IN THE UTAH SUPREME COURT

STATE OF UTAH, Plaintiff/Respondent, vs. **DEON LOMAX CLOPTEN,** Defendant/Petitioner.	Supreme Court No. 20080631 Court of Appeals No. 20060254 District Court No. 031903432

On Petition For A Writ Of Certiorari To The Utah Court of Appeals

PETITIONER'S OPENING BRIEF

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Jurisdiction

The court has jurisdiction under Utah Code section 78A-3-102(3)(a), (5).

Statement of the Issue, Standard of Review, and Preservation

Tony Fuailemaa was shot and killed during a concert at a Salt Lake City nightclub. Based upon eyewitness testimony, a jury convicted Deon Clopten of murdering Mr. Fuailemaa. Mr. Clopten maintained that someone else—Freddie White—shot Mr. Fuailemaa. At trial, Mr. Clopten sought to introduce expert testimony concerning the fallibility of the eyewitness identification. The trial court initially ruled that Mr. Clopten's expert witness could testify, but later, taking cues from language in this court's decisions, the trial court reversed course and ruled that the testimony proffered would not assist the jury and would be cumulative of a jury instruction.

Before the court of appeals, Mr. Clopten argued that (i) the trial court had erred in excluding the proffered expert testimony because the State's case hinged upon eyewitness identification and (ii) this error was not harmless because some eyewitness testimony implicated Mr. White—who had confessed to the shooting several times to different people—and had the expert testimony been admitted, there was a reasonable likelihood that he would not have been convicted.

The panel reluctantly affirmed the expert's exclusion in light of a number of virtually unchallenged empirical studies demonstrating that jury instructions addressing eyewitness identification are useful, but not sufficient, to educate jurors about the potential weakness of such evidence. The panel considered itself bound by this court's decisions suggesting that it is never an abuse of discretion, State v. Maestas, 2002 UT 123, 63 P.3d 621, or at least never a harmful abuse of discretion, State v. Hubbard, 2002

UT 45, 48 P.3d 953, to exclude such expert testimony because a jury instruction consistent with State v. Long, 721 P.2d 483 (Utah 1986) is sufficient to communicate to jurors the fallibility of eyewitness identification. State v. Clopten, 2008 UT App 205, 186 P.3d 1004 ("Opinion").

This brief contends that this court should retreat from its pronouncements in Hubbard and Maestas that exclusion of expert testimony is neither an abuse of discretion nor harmful. Instead, this court should hold, and inform trial courts and the court of appeals, that expert testimony concerning the factors pertinent to determining the reliability of eyewitness testimony (i) is presumptively helpful to the trier of fact in understanding and weighing testimony of eyewitnesses under Rule 702, and (ii) is not cumulative of a jury instruction under Rule 403. While this holding would not mandate the admission of expert testimony, it would recognize that there are circumstances—such as those present here—in which (i) it is an abuse of discretion to exclude expert testimony and (ii) erroneously excluding expert testimony is not harmless simply because a Long instruction is given.

Issue: Whether a timely request for expert testimony regarding the reliability of eyewitness identification should be presumed admissible.

Standard of Review: "On certiorari, we review de novo the decision of the court of appeals, not that of the trial court." State v. Gardner, 2007 UT 70, ¶20, 167 P.3d 1074.

Preservation: This issue is preserved at R. 252; 259-64; 639:8-11, 18; 644:12.

Determinative Provisions

Fourteenth Amendment to the United States Constitution

No State shall . . . deprive any person of life, liberty, or property, without due process of law.

Article I, Section 7 of the Utah Constitution

No person shall be deprived of life, liberty or property, without due process of law.

Utah Rule of Evidence 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

Utah Rule of Evidence 702

(a) Subject to the limitations in subsection (b), if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

(b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony if the scientific, technical, or other principles or methods underlying the testimony meet a threshold showing that they (i) are reliable, (ii) are based upon sufficient facts or data, and (iii) have been reliably applied to the facts of the case.

(c) The threshold showing required by subparagraph (b) is satisfied if the principles or methods on which such knowledge is based, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.

Utah Rule of Evidence 703

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Utah Rule of Evidence 704

(a) Except as provided in subparagraph (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Statement of the Case

I. Nature of the Case and Course of Proceedings

Mr. Clopten was convicted based upon eyewitness testimony identifying him as the person who shot Mr. Fuailemaa. (R. 609.) Mr. Clopten first went to trial in May of 2005. (R. 643.) Prior to trial, Mr. Clopten sought to introduce the expert testimony of Dr. David H. Dodd, who would explain the relevant scientific evidence regarding circumstances which can affect the accuracy of eyewitness identification, including (i) cross-racial identifications; (ii) the impact of violence, trauma, and stress during the event; (iii) the tendency to focus upon a weapon instead of a person; (iv) facial recognition; (v) the suggestive nature of show-up identification procedures; (vi) suggestive statements by police officers before or after identification; (vi) the phenomenon of false confidence; and (vii) the counterintuitive nature of the science related to many of these factors. (R. 252; 259-64; 639:8-11, 18.)

Mr. Clopten's trial counsel argued that if the trial court excluded Dr. Dodd's testimony, then counsel for Mr. Clopten would be precluded from discussing with the jury the scientific bases for challenging the accuracy of the eyewitness identifications because the Long instruction—the only information the jury would receive on the subject—is not evidence. (R. 639:14.) In addition, Mr. Clopten's counsel pointed out that many of the concerns with the eyewitness identifications in this case are not addressed in the Long instruction. (R. 640:4.) In response, the State argued that the science was "old" and that it was a "trend in Third District Court" to exclude expert testimony regarding eyewitness identifications and instead to use only the Long

instruction. (R. 639:16; 640:7.) Unfortunately, the State has correctly stated the trend within Utah's trial courts.

In the first trial, the court initially ruled that Dr. Dodd could testify, later reversed course and ruled that Dr. Dodd could not testify, and then reversed course again and ruled that Dr. Dodd could testify, but only in general terms about the science of eyewitness identification without any "specifics in regards to this case." (R. 640:7.) The trial court apparently believed this limitation on Dr. Dodd's testimony was necessary so that credibility determinations about the identifications made by the eyewitnesses would be left to the jury. (R. 639:11.) Ultimately, these rulings were superseded in May 2005, when the court declared a mistrial after Mr. Clopten's counsel discovered a personal conflict stemming from his prior representation of a witness. (R. 643:160.)

Before the second trial, Mr. Clopten again sought to introduce the expert testimony of Dr. Dodd. (R. 644:12.) This time, however, the court excluded the testimony because "the eyewitness [jury] instruction does an adequate job" and, according to the trial court, "Dr. Dodd's testimony . . . would only confuse the issue." (R. 644:12.) The trial court then stated that this proffered evidence was cumulative of non-evidence—the Long instruction: "Dr. Dodd's testimony [wa]s just superfluous and would have no bearing on the jury's decision." (R. 644:13.) The jury convicted Mr. Clopten. (R. 609.)

On appeal, a panel of the court of appeals reluctantly affirmed based upon its interpretation of this court's precedent. (Opinion ¶21.) The panel's lead opinion, authored by Judge McHugh, noted that "courts and legal commentators have argued that jury instructions and cross-examination do not adequately address the vagaries of

eyewitness identification." (Opinion ¶19.) Judge Thorne concurred to suggest that the boundaries of trial court discretion in excluding expert testimony should be revisited "in light of the persuasive authorities . . . explaining the shortcomings of eyewitness testimony." (Opinion ¶32.) He "urge[d]" this court "to consider mandating the admission of such testimony in appropriate cases" because there is "little to lose and much to gain if criminal defendants are allowed to present expert testimony explaining how and why the eyewitness testimony in any particular case may be unreliable." (Opinion ¶¶32-33.)

On November 13, 2008, this court granted Mr. Clopten's petition for writ of certiorari.

II. Statement of Facts

Mr. Clopten will divide his statement of facts into two sections. The first section will describe those facts that are undisputed and describe the chronology relevant events. The second section will describe the eyewitness identifications that link Mr. Clopten to Mr. Fuailemaa's killing. The circumstances in which these identifications were made demonstrate both that the science relating to the fallibility of eyewitness identifications would have assisted the trier of fact in this case and that the exclusion of the expert testimony was not a harmless error.

A. Undisputed Facts Concerning Mr. Fuailemaa's shooting

Tony Fuailemaa was shot and killed outside a Salt Lake City nightclub on December 1, 2002. (Opinion ¶2; 645:31, 44.) Deon Clopten was present at the time of the shooting along with three companions, one of whom was Freddie White. (Opinion

¶3; R. 633:30.) Mr. Clopten, Mr. White, and one other of their companions were wearing red. (R. 634:181; 646:213; 645:84, 155-56.)

