[J-17-2012]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, ORIE MELVIN, JJ.

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

OPINION

MADAME JUSTICE TODD **DECIDED: May 28, 2014**

In this appeal by allowance we address the question of whether a trial court may, in its discretion, permit expert testimony in the area of eyewitness identification, and, in doing so, we reconsider our current decisional law which absolutely bans such expert testimony. For the reasons that follow, we hold that, in Pennsylvania, the admission of expert testimony regarding eyewitness identification is no longer *per se* impermissible, and join the vast majority of jurisdictions which leave the admissibility of such expert testimony to the discretion of the trial court. Thus, we reverse the order of the Superior

Court, and remand the matter to the trial court for reconsideration of such expert testimony, including the possibility of a Frye hearing in light of our decision today.[1]

The origins of this appeal stem from two armed robberies which occurred within two weeks of each other in October 2005 in Philadelphia. As found by the trial court, at 1:00 a.m. on October 15, 2005, three Drexel University students, Jenna Moreno, Courtney Howe, and Caitlyn Costello, were walking south on 36th Street at the intersection of Baring Street. At this intersection is a church with a lighted archway. A man alleged to be Appellant, Benjamin Walker, approached the women, drew a black handgun approximately 6-8 inches in length, cocked it, and demanded that the women give him their money. After the women explained that they had no money, the assailant demanded their cell phones. Each complied, giving the man their cell phones and digital cameras.

The victims immediately went to campus security who escorted them to a police station to provide a statement and identify their assailant. Two days later, the victims met with Philadelphia Police Detective William Farrell to determine if they could identify the assailant from two photo arrays. Each photo array was composed of eight individuals. Included in the photo arrays were Appellant, along with another suspect, and other individuals closely resembling Appellant and the other suspect. The three victims were separated and provided a photo array one at a time. Moreno and Howe identified Appellant out of the photo arrays. Three months later, on January 18, 2006, Moreno identified Appellant in an in-person lineup.

[1] As discussed more fully *infra*, a Frye hearing, named after the seminal decision in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), is a hearing held for the trial court to determine whether the general scientific community has reached a general acceptance of the principles and methodology used by the expert witness.

The second robbery occurred on October 28, 2005. At approximately 3:00 a.m., University of Pennsylvania students Jonathan Ghitis and Kristina Leone were walking west on Pine Street between 40th and 41st Streets. This section of Pine Street is residential in character with several lampposts lining the street. Again, a man alleged to be Appellant and a co-conspirator walked toward the students. As the men approached the couple, Appellant separated from his co-conspirator, and flashed a silver handgun, approximately 6-8 inches in length. Leone began to scream. Appellant threw her to the ground and ordered her to be quiet. At the same time, Appellant's co-conspirator threw Ghitis down onto steps of a nearby residence. The men demanded whatever the victims had. Immediately, Leone gave Appellant her pocketbook, and Ghitis gave Appellant's co-conspirator his wallet, watch, and cell phone. Leone continued to cry and scream, and, so, Appellant, although already in possession of her pocketbook, repeatedly struck her on the back of her head with his gun. Appellant ordered Ghitis to calm Leone, which he did. Appellant let Leone go, and shortly thereafter, Appellant and his co-conspirator fled the scene.

At 3:30 a.m., after calling the police, both victims gave their account of the events and described their assailant to Detective Philip Lydon of the University of Pennsylvania police department. They met with Detective Lydon at his headquarters three hours later. There, the Detective separated the victims and showed three separate photo arrays of individuals that had similar characteristics to Appellant. Leone looked at the first array and told Detective Lydon that she could not recognize anyone. Upon viewing the second array, Leone immediately identified Appellant, viscerally reacting to his picture. Leone was shown a third array, which included an individual the police suspected was Appellant's co-conspirator, but she could not identify him. Leone spent three to four minutes looking at the arrays. Detective Lydon did not comment to her as

to whether Appellant was a suspect after she had made her identification. The same procedure was conducted with Ghitis. He pointed out Appellant from the array, but was less than 100% positive. Again, Detective Lydon did not comment to Ghitis whether Appellant was the suspect after he made his identification. The sole evidence connecting Appellant to the robberies was eyewitness identification by the victims.

Appellant was arrested and charged with various crimes relating to the two robberies, and the charges were consolidated for a single trial. Appellant filed a pre-trial motion *in limine* to present the expert testimony of Dr. Solomon Fulero regarding the fallibility of human memory, the science as to human recall, and scientific studies related to the reliability of eyewitness testimony generally. In the alternative, Appellant requested a Frye hearing to determine the admissibility of such evidence. After hearing argument, the court denied the motions on September 17, 2007. After trial, the jury acquitted Appellant on all charges relating to the October 15, 2005 robbery involving the three Drexel students, but found Appellant guilty of five charges relating to the October 28, 2005 robbery involving the two University of Pennsylvania students.[2] On December 12, 2007, the trial court sentenced Appellant to an aggregate term of incarceration of 17½ - 35 years, followed by 5 years probation.

Regarding the denial of Appellant's motion to admit expert testimony on human recall, or to hold a Frye hearing, the trial court's threshold determination was that a Frye hearing was not necessary, relying upon Pennsylvania case law which holds that expert testimony concerning eyewitness identification is inadmissible. Commonwealth v. Simmons, 541 Pa. 211, 662 A.2d 621 (1995); Commonwealth v. Bormack, 827 A.2d

[2] Aggravated assault 18 Pa.C.S.A. § 2702(a)(1); firearms not to be carried without a license, 18 Pa.C.S.A. § 6106(a)(1); prohibited person in possession of a firearm, 18 Pa.C.S.A. § 6105(a)(1); criminal conspiracy, 18 Pa.C.S.A. § 903(a)(1); and two counts of robbery, 18 Pa.C.S.A. § 3701(a)(1)(i).

503 (Pa. Super. 2003). The trial court opined that, not only has our Court explained that an expert would have an unwarranted appearance of authority on the eyewitness's credibility, but that a defendant was free to attack a witnesses' credibility by pointing out inconsistencies through cross-examination and in closing arguments.

The trial court also rejected Appellant's claim that he was denied his constitutional right to present a defense under the United States and Pennsylvania Constitutions by excluding expert testimony, both on eyewitness identification and on suggestiveness of out-of-court identification procedures. The trial court reasoned that, as defendants must comply with the rules of evidence to assure fairness and reliability in the ascertainment of guilt and innocence, and as expert testimony on eyewitness identification is inadmissible, this argument was without merit. The court, thus concluded that it did not infringe upon Appellant's constitutional right to present a defense. Furthermore, the trial court dismissed Appellant's contention that his expert testimony was admissible pursuant to Rule 702 of the Pennsylvania Rules of Evidence. Noting that this Court in Simmons has already spoken to the admissibility of expert testimony, that Rules 401 and 403 require that all evidence be relevant, and that the probative value outweigh its danger of unfair prejudice, the trial court found that Appellant's statistics regarding eyewitness identifications had no bearing on whether the eyewitnesses testifying in this case were mistaken. Thus, the expert testimony, according to the trial court, did not make the fact of the eyewitnesses' identification more or less probable. Finally, according to the trial court, even assuming that the expert's testimony met the threshold for relevance, the probative value of such testimony was nominal, as several witnesses identified Appellant and their encounters with him were more than brief. Again, consistent with Simmons, the trial court reasoned

that an expert would have an unwarranted appearance of authority on the eyewitness's credibility.[3]

On appeal, a unanimous three-judge panel of the Superior Court affirmed Appellant's judgment of sentence in an unpublished memorandum opinion. With respect to the issue of the trial court's denial of the admission of expert testimony on the subject of eyewitness identification, the Superior Court initially noted that evidentiary rulings and the admission of expert testimony is a matter of discretion for the trial court, and will not be disturbed absent an abuse of discretion. The Superior Court explained that it was mindful that our Court has been "unequivocal" in rejecting expert testimony regarding the reliability of eyewitness identification, as such testimony would impermissibly speak to the credibility of a witness's testimony, which is for the jury to assess, citing Simmons, and that the Superior Court has consistently followed this precedent, citing Bormack. Commonwealth v. Walker, 1477 EDA 2008 at 14-15 (Pa. Super. filed August 23, 2010). Thus, based upon our Court's prior case law, the Superior Court found itself "constrained to apply the consistent precedent of our Supreme Court until it rules otherwise with regard to this type of evidence." Id. at 16.[4]

[3] Similarly, the trial court addressed and rejected Appellant's related claim that it erred in failing to take judicial notice of certain "facts" relating to eyewitness identifications which may have caused the identifications to be unreliable, repeating that such information was not relevant to the case, and that cross-examination and closing arguments were the appropriate vehicle by which to educate the jurors of these factors.

[4] The Superior Court also rejected Appellant's related argument that the court should take judicial notice of certain scientifically proven facts relating to eyewitness identification, including weapons focus; cross-racial identification; high-stress/traumatic criminal events; and witness statement confidence and witness accuracy. Id. at 20. Again, the Superior Court explained that, like its rationale regarding expert testimony on witness identification, taking judicial notice of scientific facts concerning the reliability of eyewitness identification would invade the province of the jury to assess credibility.

