No. 118496

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court,
Petitioner,	)	First District, No. 1-12-1880
v.	)	On Appeal from the Circuit Court of Cook County, No. 08
EDUARDO LERMA,	)	CR 9899
Respondent.	)	Hon. Timothy J. Joyce, Presiding.

BRIEF OF *AMICUS CURIAE* THE INNOCENCE NETWORK IN SUPPORT OF DEFENDANT-APPELLEE

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I. STATEMENT OF INTEREST

The Innocence Network is a coalition of innocence organizations around the country (as well as in other countries) dedicated to uncovering evidence that conclusively proves the innocence of convicted individuals. The members of the Innocence Network represent hundreds of prisoners with innocence claims in all fifty states and the District of Columbia. To date, the Innocence Network's member organizations in the United States have helped to exonerate over 250 persons with DNA testing and hundreds more without DNA testing.

In addition to its work on behalf of the wrongfully convicted, the Innocence Network works to prevent future wrongful convictions by researching the causes of wrongful convictions and pursuing reform initiatives. In its research, the Network has found that eyewitness misidentification is one of the leading causes of wrongful convictions in the country and that expert testimony on the reliability of eyewitnesses helps prevent wrongful convictions.

As amicus, the Innocence Network supports the Appellate Court decision below (*People v. Lerma*, 2014 IL App (1st) 121880) that it was error to exclude eyewitness expert testimony.

II. ARGUMENT

A. In recent years, the reliability of eyewitness testimony has received increasing scrutiny.

Twenty five years ago, in *People v. Enis*, 139 Ill. 2d 264 (1990), this Court last addressed whether and when experts could testify about the reliability of eyewitnesses. And during the quarter century since *Enis* was decided, the landscape has changed dramatically. Most notably, DNA testing has ushered in a

wave of exonerations, revealing that the leading national cause of wrongful convictions is eyewitness misidentification. In the wake of these exonerations, a new scientific consensus has emerged about what causes eyewitness misidentification.

1. Eyewitness testimony is a leading cause of wrongful convictions.

While the "vagaries of eyewitness identification," *United States v. Wade*, 388 U.S. 218, 288 (1967), have long been recognized, the advent of DNA testing has brought the contours of that problem into sharp relief. We now know that eyewitness misidentification is one of the most "pervasive factor[s] in the conviction of the innocent." Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 Vill. L. Rev. 337, 358 (2006). At the date of writing, the National Registry of Exonerations lists 1,655 nationwide exonerations; of those, 33% (542) involved mistaken eyewitness identification. https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx. Seven in every ten sexual-assault exonerations involved a mistaken identification. *Id.* Similarly, a 2009 Innocence Project study of over 230 cases in which prisoners were exonerated through DNA testing showed that 75% of those wrongful convictions involved eyewitness misidentification. Innocence Project, Benjamin N. Cardozo School of Law, Yeshiva University, *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification*, at 3 (2009). Faulty eyewitness testimony not only convicts the innocent, but it can allow the guilty to commit more crimes. In at least 48% of cases where the real perpetrator was later

identified by DNA, the perpetrator had committed additional crimes, including rape and murder, while the innocent, convicted party was in prison. *Id.* at 4.

Further, DNA exonerations have changed beliefs about what might lead an eyewitness to make a mistaken identification. For instance, common knowledge may suggest that an eyewitness can never mistakenly identify an acquaintance; that is what the trial court below believed. *See People v. Lerma*, 2014 IL App (1st) 121880, ¶36 ("The court found that 'it is a fact that persons who [*sic*] are less likely to misidentify someone they have met or know or seen before than a stranger.'"). Scientific research, on the other hand, makes clear that there is a vast difference between slight acquaintances and close relations, and that eyewitnesses may in fact mistakenly identify the former. The Innocence Network has compiled a list of at least 32 known exonerations where an innocent defendant was convicted based on the eyewitness testimony of someone who claimed to have known the defendant before the crime. (Appendix A).