The police later apprehended Mr. Clopten, Mr. White, and their two companions. (R. 633:85-99.) At the time of the arrest, Mr. Clopten was in the driver's seat of the vehicle, and Mr. White was sitting in the back on the passenger side. (R. 645:155-58; 633:57.) Mr. Clopten was wearing red sweatpants, a red sweatshirt, red and white shoes, and a white t-shirt. (R. 645:155-56; 646:199.) Mr. White was wearing a red t-shirt, but at the scene of the arrest he was not wearing a red sweatshirt, which was later found in the car near where he had been sitting. (R. 646:213, 296-97; 647:453-54; Defendant's Ex. D-1.) One of Mr. Clopten's other companions was also wearing a red plaid shirt. (R. 634:181.)

For some reason, the officers did not immediately seize as evidence the red sweatshirt discovered near Mr. White in the SUV, even though the shooter had been described as wearing red. And the police never conducted tests on this red sweatshirt. Instead, the car was impounded with the red sweatshirt inside, and the vehicle—with the sweatshirt—was released to a third party. (R. Defendant's Ex. D-1; R. 646:296-97; R.647:453-54.)

At trial, there was evidence that Mr. Clopten had confessed to the shooting to another prisoner at the jail who received a greatly reduced sentence on federal RICO charges in exchange for his testimony against Mr. Clopten. (R. 646:352, 369-70.) However, a number other witnesses testified that Mr. White confessed to them that he was the shooter. (R. 647:491-92, 497-98, 500, 505-07, 522-23.) The foregoing is all of the relevant testimony unrelated to eyewitness identification.

B. The Eyewitness Identifications

1. Shannon Pantoja

Prior to the shooting, Mr. Fuailemaa pointed out Mr. Clopten to his girlfriend, Ms. Pantoja. Mr. Fuailemaa told her that he and Mr. Clopten had been incarcerated together and that Mr. Clopten "had had some problems with some of the homies out in the prison." (R. 645:35-36.) Ms. Pantoja had not previously met Mr. Clopten. As Ms. Pantoja and Mr. Fuailemaa left the concert, Ms. Pantoja saw the members of Mr. Clopten's group. (R. 645:37-38.) The men "were kind of like hiding behind--crouched behind the building" and they "peeked out and then immediately ducked back again." (R. 645:38.) Ms. Pantoja testified that the shooter "came out with his arm extended. He had a gun in his hand." (R. 645:40.) Ms. Pantoja heard the shooter say, "What's up now," and then watched as Mr. Fuailemaa was shot twice in the head. (R. 645:44.) Ms. Pantoja also remembered that the weapon was a "small black handgun, like a Glock" and that she saw a flash and a spark from the gun during the shooting. (R. 645:81.) Later, contradicting this, Ms. Pantoja stated that she could not see the gun because Mr. Fuailemaa, who was six feet five inches tall and weighed 300 pounds, "was in the way." (R. 645:48, 86-88.)

After hearing gun shots, one of the undercover officers attending the concert ran to Ms. Pantoja and asked, "Who did it?" (R. 645:45-46.) Ms. Pantoja did not answer by saying Mr. Clopten, but instead answered by saying, "It's the guy in all red."[1] (R. 645:46.) Ms. Pantoja confirmed at the trial and the preliminary hearing that

[1] At the first trial, Ms. Pantoja's testimony was that she said "the one in red." (R. 641:18.) She told the police he had a red shirt on, but did not say anything about a red sweatshirt or sweatpants. (R. 646:224-25.)

Mr. Clopten, Mr. White, and another member of their group were wearing red the night of the shooting. (R. 645:84; 634:181.) Ms. Pantoja stated that Mr. Clopten was wearing red, but also described Mr. White as "the guy in red" during police questioning.[2] (R. 645:36, 84.) Ms. Pantoja also confirmed that one of Mr. Clopten's other companions was wearing a red plaid shirt. (R. 634:181.)

Officers brought Ms. Pantoja to the scene of the arrest, telling her that they needed her "to go identify 'em, see if they're the ones."[3] (R. 645:50.) Ms. Pantoja participated in the field identification during which each person was presented to her one at a time in handcuffs. (R. 633:85-99, 118; R. 646:211.) Mr. Clopten was led out first. (R. 646:211.) He was wearing a red sweatshirt with writing on it, and Ms. Pantoja, who had been "hysterical" and "hyperventilating," identified him as the shooter. (R. 633:79; 633:89; 645:156; 645:52; 641:49.) Mr. White was also led before Ms. Pantoja. At that time, he was wearing a red t-shirt, but not the red sweatshirt later found in the car near where Mr. White had been sitting. (R. 645:158; R. 646:213, 297.)

Approximately 20 minutes after the show up at the arrest scene, Ms. Pantoja was shown a photo array of the four suspects at the police station. She identified Mr. Clopten as the shooter. (R. 634:157.) Ms. Pantoja also identified Mr. Clopten as the shooter during a January 2004 police lineup, 13 months after the shooting, and then again at trial in 2005. (R. 634:158; 645:55-58.) Despite the fact of these identifications, under police

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[2] In her testimony at trial, Ms. Pantoja repeatedly stated that Mr. White had a white coat, but no other witnesses confirmed her recollection, and, in fact, their testimony expressly contradicted it. Additionally, Mr. White did not have white coat when arrested after the shooting. (R. 645:84; 646:213, 218-19.)

[3] At the first trial, Ms. Pantoja testified that the police had "some people pulled over, you know, suspects in Davis County." And that the police told her "You need to identify these people." (R. 641:52.)

questioning 2 days after the shooting, Ms. Pantoja did not have a clear memory of seeing Mr. Clopten during the concert. Rather, her memory was based on the same group of four men being together before the concert and at the scene of the shooting. (R. 645:86, 90-93.) Ms. Pantoja also did not remember any writing on the shooter's red clothing, although Mr. Clopten's clothing had writing on it. (R. 641:49-50.)

In contrast to Ms. Pantoja's initial identifications, which lacked clarity, both at the January 2004 preliminary hearing—over one year after the shooting—and at trial, Ms. Pantoja claimed to have a clear memory of Mr. Clopten prior to the concert and a clear memory of Mr. Clopten's distinctive hairline, even though every witness other than Ms. Pantoja stated that the shooter had the hood of the red sweatshirt up at the time of the shooting. (R. 633:29; 646:247, 263, 313; 647:479.) This "clear memory" Ms. Pantoja reported to the jury apparently had developed after she saw Mr. Clopten in the following circumstances after the shooting: (i) a show-up, (ii) a photo-array, (iii) a line-up, (iv) a preliminary hearing, and (v) during the first trial. (R. 645:93-94; R. 641:53; 634:157.)

2. Melissa Valdez

Melissa Valdez also attended the concert and witnessed Mr. Fuailemaa's murder. Before the concert, Ms. Valdez talked to a group of men about getting tickets. (R. 646:243-44.) One of the men was wearing red pants and a red sweatshirt. (R.:646:246-47.) As Ms. Valdez was leaving, she saw a man in a red sweatsuit whom she thought she had spoken with earlier. (Id.) She asked the man if he had obtained tickets, and the man indicated that he had. (Id.) Shortly thereafter, Ms. Valdez happened to look back over her shoulder. (R. 646:249.) At that moment, she saw a man in a red

hooded sweatshirt standing behind the victim with his right arm extended and holding what appeared to be a gun. (R. 646:249, 263.)

Ms. Valdez identified Mr. Clopten as the shooter in a photo array and at trial. (R. 646:247, 254-55.) Yet shortly after the shooting, Ms. Valdez stated that the shooter had been wearing a "single pull-over sweatshirt, one that did not zip up" with "one big pocket" and no logos. (R. 646:262-64.) She also told the police that the shooter was wearing sweatpants, but not matching red sweatpants. (R. 646:262-63.) Mr. Clopten's sweatshirt had a zipper and logos and had two pockets rather then one across the front. (R. 641:49; R. 646:262-64.) Mr. Clopten was wearing matching red sweatpants. (R. 645:155-56.) Additionally, Ms. Valdez's companion told Mr. Clopten's previous counsel that the driver of the white SUV was not the shooter. (R.647:486.) Several witnesses confirmed that Mr. Clopten—who was driving the vehicle when apprehended by police—drove the vehicle from the scene. (R. 633:57; 646:198-202.)

3. Andre Hamby

Andre Hamby—one of Mr. Clopten's companions at the concert—also witnessed the shooting and testified for the State. Mr. Hamby initially told police that he was in the car at the time of the shooting and did not witness it. (R.646:326.) Mr. Hamby's story changed after the police told him that he could either go to jail for "many years" or be a witness, and that because there were other witnesses, there was "no saving" Mr. Clopten. (R. 646:331-32.) After the police told Mr. Hamby that Mr. Clopten had been identified as the shooter, Mr. Hamby stated that he didn't want to go to prison and related a story consistent with Mr. Clopten being the shooter. (R. 646:332-33.)