We granted allocatur to consider whether a trial court may permit, in its discretion, the testimony of an expert in the field of eyewitness identification. Implicit in resolving this question is the issue of whether the allowance of such expert testimony improperly encroaches on the credibility determining function of the finder of fact. Specifically, we granted allowance of appeal on the following two issues, as stated by Appellant:

> a. Should not the trial court have had the discretion to permit [Appellant] to present the testimony of a nationally recognized expert in the field of human memory, perception and recall where the sole evidence to establish guilt was the testimony of a victim who was under extreme duress when assaulted at gunpoint by a stranger of another race?
>
> b. Should not the court permit expert testimony, whether it be for the defense or prosecution, on how the mind works as long as such testimony has received general acceptance within the scientific community?

Commonwealth v. Walker, 17 A.3d 921 (Pa. 2011) (order).

Traditionally, in reviewing trial court decision making regarding the admissibility of evidence, an appellate court determines whether the lower tribunal abused its discretion. Paden v. Baker Concrete Constr. Inc., 540 Pa. 409, 658 A.2d 341 (1995). An abuse of discretion "is not merely an error of judgment, but if in reaching a conclusion the law is over ridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by the evidence or the record, discretion is abused." Mielcuszny et ux. v. Rosol, 317 Pa. 91, 93-94, 176 A. 236, 237 (1934). The circumstances in this appeal, however, are somewhat unique. The lower tribunals adhered to our prior precedent regarding the admission of expert testimony concerning eyewitness identification in rendering their decisions, and, thus, we are asked to reevaluate our prior decisions, which raises a

pure question of law. Thus, in these circumstances, our standard of review is *de novo* and our scope of review plenary. Buffalo Twp. v. Jones, 571 Pa. 637, 645 n.4, 813 A.2d 659, 664 n.4 (2002).

Initially, Appellant notes the quantifiable and peculiar problems inherent in questions of identification and asserts that mistaken identifications are the leading cause of wrongful convictions. Appellant submits that because DNA evidence is often times unavailable, determinations of guilt must be based on an accurate understanding of perception, memory, and recall. According to Appellant, scientific advancements in the field of memory and eyewitness identification evince "the need for expert testimony to explain the vagaries inherent in eyewitness identification." Appellant's Brief at 12.

Appellant offers that Dr. Fulero would have explained to the jury how the mind works and informed the jury of certain "scientifically proven facts" relating to eyewitness identification. Id. These findings, as stated by Appellant, are: "(1) the phenomenon of 'weapons focus'; (2) the reduced reliability of identification in cross-racial identification cases; (3) the significantly decreased accuracy in eyewitness identifications in high-stress/traumatic criminal events; (4) increased risk of mistaken identification when police investigators do not warn a witness, prior to viewing a photo array or line up, that the perpetrator may or may not be in the display; and (5) the lack of a strong correlation between witness statements of confidence and witness accuracy." Id. According to Appellant, "[a]ll of these scientific findings have received general acceptance in the scientific, legislative, and judicial communities." Id.

Specifically, regarding the "weapons focus" effect, Appellant claims that multiple studies have shown that the presence of a weapon during an event impairs eyewitness memory and identification accuracy. Appellant points to numerous court decisions in which "weapons focus" has been accepted as a valid scientific principle, including,

People v. Cornwell, 117 P.3d 622 (Cal. 2005); Campbell v. State, 814 P.2d 1 (Colo. 1991); Garden v. State, 815 A.2d 327 (Del. 2003); United States v. Brownlee, 454 F.3d 131 (3d Cir. 2006); and United States v. Mathis, 264 F.3d 321 (3d Cir. 2001).

Similarly, Appellant asserts that studies have consistently shown that cross-racial identification is not as accurate as same-race recognition. Citing to the American Bar Association Criminal Justice Section Report to the House of Delegates, Appellant offers that it found that "the issue of mistaken eyewitness identification and the increased risk of cross-racial eyewitness identification is a serious problem in the United States." ABA Criminal Justice Section Report to House of Delegates 104D (2008) (available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am08104d.authcheckdam.pdg). He further adds that "[c]ourts should have the discretion, where appropriate in an individual case, to allow a properly qualified expert to testify both pretrial and at trial on the factors affecting eyewitness accuracy." ABA Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures, ABA Criminal Justice Section, 1 n.16 (August 2004) (available at http://www.americanbar.org/content/dam/aba/migrated/leadership/2004/annual/111c.authcheckdam.doc). Additionally, Appellant points to case law noting that especially where cross-racial identification is involved, human perception is inexact and memory fallible. Commonwealth v. Christie, 98 S.W.3d 485 (Ky. 2002); State v. Cromedy, 727 A.2d 457 (N.J. 1999); People v. Radcliffe, 196 Misc. 2d 381 (N.Y.S. 2003); State v. Whaley, 406 S.E.2d 369 (S.C. 1991); State v. Copeland, 226 S.W.3d 287 (Tenn. 2007).

With respect to the impact of stress on eyewitness identifications, Appellant references studies which show a significant difference in correct identifications in a low-stress setting compared to those made in a high-stress setting and case law supporting

expert testimony regarding this subject. Skamarocius v. State, 731 P.2d 63 (Alaska 1987); Garden; State v. Allen, 875 N.E.2d 1221 (Ill. App. 2007); Currie v. Com., 515 S.E.2d 335 (Va. Ct. App. 1999); Brownlee; United States v. Harris, 995 F.2d 532 (4th Cir. 1993). Appellant also cites various studies in contending that failure of a police officer to inform a witness that the perpetrator may or may not be in a photo array contributes to a risk of misidentification. This concern, according to Appellant, has been voiced in case law as well. State v. Ledbetter, 881 A.2d 290 (Conn. 2005); Stephenson v. State, 226 S.W.3d 622 (Tex. App. 2007). Finally, based upon various studies, Appellant advances that any correlation between witness confidence in identification, and witness accuracy in identification, is minimal. Appellant offers two examples where eyewitness testimony, including in one instance five eyewitness testimonials, which were expressed with confidence, nevertheless led to convictions which DNA evidence later refuted. According to Appellant, expert testimony on the absence of confidence-accuracy correlation has been accepted in numerous jurisdictions, citing, *inter alia*, Radcliffe, *supra*.

Appellant goes on to offer that Dr. Fulero's testimony regarding eyewitness testimony would have assisted the jurors in this case. Appellant submits that lay persons' knowledge of eyewitness behavior is not only limited in scope but also highly inaccurate. Appellant adds that cross-examination is not an effective tool to educate jurors regarding the potential inaccuracy of witness identification. This is especially true, according to Appellant, when witnesses, although mistaken, sincerely believe what they say is true. State v. Clopten, 223 P.3d 1103, 1110 (Utah 2009). Appellant maintains that making jurors aware of the variables that impact eyewitness accuracy is critical to "a fair adjudication of the truth." Appellant's Brief at 24. Building upon his argument, Appellant contends that the only evidence offered by the Commonwealth in

this case were the victim's cross-racial identifications after a stressful nighttime gunpoint robbery, and included identifications from photo arrays, which, according to Appellant, were designed around Appellant and his brother. As noted by Appellant, these eyewitness identifications were without corroboration. Related thereto, Appellant, in a largely undeveloped argument, claims that he has a constitutional right to present a defense, including expert testimony on eyewitness identification, under the Sixth Amendment to the United States Constitution and Article 1, Section 8 of the Pennsylvania Constitution.

Turning to admissibility under Pa.R.E. 702, Appellant maintains that every requirement of Rule 702 has been met. Specifically, Appellant argues that, under the Frye general acceptance test, testimony by eyewitness identification experts has been generally accepted, and that there is a high degree of consensus among researchers. This acceptance has been confirmed by numerous federal and state judicial decisions applying both the Frye and Daubert tests[5] to such evidence. Additionally, Appellant urges that expert testimony on eyewitness identification should no longer be considered as speaking to credibility, and is distinct from testimony that a particular witness is reliable or not. Appellant stresses that such an expert provides the jury with more information so that it can make informed decisions.

Related thereto, Appellant highlights that, of the jurisdictions that have considered this issue, the vast majority give the trial court discretion to allow an expert to testify regarding eyewitness identification, and only a minority of three jurisdictions

[5] The United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), held that Frye was superseded in the federal courts by F.R.E. 702. Various states have adopted the Daubert test for the admission of expert testimony. In Grady v. Frito-Lay, Inc., 576 Pa. 546, 839 A.2d 1038 (2003), our Court reaffirmed that Frye would continue to control the admissibility of scientific evidence in the Commonwealth.

besides Pennsylvania — Louisiana, Kansas, and Nebraska — embrace such a *per se* exclusion. Touting the "modern trend," Appellant urges that in cases where stranger-eyewitness identification is a key element of the prosecution's case, expert testimony on such identification should be permitted. Appellant's Brief at 36. Appellant highlights that, in the past 15 years, numerous states, including Iowa, Kentucky, Tennessee, and Utah, which had previously utilized the absolute prohibition approach, have reversed themselves and embraced this trend, and calls for Pennsylvania to do the same.

