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 REPLY BRIEF

JEFFREY S. GRAY Assistant Attorney General MARK L. SHURTLEFF Utah Attorney General 160 East 300 South, 6th Floor PO BOX 140854 Salt Lake City, UT 84114-0854 WILLIAM K. KENDALL B. FRED BURMESTER Deputy Salt Lake District Attorneys Attorneys for Respondent	MICHAEL D. ZIMMERMAN (3604) TROY L. BOOHER (9419) KATHERINE CARREAU (11043) SNELL & WILMER L.L.P. 15 West South Temple, Suite 1200 Salt Lake City, Utah 84101-1004 Telephone: (801) 257-1900 Facsimile: (801) 257-1800 Attorneys for Petitioner

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Summary

Our criminal justice system is designed to distinguish between truthtellers and liars, not to identify those genuinely mistaken. Scientific studies reveal that untutored jurors systematically fail to spot mistaken eyewitnesses, a critical failure because "eyewitness identifications are mistaken more than 58% of the time." (Sup. Apx. at 650.)[1] This explains why mistaken eyewitnesses have contributed to 88% of known wrongful rape convictions and 50% of known wrongful murder convictions. (Pet. Apx. at 205.) Wrongful convictions should concern all participants in the criminal justice system—courts, defense attorneys, the State, and victims—because they not only send the innocent to prison, but also allow the guilty to remain free, and a threat to society.

Scientific studies also demonstrate that expert testimony sensitizes jurors to factors contributing to mistaken eyewitness identification and that jury instructions are not adequate substitutes for expert testimony. (Pet. Apx. at 480, 482.) The State cites no studies concluding otherwise. There are none. Instead, the State cites scientific studies concluding that (i) one type of jury instruction increases juror skepticism, but still does not sensitize jurors to factors contributing to mistaken eyewitness identifications as effectively as does expert testimony; and (ii) the correlation between eyewitness confidence and the accuracy of an identification, while always weak, may increase under circumstances absent during the commission of most crimes. (RB at 21-38.)

In advancing the first proposition, the State chides Mr. Clopten for failing to craft a better jury instruction, implying that some unspecified different instruction may have

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[1] Kevin Jon Heller, The Cognitive Psychology of Circumstantial Evidence, 105 Mich. L. Rev. 241, 244 (2006).

conveyed the same information as the proffered testimony of Dr. Dodd. (RB at 36.) Yet the State cites no studies identifying a jury instruction that is an adequate substitute for expert testimony. In fact, scientific studies consistently conclude that while the effectiveness of jury instructions may vary from minimal to none, no jury instruction is an adequate substitute for expert testimony. (Pet. Apx. at 169, 480, 482.)

By advancing the second proposition—the correlation between eyewitness confidence and accuracy may vary—the State attempts to undermine the overwhelming science by selectively quoting from studies addressing this single factor contributing to jurors believing mistaken eyewitnesses. The most the State can establish, however, is that under pristine conditions the correlation is weak, and when coupled with other conditions—such as stress, viewing conditions, confirming feedback, etc.—the correlation vanishes. (RB at 25; Sup. Apx. at 541-42, 718-21.) Jurors should understand the weakness of this correlation, especially since jurors overestimate "the accuracy of eyewitness identifications by more than 500%." (Sup. Apx. at 650.)[2]

The State therefore has failed to undermine the need for an evidentiary presumption. The scientific studies continue to support the following approach: (i) trial courts may take judicial notice of the reliability[3] of the science concerning the fallibility of eyewitness identification; (ii) a presumption that expert testimony based upon this science, and addressing the particular eyewitnessing conditions in the case, will assist the trier of fact; and (iii) a clarification that expert testimony is never cumulative of a jury instruction, nor inherently prejudicial. (Pet. Apx. at 169, 480, 482.)

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[2] Heller, supra note 1, at 244.

[3] Mr. Clopten did not address reliability in the opening brief because the State conceded reliability in the trial court. Mr. Clopten addresses it because the State did in response.

Had the trial court taken this approach here, it would not have erred in ruling that the Long instruction "does an adequate job," and therefore, admitting Dr. Dodd's testimony would have "confused the issues addressed by the jury." (R. 644:12-13.) Instead, Dr. Dodd would have been permitted to testify about the numerous factors in play here that contribute to mistaken eyewitness identification, including the (i) presence of a weapon; (ii) effects of stress, trauma, and violence; (iii) race of the eyewitness and the defendant; (iv) effect of show-up and lineup procedures on memory; (v) stages of memory; and (vi) relevance of witness confidence in an identification. Tellingly, the State discusses only the last of these factors—witness confidence—and the studies cited in the State's discussion, examined in full, support the proposed evidentiary presumption for this factor as well.

Had Dr. Dodd testified, there is a substantial likelihood that Mr. Clopten would not have been found guilty beyond a reasonable doubt. The immediate eyewitness descriptions reference someone wearing only a red sweatshirt, and only later did these accounts change to implicate Mr. Clopten in his matching red sweatpants. This is important because Mr. Clopten's friend, Freddie White, was likely wearing a red sweatshirt at the time of the shooting but not at the time of the show-up, and Mr. White confessed to a number of people that he, not Clopten, was the shooter.

This court should reverse the court of appeals, review for itself the trial court's ruling excluding Dr. Dodd's testimony, and order a new trial, at which jurors can evaluate for themselves the eyewitness identifications in light of Dr. Dodd's expert testimony about the overwhelming and undisputed science.

