N.Y.2d 306, 309 (1990) ("[T]he quality and weight of the proof [are] reserved for the trier of fact."); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . .").

[82] *Young*, 7 N.Y.3d at 46.

[83] *In re* L.C., 92 A.3d 290, 297-99 (D.C. 2014).

grant trial courts the liberty to decide what evidence is admissible based, either in whole or in part, on the strength of the [adversary's] case."[84] Evidence corroborating the identification undermines the weight, not admissibility, of expert-identification testimony.[85]

Even worse, the corroboration rule is grounded in the theory that a judge can block the defense from challenging a government eyewitness because corroboration renders that eyewitness reliable. The corroboration rule thus usurps the jury's power to determine the identification's accuracy—a quintessential jury question.[86]

If taken seriously, the corroboration approach would fundamentally change New York evidence law. After all, barring a relevant identification expert because the eyewitness seems reliable given corroboration is no different than barring cross-examination of the eyewitness on the same grounds (for example, cross-examination regarding eyesight or a prior perjury conviction). In the cross-examination context, the theory would be the same: The government's evidence proves the eyewitness is reliable, so the cross-examination is a "harmful distraction."[87] But that is not how a criminal trial works. No court has ever suggested (outside the identification-expert context) that a judge can canvass the evidence, deem the government's evidence reliable, and then bootstrap that reliability determination into a defense-witness-preclusion order. The Court of Appeals even recognized that point in *Oddone*, stating that judges "do not normally exclude relevant evidence merely because the case against the defendant is strong."[88] But *Oddone* ignored that basic rule when it confirmed that courts can block expert testimony for that exact reason.[89]

Of course, a jury might ultimately find the eyewitness reliable or the identification-expert testimony insignificant because the identification is corroborated. But a judge lacks the authority to usurp the jury's prerogative to make those calls.

In pinning admissibility to the apparent strength of the government's case, the corroboration rule confuses harmless error, a standard that only

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[84] State v. Guilbert, 49 A.3d 705, 738 n.44 (Conn. 2012); *accord In re L.C.*, 92 A.3d at 297 ("[C]orroborative evidence [is] irrelevant to the question of the admissibility of appellant's proffered expert testimony . . . .").

[85] *See e.g.*, *In re L.C.*, 92 A.3d at 298-99; *see generally Batashure*, 75 N.Y.2d at 309 (finding that questions regarding the weight of evidence are reserved for the jury).

[86] *See e.g.*, *Marte*, 12 N.Y.3d at 589; *Drake*, 7 N.Y.3d at 34.

[87] People v. Oddone, 22 N.Y.3d 369, 379 (2013).

[88] *Id.*

[89] *Id.* at 379-80.

governs appeals, with trial-level admissibility.[90] If the trial court erroneously precludes an identification expert, the government can defend the conviction by showing harmless error, that is, its non-identification evidence was "overwhelming" and there was no reasonable possibility that the expert preclusion impacted the verdict.[91] The corroboration standard poses an identical question: Given the non-identification evidence in the case, would the identification expert likely be important to the jury?[92] But appellate courts apply harmless error *after* the jury has convicted the defendant. No one has ever argued that harmless-error analysis governs the admissibility of evidence at the trial level.

B. The corroboration rule usurps the jury's prerogative to determine whether the purported corroboration should be credited in the first place.

Beyond ignoring that the weight of both the expert testimony and the identification are classic jury questions, the corroboration rule ignores that the reliability of the purported corroboration itself is a quintessential jury question. To block defense evidence on corroboration grounds, a judge must necessarily credit the purported corroboration. But in our system, a jury, not a judge, decides whether the government's proof should be credited.[93] And the jury makes that call *after* hearing all the evidence.

The corroboration rule thus distorts the fact-finding process. After all, a jury may reject the purported corroborative evidence or testimony, thus rendering the eyewitness identification dispositive of the defendant's fate. For instance, the *McCullough* jury may have easily found the accomplice's testimony placing the defendant at the homicide scene—offered in exchange for a beneficial plea bargain[94]—incredible. And if the jury had done that, the only remaining evidence was a stranger's identification. If the deliberations proceeded in that plausible manner, the defendant would have had a compelling need for expert-identification testimony. But under

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[90] *See, e.g.*, *In re L.C.*, 92 A.3d at 299 (discussing how a corroboration rule conflates harmless error analysis with admissibility analysis); Schmechel et al., *supra* note 17, at 190 ("Harmless error review by appellate courts can effectively ensure that convictions will survive in those rare cases where any expert testimony would truly have been unimportant to the jury's verdict. This appears to be the intent of some trial and appellate courts when applying a corroboration rationale to exclude experts in cases where the evidence is in fact overwhelming; the courts are effectively saying that any exclusion of the expert testimony is harmless because there was so much independent evidence supporting the guilt of the defendant.").

[91] *E.g.*, People v. Crimmins, 36 N.Y.2d 230, 240-41 (1975).

[92] *See* People v. Young, 7 N.Y.3d 40, 46 (2006).

[93] *E.g.*, Holmes v. South Carolina, 547 U.S. 319, 330 (2006).

