[J-17-2012] [MO: Todd, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 28 EAP 2011
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court entered on August 23, 2010 at No.
	:	1477 EDA 2008 affirming the judgment of
v.	:	sentence entered on December 12, 2007
	:	in the Court of Common Pleas of
	:	Philadelphia County, Criminal Division, at
BENJAMIN WALKER,	:	No. CP-51-CR-1201561-2005
	:	
Appellant	:	
	:	ARGUED: March 7, 2012

DISSENTING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: May 28, 2014**

I respectfully dissent and I also join Mr. Justice Eakin's Dissenting Opinion.

In abandoning the existing exclusion of expert testimony regarding the reliability of eyewitness identification, the Majority Opinion: (1) accepts dubious external literature and sources as settled "science" in the absence of a factual determination below (or anywhere, it appears), and despite the "science" being specifically contested by the Commonwealth; (2) fails to meaningfully justify its preference for institutionalizing a requirement for costly and generic expert "scientific" testimony, especially in light of obvious practical difficulties; and (3) fails to provide any practical guidance to trial courts regarding how they may wield their new-found discretion in this allegedly "scientific" arena in a fashion that is other than arbitrary. Make no mistake about it, the effect of

the no-record "scientific" conclusion here will be to ensure that some of the most brazen of criminals – perpetrators of stranger-upon-stranger violent crime -- will walk away scot-free, all because of the generic opinion of some on-call social-scientific "expert" on a matter that can be explored by ordinary trial means (effective cross-examination and specific jury instruction) and decided by ordinary jurors, as the record in this very case makes abundantly clear. I cannot sign on to the Majority's enshrinement of this contested social science in these circumstances.

Preliminarily, it is worth noting that not all disciplines self-denominated as scientific are as objectively reliable as others. A properly trained chemist can usually reliably explain the chemical composition of a substance, for example, without there being much room for debate. But studies of human beings, human nature, human perception, and human recollection inevitably have a heavy dose of subjectivity. Having been a trial lawyer for many years, I have some experience with issues affecting identification testimony, and I maintain some skepticism that the experts the Majority will now require the state to provide have more knowledge than, or can reliably guide a jury any better than, the process of cross-examination, closing argument, appropriate jury charges, and the collective jurors' own human experience and judgment. I am also skeptical, in the absence of any record demonstration and testing of the "science" proffered here, because the science happens to dovetail so nicely with the preferences of the criminal defense position. There is little reason, budget, or occasion, for example, for prosecution authorities to sponsor counter-studies. And, one can expect that, if and when these experts are permitted to testify for the defense, the defense closing will invariably proceed along the lines that the expert's testimony alone creates reasonable doubt – irrespective of the facts of the case.

Of course, scientific advances occur and courts, when reliable science advances the pursuit of truth, should make accommodating adjustments. Cognizant that the trial court here had no obligation under existing law to put this "science" to an evidentiary test, I would have no objection to a remand for that purpose; that is a far better course than the Majority's rendering of a definitive academic judgment. (The Majority remands, but only for implementation of its predicate "scientific" holding that expert testimony in this area will actually assist jurors in carrying out their truth-determining function. As I explain below, the "research" supporting this conclusion is wanting.)[1] With that record in place, I would then proceed to a more grounded and balanced **legal** determination of whether to revisit our long-standing precedent in Spence and its progeny, and if so, to determine what is the best course going forward.[2] Respecting the latter point, I would consider more seriously than the Majority has, that if appellant, following a contested hearing, can in fact **prove** that there is some helpful accepted scientific consensus in this area -- involving a complex variety of human beings responding in infinite ways – why subsidization of competing experts is required to convey the supposedly settled generic science. The more logical accommodation of the science the Majority has

[1] The Majority misstates my position in saying that I support remanding the case for a Frye hearing (see Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923) "regarding discrete aspects of eyewitness identification." See Majority Slip Op. at 42-43. Rather, my position is that if the Court is inclined to entertain lifting our existing ban on such testimony, the appropriate threshold question on any remand should be whether expert testimony in this area is effective and should be admitted at all. But, the Majority has already answered that question, without an evidentiary examination below, and approved the "science" as a matter of law.