In Illinois alone, several exonerees have been convicted based on the testimony of an acquaintance. In 1989, Ronald Jones was wrongfully convicted of rape and murder based in part on an eyewitness misidentification. The victim, while walking with a friend, was approached by a man known as "Bumpy," and the next morning was found dead. The victim's friend later testified that she "knew [Jones] from the neighborhood as 'Bumpy.'" *People v. Jones*, 156 Ill. 2d 225, 243 (1993), *vacated*, 1997 WL 1113760 (Ill. 1997). Jones was convicted and sentenced to death after trial, and this Court affirmed his sentence. *Id.* at 257. DNA testing later excluded Jones as the perpetrator and he was released after serving 10 years in prison. *See Ronald Jones*, Innocence Project,

http://www.innocenceproject.org/cases-false-imprisonment/ronald-jones (last visited Sept. 30, 2015).

In 1994, Christopher Coleman was arrested on suspicion of home invasion, criminal sexual assault, robbery, and burglary he did not commit, after one of the victim's siblings identified him in a lineup. *People v. Coleman*, 2013 IL 113307, ¶4. At trial, two of the victims mistakenly identified Coleman as one of the perpetrators of the crime, testifying that they knew Coleman beforehand as a neighborhood resident nicknamed "Fats." *Id.* ¶¶10, 20, 41. An adolescent co-defendant named Brooks pled guilty and testified that Coleman asked him to serve as lookout for the crime. *Id.* ¶60. Despite the testimony of two other co-defendants who admitted to the crime but stated that Coleman was not involved, he was convicted and sentenced to 60 years in prison. *Id.* ¶46. When Coleman filed a second petition for post-conviction release based on Brooks's recantation and the testimony of four admitted participants that Coleman was in no way involved, this Court held that there was "compelling evidence" of Coleman's innocence. *People v. Coleman*, 2013 IL 113307, ¶94, 114–18. Coleman was later granted a certificate of innocence under 735 ILCS 5/2-702. *Coleman v. State of Illinois*, No. 94-cf-764 (Cir. Ct. Peoria Cnty. Mar. 5, 2015). *See generally* Rob Warden & Maurice Possley, *Christopher Coleman*, Nat'l Registry of

Exonerations, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4398 (last edited Mar. 6, 2015).[1]

2. A strong consensus has developed that certain factors limit the reliability of eyewitness testimony

A vast body of scientific research on eyewitness testimony has emerged in the past two decades. As the New Jersey Supreme Court noted, this broad and nearly unanimous research "represents the gold standard in terms of the applicability of social science research to the law. Experimental methods and findings have been tested and retested, subjected to scientific scrutiny through peer-reviewed journals, evaluated through the lens of meta-analyses, and replicated in real-world settings." *State v. Henderson*, 27 A.3d 872, 916 (N.J. 2011).[2] The Connecticut Supreme Court called this consensus "near perfect." *State v. Guilbert*, 49 A.3d 705 (Conn. 2012).

It is now beyond serious dispute that the following factors, among others, significantly decrease the accuracy of eyewitness identification:

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[1] These are but a few examples of the known wrongful convictions based on mistaken identification by a prior acquaintance in Illinois. *See also Evans v. Katalinic*, 445 F.3d 953 (7th Cir. 2006) (noting that Evans's "conviction, which was based in large part on the testimony of a single 'eyewitness,' was eventually vacated after DNA testing proved Evans innocent"); Petition for Certificate of Innocence ¶13, *People v. Patterson*, No. 02-cr-13473, *available at* http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_6e_daniel_patterson_coi_petition.authcheckdam.pdf (wrongful conviction of Maurice Patterson based on prior acquaintance misidentification).

[2] The Illinois legislative and executive branches recognize this scientific consensus as well. *See* Commission on Capital Punishment, Report of the Governor's Commission on Capital Punishment 32 (Apr. 15, 2002) ("The fallibility of eyewitness testimony has become increasingly well-documented in both academic literature and in courts of law."); 725 ILCS 5/107A-2 (prescribing lineup procedures to minimize risk of misidentification).

