# Sample Reply to Objection to Defense Eyewitness Identification Expert— Focusing on Stress, Weapon Focus, Police Procedures, “Beyond the Ken,” and Expert Qualifications

The defense is entitled to put on evidence that supports it defense. The default position should be that a qualified eyewitness identification expert can be called by the defense. Instead of starting with a motion to put on expert testimony (which puts the defense in the position, perceived or otherwise, of having to prove up its motion), you can instead just give notice that you are putting on an expert under your relevant criminal procedure rules and put the burden on the prosecution to file a motion to preclude your expert.

However, you can also file an affirmative motion to introduce expert testimony. The following is a response to a prosecution objection to an affirmative defense motion to introduce expert testimony.

However, it can also be used as a response to a prosecution motion to preclude expert testimony if you decide to just file a bare-bones expert notice rather than an affirmative motion.

This motion focuses on the topics of the effects of stress on eyewitness identifications, the weapon focus effect, and improper police identification procedures. It also discusses how these topics are not “beyond the ken” of the average juror. Finally, this motion responds to the prosecution’s argument that the defense expert is not properly qualified.

# SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

**Criminal Division -- Felony Branch**

**UNITED STATES OF AMERICA : Crim. No.: 000**

**:**

**v. : Hon. [Judge]**

**:**

**[DEFENDANT] : Trial: [Date]**

**MR. [DEFENDANT]’S REPLY IN SUPPORT OF MOTION TO ADMIT EXPERT TESTIMONY REGARDING THE EFFECTS OF STRESS, WEAPON FOCUS AND POLICE PROCEDURES ON EYEWITNESS IDENTIFICATION ACCURACY**

In its opposition to Mr. [Defendant]’s Motion to present expert testimony from Dr. Lori

R. Van Wallendael on the effect of stress, weapon focus and police procedures on eyewitness identification accuracy, the government curiously focuses on a topic not even at issue in this case, namely cross-racial identifications. No expert testimony has been proffered on the cross- race effect in this case; indeed this issue is not implicated by the facts. As a result, the defense is left to parse through a quixotic attack on a non-issue, in order to extrapolate any arguments that might be arguably applicable to this case. Even giving the government the benefit of every doubt and adapting its misdirected arguments to the subjects actually at issue, the government’s opposition cannot survive scrutiny. In short, under the circumstances, where the government’s case against Mr. [Defendant] appears to rely heavily on questionable eyewitness identification evidence, Mr. [Defendant] must be permitted to present the jury with the tools to intelligently evaluate the import of that evidence.

# THE GOVERNMENT’S OPPOSITION IS NON-RESPONSIVE, AND

**SHOULD BE TREATED AS A CONCESSION OF ADMISSIBILITY**

In opposing expert testimony in this case, the government has made *no* arguments attacking Mr. [Defendant]’s actual proffer, in which he has sought the admission of expert testimony on the deleterious effects of stress and violence on eyewitness memory, weapon focus, and deficient and unreliable identification procedures. Instead, the government has squandered its entire pleading challenging the admission of expert testimony on the cross-race effect, a non-issue because all of the witnesses and all of the suspects in this case are of the same race. The government’s pleading amounts to nothing more than a filler opposition, a filler opposition with which the Court is already familiar; the legal arguments are in almost every respect the same arguments that were presented to the Court in *United States v. Mack*, Docket No. 2006 CF3 18096, just last month.[1](#_bookmark0) The Court was not persuaded when it considered this pleading in *Mack*, in which cross-race *was* an issue, and it should not be persuaded here where the government’s arguments carry even less force. Presumably, the government has chosen the filler-pleading tactic in this case because it has no legitimate arguments by which to oppose expert testimony in this case. Accordingly, the government’s filler opposition should be treated as a concession that the well-documented scientific phenomena actually proffered in this case are demonstrably outside of the jury’s ken and the proper subject of expert testimony in this case.

# EXPERT TESTIMONY ON EYEWITNESS RELIABILITY IS ADMISSIBLE IN D.C., AND NEW SCIENTIFIC RESEARCH AND NEW CASE LAW

1 The only significant distinction between the government’s *Mack* Opposition and the Opposition in this case is that the government in this case has attempted in this case to demonstrate that Mr. [Defendant]’s proffered expert, Dr. Van Wallendael, is not qualified to testify as an expert. But as explained below, *see* Point *infra*, the government’s arguments on this point are without merit.

# REQUIRE EXPERT TESTIMONY IN THIS CASE

Notwithstanding the government’s misdirected response to the substance of the proffered testimony, the government’s pleading begins with a misstatement of the law in the District of Columbia, *see* Govt. Opp. at 23, and relies throughout on mischaracterizations of the relevant science and decades-old case law that hinges on an outdated assessment of the state of that science. Times have changed in the sciences, and in light of scientific developments and well as the mounting number of DNA exoneration cases that definitively establish the dangers of relying on mistaken identification evidence, courts across the country, including the Court of Appeals, have altered their stance. *See, e.g., United States v. Brownlee*, 454 F.3d 131, 142 (3d Cir. 2006) (reversing conviction where expert testimony was excluded, noting potential unreliability of eyewitness identification evidence and “[e]ven more problematic, the fact that “jurors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable.”) (internal citation and quotation omitted); *State v. Copeland*, S.W.3d. , 2007 WL 1498396 \*10 (Tenn. May 23, 2007) (reversing conviction where testimony of Dr. Brigham was improperly excluded, observing that with respect to the state of the science, “Times have changed.”); *Hager*

*v. United States*, 856 A.2d 1143, 1149 (D.C. 2004) (acknowledging that where eyewitness identification evidence is central to the government’s case, exclusion of expert testimony may be an abuse of discretion). Under the governing standard, expert testimony on the factors affecting the reliability of the eyewitness evidence not only falls within the trial court’s discretion, but to deny it on the facts present in this case would be an abuse of that discretion.