[2] See Commonwealth v. Spence, 627 A.2d 1176 (Pa. 1993); Commonwealth v. Simmons, 662 A.2d 621 (Pa. 1995); and Commonwealth v. Abdul-Salaam, 678 A.2d 342 (Pa. 1996).

accepted is simply to revise the Court's time-tested Kloiber[3] charge to address established concerns regarding circumstances that may impair – or heighten -- an eyewitness's reliability.[4]

I. The Science

Foremost, I have deep concerns about the Majority's description and acceptance of what it calls "considerable empirical research" as definitive. It appears that the Majority's analysis largely follows lockstep the conclusions of other courts, with scant substantive evaluation of the "scientific" literature itself, resulting in a paucity of support for the Majority's ultimate legal determination. The Majority begins its analysis by correctly noting that our existing ban of expert testimony regarding eyewitness reliability rests on the experience-based notion that such testimony creates an "unwarranted appearance of authority invading the province of the jury's credibility determination," and that there exist "alternative means of challenging the reliability of eyewitness testimony[.]" Majority Slip Op. at 22. The Majority then asserts that "science" has changed everything, because our prior precedent "did not consider or mention the advent of scientific research on the issue of reliability of eyewitness testimony or the experience of other jurisdictions on this topic. Thus… it is important to recognize the considerable empirical research that has been conducted regarding eyewitness

[3] Under Commonwealth v. Kloiber, 106 A.2d 820, 826-27 (Pa. 1954), cert. denied, 348 U.S. 875 (1954), a charge that an eyewitness's identification should be viewed with caution is required where the eyewitness: (1) did not have an opportunity to clearly view the defendant; (2) equivocated on the identification of the defendant; or (3) had a problem making an identification in the past. Commonwealth v. Ali, 10 A.3d 282, 303 (Pa. 2010).

[4] As the Majority notes, as presented in this appeal, the issue centers on the memory accuracy of eyewitnesses who sincerely believe their identifications are correct.

identification," as well as the extra-jurisdictional decisional law admitting expert testimony. Id. at 23.

So then, reliability is the polestar, as it should be in the quest for truth. But, how does this "science" promise to enhance the search for reliability? And, does the Majority's framing of the appropriate manner in which the expert testimony should proceed better ensure reliability? As always, the devil is in the details – details not subjected to factual examination below and not fully appreciated by the Majority here.

By way of background, in this area of "science," we apparently have research, articles, and articles about research. The impressively labeled "empirical research" touted by the Majority references studies about how people respond to a variety of stimuli (*e.g.*, the studies seek to assess the accuracy of human memory under stress, or in the presence of a weapon, etc.); the articles try to create a bridge from the research and into the courtroom by explaining the expert's role of assisting the jury to carry out its truth-determining function when an eyewitness has encountered these stimuli.[5] The research no doubt supports the idea that there exist "an array of variables that are most likely to lead to a mistaken identification" – most trial lawyers and judges could tell you that. But, does the empirical research demonstrate the effectiveness of expert testimony at educating jurors in such a way that they will be better able to determine which identifications are reliable and which are not? It is on this point that there is a

[5] The Majority quotes Connecticut v. Guilbert, 49 A.3d 705, 720 (Conn. 2012) for the proposition that "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," and references Mark S. Brodin, *Behavioral Science Evidence in the Age of Daubert: Reflections of a Skeptic*, 73 U. CIN. L. REV. 867, 889-90 (2005) (hereinafter "Brodin") to explain that experts can use the research to testify in court about the supposed limitations and weaknesses of eyewitness identification. Majority Slip Op. at 23-24.

clear disconnect between the research the Majority embraces and the solution proposed within these articles, which the Majority accepts as grounded in settled scientific research.