Estimator Variables (factors that affect the witness's ability to correctly make and store a memory of the event):

- **Cross-racial identification.** People have greater difficulty identifying members of another racial group. Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own–Race Bias in Memory for Faces: A Meta–Analytic Review,* 7 Psychol. Pub. Pol'y & Law 3, 21 (2001) (finding that, across dozens of studies, eyewitnesses were more likely to remember faces of their own race and more likely to incorrectly identify faces of any other race); *see also Commonwealth v. Bastaldo*, 32 N.E.3d 873, 880–81 (Mass. 2015) (finding that the "cross-race effect" has reached "near consensus" and therefore requiring jury instructions in all cases where the witness is of a different race than the defendant).
- **Stress.** The stress of experiencing a crime makes it difficult to accurately identify the culprit. Kenneth A. Deffenbacher *et al., A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory* 28 Law & Hum Behav. 687 (2004).
- **Lighting and distance.** Distance from the suspect and lighting conditions can substantially decrease the accuracy of an identification. R.C.L. Lindsay et al., *How Variations in Distance Affect Eyewitness Reports and Identification Accuracy,* 32 *Law & Hum. Behav.* 526 (2008)
- **Time.** The more time that passes between the incident and identification, the less reliable the identification becomes. Kenneth A. Deffenbacher et al., *Forgetting the Once–Seen Face: Estimating the Strength of an*

Eyewitness's Memory Representation, 14 *J. Experimental Psychol.: Applied* 139, 142 (2008)

- **Weapon focus.** The presence of a weapon causes the witness to focus on the weapon rather than the person, decreasing the accuracy of identifications. Jonathan M. Fawcett *et al.*, *Of Guns and Geese: A Meta-Analytic Review of the 'Weapon Focus' Literature*, 19 Psychol. Crime & L. 1 (2011).

System Variables (factors that affect how the memory is retrieved)

- **Post-identification information.** Post-identification information, such as media mentions of a suspect, can lead to inaccurate identifications. *See* Susan Dixon & Amina Memon, *The Effect of Post-Identification Feedback on the Recall of Crime and Perpetrator Details*, 19 Applied Cognitive Psychol. 935 (2005).
- **Police identification procedures.** Suggestive police identification procedures–such as improperly administered lineups or post-identification feedback–strongly influence eyewitness identifications. *See, e.g.*, Nancy K. Steblay *et al.*, *The Eyewitness Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications*, 20 Psychol. Pub. Pol. & L. 1, 11 (2014) ("Confirming feedback significantly inflates eyewitness reports on an array of testimony-relevant measures, including attention to and view of the crime event, ease and speed of identification, and certainty of the identification decision")

Several other points settled within the scientific community fall well outside the scope of lay experience, to the point where the scientific consensus is

counterintuitive to the ordinary juror. Of particular importance to Lerma's case, scientific research suggests that there is minimal, if any, correlation between an eyewitness's confidence in the identification and the accuracy of that identification. *See, e.g.*, Kevin Krug, *The Relationship Between Confidence and Accuracy: Current Thoughts of the Literature and a New Area of Research*, 3 Applied Psychol. in Crim. Justice 7, 9 (2007). Jurors, however, "are more likely to believe witnesses who appear very confident and excuse inaccuracies in their testimony . . . ." *Id.* at 8.

Similarly, research suggests that knowing the suspect does not eliminate the possibility of a mistaken identification. Eyewitnesses frequently misidentify people they have met before. *See* James E. Coleman *et al.*, *Don't I Know You?: The Effect of Prior Acquaintance/Familiarity on Witness Identification*, The Champion 52–56 (Apr. 2012). For instance, in a 1995 field study, researchers asked clerks to pick an interviewer out of a photographic lineup. The clerks had either a 30-second or a 4 to 12-minute conversation with the interviewer two days before the clerks were shown the lineup. The clerks who had a 4 to 12-minute conversation were *more* likely to mistakenly pick a stranger out of a lineup than clerks who had only a 30-second conversation. The researchers hypothesized, given the clerks' exposure to the interviewer, the clerks believed they *should* be able to identify someone, inflating their sense that they could do so correctly. *See id.* at 53 (citing J. Don Read, *The Availability Heuristic in Person Identification: The Sometimes Misleading Consequences of Enhanced Contextual Information*, 9 Applied Cognitive Psychol. 91, 97 (1995)).

