

**IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

No. 28 EAP 2011

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

BENJAMIN WALKER,

Appellant.

**BRIEF FOR AMICUS CURIAE
AMERICAN PSYCHOLOGICAL ASSOCIATION
IN SUPPORT OF APPELLANT**

**Appeal From The August 23, 2010, Order Of The Superior Court In No. 1477
EDA 2008, Affirming The December 12, 2007, Order Of The Court Of
Common Pleas Of Philadelphia County At CP-51-CR-1201561-2005**

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INTEREST OF AMICUS CURIAE

The American Psychological Association (“APA”) is the leading association of psychologists in the United States. A nonprofit scientific and professional organization, it has approximately 155,000 members and affiliates, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. Among APA’s major purposes are to increase and disseminate knowledge regarding human behavior, to advance psychology as a science and profession, and to foster the application of psychological learning to important human concerns, thereby promoting health, education, and welfare.

APA has filed more than one hundred amicus briefs in state and federal courts around the country. These briefs have been cited frequently by courts over the years, including the U.S. Supreme Court. *See, e.g., Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010); *Panetti v. Quarterman*, 551 U.S. 930, 962 (2007); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

APA has a rigorous approval process for amicus briefs, the touchstone of which is an assessment of whether the case is one in which there is sufficient scientific research, data, and literature on a question before a court that APA can usefully contribute to the court’s understanding and resolution of that question. APA regards this as one of those cases.¹

The issue here is whether expert psychological testimony regarding the factors that bear on the accuracy of eyewitness testimony is admissible. Those factors have been the subject of significant psychological research, and APA submits this brief both to present the results of that research and to address why expert testimony discussing them would be helpful to triers of fact. APA supports the admission of such testimony. The integrity of the criminal-justice system is undermined if jurors are left to determine whether to rely on eyewitness identifications without

¹ APA gratefully acknowledges the assistance of Lori Butts, J.D., Ph.D.; David DeMatteo, J.D., Ph.D.; Marc Pearce, J.D., Ph.D.; and Steven Penrod, J.D., Ph.D. in the preparation of this brief.

understanding the scientifically established factors that affect the accuracy of such identifications.²

SUMMARY OF ARGUMENT

Although eyewitness testimony is compelling and often very important in the search for truth, courts around the country have long recognized that eyewitness identifications are often inaccurate. Indeed, more than a century ago this Court sharply questioned the accuracy of eyewitness testimony, stating that “[t]he carelessness or superficiality of observers, the rarity of powers of graphic description, and the different force with which peculiarities of form or color or expression strike different persons, make recognition or identification one of the *least* reliable of facts testified to even by actual witnesses who have seen the parties in question.” *In re Bryant’s Estate*, 176 Pa. 309, 318 (1896) (emphasis added), *modified on other grounds*, 180 Pa. 192, 195-196 (1897). And nearly fifty years ago, the U.S. Supreme Court similarly observed that “[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.” *United States v. Wade*, 388 U.S. 218, 228 (1967). Empirical studies released as early as 1932 and as recently as 2008 confirm that observation, documenting wrongful convictions that rest largely or wholly on incorrect eyewitness identifications. See, e.g., Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 60 (2008) (out of the first 200 people exonerated by post-conviction DNA, nearly 80 percent were convicted based on eyewitness testimony); Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 542 (2005) (concluding that “[t]he most common cause of wrongful convictions is eyewitness misidentification,” which occurred in “64% of the[340]

² This brief focuses on the first question on which this Court granted review, namely whether the trial court had discretion to admit appellant’s proffered expert testimony regarding eyewitness identifications. APA does not separately address the second, more general question presented, although the two questions are closely related and hence much of the argument herein pertains to both.

exonerations” reviewed by the authors); Borchard, *Convicting the Innocent* xiii (1932) (“[T]he major source of these tragic errors[(65 wrongful convictions)] is an identification of the accused by the victim.”); Epstein, *Tri-State Vagaries: The Varying Responses of Delaware, New Jersey, and Pennsylvania to the Phenomenon of Mistaken Identifications*, 12 *Widener L. Rev.* 327, 328 (2006); Connors et al., *Convicted by Juries, Exonerated by Science*, National Institute of Justice (NIJ) Research Report (1996).³ Moreover, “given the exceedingly small number of cases in which DNA exonerations are even possible, it is clear that the number of verifiably mistaken convictions [is] dwarfed by the number that actually occur in the United States each year.” Loftus et al., *Juror Understanding of Eyewitness Testimony: A Survey of 1000 Potential Jurors in the District of Columbia* 1.⁴

This case presents the Court with an opportunity to address the long-recognized limitations of eyewitness identifications, by allowing—indeed, encouraging—trial courts to admit expert scientific testimony regarding such identifications in appropriate circumstances. This testimony meets the requirements of Rule of Evidence 702: The relevant scientific findings largely lie “beyond [the knowledge] possessed by a layperson,” such that expert testimony about them will “assist the trier of fact to understand the evidence,” Pa. R. Evid. 702. *See infra* Part I.A. And although this Court has previously deemed such testimony inadmissible on the ground that it invades the jury’s province to evaluate witnesses’ credibility, APA respectfully submits that this does not provide a sound basis for exclusion, and urges the Court to overrule the relevant precedents. *See infra* Part I.B. Moreover, the subject matter of the proffered

³ NIJ is “the research, development and evaluation agency of the U.S. Department of Justice.” About NIJ, <http://www.nij.gov/about/welcome.htm> (last visited Aug. 1, 2011).