The issue before this Court is not whether juries always appreciate factors that make eyewitness identifications more or less reliable -- that some factors go un-weighed by jurors is evident and likely inevitable. Rather, the question is whether the proffered expert testimony does anything to rectify this issue, in other words to ensure that identifications are more reliable. Surely, the point is not to convince juries to distrust all identifications, for the proffered "science" does not and cannot say that. However, does the science and process approved by the Majority create an "unwarranted appearance of authority invading the province of the jury's credibility determination[?]" Majority Slip Op. at 22; Commonwealth's Sur-Reply Brief at 2.

To be sure, understanding the proper role of the expert at trial is paramount. Proponents of admitting expert testimony in these cases explain that "[t]ypically, eyewitness experts are prepared to testify in court about the extent to which the research literature explains how a particular factor, considered alone or in combination with others, likely would affect the reliability of an identification." Richard S. Schmechel, Timothy P. O'Toole, Catharine Easterly, & Elizabeth F. Loftus, *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177, 180 (1996). So far, the article tells us what should already be evident: that an expert is there to explain the research. But why is the expert necessary to explain the research? An article cited by the Commonwealth frames the question more accurately: If "'[t]he pyschologists' [sic] role as expert is to help the trier of fact reach an accurate conclusion about whether the eyewitness's testimony can be trusted in the instant case'… our evaluation should be made with regard to jurors' ability to discriminate accurate from

inaccurate eyewitness testimony after hearing expert evidence." Kristy A. Martire & Richard I. Kemp, *Can Experts Help Jurors to Evaluate Eyewitness Evidence? A Review of Eyewitness Expert Effects*, 16 LEGAL AND CRIMINALOGICAL PSYCHOLOGY 24, 25 (2011) (hereinafter "Martire & Kemp") (*quoting*, *in part*, R.O. Lempert, *Social Science in Court: On "Eyewitness Experts" and Other Issues*, 10 LAW AND HUM. BEHAV. 167, 172 (1986)).

The Majority, after being informed by what it evaluates as "an understanding of the significant empirical research and the clear trend of jurisdictions," eventually offers to rebut the core rationale of Spence by explaining its own unverified assumptions that: (1) the expert "merely assist[s] the jury in understanding the factors" and providing a background against which the jury may assess them; (2) the expert testimony "would not speak to the legitimacy of the victim's identification or pass on the veracity of a particular witness"; and (3) the jury remains free to weigh and ultimately reject the testimony if it so chooses. Majority Slip Op. at 28-30.

However, I am not as convinced as the Majority that the paradigm it approves will result in an expert who would "educate" the jury by speaking of factors that would make an eyewitness more reliable. The science is grounded in negativity: at its essence is the concern that identifications are wrong or unreliable, and here are the reasons why they may be. But, there obviously are manifold instances of accurate identifications notwithstanding the stress factors the experts identify. How is such negative data, generically explained as the Majority proposes, supposed to help jurors separate the reliable from the unreliable? Are the experts, in their supposed roles as independent "educators" of the jury, as familiar with studies about positive factors as negative ones? Have studies of that type even been conducted? The authors cited by the Majority paint

a noticeably one-sided picture.[6] Although the Majority claims that it can "envision" how this would proceed in our courts, I remain skeptical.

First, the Majority admonishes the Commonwealth for suggesting that an "informational cascade" could be the reason why so many jurisdictions have fallen for this expert testimony, rather than, for example, each jurisdiction independently reviewing and weighing the "scientific literature" on the subject. See Majority Slip Op. at 17 n.6. The Majority then proceeds to identify fifty-four jurisdictions (forty-four states and ten federal circuits) that have allowed this testimony, yet fails to independently evaluate any of the research itself because, I suppose, it hopes or assumes that someone along the way knuckled down and did the hard work. Id. at 24-26 (stating, *inter alia*, that the Supreme Court of Connecticut engaged in an "encyclopedic review of [the] topic" in State v. Guilbert, 49 A.3d 705 (Conn. 2012), and the Supreme Court of Utah "recogniz[ed] decades of study" in State v. Clopten, 223 P.3d 1103 (Utah 2009)). I understand the attraction of the lemmings to the sea approach, but I also try to keep in mind the cliff awaiting – especially in a case where we have no factual development and findings below, and the Commonwealth here has contested the issue. I also appreciate that the "science" can change and evolve as other studies are conducted, and as prosecution authorities come to realize the effect of the new evidence. It is notable that the Majority only once, and then parenthetically, alludes to research that may show whether expert testimony in this area may actually assist the trier of fact in distinguishing reliable from unreliable identifications. Majority Slip Op. at 27 (citing the