Amicus American Psychological Association ("APA") supports the admission of expert testimony regarding the factors that bear on eyewitness testimony. Citing various studies, the APA first offers that most jurors do not know, or misunderstand, the issue of eyewitness testimony accuracy, and that expert testimony can bridge this "knowledge gap." APA Brief at 6. Echoing Appellant's arguments, the APA submits that expert testimony does not invade the province of the jury, as such testimony does not go to whether a particular witness is lying, and, moreover, does not give an opinion on the accuracy of a particular witness' identification. Rather, the expert would speak to objective scientific research and knowledge relating to eyewitness identification. The APA offers that studies suggest that jurors do not abdicate their fact-finding role when presented with expert testimony. Turning to the requirement that the methodology underlying the expert testimony must have general acceptance in the relevant scientific community, the APA submits that extensive research has been conducted on human memory and its limits, as well as inaccurate eyewitness identification, and, thus, the science of eyewitness identification passes the Frye general acceptance test. Finally, the APA notes that researchers have identified numerous factors that impact eyewitness identification, including those areas at issue in this appeal.

Amici Innocence Network and the Pennsylvania Innocence Project ("Amici"), while covering many of the same arguments as Appellant, first emphasize the high percentage of erroneous eyewitness identifications involved in convictions later vacated and urge that evolving scientific knowledge requires a change in approach to the admission of expert testimony which is necessary to ensure that fact finders have complete and accurate information about eyewitness identification. Amici offers that a vast majority of states and the federal circuits permit eyewitness identification expert testimony and leave it to the discretion of the trial judge as to whether to admit such evidence. According to Amici, such testimony should be permissible at every stage of criminal proceedings where eyewitness testimony is offered. Amici point out that the United States Supreme Court in Manson v. Brathwaite, 432 U.S. 98 (1977), set forth the minimum due process requirements for the admission of pretrial identification evidence. Manson relies on five factors: (1) the opportunity of witnesses to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation. Id. 432 U.S. at 113. Amici contends that this criteria is no longer satisfactory in light of the scientific research conducted since Manson, and that it fails to permit additional factors bearing on eyewitness identification. Further, Amici offers that the admission of expert testimony in this area should be determined on a case-by-case basis, under the same standards applicable to other expert testimony. Finally, and while largely tracking Appellant's arguments, the Pennsylvania Association of Criminal Defense Lawyers, as do prior amici, adds that, in its view, expert testimony regarding eyewitness identification would satisfy Rule 702, including being scientifically reliable, and would not constitute an impermissible comment on credibility.

The Commonwealth emphasizes that our Court has repeatedly held that expert testimony on the reliability of eyewitness identifications is inadmissible. The Commonwealth contends that, under Pennsylvania Rule of Evidence 403, psychological testimony concerning eyewitness testimony is unfairly prejudicial because it invites the jury to abdicate its responsibility. The Commonwealth offers that "credibility" is more than simply whether a witness is lying, but is the quality that makes a witness worthy of belief, including trustworthiness and reliability. Thus, the Commonwealth submits that Appellant's theory of mistaken identity based upon a witness's inability to identify a perpetrator directly challenges the witness's credibility, even though it does not suggest the witness is intentionally lying. Commonwealth's Brief at 9. Thus, according to the Commonwealth, when properly understood, expert testimony on the reliability of eyewitness testimony constitutes prohibited expert testimony on the credibility of eyewitnesses. Moreover, the Commonwealth asserts that expert testimony that does not address a *particular* witness's ability to make an accurate identification improperly shifts the jury's focus to the credibility of identifications from a class of witnesses and to the expert assessment of the credibility of eyewitnesses generally. This, the Commonwealth contends, gives the expert an unwarranted appearance of authority on the subject of witness credibility, citing Commonwealth v. Crawford, 553 Pa. 195, 718 A.2d 768 (1998); Commonwealth v. D.J.A., 800 A.2d 965 (Pa. Super. 2002). The Commonwealth claims that Appellant's proffered expert testimony is identical to that which our Court has previously rejected, citing Simmons, *supra*, and Commonwealth v. Spence, 534 Pa. 233, 627 A.2d 1176 (1993). Thus, according to the Commonwealth, the trial court properly excluded Appellant's expert testimony.

The Commonwealth argues that, even if our Court were to review the admissibility question anew, prejudice and other damaging effects of expert testimony

on eyewitness reliability would outweigh any probative value. The Commonwealth offers its own study which it claims confirms that expert testimony does not make juries better able to distinguish between reliable and unreliable identifications, and instead makes juries skeptical of all identification evidence. See Martire and Kemp, Can Experts Help Jurors to Evaluate Eyewitness Evidence? A Review of Eyewitness Expert Effects, Legal and Criminological Psychology 16 (2011) ("Martire and Kemp"). Rather than making jurors more sensitive to identifications of varying quality, the Commonwealth postulates that expert testimony makes jurors skeptical of eyewitness identification, undermining the credibility of both relatively strong and relatively weak eyewitness testimony. Thus, the Commonwealth avers that psychological studies on the issue show that expert testimony on eyewitness reliability is more than twice as likely to cause unfair prejudice to the prosecution as it is to fairly help the jury and that such testimony is more likely to have no effect or cause unfair prejudice to the defendant than to help the jury. Thus, according to the Commonwealth, the probative value of expert testimony in these instances is outweighed by the danger of prejudice and juror confusion.

Additionally, the Commonwealth asserts that expert testimony is not superior to cross-examination which is the primary means of exposing testimony that is inaccurate and mistaken. Manson; U.S. v. Salerno, 505 U.S. 317 (1992) (Stevens, J. dissenting) ("[I]n the Anglo-American system cross-examination is the principal means of undermining the credibility of a witness whose testimony is false *or inaccurate*." (emphasis added and footnote omitted)). According to the Commonwealth, again citing to studies regarding juror sensitivity, cross-examination is superior to the use of expert testimony as a tool for exposing eyewitness unreliability.

The Commonwealth warns that permitting expert testimony on eyewitness reliability would present numerous practical problems, including exposing the judiciary to hundreds or thousands of potential ineffectiveness assistance of counsel claims in violent felony cases. While acknowledging that these concerns are not dispositive, the Commonwealth contends they weigh against a change to current precedent. Moreover, the Commonwealth argues it would inevitably lead to expensive, time-consuming, and potentially prejudicial battles of experts on other issues that the Commonwealth submits are properly left to the jury. The Commonwealth suggests defendants may intentionally omit expert testimony through gamesmanship to allow for an appellate or post-conviction claim, and raises the specter of reversal of state convictions on federal *habeas corpus* review. The Commonwealth presses its argument, offering that there would be no firm distinction between expert testimony on eyewitness testimony and expert testimony on "how the mind works" in other situations, suggesting a slippery slope of overruling prior decisions prohibiting expert testimony in various other matters. See Crawford (repressed memories); Commonwealth v. Gallagher, 519 Pa. 291, 547 A.2d 355 (1988) ("rape trauma syndrome"); Commonwealth v. Davis, 518 Pa. 77, 541 A.2d 315 (1988) (ability to fabricate sexual experiences); Commonwealth v. Seese, 512 Pa. 439, 517 A.2d 920 (1986) (veracity of children who claim to be victims of sexual abuse). The Commonwealth argues that if such expert testimony was allowed for the defense, at a minimum, the prosecution would be permitted to call its own expert to challenge the claims of the defense expert and to present testimony on factors — such as the witness's youth and close proximity to his or her attackers, and same-race identification — that according to studies *enhance* the reliability of identifications. The Commonwealth even posits the possibility of expert testimony on the effect that expert testimony has on jurors and expert testimony on "informational cascades," actions by

which laypersons and experts accept uncritically even erroneous views of experts who have considered an issue before them.[6]

With respect to the studies offered by Appellants in support of their desire to permit the admission of expert testimony regarding eyewitness identification, the Commonwealth contends that, even if relevant, these publications and extra-jurisdictional cases are largely the same as those presented to our Court in previous cases. The Commonwealth adds that the "wrongful conviction" lists cited by Appellant and amici are exaggerated and unreliable, and do not demonstrate the degree to which eyewitness errors occur, do not offer any particular cause for the mistakes, and do not establish that expert testimony would improve the accuracy of verdicts.

According to the Commonwealth, the publications cited by Appellants do not address what it believes to be the core issue of unfair prejudice and juror confusion. Indeed, the Commonwealth claims that there is no Frye issue in this case. According to the Commonwealth, even if every publication were based on "actual science" and were generally accepted in the relevant scientific community, expert evidence should be excluded under Rule 403 as it will not assist the trier of fact, as it is inherently more prejudicial than probative. While denying their relevance, the Commonwealth argues that the studies on which Appellant relies do not involve or replicate actual crimes with actual victims and eyewitnesses. Watching a video or live-action simulation cannot replicate real life, and, the emotion of being a victim of a violent crime, and, thus, according to the Commonwealth, such studies are unreliable compared to studies of

[6] Indeed, the Commonwealth boldly goes so far to extrapolate this theory beyond the scientific arena, and suggests that "informational cascades" may account for why so many jurisdictions allow eyewitness identification expert testimony. Commonwealth Brief at 27 n.8. We are confident that the judges of our sister states and the federal judiciary who have addressed this very difficult issue have done so after careful consideration, rather than simply following the herd.

actual cases. Finally, the Commonwealth asserts that admitting expert testimony regarding eyewitness testimony fails to account for the nature of our jury system, and that, rather than the admission of expert testimony, the best way to account for eyewitness credibility is reliance upon the "collective sense and experience" of twelve people who will "bring to their deliberations an array of experiences and views on the issues affecting eyewitness credibility." Commonwealth Brief at 43. Here, the Commonwealth emphasizes that multiple witnesses identified Appellant both before and at trial, Appellant was able to extensively cross-examine each witness, and after consideration of the circumstances affecting the reliability of the identifications, the jury acquitted Appellant of three of the robberies.