⁴ Available at <http://www.pdsdc.org/Resources/SLD/PDS%20Poll%20-%20Juror%20Knowledge%20of%20Eyewitness%20Factors%20-%20article%20by%20Dr.%20Elizabeth%20Loftus%20and%20Tim%20O'Toole.pdf> (last visited Aug. 1, 2011).

testimony—eyewitness science—has been thoroughly researched, using widely accepted methodologies. *See infra* Part II.A. The testimony thus meets the general acceptance standard of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which governs in this Commonwealth. The findings drawn from this research are also overwhelmingly accepted within the scientific community, *see infra* Part II.B., although that is not a prerequisite for admission. A growing number of state and federal appellate courts have held that expert testimony on eyewitness science is admissible in appropriate cases. *See infra* Part III. This Court should hold likewise.

ARGUMENT

I. EXPERT PSYCHOLOGICAL TESTIMONY REGARDING EYEWITNESS IDENTIFICATION WILL ASSIST THE TRIER OF FACT WITHOUT INVADING ITS PREROGATIVES

A. Most Jurors Either Do Not Know Or Misunderstand The Accuracy Of Eyewitness Identifications

To be admissible, proffered expert testimony must address matters “beyond [the knowledge] possessed by a layperson,” such that the testimony would “assist the trier of fact to understand the evidence or to determine a fact in issue.” Pa. R. Evid. 702. Expert testimony regarding psychological research on eyewitness identification satisfies this test.

Since the 1980s, several studies have assessed jurors’ understanding of the factors that adversely influence an eyewitness’s accuracy. *See* Benton et al., *Eyewitness Memory Is Still Not Common Sense*, 20 *Applied Cognitive Psychol.* 115 (2006); Schmechel et al., *Beyond the Ken? Testing Jurors’ Understanding of Eyewitness Reliability Evidence*, 46 *Jurimetrics* 177, 191-205 (2006).⁵ These studies have consistently concluded that jurors misunderstand the accuracy of eyewitness identification. In a 1992 study, for example, researchers surveyed a sample of

⁵ *See also, e.g.,* Seltzer et al., *Juror Ability To Recognize the Limitations of Eyewitness Identifications*, 3 *Forensic Reports* 121, 124-133 (1990); Noon & Hollin, *Lay Knowledge of Eyewitness Behaviour*, 1 *Applied Cognitive Psychol.* 143, 143, 145-149 (1987); Deffenbacher & Loftus, *Do Jurors Share A Common Understanding of Eyewitness Behavior?*, 6 *Law & Hum. Behav.* 15, 24-26 (1982).

potential jurors and asked them whether they agreed with a series of 21 propositions about eyewitness reliability that had previously been posed to psychologists. *See* Kassin & Barndollar, *The Psychology of Eyewitness Testimony: A Comparison of Experts and Potential Jurors*, 22 J. of Applied Soc. Psychol. 1241, 1243-1244 (1992). The study found that there was statistically significant disagreement between the jurors and the experts on 15 of 21 topics. *See id.* at 1246.

Jurors' misconceptions about eyewitness' accuracy, moreover, have proved resilient even in the face of the recent wave of high-profile exonerations. In a 2006 study, researchers found statistically significant discrepancies between jurors' and experts' responses in connection with 26 out of 30 statements about eyewitness accuracy. *See* Benton et al., *Eyewitness Memory Is Still Not Common Sense*, 20 Applied Cognitive Psychol. at 119. If anything, jurors performed more poorly in the 2006 study than in the 1992 study, where potential jurors had agreed with the experts on 33 percent of the issues tested—as opposed to merely 13 percent in 2006. *See id.* at 119, 126.⁶

As a general matter, this research also shows that jurors tend to “over believe” eyewitness identifications, perhaps because of their lack of knowledge of the factors that bear on eyewitness accuracy.⁷ In a seminal 1983 study, researchers presented a sample of registered voters with crime scenarios derived from previously conducted empirical studies and asked them to predict the accuracy rate of eyewitness identification observed in those studies. *See* Brigham & Bothwell, *The Ability of Prospective Jurors To Estimate the Accuracy of Eyewitness Identifications*, 7 Law & Hum. Behav. 19, 22-24 (1983), *cited in* Leippe & Eisenstadt, *The Influence of Eyewitness Expert Testimony on Jurors' Beliefs and Judgments*, in *Expert Testimony*

⁶ Similar findings have been made with respect to judges, suggesting that the grounds for admission discussed in this brief apply equally to bench trials. *See, e.g.,* Wise & Safer, *A Comparison of What U.S. Judges and Students Know and Believe About Eyewitness Testimony*, 40 J. Applied Soc. Psychol. 1400, 1416-1418 (2010).