[6] See Brodin, supra note 5, at 890 ("The expert is prepared to testify about the factors that adversely affect accuracy (for example, stress, "weapon focus," and confusion of post-event information) and to contradict assumptions likely to be shared by jurors, such as the equation of the witness's level of certainty with the accuracy of the identification.").

Utah Supreme Court in Clopten, supra). But, a review of the Clopten court's actual analysis reveals a grand total of three sentences dedicated to the subject,[7] followed by a citation to a near-twenty-year-old book by psychologists Brian L. Cutler & Steven D. Penrod[8] -- a text which, for reasons I will explain below, should not so hastily receive any court's non-record-tested judicial *imprimatur*.

Second, the Majority's assurance that a jury will remain free to choose whether to accept or reject the testimony, and that the expert will not opine on the testimony in the instant case, skirts the underlying, valid concern addressed in Spence. The Spence rule's purpose is not to prevent an expert from opining on the ultimate decision for the jury, but the purpose is to prevent undue prejudice by barring evidence presented under an improper air of authority that invades the jury's province. As the Supreme Court of Louisiana (one of the three remaining states to preclude expert testimony on this issue) explains:

> [U]pon review, the touted advances in the social sciences regarding the validity of eyewitness identifications do not render obsolete the underlying premise for which such evidence was held to be inadmissible…. There is still a compelling concern that a potentially persuasive expert testifying as to the generalities of the inaccuracies and unreliability of eyewitness observations, that are already within a juror's common knowledge and experience, will greatly influence the jury more than the evidence presented at trial. By merely being labeled as a specialist in eyewitness identifications, an expert has the broad ability to mislead a jury through the "education" process into believing a certain factor in an eyewitness identification makes that identification less reliable

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[7] The Clopten court declared: "Importantly, expert testimony does not unfairly favor the defendant by making the jury skeptical of all eyewitnesses. In fact, when a witness sees the perpetrator under favorable conditions, expert testimony actually makes jurors more likely to convict. When expert testimony is used correctly, the end result is a jury that is better able to reach a just decision." 223 P.3d at 1109 (footnote omitted).

[8] BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY AND THE LAW 256 (1995) (hereinafter "Cutler & Penrod").

> than it truly is. Moreover, expert testimony on eyewitness identifications can be more prejudicial than probative because it focuses on the things that produce error without reference to those factors that improve the accuracy of identifications. The expert testimony presumes a misidentification, in the absence of presenting factors which support the validity of the identification. This fosters a disbelief of eyewitnesses by jurors.

State v. Young, 35 So. 3d 1042, 1049-1050 (La. 2010) (internal citations omitted); see also Commonwealth v. Simmons, 662 A.2d 621, 631 (Pa. 1995); accord Commonwealth's Brief at 15-17 (citing Martire & Kemp, supra, which reviewed research in this area conducted since 1980, and concluded, *inter alia*, that most common effect of expert testimony is to make jurors more skeptical of **all** identifications, *i.e.*, identifications under both favorable and unfavorable conditions).

The Majority takes exception to the notion that relevant factors affecting the reliability of eyewitness identification are within the common knowledge and experience of the jury -- indeed, its analysis is almost entirely dedicated to undermining that idea. But, the scientific literature is all about humanity, with all its limitations and its frailties. Before modern movements in psychiatry and psychology, mankind already had a rich literature laden with insight into humanity. A great deal of what is found in the work Freud, Jung, and others rang true to those who were already conversant in Shakespeare and ancient Greek drama. In short, matters affecting human perception and recall are hardly the exclusive and special bailiwick of social science experts.