The Commonwealth also counters Appellant's accounting of the various jurisdictions that give trial courts the discretion to admit expert testimony on eyewitness identification by first suggesting that our Court's exclusion of such expert testimony is hardly an anomaly. The Commonwealth continues that a number of the jurisdictions favoring discretion on the part of the trial court in admitting expert testimony are without any coherent reason for doing so, citing Simmons v. State, 934 So.2d 1100 (Fla. 2006), and advocates "clear rules and uniform justice," instead of "inconsistent results." Commonwealth Brief at 46. Finally, the Commonwealth rebukes Appellant's due process claim, noting a defendant's right to present evidence is not unlimited, but subject to relevancy and applicable evidentiary rules, and that, here, under Pennsylvania's long-standing precedent, Appellant's proposed expert testimony is inadmissible.

Our analysis begins with a brief background regarding eyewitness identification and the current state of Pennsylvania law concerning the admissibility of expert testimony regarding eyewitness identification.

Eyewitness evidence may be extremely probative of guilt and is often times crucial to the Commonwealth's case against a defendant, and, thus, indispensable to the proper functioning of our criminal justice system. It is arguably the most powerful form of evidence. As Justice William Brennan noted, "There is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J. dissenting) (emphasis original) (quoting Elizabeth F. Loftus, Eyewitness Testimony (1979)). Yet, the high Court has also recognized "the 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). Because eyewitnesses can offer inaccurate, but honestly held, recollections in their attempt to identify the perpetrator of a crime, eyewitness identifications are widely considered to be one of the least reliable forms of evidence. Id. ("[United States Supreme Court] Justice [Felix] Frankfurter once said: 'What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent -- not due to the brutalities of ancient criminal procedure.'"). Our Court has long echoed the same sentiment. See Estate of Bryant, 176 Pa. 309, 318, 35 A. 571, 577 (1896) ("[R]ecognition or identification [is] one of the least reliable of facts testified to even by actual witnesses who have seen the parties in question."). Thus, as recently emphasized by the United States Supreme Court, "[w]e do not doubt either the importance or the fallibility of eyewitness identifications." Perry v. New Hampshire, 132 S.Ct. 716, 728 (2012).

The recent advent of DNA testing has raised the profile of erroneous eyewitness identifications, and the resulting overturning of convictions based upon such testing has made the concern over the accuracy of eyewitness identification manifest.[7] Further, DNA testing has brought to the fore the damaging impact of erroneous eyewitness identification as well. While an erroneous eyewitness identification which leads to the wrongful conviction of an innocent defendant no doubt generates great suffering on the part of the individual and his or her family, and possibly death in the capital arena, it is not an issue that impacts only the wrongfully accused; incorrectly identifying their attackers can be traumatizing for a victim, as well, due to the guilt of convicting an innocent person, and the resulting awareness that the criminal who perpetrated the crime remains at large. It is axiomatic that law enforcement officers would express similar views if a wrongful conviction due to erroneous eyewitness testimony permitted dangerous criminals to remain on the loose.

Thus, as demonstrated above, there is no doubt that wrongful conviction due to erroneous eyewitness identification continues to be a pressing concern for the legal system and society. One way in which fact finders may be assisted in making more accurate and just determinations regarding guilt or innocence at trial is through the admission of expert testimony.

Rule 702 of the Pennsylvania Rules of Evidence speaks to the general admissibility of expert testimony where scientific evidence is at issue, and provides that a witness who is qualified as an expert may testify "in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by a layperson; (b) the expert's scientific, technical, or other

[7] See Garrett, Judging Innocence, 108 Colum. L. Rev. 55, 60 (2008) (offering that of the first 200 individuals whose convictions were overturned by post-conviction DNA testing, nearly 80% were convicted based upon eyewitness testimony).

specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and (c) the expert's methodology is generally accepted in the relevant field." Thus, to be admissible, the expert testimony must be beyond the knowledge possessed by a layperson and assist the trier of fact to understand the evidence or determine a fact in issue. Moreover, the Comment to Rule 702 makes clear that this rule reflects our Commonwealth's adoption of the Frye standard which allies the "general acceptance" test for admissibility. Pa.R.E. 702 cmt. Thus, the Frye standard, as discussed below, is a component of Rule 702. Commonwealth v. Chmiel, 612 Pa. 333, 382, 30 A.3d 1111, 1140 (2011).

While in Pennsylvania the admission of expert testimony is generally a matter left to the discretion of the trial court, our decisional law from the mid-1990s has repeatedly barred, without exception, the admission of expert testimony regarding eyewitness identification. Spence; Simmons; Abdul-Salaam, 544 Pa. 514, 678 A.2d 342 (1996).

In Spence, the first case speaking to this issue, the defendant, on trial for, *inter alia*, first-degree murder, sought to present the expert testimony of a psychologist as to the effects of stress on persons offering identification testimony. Citing prior case law prohibiting expert testimony on various subjects, our Court rejected his claim as giving an unwarranted appearance of authority on the subject of credibility upon which expert opinion may not intrude:

> Expert opinion may not be allowed to intrude upon the jury's basic function of deciding credibility. See, e.g., Commonwealth v. Gallagher, 519 Pa. 291, 547 A.2d 355 (1988) (error to allow expert testimony in area of "rape trauma syndrome" to explain that such trauma could prevent a victim from making a timely identification of assailant); Commonwealth v. Davis, 518 Pa. 77, 541 A.2d 315 (1988) (error to allow expert to testimony that child sex abuse victims generally lack the ability to fabricate sexual experiences); Commonwealth v. Seese, 512 Pa. 439, 517

> A.2d 920 (1986) (doctor may not testify regarding the veracity of children who claim to be victims of sexual abuse.).
>
> Spence argues that because the expert was going to attack rather than enhance the credibility of the victim, Ogrod, his testimony was permissible. Whether the expert's opinion is offered to attack or enhance, it assumes the same impact -- an "unwarranted appearance of authority in the subject of credibility which is within the facility of the ordinary juror to assess." Commonwealth v. Gallagher, 519 Pa. at 297, 547 A.2d at 358. The trial court properly excluded the proposed expert testimony.

Spence, 534 Pa. at 245, 627 A.2d at 1182.

Two years later, in Simmons, a request by the defendant to present testimony on the general topic of the reliability of eyewitness identification was similarly rejected. The Simmons Court followed Spence, offering similar concerns that such testimony would give "an unwarranted appearance of authority as to the subject of credibility, a subject which an ordinary jury can assess." Simmons, Pa. at 231, 662 A.2d at 631. Second, we opined that cross-examination and closing argument was sufficient to challenge the reliability of eyewitness testimony. Id. ("[A]ppellant was free to and did attack the witnesses' credibility and point out inconsistencies of all the eyewitnesses at trial through cross-examination and in his closing argument."). Finally, a year after our decision in Simmons, we rejected a similar request for an expert on eyewitness identification, relying on Simmons without further analysis. Abdul-Salaam, Pa. at 535-36, 678 A.2d at 352. Thus, our cases from the mid-1990s make clear that an unwarranted appearance of authority invading the province of the jury's credibility determination, and the existence of alternative means of challenging the reliability of eyewitness testimony, serve as the basis for the current *per se* ban on expert testimony in this area.

Importantly, while the nature of the advocacy presented to our Court is unclear, in this line of cases, we 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, before directly considering the foundations of our current case law, it is important to recognize the considerable empirical research that has been conducted regarding eyewitness identification, as well as the decisional law that has spoken to the admission of expert testimony regarding eyewitness identification.

Since our decision in Spence, 20 years of advances in scientific study have strongly suggested that eyewitnesses are apt to erroneously identify a person as the perpetrator of a crime when certain factors are present:

> [A] vast body of scientific research about human memory has emerged. That body of work casts doubt on some commonly held views relating to memory . . . Study after study revealed a troubling lack of reliability in eyewitness identifications. From social science research to the review of actual police lineups, from laboratory experiments to DNA exonerations, the record proves that the possibility of mistaken identification is real. Indeed, it is now widely known that eyewitness misidentification is the leading cause of wrongful conviction across the country.

New Jersey v. Henderson, 27 A.3d 872, 877-78 (N.J. 2011). See also, Wells and Smalarz, Eyewitness-Identification Evidence: Scientific Advances and the New Burden on Trial Judges, 48 Court Review 14 (2012) (noting vast amount of scientific literature regarding eyewitness identification research and summarizing general principles regarding mistaken identification). Many scholarly articles detail the considerable amount of behavioral research in the area of eyewitness identification. The "extensive and comprehensive scientific research, as reflected in hundreds of peer reviewed

studies and meta-analyses,[8] convincingly demonstrates the fallibility of eyewitness identification testimony and pinpoints an array of variables that are most likely to lead to a mistaken identification." Connecticut v. Guilbert, 49 A.3d 705, 720 (Conn. 2012); see also, Mark S. Brodin, Behavioral Science Evidence in the Age of Daubert: Reflections of a Skeptic, 73 U. Cin. L. Rev. 867, 889-90 (2005) ("Ironically, the form of social science evidence which is most solidly based in 'hard' empirical science has met with the most resistance in the courts. Expert testimony concerning the limitations and weaknesses of eyewitness identification is firmly rooted in experimental foundation, derived from decades of psychological research on human perception and memory as well as an impressive peer review literature."). Thus, it is beyond serious contention that the statistical evidence on eyewitness inaccuracy is substantial, and scientific research in the field of eyewitness identification has advanced significantly since our law establishing an absolute ban on expert testimony in this regard 20 years ago.