⁷ These factors are discussed in Part II.B.

on the *Psychology of Eyewitness Identification* 169, 171 (Cutler ed., 2009). On average, nearly 84 percent of respondents overestimated the accuracy rates. *See id.* at 28. Moreover, according to the same study, juror overestimation is not only widespread, but also of alarming magnitude. Respondents estimated an average accuracy rate of 71 percent for a highly unreliable scenario in which only 12.5 percent of eyewitnesses had in fact made a correct identification. *See id.* at 24. Other studies confirm that jurors often “over believe” eyewitness testimony. *See, e.g.,* Sigler & Couch, *Eyewitness Testimony and the Jury Verdict*, 4 N. Am. J. Psychol. 143, 146 (2002) (conviction rate by mock juries increased from 49 percent to 68 percent when a single, vague eyewitness account was added to the circumstantial evidence described in a case summary).⁸

In short, “[a]fter a quarter of a century, the discrepancy between lay understanding of factors affecting eyewitness accuracy and what decades of empirical research has reliably demonstrated to be true continues to be evidenced. The ... discrepancy not only still exists but also is large.” Benton et al., *Eyewitness Memory Is Still Not Common Sense*, 20 Applied Cognitive Psychol. at 126. Expert testimony can bridge this knowledge gap—i.e., “assist the

⁸ Jurors are particularly likely to credit eyewitnesses who are confident about their identifications. *See, e.g.,* Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 Psychol. Sci. in Pub. Int. 45, 60 (2006); Lindsay et al., *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. App. Psychol. 79, 87 (1981). This belief that confidence correlates with accuracy was once shared by some courts. *See, e.g., Neil v. Biggers*, 409 U.S. 188, 199 (1972). Modern scientific research, however, has called that notion into very serious question. As one report concluded, “[t]he outcomes of empirical studies, reviews, and meta-analyses have converged on the conclusion that the confidence-accuracy relationship for eyewitness identification is weak, with average confidence-accuracy correlations generally estimated between little more than 0 and .29.” Brewer et al., *The Confidence-Accuracy Relationship in Eyewitness Identification*, 8 J. Experimental Psychol. Applied 44, 44-45 (2002). Even these various correlation figures, moreover, are likely overestimates, because the confidence of eyewitnesses in actual cases, unlike in controlled experiments, can be infected by positive feedback received in the investigative process (for example, an officer stating during a photo array or lineup, “good, you identified the suspect”). *See* Wells & Bradfield, “Good, You Identified the Suspect”: Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. Applied Psychol. 360, 374 (1998).

trier of fact to understand the evidence,” Pa. R. 702—and thus help juries assess eyewitness identifications more accurately—i.e., “determine a fact in issue,” *id.* Indeed, such testimony has been shown to improve potential jurors’ understanding of the factors affecting eyewitness reliability. According to one study, mock jurors who hear expert testimony on the subject significantly correct their judgments about the accuracy of eyewitness identification, and spend significantly more time discussing eyewitness identifications during jury deliberations. See Hosch et al., *Influence of Expert Testimony Regarding Eyewitness Accuracy on Jury Decisions*, 4 Law & Hum. Behav. 287, 294 (1980). Similarly, in another study that presented a large sample of individuals with a videotaped armed-robbery trial, researchers found that permitting expert testimony generally resulted in increased juror attention to identification conditions and better post-trial knowledge of the factors affecting identification accuracy. See Cutler et al., *The Eyewitness, the Expert Psychologist, and the Jury*, 13 Law & Hum. Behav. 311, 320-326 (1989). Expert testimony thus leads to better-informed jury deliberations. That is surely a sound basis for admission.

B. Expert Testimony On Eyewitness Science Does Not Invade The Province Of The Factfinder

In the past, this Court has expressed concern that expert psychological testimony on eyewitness identification would improperly “intrude upon the jury’s basic function of deciding credibility.” *Commonwealth v. Spence*, 534 Pa. 233, 245 (1993); see also *Commonwealth v. Simmons*, 541 Pa. 211, 231 (1995) (“Such testimony would have given an unwarranted appearance of authority as to the subject of credibility, a subject which an ordinary juror can assess.”). APA respectfully submits that this concern does not warrant exclusion of the expert testimony discussed herein.

As an initial matter, in expressing this concern this Court has appeared to use the term “credibility” to mean simply whether a witness is lying, rather than whether the witness’s testimony should be credited or discredited (e.g., because the witness is mistaken). See *Commonwealth v. Miner*, 562 Pa. 46, 55 (2000) (“Because the truthfulness of a witness is solely within the province of the jury, expert testimony cannot be used to bolster the credibility of witnesses.”). But the expert psychological testimony proffered by Mr. Walker did not include an opinion on whether any witness is lying. Consistent with the discussion herein, it instead addressed factors pertinent to eyewitness *accuracy*—and the conditions that favor or disfavor accurate identifications. Concern about experts invading the jury’s role of assessing witnesses’ honesty thus should not result in exclusion of the testimony contemplated here.⁹

Furthermore, the expert testimony proffered here did not include an opinion on the accuracy of a particular eyewitness’s identification. To the contrary, to give the expert testimony envisioned in this case, an expert would not have to know anything about either the relevant eyewitnesses or their identifications. Instead, the expert would make a general presentation about objective scientific research and knowledge pertinent to eyewitness testimony. See *Commonwealth v. Johnson*, 456 Pa. Super. 251, 256 (1997) (en banc) (holding that expert testimony was admissible and did not intrude on the jury’s right to evaluate credibility because it “pertained to objective medical facts”), *quoted in Miner*, 562 Pa. at 53. This would provide the jury knowledge with which to evaluate the circumstances of this case. It would remain

⁹ To the extent an expert in a particular case sought to opine on the truthfulness of a witness, the trial court would presumably have discretion to exclude that opinion, while allowing the remainder of the expert’s testimony.

exclusively for the jury to decide what if anything to do with those general principles, i.e., whether to apply them to the identifications presented in the case, and if so how.¹⁰

