

**[J-88-2012] [M.O. - Mccaffery, J.]  
IN THE SUPREME COURT OF PENNSYLVANIA  
EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 27 EAP 2012
	:	
Appellant	:	Appeal from the Judgment of Superior
	:	Court entered on 3/14/11 at No. 2445 EDA
	:	2008 (reargument denied on 5/18/11)
v.	:	affirming/remanding the Order entered on
	:	8/18/08 in the Court of Common Pleas,
	:	Philadelphia County, Criminal Division at
	:	No. CP-51-CR-0107261-2008
JOSE ALICIA,	:	
	:	
Appellee	:	ARGUED: September 11, 2012

**DISSENTING OPINION**

**MR. JUSTICE SAYLOR**

**DECIDED: May 28, 2014**

In Commonwealth v. Walker, \_\_\_ Pa. \_\_\_, \_\_\_ A.3d \_\_\_ (2014), this Court lifted the absolute prohibition against expert testimony concerning eyewitness identifications, investing judgment about the admissibility of such evidence within the sound discretion of trial judges. Walker, in my view, reflects an emerging reluctance to adhere reflexively to nineteenth-century conventions and axioms, amidst growing evidence produced by social and behavioral scientists (among others) that these may have been precipitous. In this regard, I believe Walker represents an exercise in judicial modesty. After Walker, no longer will we intone that jurors' life experience and common sense will necessarily guide them to the truth when the essential inquiry encompasses understanding the complex subjects of perception and memory. Rather, in appropriate cases -- where the science is sound and the evidence is deemed probative and necessary -- we will not

inflexibly block litigants' attempts to educate jurors about matters we are learning may be further from the realm of everyday experience than our predecessors had envisioned.

My position in the present case tracks my vote in Walker. Here, I would abandon the restraint upon our trial courts against admitting expert testimony regarding human behavior in police interrogations based on the notion that such evidence is by nature an "impermissible invasion of the jury's role as the exclusive arbiter of credibility." Majority Opinion, slip op. at 19.<sup>1</sup> Although I believe that it should be the unusual case in which such evidence would be admitted, ultimately, I find insufficient justification to support perpetuating the per se prohibition.

I realize there are costs associated with moving beyond holding that everyday experience and common sense alone are sufficient to effectuate justice in cases requiring crucial judgments relative to eyewitness testimony and the behavior of those subject to interrogation. As the Commonwealth observes, the strategic use of expert testimony in litigation invites a counter-presentation and may make the prosecution's task of establishing guilt beyond a reasonable doubt more difficult. Nevertheless, the alternative of blanket exclusion of relevant evidence based upon unanalyzed assumptions about juror capabilities, even as these assumptions are challenged by demonstrations of wrongful convictions and developing behavioral science, is no longer satisfactory from my viewpoint. Cf. Corley v. United States, 556 U.S. 303, 321, 129 S. Ct. 1558, 1570 (2009) (observing that "there is mounting empirical evidence that [police

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<sup>1</sup> Parenthetically, I find the majority's treatment of the Tenth Circuit's decision in United States v. Benally, 541 F.3d 990 (10th Cir. 2008), to be materially incomplete. In this regard, I observe that the Benally court did not overturn prior decisions allowing the admission of expert testimony when a defendant's identifiable medical disorder raises a question as to the reliability of his confession. See id. at 996. Accordingly, the Benally decision is more fact-dependent than the majority opinion conveys.

interrogations] can induce a frighteningly high percentage of people to confess to crimes they never committed” (citing Steven A. Drizin & Richard A. Leo, The Problem of False Confessions in the Post–DNA World, 82 N.C.L. Rev. 891, 906–907 (2004))).

In my considered judgment, the better approach is to trust our trial judges to make fair and just decisions on admissibility of expert evidence, knowing full well that there will be inconsistencies which will need to be addressed by the appellate courts in the developing decisional law. In the choice among the many imperfect approaches available to us for effectuating justice within our existing adversary system, I have come to prefer options which do not depend upon under-analyzed and untested presumptions.

Madame Justice Todd joins this dissenting opinion.