Mr. Hamby also testified that after the shooting he, Mr. Clopten, Mr. White, and another person "drove off" in the same vehicle. (R. 633:57.) Mr. Hamby stated that he was in the back seat behind the driver, Mr. White was in the back seat on the passenger side of the vehicle, and Mr. Clopten drove the vehicle. (Id.)

4. Bruce and Brenda Aimone

Two other witnesses observed the shooting and testified at trial, but their testimony indicated that Mr. White, not Mr. Clopten, had been the shooter. Bruce Aimone and his wife Brenda were staying on the eleventh floor of the Marriott Hotel the night of the shooting. (R. 646:302.) The Aimones saw four people running away from Mr. Fuailemaa toward an SUV. (R. 646:303-4.) Mr. Aimone testified that he saw the person in a red jacket or red fleece coat enter the SUV on the passenger side. (R. 646:304-5.) Mrs. Aimone also testified at trial that there was "no doubt" that the individual with the red jacket entered the passenger side door. (R. 646:313.) Again, the uncontroverted testimony is that Mr. Clopten was, at all times, the driver of the vehicle, not a passenger.

Based upon this evidence and the absence of Dr. Dodd's testimony, the jury convicted Mr. Clopten. (R. 609.)

Summary of the Argument

This court's recent decisions have left trial courts with the impression that they should exclude expert testimony concerning the reliability of eyewitness identifications and the court of appeals with the impression that all such exclusions should be affirmed. As the State commented to the trial court, it is the "trend in Third District Court" to exclude such testimony, a trend the trial court continued. (R. 640:7.) Relying upon language in this court's recent decisions, the trial court concluded that expert testimony would not assist the jury and would be no more helpful than a Long instruction. Yet the empirical research conclusively demonstrates otherwise. In most cases, a jury instruction is not a sufficient means of informing jurors about the problems with eyewitness identification. Instead, expert testimony is necessary to explain the scientific research underlying its counterintuitive findings, such as the lack of correlation between an eyewitness' certainty in identifying someone and the accuracy of the identification.

This court should send a different message to trial courts and the court of appeals, one consistent with the science. Specifically, this court should take the position that whenever the State introduces testimony of an eyewitness to prove guilt beyond a reasonable doubt, expert testimony concerning the fallibility of eyewitness identifications is presumed to "assist the trier of fact" under Rule 702. The State could rebut this presumption by demonstrating that expert testimony would not assist the trier of fact in a particular case due to, for example, the close relationship between the identifier and identifiee. However, if the State cannot rebut the presumption, then a trial court would abuse its discretion if it excluded the expert testimony. Further, this court should

conclude that improperly excluding expert testimony is not harmless error simply because a Long instruction is given.

Applying the foregoing standard to this case, it is apparent that the trial court abused its discretion in excluding Mr. Clopten's proffered expert testimony on the ground that the testimony would be unhelpful to the jury and cumulative of the Long instruction. Under the approach proposed, which accords with the scientific evidence, the trial court would have allowed Dr. Dodd to testify because the State offered no grounds to rebut the presumption that the expert testimony would assist the jury.

Further, in the present case the error was not harmless. First, the fact that a Long instruction was given does not render the exclusion of Dr. Dodd's testimony harmless. The relevant science overwhelmingly demonstrates that a jury instruction is not an adequate substitute for expert testimony. Second, with the Long instruction properly classified as insufficient, there is a reasonable likelihood that the jury would have reached a different result. A number of studies demonstrate that juries rely heavily on eyewitness testimony, even when that identification is questionable. In addition, there is an abundance of evidence—including numerous confessions—that Mr. White shot Mr. Fuailemaa. Had Dr. Dodd testified, the jury may have found reasonable doubt that Mr. Clopten shot Mr. Fuailemaa. Given the harmfulness of this error, the court should order a new trial.

Argument

Mistaken eyewitness identification is the leading cause of wrongful convictions in the United States, accounting for 88% of wrongful rape convictions and 50% of wrongful murder convictions between 1989 and 2003. (Pet. Apx. at 205.)[4] There is a body of growing and virtually undisputed "scientific evidence that eyewitness testimony is systematically fallible in ways that lead away from the truth and towards unjust verdicts." (Pet. Apx. at 308.)[5] The root of the problem is the reluctance of juries to accept the truth that eyewitness testimony is fallible, usually because the reasons for its fallibility are "quite counterintuitive and hardly commonsensical." (Pet. Apx. at 107-08.)[6] Jurors therefore must be properly educated about the weakness of eyewitness identification before they can be expected to evaluate properly an eyewitness identification.

Over the last 30 years, this court has addressed the need for juror education in the science relevant to eyewitness identification, but not with a consistent approach. It has mandated that a jury instruction be given which spells out in conclusory fashion the factors relevant to determining the reliability of eyewitness testimony. And it has given trial courts discretion in deciding whether to allow expert testimony on the same subject. But the net result has been two steps forward and one back. Trial courts have interpreted this court's decisions that review the exclusion of expert testimony as instructing them to

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[4] Timothy P. O'Toole & Giovanna Shay, Manson v. Braithwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures, 41 Valparaiso L. R. 109, 110 (2006).

[5] Edward Stein, The Admissibility of Expert Testimony About Cognitive Science Research on Eyewitness Identification, 2 Law, Probability & Risk 295, 297 (2003).

[6] Henry F. Fradella, Why Judges should Admit Expert Testimony on the Unreliability of Eyewitness Testimony, 2006 Fed. Cts. L. Rev. 3, 23, 28 (June 2006).

presume that as long as the required instruction is given, then expert testimony is not helpful to the jury and, therefore, is presumptively inadmissible. The net effect is that Utah trial courts have adopted a per se rule against the admissibility of expert testimony. The dangers of this practice are highlighted by the body of scientific evidence demonstrating that jury instructions alone are often insufficient to communicate effectively the findings of science to jurors, and, therefore, expert testimony is necessary to assist the trier of fact.

Because the scientific evidence is at odds with the practice in Utah's trial courts, this court should chart a different course. It is proposed that this court adopt the following approach: Whenever the State introduces testimony of an eyewitness to prove guilt beyond a reasonable doubt, qualified expert testimony concerning the fallibility of eyewitness identifications is presumed to "assist the trier of fact" under Rule 702 and should be admitted unless the State can rebut this presumption by demonstrating that expert testimony would not assist the trier of fact in a particular case.

This brief candidly recognizes that the course it argues for diverges from that charted by this court's precedents, a course which has resulted, in practice, in exclusive reliance on jury instructions. In arguing for a new direction, this brief proceeds in six stages. First, it outlines the evolution of Utah law with regard to eyewitness identifications. Second, it demonstrates the incompatibility of current Utah law (and practice) with the scientific evidence. Third, it draws upon the scientific evidence to advocate for the adoption of a presumption that expert testimony is helpful to jurors. Fourth, it explains why the alternative approaches of other jurisdictions are less consistent with the scientific evidence than the approach urged in this brief. Fifth, it

demonstrates that if the trial court here had applied a presumption that Dr. Dodd's testimony would have been helpful to the jury, then the trial court would not have excluded Dr. Dodd's testimony. Finally, it demonstrates that the trial court's error was not harmless, and, therefore, a new trial is warranted.

I. Trial Courts Have Interpreted This Court's Jurisprudence as Articulating a Presumption That Expert Testimony Concerning Eyewitness Identifications Is Not Helpful to Juries

This court has struggled for almost 30 years with how trial courts should inform juries about the myriad of problems with eyewitness identification. The science regarding problems with eyewitness testimony was first described in briefs submitted to this court in 1981, but rather than adopt an evidentiary approach grounded in this science, the court left the decision of whether to admit expert testimony on the subject entirely to the discretion of the trial court. State v. Griffin, 626 P.2d 478, 481 (Utah 1981). The next year the court followed Griffin in upholding the exclusion of expert testimony on the ground that the testimony would constitute a "lecture to the jury about how they should perform their duties." State v. Malmrose, 649 P.2d 56, 61 (Utah 1982). In a vigorous dissent, Justice Stewart, joined by Justice Durham, warned that "[t]he inherent dangers of good faith error in eyewitness identification are widely recognized," and urged the court to minimize the dangers of wrongful convictions by at least instructing juries about the problems inherent in such testimony. Id. at 62-66.