Contrary to the government’s remarkable assertion that generally it is “well-settled” that “expert testimony regarding various factors which may affect eyewitness identifications is not

admissible at trial in Superior Court,” *see* Govt. Opp. at 23, the admission of such testimony falls squarely within the Court’s discretion. *See, e.g., Dyas v. United States*, 376 A.2d 827, 831 (D.C. 1977).

In support of its contention that expert testimony on eyewitness reliability factors is inadmissible, the government relies on the 30-year-old *Dyas* decision. Although the Court of Appeals in *Dyas* affirmed a trial court’s exclusion of eyewitness identification evidence, the Court’s express holding was that: “The admission of expert testimony is committed to the broad discretion of the trial court.” *Id.* Twenty years later, in *Green v. United States*, the Court of Appeals reaffirmed and reinforced its holding in *Dyas*. 718 A.2d 1042 (D.C. 1998). The Court specifically acknowledged that some lower courts had misinterpreted *Dyas* as authorizing the per se exclusion of expert testimony on eyewitness reliability, and then explicitly stated that such an interpretation was incorrect:

The *Dyas* case and its progeny simply upheld discretionary calls by the trial court in the circumstances presented. *Dyas* does not exclude expert testimony about the reliability of eyewitness identification for all purposes and under all circumstances, even where a trial court, in its discretion, believes the jurors might find such testimony truly helpful…. In other words, *Dyas* and its progeny do not articulate a *per se* requirement that all expert testimony about the reliability of eyewitness identification must be excluded.

*Green*, 718 A.2d at 1050-51. Following *Dyas* and its later reinforcement in *Green*, it is evident that expert testimony on the factors affecting the reliability of eyewitness evidence is not only not *per se* inadmissible, but that it *should* be admitted in cases where it would be helpful in assessing the evidence. In fact, “a determination by the trial court excluding such testimony as not ‘beyond the ken of the average layman’ is a ruling *only that upon the particular proffer made* and *in the concrete setting of that case*, the possible assistance of the expert testimony to the jury

is insufficient to outweigh the potential for distracting the jury or supplanting its customary role in evaluating credibility.” *Id.* (emphasis added).

More recently in *Hager v. United States*, 856 A.2d 1143, the Court of Appeals made clear that a trial court does not have unbounded discretion to exclude expert testimony. The Court noted that the trial court might abuse of its discretion if it were to exclude such testimony where the eyewitness identification evidence formed a central part of the government’s case. *Id* at 1149. The Court in *Hager* did not overturn the conviction for the trial court’s failure to admit expert testimony on eyewitness reliability factors, but only because in that case *there was definitive forensic evidence corroborating the identification*, namely two inculpatory fingerprints, as well as a confession. *Id*.

In concert with developments in the social sciences, recent case law makes clear that courts are beginning to acknowledge the importance of eyewitness expert testimony, as a critical means of equipping juries with the necessary tools to accurately examine this type of evidence. In *State v. Copeland*, the Supreme Court of Tennessee considered a similar case where “identification testimony was a crucial component of the State’s theory.” *Copeland*, 2007 WL 1498396, at \*2. In support of its theory of mistaken identification, the defense sought to introduce the testimony of Dr. Brigham on the factors that research has shown to affect the reliability of eyewitness evidence. Id. at \*9. The trial court in that case excluded the expert

testimony in reliance on a 24-year-old precedent, in which the earlier court had reasoned, based on the state of the science at that time, that “[e]yewitness testimony has no scientific or technical underpinnings which would be outside the common understanding of the jury; therefore, expert testimony is not necessary to help jurors ‘understand’ the eyewitness’s testimony.” *Id.*

The Tennessee Supreme Court in 2007, however, acknowledged that “[t]here have been advances in the field of eyewitness identification.” Indeed, the court noted that the historical suspicion of eyewitness expert testimony was particularly unwarranted:

Ironically, the form of social science evidence which is most solidly based in “hard” empirical science has met with the most resistance in the courts. Expert testimony concerning the limitations and weaknesses of eyewitness identification is firmly rooted in experimental foundation, derived from decades of psychological research on human perception and memory as well as an impressive peer review literature.

Id. at \*10 (quoting Mark S. Brodin, *Behavioral Science Evidence in the Age of Daubert:*

*Reflections of a Skeptic*, 73 U. Cin. L. Rev. 867, 889-90 (2005)). The Court then noted the double-standard for the admission of expert testimony for the prosecution:

Another author has observed that while experts are often not permitted to testify regarding eyewitness testimony, police officers and other law enforcement officials are regularly permitted to testify “concerning the general way criminal schemes and enterprises operate and the usual meaning of criminal slang and code words.”

Id. (citing D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of*

*Certainty Being Left on the Dock?*, 64 Alb. L. Rev. 99, 132 (2000)).

Acknowledging the maturity of eyewitness research in 2007, as well as the disparate treatment of expert memory research in the courts as compared to far less “scientific” testimony that was regularly admitted, the Supreme Court of Tennessee reversed the conviction in *Copeland*, finding the exclusion of Dr. Brigham’s testimony to be reversible error. *Id.* In that court’s words, “Times have changed.” *Id.* at \*10 (observing that there are now “literally hundreds of articles in scholarly, legal, and scientific journals on the subject of eyewitness testimony”). Ultimately, it was “the educational training of the experts and the empirical science behind the reliability of eyewitness testimony that persuade[d] [that court] to depart from” its

precedent, which to that point had served to exclude the same type of testimony over previous decades while the science continued to mature.

