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## ***Expert Opinion and Jury Charge on Eyewitness Identification Testimony***

With regards to attacks on eyewitness identification, Georgia courts have primarily dealt with the admission of expert testimony, the likelihood of misidentification, and most recently, the certainty of the eyewitness' identification. As detailed below, the Supreme Court has held that the admission of expert testimony is within the discretion of the trial court, subject to an abuse of discretion review and that it is improper to allow testimony regarding the witness' certainty in their identification of the defendant as the perpetrator of the crime.

In Georgia, the memory of a witness may not be disparaged by another witness in order to impeach that testimony; it must be done by cross-examination. *Johnson v. State*, 272 Ga. 254 (2000). As such, the admissibility of expert testimony regarding eyewitness identification is in the discretion of the trial court. *Id.* at 254. Where eyewitness identification of the defendant is a key element of the State'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. *Id.* at 257. The trial court must also determine whether expert eyewitness testimony is the only effective way to reveal any weaknesses in an eyewitness identification. *Id.* at 257. However, the admission or exclusion of this evidence lies within the sound discretion of the trial court, whose decision will not be disturbed on appeal absent a clear abuse of discretion. *Johnson* at 257. An expert may offer an opinion, based on the facts surrounding an individual eyewitness' identification when posited in the form of a hypothetical question, as to whether scientific research has established a likelihood of unreliability for identifications derived from comparable facts. *Id.* However, an expert is **NOT** authorized to express his or her opinion regarding the credibility or trustworthiness of any individual eyewitness. *Id.* An eyewitness' personal ability to identify another person is a matter to be explored exclusively on direct and cross-examination of that witness. *Id.*

With regard to the actual identification by an eyewitness, juries in this state have been instructed that identity is a question of fact for their determination. *Brodes v. State*, 279 Ga. 435, 436 (2005). Factors which were to be considered in determining whether there was a possibility of mistaken identity include: 1) the witness' opportunity to view the accused at the time of the crime; 2) the witness' degree of attention; 3) the accuracy of the witness' prior description of the accused; 4) the witness' level of certainty at the confrontation with the accused; and 5) the length of time between the crime and the confrontation. *Jones v. State*, 273 Ga. 213, 216 (2000). Other factors that were to be considered in assessing reliability of identification included: 1) the opportunity of the witness to view the alleged perpetrator at the time of the alleged incident; 2) the witness' degree of attention toward the alleged perpetrator at the time of the alleged incident; 3) the level of certainty shown by the witness

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about his identification; 4) the possibility of mistaken identity; 5) whether the witness' identification may have been influenced by factors other than the view that the witness claimed to have had; and 6) whether the witness on any prior occasion did not identify the defendant in this case as the alleged perpetrator. Brodes, Id. When identification is an essential issue at trial, appropriate guidelines focusing the jury's attention on how to analyze and consider the factual issues with regard to the reliability of a witness's identification of a defendant as the perpetrator are critical. Id. at 442. Therefore, in light of the scientifically-documented lack of correlation between a witness's certainty in his or her identification of someone as the perpetrator of a crime and the accuracy of that identification, and the critical importance of accurate jury instructions ... the court can no longer endorse an instruction authorizing jurors to consider the witness's certainty in his/her identification as a factor to be used in deciding the reliability of that identification. Id. at 442. Accordingly, trial courts are advised to refrain from informing jurors they may consider a witness's level of certainty when instructing them on the factors that may be considered in deciding the reliability of that identification. Id.

Accordingly, Suggested Pattern Jury Instruction 1.35.10, from Volume III: Criminal Cases, updated April 2003 is hereby changed. Factor (c) of this jury charge must be removed. Failure to remove factor (c) from this charge will result in a reversal of conviction.