B. Illinois should join the vast majority of states that now treat eyewitness experts at least as favorably as any other expert.

A number of the factors that can cause misidentification were present in this case, creating a real risk that Lerma was convicted of a crime he did not commit. First, Lydia Clark was the only eyewitness to identify Lerma (whom she knew as "Lucky"). The jury, relying on her knowing Lerma and her confidence in the identification, may have given her testimony more credence than scientific evidence shows is warranted. But the trial court here prevented the jury hearing from any expert testimony on the causes of eyewitness misidentification. *Lerma*, 2014 IL App (1st) 121880, ¶18.[3]

In light of the developments described above, this case provides a prime opportunity to revisit *Enis* and join the vast majority of jurisdictions that now permit, or even favor in certain circumstances, expert witness testimony on eyewitness identification. Today, every state other than Louisiana and Nebraska, and every federal court of appeals except the Eleventh Circuit, permits eyewitness experts on terms at least as favorable as any other expert.

1. Following *Enis*, Illinois courts effectively exclude eyewitness experts per se.

Despite near unanimity elsewhere, Illinois courts continue to almost categorically exclude eyewitness experts and do so because of *Enis*. In *Enis*, the trial court granted the state's motion in limine to preclude expert testimony on the reliability of eyewitness testimony. *Enis*, 139 Ill. 2d at 285. The expert proposed to testify on the impact of eyewitnesses on juries, the gap between an

[3] Other variables listed above, like stress, lighting, and distance, and weapons focus, also appear to be present in this case.

eyewitness's confidence and accuracy, the effects of stress on perception and memory, and the inaccuracy of eyewitnesses' time estimates. This Court, affirming the trial court, reasoned that stress and time estimates were not relevant, and the confidence-accuracy gap was not, by itself, enough to reverse. *Id.* at 289. It also stated in dicta,

> We caution against the overuse of expert testimony. Such testimony, in this case concerning the unreliability of eyewitness testimony, could well lead to the use of expert testimony concerning the unreliability of other types of testimony. So-called experts can usually be obtained to support most any position. . . . We are concerned with the reliability of eyewitness expert testimony . . . whether and to what degree it can aid the jury, and if it is necessary in light of defendant's ability to cross-examine the witnesses.

Id.

This dicta has caused lower courts to create what is, in practice, a general, per se exclusion of eyewitness expert testimony. "Although *Enis I* was decided over 20 years ago and . . . there have been many changes in the science and law of eyewitness identification in the interim . . . Illinois continues to reject, at least in practice, expert testimony on the reliability of eyewitnesses." *People v. McGhee*, 2012 IL App (1st) 093404, ¶55; *see also, e.g.*, *People v. Fields*, 2014 IL App (1st) 110311, ¶32 (affirming exclusion of eyewitness expert); *People v. Aguilar*, 396 Ill. App. 3d 43 (1st Dist. 2009) (same); *People v. Tisdel*, 338 Ill. App. 3d 465, 468 (1st Dist. 2003) (affirming exclusion even though "the trial court would not have abused its discretion had it allowed the testimony").

Trial courts with their wide discretion over the admissibility of expert testimony generally, and prompted by the dicta in *Enis*, still often exclude

eyewitness experts. *E.g.*, *McGhee*, 2012 IL App (1st) 093404, ¶55 ("[U]nless and until the supreme court decides to revisit this issue, we must conclude that it was not unreasonable for defense counsel to decline to present expert testimony regarding the reliability of eyewitness identification."). And in practice, the only real limitation on trial courts' discretion to exclude such experts is to give *some* reason for doing so. *People v. Allen*, 376 Ill. App. 3d 511, 520–25 (1st Dist. 2007) (remanding because the trial court did not carefully consider the proffered expert testimony). Even in *Allen*, on remand, the expert was excluded. *People v. Allen*, No. 01CR-11362, 2009 WL 6849979 (Cook Cnty. Cir. Ct. July 21, 2009).

2. At least 13 states favor eyewitness experts

Regularly excluding eyewitness experts based on *Enis* puts Illinois out of step with almost every other state. In fact, at least 13 states actually *favor admitting* eyewitness experts, recognizing the overwhelming consensus among social scientists and the frequency of wrongful convictions based on eyewitness misidentification.