Recognizing this, courts in other jurisdictions have permitted expert testimony that provides juries with knowledge of the factors affecting the accuracy of eyewitness identifications, excluding only hypothetical questions that narrowly link the relevant factors to the specifics of the eyewitness testimony at hand. *See, e.g., State v. Clopten*, 223 P.3d 1103, 1114 (Utah 2009) (“It is ... acceptable for an eyewitness expert to ‘give a dissertation or exposition’ of factors found in the case that are understood to contribute to eyewitness inaccuracy. As long as the expert does not attempt to tell the jury that a specific eyewitness identification either is or is not accurate, then the expert has not impinged on the jury’s duty as the sole evaluator of witness credibility.” (citation omitted)); *State v. Fontaine*, 382 N.W.2d 374, 378 (N.D. 1986) (“The trial court reached an appropriate balance when it permitted Dr. Maki to testify concerning the difficulty of eyewitnesses to properly identify persons [including the various factors which affect one’s ability to remember], but did not permit an answer to the hypothetical question.” (footnote omitted)).¹¹

Empirical research suggests, moreover, that jurors do not abdicate their fact-finding prerogatives when presented with expert testimony. In one study, scholars found that, while

¹⁰ To be sure, the fact that the testimony comes from an expert called to testify by one side or the other (the prosecution could certainly adduce expert testimony if a case involved an identification by a defense witness) may lead jurors to conclude that the testimony is intended to steer them to one finding or another, or even lead them to conclude that the expert him- or herself has a view regarding the accuracy of an identification. But such concerns apply to almost any expert witness. They do not provide a basis for keeping important and otherwise-admissible information from the jury. *See Miner*, 562 Pa. at 54 (citing *Commonwealth v. Hawk*, 551 Pa. 71, 79-80 (1998)).

¹¹ APA notes that Rule of Evidence 704 allows experts to opine even on “an ultimate issue to be decided by the trier of fact.” While this provision suggests that even expert psychological testimony that *did* include an opinion on the accuracy of a particular identification might be admissible, this case does not present that issue.

expert testimony resulted in significantly improved sensitivity to relevant witnessing and identification conditions, it does not replace jurors' independent judgment as to the credibility of the particular eyewitness who testified in the case before them. See Cutler & Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* 238 (1995) (reviewing Cutler et al., *The Eyewitness, the Expert Psychologist, and the Jury*, 13 Law & Hum. Behav. 311).

Psychological expert testimony thus has precisely the salutary effects that its proponents have identified.¹²

II. A LARGE BODY OF PSYCHOLOGICAL AND OTHER SCIENTIFIC RESEARCH, RESEARCH THAT EMPLOYS GENERALLY ACCEPTED METHODOLOGIES, DEMONSTRATES THE LIMITS OF EYEWITNESS IDENTIFICATION

A second requirement for the admission of expert scientific testimony is that “the methodology that underlies the evidence ha[ve] general acceptance in the relevant scientific community.” *Grady v. Frito-Lay, Inc.*, 576 Pa. 546, 555 (2003).¹³ That test is also satisfied here: In the past several decades, extensive psychological research has been done on human memory (and its limits), including research both on the phenomenon of inaccurate eyewitness identification that flows from these limits and on the factors that cause such misidentification.

¹² Opponents of the testimony discussed herein sometimes contend that voir dire, cross-examination, and jury instructions adequately safeguard against erroneous identifications. See, e.g., Devenport et al., *Effectiveness of Traditional Safeguards Against Erroneous Conviction Arising From Mistaken Eyewitness Identification*, in *Expert Testimony on the Psychology of Eyewitness Identification* 51, 55-64 (Cutler ed., 2009). But these procedures (alone or in combination) are not an effective substitute. None of them provides a jury with actual evidence, i.e., substantive scientific information from a witness or other source of admissible information, regarding eyewitness testimony. Cross-examination, for example, can elicit the *facts* surrounding an eyewitness' acquisition, retention, and retrieval of the relevant event—facts that would likely raise red flags with someone knowledgeable in the field. But it cannot establish the *significance* of those facts for a jury that is not familiar with the relevant scientific principles. See Cutler & Penrod, *Mistaken Identification* at 143.

¹³ This “general acceptance” test was first enunciated in *Frye*, and it continues to govern in Pennsylvania courts despite the U.S. Supreme Court's rejection of it as a matter of federal law in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 585-589 (1993). See *Grady*, 576 Pa. at 556-557.

The methodology underlying this research is valid and all-but-universally accepted in the psychological community. And although admissibility does not require a showing that the relevant scientific findings have likewise been generally accepted, *see id.* at 558, here they unquestionably have been.

A. The Science Of Eyewitness Identification Is Overwhelmingly Accepted Within The Scientific Community

This Court embraced *Frye*'s general acceptance test in order to "assur[e] that judges would be guided by scientists when assessing the reliability of a scientific method." *Grady*, 576 Pa. at 557 (citing *Commonwealth v. Topa*, 471 Pa. 223, 232 (1977)). As the Court explained, "[r]equiring judges to pay deference to the conclusions of those who are in the best position to evaluate the merits of scientific theory and technique when ruling on the admissibility of scientific proof ... is the better way of insuring that only reliable expert scientific evidence is admitted." *Id.* Hence, "novel scientific evidence is admissible if the methodology that underlies the evidence has general acceptance in the relevant scientific community." *Id.* at 555. As indicated by several factors, the scientific community has overwhelmingly accepted the science of eyewitness identification.