Argument

The State's brief illustrates the contradictory messages this court is sending trial courts, and the reason this court should reject the State's suggestion to retain the status quo. (RB at 13.) On the one hand, the State agrees with Mr. Clopten that this court should continue to give trial courts discretion in determining whether to admit expert testimony concerning eyewitness fallibility. On the other hand, this court's jurisprudence instructs trial courts to exercise this "discretion" by excluding the testimony. The State correctly interprets the jurisprudence as stating that (i) if expert testimony is a "mere lecture" because it is unrelated to the specific facts in the case, then a Long instruction is adequate and expert testimony is unnecessary, but (ii) if the expert testimony does relate to the specific facts in the case, then the testimony is inadmissible because it invades the province of the jury by commenting on the credibility of the eyewitness. (RB at 27.)

The contradictions inherent in these messages explains why, as the State notes, it is the "trend of the Third District Court" to exclude expert testimony. (R. 640:7.) In practical fact, Utah has adopted a per se rule against the admissibility of expert eyewitness testimony: the testimony either does not relate to case-specific facts and is superfluous or does relate to case-specific facts and is improper. The only ruling that effectively insulates a trial court from reversal is to exclude the expert testimony. As the State notes, Utah appellate courts have never reversed a ruling excluding such testimony. (RB at 16-17.)

The current operative per se rule is inconsistent with the overwhelming scientific consensus stressing the importance to jurors of expert testimony that will assist them in countering their tendency to credit eyewitness testimony indiscriminately, for "not only is

eyewitness evidence powerful, it is also more likely to be erroneous than any other type of evidence." (Sup. Apx. at 616.)[4] In light of the science, a per se rule against admitting expert testimony has been abandoned by virtually every state, most recently Tennessee. State v. Copeland, 226 S.W.3d 287 (Tenn. 2007). Copeland recognized what the State asks this court to ignore: "neither cross-examination nor jury instructions on the issue are sufficient to educate the jury on the problems with eyewitness identification." Id. at 300.

To correct Utah's de facto per se exclusionary rule, this court should clarify for lower courts that while trial courts have discretion with regard to the admission of expert testimony, trial courts should not presume expert testimony is inadmissible. Instead, trial courts should exercise their discretion in recognition of the overwhelming scientific consensus, which suggests the following: (i) trial courts may take judicial notice that the science concerning eyewitness identification is reliable;[5] (ii) a presumption that expert testimony based upon this science will assist the trier of fact; and (iii) a clarification that expert testimony is never cumulative of a jury instruction, nor inherently prejudicial.

Under this approach, the State can rebut the presumption by showing that the expert testimony does not apply to the particular eyewitness identifications at issue, and for that reason, will not assist the trier of fact.[6] In addition to determining whether the State has rebutted the presumption, trial courts will continue their gatekeeping role of

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[4] John C. Brigham, Adina W. Wasserman & Christian A. Meissner, Disputed Eyewitness Identification Evidence: Important Legal and Scientific Issues, 36 Court Review 12 (1999).

[5] Judicial notice is appropriate because the science plainly meets the alternative requirements that the principles underlying the expert testimony either (i) be "based upon sufficient facts or data" under Rule 702(b)(ii) or (ii) be "generally accepted by the relevant expert community" under Rule 702(c).

[6] This corresponds to the requirement under Rule 702(b)(iii) that the principles underlying the expert testimony "have been reliably applied to the facts of the case."

determining whether (i) the expert is qualified and (ii) the testimony should be excluded under Rule 403 for reasons other than the fact that a Long instruction is given.[7] In the absence of such factors weighing against admissibility, expert testimony is admissible.

The appropriateness of this approach is confirmed by studies indicating that memory is complex and operates in counterintuitive ways. Just as jurors should be informed about how a crime scene, or subsequent testing procedures on evidence from that crime scene, may have been contaminated so they can better judge the accuracy of the results of tests performed with evidence taken from that crime scene,[8] jurors should also be informed about how memory may have been contaminated so they can better assess the accuracy of eyewitness identifications based upon those memories. Under this approach, the State, of course, remains free to call a rebuttal expert if it believes there is science that supports the accuracy of eyewitness memory in any particular case.[9]

As demonstrated below, in its response brief the State provides no reason to reject the approach advocated by Mr. Clopten. First, the Rimmasch test the State discusses at length does not govern the admissibility of Dr. Dodd's testimony because it was excluded prior to the relevant amendment of Rule 702, leaving the bulk of the State's discussion

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[7] For example, expert testimony would be improper if it instructed jurors to disregard eyewitness testimony. Patey v. Lainhart, 1999 UT 31, ¶21, 977 P.2d 1193 ("Although expert opinion testimony should not be permitted to invade the field of common knowledge or the province of the jury, an expert opinion is not inadmissible merely because it embraces an ultimate fact in issue, such as the cause of an accident or injury.").

[8] State v. Tankersley, 191 Ariz. 359, ¶21, 956 P.2d 486 ("complaints of laboratory error or incompetence are considered by the trier of fact in assessing the weight of the evidence"); State v. Lyons, 924 P.2d 802, 813 (Ore. 1996) ("potential for contamination may present an open field for cross-examination or may be addressed through the testimony of defense experts at trial, as is true with other forensic evidence").

[9] State v. Ramsey, 550 S.E.2d 294, 298 (S.C. 2001) ("Two conflicting theories were offered at trial as to how the evidence was collected and its potential for contamination.").

beside the point. Second, even under the Rimmasch test, the approach advocated by Mr. Clopten is warranted. Mr. Clopten will discuss each in turn.

I. The Rimmasch Test Does Not Apply to the Admissibility of Dr. Dodd's Testimony, and Under the Proper Standard His Testimony Is Admissible

In the response brief, the State relies upon the test developed by this court in State v. Rimmasch, 775 P.2d 388 (Utah 1989), as a ground to reject the evidentiary approach advocated by Mr. Clopten. The State argues that under the Rimmasch test, Dr. Dodd's testimony was properly excluded. (RB at 19-45.) While Mr. Clopten will discuss the Rimmasch test below because this test appears relevant to the admissibility of all expert testimony under the current Rule 702, the Rimmasch test does not govern the admissibility of Dr. Dodd's testimony under the version of Rule 702 at issue here.