In *Garden v. State*, 815 A.2d 327 (Del. 2003), *superseded on other grounds by* 11 Del. C. § 4209(d), the defense sought to present expert testimony on cross-racial identification, weapon focus, the effect of stress, and the confidence/accuracy gap. *Id.* at 339. The trial court admitted the expert testimony on all but the confidence/accuracy gap. *Id.* at 338–39. The Delaware Supreme Court held that it was an abuse of discretion (although harmless under the facts of that case) to exclude this testimony, explaining, "Because the expertise of this witness was clearly established, there appeared to be a sufficient basis to admit [the eyewitness expert] testimony concerning the

confidence/accuracy issue. Such evidence is normally admitted if supported by sufficient authority." *Id.* at 339.

In *State v. Clopten*, 223 P.3d 1103 (Utah 2009), the Utah Supreme Court abandoned its own presumption against eyewitness expert testimony. *Id.* at 1112. An earlier Utah Supreme Court decision from 1986 had, like *Enis*, discouraged "the inclusion of eyewitness expert testimony . . . As a result, trial judges reached two logical conclusions: (1) when in doubt, issuing cautionary instructions was a safe option; and (2) allowing expert testimony was hazardous if the expert 'lectured the jury' about the credibility of a witness." *Id.* at 1107. But 23 years later in *Clopten*, the court reviewed the state of the scientific literature on eyewitness testimony and the value of eyewitness experts, finding "that the empirical data is conclusive on these matters." *Id.* at 1108. As a result, the court overturned its presumption against eyewitness expert testimony, in favor of a "liberal and routine" admission of such testimony, stating that "the testimony of a qualified expert regarding factors that have been shown to contribute to inaccurate eyewitness identifications should be admitted whenever it meets the requirements of rule 702 of the Utah Rules of Evidence. We expect this application of rule 702 will result in the liberal and routine admission of eyewitness expert testimony, particularly in cases where, as here, eyewitnesses are identifying a defendant not well known to them." *Id.* at 1112.

Other states hold that as a matter of law, the psychology and social science of eyewitness reliability are established enough to support such expert testimony. *State v. Guilbert*, 49 A.3d 705, 732 (Conn. 2012) ("We . . . conclude that . . . competent expert testimony predicated on those studies' findings satisfies the

threshold admissibility requirement . . . ."); *State v. Buell*, 489 N.E.2d 795, 803 (Ohio 1986) (expert testimony about eyewitnesses generally admissible, but not a particular witness).

Still other jurisdictions favor admission if certain factors affecting reliability are present in the case. *E.g.*, *State v. Critchfield*, 290 P.3d 1272 (Idaho Ct. App. 2012) ("[M]ost other jurisdictions addressing the issue have held that expert opinion testimony to show that a witness's memory has been tainted by improper interview techniques is generally admissible. We agree with these decisions . . . ."); *State v. Lawson*, 291 P.3d 673 (Or. 2012) (noting that experts should be admitted to address certain "estimator variables").

And a significant number of states explicitly favor eyewitness experts where uncorroborated eyewitness testimony is critical to the prosecution's case. *E.g.*, *People v. Jones*, 70 P.3d 359, 388 (Cal. 2003) (applying California's pre-*Enis* rule that "[e]xclusion of the expert testimony is justified only if there is other evidence that substantially corroborates the eyewitnesses identification and gives it independent reliability"); *State v. Wright*, 206 P.3d 856 (Idaho Ct. App. 2009) ("[I]t would ordinarily be error to exclude [eyewitness expert testimony] when those circumstances are extant."); *Cook v. State*, 734 N.E.2d 563, 570–71 (Ind. 2000) ("[T]rial courts might well be advised to permit eyewitness identification expert testimony . . . . Cases that . . . typically lend themselves to the admission of expert eyewitness identification testimony generally involve a single eyewitness and identification is the primary issue at trial."); *State v. DuBray*, 77 P.3d 247, 255 (Mont. 2003) ("In light of the scholarship on the subject of eyewitness testimony over the past decade, we agree with the California Supreme Court's