[94] People v. McCullough, 27 N.Y.3d 1158, 1165 (2016) (Rivera, J., dissenting).

the corroboration rule, Mr. McCullough was out of luck because a judge decided that the accomplice's testimony seemed accurate.

The corroboration rule also ignores that evidence can reinforce other evidence—that is, a jury could find the purported corroboration (e.g., an accomplice-cooperator's testimony) more reliable because of the identification. In *McCullough*, for instance, the jury could have placed more weight on the accomplice's corroborative testimony because an eyewitness identified McCullough. But expert-identification testimony may have caused the jury to doubt the identification and, in turn, the accomplice's testimony too. Thus, by blocking an identification expert, a court artificially enhances the corroboration's probative value, increasing the likelihood that the jury will credit it and convict.

The better approach is to stop tinkering with the jury's deliberations and allow it to hear relevant expert testimony, as the Appellate Division did in *People v. Evans*, a false-confession expert case. *Evans* rejected the government's claim that the trial court's preclusion of a false-confession expert was permissible "in light of the overwhelming evidence corroborating the confession."[95] *Evans* held that courts cannot "ponder" a confession's veracity by "comparing the details given in the confession with the details contained in the witnesses' testimony."[96] Instead, that issue is for the jury, which can "consider the details of [a] confession, along with the details described by the witnesses and decide whether the People met their burden."[97] *Evans* is right. Because jurors—not judges—determine the strength of the government's evidence, judges cannot pin the admissibility of defense evidence to their assessment of the government's case.

The *Evans* dissent claimed that a corroboration rule was necessary to prevent the "floodgates" from opening up.[98] This may very well be the central argument of those who support the corroboration rule: without it, the accused can introduce expert testimony whenever the government introduces a stranger's identification into evidence. This argument reflects a pernicious trend in our law: The government routinely seeks to nullify an individual right with the "audacious" counter that—even if a "*substantive* analysis of law" mandates that right—courts should reject it because individuals will assert the right too often.[99] Although rarely openly described as such, this floodgates argument is (at least at face value) a cash

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[95] People v. Evans, 32 N.Y.S.3d 119, 121-124 (App. Div. 2016).

[96] *Id.* at 123.

[97] *Id.*

[98] *Id.* at 133 (Tom, J.P., dissenting) (arguing that if a corroboration rule does not govern the admissibility of false-confession-expert testimony, the "floodgates" "would open up").

[99] *See* Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1052-53, 1077 (2013) (emphasis added) (citation omitted); *see also* Hudson v. McMillian, 503 U.S. 1, 15 (1992) (Blackmun, J., concurring); *accord* Crooker v. TSA, 323 F. Supp. 3d 148, 157 (D.

argument, rooted in the belief that we should limit rights because they cost too much. Our courts are flooded with these floodgates arguments.[100]

Besides being a convenient cover for limiting individual liberty,[101] this floodgates argument has no principled foundation, especially here.[102] No legal principle allows a court to block the defense from challenging a government witness because the government has opted to use that class of witnesses (here, eyewitnesses) in many cases. Individual rights trump whatever money or time we gain by blocking expert testimony in the few cases where defendants bypass a coercive plea regime and demand a trial. A too-many-defense-witnesses problem pales in comparison to the more

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Mass. 2018) ("The floodgates argument is frequently raised with but vague meaning and few facts to support its sometimes-shaky foundations.").

[100] *E.g.*, Levy, *supra* note 99, at 1022 (explaining that floodgates arguments are frequently advanced in our courts).

[101] Blackstone recognized the obvious point that it is easier to limit rights by relying on pretexts, such as floodgates concerns, instead of openly challenging rights themselves. United States v. Haymond, 139 S. Ct. 2369, 2384 (2019) (plurality opinion) ("In what now seems a prescient passage, Blackstone warned that the true threat to trial by jury would come less from 'open attacks,' which 'none will be so hardy as to make,' as from subtle 'machinations, which may sap and undermine i[t] by introducing new and arbitrary methods.'") (alteration in original) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 298, 343 (1769)). Judges and scholars have recognized that point in the "floodgates" context, observing that the floodgates argument can serve as a pretext to limit rights. *E.g.*, Levy, *supra* note 99, at 1074 ("[Supreme Court] justices often invoke floodgates arguments without much support for why they believe a large number of cases will come . . . . Of course, it can be easy to hide one's claims behind this kind of hyperbole—and there is reason to suspect that parties and justices have invoked this language at times precisely because, in the words of Justice Powell, a 'floodgates' argument can be easy to make and difficult to rebut.'") (quoting Rummel v. Estelle, 445 U.S. 263, 304 (1980) (Powell, J., dissenting)); Tim Bain, *The Wrong Tort in the Right Place: Avenues for the Development of Civil Privacy Protections in New Zealand*, 22 CANTERBURY L. REV. 297, 304 (2016) (referring to the floodgates argument as "that ubiquitous excuse for judicial conservativism"); Toby J. Stern, *Federal Judges and Fearing the "Floodgates of Litigation,"* 6 U. PA. J. CONST. L. 377, 412 (2003).