The New York Court of Appeals recently exhibited a similar shift in its treatment of eyewitness expert testimony, in *People v. LeGrand*. 867 N.E.2d 374 (N.Y. 2007). That court also traced its own historically hostile treatment of eyewitness expert testimony, but observed that “the trend has been of late to more liberally admit such testimony.” *Id.* at 380. In keeping with this shift toward admissibility, the New York Court of Appeals found “sufficient evidence to confirm that the principles upon which the expert based his conclusions are generally accepted by social scientists and psychologists working in the field.” *Id.* On that basis the court found an abuse of discretion for the exclusion of eyewitness expert testimony on a collection of factors at trial, particularly given the dearth of evidence corroborating the identification, much like the case before this Court. *Id.* (“Under the facts and circumstances of this case, the hearing court abused its discretion in failing to admit eyewitness expert testimony on the question of identification.”).

Here in the District of Columbia, the Court of Appeals has acknowledged that danger of relying on mistaken eyewitness identification evidence, *In Re As. H.*, 851 A.2d 456, 460 (D.C. 2004), and has confirmed the importance of expert testimony in cases where eyewitness identification evidence is central to the government’s case, *Hager*, 856 A.2d at 1149. In other words, the District of Columbia has followed the national trend in accepting that “[t]imes have changed” and that knee-jerk hostility to well-founded and generally accepted empirical data on the causes of eyewitness identification errors should not compromise a defendant’s ability to present an adequate defense as the D.C. Code and the United States Constitution guarantee. *See Ake v. Oklahoma*, 470 U.S. 68, 76 (1985); D.C. Code §11-2605(a).

In Mr. [Defendant]’s case, the government’s apparently intends to rely on two identifications in different incidents by strangers. Unlike *Hager*, there is no confession, and no physical evidence corroborating that identification – although physical evidence, fingerprints, were recovered at the scene. The only possible “corroboration” is the testimony of two government informants facing significant prison sentences, which is evidence the Court of Appeals has consistently viewed with caution. *See, e.g., Nixon v. United States*, 870 A.2d 100 (D.C. 2005) (“The credibility of a paid or professional informer may be suspect…”) (citation omitted); *Davis v. United States*, 759 A.2d 665, 672 (D.C. 2000). The Supreme Court has also discouraged reliance on this type of uncorroborated informant testimony, particularly where, as here, the government is unable to validate that testimony with any independent basis. *Florida v. J.L.*, 529 U.S. 266, 271 (2000).

This is not the sort of corroboration on which the government can hang its hat. In order to find that the government has sustained its burden of proof, it is critical that the jury credit the stranger identifications of Mr. [Defendant]. *See Holmes v. South Carolina*, 547 U.S. 319 (2006) (defendant cannot be precluded from putting forth evidence in his defense simply because the prosecution has corroborating evidence; the probative value of the defense evidence in light of the government’s proof must be assessed). Under such circumstances, Mr. [Defendant] must be permitted to present expert testimony, and this case falls squarely into the class of cases that the Court of Appeals foresaw in *Hager*, where expert testimony on the proffered subjects is not only properly admitted, but to exclude it would be an abuse of discretion.

# THE STATE OF KNOWLEDGE IN THE RELEVANT FIELD PERMITS A REASONABLE OPINION TO BE ASSERTED

Betraying its misunderstanding of the *Frye* standard at the outset, the government relies

“first and foremost” on the irrelevant and outdated assertion that “psychologists do not ‘generally accept’ the proposition that juries rely too heavily on eyewitness testimony.”[2](#_bookmark1) Govt. Opp. at 27-

1. As this Court well knows, *Frye* requires general acceptance of the scientific basis for the proffered testimony, and invites no consideration of scientists’ opinions on the appropriateness of the weight that juries tend to assign to the type of evidence at issue. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (“while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs”); *Dyas*, 376 A.2d at 832 (adopting *Frye*, finding that “expert testimony is inadmissible if ‘the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert.’”).

To be clear, expert testimony meets the *Frye* standard, incorporated by the third prong of the *Dyas* analysis, when the proponent of the testimony establishes that the basis of the testimony has “gained general acceptance in the particular field in which it belongs.” *See Ibn-Tamas v.*

*United States*, 407 A.2d 626 (D.C. 1979). General acceptance is not undermined even when “a number of articles criticizing the methodology” are presented in opposition. *Nixon v. United*

2 Even if true (which the defense contests), one explanation for a lack of consensus at the time of the 24-year-old publication relied upon by the government might be that psychologists with expertise in the mechanisms of eyewitness memory are not in the business of studying jury habits, and thus would have had no basis for such an opinion by the very nature of their expertise. Nevertheless, the Supreme Court disagrees, *see Watkins v. Sowders*, 449 U.S. 341, 352-53 (U.S. 1981) (observing that eyewitness testimony has a “powerful impact” on juries, “regardless of its reliability”), and nothing makes the widespread over-reliance on eyewitness testimony more evident than the 200 plus wrongful convictions revealed by the Innocence Project in the decades since the article relied on by the government was published, when the field of eyewitness research was in its infancy. *See* [www.innocenceproject.org](http://www.innocenceproject.org/) (navigate to “Understand the Causes,” then click “Eyewitness Misidentification”) (as of Aug. 6, 2007).

*States*, 728 A.2d 582, 588 (D.C. 1999). In other words, general acceptance does not require total unanimity of opinion with respect to every component of the proffered testimony and its scientific foundation; general acceptance means general acceptance.

This Court must determine the admissibility of the expert testimony proffered in this case based on its assessment of the current state of the science, and not in reliance on an earlier court’s assessment of the state of that science in its infancy several decades prior. In order to make that assessment, the Court should turn its attention to trends in the courts and the relevant scientific community. *See, e.g., Nixon v. United States*, 728 A.2d 582 (D.C. 1999) (allowing expert psychological testimony on “battered women’s syndrome” on basis of trend of admissibility in state courts and development of clear consensus among psychologists); *contra Ibn-Tamas v. United States*, 455 A.2d 893 (D.C. 1983) (affirming exclusion of expert testimony on “battered women’s syndrome,” prior to advent of modern trend of admissibility of the same).