reasoning . . . . It shall be an abuse of discretion for a district court to disallow expert testimony on eyewitness testimony when no substantial corroborating evidence exists."); *Echevarria v. State*, 839 P.2d 589, 597 (Nev. 1992) (error to exclude eyewitness expert, but harmless where there is other corroborating evidence); *People v. LeGrand*, 867 N.E.2d 374, 379 (N.Y. 2007) ("[T]here are cases in which it would be an abuse of a court's discretion to exclude expert testimony on the reliability of eyewitness identifications."); *State v. Whaley*, 406 S.E.2d 369 (S.C. 1991) ("[A]n expert's testimony is admissible where . . . the main issue is the identity of the perpetrator, the sole evidence of identity is eyewitness identification, and the identification is not substantially corroborated by evidence giving it independent reliability.").

These states join the number of jurisdictions that had already recognized the value of expert witnesses before *Enis* was decided. *See Skamarocius v. State*, 731 P.2d 63, 66–67 (Alaska App. 1987) (reversible error to exclude eyewitness expert); *State v. Chapple*, 660 P.2d 1208 (Ariz. 1983), *superseded in other part by* A.R.S. § 13-756(A) (abuse of discretion to exclude eyewitness expert); *People v. McDonald*, 690 P.2d 709, 721 (Cal. 1984) ("[T]he body of information now available on these matters is 'sufficiently beyond common experience' that in appropriate cases expert opinion thereon could at least 'assist the trier of fact.'").

3. At least 28 other states treat eyewitness experts at least as favorably as other experts.

Twenty eight other states treat eyewitness experts at least as favorably as other experts. For example, in *State v. Henderson*, 27 A.3d 872 (N.J. 2011) (encouraging use of expert witnesses as one of many tools to combat mistaken

identifications), the New Jersey Supreme Court appointed a special master to advise on the fallibility of eyewitnesses in order to comprehensively reevaluate the use of eyewitness testimony in criminal trials. The special master evaluated the state of scientific literature on eyewitnesses, which the court found "represents the gold standard in terms of the applicability of social science research to the law." *Id.* at 916. After reshaping the test for admission of eyewitness testimony and the standard jury instructions for eyewitnesses, the court also noted that "expert testimony may also be introduced at trial, but only if otherwise appropriate" under the general rule of evidence governing experts. *Id.* at 925.

A majority of states follow this approach, admitting eyewitness experts under the same standards as any other expert. *Ex parte Williams*, 594 So. 2d 1225, 1227 (Ala. 1992) ("[E]xpert testimony on the subject of human memory can be introduced into evidence in cases turning on an eyewitness identification. We further hold, however, that the admissibility of such evidence is, like all other types of expert testimony, subject to the discretion of the trial court . . . ."); *Jones v. State,* 862 S.W.2d 242, 244–45 (Ark. 1993) (admission of eyewitness expert is within the trial court's discretion); *Campbell v. People*, 814 P.2d 1, 7–8 (Colo. 1991) (applying the general rule for admission of expert testimony), *abrogated in part by People v. Shreck*, 22 P.3d 68, 74 (Colo. 2001) (eliminating *Frye* standard); *McMullen v. State*, 714 So. 2d 368, 372 (Fla. 1998) (trial court has discretion); *State v. Schutz*, 579 N.W.2d 317, 320 (Iowa 1999) (reversing per se exclusionary rule and committing admission of eyewitness experts to trial court's discretion); *State v. Carr*, 331 P.3d 544, 690 (Kan. 2014) (same); *Commonwealth*