First (and perhaps conclusive on the point), "[e]yewitness reliability research uses methods accepted in all sciences." Schmechel et al., *Beyond the Ken?*, 46 *Jurimetrics* at 179. In particular, the vast majority of the relevant research involves experimental methods, specifically, experiments in which researchers expose a controlled set of subjects to different videotaped or staged crimes (or, occasionally, still images of criminal conduct) and then test the accuracy of the subjects' identification skills. *See, e.g.,* Wells et al., *Eyewitness Evidence: Improving Its*

Probative Value, 7 Psychol. Sci. in Pub. Int. 45, 49 (2006).¹⁴ This approach is widely considered to yield “the most robust findings” in eyewitness research because it controls for exogenous factors and thus “ensures strong internal validity.” Malpass et al., *The Need for Expert Testimony on Eyewitness Identification*, in *Expert Testimony on the Psychology of Eyewitness Identification* 3, 13; see also Wells et al., *Eyewitness Evidence*, 7 Psychol. Sci. in Pub. Int. at 49 (“The primary strength of experimental methods is that they are proficient at establishing cause-effect relations.”). Controlled studies also usefully produce error rates in the form of statistical probabilities.

Second, the sheer volume of relevant research demonstrates that the subject matter is accepted and established. Sixteen years ago, two prominent researchers observed that eyewitness psychology had been the subject of more than 2,000 publications. See Cutler & Penrod, *Mistaken Identification* at 68. That number has grown substantially since then. Several texts are now dedicated entirely to the factors influencing eyewitness performance. See, e.g., *Expert Testimony on the Psychology of Eyewitness Identification* (Cutler ed., 2009); *The Handbook of Eyewitness Psychology* (Toglia et al. eds., 2007); Thompson et al., *Eyewitness Memory* (1998); *Psychological Issues in Eyewitness Identification* (Sporer et al. eds., 1996); Loftus & Ketcham, *Witness for the Defense: The Accused, the Eyewitness and the Expert Who Puts Memory on Trial* (1991). Indeed, the psychology of eyewitness identification has become part of the core curriculum of psychology, featured in almost all introductory psychology textbooks and comprising a significant portion of textbooks for programs in social psychology, cognitive psychology, and interdisciplinary law-and-psychology. See Hosch et al., *Expert Psychology Testimony: Consensus Among Experts?*, in *Expert Testimony on the Psychology of Eyewitness*

¹⁴ A minority of the studies have involved archival analyses, i.e., review of actual identifications, especially with regards to lineups. See *id.*

Identification 143, 161-163. The large body of research on eyewitness identification also builds on, and is consistent with, an even larger body of research pertaining to human memory generally. *See infra* pp. 14-16 (discussing this larger body).

Third, psychological research on eyewitness identification has been—and continues to be—subject to thorough peer review. At the funding stage, a proposed project normally must satisfy the strict standards of institutions such as the National Science Foundation and the National Institute of Mental Health, which fund much of the relevant research. *See* Cutler & Penrod, *Mistaken Identification* at 66. These agencies “typically subject research proposals to a review process in which anonymous evaluations are solicited from a half-dozen to as many as 20 scientific reviewers.” *Id.* at 66-67. It is estimated that “only one in five such proposals receives funding.” *Id.* at 67. And if funding is secured and a study completed, research psychologists typically submit their work to a scientific journal for potential publication, at which point the research undergoes a second round of anonymous peer review. *See id.* An “essential requirement” of this peer review “is that a study be sufficiently well designed ... that it can be relied upon to address the questions posed by the researcher.... The standards are high and in leading journals it is not unusual for 80-90% of all submissions to be rejected.” *Id.* That so many studies regarding the reliability of eyewitness identification obtain peer-reviewed funding and are published in peer-reviewed journals is itself a testament to the general acceptance of this field of science. As the U.S. Supreme Court has explained, “submission to the scrutiny of the scientific community is a component of ‘good science,’ in part because it increases the likelihood that substantive flaws in methodology will be detected.” *Daubert*, 509 U.S. at 593.

Finally, although the admission of expert testimony does not require general acceptance of the relevant scientific findings, *see Grady*, 576 Pa. at 558, surveys of experts show that the

findings and conclusions in this field are indeed widely accepted. In a 1989 study, researchers surveyed psychologists who had published in the field. See Kassin et al., *The “General Acceptance” of Psychological Research on Eyewitness Testimony*, 44 Am. Psychologist 1089, 1090 (1989). This study revealed that, even 22 years ago, experts generally agreed that at least nine variables had been reliably shown to influence eyewitness accuracy. See *id.* at 1093, 1094 & tbl. 4. A follow-up survey conducted in 2001 confirmed the 1989 results as to each of those nine factors. See Kassin et al., *On the “General Acceptance” of Eyewitness Testimony Research: A New Survey of the Experts*, 56 Am. Psychologist 405, 410, 413 tbl. 5 (2001). It also found that two factors connected to the accuracy of eyewitness identifications were considered significantly more predictive in 2001 than in 1989. And it identified several new (i.e., previously untested) factors reliably linked to eyewitness error. See *id.* More recent results confirm this near-universal acceptance. See Hosch et al., *Expert Psychology Testimony* at 152 (according to an unpublished 2008 study (cited therein), “the level of general acceptance in the field is even higher than it was in 2001”). “In fact, relative to other scientific research that enters courtrooms, the lack of controversy in the field of eyewitness identification is remarkable.” Schmechel et al., *Beyond the Ken?*, 46 Jurimetrics at 179.