In contesting admissibility here, the government relies throughout its response not only on the *wrong* science, as it is directed at cross-race research not at issue here, but on the Court of Appeals’ assessment of the state of that science in *Dyas*, a 30-year-old decision in which the Court considered the admissibility of social science evidence when that entire domain of scientific inquiry was in its infancy, at the very inception of the field of eyewitness memory research. *See, e.g.*, 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., & L. 3, 4 (2001) (comparing the state of research on “own-race bias” in 1971 when “only a handful of studies had examined the phenomenon,” to “three decades later [when] a plethora of researchers have studied” the phenomenon); Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the*

*Effects of High Stress on Eyewitness Memory*, 28 L. Hum. Behav. 687, 688 (2004) (noting that “the renaissance of research on eyewitness testimony began in the early 1970s”). To exclude expert testimony on the basis of the state of the underlying science 30 years prior would be blatant, reversible error. To apply the standard correctly, the Court must assess the state of not only the *relevant* science, but the relevant science as it exists today.

[I think the following three paragraphs can be cut][Just make sure that the 87% stat is cited in the specific subsection below on weapon focus]

# There Is Broad Consensus That Stress Negatively Impacts Eyewitness Accuracy and Reliability

A substantial body of research, as well as a broad consensus among social scientists with expertise in eyewitness memory, supports the proposition that the presence of high stress has a dramatically negative effect on the reliability of eyewitness accuracy and reliability. A meta- analysis examining 27 independent tests on the effects of stress on eyewitness reliability was conducted in 2004, and found that the entire 30-year body of research surveyed provided “clear support for the hypothesis that heightened stress has a negative impact on eyewitness identification accuracy.” Deffenbacher et al., *supra*, at 694. The same analysis also showed that the more an experiment resembled a real-world crime event, the more pronounced the detrimental effect of stress was observed to be. *Id.* at 697.

A landmark field study conducted by Yale psychiatrist Dr. Charles A. Morgan and colleagues provides a stark example of the pronounced, negative effect of stress on eyewitness recall. Charles A. Morgan et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int’l J.L. & Psychiatry 265 (2004). That study constitutes one of the most comprehensive and carefully engineered field studies on the effects

of stress on eyewitness recall to date, where test subjects were “exposed to valid, reliable, and controlled conditions of realistic stress” in the context of military survival school training. *Id.* at

266. Whereas previous laboratory studies on this same phenomenon had been limited by the ethical constraints on researchers, namely the inability to subject test subjects to real-life crime scenarios, this study had no such limitations, by way of the researchers’ partnership with the military and use of an intensive training program already in place. The Morgan et al. study is as life-like to a real crime situation as a field study could aspire to, and the results are unequivocal.

Each of the field study’s participants was interrogated for 40 or more minutes, in a well- lit room, face-to-face with an interrogator, and 24 hours later the test subjects were asked to identify the interrogator from either a live lineup or a photo array. *Id.* at 267. Astoundingly, only 34% of test subjects from the high-stress condition were able to correctly identify their interrogator from a photo spread, as opposed to 76% from the low-stress condition. *Id.* at 272. A full 68% of those subjected to the high-stress condition falsely identified someone other than the interrogator from a photo spread, as compared to only 12% from the low-stress condition.

*Id.* The Morgan et al. makes strikingly clear what earlier studies had already demonstrated, namely that a high amount of stress such as that of a violent crime scenario has devastating effects on the reliability of the memory of a witness.

In further support of this well-established phenomenon, the Department of Justice and the Federal Bureau of Investigation have delineated in substantial detail the deleterious effects of stress on recall, in connection with their own training procedures for law enforcement officers.

U.S. Department of Justice, Federal Bureau of Investigation, *Violent Encounters: A Study of Felonious Assaults on Our Nation’s Law Enforcement Officers* (2006). The FBI training manual

chronicles numerous instances in which police officers have experienced drastic distortions of memory of stressful events encountered on the job, including “auditory exclusion, time distortion, and tunnel vision.” *Id.* at 67. “By focusing on preservation, the brain directs all of its forces to those activities needed to survive,” and, many officers report, not on creating accurate memories of perpetrator identities or other details connected to the stressful event. *Id.* at 68.

The FBI training manual correctly observes that “[p]hysiological conditions can affect the way that the brain processes information,” and readily admits that a substantial body of research has now “dispelled the theory that the brain works like a video camera.” *Id.* at 63; *see also Training Key #600: Eyewitness Identification*, International Association of Chiefs of Police 1 (2006) (noting in police training document that “human perception tends to be inaccurate, especially under stress”).

The detrimental effects of stress on eyewitness recall are well-documented in the scientific research, broadly acknowledged in police training manuals, and also supported by broad consensus among social scientists. Further, experts have postulated, in part based on observations from the real-life Morgan et al. field study, that the deleterious effect observed in lab studies “is perhaps a serious underestimate of the debilitating effects of stress engendered by violent crime,” given the comparatively modest amount of stress that is typically engendered in controlled studies. Deffenbacher et al., *supra*, at 703. As more recent studies have come closer to approximating the stress typical for a violent crime victim, experts have unequivocally observed the negative effect on memory to be stronger. *Id.* at 703-04.