v. Christie, 98 S.W.3d 485, 492 (Ky. 2002) (same); *Bomas v. State*, 987 A.2d 98, 112 (Md. App. 2010) (trial court has discretion, and that discretion should not be guided by the "negative tone" of 1986 case disfavoring eyewitness experts); *Commonwealth v. Santoli*, 680 N.E.2d 1116, 1120 (Mass. 1997) ("[T]he admissibility of expert testimony about the reliability of eyewitness identification must be justified on general principles related to the admission of expert testimony."); *People v. Kean*, 2011 WL 6004070, at *3 (Mich. Ct. App. Dec. 1, 2011) (applying Michigan's general rule of evidence regarding experts); *Flowers v. State*, 158 So. 3d 1009, 1036 (Miss. 2014) (trial court has discretion); *State v. Hill*, 839 S.W.2d 605, 607 (Mo. 1992) (trial court has discretion); *State v. Hungerford*, 697 A.2d 916, 924 (N.H. 1997) (dicta in case concerning repressed memory expert); *State v. Lee*, 572 S.E.2d 170, 175 (N.C. 2002) (trial court has discretion); *State v. Fontaine*, 382 N.W.2d 374, 377 (N.D. 1986) (trial court has discretion); *Torres v. State*, 962 P.2d 3, 20 (Okla. Crim. App. 1998) (though counsel not ineffective for failing to retain eyewitness expert, "it might be that expert testimony regarding eyewitness identification would have been admissible in this case"); *Commonwealth v. Walker*, 92 A.3d 766, 791–93 (Pa. 2014) (reversing per se exclusion); *State v. McCord*, 505 N.W.2d 388, 391 (S.D. 1993) (affirming admission of prosecution's expert testimony because jurors "do not possess an expert's comprehensive training in assessing the reliability of identification"); *State v. Copeland*, 226 S.W.3d 287, 300–01 (Tenn. 2007) (reversing per se exclusion); *Tillman v. State*, 354 S.W.3d 425 (Tex. Crim. App. 2011) (reversing trial court's exclusion of eyewitness expert); *State v. Percy*, 595 A.2d 248, 252 (Vt. 1990) (trial court has discretion, though it may be an abuse of

discretion where the eyewitness identification is not corroborated); *Currie v. Commonwealth*, 515 S.E.2d 335, 338–39 (Va. Ct. App. 1999) (trial court has discretion); *State v. Cheatam*, 81 P.3d 830, 840–41 (Wash. 2003) (same); *State v. Taylor*, 490 S.E.2d 748, 753 (W. Va. 1997) (not abuse of discretion to deny indigent defendant public funds to hire eyewitness expert, but recognizing that "an argument might be made" in favor of presenting the expert testimony); *State v. Shomberg*, 709 N.W.2d 370, 376–77 (Wis. 2006) (trial court has discretion); *Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991) (recognizing trend toward admitting eyewitness experts, but committing the decision to the trial court's discretion).

4. The federal courts of appeal also acknowledge the usefulness of eyewitness experts.

Like the near-unanimity among state courts, the federal courts of appeal similarly recognize the importance of eyewitness experts. For example, the Seventh Circuit disagreed with a trial court ruling that experts were unnecessary because jurors could evaluate the eyewitness's reliability on their own, reasoning:

> [T]he problem with eyewitness testimony is that witnesses who *think* they are identifying the wrongdoer-who are credible because they believe every word they utter on the stand-may be mistaken. Study after study has shown very high error rates in the identification of strangers. . . . It will not do to reply that jurors know from their daily lives that memory is fallible. The question that social science can address is *how* fallible, and thus how deeply any given identification should be discounted. That jurors have beliefs about this does not make expert evidence irrelevant; to the contrary, it may make such evidence vital, for if jurors' beliefs are mistaken then they may reach incorrect conclusions.

United States v. Bartlett, 567 F.3d 901, 906 (7th Cir. 2009); *see also, e.g., United States v. Brownlee*, 454 F.3d 131, 144 (3d Cir. 2006) (exclusion of eyewitness

expert on the confidence-accuracy gap was erroneous, remanded for new trial); *United States v. Smithers*, 212 F.3d 306, 314–18 (6th Cir. 2000) (eyewitness experts are admissible). Indeed, "all federal circuits that have considered the issue, with the possible exception of the 11th Circuit, have embraced this approach." *Commonwealth v. Walker*, 92 A.3d 766, 783 (Pa. 2014) (collecting cases).

5. While Illinois has adhered to what amounts to a per se exclusion, in recent years other states have abandoned similar approaches to admitting eyewitness identification experts.