A. The Rimmasch Test Does Not Apply in This Case

The trial court excluded Dr. Dodd's testimony on February 9, 2006. (R. 644:13.) Under the version of Rule 702 that was operative prior to November 2007, the Rimmasch test applied only when expert testimony was "based on newly discovered principles." State v. Adams, 2000 UT 42, ¶16, 5 P.3d 642. Here, the scientific principles and techniques upon which Dr. Dodd relied are not "newly discovered," but have been confirmed by "the accumulation of literally thousands of studies on the weaknesses of eyewitness testimony."[10] D. Michael Risinger & Jeffrey L. Loop, Three Card Monte, Monty Hall, Modus Operandi, and "Offender Profiling": Some Lessons of Modern

[10] The State's application of the Rimmasch test in this case is puzzling, as the State (i) notes that the exclusion of Dr. Dodd's testimony occurred under the prior version of Rule 702, (RB at 2), (ii) argues that subsequent changes in Rule 702 standards do not apply here, (RB at 41), and (iii) cites a case stating that the Rimmasch test applies only to "newly discovered principles" under the prior version of Rule 702. (RB at 27.)

Cognitive Science for the Law of Evidence, 24 Cardozo L. Rev. 193, 194 (2002). This perhaps explains why the State did not challenge the reliability of the scientific methods underlying Dr. Dodd's testimony. (RB at 39.) The Rimmasch test does not apply here.

In 2006, in Utah, there were only two criteria for determining the admissibility of Dr. Dodd's testimony: (i) whether the testimony would "assist the trier of fact," Adams, 2000 UT 42 at ¶17, and (ii) whether the probative value of the testimony "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." State v. Mead, 2001 UT 58, ¶40 n.6, 27 P.3d 1115.

Here, the trial court excluded Dr. Dodd's testimony on the ground that "the eyewitness [jury] instruction does an adequate job," and "Dr. Dodd's testimony [wa]s just superfluous and would have no bearing on the jury's decision." (R. 644:12, 13.) In other words, the trial court ruled that Dr. Dodd's testimony would not "assist the trier of fact" more than the Long instruction, and, for this reason, would be "cumulative" of the Long instruction. As demonstrated below, the trial court erred as a matter of law[11] in ruling that the Long instruction is an adequate substitute for Dr. Dodd's testimony.

B. The Long Instruction Was Not an Adequate Substitute for Dr. Dodd's Expert Testimony

Every relevant scientific study demonstrates that the trial court erred in concluding that the Long instruction was an adequate substitute for Dr. Dodd's testimony, a point the State does not dispute in its response brief. Instead, the State argues that Mr. Clopten

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[11] While an abuse of discretion standard typically applies when this court reviews the exclusion of expert testimony, the trial court is in no better position than this court to compare the Long instruction to the proffered testimony of Dr. Dodd to determine whether the Long instruction is an adequate substitute for Dr. Dodd's testimony.

should have asked for a different version of the Long instruction, and, the State speculates, some version may have been an adequate substitute. (RB at 35-36.) The State even suggests that Mr. Clopten somehow invited the trial court's error in excluding Dr. Dodd's testimony by failing to craft some unspecified alternative Long instruction. (RB at 41.) There is no scientific support for the State's speculation.

As demonstrated in the opening brief, jury instructions are at best "minimally effective," and expert testimony is far more effective in sensitizing[12] jurors to factors influencing the accuracy eyewitness identifications. (Pet. Apx. at 245, 252, 57.)[13] The State does not cite a single scientific study concluding that jury instructions are adequate substitutes for expert testimony. There are none. For a jury instruction to provide jurors with the same information as expert testimony, the instruction would have to be a scientific treatise that jurors could not understand on their own. (Sup. Apx. at 252.)[14]

Rather than dispute the findings of these studies, the State complains that the studies describe tests using a Telfaire instruction, instead of a Long instruction, or some unspecified revision of a Long instruction. (RB at 38.) The State then implies that because every version of a Long instruction was not tested, the studies do not support the inference that a Long instruction also is an inadequate substitute for expert testimony.

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[12] "Sensitivity" consists of (i) knowledge, i.e., "awareness of the manner in which a factor influences eyewitness memory;" and (ii) integration, i.e., "the ability to render decisions that reflect knowledge." Steven Penrod & Brian Cutler, Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation, 1 Psychology, Public Policy, and Law 817, 831 (Dec. 1995). Skepticism is distinct and is measured differently. Id. at 840.

[13] Stephen D. Penrod & Brian L. Cutler, Eyewitness Expert Testimony and Jury Decisionmaking, 52 Law & Contemp. Prob. 43, 44, 52 (1989) (jury instruction minimally effective); Brian L. Cutler & Steven D. Penrod, Mistaken Identification: The Eyewitness, Psychology, and the Law 263, 250 (1995) (expert testimony sensitizes).

[14] Penrod & Cutler, supra note 13, at 52 (instructions merely list factors "without explaining the relative impact those factors have on memory or identification accuracy").

Apart from the fact that one cannot test every possible jury instruction, the State's complaint misses the point. Edith Greene—the author of the single study cited by the State that found some effectiveness to a jury instruction she drafted—rejected the notion that jury instructions are effective: "jurors may need more assistance than they currently receive in order to fairly and accurately evaluate eyewitness accounts." (Sup. Apx. at 496.)[15] Ms. Greene warned that "[i]t is incorrect to assume that when jurors have received a cautionary instruction, they will be able to understand and follow the instruction." (Id.)[16] And at most, Ms. Greene's instruction increased juror skepticism, but not juror sensitivity. (Sup. Apx. at 809.)[17] In the end, therefore, the lone study located by the State that finds any effectiveness of a jury instruction still supports Mr. Clopten's position that jury instructions "do not serve as an effective safeguard against mistaken identifications and conviction."[18] (Pet. Apx. at 296-99, 107.)[19] The trial court erred in excluding Dr. Dodd's testimony as cumulative of the Long instruction.