Furthermore, the jury in every case receives an education -- through the evidence, cross-examination, argument, and jury charges -- on the issues to be tried. Judges instruct juries on matters that fall within the humanistic sciences, including on perceptions, motivations, etc. – like the Kloiber charge. Moreover, the question of whether every negative factor of concern to researchers interested in mistaken identification is within the jury's common knowledge does little to dispel the likelihood

that this expert testimony will do more harm than good in assisting a jury to **distinguish** reliable from unreliable identifications. Notably, the Commonwealth here contends that the American Psychological Association ("APA"), in their *amicus* brief, selectively ignore more modern studies that show that expert testimony on eyewitness reliability increases juror skepticism and juror confusion, and that such testimony "is more than twice as likely to cause unfair prejudice to the prosecution as it is to fairly help the jury." Commonwealth's Brief at 16-17 & n.16 (citing Martire & Kemp, supra).[9] The parties obviously view the literature in this area very differently; there are obvious strategic, political, and litigation interests implicated, and we have had no hearing to sort through the issues. Simply accepting an important, but contested point, while ignoring inconvenient counter-arguments, grafts poor judging onto what may be not-so-accepted science – for all we know.

Although the parties, and appellant's *amici*, have placed an abundance of literature before this Court, the studies on the discrete issue of the effectiveness of expert testimony in assisting the jury in this area should be the one of prime concern – and it is fairly disputed. The underlying empire of research touting the effectiveness of this sort of expert testimony is overstated. Of twenty-four studies published on the effect of expert testimony, only three evidenced an increase of jury sensitivity to factors affecting reliability, and those results were modest. See Commonwealth's Brief at 15-17 (citing Martire & Kemp, supra).[10] The question of the legitimacy of the literature, what

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[9] If the study cited by the Commonwealth is true, the discrepancy should implicate a weighing of prejudice against probative value under Pennsylvania Rule of Evidence 403 (evidence may be excluded if its probative value is outweighed by prejudicial effect, confusion, etc.), as argued by the Commonwealth. See Commonwealth's Brief at 9, 20.

[10] In a footnote, the Majority criticizes the Commonwealth's reliance on the Martire & Kemp article and notes that only one study out of twenty-four "established that expert testimony can significantly improve a juror's ability to discriminate between accurate and (continued…)

reliable "scientific" conclusions can be drawn from it, and if and how the Court should respond, require a hearing where the proffers themselves can be examined and tested – including by the great engine of cross-examination. The "literature" cited by the Majority deserves no more deference than an identification witness, or the victim of a crime, receives.

Putting aside the Majority's one-sided approach to the research, the Majority also fails to address a host of practical problems posed by the Commonwealth, such as: (1) the exposure of hundreds, if not thousands, of violent felony convictions to potential ineffective assistance of counsel attacks where no such expert testimony is presented; (2) the cost of the now-required expert testimony by both the prosecution and the defense; and (3) the encouragement of gamesmanship by potentially rewarding defendants who refrain from calling an expert, only to attack the omission on collateral review or in federal *habeas* proceedings. See Commonwealth's Brief at 21-23. The Majority side-steps these concerns by "envisioning" limited use of the testimony, quipping that there is a cost for all tools used to achieve justice, and relying on the

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(…continued)
inaccurate eyewitness identifications," while the authors found the others to be either methodologically deficient for evaluating this theory, or inconclusive. Majority Slip Op. at 30 n.9. What should matter more, however, is what the article says about what is in fact a paucity of "scientific" evidence supporting the broad holding rendered by the Majority today, one that the Majority claims is based on compelling scientific studies. The body of research relied on by the Majority in making its pronouncement today in fact is exaggerated in the extreme. Indeed, the authors of this article agree that "the most appropriate conclusion regarding the extent to which expert evidence aides the jury in reaching an accurate resolution of a disputed issue, is that the case is not yet proven." Martire & Kemp at 34. It is not prudent to base our innovative "scientific" decision today on one study that indicates expert testimony may be beneficial in this area, nor do I subscribe to the Majority's contention that "the **possible** educational value of expert testimony" renders the absolute bar on "expert" evidence, intruding into a core jury function, unsupportable. See Majority Slip Op. at 42 (emphasis added).

supposed collective experience of the other jurisdictions that have allowed the testimony. See Majority Slip Op. at 34.