# There Is Broad Consensus That The Presence of a Weapon Negatively Impacts the Ability of An Eyewitness To Identify His or Her Assailant

There also exists a substantial body of research and broad consensus among scientists on

the “weapon focus” effect. In 1992, Dr. Nancy Steblay conducted a meta-analytic review of the scientific literature on weapon focus as of that time. Nancy M. Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 L. & Hum. Behav. 413-424 (1992). The study demonstrated that a statistically significant weapon focus effect does in fact exist, and that the effect was “more pronounced in research scenarios that appear as real life to the subject.” *Id.* at 421. The study also showed an increase in the effect when the viewed object was clearly a threatening object, like a gun, even if the entire incident was being viewed on video. *Id.* In other words, the body of research has shown that the presence of a weapon during the witnessing of a crime diminishes the ability of the witness to accurately identify the perpetrator, and the effect is strongest as the experimental scenarios become closer to approximating real-life crime events.

Support among scientists for the weapon focus effect has only grown since Dr. Steblay’s seminal study in 1992. The existence of the weapon-focus effect is bolstered by a sweeping consensus among social scientists with expertise in this area. Dr. Saul Kassin conducted a survey of eyewitness memory experts in 2001, and found that continued research on the weapon-focus effect over the last decade had led to a substantial increase in its general acceptance between an earlier survey in 1989 and the 2001 survey. Kassin et al., *On the “General Acceptance” of Eyewitness Testimony Research: A New Survey of the Experts*, 56 Amer. Psychol. 405, 410 (2001). By 2001, Kassin et al. reported a “strong consensus” on the existence of the weapon-focus effect, which the vast majority of experts surveyed found sufficiently reliable to support expert testimony in court. *Id.* at 413-14.

# There Is Broad Consensus That The Use of Certain Police Procedures Used In This Case To Collect Eyewitness Evidence Make That Evidence Less Reliable

That certain police procedures make eyewitness evidence more or less reliable is also broadly acknowledged among scientists, and supported by a substantial body of scientific research spanning over three decades. The Department of Justice and the American Bar Association have acknowledged this broad consensus in the scientific community, and in light of the growing list of wrongful convictions resulting from faulty eyewitness evidence, both have issued recommendations for best practices in conducting lineup procedures. United States Department of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (Oct. 1999); American Bar Association, *Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures* (Aug. 2004). Acknowledging their own wrongful conviction problems, many police departments, attorney general offices, and state legislatures have adopted these same measures to minimize the likelihood that police procedures will result in flawed eyewitness evidence. *See, e.g.*, New Jersey Attorney General, *Guidelines for Eyewitness Identification Procedures* (Apr. 2001) (available at <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf>); State of Wisconsin, Office of the Attorney

General, *Model Policy and Procedure for Eyewitness Identification* (2005); Amy Klobuchar et al., *Improving Eyewitness Identifications: Hennepin County’s Blind Sequential Lineup Pilot Project*, 4 Cardozo Pub. L., Pol., & Ethics J. 381 (2006); West Virginia Eyewitness Identification Act, SB 82 (passed Mar. 10, 2007) (available at [http://www.legis.state.wv.us/Bill\_Text\_HTML/2007\_SESSIONS/RS/BILLS/sb82%20sub1%20](http://www.legis.state.wv.us/Bill_Text_HTML/2007_SESSIONS/RS/BILLS/sb82%20sub1%20enr.htm)

[enr.htm](http://www.legis.state.wv.us/Bill_Text_HTML/2007_SESSIONS/RS/BILLS/sb82%20sub1%20enr.htm)).

Experts agree that cautionary instructions should be given to alert the witness that the perpetrator may or may not be present in a lineup, and that failing to do so greatly reduces the

accuracy of the resulting identification. *See, e.g.* Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277, 286-287 (2002); R.S. Malpass & P.G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. of Applied Psychol. 482 (1981). A 1997 meta-analysis of the scientific literature on lineup instructions showed that simply providing an instruction that the perpetrator “might or might not be present,” compared with an identical lineup at which no such instruction was provided, reduced mistaken identifications by *41.6%* in lineups where the actual perpetrator was not present. *See* Wells & Olson, *supra*, at 286 (citing Nancy Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 L. & Hum. Behav. 283 (1997)).

In the 2001 survey of experts, the effect of lineup instructions on eyewitness accuracy was ranked second in the list of eyewitness factors supported by “strong consensus” among social scientists with expertise in this area. Kassin et al., *supra*, at 413. Relying on this body of research, the Department of Justice published a set of guidelines for police lineup procedures, in which cautionary instructions of this type are recommended as a core best practice. *Eyewitness Evidence: A Guide for Law Enforcement*, United States Department of Justice, 31-32 (Oct.

1999). Furthermore, in a training manual published by the International Association of Chiefs of Police, that organization recommends “[s]crupulously adhering to the procedures and precautions outlined in [that] document,” including the use of the “might or might not be present” cautionary instruction and a notification that the investigation will continue whether or not a selection is made, in order to “help avoid misidentifications that may lead to unjust accusations or even erroneous convictions of innocent persons and divert the investigation away

from the real culprit.” *Training Key #600: Eyewitness Identification*, *supra*, at 1-3.

The importance of avoiding cross-contamination among witnesses by admonishing them not to confer about their memories or identifications is similarly regarded by experts as critical to the reliability of an identification, ranking third on the list of topics supported by “strong consensus” in the Kassin survey. Kassin et al., *supra*, at 413; *see* Elizabeth Loftus, *Our Changeable Memories: Legal and Practical Implications*, 4 Neuroscience 231, 43 (2002) (observing that new information, including conversations with other people, often contaminates eyewitness memory, even to the extreme of creating complete, yet entirely false memories). The International Association of Chiefs of Police has acknowledged the importance of this procedural protection, urging lineup administrators that “witnesses should be kept separate after the lineup procedure has been conducted,” to prevent discussions between witnesses following a lineup. *Training Key #600: Eyewitness Identification*, *supra*, at 4. The Department of Justice makes the same recommendation. *Eyewitness Evidence: A Guide for Law Enforcement*, *supra*, at 34 (recommending that the lineup administrator “[i]nstruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case”).