In 1986 in State v. Long, the court heeded Justice Stewart's advice. 721 P.2d 483 (Utah 1986). In Long, this court first acknowledged the substantial scientific evidence on the fallibility of eyewitness testimony, including a government study conducted in Great Britain that went so far as to recommend that, in light of the inherent problems with this

form of uncorroborated evidence, visual identification alone should never be a basis for a conviction unless special circumstances exist. Id. at 491. While this court declined to go that far in 1986, it did not reject the British position out of hand, noting that "[s]uch a bold departure will have to await further empirical evidence that less radical alternatives do not ameliorate the problem." Id. at 492. The less radical alternative adopted by the court was a mandatory cautionary jury instruction whenever (i) "eyewitness identification [was] a central issue in a case" and (ii) the defendant requests an instruction. Id.

For the next 16 years, Utah appellate courts routinely affirmed the decisions of trial courts to exclude expert testimony on the ground that a Long instruction was adequate protection against unwarranted reliance upon eyewitness identifications. State v. Kinsey, 797 P.2d 424, 429 (Utah Ct. App. 1990) (deferring to trial court's determination that expert testimony on eyewitness identifications was unnecessary and a Long instruction adequately educated the jury about the unreliability of eyewitness testimony); State v. Butterfield, 2001 UT 59, ¶¶41-44, 27 P.3d 1133 (trial court did not abuse its discretion in excluding eyewitness expert testimony that "did not deal with the specific facts from th[e] case");[7] State v. Hubbard, 2002 UT 45, ¶¶10, 13, 15, 48 P.3d 953 (trial court's exclusion of eyewitness expert testimony was not an abuse of discretion

[7] Ironically, the expert testimony was excluded in Butterfield because it did not deal with the specific facts of the case, while in other cases, the court cautions that the expert may invade the province of the jury by making a conclusion about the ultimate issue of credibility of the eyewitness identification. Butterfield, 2001 UT 59 at ¶44; Hubbard, 2002 UT 45 at ¶15. These seemingly contradictory descriptions may be remedied by this court through clarification that the expert should discuss the unreliability of eyewitness identifications by explaining the specific factors relevant to the identifications at issue in the case, but that the expert cannot opine that a particular witness's identification was in fact unreliable. The expert should be able to explain, however, what the science shows about the type of identification a particular witness has made, e.g., cross-racial or where focus is likely to be on a weapon, not the person.

where an instruction was given and the testimony would have "directly or indirectly" stepped into the province of the jury to determine credibility); State v. Maestas, 2002 UT 123, ¶74, 138 63 P.3d 621 (upholding trial court's decision to exclude expert testimony).

A few of these cases warrant a detailed discussion, as they contain the language trial courts now rely upon to exclude expert testimony as a matter of course. (R. 639:16; 640:7.) In Hubbard, this court reverted to the Griffin characterization of expert testimony as a mere "lecture" to the jury. Hubbard, 2002 UT 45 at ¶¶13-20. While this court reiterated that trial courts had discretion to determine whether to admit expert testimony, it provided a clear cautionary note that an expert's "lecture" could "step[] into the province of the jury." Id. at ¶15. The court then stated that the substance of any expert testimony "can be just as adequately conveyed to the jury through the judge in a jury instruction." Id. at ¶17. Even assuming it was error to exclude expert testimony, the error would be per se harmless provided a Long instruction was given to the jury. Id. at ¶20 (where cautionary instruction is given, the expert testimony would not have had "a substantial influence in bringing about a different verdict").

It is not difficult to see why trial courts find in this language an explicit incentive to reject all proffered expert testimony and rely exclusively on the Long instruction. If expert testimony is a mere "lecture" that communicates the same information as a Long instruction, then trial courts will never be reversed if they exclude expert testimony and give a Long instruction because any error will be considered harmless. Yet if they admit the testimony, then they risk reversal. In fact, Utah appellate courts have never reversed a trial court decision to exclude such testimony and instead have repeatedly explained that a Long instruction is an adequate substitute for expert testimony.

This court's subsequent decision in Maestas reinforced this message by suggesting that it is never an abuse of discretion to exclude expert testimony. Maestas, 2002 UT 123 at ¶¶76, 138. In Maestas, Justice Russon, joined by Chief Justice Howe, concluded that either cross-examination or an appropriate jury instruction will serve to inform the jury of any deficiency in eyewitness testimony. Id. at ¶138. Justice Durrant, joined by Justice Wilkins, alternatively concluded that the trial court did not abuse its discretion in determining that expert testimony would intrude on the jury's role as fact finder. Id. at ¶74. Accordingly, four members of the court concluded that the expert testimony would not "assist the trier of fact" under Rule 702. Id. at ¶¶73-76.

Justice Durham dissented, essentially forecasting the issue now before the court and summarizing the current scientific research. She stated that jury instructions "can only give the jury general information, which itself only comes after all the evidence is in. Expert testimony, targeted to the specific evidence in a case, will be far more helpful to the jury in considering whether witnesses are in fact correct in identifying a particular defendant as a perpetrator. Recent experience . . . has conclusively established that eyewitnesses can be mistaken, for many reasons that are beyond the general knowledge and experience of the average juror." Maestas, 2002 UT 123 at ¶23 (citing Gary L. Wells, http:www.psychology.iastate.edu/faculty/gwells/homepage.htm).

Put in the context of current Utah law, a Long instruction illustrates the shortcomings of an "instruction only" approach. That standard form instruction explains, in very general terms, the science of eyewitness identification, but does not explain the

science or how the science applies to a particular identification.[8] Nor could any concise, standard form instruction adequately convey to a jury why the findings regarding the fallibility of eyewitness testimony are so counterintuitive. Indeed, empirical research demonstrates that over half of trial judges are as unaware as the average juror of the inherently unreliable nature of eyewitness identifications. (Pet. Apx. at 480, 482.)[9] Yet the empirical research demonstrates that "expert testimony is the only legal safeguard that is effective in sensitizing jurors to eyewitness factors." (Pet. Apx. at 480, 482.)[10] And the practice of using jury instructions to dispense with the need for expert testimony has received "almost universal" criticism. (Pet. Apx. at 169.)[11]

To reverse this trend, and to bring Utah practice into line with the overwhelming scientific concerns, trial courts need to be educated about the importance of this science and of expert testimony. It is therefore for this court to explain that expert testimony typically aids juries in evaluating eyewitness testimony in ways that neither stock jury instructions nor cross-examination can, and to adopt an evidentiary presumption that supports the admission of such evidence.

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[8] In this case, the instruction failed to inform the jury about two critical and relevant issues: (i) the counterintuitive effect of weapon focus and (ii) the lack of a correlation between a witness's confidence and the actual accuracy of her identification. Dr. Dodd's testimony would have reached each of these issues.

[9] Richard A. Wise & Martin A. Safer, What US Judges Know and Believe About Eyewitness Testimony, 11 Applied Cognitive Psych. 427, 433, 435 (2004) (only 32% of judges surveyed correctly disagreed with a statement that eyewitness confidence is a good indicator of identification accuracy).

[10] Id. at 433, 435.

[11] Roger B. Handberg, Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury, 32 Am. Crim. L. Rev. 1013, 1062 (1995).

II. Utah Law Is Not In Line With the Growing Body of Undisputed Scientific Evidence

This court has long recognized the need for Utah law to evolve in response to new developments regarding scientific evidence. Responding to the evolving science concerning eyewitness testimony, this court noted more than 20 years ago that "a cautionary instruction plainly is not a panacea" and "[f]ull evaluation of the efficacy of cautionary instructions must await further experience." Long, 721 P.2d at 492 n.5 (emphasis added). Succeeding years have brought that further experience, which has demonstrated that a jury instruction alone is generally inadequate. Because a jury instruction "points only to certain factors without explaining the relative impact those factors have on memory or identification accuracy," an instruction is only "minimally effective." (Pet. Apx. at 253.)[12] In fact, some research demonstrates no beneficial effect from jury instructions. (Pet. Apx. at 245.)[13] Because expert testimony will "focus[] the jury's attention on those factors most likely to affect the accuracy of an eyewitness identification," testimony is a more effective mechanism to address the fallibility of eyewitness testimony. (Pet. Apx. at 253.)[14] Jury instructions simply cannot "explain the complexities about perception and memory in a way a properly qualified expert witness can." (Pet. Apx. at 108.)[15]

For example, a review of several experiments on the effectiveness of jury instructions concluded that there is "little evidence that judges' instructions concerning

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[12] Steven D. Penrod & Brian L. Cutler, Eyewitness Expert Testimony and Jury Decisionmaking, 52 Law & Contemp. Probs. 43, 52 (1989).
[13] Id. at 44.
[14] Id. at 52.
[15] Fradella, supra note 6, at 28.

the reliability of eyewitness identification enhance juror sensitivity to eyewitness identification evidence."[16] (Pet. Apx. at 67.)[17] Perhaps most telling, manipulating the content of the instructions and altering the timing of the instructions does not lead to any improvement. (Id.) In fact, some evidence suggests that instructions alone "actually reduced juror sensitivity to witnessing and identification conditions." (Id. (emphasis added).)