Within the last three years alone, four states have reversed their per se exclusions. In *State v. Guilbert*, 49 A.3d 705 (Conn. 2012), the Connecticut Supreme Court reversed its per se exclusion, finding that approach was "out of step with the widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror." *Id.* at 720. The court concluded: "In light of the numerous scientifically valid studies cited previously in this opinion, we also conclude that, as a general matter, competent expert testimony predicated on those studies' findings satisfies the threshold admissibility requirement." *Id.* at 732. *See also Commonwealth v. Walker*, 92 A.3d 766, 791–93 (Pa. 2014) (reversing per se exclusion); *State v. Carr*, 331 P.3d 544, 690 (Kan. 2014) (same); *State v. Lawson*, 291 P.3d 673, 696 (Or. 2012) (same).

III. CONCLUSION

In the 25 years since *Enis* was decided, scientific studies have proven time and again that an eyewitness may misidentify the perpetrator for a variety of

reasons not readily apparent to a lay person. Because of this scientific evidence, courts across the country in almost every jurisdiction have abandoned earlier skepticism of eyewitness experts and have either favored such testimony or treated it the same as other expert testimony.

As recent research has also proven, eyewitness misidentification is a leading cause of convicting the innocent. Eyewitness experts can be an important safeguard against such wrongful convictions. The time has come for this Court to revisit *Enis* and join almost every other jurisdiction by making plain that there is no presumption against eyewitness expert testimony. Rather, such testimony should either be favored outright or at the very least placed on the same footing as other expert testimony. The decision of the Appellate Court below, finding reversible error in excluding such testimony should be affirmed.

Respectfully submitted,

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Name	State	Relationship/Notes
Victim ID cases in which the victim claimed to know the defendant/alleged perp		
Abbitt, Joseph Lamont	NC	seen before in/knew from building/neighborhood
Bain, James	FL	seen before in/knew from building/neighborhood
Bostic, Larry	FL	seen before in/knew from building/neighborhood
Bravo, Mark Diaz	CA	seen before in/knew from building/neighborhood
Brown, Danny	OH	dating Brown). EW ID'd Brown from a photo array; he was brought into a room with Brown and two men whom Brown had said he was with the night of the murder; EW said he didn't recognize the other two men
Brown, Patrick	PA	aquaintance/friend
Chatman, Charles	TX	seen before in/knew from building/neighborhood
Courtney, Sedrick	OK	aquaintance/friend
Dabbs, Charles	NY	relative
Davidson, Willie	VA	aquaintance/friend
Davis, Dewey	WV	aquaintance/friend
Davis, Gerald	WV	aquaintance/friend
Elkins, Clarence	OH	relative
Fears, Joseph Jr.	OH	aquaintance/friend
Green, Kevin	CA	intimate partner (former or current)
James, Henry	LA	aquaintance/friend
Johnson, Arthur	MS	other - V said attacker may have been "Boo Rabbit"
Jones, Ronald	IL	at 3am to ask for change; Friend made photo array and in-court ID's of Jones. She said she had known him previously as "Bumpy".
Kagonyera, Kenneth & Robert Wilcoxson	NC	Victim's son ID'd Kagonyera by name (Kenny) and Wilcoxson by his street name (Detroit).
McClendon, Robert	OH	relative
McKinney, Lawrence	TN	seen before in/knew from building/neighborhood
Mercer, Michael	NY	seen before in/knew from building/neighborhood
Peacock, Freddie	NY	seen before in/knew from building/neighborhood
Piszczek, Brian	OH	seen before in/knew from building/neighborhood
Rachell, Ricardo	TX	seen before in/knew from building/neighborhood
Rose, Peter	CA	aquaintance/friend
Vasquez, David	VA	near victim's house at around 8pm night of the murder (which occurred btw 8-12). She knew him by name and said she had once seen him watching the victim while she sunbathed in her yard.
Whitley, Drew	PA	as Whitley, also said he recognized his voice and made in-court ID, but no official ID procedure.
Williams, Johnny	CA	aquaintance/friend
Williams, Michael Anthony	LA	other - victim had tutored Williams
Woodard, James Lee	TX	heard someone scream for help and then when she looked out she saw the victim in Woodard's car and that Woodard was driving. She knew him so no ID
York, Kenneth	MO	seen before in/knew from building/neighborhood