As a direct result of this growing field of study, the use of experts has gained substantial acceptance by courts nationally. Indeed, there is a clear trend among state and federal courts permitting the admission of eyewitness expert testimony, at the discretion of the trial court, for the purpose of aiding the trier of fact in understanding the characteristics of eyewitness identification. Beginning with the Supreme Court of Arizona's decision in State v. Chapple, 660 P.2d 1208 (Ariz. 1983), courts in 44 states and the District of Columbia have permitted such testimony at the discretion of the trial judge. See Ex parte Williams, 594 So.2d 1225 (Ala. 1992); Skamarocius v. State, 731 P.2d 63 (Alaska Ct. App. 1987); State v. Nordstrom, 25 P.3d 727 (Ariz. 2001) (en banc), *abrogated on other grounds by* State v. Ferrero, 274 P.3d 509 (Ariz. 2012) (en banc);

[8] A meta-analysis is a study that combines and synthesizes the results of other available studies.

Parker v. State, 968 S.W.2d 592 (Ark. 1998); People v. McDonald, 690 P.2d 709 (Cal. 1984), *overruled on other grounds*, People v. Mendoza, 4 P.3d 265 (Cal. 2000); Campbell v. People, 814 P.2d 1 (Colo. 1991) (en banc), *abrogated by* People v. Shreck, 22 P.3d 68 (Colo. 2001) (en banc) (to the extent that Campbell held out Frye as the appropriate standard for determining the admissibility of scientific evidence rather than C.R.E. 702); State v. Guilbert, 49 A.3d 705 (Conn. 2012); Garden v. State, 815 A.2d 327 (Del. 2003), *superseded by statute on other grounds*, Del. Code Ann. tit. 11, §4209(d) (2003); Benn v. United States, 978 A.2d 1257 (D.C. 2009); McMullen v. State, 714 So.2d 368 (Fla. 1998); Howard v. State, 686 S.E.2d 764 (Ga. 2009); State v. Wright, 206 P.3d 856 (Idaho Ct. App. 2009); People v. Allen, 875 N.E.2d 1221 (Ill. App. Ct. 2007); Cook v. State, 734 N.E.2d 563 (Ind. 2000); State v. Schutz, 579 N.W.2d 317 (Iowa 1998); Commonwealth v. Christie, 98 S.W.3d 485 (Ky. 2002); State v. Kelly, 752 A.2d 188 (Me. 2000); Bomas v. State, 987 A.2d 98 (Md. 2010); Commonwealth v. Santoli, 680 N.E.2d 1116 (Mass. 1997); People v. Carson, 553 N.W.2d 1 (Mich. Ct. App. 1996), *adopted in pertinent part*, People v. Carson, 560 N.W.2d 657 (Mich. Ct. App. 1996); State v. Miles, 585 N.W.2d 368 (Minn. 1998); State v. Ware; 326 S.W.3d 512 (Mo. Ct. App. 2010); State v. DuBray, 77 P.3d 247 (Mont. 2003); State v. Trevino, 432 N.W.2d 503 (Neb. 1988); White v. State, 926 P.2d 291 (Nev. 1996); State v. Henderson, 27 A.3d 872 (N.J. 2011); People v. LeGrand, 867 N.E.2d 374 (N.Y. 2007); State v. Lee, 572 S.E.2d 170 (N.C. Ct. App. 2002); State v. Fontaine, 382 N.W.2d 374 (N.D. 1986); State v. Buell, 489 N.E.2d 795 (Ohio 1986); Torres v. State, 962 P.2d 3 (Okla. Crim. App. 1998); State v. Lawson, 291 P.3d 673 (Or. 2012) (en banc); State v. Werner, 851 A.2d 1093 (R.I. 2004); State v. Whaley, 406 S.E.2d 369 (S.C. 1991); State v. McCord, 505 N.W.2d 388 (S.D. 1993); State v. Copeland, 226 S.W.3d 287 (Tenn. 2007); Weatherred v. State, 15 S.W.3d 540 (Tex. 2000); State v. Clopten, 223 P.3d

1103 (Utah 2009); State v. Percy, 595 A.2d 248 (Vt. 1990); Currie v. Commonwealth, 515 S.E.2d 335 (Va. Ct. App. 1999); State v. Cheatam, 81 P.3d 830 (Wash. 2003) (en banc); State v. Taylor, 490 S.E.2d 748 (W.Va. 1997); State v. Shomberg, 709 N.W.2d 370 (Wis. 2006); Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991).

Moreover, all federal circuits that have considered the issue, with the possible exception of the 11th Circuit, have embraced this approach. Compare United States v. Rodriguez-Berrios, 573 F.3d 55 (1st Cir. 2009); United States v. Lumpkin, 192 F.3d 280 (2d Cir. 1999); United States v. Brownlee, 454 F.3d 131 (3d Cir. 2006); United States v. Harris, 995 F.2d 532 (4th Cir. 1993); United States v. Moore, 786 F.2d 1308 (5th Cir. 1986); United States v. Smithers, 212 F.3d 306 (6th Cir. 2000); United States v. Bartlett, 567 F.3d 901 (7th Cir. 2009); United States v. Martin, 391 F.3d 949 (8th Cir. 2004); United States v. Rincon, 28 F.3d 921 (9th Cir. 1994); United States v. Rodriguez-Felix, 450 F.3d 1117 (10th Cir. 2006); United States v. Smith, 621 F.Supp. 2d 1207 (M.D. Ala. 2009) (Eleventh Circuit) (determining district court may admit testimony concerning eyewitness identification) with United States v. Smith, 122 F.3d 1355, 1358 (11th Cir. 1997) (finding district court did not abuse its discretion when excluding expert on eyewitness testimony and declining to decide whether *per se* inadmissibility rule remained in effect).

Of the remaining jurisdictions that have addressed the issue, only Pennsylvania, Kansas, and Louisiana continue to adhere to a *per se* exclusionary approach to the admission of expert testimony regarding eyewitness identification. State v. Gaines, 926 P.2d 641 (Kan. 1996); State v. Young, 35 So.3d 1042 (La. 2010); Simmons, supra.

Recent state high court decisions make manifest the movement towards abandoning an absolute exclusion approach in favor of a discretionary approach to the admission of expert testimony regarding eyewitness identification. Guilbert, 49 A.3d

705 (Conn. 2012) (undertaking encyclopedic review of topic and overruling prior precedent prohibiting expert testimony on eyewitness identification based upon extensive and comprehensive scientific research on fallibility of eyewitness identification); Clopten, 223 P.3d 1103 (Utah 2009) (recognizing decades of study established fallibility of eyewitness testimony, that jurors are unaware of such deficiencies, and that such expert testimony will assist trier of fact); People v. LeGrand, 867 N.E.2d 374, 380 (N.Y. 2007) (finding ban on expert testimony inappropriate due to advances in scientific research); State v. Copeland, 226 S.W.3d 287 (Tenn. 2007) (overruling prior categorical ban on expert testimony based upon advances in field of eyewitness identification, inadequacy of cross-examination and jury instructions; and ability of trial court to evaluate admissibility of expert testimony); Commonwealth v. Christie, 98 S.W.3d 485 (Ky. 2002) (highlighting number of courts that have held expert testimony should be admitted when no other inculpatory evidence presented); State v. Schultz, 579 N.W.2d 317 (Iowa 1998) (concluding impressive studies regarding eyewitness identification required reversal of per se rule of exclusion). Thus, since the mid-1990s, the unmistakable trend has been away from an absolute ban on expert testimony in this area and the vast majority of jurisdictions now allow the admissibility of expert testimony on eyewitness reliability at the discretion of the trial court.

With an understanding of the significant empirical research and the clear trend of jurisdictions towards the admission of expert testimony on eyewitness identification at the discretion of the trial court, we turn to the concerns expressed by our Court regarding the credibility-determining role of the jury and the existence of adequate alternatives to the use of expert testimony regarding eyewitness identifications.

The underpinnings of our current ban on expert testimony in the area of eyewitness reliability, and the primary reason offered by the Commonwealth, as noted

above, is that the admission of such testimony will invade the province of the jury in making credibility determinations and provide an unwarranted appearance of authority on the subject of credibility.

Expert testimony on relevant psychological factors which may impact eyewitness identification, however, does not directly speak to whether a particular witness was untrustworthy, or even unreliable, as the expert is not rendering an opinion on whether a specific witness is accurate in his or her identification. Rather, such testimony teaches — it provides jurors with education by which they assess for themselves the witness's credibility. In light of demonstrated misconceptions that jurors and other lay persons may possess regarding the infallibility of eyewitness identification, and ideas contrary to "common sense," such as the correlation between certainty and accuracy, use of expert testimony in appropriate cases will permit jurors to engage in the process of making credibility determinations with full awareness of limitations that eyewitness testimony may present. Moreover, while the Commonwealth claims that expert testimony would speak to a class of witnesses, causing the jury to defer to the expert and to give the expert an unwarranted appearance of authority, the focus is on factors that jurors may be unaware, and will potentially enhance their ability to render a just decision. Indeed, as expressed by the Supreme Court of Utah, "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." Clopten, 223 P.3d at 1109.