[102] *See Haymond*, 139 S. Ct. at 2384; *see also* People v. Tiger, 32 N.Y.3d 91, 118 (2018) (Wilson, J., dissenting) ("'[C]onservation of judicial resources' does not appear alongside 'life, liberty and the pursuit of happiness.'"); Davis v. Passman, 442 U.S. 228, 248 (1979) ("Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.") (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 411 (1971) (Harlan, J., concurring)); Tobin v. Grossman, 24 N.Y.2d 609, 615-16 (1969) ("[P]roliferation of claims" does not justify a refusal to change the law; although "extra litigation" may result from the change, that is "no reason for a court to eschew a measure of its jurisdiction.") (internal quotation marks omitted); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 56 (5th ed. 1984) ("It is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation.'").

fundamental problem of too many innocent defendants sitting in prison due to mistaken identifications.

Ultimately, the fact that courts are currently precluding many defendants from introducing valuable and material evidence in many cases is a reason to *change* the law, not to maintain the status quo.[103] Any fear of too many defense witnesses seems to be grounded in a fear of "too much justice."[104]

C. The Court of Appeals's vague theory that an identification expert is "collateral" also fails to justify the corroboration rule.

In *Oddone*, the Court suggested, for the first time, that expert testimony is "collateral" because it "advis[es] the jury on how to evaluate the testimony of fact witnesses."[105] This argument fails for a few reasons.

By claiming that this class of expert testimony is collateral, *Oddone* was ultimately suggesting that, although relevant, expert-identification testimony generally has remote relevance.[106] But this vague, "collateral" point has nothing to do with corroborative evidence. Even if the government's case rests entirely on identification testimony, expert testimony is still, under *Oddone*'s theory, collateral because it helps the jury evaluate other testimony.

More importantly, expert-identification testimony cannot be styled "collateral" under the theory that it has some remote connection to the

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[103] *See* Dillon v. Legg, 441 P.2d 912, 917 n.3 (Cal. 1968) (en banc) ("To the extent that this argument shades into the contention that such claims should be denied because otherwise courts would experience a 'flood of litigation,' we point out that courts are responsible for dealing with cases on their merits, whether there be few suits or many; the existence of a multitude of claims merely shows society's pressing need for legal redress."); *Tobin*, 24 N.Y.2d at 615-16; W. PAGE KEETON ET AL., *supra* note 102.

[104] McCleskey v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting); *see also* Schmechel, et al., *supra* note 17, at 190 ("Ending reliance on corroborating evidence will admittedly lead to the admission of expert testimony in many more cases. But this is a natural product of the adversarial system in which juries and not judges should resolve disputed questions about the reliability of a piece of government proof. Courts need not fear that such a regime would necessarily invalidate convictions in cases where judges erroneously exclude expert testimony. Harmless error review by appellate courts can effectively ensure that convictions will survive in those rare cases where any expert testimony would truly have been unimportant to the jury's verdict.").

[105] People v. Oddone, 22 N.Y.3d 369, 379 (2013).

[106] *Id.* ("On the other hand, applications to admit evidence of this kind—in essence, testimony by an expert witness advising the jury on how to evaluate the testimony of fact witnesses—must be approached with caution. Such testimony is collateral to the main issues in the case, and we have warned that the exploration of collateral issues tends 'to obscure the main issue in the minds of the jury, to lead them away from the principal matters which require their attention and to protract trials to an unreasonable extent without any corresponding advantage to any one concerned.'") (quoting People v. Harris, 209 N.Y. 70, 82 (1913)).

case. An identification expert squarely undermines testimony (an eyewitness identification) that is often essential to the government's case, as it was in every case discussed above where the Court of Appeals applied the bar. It is hard to see how informative testimony that undermines dispositive prosecution testimony can somehow be labelled "collateral."

And of course, if expert testimony were collateral because it helps the jury "evaluate the testimony of fact witnesses,"[107] large swaths of expert testimony could be precluded on that tenuous ground. For instance, expert testimony that the complainant's behavior is consistent with rape trauma or child abuse—commonly introduced by the government—would be collateral and thus subject to a corroboration rule.[108] But none of this testimony is subject to a corroboration rule. *Oddone*'s analysis ignores that helping the jury evaluate the facts is not some kind of inferior expert role. Instead, it is an expert's core function.

D. Corroboration is irrelevant to the helpfulness standard governing all experts.

Still searching for a doctrinal justification for the corroboration approach the Court of Appeals created 15 years earlier, the *McCullough* Court (in 2016) tried to shoehorn the corroboration factor into the broader question of "whether expert testimony on eye-witness identification 'would aid a lay jury in reaching a verdict.'"[109] This effort fails too.

Although *McCullough* cited *Lee* for this new justification, *Lee* held no such thing. *Lee* correctly held that the expert testimony's subject matter must "aid the jury"—that is, it must convey information beyond a lay person's common knowledge.[110] That holding is consistent with longstanding case law, which in assessing the helpfulness standard, has considered whether the testimony was beyond the "ken of the typical juror,"[111] not whether it would assist the jury in light of the strength of the

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[107] *Id.*

[108] People v. Carroll, 95 N.Y.2d 375, 387 (2000) ("We have long held that expert testimony regarding rape trauma syndrome, abused child syndrome or similar conditions may be admitted to explain behavior of a victim that might appear unusual or that jurors may not be expected to understand.").

[109] People v. McCullough, 27 N.Y.3d 1158, 1161 (quoting People v. Lee, 96 N.Y.2d 157, 162 (2001)).