For this reason, experts have concluded "that the judges' instructions do not serve as an effective safeguard against mistaken identifications and convictions and that expert testimony is therefore more effective than judges' instructions as a safeguard." (Id. at 68.)[18] Put more bluntly, "Judges and attorneys who cling to traditional methods of

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[16] See also Penrod & Cutler, supra note 12, at 44 (Pet. Apx. at 245) ("Judges' instructions, designed to aid the jury in evaluating eyewitness evidence, have no beneficial effect on jury decisionmaking."); Fredric D. Woocher, Did Your Eyes Deceive You?: Expert Psychological Testmony of the Unreliability of Eyewitness Identification, 29 Stan. L. Rev. 969, 1004 (1976-1977) (Pet. Apx. at 409) ("Instructions alone cannot supply the jury with any data or information that would assist them in evaluating the reliability of a particular witness' identification."); Cindy O'Hagan, When Seeing is Not Believing: The Case for Eyewitness Expert Testimony, 81 Geo. L. J. 741, 753 (1993) (Pet. Apx. at 184) (stating that "instructions are usually buried in a long and complicated charge by the judge" at the end of trial when "most jurors have already made their decisions, and an instruction by the judge is unlikely to change their minds"); Stein, supra note 8, at 302 (Pet. Apx. at 310) ("Being told the results of scientific research in a conclusory manner by a judge is not a more effective way of educating a jury about cognitive biases and errors involved in eyewitness identification."); Peter J. Cohen, How Shall They Be Known? Daubert v. Merrell Dow Pharmaceuticals and Eyewitness Identification, 16 Pace L. Rev. 237, 272 (1996) (Pet. Apx. at 36) ("There is no scientific evidence that cautionary jury instructions . . . are effective.").

[17] Brian L. Cutler & Steven D. Penrod, Mistaken Identification: The Eyewitness, Psychology, and the Law 263 (1995).

[18] Id. at 264.

instructing jurors . . . are not serving well the interests of jurors, innocent defendants, or the public." (Id. at 68-D.)[19]

In contrast, studies "indicate that expert psychological testimony can serve as a safeguard against mistaken identification." (Pet. Apx. at 57.)[20] "Expert testimony appears to have the beneficial effect of educating jurors about factors that influence eyewitness identification and enhancing their reliance on those factors when rendering decisions in eyewitness cases." (Id.) The testimony does not invade the province of the jury, but does facilitate the jury's "greater reliance on witnessing and identification conditions in determining the probability that the identification was correct." (Pet .Apx. at 278.) There is no indication, however, that expert testimony causes jurors to question eyewitness credibility, to become generally skeptical of the accuracy of identifications, or to be less likely to believe a defendant is guilty. (Id.)[21] In other words, expert testimony helps jurors make better decisions, but does not make decisions for them.

A. Specific Factors that Evade Appropriate Explanation in a Jury Instruction

The most crucial shortcoming of a Long instruction is that it cannot effectively explain the science behind the factors it instructs the jury to consider, and inform them of why they are not likely to recognize the flaws in eyewitness testimony.[22] (Pet. Apx. at

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[19] Id. at 268.

[20] Id. at 250.

[21] Penrod & Cutler, supra note 12, at 77.

[22] See also O'Hagan, supra note 16, at 755 (Pet. Apx. at 186) ("[T]he expert testimony can explain the unreliability of the memory process and the different factors that can distort memory retrieval," and "unlike a jury instruction, the live testimony of an expert can help dilute a jury's excessive reliance on eyewitness identifications."); Stein, supra note 8, at 300 (Pet. Apx. at 309) (recognizing that the results of the empirical research are

409.)[23] In Long, this court mandated that the jury be instructed to "take into account both the strength of the identification, and the circumstances under which the identification was made." Long, 721 P.2d at 493 n.7. The science now demonstrates, however, that such instructions are an inadequate means of educating juries about problems involving an eyewitness's perception, retention of that perception, and later retrieval of information.

For example, the impact of stress or fright—both of which were present during the identifications here—on perception and memory is very complex and counterintuitive. High levels of stress have a negative impact on the accuracy of perception and memory, but moderate levels of stress may be beneficial to perception and memory. (Pet. Apx. at 104.)[24] According to the latest research, it is counterintuitive to most jurors that stress could diminish, rather than enhance, the ability of a witness to identify a perpetrator accurately. (Pet. Apx. at 88.)[25] Thus, an explanation of the science underlying the jury instruction is crucial both to overcome juror skepticism and to ensure that jurors understand the subtle relationship between stress, perception, and memory, only some of which is, or could reasonably be, conveyed in a jury instruction.

"counterintuitive" and that expert testimony "would help the trier of fact appropriately weigh eyewitness testimony").

[23] Woocher, supra note 16, at 1004 ("Because the real dangers inherent in eyewitness identifications are not obvious to the lay juror, the cautionary instructions can be effective only if the judge goes beyond calling the issue to the jury's attention.").

[24] Fradella, supra note 6, at 12-13.

[25] Jules Epstein, Tri-State Vagaires: The Varying Responses of Delaware, New Jersey, and Pennsylvania to the Phenomenon of Mistaken Identifications, 12 Widener L.R. 327, 346 (2006).

Another important circumstance is the presence of a weapon, a circumstance present here. The research concerning "weapon focus"[26] is counterintuitive. Most jurors believe that the presence of a weapon will make the witness's memory more reliable, when, in fact, the opposite is true. (Pet. Apx. at 88.)[27] When a weapon is present the accuracy of the identification decreases because the witness focuses on the weapon rather than other aspects of the event, including the face of the person with the weapon. (Pet. Apx. at 104.)[28] And this effect is "magnified when the use of a weapon comes as a surprise to a witness." (Id.) Despite these problems, jurors are more likely to convict when a weapon was present. (Pet. Apx. at 261, 278.)[29] Expert testimony can help jurors understand the effects of weapon focus. A jury instruction—even if it becomes a scientific treatise—cannot perform the same function. (Pet. Apx. at 301-02.)[30]

Another example of the inability of a Long instruction to address adequately the relevant science is in its direction to the jury to consider the "strength of identification." The scientific studies demonstrate that the "strength of identification," like weapon focus, is a counterintuitive factor. Witness confidence and the accuracy of the resulting identification have no relationship. And only 17% of the population is aware of this lack of correlation. (Pet. Apx. at 89.)[31] When expert testimony is presented, however,

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[26] Weapon focus has been described as "the phenomenon of a crime witness or victim unconsciously directing his or her attention away from the perpetrator's face and toward an actual or perceived weapon." Epstein, supra note 25, at 334 (Pet. Apx. at 76).
[27] Epstein, supra note 25, at 346.
[28] Fradella, supra note 6, at 14.
[29] Penrod & Cutler, supra note 12, at 60, 77.
[30] Steven Penrod & Brian L. Cutler, Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation, 1 Psych. Pub. Pol. & L. 817, 839 (1995).
[31] Epstein, supra note 25, at 347.

"confidence is viewed as less relevant among jurors." (Pet. Apx. at 301.)[32] "Thus, expert testimony appears to improve juror knowledge for the confidence-accuracy relation." (Id.)

This empirical research again demonstrates that expert testimony is "a more effective solution" to the need for juror education and that "jury instructions should be used as a complement to the expert testimony, not as a substitute." (Pet. Apx. at 185-86.)[33] This court should reconsider its prior jurisprudence suggesting otherwise.

B. The Impact of Eyewitness Testimony In Cases Involving Corroborating Evidence

Expert testimony is helpful even in cases where other evidence is supportive of the eyewitness testimony. Research indicates that "sometimes eyewitness identifications are incorrect even when there is corroborative evidence." (Pet. Apx. at 150.)[34] Juror reliance upon eyewitness identification in such cases is troublesome precisely because jurors place disproportionate emphasis on the eyewitness evidence.

In one study, for example, when only the corroborative evidence was admitted but not the eyewitness testimony, 18% of the jurors that voted for conviction, but when the eyewitness testimony was added, 72% voted for conviction. (Id.) Even more problematic, when researchers informed jurors that the only eyewitness was legally blind and was not wearing glasses during the crime, 68% still voted for conviction. (Id.) Eyewitness testimony "produces a perverse result, in that a defendant who would not

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[32] Penrod & Cutler, supra note 30, at 839.
[33] O'Hagan, supra note 16, at 754-55.
[34] Handberg, supra note 11, at 1043.

have been convicted based solely on scant circumstantial evidence may well be convicted if there is an unreliable identification to go along with that evidence."[35] (Id.)