II. Had the Trial Court Not Excluded Dr. Dodd's Testimony, There is a Mr. Clopten Likely Would Not Have Been Found Guilty

Had Dr. Dodd testified, there is a substantial likelihood Mr. Clopten would not have been found guilty beyond a reasonable doubt. The exclusion of Dr. Dodd's

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[15] Edith Greene, Eyewitness Testimony and the Use of Cautionary Instructions, 8 U. Bridgeport L. Rev. 15, 20 (1987).

[16] Id.

[17] Penrod & Cutler, supra note 12, at 834.

[18] In addition, the Greene instruction is not similar to the Long instruction in this case. (Compare R. 594-96 with Greene, supra note 15, at 18 n.13.)

[19] Penrod & Cutler, supra note 12, at 832, 835 (jury instructions neither explain how the factors "influence memory" nor "identify the magnitude of their effects"); Henry F. Fradella, Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony, 2 Fed. Cts. L. Rev. 1, 25 (2007) ("Jury instructions do not explain the complexities about perception and memory in a way a properly qualified person can.").

testimony therefore was not harmless. The State advances three harmless error arguments: (i) the identifications of Mr. Clopten hinged more upon the identification of clothing than facial features; (ii) the witnesses who identified Mr. Clopten as the shooter were not complete strangers; and (iii) the testimony of Andre Hamby, who was with Mr. Clopten the night of the shooting, and of Robert Land, who was in prison with Mr. Clopten, confirms that Mr. Clopten was the shooter. (RB at 42-45.)

All three arguments fail in light of the science. Understanding why the State's arguments fail not only reveals how the exclusion of Dr. Dodd's testimony was anything but harmless, but also further demonstrates the need for expert testimony more generally.

A. The Different Descriptions of the Shooter's Clothing Demonstrate the Need for Expert Testimony in this Case

The State's primary argument retreats from challenging the science concerning facial recognition, and instead focuses only on the clothes the shooter was wearing. (RB at 42-43.) In particular, the State's argument hinges upon Ms. Pantoja's description of the shooter as wearing "all" red. (RB at 43.) The record reveals, however, that no witness initially described the shooter as "all" in red. Ms. Pantoja initially described the shooter simply as wearing red. (R. 646:195, 224-25, 236; 246, 263-64; 641:18.) Ms. Valdez initially described the shooter as wearing a red sweatshirt and denied that the shooter wore matching red sweatpants, which Mr. Clopten wore. (R. 646:263-64).

Despite these initial descriptions focusing on a red sweatshirt, police ignored a red hooded sweatshirt found in the suspect's vehicle near where Mr. White, who later confessed to the crime, was seated. (R. at Def.'s Ex. D-1; R. 646:296-97; R. 647:453-54.) No forensic tests were ever preformed on this sweatshirt. Instead, the investigation

focused solely on Mr. Clopten, despite Ms. Valdez's initial statement that the shooter was not wearing matching red sweatpants, as Mr. Clopten was.[20] (R. 646:296-97.)

The fatal flaw in the State's focus in its brief on the clothing as being determinative of the accuracy of this identification is that when Ms. Pantoja identified Mr. Clopten as the shooter at a show-up later that evening, Mr. Clopten was the only individual presented to her wearing a red sweatshirt. Mr. White was not required to put on the red sweatshirt found near him in the car. Dr. Dodd was prepared to testify that such a show-up can contaminated an eyewitness' memory.[21] (R. 263.) The scientific research shows that "for a lineup or photo array to be fair, the actual suspect should not stand out from the other participants." (Pet. Apx. at 105.)[22] Instead, participants "should be similarly dressed," and should not be wearing "clothing matching witnesses' descriptions of clothing worn by the culprit." (Pet. Apx. at 105.)[23] Critically, "[r]esearch consistently supports the view that using fillers who do not fit the eyewitness' previous

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[20] Moreover, the descriptions of the sweatshirt by Ms. Pantoja and Ms. Valdez did not match the particular sweatshirt worn by Mr. Clopten. This disparity involved the pocket of the sweatshirt and the writing on the sweatshirt. (AOB at 10-11.)

[21] The State suggests that Mr. Clopten conceded the exclusion of this testimony. (RB at 39-40.) This is incorrect. Trial counsel stated that Dr. Dodd would not specifically discuss the affect of the show-up on Ms. Pantoja's memory. He would have testified about the science concerning how show-up procedures affect memory. (R. 639:19.)

[22] Fradella, supra note 19, at 18.

[23] Id. at 19; see also Gary L. Wells, Mark Small, Steven Penrod, Roy S. Malpass, Solomon M. Fulero, & C.A.E. Brimacombe, Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads, 22 Law and Human Behavior 1, 23-24 (1998) (cautioning that "the suspect should not stand out in the lineup or photospread as being different from the distractors based on the eyewitness's previous description of the culprit or based on other factors that would draw extra attention to the suspect," i.e., where the suspect is the "only one dressed in the type of clothes worn by the culprit").

verbal description of the culprit dramatically increases the chances that an innocent suspect who fits this description will be mistakenly identified." (Sup. Apx. at 503.)[24]

In addition, eyewitness confidence, but not accuracy, increases when only one person in the lineup or show-up fits the initial description: "A suggestive lineup procedure in which the suspect stands out as the only lineup member who fits the description has similar effects; witnesses are more confident in their identifications of the suspect when the suspect stands out than when the suspect is surrounded by appropriate fillers, regardless of whether the suspect is guilty or not." (Sup. Apx. at 508.)[25] Unsurprisingly, then, by the time of trial both Ms. Pantoja and Ms. Valdez described the shooter as wearing "all" red and remembered matching red sweatpants, whereas their initial recollections were different. (RB at 43-44.) As researchers warn, "[n]ot surprisingly, later descriptions tend to become more detailed and become more consistent with the identified person." (Sup. Apx. at 514.)[26] In other words, eyewitness memories may have been contaminated, much like a crime scene, by the show-up procedure and, perhaps self-fulfilling, by the focus only on Mr. Clopten.[27] The jurors should have been educated about these issues.