[110] *Lee*, 96 N.Y.2d at 162 ("Despite the fact that jurors may be familiar from their own experience with factors relevant to the reliability of eyewitness observation and identification, it cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror.").

[111] *E.g.*, People v. Rivers, 18 N.Y.3d 222, 228 (2011) (quoting De Long v. Cty of Erie, 60 N.Y.2d 296, 307 (1983)); People v. Young, 7 N.Y.3d 40, 45 (2006) ("As we made clear in *Lee*, a court's exercise of discretion in a case like this depends in large part on whether the 'specialized knowledge' of the expert can give jurors more perspective than they get from

adversary's case. "The fact that the identification was corroborated is irrelevant to the pertinent [helpfulness] question, which is whether the scientific *subject matter* of [the expert's] testimony was beyond the ken of the average layperson."[112]

E. The corroboration rule is onerous.

The corroboration rule is a harsh bludgeon that "unfairly restrict[s] the defendant's opportunity to mount a defense."[113] Under the rule, a defendant cannot present expert-identification testimony unless the government's case consists of nothing but an identification. Even a witness with an obvious motive to lie, like the cooperator in *McCullough* (who received a significant sentence reduction in exchange for his testimony), satisfies the corroboration rule.[114] "If expert testimony was not allowed in [*McCullough*], one can hardly imagine an occasion where corroborating evidence is more unreliable such that the expert testimony would be held admissible."[115] Ultimately, because the government will rarely rely exclusively on an identification, defendants will rarely overcome this harsh barrier.

Even the appellate harmless error standard—mistakenly converted by the Court of Appeals into a free-standing rule of admissibility in this context—is not so harsh. To show harmless error, the government must prove *overwhelming* evidence.[116] But the corroboration standard merely requires *any* evidence which, if credited, corroborates guilt.[117] For instance, a robbery defendant's possession of the stolen property months

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'their day-to-day experience, their common observation and their knowledge.' In other words, could the expert tell the jury something significant that jurors would not ordinarily be expected to know already?") (citations omitted); People v. Cronin, 60 N.Y.2d 430, 433 (1983) ("It is for the trial court in the first instance to determine when jurors are able to draw conclusions from the evidence based on their day-to-day experience, their common observation and their knowledge, and when they would be benefited by the specialized knowledge of an expert witness.").

[112] Patterson v. United States, 37 A.3d 230, 250 n.30 (D.C. 2012) (Glickman, J., concurring) (emphasis added), *concurring opinion subsequently withdrawn*, 56 A.3d 1152 (D.C. 2012); *see also In re* L.C., 92 A.3d 290, 298-99 (D.C. 2014) ("[T]he criterion of helpfulness is not a grant of authority to the trial judge to exclude relevant and otherwise admissible expert testimony merely because it is against the expected weight of the evidence.").

[113] State v. Guilbert, 49 A.3d 705, 738 (Conn. 2012).

[114] *McCullough*, 27 N.Y.3d at 1161, 1165-66 (2016) (holding that an accomplice cooperator's testimony was sufficient corroboration where accomplice was facing 25 years to life on a murder charge and testified against the defendant in exchange for a 10-year sentence on a robbery conviction); Karianne M. Polimeni, *New York on Eyewitness Identifications: Progressive or Regressive?*, 68 SYRACUSE L. REV. 635, 660 (2018).

[115] Polimeni, *supra* note 114, at 660.

[116] People v. Crimmins, 36 N.Y.2d 230, 241 (1975).

[117] People v. Lee, 96 N.Y.2d 157, 162-63 (2001).

after the robbery satisfies the corroboration standard.[118] While that inconclusive evidence would not justify affirmance on harmless error grounds,[119] it nevertheless justifies blocking the expert from testifying at the trial level.

The Court's approach to balancing prejudice and probative value in this area also unfairly stacks the deck against defendants. *McCullough* held that a court must determine whether the expert testimony's potential for prejudice substantially outweighs its probative value.[120] But the Court has taken one single factor (corroboration) and placed it on *both* sides of the scales. Under *Lee* and its progeny, expert testimony (1) has minimal probative value because the identification is corroborated *and* (2) is purportedly prejudicial (i.e., a "distraction") for *exactly* the same reason.[121] This double dipping ensures that any judge interested in blocking this testimony can do so with ease and then immunize the decision from appellate review under an abuse-of-discretion standard. As a result, the longstanding categorical bar of expert-identification testimony (formally rejected by *Lee*),[122] can live on under the guise of discretionary balancing.

F. The corroboration rule is an anomaly.

In no other area of New York law does a court assess the admissibility of evidence by analyzing the strength of the adversary's case. The rule is an anomaly.

Even worse, this anomalous rule only targets defense experts. No court has ever suggested, let alone held, that a court can block a government expert because the defense theory is corroborated. For example, courts have not barred the government from presenting expert testimony on child abuse accommodation syndrome,[123] rape trauma syndrome,[124] or drug-dealing practices[125] because the defense's counter-theory is corroborated by significant evidence. The arbitrary corroboration jurisprudence is thus a one-way ratchet that favors only the government. As Professor

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[118] *Id.* at 161-63.