“In short, eyewitness reliability research today is an established body of knowledge. It uses well-accepted methodologies. It is part of the research agenda at major universities throughout the world. It is a subject of thousands of peer-reviewed publications. It has existed for decades[, and t]here is nearly unanimous consensus among researchers about the field’s core findings[.]” Schmechel et al., *Beyond the Ken?*, 46 Jurimetrics at 180; accord, e.g., Report of the Special Master at 72, *State v. Henderson*, No. A-8-08 (N.J. June 18, 2010) (“The scientific evidence accumulated ... in [recent decades] is voluminous, comprehensive and consistent....

The soundness and reliability of that evidence are indisputable.”¹⁵ *id.* (quoting the testimony of one scholar that “[e]yewitness identification is the gold standard in terms of the applicability of social science research to the law”).

B. Researchers Have Identified Numerous Factors That Bear On The Accuracy Of An Eyewitness Identification

As noted, *Frye*’s test for admissibility does not require that the actual findings and conclusions yielded by a generally accepted science themselves be generally accepted. See *Grady*, 576 Pa. at 558. Nonetheless, the body of research discussed above has in fact produced numerous generally accepted findings and conclusions relevant to eyewitness identification. Many of these flow from the functioning (and limitations) of human memory. Cognitive psychologists have long “established that when we experience an important event, we do not simply record it in our memory as a videotape would.” Loftus et al., *Eyewitness Testimony* § 2-2, at 12 (4th ed. 2007). This finding traces its origin to the 1930s foundational work of Frederic Charles Bartlett. Through a series of experiments, Bartlett debunked the notion that “remembering is ... the re-excitation of innumerable fixed, lifeless and fragmentary traces.” Bartlett, *Remembering: A Study in Experimental and Social Psychology* 213 (1932). Instead, the process of remembering something “is an imaginative reconstruction, or construction.... It is thus hardly ever really exact, even in the most rudimentary cases of rote recapitulation[.]” *Id.* Inaccuracies are unavoidable, in other words, because the process of remembering necessitates the active processing of sensory inputs through the individual’s pre-existing cognitive patterns, patterns that are not infallible. As one more recent commentary explained, “human perception does not work like a camera or video recorder. Rather, what is perceived and stored in memory is often incomplete or distorted as a result of the individual’s state of mind or the nature of the

¹⁵ Available at <http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20%2800621142%29.PDF> (last visited Aug. 1, 2011).

event observed.” Brigham et al., *Disputed Eyewitness Identification Evidence*, 36 Ct. Rev. 12, 13 (1999). Bartlett’s “reconstructive” analysis enjoys widespread acceptance in the relevant scientific community. See, e.g., Castelli et al., *Evaluating Eyewitness Testimony in Adults and Children*, in *The Handbook of Forensic Psychology* 243, 244 (Weiner & Hess eds., 3d ed. 2006) (“The reconstructive view of memory is generally accepted among psychologists who study human memory and eyewitness testimony.”); Brigham & Bothwell, *The Ability of Prospective Jurors To Estimate the Accuracy of Eyewitness Identifications*, 7 Law & Hum. Behav. at 20.

Psychologists analyzing the nature of memory have focused on its three discrete steps: (1) the acquisition stage, whereby information is entered into the memory system; (2) the retention stage, which occurs after the acquisition stage but before the witness’s attempt to recall the information; and (3) the retrieval stage, when the witness attempts to recall the stored information. See Loftus et al., *Eyewitness Testimony* § 2-2, at 13. “This three-stage analysis is central to the concept of human memory,” and “[p]sychologists who conduct research in this area try to identify and study the important factors that play a role in each of the three stages.” *Id.* Those psychologists have identified in particular several factors that may taint an eyewitness’s memory at each of the three stages. At the acquisition stage, memory is subject to both event-specific variables—such as duration of the event or presence of a weapon at the crime scene—and witness-specific variables—such as age and race. *Id.* At the retention stage, additional factors such as the passage of time or post-event information may contaminate a witness’s memory. *Id.* Finally, at the retrieval stage, a witness’s memory may be negatively affected by confidence level or the method of questioning. *Id.*

As discussed, research psychologists have conducted a vast number of empirical studies—most using experimental methods—that document the adverse impact of these various

factors on the accuracy of eyewitness identification. Because of the breadth and depth of this research, almost any overview of it is necessarily incomplete. But the following abbreviated discussion of several factors underscores that they are not only numerous but also pervasive in the criminal justice system.¹⁶

Witness Stress. The level of stress experienced by an eyewitness at the time of the exposure to the perpetrator can affect the reliability of a subsequent identification. One “meta-analysis”—an analysis of data from a cross-section of prior studies—found “clear support for the hypothesis that heightened stress has a negative impact on eyewitness identification accuracy.” Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law & Hum. Behav. 687, 694 (2004) (examining 27 prior studies). Another study, involving participants at military survival schools who were exposed to genuine stress, similarly found “robust evidence that eyewitness memory for persons encountered during events that are ... highly stressful[] ... may be subject to substantial error.” Morgan et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int’l J. L. & Psychiatry 265, 274 (2004). Being the victim of a crime is of course a stressful experience.

Exposure Duration. Research has likewise demonstrated that the reliability of an eyewitness identification diminishes when the witness sees the perpetrator for a short period of time. One study, for example, found an accuracy rate of 85 to 95 percent when subjects were exposed for forty-five seconds to the image of the perpetrator during a videotaped reconstruction of robbery, and a subsequent photo array contained the perpetrator. But that rate fell to between 29 percent and 35 percent when the exposure lasted only twelve seconds.