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[24] Gary L. Wells & Deah S. Quinlivan, Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later, 33 Law & Human Behavior 1, 7 (Feb. 2009).

[25] Id. at 12.

[26] Id. at 18.

[27] The State also ignores that the sweatshirt hood was up during the shooting. (R. 633:29; 646:247, 263, 313; 647:479.) This fact not only undermines Ms. Pantoja's later memory of Mr. Clopten's distinct hairline, but also would have made accurate identifications more difficult. Gary L. Wells, Amina Memon & Steven D. Penrod, Eyewitness Evidence: Improving Its Probative Value, 7 Psychological Science in the Public Interest 45, 54 (2007) (wearing a disguise such as a hat affects identifications).

B. The Brief Encounters That Ms. Pantoja and Ms. Valdez Had With Mr. Clopten Increase the Chance of Misidentification

The State also argues that excluding Dr. Dodd's testimony was harmless because Ms. Pantoja and Ms. Valdez were "not complete strangers" to Mr. Clopten. (RB at 10, 42.) Both eyewitnesses did see Mr. Clopten briefly prior to the concert at which the shooting occurred. But contrary to the State's common-sense assumption, such brief encounters do not increase the accuracy of memory. In fact, unlike with an acquaintance, a prior brief encounter with a suspect who is not an acquaintance may actually cause an eyewitness to confuse the context of the encounter, increasing the likelihood of a mistake. (Sup. Apx. at 848.)[28] Therefore, Mr. Clopten's brief encounters with Ms. Pantoja and Ms. Valdez, at best, did not decrease, and, at worst, increased the likelihood of a mistake.

The State's own misunderstanding of the impact a brief encounter with a stranger can have on the accuracy of memory further highlights the need for expert testimony. The jury should have been informed about the counterintuitive impact brief encounters may have on memory, instead of relying upon their common intuitions.

This error was not harmless, especially in light of the evidence before the jury that Mr. White was the shooter. Numerous witnesses testified that Mr. White confessed to the shooting. (R. 647:491-92, 497-98, 500, 505-07, 522-23.) There was evidence that Mr. White had a gun. (R. 633:48-49.) During Ms. Pantoja's initial police interviews, she described Mr. White as "the guy in red," her same initial description of the shooter. (R. 645:84.) Ms. Valdez initially described the shooter was wearing a red sweatshirt and

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[28] Steven Penrod, Elizabeth Loftus, & John Winkler, The Reliability of Eyewitness Testimony: A Psychological Perspective, in The Psychology of the Courtroom 119, 142 (N. Kerr et al. eds. 1982) (recognizing the phenomenon of "unconscious transference" where eyewitnesses will choose innocent bystanders as a result of "confusing their contexts and placing a somewhat familiar face in the wrong context").

denied that the shooter was wearing matching red sweatpants, as Mr. Clopten wore. (R. 646:263-64). In contrast, Mr. White was likely wearing only a red sweatshirt at the time of the shooting: (i) two witnesses out of harm's way at the Marriott testified that someone wearing a red jacket or fleece entered the passenger side of the vehicle, (R. 646:304-05, 313), and (ii) a red hooded sweatshirt was found near where Mr. White was seated on the passenger side of the car. (R. at Def.'s Ex. D-1; R. 646:296-97; R. 647:453-54.) Finally, Ms. Valdez's companion asserted that the shooter was not the driver, and it is undisputed that Mr. Clopten was the driver. (R. 647:486.) Had jurors heard Dr. Dodd's testimony, there is a substantial likelihood that they would have found reasonable doubt that Mr. Clopten was the shooter.

C. The Self-Serving Testimony of Mr. Hamby and Mr. Land Would Have Been Insufficient to Extinguish Reasonable Doubt

The testimony of Mr. Hamby and Mr. Land would have been insufficient to extinguish reasonable doubt. While Mr. Hamby attended the concert with Mr. Clopten, he first told police that he was in the car and could not see the shooting. (R. 646:326.) His story changed when police threatened "many years" in prison, and said there was "no saving" Mr. Clopten due to testimony of other witnesses. (R. 646:331-32.) Only then did Mr. Hamby identify Mr. Clopten as the shooter. (R. 646:332-33.)

As for Mr. Land, his testimony about Mr. Clopten's supposed jail house confession was in exchange for a reduction in sentence from a potential life sentence to 8 years. And Mr. Land's testimony was contradicted at trial by his cellmate, Miguel Florez. (R. 646:344, 360-65, 369-70; 647:459-60, 465.) Mr. Land and Mr. Clopten were housed in the same unit, not the same cell, at the prison for only a matter of days.

(R. 646:358; 647:459.) During that time, inmates were allowed out of their cells for one hour and fifteen minutes every other day. (R. 646:359; R. 647:458.) Mr. Land and Mr. Clopten were not allowed out of their cells on the same days. (R. 646: 358-59.) According to Mr. Land, during one of Mr. Clopten's recreation periods, Mr. Clopten came to Mr. Land's cell and confessed to the shooting. (R.646:343-44, 358-59.) Mr. Florez, who was always in the cell with Mr. Land, contradicts this testimony. (R. 647:458-60.) Mr. Florez testified that Mr. Clopten spoke only to Mr. Florez, not Mr. Land, because Mr. Clopten did not like Mr. Land. (R. 647:459-60.)