Another fundamental principle of proper lineup administration, as with any reliable experiment, is that it is conducted in double-blind fashion – that is, where the person conducting the procedure does not know the identity of the suspect. “The reason for keeping the tester blind is to prevent the tester from *unintentionally* influencing the outcome of the results.” Gary Wells, *Eyewitness Identification: Systemic Reforms*, 2006 Wisconsin L. Rev. 615, 629 (2006) (identifying double-blind administration as one of six critical procedures necessary to obtaining reliable eyewitness identification evidence, and noting that there need exist no intentional bias

on the part of the administrator for his influence to corrupt the identification). It is well-known among scientists “that people have natural propensities to test a hypothesis in ways that tend to bias the evidence toward confirming the hypothesis.” Gary Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & Hum.

Behav. 603, 627 (1998). This basic principle is fundamental to police training protocols, as a critical mechanism to minimize the likelihood of a false identification:

In conducting the lineup, officers who are not assigned to that case should handle the procedure if possible. This helps to minimize the possibility that the officers who are conducting the investigation will in their zeal to solve the case, convey (inadvertently or otherwise) clues to the witness as to which person to pick out, or put pressure on the witness to pick out somebody.

*Training Key #600: Eyewitness Identification*, *supra*, at 3. According to the Department of Justice, in a 2003 follow-up publication to its 1999 *Guide*, using blind lineup procedures “helps ensure [] that the case investigator does not unintentionally influence the witness.” United States Department of Justice, *Eyewitness Evidence: A Trainer’s Manual for Law Enforcement* 42 (Sept. 2003). When these procedures are not followed “scrupulously,” the danger of misidentification increases dramatically.

Also fundamental to reliable lineup administration is that members of the lineup be presented sequentially, or one at a time, rather than simultaneously. Social science experts and police trainers are in broad agreement on this point as well. Following instructions, the Department of Justice lists the sequential presentation of lineup members, whether live or photograph, as the first requirement in its description of how a lineup should be presented to a witness. *Eyewitness Evidence: A Guide for Law Enforcement*, *supra*, at 33-34 (finding this method to be “a manner conducive to obtaining accurate identification or nonidentification

decisions”). This recommendation is based on sound, broadly accepted social science research, which shows that witnesses are less likely to guess, or make what have been termed “relative judgments,” when presented with only one person or photo at a time. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, *supra*, at 615 (citing a study showing that “eyewitnesses tend to select whomever looks most like the perpetrator regardless of whether the actual perpetrator is in the lineup”). A 2001 meta-analysis bore out the existence of the relative judgment phenomenon: When the actual culprit is absent from a lineup, witnesses are less likely to falsely identify someone when lineup members are presented sequentially, rather than simultaneously. Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 L. & Hum. Behav. 459, 464 (2001). The superiority of sequential lineups is also supported by “strong consensus” among eyewitness experts. Kassin et al., *On the “General Acceptance” of Eyewitness Testimony Research: A New Survey of the Experts*, *supra*, at 405, 410-11.

The government’s opposition inadvertently refers to one report authored by the general counsel of the Chicago City Police that claims to contradict the otherwise uncontroverted superiority of the double-blind sequential lineup method -- although the government cites this report to attack the scientific validy of the cross-race effect. Government’ Opposition at

(referencing Mecklenberg Report at . . . )In any event, the study underlying this report has been conclusively discredited as unreliable and for every proposition it purported to examine. *See* Daniel L. Schachter et al., *Policy Forum: Studying Eyewitness Investigations in the Field*, L. Hum. Behav. (forthcoming 2007), available at <http://www.jjay.cuny.edu/extra/policyforum.pdf>

(observing in the Illinois study a “variable confound” with “*devastating consequences* for

assessing the real-world implications of this particular study”) (emphasis added); Gary Wells’ comments on the Mecklenburg Report, available at <http://www.psychology.iastate.edu/FACULTY/gwells/Illinois_Project_Wells_comments.pdf>

(“My main reaction to this report is disappointment and concern that the design of the study does not permit any clear conclusions [the design] is extremely problematic”). The Illinois

study was never subjected to peer review, and has been summarily dismissed as unscientific and unreliable by scientists. *See* Schachter et al., *supra*.

Every scientifically rigorous study on the same topic has borne out the consensus among researchers, namely that the sequential double-blind lineup procedure serves as an important protection against false identifications. The Attorney General for the State of Minnesota also conducted a pilot project testing sequential double-blind lineups, and found that the procedure was superior to the status quo method and provided “increased protection for innocent suspects.” Amy Klobuchar et al., *Improving Eyewitness Identifications: Hennepin County’s Blind Sequential Lineup Pilot Project*, *supra*, at 405. It remains uncontroverted in the research and in the field that double-blind sequential lineups produce more reliable eyewitness identifications.

# EXPERT TESTIMONY ON EYEWITNESS IDENTIFICATION *IS* BEYOND THE KEN OF THE AVERAGE LAYPERSON

It is well-settled in the District of Columbia that “a determination by the trial court excluding [eyewitness expert] testimony as not ‘beyond the ken of the average layman’ is a ruling only that upon the particular proffer made and in the concrete setting of that case, the possible assistance of the expert testimony to the jury is insufficient to outweigh the potential for distracting the jury or supplanting its customary role in evaluating credibility.” *Green*, 718 A.2d at 1051. When the trial court “believes the jurors might find such testimony truly helpful,” then

the testimony should be admitted under the trial court’s proper exercise of discretion. *Id.*

In other words, if it is shown that the testimony “may assist the jury in understanding the evidence,” then it should be admitted under *Dyas*. *Nixon v. United States*, 728 A.2d 582 (D.C. 1999) (admitting expert psychological testimony on “battered women’s syndrome,” finding that “[w]ith that information, the jurors were in a better position to determine whether” certain factors observed by social scientists might bear on the evidence in that case).