The Majority's vision of a limited role for this testimony is at best naïve given that this new rule will be a tool for defense counsel, who are obliged to advocate zealously for their clients. As explained above, the expert testimony the Majority approves exists only to **undermine** identifications, by highlighting what some experts believe **can** -- generally, of course, not necessarily in a particular case -- make an identification **un**reliable. There is no downside to the defense in such testimony, only upside. In every case with a contested identification, counsel will of necessity demand an expert – or counsel will be faulted on a later collateral attack. The Majority also fails to show whether the new testimony will actually lead to more just results (*i.e.*, whether it will rectify the costs associated with wrongful convictions, see id. at 43 n.11), let alone whether the results will justify the price-tag.[11]

II. Alternative Approaches

[11] The Majority states that, "there is no doubt that wrongful conviction due to erroneous eyewitness identification continues to be a pressing concern for the legal system and society." Majority Slip Op. at 20. Although misidentification resulting in conviction is a grave injustice, the point is to take measures that enhance reliability and enhance the ability to assess reliability. The Majority relies upon a study stating that in nearly 80% of the first 200 cases where convictions were overturned due to DNA testing, the convictions were based upon eyewitness testimony. Id. at 20 & n.7 (citing Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 60 (2008)). But that same study also noted that "exonorees typically had more than one type of evidence supporting their convictions," including forensic evidence (57% of cases), testimony by confidential informants (18%), and false confessions by the defendants themselves (16%). Garret, supra at 60 n.8. Without analysis of the actual influence that eyewitness testimony had on the convictions, relative to other evidence, and without any science on how the expert testimony the Majority now approves enhances the jury's ability to **distinguish** identifications, the Majority's new rule here does not address the problem it identifies.

Even assuming that there is a solid, prevailing "science" in this social science arena, it is not self-evident why a jury charge and cross-examination cannot suffice to educate the fact-finder to the concerns attending identification evidence. Again assuming the science is generally accepted and reliable, why is there a need for an expert? A modified Kloiber charge could present to the jury factors regarding eyewitness identifications for the jury to consider in its deliberation. The Majority summarily dismisses the notion with the off-point comment that the concerns here are not ones **currently** addressed by a Kloiber charge, as if the charge somehow was not subject to modification. Majority Slip Op. at 32 n.10. The Majority also cites Clopten and State v. Copeland, 226 S.W.3d 287 (Tenn. 2007) as definitive authorities for the proposition that "research" indicates that cautionary instructions are inadequate.

I respectfully disagree. First, the concerns the Majority speaks of that affect identifications -- weapons focus, cross-racial identification, stress, etc. -- fit comfortably into the notion of "the compromised position of the witness," an element of the existing Kloiber charge. If the purpose of the expert testimony is to apprise the jury of factors that **could have had** some effect on the witness's ability to accurately recall details of an event, the factors here need not be treated any differently than those currently described in a Kloiber charge.

The Majority's other justification for dismissing appropriate jury charges, and requiring the expense of experts, is that a jury charge in this particular instance must be deemed inadequate as a matter of law. However, the supporting authority cited by the Majority on this point is anything but scientific. Both Clopten and Copeland cite a handful of studies, as well as the Utah Supreme Court's decision in State v. Long, 721

P.2d 483 (Utah 1986). These sources, insofar as they mention jury instructions at all,[12] criticize the implementation of and experience with so-called Telfaire[13] instructions, the federal analog to our Kloiber charge, endorsed by the United States Court of Appeals for the District of Columbia in 1972.