[119] *Crimmins*, 36 N.Y.2d at 240-41.

[120] People v. McCullough, 27 N.Y.3d 1158, 1161 (2016).

[121] People v. Young, 7 N.Y.3d 40, 46 (2006); *see McCullough*, 27 N.Y.3d at 1161; People v. Oddone, 22 N.Y.3d 369, 379 (2013).

[122] *Lee*, 96 N.Y.2d at 162-63.

[123] *See* People v. Spicola, 16 N.Y.3d 441, 465 (2011) (permitting expert testimony that certain behaviors by a child are consistent with sexual abuse).

[124] *See* People v. Taylor, 75 N.Y.2d 277, 292 (1990) (admitting expert testimony regarding rape trauma syndrome because it can "assist jurors in reaching a verdict by dispelling common misperceptions about rape.").

[125] *See* People v. Hicks, 2 N.Y.3d 750, 751 (2004) (citing People v. Brown, 97 N.Y.2d 500, 505 (2002)) (holding that an expert can testify about factors consistent with narcotics sales, such as the packaging and quantity of drugs).

Risinger has explained, the judiciary's willingness to permit the government to educate the jury regarding certain behaviors (e.g., rape trauma syndrome and drug-dealing practices) while barring similar defense efforts reflects an anti-defense bias.[126] "Something is wrong with this picture."[127]

As the Court of Appeals has confirmed, "one of the essential ingredients of due process of law is reciprocity."[128] Thus, the government cannot adopt rules that benefit the government while depriving the accused of those same benefits.[129] *Lee* and its progeny ignore that core principle.

G. The corroboration rule produces arbitrary results.

The corroboration rule is inherently subjective, requiring judges, like jurors, to assess the totality of the government's case. Predictably, this subjective standard produces arbitrary results as judges cannot employ it consistently. As one article aptly put it, the corroboration approach "clearly places too much discretion in the hands of the judge, so much so that [it] is not a protection at all, but rather a gamble."[130]

Again, *McCullough*, the barbershop murder case, best demonstrates the point.[131] There, the only evidence corroborating the stranger's identification was the accomplice-cooperator's testimony that he dropped McCullough off at the barbershop and drove him away after the shooting. Before trial, McCullough proffered expert testimony regarding numerous identification factors, such as weapon focus.[132] The trial court blocked the expert because the accomplice-cooperator's testimony was "sufficient corroboration."[133] Mr. McCullough was convicted.

Three Appellate Division justices then found the corroboration insufficient because the accomplice was a "liar" who only identified Mr. McCullough after he was promised a beneficial plea bargain.[134] Further, the accomplice "had never met defendant prior to the robbery," "remained

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[126] D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 131-32 (2000).

[127] *Id.* at 135.

[128] People v. Scarola, 71 N.Y.2d 769, 776 (1988) (citing Wardius v. Oregon, 412 U.S. 470, 472 (1973)).

[129] *Wardius*, 412 U.S. at 470-75 (holding that due process barred the State from forcing the defendant to provide discovery while depriving the defendant of reciprocal discovery rights since "discovery must be a two-way street").

[130] Polimeni, *supra* note 114, at 660.

[131] People v. McCullough, 27 N.Y.3d 1158 (2016).

[132] *Id.* at 1160 n.*.

[133] *Id.* at 1160.

[134] People v. McCullough, 5 N.Y.S.3d 665, 668 (App. Div. 2015).

in the vehicle during the robbery," and had a limited opportunity to observe the shooter.[135]

The Appellate Division dissenters had a different view, finding the accomplice's testimony "reliable" because it was "very detailed."[136] The dissent concluded that the accomplice's testimony "harmonized with the eyewitness's testimony in such a manner as to furnish the necessary" corroboration.[137]

In the Court of Appeals, a four-judge majority found that the trial court correctly blocked the expert on corroboration grounds.[138] The majority found that given the corroboration, "the trial court was entitled to reject the expert testimony after balancing the probative value of the evidence against its prejudicial or otherwise harmful effects."[139]

In dissent, Judge Rivera (joined by two other judges) concluded that the accomplice's testimony "lack[ed] 'the strong indicia' necessary to sufficiently corroborate" the identification.[140] The dissent did not trust the accomplice because he initially implicated others in the offense without mentioning McCullough.[141] While the accomplice claimed he did not initially reference McCullough because "he did not know everything about what happened," the dissent found that excuse "unbelievable given [the accomplice's] role as the getaway driver."[142] But even if this "was a tenable excuse, it would not outweigh the other circumstances pointing to his unreliability."[143]

McCullough proves just how arbitrary the corroboration rule is. The flawed rule requires judges to participate in what ultimately amounts to a subjective summation battle regarding the apparent strength of the government's case.

The dissent in *McCullough*, however, is perhaps just as flawed as the majority's opinion because it reinforces the mistaken belief that judges have the right to pin the admissibility of defense evidence to their opinion about the strength of the government's case. Indeed, even if judges could gauge corroboration with some level of consistency, that would not matter. The core vice of the corroboration rule is not unworkability, but rather its violation of the basic rule that "the law of evidence does not grant trial

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[135] *Id.*

[136] *Id.* at 1456 (Scudder, J.P. & Lindley, J., dissenting).