In light of Dr. Dodd's expert testimony concerning eyewitness identifications, there is a substantial likelihood that the jury would not have considered Mr. Hamby's or Mr. Land's testimony to extinguish reasonable doubt.[29] For all of these reasons, there exists reasonable likelihood of a better outcome had Dr. Dodd testified. State v. Knight, 734 P.2d 913, 919-20 (Utah 1987). The trial court's error was not harmless.

III. Trial Courts Should Take Judicial Notice of the Reliability of the Science Concerning the Fallibility of Eyewitness Identifications Because the Science Is Widely Accepted and Courts Should Presume Expert Testimony Based Upon That Science is Helpful to Jurors

Because some version of the Rimmasch test will be used to evaluate the admissibility of expert testimony concerning the fallibility of eyewitness identification in cases tried under the current Rule 702, and because the court may wish to address these considerations in providing guidance for trial courts, Mr. Clopten will address the State's

[29] Dr. Dodd was prepared to testify about a number of other factors that the State has not addressed, including (i) weapon focus, (ii) the stressful and violent nature of the event, (iii) cross-racial identifications, (iv) unconscious reconstruction of memory based on the previous comments by Mr. Fuailemaa about Mr. Clopten, (v) post-event information, (vi) descriptions of the shooter's clothing that did not match Mr. Clopten's clothing, and (vii) the lack of correlation between accuracy and confidence. (AOB 38-43.)

analysis of the Rimmasch test. Mr. Clopten stresses, however, that the more relaxed admissibility standard in the prior version of Rule 702 applies of the facts of this case.

In applying the Rimmasch test, the State first argues that trial courts cannot take judicial notice of the reliability of the principles and methods confirmed by the volumes of studies because "errors in eyewitness identification generally cannot be traced to a single variable" and the science is "ever evolving." (RB at 22, 26.) The State next argues that expert testimony will not be helpful to the trier of fact because (i) "it cannot reliably predict 'the existence or nonexistence of a fact in issue,' i.e., whether the identification of a particular witness was or was not accurate," and (ii) it "cuts deeply into sensitive areas," such as "whether one witness or another is telling the truth." (RB at 31, 32.) Mr. Clopten will address each argument in turn.

A. Trial Courts Can Take Judicial Notice of the Reliability of the Science Concerning the Fallibility of Eyewitness Identification

The State argues that judicial notice of the reliability of the science is inappropriate because (i) errors in identification are traced to many variables and (ii) the science evolves. (RB at 22, 26.) Neither concern addresses, let alone undermines, the reliability of the "scientific, technical, or other principles or methods underlying" Dr. Dodd's testimony. Utah R. Evid. 702(b). Trial courts should take judicial notice of the reliability of the science concerning the fallibility of eyewitness identification.

1. The Complexity of Memory Demonstrates the Need for Expert Testimony, Not the Unreliability of the Science

The fact that "errors in eyewitness identification generally cannot be traced to a single variable," and therefore is complex, demonstrates the need for expert testimony on the subject; it does not demonstrate the unreliability of methods used to study the subject.

The State's concerns are therefore beside the point. It is the decades of studies confirming the science, and the lack of any studies undermining it, that demonstrates the reliability of the science.[30] The scientific studies cited in the briefs more than demonstrate that the "principles and methods on which [the expert's specialized] 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 R. Evid. 702(c). In fact, it is difficult to imagine science more "generally accepted." Trial courts should take judicial notice of its reliability.

2. The Evolving Science of Eyewitness Identification Has Led to More Precise Results And Does Not Undermine Prior Studies

The State's second argument is that trial courts should not take judicial notice of the reliability of the science because the science is evolving. In support of this argument, the State cherry picks a single factor—the lack of meaningful correlation between witness confidence and accuracy—and takes its best shot at calling into question the conclusions of some scientific studies.

The State argues that more recent science on the relationship between eyewitness confidence and accuracy discredits earlier research finding no significant correlation.[31] While some more recent studies do demonstrate that highly confident witnesses may be

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[30] D. Michael Risinger & Jeffrey L. Loop, Three Card Monte, Monty Hall, Modus Operandi, and "Offender Profiling": Some Lessons of Modern Cognitive Science for the Law of Evidence, 24 Cardozo L. Rev. 193, 194 (2002); see also Amina Memon, Aldert Vrij & Ray Bull, Psychology and Law: Truthfulness, Accuracy and Credibility 87-167 (2d ed. 2003) (surveying research on eyewitness fallibility).

[31] The State also cites a case to support its argument that accuracy and confidence are correlated. Jones v. State, 539 S.E.2d 143, 148 (Ga. 2000). Jones, however, did not concern the exclusion of expert testimony, but instead merely held that it was not error to allow a witness to testify about her confidence. Mr. Clopten has not argued that the eyewitnesses should have been precluded from testifying about their confidence.

"somewhat more likely to be correct," it is notable that the State fails to provide the court a copy of the study or to explain the limited nature of these findings.