Insofar as the Majority's preferred sources focus on the cautionary instructions in use today, they beg the question whether future, more robust instructions, would be effective, more reliable (settled "science" should not implicate credibility), and less expensive. In fact, the psychologists behind this handful of studies seem to argue that the kind of instructions then in use – nineteen years ago -- were "a step in the appropriate direction"[14] and acknowledge that instructions are helpful because they can be "based on a careful analysis and balancing of policy concerns, including potential risks of eyewitness identification both in terms of accuracy and unjustified jury reliance," even if they also portray shortcomings.[15] It is this quality alone that justifies the use of instructions over expert testimony, testimony purchased by advocates, which will inevitably betray the advocate's slant.

To be sure, some sources in this area, itself laden with litigation incentives, have hedged against these acknowledgments -- not with facts based on research, but with

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[12] See Elizabeth Loftus, *Reconstructing Memory: The Incredible Eyewitness*, 15 JURIMETRICS J. 188, 189-90 (1975) (cited by Clopten, study did not mention jury instructions and merely found that in simulated criminal trial, students were more likely to convict in light of eyewitness testimony, even if eyewitness was discredited by his poor eyesight).

[13] United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972).

[14] Cutler & Penrod, supra note 8, at 256.

[15] Peter J. Cohen, *How Shall They Be Known? Daubert v. Merrell Dow Pharmaceuticals and Eyewitness Identification*, 16 PACE L. REV. 237, 272 (1996).

mere opinion based on speculation. For example, Clopten cited a now eighteen-year-old law review article which posited, notably without citation:

> There is no scientific evidence that cautionary jury instructions, given at the end of what might be a long and fatiguing trial, and buried in an overall charge by the court, are effective. A powerful eyewitness' [sic] testimony may be so firmly embedded in the jurors' minds that the court's instructions days or weeks later may be unable to undo potential prejudice. In short, once a juror has decided that the eyewitness identification is dispositive, there is no guarantee that trial court instructions at a later time will change his or her mind.

Cohen, supra note 15, at 272-73. The author, a medical doctor who had graduated from law school a year before the article appeared, does not ground his assertion in research, much less upon "science," but instead upon a negative implication of the lack of research, and also by speaking of undefined "guarantees" on the point. To those of us with a little more experience in how law is practiced and how jury trials proceed – including the flexibility of when instructions are given, and their actual effect upon juries – this newly-minted lawyer's unsupported opinions are difficult to take seriously. The vast majority of standard jury charges are not supported by "scientific evidence," nor should they be.

Additionally, the few remaining psychological studies cited in Clopten[16] may show that while Telfaire instructions may not significantly influence the manner in which jurors evaluate eyewitness identification evidence (*i.e.*, the instructions produce neither confusion nor clarity for the jury), an alternative version of such instructions (for example, sample instructions drafted by psychologist Edith Greene, Ph.D., for her

[16] See Edith Greene, *Eyewitness Testimony and the Use of Cautionary Instructions*, U. BRIDGEPORT L. REV. 15, 20 (1987); Cutler & Penrod, supra note 8, at 255-64 (a meta-analysis of authors' own study and derivative analysis of Dr. Greene's studies).

study) may even produce unwarranted prejudice against the prosecution.[17] While I can accept that a more even-handed refinement of our cautionary instructions could strike an appropriate balance (whether it requires a "complete remaking" or a "mere reworking" of the instructions, see Majority Slip Op. at 32 n.10), if the "science" were proven after the hearing the Majority's broad holding has avoided, the point here is that the third-hand authorities cited by the Majority do not support its definitive conclusion that cautionary instructions, which are routinely employed by courts to guide the jury's consideration, which can be neutrally drafted, and which ensure a fair and even application across cases, cannot be effective in this one "special" area.

The Majority also discredits the defense bar's ability to "educate the jury with respect to the fallibility of eyewitness identification" through cross-examination and closing arguments. The Majority declares that this inability "is especially true when cross-examining a neutral, credible, and confident witness before a jury, which may overestimate the veracity and reliability of eyewitness identification" and baldly asserts that "such information would not be within the permissible scope of cross-examination." Majority Slip Op. at 31 (citing Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identity, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727 (2007)). This is the sum of the Majority's analysis on the topic, followed by a few general citations to other jurisdictions, again without addressing any of the Commonwealth's arguments.