The subjects of the proffered expert testimony in this case are demonstrably outside the domain of the average juror’s common sense, and Dr. Van Wallendael is well situated, as discussed further below, as an expert with years of experience researching and teaching these same topics, to “assist the jury in understanding the evidence.” As such, the Court should admit the testimony.

Defying logic, the government has asserted, notwithstanding its lengthy argument that scientists have not conducted sufficient study to understand the eyewitness factors in this case, that “[t]here is no reason to believe that the jurors [are] incapable of properly evaluating the evidence by using their experience and common sense, in lieu of expert elucidation.” Govt. Opp. at 25 (quoting *Taylor v. United States*, 451 A.2d 859, 867 (D.C. 1982). The government argues that the factors affecting the reliability of the identification evidence in this case are both common sense, such that no expert is necessary, and simultaneously so impenetrable that 30 years of social science research has yet to yield any reliable or generally accepted conclusions regarding those effects. The two positions are irreconcilable with one another, and both are empirically unsupportable.

In fact, empirical data reveal that average jurors do not understand the factors affecting

eyewitness evidence in this case that are the subject of Mr. [Defendant]’s expert proffer, and as supported at length in previous briefing and this brief, experts in the field have identified certain well-settled effects that contradict common sense on those same points.

Data show that typical jurors do not understand many of the factors affecting the reliability of eyewitness evidence. “Scientifically tested studies, subject to peer review, have identified legitimate areas of concern” with respect to juror understanding of these issues.

*Copeland*, 2007 WL 1498396, at \*11 (citing Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence,* 14 L. & Hum. Behav. 185, 190 (1990) (concluding that jurors were insensitive to many factors that influence eyewitness memory and give disproportionate weight to the confidence of the witness). According to the Supreme Court of Tennessee, polling data reveal that jurors overestimate the reliability of eyewitness identification evidence. Id. (citing Timothy P. O’Toole et al., *District of Columbia Public Defender*

*Eyewitness Reliability Survey*, Champion, Apr. 2005, 28, 28-32).

The Utah Supreme Court made a similar observation regarding the range of eyewitness

factors:

Although research has convincingly demonstrated the weaknesses inherent in eyewitness identification, jurors are, for the most part, unaware of these problems. People simply do not accurately understand the deleterious effects that certain variables can have on the accuracy of the memory processes of an honest eyewitness.

*Id.* (quoting *State v. Long*, 721 P.2d 483, 490 (Utah 1986)).

In *Nixon*, the Court of Appeals relied on substantially similar polling data – specifically, “empirical research indicating that potential jurors may hold beliefs and attitudes about abused women at variance with the views of experts who have studied or had experience with abused

women” – to find expert testimony on “battered women syndrome” admissible, as beyond the ken of the average juror. *Nixon*, 728 A.2d at 591 (citing N. Vidmar & P. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, 52 Law & Contemp. Probs. 133, 154 (1989)). Notably, the survey data to which the Court cited demonstrated that the level of misunderstanding was not high. To the contrary, the study showed that “it appears that jurors may be better informed than critics have suggested” and “while there are grounds for concluding that jurors might be helped by expert testimony on battered women syndrome, the data are not overwhelming.” N. Vidmar & P. Schuller, supra, at 152. Nonetheless the Court of Appeals

relied on this study to determine the trial judge had properly admitted the testimony as “helpful to the jury.” *Id.*

Here, there can be no question that the juror beliefs about the eyewitness factors at issue here are “at variance with the views of experts who have studied or had experience” with those same phenomena. *Nixon*, 728 A.2d. at 591.

# The Detrimental Effects of Stress on Eyewitness Memory Are In Direct Conflict With the Common-Sense View

Many lay jurors believe, as a matter of common sense, that stress *enhances* the reliability of recall. We know this because potential jurors in the District have been polled on this exact question, and these hard, empirical data unequivocally reveal this to be a widely held common- sense view. O’Toole et al., *District of Columbia Public Defender Eyewitness Reliability Survey*, *supra*, at 30 (finding that 39% of eligible D.C. jurors believe that stress *enhances* eyewitness recall, and another 31% believe it either has no effect or do not know its effect). Prosecutors routinely argue that a witness “would never forget that face,” after being confronted with it under traumatic circumstances, *because of the intensity of the experience* – the image must be “burned

in the mind” of the witness, the argument goes, because the crime sequence was so poignant and so emotionally overwhelming that the witness could not conceivably forget it.[3](#_bookmark2) Yet a substantial body of scientific research, referenced above, tells us that the traumatic nature of an event makes it *dramatically* less likely that the witness will recall the identity of the perpetrator, *i.e.*, that the effect is the precise opposite. Despite the common-sense view that a traumatic event leaves an acute memory, and while this may be true with respect to very general aspects of the memory – such as where one was located when a traumatic event occurred – research shows that memory of specific details and the identity of individuals is often fatally compromised by the stress of an event. The divide between the scientific consensus and the views of lay jurors could hardly be more at odds on the effects of stress on eyewitness recall, which makes expert testimony particularly critical to prevent the jury from relying on false beliefs as it weighs the evidence in this case.