The problems with the State's analysis are many. First, the correlation between accuracy and confidence in the studies cited by the State—between .23 and .29—is weak. The State admits that a meaningful correlation is .6, a level more than twice the correlation in the studies. (RB at 23 n.7.) Second, the State's studies confirm that the level of correlation between confidence and accuracy of identification is affected by many factors, such as confirming feedback, high arousal, stress or fear, poor viewing conditions, and biased lineup instructions. (Sup. Apx. at 541-42.)[32] A 2007 study concludes that years of research "call into question the notion that witness confidence can be of significant assistance to jurors." (Sup. Apx. at 542.)[33] In addition, the one study describing the correlation as useful and significant also cautioned that adding other factors which affect eyewitness memory can make confidence a "very poor and even useless or misleading indicator of witness accuracy." (Sup. Apx. at 788.)[34]

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[32] The scientific studies cited by the State recognize the negative impact these factors have on the correlation. Wells, Memon & Penrod, supra note 27, at 65-66 ("it is now clear that the relationship between confidence and accuracy varies greatly as a function of many other factors"); Robert K. Bothwell, Kenneth A. Deffenbacher & John C. Brigham, Correlation of Eyewitness Accuracy and Confidence: Optimality Hypothesis Revisited, 72 Journal of Applied Psychology 691, 694 (1987) ("under conditions of high arousal, [like actual criminal events,] there may be little, if any, correlation of recognition memory and confidence"); Brigham, Wasserman & Meissner, supra note 4, at 18 ("high fear or stress (if present) is likely to interfere with memory and impair the accuracy of subsequent identifications"); Siegfried Ludwig Sporer, Steven Penrod, Don Read & Brian Cutler, Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies, 118 Psychological Bulletin 315, 324 (1995) (small but significant correlation, but other factors will make confidence a "very poor and even useless or misleading indicator of witness accuracy").

[33] Wells, Memon &. Penrod, supra note 27, at 66.

[34] Sporer, Penrod, Read & Cutler, supra note 32, at 324.

The danger of failing to educate jurors about the lack of correlation between eyewitness confidence and accuracy is that confidence "is the most powerful single determinant of whether or not observers of that testimony will believe that the eyewitness made an accurate identification." (Sup. Apx. at 566.)[35] Therefore, to the extent there is a correlation between confidence and accuracy, an expert should be allowed to explain that it is one of many factors indicating an identification's accuracy. (Sup. Apx. at 819.)[36]

As a practical matter, however, any correlation will be irrelevant in most criminal cases because the presence of stress or fear, which the study relied upon by the State indicates weakens the level of correlation, will be present at most crime scenes. Thus, the minimal correlation, aside from having nothing to do with reliability of the science, will have no application in most criminal cases. In the end, the science concerning the fallibility of eyewitness identification has become more reliable over time, not less, and the Sate does not contend otherwise. The results of the science are confirmed by numerous DNA exonerations demonstrating the fallibility of the eyewitness identifications. (Sup. Apx. at 554.)[37] Trial courts should take judicial notice of the reliability of this science.

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[35] Wells, Small, Penrod, Malpass, Fulero &Brimacombe, supra note 23, at 15.

[36] Penrod & Cutler, supra note 12, at 842 ("In light of the empirical evidence concerning the weak relationship between confidence and accuracy, jurors' heavy reliance on witness confidence as a guide to witness accuracy, their tendency to overbelieve eyewitnesses, their insensitivity to the many factors known to influence eyewitness performance, and the inability of traditional safeguards such as cross-examination and cautionary instructions to remedy these problems, we are left with one alternative: eyewitness expert testimony.").

[37] Wells, Small, Penrod, Malpass, Fulero & Brimacombe, supra note 23, at 3 (recognizing that 36 of the first 40 DNA exonerations were from convictions based on eyewitness identifications, including one where the wrongfully convicted man was identified by five separate witnesses); Wells & Quinlivan, supra note 24, at 1-2 (stating that "[m]ore than 200 exonerations based on post-conviction DNA testing reveal that mistaken

B. Expert Testimony Assists the Trier of Fact Because It Is the Only Reliable Method of Educating Jurors About the Fallibility of Eyewitness Identification

The State also argues that this court should reject a presumption that expert testimony is helpful to the trier of fact. In support of this argument, the State asserts that expert testimony (i) "cannot reliably predict 'the existence or nonexistence of a fact in issue,' i.e., whether the identification of a particular witness was or was not accurate" and (ii) "cuts deeply into sensitive areas," such as "whether one witness or another is telling the truth." (RB at 31, 32.) Neither assertion shows that expert testimony will not assist the trier of fact.[38]

The State's first assertion—expert testimony does not reliably predict which eyewitnesses are mistaken—misses the point. Expert testimony educates jurors about systematic problems with eyewitness memory so that jurors can determine whether an eyewitness is mistaken. This is no different than expert testimony about how a crime scene was contaminated, which then allows jurors then to make a determination as to whether tests performed on evidence taken from that crime scene accurately reveal who committed the crime. The fact that expert testimony concerning contaminated crime

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identification was involved in more of these DNA exonerations (over 75%) than all other causes combined"); cf. Robert P. Mosteller, Syndromes and Politics in Criminal Trials and Evidence Law, 46 Duke L.J. 461, 494 (1996) (recognizing the contradiction that expert testimony regarding battered woman syndrome is generally admitted even though the research as been "vigorously criticized," while expert testimony on eyewitness identification is routinely excluded even though the research is "classic in its methodology [and] rests on very solid ground").

[38] The State's additional assertion that expert testimony discusses a topic outside the knowledge of average jurors simply recites the definition of "specialized knowledge" which identifies expert, as opposed to lay, testimony. State v. Rothlisberger, 2006 UT 49, ¶31, 147 P.3d 1176 (defining "specialized knowledge" as knowledge "with which lay persons are not familiar" and rejecting a requirement that specialized knowledge be of a type "which can be mastered only by specialists in the field").

scenes does not "reliably predict the accuracy of tests performed using evidence from the scene" does not make the testimony unhelpful to the jury, or otherwise inadmissible.