Because of the "demonstrably persuasive impact identifications have on juries," expert testimony should be presumed helpful to the jury in all cases involving eyewitness identifications, "not only when identifications are the only evidence presented." (Pet. Apx. at 198.)[36] The weight given to eyewitness testimony means it presents risks whenever admitted, "not merely when [it is] the only evidence admitted at trial." (Pet. Apx. at 200.)[37] Juries should understand "why the eyewitnesses' identifications [are] inherently unreliable" through the presentation of "a scientific, professional perspective," for which there is no substitute. Ferensic v. Birkett, 501 F.3d 469, 477 (6th Cir. 2007) (emphasis in original). Therefore, anytime eyewitness testimony is in play, expert testimony should be presumed to be helpful to the trier of fact.

III. Utah Should Adopt a Presumption that Expert Testimony Will Assist the Trier of Fact Under Rule 702

Utah law should reflect the virtually undisputed science indicating that expert testimony helps to sensitize jurors to the counterintuitive fallibility of eyewitness identification. To accomplish this, the court should hold that expert testimony is presumptively helpful to the trier of fact under Rule 702. In theory, such a presumption will not increase the number of cases in which expert testimony is appropriate, but will

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[35] See also O'Hagan, supra note 16, at 752 (Pet. Apx. at 183) (recognizing that "the existence of other evidence will not eradicate the jury's reliance on the identification" and that "even weak 'corroboration' can serve to justify the jury's reliance on the identification").

[36] Id. at 767.

[37] Id. at 769.

instead shift the burden to the party relying upon eyewitness testimony[38] to demonstrate that expert testimony will not be helpful in a particular case. In practice, however, a presumption will result in trial courts more often allowing expert testimony and reversing what the State calls the "trend in Third District Court" to exclude expert testimony as a matter of course. (R. 639:16; 640:7.)

It is suggested that this court adopt a presumption that qualified expert testimony concerning the fallibility of eyewitness identifications is presumed to "assist the trier of fact" under Rule 702.[39] This court should also make clear that under Rule 403 expert testimony has probative value independent of, and in addition to, a Long instruction, for the reasons discussed in the previous section.

This approach, both in theory and in operation, would reflect the scientific consensus: "[E]xpert testimony on eyewitness identifications . . . is now universally recognized as scientifically valid and of aid to the trier of fact for admissibility purposes." Ferensic v. Birkett, 501 F.3d 469, 482 (6th Cir. 2007) (alterations and quotations omitted). Because "jurors tend to be unduly receptive to, rather than skeptical of,

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[38] While the State most often relies upon eyewitness testimony to prove guilt beyond a reasonable doubt, at times it is the defendant that introduces eyewitness testimony to prove, for example, an alibi. In these circumstances, the State should enjoy a presumption the expert testimony concerning the fallibility of eyewitness identification will assist the trier of fact.

[39] Evidentiary presumptions have been recognized in other contexts. See e.g., Clark v. Clabaugh, 20 F.3d 1290, 1294-95 (3d Cir. 1994) (recognizing that, under Federal Rule of Evidence 803(8), official public reports are "presumed admissible" unless the other party "come[s] forward with some evidence which would impugn its trustworthiness"); Bridgeway Corp. v. Citibank, 201 F.3d 134, 143 (2d Cir. 2000) (same); Morris v. New York, 2008 U.S. Dist. LEXIS 25038 (E.D. N.Y. March 29, 2008) (holding that evidence of prior sexual assaults are presumptively admissible under Fed. R. Evid. 413 in a federal prosecution for sexual assault); State v. Keith, 2005 UT App 445 ("breath test results are presumptively admissible and accurate if certain standards and safeguards are met").

eyewitness testimony" expert testimony explaining the fallibility of eyewitness identifications should be presumed admissible absent a showing to the contrary by the State. Id.; see also Watkins v. Sowders, 449 U.S. 341, 352 ("[D]espite its inherent unreliability, much eyewitness identification evidence has a powerful impact on juries. Juries seem most receptive to, and not inclined to discredit, testimony of a witness who states that he saw the defendant commit the crime."). As other courts have recognized, the problems with eyewitness identifications are "not within the common experience of most jurors, and . . . are counter-intuitive." Ferensic, 501 F.3d at 482.

The proposed presumption of helpfulness is not only in accord with the science, but is also appropriate under the language of the current Rule 702, which provides that "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Utah R. Evid. 702. The virtually undisputed science demonstrates that expert testimony about the deficiencies of eyewitness identifications will "assist the trier of fact." In effect, the proposed presumptive rule only recognizes what rule 702 already should require.[40]

It is suggested that this court also clarify the relationship between a Long instruction and expert testimony and the role each plays. Under Rule 403, relevant

[40] And even assuming that expert testimony would invade the province of the jury—which it would not—this fact would not provide a reason to exclude the testimony. Under Rule 704, expert testimony "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Utah R. Evid. 704(a); see also State v. Chapple, 660 P.2d 1208, 1219 (Ariz. 1983) ("the worry about invading the province of the jury has been solved for us by the provisions of Rule 704, . . . which permits opinion testimony even though 'it embraces an ultimate issue.'").

evidence may be excluded if "its probative value is substantially outweighed by the . . . needless presentation of cumulative evidence." Trial courts need guidance if they are to understand why expert testimony about the fallibility of eyewitness identification is not "cumulative of a Long instruction." For example, in the present case the trial court ruled that Dr. Dodd's testimony would be cumulative of the Long instruction. (R. 644:13.) Yet a jury instruction is not evidence. Without expert testimony regarding the weakness of eyewitness testimony, there will be no evidence before a jury on this central subject. Argument by counsel will be just that—counsel's statement, not evidence. Ferensic v. Birkett, 501 F.3d 469, 477 (6th Cir. 2007) (noting that although counsel may argue that eyewitness identifications are inherently unreliable, arguments by counsel are not evidence and thus, there is no evidence to support counsel's argument). Thus, jury instructions, cross-examination, and closing arguments "do not effectively substitute for expert testimony on [] inherent unreliability." Id. at 478, 481. This court should clarify that these other mechanisms, most importantly a Long instruction, are never cumulative of expert testimony under Rule 403.

Another reason for this court to explain clearly the relationship between a Long instruction and expert testimony is exemplified by the trial court's ruling that Dr. Dodd's testimony would "confuse" the jury. (R. 644:12.) As discussed above, the empirical studies show that expert testimony assists jurors instead of confusing them. In fact, a Long instruction merely summaries the factors that expert testimony would elucidate in depth and would relate to the particular circumstances of a given case. Therefore, an explanation of this fact would guide all trial courts in applying Rule 403, under which the court below apparently excluded the testimony proffered by Mr. Clopten. Under Rule

403, probative evidence can be excluded if it is "substantially outweighed by the danger of . . . misleading the jury." Expert testimony, of the type discussed here, is certainly not likely to mislead the jury. The scientific evidence is that jurors are likely to be "misled" by their common intuitions without expert testimony to explain the science that calls these intuitions into question.

Importantly, the proposed presumption of admissibility does not mandate that expert testimony be admitted in every case involving eyewitnesses. The State can rebut the presumption by showing that an explanation of the science concerning fallibility will not assist the jury in the particular case. For instance, if there is a long-standing relationship between the eyewitness and perpetrator, such that the witness's identification is not likely to be in error, the science may not be helpful to the jury in evaluating the eyewitness testimony. Similarly, if the scene of the crime was well lit and the eyewitness viewed the perpetrator for a substantial period of time under circumstances where mistake is unlikely, then expert testimony may not be helpful. If the State cannot rebut the presumption, however, then the trial court should conclude that the expert testimony will assist the trier of fact.

This proposed approach will solve many of the problems inherent in the current practice of Utah trial courts of presuming that expert testimony should not be admitted. This court should hold that expert testimony is (i) presumptively helpful to the trier of fact under Rule 702, (ii) unlikely to confuse the jury under Rule 403, and (iii) never cumulative of a Long instruction under Rule 403.

IV. The Court Should Not Adopt a Per Se Rule

There is a spectrum of approaches for dealing with expert testimony about the fallibility of eyewitness evidence. First, a decreasing number of courts exclude any such evidence. Commonwealth v. Bormack, 827 A.2d 503 (Pa. 2003); United States v. Holloway, 971 F.2d 675 (11th Cir. 1992). The courts abandoning this approach are taking cognizance of the relevant science discussed in this brief. State v. Copeland, 226 S.W.3d 287, 300 (Tenn. 2007).