# The Detrimental Effects of the Presence of a Weapon On Eyewitness Recall Are In Conflict With the Common-Sense View

Similarly, the common-sense view on the effect that the presence of a weapon has on eyewitness accuracy is directly at odds with well-established, uncontroverted scientific research. According to polling data, 70% of eligible District jurors misunderstand the effect that the presence of a weapon during the commission of a crime has on the reliability of an eyewitness’s memory of the identity of the perpetrator. *Id.*; *see also* Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, *supra*, at 190 (“This study clearly demonstrates that jurors are insensitive to the factors that influence eyewitness memory,” including the presence of a

3 Whether the Court grants or denies this motion to admit expert testimony, it should, at minimum, preclude the government from making this type of argument, which urges the jury to form beliefs based on demonstrably false assumptions.

weapon.). A vast body of scientific research shows a consistent weapon focus effect that undermines the reliability of eyewitness memory, and jurors are widely ignorant of this phenomenon. Because common sense fails to accurately inform jurors on this effect, expert testimony is critical on this point as well.[4](#_bookmark3)

# The Effects of Flawed Police Lineup Procedures Are Beyond the Ken of the Average D.C. Juror

Empirical data also show that jurors believe that faulty eyewitness procedures are more reliable than procedures recommended by the Department of Justice, the International Agency of Chiefs of Police, and experts in the field of eyewitness memory. When polled on the question of whether an instruction cautioning a witness that the perpetrator “might or might not be present” – one of most fundamental principles of reliable lineup administration – over half (51%) of eligible District jurors believed that the instruction would make an identification *less reliable*. O’Toole et al., *District of Columbia Public Defender Eyewitness Reliability Survey*, *supra*, at 31. An additional 19% of eligible jurors either believe that the cautionary instruction will have no effect, or do not know what effect it will have. *Id.* Cutler et al. also found that lay persons are insensitive to the effects of cautionary instructions and other best practices on lineup reliability. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, *supra*, at 190.

The same is true for the use of double-blind procedures and the sequential presentation of lineup members, over simultaneous presentation. Social science experts and police trainers agree on the superiority of these best practices over the flawed procedures used in this case, as detailed above, and yet jurors remain in the dark. Polling data show that over half of eligible District

4 As with stress, the government should at minimum be precluded from making arguments at odds with the research showing that the presence of a weapon makes identifications less reliable.

jurors misunderstand the effects of both of these procedural safeguards on the reliability of a police lineup. Schmechel et al., *Beyond the Ken: Testing Jurors’ Understanding of Eyewitness Evidence*, 46 Jurimetrics 177, 202-04 (2006). 61% of eligible jurors believe that simultaneously presented photo arrays are either better than sequential, the same, or do not know what the difference of the safeguard is. *Id.* at 203. A majority of eligible jurors are also unaware of the importance that a lineup is conducted in double-blind format, to avoid the inadvertent influence of the administrator on a witness’s choice. *Id.* at 204 (finding that a full 30% of jurors believe that a lineup done by someone aware of the identity is *more* reliable, with another 22% either believing they are equivalent or being unsure).

# DR. VAN WALLENDAEL IS UNQUESTIONABLY QUALIFIED TO TESTIFY ABOUT THE SCIENTIFIC STUDY OF EYEWITNESS IDENTIFICATION AND IN PARTICULAR ABOUT THE IMPACT OF STRESS, WEAPON FOCUS AND POLICE PROCEDURES ON THE ACCURACY OF AN EYEWITNESS’ IDENTIFICATION

1. **IT WOULD BE AN ABUSE OF DISCRETION TO EXCLUDE EXPERT TESTIMONY HERE**

Under *Nixon* and *Green*, “in the concrete setting” of this case and within the discretionary authority set forth in *Dyas* and bounded by *Hager*, it is incumbent upon this Court to admit expert testimony on the eyewitness factors that are the subject of the expert proffer in this case.

Juror understanding of the same factors is “at variance with the views of experts,” which renders the findings of experts not only helpful, but critical to avert the jury’s reliance on the eyewitness evidence to a degree that is disproportionate to its actual force.

Courts are also beginning to acknowledge that “the research also indicates that neither cross-examination nor jury instructions on the issue are sufficient to educate the jury on the problems with eyewitness identification, contrary to the conclusion” of earlier courts. *Copeland*,

2007 WL 1498396, \*12 (“[E]ven when presented with an eyewitness who was quite thoroughly discredited by counsel, a full 68% still voted to convict.”) (citing Elizabeth Loftus, *Reconstructing Memory: The Incredible Eyewitness*, 15 Jurimetrics J. 188, 189-90 (1975)).

The Court of Appeals has acknowledged that “in a complicated case cross-examination, final arguments, and general instructions on credibility and burden of proof may not adequately apprise the jury of its role in this crucial area” relating to the reliability of eyewitness evidence. *Smith v. United States*, 343 A.2d 40, 44 (D.C. 1975).

Experts have observed that “[c]onsidered as a whole, the studies of juror knowledge and decision making indicate that expert psychological testimony can serve as a safeguard against mistaken identification.” *Id.* (quoting Steven D. Penrod & Brian L. Cutler, *Preventing Mistaken Identification in Eyewitness Identification Trials*, Psychol. & L.: The State of the Discipline 89, 114 (1999)). According to the Supreme Court of Tennessee, “[r]esearch over the past 30 years has shown that expert testimony on memory and eyewitness identification is the only legal

safeguard that is effective in sensitizing jurors to eyewitness errors.” *Copeland*, 2007 WL 1498396, at \*11 (quoting Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 Am. Crim. L. Rev. 1271, 1273 (2005)).

Expert testimony in “the concrete setting” of this case is the “only legal safeguard that is effective in sensitizing jurors to eyewitness errors,” and it would be manifestly erroneous to exclude it under these facts.

# CONCLUSION

For the foregoing reasons, and any others this Honorable Court may deem just and proper, Mr. [Defendant] respectfully requests that this Court allow expert testimony regarding

the psychological and identification procedure factors that effect eyewitness identification. Furthermore, if the Court determines that it cannot rule in Mr. [Defendant]’s favor based on the pleadings, Mr. [Defendant] respectfully requests that this Court hold a hearing on this issue in advance of the trial date so this matter can be resolved. Undersigned counsel would with leave from the Court arrange to have Dr. Van Wallendael available for testimony at such a hearing.

Respectfully submitted,

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