I fail to see how cross-examining a sincere, confident witness can "overestimate" the reliability of the identification, yet expert testimony would not "overestimate" its unreliability. In fact, the Majority's only source of information here comes from a law

[17] Cutler & Penrod, supra note 8, at 263.

professor, well known to the Court as an experienced and able advocate for the criminal defense, and who, with his typical candor, employs a title that makes clear which side he favors. Moreover, the cited article does nothing more than pose hypothetical concerns regarding the pitfalls of cross-examination and provide a cursory examination of a handful of psychology papers from almost twenty years ago. See Epstein, supra, at 770-84.[18]

Moreover, in my view, the only information arguably outside the easy scope of cross-examination is the notion that witness confidence may not correlate to witness reliability -- every other factor affecting witness reliability is clearly fair game for cross-examination. See, e.g., Manson v. Brathwaite, 432 U.S. 98, 113 n.14 (1977) ("While identification testimony is significant evidence, such testimony is still only evidence…. Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi.") (citations and quotation marks omitted). And, even as to the relationship between witness confidence and reliability, the popular phrases "always

[18] I am reminded of the observation of the Chief Justice of the United States, a renowned appellate advocate before his ascent to the bench: "Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar." Chief Justice of the United States John G. Roberts, Jr., Interview at Fourth Circuit Court of Appeals Annual Conference, June 25, 2011, available at http://www.c-spanvideo.org/program/FourthCi. Even with less arcane subjects, the potential difficulty with law review articles rests itself in human nature: many professors devote their time and energy to projects they care deeply about and, lawyers being lawyers, few are truly "neutral" when writing to "hot topics" of the day. Primers to assist one side of a debate or another on a legal issue are not necessarily the most reliable of sources for tribunals.

certain, often wrong" or "often wrong, never in doubt," reveal just how much that "phenomenon" is accessible to jurors.

Finally, if "education" is what this endeavor is all about, there is something to be learned from the actual trial in this case. As the Commonwealth points out, appellant's skilled trial attorney, employing the great engine that Professor Epstein thinks "can't," focused on several factors (cross-racial identification, stress, and weapons focus) in this case, both during cross-examination and in closing arguments, and the jury ultimately acquitted appellant of the robberies of three of the victims here. See Commonwealth's Sur-Reply Brief at 9-12 (citing N.T., 11/1/07, at 70, 73-75, 79, 92-93, 97). The Majority accepts as Gospel untested studies, but the actual record in this case shows the wisdom of the prevailing system.

III. Lack of Guidance

Finally, the standard fixed by the Majority will offer little guidance to trial judges. The Majority paints its holding as a modest one that allows expert testimony on relevant factors concerning eyewitness identification, at the discretion of the trial court, following a Frye hearing, subject to review for an abuse of discretion. Majority Slip Op. at 35. The Majority also postulates that many of the questions I raise here will be "addressed through case-by-case development -- the traditional process for changes in the law." See Majority Slip Op. at 44 n.11. But, of course, the Commonwealth cannot appeal an acquittal, so the law will develop in only one direction. Moreover, what room is there for a Frye hearing? The Majority has already rendered its verdict on the "science"; trial judges are no more vested with discretion to ignore the Court's verdict on the science today than they were vested with discretion to ignore Simmons yesterday. All that

actually remains is for trial courts to determine the relevance of the evidence in a particular case.

Where the eyewitness identifications giving rise to the Court's decision today are at issue, there is little non-arbitrary room for the exercise of discretion. This is yet another circumstance weighing in favor of considering neutral jury charges, if the Court insists on going down this path.

IV. Conclusion

In the end, neither party disputes that the expert testimony proferred by appellant was properly excluded by the trial court under our existing decisional law in this area. If we are to move away from that precedent, the decision needs to be better-grounded, and should follow only after a remand to resolve the contested issues here, and a more balanced assessment.

I respectfully dissent.