[137] *Id.* at 1458 (internal quotation marks omitted).

[138] *McCullough*, 27 N.Y.3d at 1161.

[139] *Id.*

[140] *Id.* at 1171 (Rivera, J., dissenting) (quoting People v. Santiago, 17 N.Y.3d 661, 671 (2011)).

[141] *Id.* at 1170.

[142] *Id.*

[143] *Id.*

courts the liberty to decide what evidence is admissible based, either in whole or in part, on the strength of the [adversary's] case."[144] The solution, therefore, is to stop considering corroboration altogether, not to try to improve the standard or narrow its reach.[145] The Court of Appeals should take that step and hold that the strength of the government's case is irrelevant to the admissibility of a defense expert.

III. THE CORROBORATION RULE IS ALSO UNCONSTITUTIONAL

Precluding a relevant identification expert because a judge finds the government's evidence strong is also unconstitutional, violating the constitutional rights to present a complete defense and compulsory process.[146]

The "Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"[147] "This right is abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve."[148] The Supreme Court has not specifically clarified which Amendment establishes the complete-defense right, instead explaining that it is either rooted in the Due Process, Compulsory Process, or Confrontation Clauses.[149]

In *Holmes v. South Carolina*, the Supreme Court applied its complete-defense jurisprudence to a South Carolina rule that barred evidence of third-party guilt if a judge found the government's evidence "strong."[150] There, the South Carolina courts blocked evidence that another person had committed the offense because the government's case, which consisted of DNA evidence, was otherwise compelling.[151] Under the South Carolina rule, the trial judge "does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt."[152] Instead, like the New York corroboration rule,

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144 State v. Guilbert, 49 A.3d 705, 738 n.44 (Conn. 2012).

145 *But see* Katherine I. Higginbotham, *Narrowing the LeGrand Test in New York State: A Necessary Limit on Judicial Discretion*, 83 BROOK. L. REV. 1059 (2018) (arguing the Court of Appeals should retain the corroboration standard but narrow judicial discretion by holding that an accomplice's testimony or another eyewitness identification cannot constitute sufficient corroboration).

146 *See* Holmes v. South Carolina, 547 U.S. 319 (2006); *see also* U.S. CONST. amend. VI.

147 *Holmes*, 547 U.S. at 324 (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)).

148 *Id.* (internal quotation marks omitted).

149 *Id.*

150 *Id.* at 328-31.

151 *Id.*

152 *Id.* at 329.

> The critical inquiry concerns the strength of the prosecution's case: If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, viewed independently, would have great probative force and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues."[153]

The South Carolina rule embraced the following logic: "[S]trong evidence" of guilt renders the defense's third-party evidence "weak."[154]

A unanimous Supreme Court held that this state evidentiary rule violated the right to present a complete defense because it was arbitrary and illogical.[155] The rule was illogical because "an accurate evaluation of the prosecution's proof, and the true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence."[156] Thus, while it may be true that "the prosecution's evidence, *if credited*, would provide strong support for a guilty verdict," that does not justify precluding exculpatory evidence because only the jury can determine whether evidence should be "credited."[157] Indeed, "where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the [jury]."[158]

The Court further held that the South Carolina rule was just as illogical as its converse, that is, "a rule barring the prosecution from introducing evidence of a defendant's guilt if the defendant" presented evidence that "if believed, strongly supports a verdict of not guilty."[159] By "evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. Because the rule [here] did not heed this point, the rule is 'arbitrary.'"[160]

At its core, *Holmes* found it unconstitutional to preclude exculpatory evidence under the theory that because the government's case is strong, the defense evidence is immaterial. Such an approach inverts the basic structure of our jury system: Jurors assess the reliability of the government's evidence and weigh it against the defense's evidence *after* hearing

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153 *Id.*
154 *Id.* at 330.
155 *Id.* at 331.
156 *Id.* at 330.
157 *Id.*
158 *Id.*
159 *Id.*
160 *Id.* at 331.

the relevant evidence. A court cannot put its thumb on the scales by (1) weighing the evidence; (2) reaching a "conclusion on its own about factually who committed the crime"; and then (3) shaping "the evidence the jury hear[s] to conform the verdict to the trial court's factual conclusion."[161]

As several courts and judges have suggested[162]—but the Court of Appeals has not yet addressed—*Holmes* invalidates a rule barring a defense expert because the government has evidence which, "*if credited*, would provide strong support for a guilty verdict."[163] As *Holmes* explained, by "evaluating the strength of only [the government's] evidence, no logical conclusion can be reached regarding the strength of contrary evidence"—here an exculpatory defense witness—offered "to rebut or cast doubt."[164] And like the rule in *Holmes*, the corroboration rule ignores that "the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the [jury]."[165] Accordingly, the corroboration rule is arbitrary and violates the right to present a complete defense.[166]

A leading treatise notes that *Holmes* may "arguably" be distinguishable from the identification-expert context because third-party-guilt evidence (at issue in *Holmes*) proves "innocence" while expert-identification testimony "merely casts general doubts on one aspect of the state's case."[167] This suggestion rests on a distinction between evidence that undermines the reliability of the government's evidence and evidence that completely disposes of the government's case (such as third-party-guilt evidence).