Second, a growing group of courts require automatic admission of such expert testimony in narrow circumstances. Under this rule, "[w]hen an eyewitness identification of the defendant is a key element of the prosecutor's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony." People v. Campbell, 847 P.2d 228, 234-35 (Colo. Ct. App. 1992) (citing People v. McDonald, 690 P.2d 709, 727 (Cal. 1984)). While this is referred to as a "per se rule," its application is so limited that, in practice, it is not as sweeping as it may appear at first glance. For example, the rule does not apply if any other corroborating evidence is presented.[41]

[41] See State v. DuBray, 77 P.3d 247, 255 (Mont. 2003) ("It shall be an abuse of discretion for a district court to disallow expert testimony on eyewitness testimony when no substantial corroborating evidence exists."); State v. Chapple, 660 P.2d 1208, 1218-24 (Ariz. 1983) (holding it was an abuse of discretion to exclude expert testimony where "identification [was] the one issue on which the guilt or innocence of defendant hinged"); People v. Campbell, 847 P.2d 228, 234-35 (Colo. Ct. App. 1992) (deeming the expert testimony admissible where, other than the eyewitness identification, there "was no other evidence linking defendant to the robbery"); State v. Whaley, 406 S.E.2d 369, 372 (S.C. 1991) ("[A]n expert's testimony is admissible where, as here, the main issue is the identity of the perpetrator, the sole evidence of identity is eyewitness identification, and

Third, a further group leaves the matter to the discretion of trial courts.[42] The approach advocated here is a version of this discretionary approach. While the proposed presumption would leave discretion to exclude such testimony in certain cases, it would require a particularized examination of the circumstances in light of the empirical findings of science before the evidence could be excluded. This approach best comports with the findings of the science.

This court has rejected a per se admissibility rule and there is no reason for this court to reconsider that rejection. A per se approach does not comport with the science as well as does the proposed presumption. The per se rule is both too broad and too narrow. On the one hand, when science does not call into question an eyewitness's identification because of, for example, close familiarity with the perpetrator, then expert testimony may not assist the trier of fact under Rule 702. Trial courts should have discretion to exclude expert testimony under these circumstances. On the other hand, the need for expert testimony is not obviated by the presence of corroborating evidence. While other

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the identification is not substantially corroborated by evidence giving it independent reliability.").

[42] The presumption advocated here is consistent with providing trial courts discretion in determining whether to admit expert testimony, discretion recognized in a majority of jurisdictions. State v. Copeland, 226 S.W.3d 287, 300 (Tenn. 2007); McMullen v. State, 714 So.2d 368 (Fla. 1998); State v. Schutz, 579 N.W.2d 317 (Iowa 1998); Commonwealth v. Santoli, 680 N.E.2d 1116 (Mass. 1997); White v. State, 926 P.2d 291 (Nev. 1996); People v. Mooney, 559 N.E.2d 1274 (N.Y. 1990); State v. Whaley, 406 S.E.2d 369 (S.C. 1991); State v. Moon, 726 P.2d 1263 (Wash. Ct. App. 1986); Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991); United States v. Brien, 59 F.3d 274 (1st Cir. 1995); United Sates v. Harris, 995 F.2d 532 (4th Cir. 1993); United States v. Moore, 786 F.2d 1308 (5th Cir. 1986); United States v. Daniels, 64 F.3d 311 (7th Cir. 1995); United States v. Kime, 99 F.3d 870 (8th Cir. 1996); United States v. Rincon, 28 F.3d 921 (9th Cir. 1994); United States v. Brown, 540 F.2d 1048 (10th Cir. 1976).

eyewitness testimony is not considered "corroborating evidence,"[43] almost any other evidence is considered corroborating evidence sufficient to make the per se rule inapplicable. As described in Part II(B), the "powerful impact" eyewitness testimony has on jurors suggests that jurors are likely to place great weight on extremely unreliable eyewitness identifications even when, without the identification, they would be unlikely to convict on circumstantial evidence. (Pet. Apx. at 150.)[44]; Watkins v. Sowders, 449 U.S. 341, 352 (1981); Ferensic v. Birkett, 501 F.3d 469, 482 (6th Cir. 2007). The presence of "corroborating evidence," then, does not solve the problems with eyewitness identification. (Pet. Apx. at 447-49.)[45] The proposed presumption better conforms to the science.

Other jurisdictions have not adopted the presumption advocated here. However, courts across the country are increasingly recognizing the importance of expert testimony. For example, Tennessee recently abandoned its per se rule against the

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[43] See e.g., People v. Campbell, 847 P.2d 228, 233 (Colo. App. 1992) (holding that it was an abuse of discretion to exclude expert testimony where there were two eyewitnesses), United States v. Downing, 753 F.2d 1224, 1230 n.6 (3d Cir. 1985) (holding that it was an abuse of discretion to exclude expert testimony where there were twelve eyewitnesses); People v. McDonald, 690 P.2d 709, 723 (Cal. 1984) (holding that it was an abuse of discretion to exclude expert testimony where there were seven eyewitnesses); United States v. Smithers, 212 F.3d 306, 315 (6th Cir. 2000) ("expert testimony should be admitted in the precise situation presented to the trial court in this case—that is, when there is no other exculpatory evidence presented against the Defendant with the exception of a small number of eyewitness identifications").

[44] Roger B. Handberg, supra note 11, at 1043.

[45] Richard S. Schmechel, Timothy P. O'Toole, Catharine Easterly, & Elizabeth F. Loftus, Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence, 46 Jurimetrics 177, 188-190 (Winter 2006) (recognizing that trial court's are ill equipped to determine whether so-called corroborating evidence is sufficient to preclude expert testimony on eyewitness identifications at the pre-trial stage and that it is often difficult to determine whether the corroborating evidence arose independently of the eyewitness identification).

admission of expert testimony. In doing so, the Tennessee Supreme Court recognized the research indicating "that neither cross-examination nor jury instructions on the issue are sufficient to educate the jury on the problems with eyewitness identification." State v. Copeland, 226 S.W.3d 287, 300 (Tenn. 2007). As the Third Circuit has explained, "[t]o the extent that a mistaken witness may retain great confidence in an inaccurate identification, cross-examination can hardly be seen as an effective way to reveal the weakness in a witness' recollection of an event." United States v. Downing, 753 F.2d 1224, 1230 n.6 (3d Cir. 1985). The Colorado Court of Appeals has agreed: "[t]he courts permitting expert eyewitness testimony on these matters do so in part because there is no other effective way to reveal any weakness in the eyewitness identification." People v. Campbell, 847 P.2d 228, 233 (Colo. App. 1992). Jury instructions—the very foundation of this court's current jurisprudence—while helpful, are inadequate. People v. McDonald, 690 P.2d 709, 723 (Cal. 1984) (vacated in part on other grounds) ("The instruction contains only a few general remarks on the topic; it does not even begin to convey to the jury the specific data on the eyewitness identification process that [the expert's] testimony would have provided, a task in any event beyond the function of instructions.") (emphasis added).

The proposed presumption educates trial courts to the importance of expert testimony while continuing to provide discretion to trial courts to determine the admissibility of expert testimony.

V. Had the Trial Court Applied the Presumption, It Would Have Allowed Dr. Dodd to Testify

Under the presumption, Dr. Dodd's testimony should have been admitted. First, the State presented several eyewitnesses to prove guilt beyond a reasonable doubt. At least two of these eyewitnesses were strangers to Mr. Clopten and had seen Mr. Clopten and his companions only briefly prior to the concert. Second, Mr. Clopten sought to introduce the expert testimony of Dr. Dodd on the fallibility of eyewitness identifications. The trial court recognized that Dr. Dodd was qualified to provide the proffered expert testimony. (R. 639:6.)

The only issue therefore would have been whether the State could have overcome the presumption. It could not have in this case. Dr. Dodd was prepared to testify about the science of eyewitness identifications relevant to the circumstances present here. Specifically, Dr. Dodd would have testified about (i) the impact of an identification by a person of a race different than the race of the perpetrator; (ii) the impact of the presence of a weapon; (iii) the effect of the presence of stress, trauma, and violence; (iv) the stages of memory and their effects on facial recognition; (v) the effect of the show-up procedures and statements made by officers before and after the identifications; and (vi) the relevance of witness confidence.

Because the record indicates that the science concerning eyewitness identifications is relevant to the type of eyewitness testimony in this case, the State did not overcome the presumption on admissibility. In addition, the trial court's stated ground for excluding Dr. Dodd's testimony—that it was cumulative of the Long instruction—is not a legitimate basis to exclude expert testimony that would otherwise assist the jury. The trial court therefore abused its discretion in excluding Dr. Dodd's testimony in this case.

VI. The Trial Court's Error Was Not Harmless Because Dr. Dodd's Testimony May Have Led to a Different Outcome

The exclusion of Dr. Dodd's testimony was not harmless. Harmful error exists when there is a reasonable likelihood that a trial without the errors "may well have resulted in a different jury determination." S.H. v. Bistryski, 923 P.2d 1376, 1382 (Utah 1996). A "reasonable likelihood" of a better outcome exists when the court's confidence in the verdict is undermined. State v. Knight, 734 P.2d 913, 919-20 (Utah 1987). "[C]onfidence in the verdict" is legitimately undermined at a point "substantially short" of where a court might conclude that a different result was "more probable than not." Id. at 920.