Numerous cases have rejected this basis for banning expert testimony in this area for these same reasons. See, e.g., United States v. Hines, 55 F. Supp. 2d 62, 72 (D. Mass. 1999) ("Nor do I agree that this testimony somehow usurps the function of the

jury. The function of the expert here is not to say to the jury -- 'you should believe or not believe the eyewitness.' . . . All that the expert does is provide the jury with more information with which the jury can then make a more informed decision."); People v. McDonald, 690 P.2d 709, 722 (Cal. 1984) (quoting Dean Wigmore, and referring to expert psychological evidence on eyewitness identification, "the objection [to such expert testimony] based upon the 'province of the jury' is no more than a shibboleth which, if accepted, would deprive the jury of important information useful and perhaps necessary for a proper decision on a difficult issue;" "Nor could [expert testimony] in fact usurp the jury's function. As is true of all expert testimony, the jury remains free to reject it entirely after considering the expert's opinion, reasons, qualifications, and credibility." (citations omitted)).

Moreover, our Rules of Evidence expressly contemplate just such a limited role for an expert, a role that does not impact credibility determinations. Specifically, the comment to Rule 702 makes clear that "[m]uch of the literature assumes that experts testify only in the form of an opinion. The language 'or otherwise' reflects the fact that experts frequently are called upon to educate the trier of fact about the scientific or technical principles relevant to the case." Pa.R.E. 702 cmt. The comment to Pa.R.E. 702 refers to the comments to Federal Rule of Evidence 702, which further explains, "[a]n intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical or other specialized knowledge[;] . . . The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts." F.R.E. 702 cmts.

Expert testimony on relevant factors concerning eyewitness identification would not speak specifically to the legitimacy of the victim's identification, or pass directly on

the veracity of a particular witness, but would provide a background against which the jury could assess various factors concerning eyewitness identification at issue in the case. Consequently, rather than inviting the jury to abdicate its responsibility, as asserted by the Commonwealth, such expert testimony would merely assist the jury in understanding the factors impacting eyewitness identification testimony. Thus, with respect to the area of eyewitness identification, we, like nearly all other courts, reject the rationale underlying the categorical ban on expert testimony: that such testimony constitutes an impermissible invasion of the jury's credibility making determination.[9]

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[9] The Commonwealth relies on the Martire and Kemp article to support its argument that the absolute ban against expert evidence concerning eyewitness identification should remain because studies have not confirmed that such testimony results in the jury, in essence, arriving at a correct decision. The Commonwealth's reliance on this article is misplaced. A close review of the Martire and Kemp article undercuts the Commonwealth's broad claims that expert testimony in this area is unreliable and that we should maintain the absolute ban on such testimony. Specifically, citing the article, the Commonwealth asserts that only "3 of 24 studies have produced any kind of positive result, and only 1 of 24 . . . produced a significant positive result." Commonwealth Sur-Reply Brief at 5. Yet, the authors of the article specifically rejected 21 of the 24 studies reviewed as methodologically unable to accurately test for juror accuracy. Martire and Kemp at 28-29, 31-33. Thus, according to the authors themselves, just three of the studies reviewed employed a methodology which could properly determine juror accuracy; of these three studies, one established that expert testimony can significantly improve a juror's ability to discriminate between accurate and inaccurate eyewitness identifications. According to the authors, the other two studies, which were subject to the peer review process, including the authors' own 2009 study discussed below, did not provide "evidence that the testimony of an eyewitness expert significantly improved juror ability to discriminate accurate from inaccurate identifications." Id. at 33. Yet, the authors' earlier conclusion is important: "Further investigations applying this methodology are clearly necessary in order to determine whether the single observed instance of improved [sensitivity to eyewitness accuracy] is the exception or the rule." Id. at 32. In short, the Martire and Kemp article, another important piece of scholarship in this field, recommends additional study, and does not *ipso facto* mandate the continued imposition of a ban on expert testimony in this area, especially in light of the experience of virtually all jurisdictions which have considered this issue.

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Our prior decisions, and the Commonwealth, also offer that cross-examination coupled with closing arguments, is sufficient to convey the possibility of mistaken identification to the jury, and, thus, is a basis to categorically exclude expert testimony on eyewitness identification.

While cross-examination and advocacy in closing argument may be common methods to unearth falsehoods and challenge the veracity of a witness, it is less effective in educating the jury with respect to the fallibility of eyewitness identification. See Guilbert, 49 A.3d at 725 ("cross-examination is far better at exposing lies than at countering sincere but mistaken beliefs"). This 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. See generally Jules Epstein, The Great Engine That Couldn't: Science, Mistaken Identity, and the Limits of Cross-Examination, 36 Stetson L. Rev. 727 (2007). Indeed, such information would not be within the permissible scope of cross-examination. If permitting expert testimony on relevant factors impacting eyewitness identification does not go to credibility, but to educating the jury, and if such factors are possibly not known or understood, or even misunderstood, by jurors, then the more effective way of educating the jury is not through the eyewitness him or herself, but through the presentation of such testimony by an expert when appropriate.

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Finally, and related thereto, the Martire and Kemp article, to a large extent, relies upon a prior article published by these same authors two years earlier, in which they conclude the impact of expert evidence was not significantly different from that of focused jury instructions. Martire and Kemp, The Impact of Eyewitness Expert Evidence and Judicial Instruction on Juror Ability to Evaluate Eyewitness Testimony, 33 Law and Human Behavior 225, 234 (2009). Thus, based upon the Martire and Kemp articles, the preference for jury instructions proffered in the dissents of Chief Justice Castille and Justice Eakin is potentially called into question.

Again, numerous courts have rejected the preclusion of expert testimony on relevant factors concerning eyewitness identification simply on the basis that cross-examination is available. See, e.g., Guilbert, 49 A.3d at 725-26 (collecting cases); Clopten, 223 P.3d at 1110; Copeland, 226 S.W.3d at 300 (cross-examination insufficient to educate the jury on aspects of eyewitness identification).

Thus, we reject reliance upon cross-examination and closing arguments as sufficient to convey to the jury the possible factors impacting eyewitness identification and as justification for an absolute bar of such expert testimony, and recognize the potential advantages of expert testimony as a means to assist the jury where mistaken identity is a possibility. See Clopten, 223 P.3d at 1110 ("Even if cross-examination reveals flaws in the identification, expert testimony may still be needed to assist the jury").[10]

[10] For similar reasons, a Kloiber instruction would not serve as a sufficient reason to deny categorically the use of expert testimony in appropriate cases. A Kloiber instruction warns jurors that they should receive evidence of eyewitness identification with caution where: "the witness is not in a position to clearly observe the assailant, or he is not positive as to identity, or his positive statements as to identity are weakened by qualification or by failure to identify [the] defendant on one or more prior occasions." Commonwealth v. Kloiber, 378 Pa. 412, 424, 106 A.2d 820, 826-27 (1954). Yet, factors such as cross-racial identification, weapons focus, stress, or correlation between confidence and accuracy of identification are divorced from the compromised position of the witness, his or her lack of positive identification, or any expressed qualification of statements regarding identification. In his dissent, Chief Justice Castille, suggests unspecified revision to the existing Kloiber instruction; yet, for the above-noted reasons, such revisions would entail a complete remaking, rather than a mere reworking, of the instruction.

Related thereto, and regarding jury instructions generally, Justice Eakin, in his dissent, initially embraces the rationale underlying the absolute bar against expert testimony, positing such testimony would necessarily suggest an unwarranted "appearance of authority" on the subject of credibility; but, Justice Eakin goes on to suggest using jury instructions to convey the same information, thus, giving it *actual* authority. If one holds to the premise that such information impermissibly intrudes upon the jury's credibility (…continued)

Finally, although not serving as an underpinning for our prior decisions in upholding an absolute ban on expert testimony regarding eyewitness identification, the Commonwealth raises numerous practical concerns to permitting such testimony. These include the possibility of the use of such expert testimony in numerous cases, the cost of allowing expert testimony, possible claims of ineffectiveness for failing to obtain

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making function, it is difficult to understand such information, coming from a judge by way of instructions, would have less of an impact on the credibility function of the jury. See Commonwealth Sur-Reply Brief at 15 ("Since the Commonwealth considers defendant's proffered expert testimony false and misleading, it obviously will not stipulate to his expert's testimony, much less to a judicial endorsement of his expert's testimony").

Indeed, our modification of an absolute ban on expert testimony in this area and an opening of the door to its use in appropriate cases, after passing the rigors of a Frye hearing, is a more conservative approach than that offered by Justice Eakin, who would have a judge, a neutral vested in actual authority, explain to the jury the possible shortcomings in eyewitness identification through jury instructions. See Henderson, 27 A.3d at 924 (directing that, in addition to the existing allowance of expert testimony at the discretion of the trial judge, enhanced instructions be given to educate juries regarding various factors that could impact reliability of identification in a given case); Supreme Judicial Court Study Group on Eyewitness Evidence, Report and Recommendation to the Justices, July 25, 2013 (Massachusetts' study group comprised of prosecutors, police, academics, attorneys, and judges, recommending, in addition to the allowance of expert testimony, *inter alia*, specific instructions regarding eyewitness identification in certain circumstances designed to guide jurors).