¹⁶ For a more complete discussion, see, for example, Wells et al., *Eyewitness Evidence*, 7 Psychol. Sci. in Pub. Int. at 51-68; Wells & Olsen, *Eyewitness Testimony*, 54 Annual Rev. Psychol. 277, 280-290 (2003); Shapiro & Penrod, *Meta-Analysis of Facial Identification Studies*, 100 Psychol. Bull. 139, 140-142 (1986).

See Memon et al., *Exposure Duration: Effects on Eyewitness Accuracy and Confidence*, 94 British J. Psychol. 339, 345 tbl. 1 (2003).¹⁷ This study, of course, did not involve many of the other factors discussed herein (witness stress, for example). That is important because research has shown that the various factors that affect eyewitness accuracy often interact to compound the risk of mistaken identification. See Pezdek, *Content, Form, and Ethical Issues Concerning Psychological Expert Testimony on Eyewitness Identification*, in *Expert Testimony on the Psychology of Eyewitness Identification* 29, 37 (Cutler ed., 2009). Hence, both the 85 to 95 percent and 29 to 35 percent accuracy figures almost certainly overstate the accuracy of real-world identifications by crime victims.

Passage of Time. Empirical research also establishes that as time passes between an event and a resulting identification, the identification becomes increasingly unreliable—put simply, the memory “decays.” See, e.g., Deffenbacher et al., *Forgetting the Once-Seen Face*, 14 J. Experimental Psychol. 139, 147-148 (2008); Shapiro & Penrod, *Meta-Analysis of Facial Identification Studies*, 100 Psychol. Bull. 139, 139, 143 (1986). Importantly, “[t]he decay function is not linear; rather, greater decay occurs early on and the rate of decay lessens over time.” Cutler, *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 Cardozo Pub. L., Pol’y & Ethics J. 327, 336 (2006). Even a gap of only a few hours between exposure and identification, then, can affect the reliability of an identification.

¹⁷ See also Shapiro & Penrod, *Meta-Analysis of Facial Identification Studies*, 100 Psychol. Bull. at 140, 150 (conducting a meta-analysis of 128 studies involving nearly 17,000 subjects, and finding a linear trend in the relationship between exposure duration and identification accuracy); Bornstein et al., *Effects of Exposure Time and Cognitive Operations on Facial Identification Accuracy*, Psychol., Crime and L. (forthcoming 2011) (“[E]xposure time ... significantly predict[s] facial identification accuracy.”).

Weapon Focus. Weapon focus is “the visual attention eyewitnesses give to a perpetrator’s weapon during the course of a crime”—attention that is “expected ... [to] reduce his or her ability to later recall details about the perpetrator or to recognize the perpetrator.” Wells et al., *Eyewitness Evidence*, 7 Psychol. Sci. in Pub. Int. at 53. Several studies, including a meta-analysis, have found that weapon focus has a statistically significant adverse impact on eyewitness identification accuracy. See Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 Law & Hum. Behav. 413, 420 (1992); O’Rourke et al., *The External Validity of Eyewitness Identification Research: Generalizing Across Subject Populations*, 13 Law & Hum. Behav. 385, 392 (1989).

Cross-Race Bias. Empirical research similarly demonstrates that eyewitnesses are more accurate at identifying perpetrators of their own race than those of a different race. In 2001, two researchers conducted a meta-analysis that spanned 39 research articles and nearly 5,000 participant witnesses. See Meissner & Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces*, 7 Psychol., Pub. Pol’y, & L. 3, 21 (2001), cited in Wells et al., *Eyewitness Evidence*, 7 Psychol. Sci. in Pub. Int. at 52. They concluded that cross-race identifications are 56 percent more likely to be erroneous than same-race identifications. See *id.* at 15.

Lineup Instructions. Finally, empirical research has found that the instructions conveyed to eyewitnesses prior to a lineup have a “considerable impact” on the accuracy of any resulting identification. Wells & Olsen, *Eyewitness Testimony*, 54 Annual Rev. Psychol. 277, 286 (2003). For example, in one meta-analytic study, psychologists found that failing to instruct witnesses that the suspect “might or might not be” in the lineup significantly increases false identifications (41.6 percent), while only minimally decreasing accurate identifications (1.9

percent). *See id.* at 286-287 (citing Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 Law & Hum. Behav. 283 (1997)).¹⁸

In sum, psychologists have identified various factors that can affect the accuracy of an eyewitness identification. This has been done through extensive research, using accepted methods, and there is widespread consensus in the scientific community that these factors are in fact related to eyewitness accuracy.

III. A SUBSTANTIAL AND GROWING MAJORITY OF STATE AND FEDERAL APPELLATE COURTS HOLDS THAT EXPERT PSYCHOLOGICAL TESTIMONY REGARDING EYEWITNESS IDENTIFICATION IS ADMISSIBLE

The fact that psychological expert testimony regarding eyewitness identification is both helpful to juries and generally accepted is confirmed by the large and expanding number of appellate courts that in recent years have held such evidence admissible. Until the 1970s, the field of psychological research on the reliability of eyewitness identification was far from fully developed. Not surprisingly, courts at the time often viewed expert testimony in this field with skepticism. *See, e.g., United States v. Fosher*, 590 F.2d 381, 383 (1st Cir. 1979) (“[T]he offer did not make clear that the testimony, even if relevant to the particular witnesses involved, would be based upon a mode of scientific analysis that meets any of the standards of reliability applicable to scientific evidence.”).