For similar reasons, the State is incorrect that expert testimony must tell jurors "whether one witness or another is telling the truth." (RB at 32.) The problem with mistaken identification and faulty memory is precisely that the mistaken witness genuinely believes she is telling the truth. The expert testimony is not designed to attack her credibility, but is designed to educate jurors about factors that may affect the reliability of her memory. (Sup. Apx. at 626.)[39] The expert testimony no more attacks the credibility of the eyewitness than does expert testimony about DNA evidence demonstrating that someone other than the person identified by the eyewitness committed the crime. In both cases, the jury may, but need not, infer that the eyewitness is mistaken, or lying. As one court explained, "[t]he 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 to provide the jury with more information with which the jury can then make a more informed decision." United States v. Hines, 55 F. Supp. 2d 62, 72 (D. Mass. 1999). The issue is not credibility, but understanding the factors that impact memory.[40]

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[39] Brigham, Wasserman & Meissner, supra note 4, at 22 (1999) ("The function of an expert witness is not to tell the jury what to believe or to imply that a particular witness is either correct or incorrect[, but instead to provide jurors a] frame of reference within which to interpret the eyewitness evidence, along with all the other evidence, in reaching a verdict[, which] may cause jury members to weigh the eyewitness evidence more heavily or, conversely, to give it less emphasis than they otherwise would.").

[40] If the issue involved only identifying truthtellers, as the State frames it, then cross-examination may be effective and expert testimony may be unnecessary. However, studies indicate that cross-examination is not effective precisely because mistaken eyewitnesses believe they are telling the truth. Brigham, Wasserman & Meissner, supra note 4, at 23 ("when a person is telling the truth as he or she knows it, cross-examination will not necessarily determine accuracy").

Moreover, this court has already rejected the State's argument (or, more precisely, accepted the State's argument to the contrary) in a related context. State v. Adams, 2000 UT 42, 5 P.3d 642. In Adams, the court held that while an expert witness could not testify about whether a victim of sexual abuse was "telling the truth," the expert could testify that the victim "did not have the cognitive ability to be coached." Id. at ¶12. Because the expert did not "offer a direct opinion of [the victim's] truthfulness about the alleged sexual abuse," and instead testified about her mental capacity to invent and consistently repeat a fabricated story, the testimony did not "reliably predict" whether the abuse occurred any more than Dr. Dodd's testimony would reliably predict the accuracy of any eyewitness identification. (Sup. Apx. at 615.)[41] Moreover, the fact that the expert in Adams did not offer a direct opinion about the "truthfulness about the alleged sexual abuse" was cited by the court as a virtue, not a reason to exclude the testimony. Id. at ¶13. Thus, experts can discuss the specific facts of a case without offering a direct opinion about witness truthfulness.

Expert testimony therefore not only assists the trier of fact, but is the only effective way to educate jurors about the factors contributing to mistaken eyewitness identification, an education this court has recognized is necessary since 1986 when it decided State v. Long. 721 P.2d 483 (Utah 1986). And contrary to the State's suggestion, corroborating evidence does not eliminate the need for expert testimony. In support of that suggestion, the State cites People v. McDonald, 690 P.2d 709 (Cal. 1984), the leading case adopting the very per se rule requiring the admission of expert testimony

[41] Fradella, supra note 19, at 25 (the results of the science "are appropriately general for the purpose of assisting jurors to take a realistic view of eyewitness testimony.").

that the State has argued against in this case and every other case involving similar expert testimony in the last ten years. Mr. Clopten does not advocate this per se rule precisely because it draws an unprincipled distinction between cases involving eyewitness identifications alone and cases involving eyewitness identifications coupled with even minimal corroborating evidence.

As explained in Mr. Clopten's opening brief, eyewitness testimony can greatly influence how much weight jurors give other evidence, even when it is obviously irrational to do so. For example, when corroborating evidence is so weak that only 18% of jurors would vote for conviction, the addition of eyewitness testimony by a legally-blind person without glasses increases the percentage of jurors voting for conviction to 68%. (AOB at 27.) The presence of some sort of "corroborating" evidence thus does not extinguish the need for expert testimony about the fallibility of eyewitness identification or the ability of that expert testimony to assist the trier of fact.[42] Even under the Rimmasch test, then, the court should adopt Mr. Clopten's evidentiary approach.

Conclusion

This court should clarify that while trial courts have discretion to determine whether to admit expert testimony concerning the fallibility of eyewitness identification, they should exercise this discretion in light of the overwhelming science demonstrating that (i) expert testimony is presumptively helpful to jurors and (ii) a jury instruction is never an adequate substitute for expert testimony. Because the science is generally accepted, trial courts also should take judicial notice of its reliability. Jurors should be

[42] An Idaho court recently cited McDonald to argue that expert testimony is typically helpful to jurors, but focused unnecessarily on corroborating evidence in fashioning its rule. State v. Wright, 2009 Ida. App. LEXIS 11, *23-24 (Idaho Ct. App, Feb. 6, 2009).

educated about how common assumptions about memory are systemically incorrect and how memories of eyewitnesses can be contaminated.

Had the trial court followed this approach—whether through the lens of the Rimmasch test or the lesser standard that applied at the time of trial—Dr. Dodd would have testified. And had Dr. Dodd testified, there is a substantial likelihood that the jury would not have found Mr. Clopten guilt beyond a reasonable doubt. At the time of the shooting, Mr. White, who confessed to the crime a number of times, was likely wearing a red sweatshirt matching initial eyewitness descriptions of what the shooter wore, a sweatshirt he was not required to wear during the show-up even though the sweatshirt matched initial eyewitness descriptions and was in the car at the time of the show-up.[43] The error was not harmless. This court should order a new trial.

DATED this 13th day of April, 2009.

SNELL & WILMER L.L.P.

Troy L. Booher
Attorney for Mr. Clopten

[43] (R. 646:213, 296-97, 304-05, 313; 647:453-54.)

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of April, 2009, true and correct copies of the foregoing were sent via first-class mail, postage prepaid, to the following:

Jeffrey S. Gray
Assistant Attorney General
Mark L. Shurtleff
Utah Attorney General
160 East 300 South, 6th Floor
PO Box 140854
Salt Lake City, UT 84114-0854