Moreover, while jury instructions may serve as another possible manner of informing the jury of factors potentially influencing eyewitness identification, Henderson, supra, like all options, jury instructions have their own shortcomings, and for purposes of our decision today, the possibility of instructions should not serve to categorically prohibit expert testimony. See Clopten, 223 P.3d at 1110-11 (finding cautionary instructions are inadequate at educating jury regarding mistaken identifications, *inter alia*, as instruction may be buried in overall charge, come at end of trial, days after witness testifies, and fail to explain how certain factors impacting eyewitness identification occur or to what extent); Copeland, 226 S.W.3d at 300 ("research also indicates that neither cross-examination nor jury instructions on the issue are sufficient to educate the jury on the problems with eyewitness identification").

an expert, and trials becoming a "battle of the experts," not only on questions of eyewitness identification, but also on related issues as well.

Initially, we envision that allowing such expert testimony would be limited to certain cases. As discussed below, such testimony would only be permitted where relevant. Pa.R.E. 401. While we need not precisely define such situations, generally speaking, it would be where the Commonwealth's case is solely or primarily dependent upon eyewitness testimony. Thus, contrary to the Commonwealth's suggestion that permitting expert testimony would impact thousands of cases, we believe the scope of removing the *per se* ban on such testimony would be limited, and, again, at the discretion of the trial judge. Second, there is a monetary cost for all tools used to achieve justice, including trial by jury. Moreover, the collective experience of the vast majority of state and federal jurisdictions that permit expert testimony appears to be that the ability to proffer such testimony has not placed an undue burden on the court system, either at trial or on collateral review, and the Commonwealth has cited no specific examples. Finally, the limited use of expert testimony regarding eyewitness identification will allow and may well encourage the Commonwealth to proffer its own experts, but as noted above, if proper, such expert testimony will merely provide the jury with additional knowledge with which the jury can then make a more informed decision.

We find that the use of expert testimony regarding eyewitness testimony when relevant does not improperly intrude upon the jury's credibility determinations and that cross-examination of a witness, and closing argument, are insufficient to convey factors regarding the fallibility of eyewitness identification to the jury. Coupled with the ground swell of empirical studies and research on factors influencing eyewitness identification, as well as the substantial acceptance nationally of expert testimony regarding eyewitness identification, we believe an absolute ban on expert testimony in this area is

no longer the best approach in determining how to assist the finder of fact where mistaken identification is at issue. Importantly, our decision today is limited to this unique area of the law, where, as noted above, the case law from other jurisdictions and the research is compelling. Thus, we believe that it is time to take the step of joining those jurisdictions which allow the admission of expert testimony on relevant factors concerning eyewitness identification, at the discretion of the trial court, subject to an abuse of discretion appellate standard of review.

Some further aspects of our limited decision to reject the *per se* ban on expert testimony regarding eyewitness identification require additional comment. As noted above, to be admissible under Pa.R.E. 702, proffered expert testimony must also address matters "beyond [the knowledge] possessed by the average layperson."

Expert testimony is admissible in all cases, civil and criminal alike, "when it involves explanations and inferences not within the range of ordinary training knowledge, intelligence and experience." Commonwealth v. Leslie, 424 Pa. 331, 334, 227 A.2d 900, 903 (1967). As noted above, eyewitness identification can be extremely powerful testimony; yet, its limits often are not understood by jurors. Studies have concluded that jurors misunderstand the accuracy of eyewitness identification. See, e.g., Elizabeth F. Loftus, et. al., Juror Understanding of Eyewitness Testimony: A Survey of 1000 Potential Jurors in the District of Columbia, 46 Jurimetrics J. 177 (2006); Handberg, Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury, 32 Am. Crim. L. Rev. 1013 (1995).

Case law reflects the same concerns. See, e.g., Guilbert, 49 A.3d at 723 (offering that scientific findings regarding eyewitness testimony "are largely unfamiliar to the average person, and, in fact, many of the findings are counterintuitive." (footnote omitted)); Clopten, 223 P.3d at 1108 ("there is little doubt that juries are generally

unaware of these deficiencies in human perception and memory"); Copeland, 226 S.W.3d at 300 (finding jurors for most part unaware of problems in eyewitness identifications); Newsome v. McCabe, 319 F.3d 301, 305 (7th Cir. 2003) ("Jurors, however, tend to think that witnesses' memories are reliable (because jurors are confident of their own), and this gap between the actual error rate and the jurors' heavy reliance on eyewitness testimony sets the stage for erroneous convictions"); United States v. Smithers, 212 F.3d 306, 312 n.1, 316 (6th Cir. 2000) ("Today, there is no question that many aspects of perception and memory are not within the common experience of most jurors, and in fact, many factors that affect memory are counter-intuitive;" "Jurors tend to overestimate the accuracy of eyewitness identifications because they do not know the factors they should consider when analyzing this testimony."); see also United States v. Brownlee, 454 F.3d 131, 142 (3d Cir. 2006) ("jurors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable" (citations omitted)).

Thus, we observe that the potential fallibility of eyewitness identification is "beyond [the knowledge] possessed by the average layperson," Pa.R.E. 702, indeed, may be counterintuitive, and so conclude that expert testimony on that subject could potentially assist the trier of fact to understand the evidence or determine a question of fact at issue. Stated another way, in light of the concerns identified by researchers and other courts, we are no longer willing to maintain a preclusive rule based on equating common knowledge among jurors with a developed understanding of the factors which potentially impact eyewitness testimony.

Factors at issue in this appeal — concerning weapons focus; the reduced reliability of identification in cross-racial identification cases; decreased accuracy in eyewitness identifications in high-stress/traumatic situations; the risk of mistaken

identification when police investigators do not warn a witness, prior to viewing a photo array or line up, that the perpetrator may or may not be in the display; and the lack of correlation between witness statements of confidence and witness accuracy — all are topics which the average juror may know little about. Thus, in light of misconceptions ordinary individuals may possess regarding eyewitness testimony, and its presumption of reliability, we conclude that, as a general proposition, the particular area of expert testimony at issue in this appeal may be beyond the ken of the average juror, and thus, as a threshold matter, possibly subject to expert testimony.

Next, under Pa.R.E. 702, such testimony must "help the trier of fact to understand the evidence or determine a fact in issue." Pa.R.E. 702. As noted above, in light of misconceptions that jurors and other lay persons may possess regarding the infallibility of eyewitness identification, use of expert testimony in appropriate cases would permit jurors to make credibility determinations with full awareness of the limitations that eyewitness testimony may present, and, thus, assist the trier of fact in understanding the evidence. Again, such expert testimony, when appropriate, can provide salutary educational value to the jurors in their credibility-determining function.

However, to be admissible under Rule 702, evidence must not only be beyond the knowledge possessed by layperson, and assist the trier of fact to understand the evidence, but it also, as noted above, must pass the Frye "general acceptance" test.

The Frye test provides that novel scientific evidence is admissible "if the methodology that underlies the evidence has general acceptance in the relevant scientific community." Grady v. Frito-Lay, Inc., 576 Pa. 546, 555, 839 A.2d 1038, 1044 (2003). The Grady Court reasoned that scientists are in a better position to evaluate the merits of scientific theory and techniques than judges. With respect to application of the Frye standard, our Court has "made it clear that Frye is not implicated every time

science comes into the courtroom; rather, it applies only to proffered expert testimony involving novel science." Commonwealth v. Dengler, 586 Pa. 54, 69, 890 A.2d 372, 382 (2005); see also Grady, 576 Pa. at 557, 839 A.2d at 1045 (finding Frye is applicable to novel science, as well as where scientific methods are utilized in novel way). Our Court has noted that "a reasonably broad meaning should be ascribed to the term 'novel,'" and "a Frye hearing is warranted when a trial judge has articulable grounds to believe that an expert witness has not applied accepted scientific methodology in a conventional fashion in reaching his or her conclusions. Betz v. Pneumo Abex LLC, et al., 615 Pa. 504, 545-46, 44 A.3d 27, 53 (2012). Further, what constitutes novel scientific evidence is usually decided on a case-by-case basis as there is some flexibility in the construction, as "science deemed novel at the outset may lose its novelty and become generally accepted in the scientific community at a later date, or the strength of the proponent's proffer may affect the Frye determination." Dengler, 586 Pa. at 69-70, 890 A.2d at 382. As we noted in Dengler:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Id. at 67-68, 890 A.2d at 380-81 (quoting Frye) (citation omitted).

Once determined to be novel evidence, under Frye, the proponent must show that the methodology is generally accepted by scientists in the relevant field, but need not prove the conclusions are generally accepted. Grady, 576 Pa. at 558, 839 A.2d at 1045. The burden of proof under the test is borne by the proponent of the scientific

evidence, who, again, must establish all the elements for the testimony to be admitted under Pa.R.E. 702, including satisfaction of the Frye test.

While numerous Frye jurisdictions have accepted eyewitness identification expert testimony as being admissible under the Frye standard, the Commonwealth has raised sufficient questions about certain methodology in this area to warrant further inquiry by the trial court through a Frye hearing. This is especially true here, in light of the trial court's denial of a Frye hearing due to our prior case law which categorically banned expert testimony regarding eyewitness identification, but which we reconsider and reject today, and given that the determination of the need for a Frye hearing is for the trial court in the first instance and to be assessed on a case-by-case basis. Grady. Accordingly, we remand this matter to the trial court for a determination of the appropriateness of a Frye hearing, consistent with our decision today.