But as explained, *see supra* Part II, over the last thirty or so years the scientific community has developed a vast and sophisticated body of science on eyewitness identification. Courts around the country have taken note of these scientific developments. Several jurisdictions have expressly overruled their prior holdings imposing a *per se* bar. *See, e.g.,*

¹⁸ Psychologists commonly divide all of these various factors into two categories: “system variables,” those that are the product of the investigative and legal proceedings, and “estimator variables,” those that are largely beyond the control of state actors. *See Wells, Applied Eyewitness Testimony Research*, 36 J. Personality & Soc. Psychol. 1546, 1548 (1978). Of the variables enumerated in the text, all but lineup-related factors are estimator variables.

State v. Copeland, 226 S.W.3d 287, 290 (Tenn. 2007); *Commonwealth v. Christie*, 98 S.W.3d 485, 488 (Ky. 2002); *Johnson v. State*, 526 S.E.2d 549, 552 (Ga. 2000); *State v. Schutz*, 579 N.W.2d 317, 320 (Iowa 1998). Others have deemed the evidence admissible when considering the issue for the first time. See *Fontaine*, 382 N.W.2d at 377 (“[T]he issue of whether or not an expert witness should be permitted to testify concerning the accuracy of an eyewitness identification is one of first impression in North Dakota.”). As a result, despite differences in controlling precedent and evidentiary standards, a vast majority of state courts and a near unanimity of federal courts have agreed on the baseline principle presented for decision in this case: Trial courts should, at a minimum, have discretion to admit psychological expert testimony under appropriate circumstances.¹⁹ Indeed, one state court observed that “only three

¹⁹ The relevant state court decisions include *Ex parte Williams*, 594 So. 2d 1225, 1227 (Ala. 1992); *Skamarocius v. State*, 731 P.2d 63, 67 (Alaska Ct. App. 1987); *State v. Chapple*, 660 P.2d 1208, 1218 (Ariz. 1983); *People v. McDonald*, 690 P.2d 709, 721 (Cal. 1984), *overruled in part on other grounds by People v. Mendoza*, 4 P.3d 265 (Cal. 2000); *Campbell v. People*, 814 P.2d 1, 7 (Colo. 1991), *overruled in part on other grounds by People v. Shreck*, 22 P.3d 68 (Colo. 2001); *Garden v. State*, 815 A.2d 327, 338 (Del. 2003), *superseded by statute on other grounds*, 11 Del. Code Ann. § 4209(d); *Russell v. United States*, 17 A.3d 581, 585 (D.C. 2011); *McMullen v. State*, 714 So. 2d 368, 371-372 (Fla. 1998); *Johnson*, 526 S.E.2d at 552; *State v. Wright*, 206 P.3d 856, 861 (Idaho Ct. App. 2009); *People v. Allen*, 875 N.E.2d 1221, 1229 (Ill. App. Ct. 2007); *Cook v. State*, 734 N.E.2d 563, 569-570 (Ind. 2000); *Schutz*, 579 N.W.2d at 319; *Commonwealth v. Christie*, 98 S.W.3d at 487-488; *Bomas v. State*, 987 A.2d 98, 112 (Md. 2010); *Commonwealth v. Santoli*, 680 N.E.2d 1116, 1118-1119 (Mass. 1997); *State v. Miles*, 585 N.W.2d 368, 371 (Minn. 1998); *State v. DuBray*, 77 P.3d 247, 255 (Mont. 2003); *White v. State*, 926 P.2d 291, 295 (Nev. 1996); *State v. Gunter*, 554 A.2d 1356, 1363 (N.J. Super. Ct. App. Div. 1989); *People v. LeGrand*, 867 N.E.2d 374, 380 (N.Y. 2007); *Fontaine*, 382 N.W.2d at 378; *State v. Buell*, 489 N.E.2d 795, 801 (Ohio 1986); *State v. Whaley*, 406 S.E.2d 369, 371-372 (S.C. 1991); *State v. Hill*, 463 N.W.2d 674, 677 (S.D. 1990); *Copeland*, 226 S.W.3d at 301-302; *Clopten*, 223 P.3d at 1114; *State v. Percy*, 595 A.2d 248, 253 (Vt. 1990); *Rodriguez v. Commonwealth*, 455 S.E.2d 724, 727 (Va. Ct. App. 1995); *State v. Cheatam*, 81 P.3d 830, 841 (Wash. 2003); *Hampton v. State*, 285 N.W.2d 868, 871 (Wis. 1979); and *Engberg v. Meyer*, 820 P.2d 70, 136-139 (Wyo. 1991).

The relevant federal decisions include *United States v. Brien*, 59 F.3d 274, 277 (1st Cir. 1995); *United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999); *United States v. Brownlee*, 454 F.3d 131, 144 (3d Cir. 2006); *United States v. Harris*, 995 F.2d 532, 534 (4th Cir. 1993);

jurisdictions”—including Pennsylvania—“have retained th[e] *per se* exclusion.” *Bomas v. State*, 987 A.2d 98, 107 (Md. 2010). This Court should embrace the majority view.

CONCLUSION

The judgment of the Superior Court should be reversed.

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Respectfully submitted,

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United States v. Moore, 786 F.2d 1308, 1312-1313 (5th Cir. 1986); *United States v. Smithers*, 212 F.3d 306, 314 (6th Cir. 2000); *United States v. Curry*, 977 F.2d 1042, 1051-1052 (7th Cir. 1992); *United States v. Rincon*, 28 F.3d 921, 923 (9th Cir. 1994); and *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1125-1126 (10th Cir. 2006). *Contra United States v. Smith*, 122 F.3d 1355, 1357 (11th Cir. 1997).

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