Erroneously excluding Dr. Dodd's testimony was harmful. As one court explained, "eyewitness misidentification is the single most important factor leading to wrongful convictions in the United States," a fact that "strongly supports the conclusion that excluding [the expert testimony] had a substantial and injurious effect" on the defendant. Ferensic, 501 F.3d at 482. This is especially true here, where Dr. Dodd's testimony would have highlighted a number of problems with the eyewitness identifications, including the following.

First, because a gun was present, the negative effect of weapon focus is directly applicable to the eyewitness identifications in this case. This is particularly true where Ms. Pantoja described the gun and a vivid memory of sparks flying from the gun. (R. 645:81.) Just as the research suggests, Ms. Pantoja was apparently focusing on the gun, not the shooter. (Pet. Apx. at 104.)[46] Weapon focus undermines the reliability of the eyewitness identifications.

[46] Fradella, supra note 6, at 14.

Second, the event was a homicide, a violent event that was traumatic for the eyewitnesses. Ms. Pantoja was hysterical following the shooting and, after a moment of shock, Ms. Valdez immediately ran in the other direction in a panic. (R. 633:79; 646:250.) The stressful nature of an event can influence an eyewitness's ability to perceive and accurately recall the identity of a perpetrator.

Third, the eyewitness identifications were made by individuals of a race different than Mr. Clopten, Mr. White, and their two other companions. Cross-racial identifications are particularly unreliable.

Fourth, because Mr. Fuailemaa pointed out Mr. Clopten to Ms. Pantoja prior to the concert and told her that Mr. Clopten had problems with "the homies" in prison, Ms. Pantoja's bias toward Mr. Clopten may have affected her memory and perception of the event. Both memory and perception can be affected by expectations and stereotypes, including "cultural biases, personal prejudices, . . . prior information, and expectations induced by motivational states, among others."[47] (Pet. Apx. at 104.)[48]

Accordingly, because "witnesses unconsciously reconstruct what has occurred from what they assume must have occurred," Ms. Pantoja may have reconstructed her memory unconsciously based on her belief that Mr. Clopten and Mr. Fuailemaa had previous problems and Mr. Clopten was wearing a red sweatshirt like the shooter. (Pet. Apx. at 385.)[49] (emphasis added). Put more succinctly, "[w]hat we expect to see clearly

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[47] See also Woocher, supra note 16, at 980 (Pet. Apx. at 385) (recognizing that this phenomenon "compensate[s] for the perceptual selectivity made necessary by the brain's limitations").

[48] Fradella, supra note 6, at 14.

[49] Woocher, supra note 16, at 980.

influences what we think we see." (Pet. Apx. at 104.)[50] Had the jury heard Dr. Dodd's testimony, it might have recognized this possibility and determined that another individual—Freddie White, who confessed to the shooting—may have been the shooter. This is especially likely given the red sweatshirt police found in the SUV where Mr. White was seated.

Fifth, apart from biases Ms. Pantoja held prior to the shooting, post-event information may also have impacted her memory. "Postevent information can . . . change a witness's memory and even cause nonexistent details to become incorporated into a previously acquired memory." (Pet. Apx. at 10 (alteration in original).)[51] Immediately after the shooting, Ms. Pantoja's descriptions were vague, but became more clear over time. (R. 645: 86, 90-93; Compare R. 641:18 with R. 645:46 (demonstrating a shift in Ms. Pantoja's description of the shooter from "the one in red" to "It's the guy in all red").) For instance, Ms. Pantoja's reported memory about Mr. Clopten's hairline appears to have been added to her memory after viewing him at the show-up and photo array. All other witnesses reported that the shooter's hood was up when the shooting occurred. But Ms. Pantoja reported to the jury that she absolutely remembered his hairline. Knowledge of the effects of post-event information altering memory may have alerted the jury to this problem and caused them to focus more on the inconsistency between her memory and the testimony of other witnesses.

Sixth, the show-up may have compromised the identification of Ms. Pantoja because Mr. Clopten was the only individual wearing a red sweatshirt at the time. "[I]n

[50] Fradella, supra note 6, at 15.
[51] Cohen, supra note 16, at 246.

an identification procedure where the suspect stands out, it cannot be determined if the eyewitness selected the suspect because he or she recognized the suspect as the perpetrator of the crime, or because of the biasing effect of the fillers in the identification procedure. In such circumstances, an eyewitness's identification of the suspect does not constitute forensically valid evidence of the suspect's guilt." (Pet. Apx. at 335.)[52] Had Mr. White been wearing the red sweatshirt found in the SUV during the show-up, Ms. Pantoja may have identified him as the shooter and then later "remembered" his distinct features as those of the shooter.[53]

Seventh, the witnesses focused on the red sweatshirt and not the shooter's facial features, but Mr. Clopten's sweatshirt differed significantly from the eyewitnesses' memories. And another red sweatshirt resembling the eyewitnesses' descriptions was found in the car and ignored by investigators after Ms. Pantoja identified Mr. Clopten at the show-up where he alone was wearing a red sweatshirt.

Finally, any confidence in the identifications expressed by the witnesses would have been accepted by the jury as indicative of the identification's accuracy, at least in the absence of expert testimony concerning the irrelevance of confidence to the accuracy of an identification. The jurors likely did not attempt to check their intuitions that run counter to the science, intuitions which could have impacted their views of reliability of the eyewitness testimony in this case. Particularly with regard to the affect of stress and weapon-focus, the research demonstrates that the jurors likely assumed that these factors

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[52] Richard A. Wise, Criminal Law: A Tripartite Solution to Eyewitness Error, 97 Crim. L. & Criminology 807, 859 (2007).

[53] In addition, suggestive statements made by police that the suspect would indeed be present at the show-up also may have undermined the reliability of Ms. Pantoja's identification.

had the opposite affect of aiding memory rather than detracting from it. Because the jury did not hear any of this scientific evidence, there is a reasonable likelihood that the outcome of the proceedings was affected.

Importantly, there were eyewitnesses whose testimony suggests that Mr. White, not Mr. Clopten, was the shooter—Mr. and Mrs. Aimone. Each of these witnesses was outside the stressful situation and never saw the weapon. What they did observe was four individuals fleeing toward the SUV after hearing gunshots. Each of these witnesses testified that a man wearing a red jacket entered the passenger side of the vehicle. It is undisputed that Mr. Clopten was the driver of the vehicle. Two other individuals, one of whom was Mr. White, entered the passenger side of the vehicle.

There was ample evidence at trial supporting Mr. Clopten's theory:[54] (i) Mr. White's confessions, (ii) testimony that Mr. White had a gun at the scene of the shooting, (iii) the presence of an additional red sweatshirt near Mr. White's seat in the vehicle, (iv) the Aimone's testimony that an individual in a red jacket entered the passenger side of the vehicle, and (v) Ms. Valdez's companion's assertion that the shooter was not the driver of the vehicle. Had Dr. Dodd testified, the verdict may well

[54] The other evidence consisted of conflicting confessions and the testimony of Mr. Hamby. And although Mr. Hamby was familiar with Mr. Clopten because he spent several hours with Mr. Clopten that day, a jury likely would have questioned his credibility if they had been made aware of the fallibility of the other eyewitness identifications. (R. 633:16-18.) This is true especially in light of the testimony by several witnesses that Mr. White had confessed to being the shooter, the presence of the additional red sweatshirt discovered in the vehicle, Mr. Hamby's testimony that Mr. White also had a gun, Mr. Hamby's failure to appear at the trial, and the suggestive police questioning of Mr. Hamby. (R. 633:27; 646:297, 319-20, 326-33; 647:491-92, 497-98, 500, 505-07, 522-23.)

have been different. The case should be remanded for a new trial in which Dr. Dodd can testify.

Conclusion

"Many jurists agree that eyewitness identifications are the most devastating and persuasive evidence in criminal trials." United States v. Smithers, 212 F.3d 306, 312 (6th Cir. 2000). Mr. Clopten asks this court to recognize the scientific research demonstrating eyewitness identifications can be inherently unreliable under certain conditions. This court should announce a presumption that expert testimony concerning the fallibility of eyewitness identification assists the trier of fact. This presumption will shift the burden to the State to demonstrate that expert testimony will be unhelpful in a particular case.

Had the trial court applied this presumption here, Dr. Dodd would have testified. And had Dr. Dodd testified, there is a reasonable likelihood that the jury would have reached a different verdict. The court should reverse and remand for a new trial.

DATED this 30th day of December, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of December, 2008, true and correct copies of the foregoing were sent via first-class mail, postage prepaid, to the following:

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