This distinction fails under the logic of *Holmes*. *Holmes* precludes courts from excluding defense testimony on the grounds that since the

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[161] Kenneth S. Klein, *Why Federal Rule of Evidence 403 Is Unconstitutional, and Why That Matters*, 47 U. RICH. L. REV. 1077, 1119-20 (2013) (analyzing *Holmes*).

[162] *See In re* L.C., 92 A.3d 290, 299 n.30 (D.C. 2014) ("Indeed, *Holmes* makes clear that a rule of evidence allowing a trial judge to exclude a defendant's relevant and otherwise admissible expert testimony when the prosecution's evidence of the defendant's guilt is strong would contravene the constitutional guarantee of 'a meaningful opportunity to present a complete defense.'") (quoting *Holmes*, 547 U.S. at 331); *cf.* People v. Santiago, 900 N.Y.S.2d 273, 284 n.4 (App. Div. 2010) (McGuire, J., concurring) (stating that the question of whether reliance on corroboration as a justification for barring an expert "is consistent with *Holmes* . . . is unclear."); *see also* State v. Guilbert, 49 A.3d 705, 738 n.44 (Conn. 2012) (stating, without resolving the constitutional question, that denying an expert on corroboration grounds would inhibit a defendant from mounting a complete defense).

[163] *Holmes*, 547 U.S. at 330.

[164] *Id.* at 331.

[165] *Id.* at 330.

[166] *Id.* at 330-31.

[167] CLIFFORD S. FISHMAN & ANNE T. MCKENNA, JONES ON EVIDENCE § 61:36 (7th ed. 2019).

government's case seems strong, any contrary defense evidence must be weak.[168] *Holmes* thus prohibits a particular justification for barring defense evidence; it is not concerned with how important the evidence is to the defense. The significance of the proffered testimony is relevant to harmless error on appeal, not trial-level admissibility under the Constitution.

The Sixth Amendment's Compulsory Process Clause also dooms New York's corroboration approach.[169] The Clause guarantees that in all criminal cases, "the accused shall enjoy the right to . . . have compulsory process for obtaining witnesses in his favor." Although the Clause's text only formally addresses the right to compel a favorable witness's attendance, the Supreme Court has held that the Clause covers the broader right to call favorable witnesses.[170] As the Court held in *Washington v. Texas*, the framers "did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use."[171]

Under the Compulsory Process Clause, a defendant has the right to call an identification expert regardless of corroboration because that witness will testify in "his favor."[172] Only by rewriting the Clause could we bar favorable defense witnesses on the grounds that a judge finds the government's evidence reliable. The Clause guarantees the right to call witnesses in the defendant's favor. It does not empower a judge to eliminate that right because the judge looks "favorably" upon the government's evidence.

Crawford v. Washington,[173] a Sixth Amendment Confrontation Clause case, confirms the Sixth Amendment violation here.[174] *Crawford* held that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with a jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."[175]

Under *Crawford*'s Sixth Amendment logic, the corroboration rule violates the Compulsory Process Clause. Just as courts cannot block confrontation of a government witness because that witness is "reliable," they also cannot block defendants from attacking a witness through compulsory process on that same nebulous ground.

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168 *Holmes*, 547 U.S. at 330-31.
169 U.S. CONST. amend. VI.
170 Washington v. Texas, 388 U.S. 14, 23 (1967).
171 *Id.*
172 *Id.*
173 541 U.S. 36 (2004).
174 Schmechel et al., *supra* note 17, at 188-89.
175 *Crawford*, 541 U.S. at 62.

Melendez-Diaz v. Massachusetts,[176] another Sixth Amendment Confrontation Clause case, drives home the point. There, Massachusetts argued that a defendant lacks the right to confront testimony that a substance is cocaine because the Confrontation Clause only covers testimony that, "taken alone," proves guilt.[177] Under that approach, the accused could not confront a forensic analyst's testimony that a substance is cocaine. That testimony, "taken alone," does not prove guilt without additional evidence connecting the accused to that substance.[178]

Melendez-Diaz soundly rejected this formalism.[179] As the Court held, the Sixth Amendment's twin rights to confront "witnesses" and call "favor[able]" witnesses "contemplate[ ] two classes of witnesses—those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter . . . . [T]here is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation."[180] Accordingly, the importance of the testimony under attack—i.e., whether it is just "part of" the government's case or whether it "alone" "suffice[s] to convict"—is irrelevant.[181]

Similar analysis nullifies the corroboration rule. There is no category of defense witnesses who are favorable to the defense but "immune from" compulsory process because they challenge prosecution testimony that does not constitute the government's entire case.[182] On the contrary, a defendant has the right to employ the Sixth Amendment's protections against inculpatory testimony regardless of that testimony's apparent centrality to the government's case.[183]

If the government wants to prevent the accused from challenging a witness with a relevant counter-witness, it can decline to call the inculpatory witness to the stand. But the Constitution bars the government from presenting that inculpatory witness to the jury and then tying the defendant's hands.