Finally, the trial court considered Pa.R.E. 401 and 403, which require that all evidence be relevant and that the probative value outweigh its danger of unfair prejudice. The trial court determined that the proffered evidence regarding eyewitness identifications had no bearing on whether the eyewitnesses testifying were mistaken in this case. Thus, such testimony, according to the trial court, did not make the fact of the eyewitnesses' identification more or less probable than without it. According to the trial court, even assuming that the expert's testimony met the threshold for relevance, the court believed that the probative benefit of such testimony was nominal, as several witnesses identified Appellant, and their encounters with him were more than brief. The Commonwealth too submits that the admission of expert testimony in the area of eyewitness identification is irrelevant and will cause jury confusion.

Relevance is defined as evidence having "any tendency to make a fact more or less probable that it would be without the evidence; and the fact is of consequence in

determining the action." Pa.R.E. 401(a),(b). Here, there was no direct evidence against Walker other than eyewitness identifications. Thus, the eyewitness identifications were central to Walker's conviction. Moreover, Appellant was the subject of cross-racial identification, made by witnesses that were under stress, and who were robbed at gunpoint. The police in this appeal did not instruct the witnesses when viewing the array that their assailant may or may not have been included in the array, and finally, while one witness equivocated during her identification of Appellant during the array and lineup, she declared with confidence her identification at trial. Importantly, the trial court's determination regarding relevancy and probative value were made against the backdrop of our mid-1990s decisions banning such eyewitness identification expert testimony *in toto*, and without consideration of the authority we discuss above. Thus, we believe at least in these limited circumstances, expert testimony on these aspects of eyewitness identification could be highly relevant.

Furthermore, even if relevant, evidence may be excluded "if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Pa.R.E. 403. For the reasons more fully explained above, we do not believe that such expert testimony, where relevant, should be *per se* excluded on this basis and merely because the trial might be simpler without it. Nor are we of the opinion that such evidence, viewed generally, will confuse jurors. Obviously, the trial court will be able to control and limit the presentation of expert testimony in this regard. Finally, even though more than one eyewitness was involved in this appeal, we question the trial court's determination that such testimony would be only nominally valuable, and are satisfied that expert testimony regarding eyewitness identification in these

circumstances could be probative and beneficial to the jury. Thus, upon remand, the trial court is instructed to reconsider its prior determinations in light of our opinion today.

In conclusion, we believe, that in light of the magnitude of scientific understanding of eyewitness identification and marked developments in case law during the last 30 years, it is no longer advisable to ban the use of expert testimony to aid a jury in understanding eyewitness identification. The absolute prohibition of such expert testimony simply proves too extreme an approach in determining whether relevant testimony should be admitted in this area. A more flexible framework strikes a crucial balance in determining the admission of expert testimony, as well as between protecting a defendant's rights while enabling the Commonwealth to meet its responsibility of protection of the public. While the general principles regarding expert testimony offered in Abdul-Salaam, Simmons, and Spence remain valid, the specific holdings in those cases barring expert testimony concerning the specific area of eyewitness identification are inconsistent with our opinion today, and, thus, are so limited. We now allow for the possibility that such expert testimony on the limited issue of eyewitness identification as raised in this appeal may be admissible, at the discretion of the trial court, and assuming the expert is qualified, the proffered testimony relevant, and will assist the trier of fact. Of course, the question of the admission of expert testimony turns not only on the state of the science proffered and its relevance in a particular case, but on whether the testimony will assist the jury. Trial courts will exercise their traditional role in using their discretion to weigh the admissibility of such expert testimony on a case-by-case basis. It will be up to the trial court to determine when such expert testimony is appropriate. If the trial court finds that the testimony satisfies Frye, the inquiry does not end. The admission must be properly tailored to whether the testimony will focus on particular characteristics of the identification at issue and explain how those

characteristics call into question the reliability of the identification. We find the defendant must make an on-the-record detailed proffer to the court, including an explanation of precisely how the expert's testimony is relevant to the eyewitness identifications under consideration and how it will assist the jury in its evaluation. The proof should establish the presence of factors (e.g., stress or differences in race, as between the eyewitness and the defendant) which may be shown to impair the accuracy of eyewitness identification in aspects which are (or to a degree which is) beyond the common understanding of laypersons.

Finally, we embrace the extensive research and studies noted above (and the experience of all or nearly all federal circuits, 44 states, and the District of Columbia) only to the extent they serve as a foundation to highlight a significant problem in our criminal justice system regarding eyewitness identification and to support modification of the current absolute ban of any expert testimony in this limited area. What we do is remand for the possibility of a Frye hearing in this matter, leaving open admissibility questions such as relevance and probative value. Indeed, in his dissent, Chief Justice Castille's characterization of this Court as accepting as "definitive" the research and studies noted above, misapprehends the nature of our determination today. What the dissent does not acknowledge is that an absolute ban on expert testimony is the exception to our otherwise accepted process of allowing expert testimony, where a trial court, in performing its gate-keeping function, deems it to be appropriate. Instead, the advent of DNA evidence, as well as hundreds of studies and the experience of virtually all jurisdictions that have entertained the issue, have highlighted the potential of expert eyewitness identification testimony in certain situations and the possible educational value of expert testimony, rendering the absolute bar on this evidence no longer supportable. Indeed, Chief Justice Castille in his dissent appears to be in a somewhat

similar posture to that of the majority — a remand to treat the request for the use of expert testimony regarding discrete aspects of eyewitness identification as a request regarding expert testimony in any other area of the law. Castille, C.J. Dissenting Opinion at 2-3.[11]

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[11] Also, Chief Justice Castille, in his dissent, resists eliminating the current absolute bar of expert testimony in this area by offering a number of traditional and often-used arguments. See Harris, Failed Evidence, Why Law Enforcement Resists Science (New York University Press 2012). These arguments include cost, the charge that anything other than an absolute bar will let the guilty escape, and that such a move will allow the defense bar to assist defendants in escaping punishment.

Specifically, Chief Justice Castille, and Justice Eakin in his dissent, asserts that modifying the absolute ban will involve monetary costs, including those to the local court system. There are, however, costs to wrongful convictions, not discussed by the dissenters, if the problems regarding eyewitness identifications are not addressed. Indirect costs for wrongful convictions, as noted above, include suffering on the part of the innocent individual and his or her family, and trauma to the victim or witness, due to the guilt of convicting an innocent person. Finally, there is a societal cost when the criminal who perpetrated the crime remains at large with a chance to continue committing crimes.

Moreover, Chief Justice Castille, by offering his dire prediction that today's decision will permit "thousands" of violent criminals to "walk away scot-free," merits little comment, as it fails to give credit to our jurors, our traditional adversarial system, or the limited circumstances in which such testimony may be used, and the 44 states and federal jurisdictions who have permitted expert testimony in this limited area. Related thereto, Chief Justice Castille suggests that our modification to the absolute bar on expert testimony merely benefits the defense bar. Yet, while defense counsel must zealously advocate on behalf of his or her client, the prosecution owes a duty to not only prosecute for the Commonwealth, but also to do justice. An "us-versus-them" perspective regarding the possible allowance of expert testimony in this area improperly discounts the benefit to both defense and prosecution, including, possibly educating jurors about aspects of positive eyewitness identification by a victim and identification of an alternative perpetrator by the defense, as well as the overarching goal of avoiding miscarriages of justice. Indeed, contrary to the dissent's view, law enforcement agencies, prosecutors, courts, and legislatures have begun to recommend a variety of modifications, including the use of expert testimony. See, e.g., Supreme Judicial Court Study Group on Eyewitness Evidence, Report and Recommendation to the Justices, (…continued)

Thus, we hold that the admission of expert testimony regarding eyewitness identification is no longer *per se* impermissible in our Commonwealth, and join the majority of jurisdictions which leave the admissibility of such expert testimony to the discretion of the trial court. We reverse the order of the Superior Court which, based upon our prior case law, banned this type of testimony. As the trial court determined that a Frye hearing was not permissible, relying upon our prior case law, we remand to the trial court for full consideration of such expert testimony, including the possibility of a Frye hearing, consistent with our decision today.[12]

Former Justice Orie Melvin did not participate in the decision of this case.

Messrs. Justice Saylor, Baer and McCaffery join the opinion.

Mr. Chief Justice Castille files a dissenting opinion.

Mr. Justice Eakin files a dissenting opinion in which Mr. Chief Justice Castille joins.

(continued…)
supra (study group comprised of judges, police officials, academics, and prosecutors setting forth various recommendations to Supreme Court of Massachusetts regarding eyewitness identification, including the use of expert testimony at trial).

Ultimately, many of the questions the dissent raises will be addressed through case-by-case development — the traditional process for changes in the law. Related thereto, while claiming that we have failed to give sufficient guidance to our trial judges, we are confident they are more than capable of dealing with the various issues that may arise regarding the introduction of expert testimony in this area, just as they ably have done so in other areas in which expert testimony has been permitted.

[12] In light of our decision today, we need not presently address Appellant's one-page argument regarding a constitutional right to present expert testimony in these circumstances under the Sixth Amendment to the United States Constitution and Article 1, Section 8 of the Pennsylvania Constitution. See Mt. Lebanon v. County Bd. of Elections, 470 Pa. 317, 322, 368 A.2d 648, 650 (1977) (finding court should not decide constitutional question unless absolutely required to do so).