IV. THE BETTER APPROACH: A RETURN TO COMMON-LAW STANDARDS OF EVIDENCE

The common-law and constitutional analysis articulated above does not preclude a court from barring or limiting expert-identification testimony when its probative value is "substantially outweighed" by a serious

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176 557 U.S. 305 (2009).
177 *Id.* at 314.
178 *Id.*
179 *Id.* at 313-14.
180 *Id.*
181 *Id.* at 314.
182 *Id.*
183 *Id.*

risk of undue prejudice, such as jury confusion.[184] That rule governs all relevant and material testimony. So, if the defense insists that expert testimony regarding weapon focus will require a deep dive into complex statistics, a court could find that the testimony's potential for confusion substantially outweighs its probative value. What courts cannot do, however, is credit the government's non-identification evidence, find sufficient corroboration, identify nothing prejudicial or confusing about the expert testimony, and then bar the expert on corroboration grounds alone. That is precisely what the Court of Appeals has permitted for the last 20 years. And that is what should end.

In assessing whether expert testimony should be barred because its probative value is substantially outweighed by its potential for prejudice, courts must exercise serious care. First, wholesale "rejection of expert testimony is the exception rather than the rule."[185] That approach is consistent with two core principles: (1) jurors should have access to relevant evidence that enhances the truth-seeking function of the trial;[186] and (2) experts can play an important role in a trial by clarifying the evidence.[187]

Second, "[a] court's discretion in evidentiary rulings is circumscribed by the rules of evidence and the defendant's constitutional right to present a defense."[188] At a minimum, that principle requires trial courts to specifically articulate a significant impediment to the trial's truth-seeking function before barring an expert. Clichés like "this scientist will distract the jury" fail as they are general claims that fail to identify a *specific* impediment to the truth-seeking function. "[I]n order for a [trial] court to exclude scientific evidence, there must be something *particularly* confusing [or otherwise prejudicial] about the scientific evidence at issue—something other than the general complexity of scientific evidence."[189]

Third, courts must consider alternatives to wholesale preclusion, such as limitations on expert testimony. For example, if a defendant proffers expert testimony that involves complex statistical data, courts can address a confusion concern by limiting the expert testimony to the conclusion itself. It will be the rare case where the expert's bottom-line

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[184] People v. Jin Cheng Lin, 26 N.Y.3d 701, 727 (2016) (citations omitted); *see* Holmes v. South Carolina, 547 U.S. 319, 326-27 (2006).

[185] *In re* Wholesale Grocery Prods. Antitrust Litig., 946 F.3d 995, 1001 (8th Cir. 2019).

[186] People v. Buie, 86 N.Y.2d 501, 509 (1995) ("Absent some strong public policy or a clear act of pre-emption by the Legislature, rules of evidence should be fashioned to further, not frustrate, the truth-finding function of the courts . . . .") (quoting Fleury v. Edwards, 14 N.Y.2d 334, 341 (1964) (Fuld, J., concurring)); Sackler v. Sackler, 15 N.Y.2d 40, 44 (1964) ("The basic rule is that all competent, substantial, credible and relevant evidence is to be available to the courts.").

[187] *E.g.*, People v. Rivers, 18 N.Y.3d 222, 228 (2011).

[188] People v. Carroll*,* 95 N.Y.2d 375, 385 (2000).

[189] *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 747 (3d Cir. 1994).

conclusion and a brief description of the underlying scientific theory or experiments will be so confusing that a court could reasonably choose wholesale preclusion over careful limitation.

CONCLUSION: *PEOPLE V. BOONE* PROVIDES SOME HOPE FOR REFORM

The Court of Appeals should abolish the anomalous corroboration rule. This important change will ensure that before convicting an individual, the jury learns valuable testimony. That's what's supposed to happen in a jury system.

People v. Boone,[190] which addressed the right to an instruction on cross-racial identifications, may provide some hope for reform. There, the Court of Appeals held that a trial court must instruct the jury regarding the unreliability of cross-racial identifications whenever the "identification of the defendant is at issue" and "the identifying witness and defendant appear to be of different races."[191] Although the Court mentioned New Jersey precedent that had previously pinned the instruction to the absence of corroboration,[192] *Boone* rejected that approach, instead holding that the charge applies *whenever* the cross-racial nature of the identification is relevant.[193] The trial court, *Boone* held, "should not engage in a weight analysis as to the quantitative degree of risk of misidentification at this threshold stage."[194]

Boone correctly holds that regardless of corroboration of the eyewitness identification, jurors must be educated about its reliability. Relevancy is the touchstone. The same logic covers the right to present identification experts. The government cannot ask the jury to consider identification evidence while simultaneously shielding it from attack. Any decent commitment to fair play bars that one-sided approach.

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[190] 30 N.Y.3d 521 (2017).

[191] *Id.* at 535-36.

[192] *Id.* at 532 n.2 (citing State v. Cromedy, 727 A.2d 457, 467 (N.J. 1999), *abrogated by* State v. Henderson, 27 A.3d 872 (N.J. 2011)). In *Henderson*, the New Jersey Supreme Court held that the charge should be given "whenever cross-racial identification is in issue at trial." 27 A.3d at 926. *Boone* adopted *Henderson*'s approach. 30 N.Y.3d at 535-36.

[193] 30 N.Y.3d at 532 (concluding that the mere "fact of a cross-racial identification" is the "basis of the court's charge").

[194] *Id.* at 536 n.6.