**SAMPLE REPLY TO OBJECTION TO DEFENSE EYEWITNESS IDENTIFICATION EXPERT—FOCUSING ON CROSS RACE, STRESS, THE ILLINOIS FIELD STUDY, AND “BEYOND THE KEN”**

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 cross-racial identifications and the effects of stress on identifications. It also discusses how these topics are not “beyond the ken” of the average juror (i.e., not “common sense”). This motion also contains a detailed reply to the government’s reliance on the badly flawed Illinois field study.

**SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA**

**Criminal Division - Felony Branch**

**UNITED STATES : Docket No. 000**

**:**

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

**:**

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

**DEFENDANT’S REPLY TO GOVERNMENT’S OPPOSITION TO DEFENDANT’S** **MOTION IN LIMINE TO ADMIT EXPERT TESTIMONY**

**AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

[DEFENDANT], through undersigned counsel and pursuant to the Fifth and Sixth Amendments to the United States Constitution, submits this Reply pleading in support of his previously filed Motion In Limine to Admit Expert Testimony.

The government has opted to present questionable eyewitness identification testimony in this case, yet in an effort to preclude [DEFENDANT] from presenting the jury with the tools to intelligently evaluate the import of that testimony, the government relies on old law incorrectly suggesting that this sort of expert testimony is per se inadmissible in the District. In fact, the D.C. Court of Appeals has followed the national trend on this issue and has held both that this testimony is admissible within the discretion of the trial court, and that such discretion must be carefully

exercised where, as here, eyewitness identification evidence forms a central part of the prosecution’s case.

The government’s attempt to attack the scientific underpinnings of the expert testimony proffered by [DEFENDANT] is equally unpersuasive. Notably, the government raises no Frye

challenge, and thus concedes the general acceptance of all-but-one of the proffered subjects of Dr.

Brigham’s testimony. Specifically, the government limits its attack to expert testimony on the cross-race effect, but its reliance on snippets of research taken out of context and a field study designed and run by the non-scientist General Counsel of the Chicago Police Department – a study that has been wholly repudiated by the scientific community – is unavailing. There is, in fact, general acceptance in the scientific community (if not in the United States Attorneys Office) of the cross-race effect, as the Court of Appeals itself has acknowledged in In re As. H*.,* 851 A.2d 456,

460 (D.C. 2004).

Alternatively, and inconsistent with its argument that there is a vigorous dispute among the scientists about the existence and nature cross-race effect, the Government argues that the factors that undermine the accuracy of eyewitness identification evidence are simply commonsense and would not be helpful to the jury. But the government offers no support for this assertion, whereas [DEFENDANT] has hard data that potential jurors in the District of Columbia do not understand the cross-race effect. This data demonstrates that expert testimony would in fact assist the jury in intelligently evaluating the evidence upon which the government has chosen to rely in its effort to prove [DEFENDANT]’s guilt beyond a reasonable doubt.

In short, the government’s arguments notwithstanding, based on the facts of this case and the current state of the law and the science, there is no legitimate basis to preclude [DEFENDANT] from calling Dr. Brigham to testify in the defense case.

1. NEW SCIENTIFIC RESEARCH AND NEW CASE LAW REQUIRE EXPERT TESTIMONY IN THIS CASE

The government’s pleading begins with a misstatement of the law in the District of Columbia, 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,

* 1. , 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.

* + 1. Expert Testimony Regarding Factors That Undermine The Accuracy Of Eyewitness Identification Evidence Is Not Inadmissible; Rather Trial Courts Have An Obligation to Carefully Exercise That Discretion And To Admit Expert Testimony Where, As Here, Eyewitness Identification Evidence Is Central To the Government’s Case.

Contrary to the government’s remarkable assertion that it is “well-settled” that “expert testimony regarding various factors which may affect eyewitness identifications is not admissible at trial in Superior Court,” the admission of such testimony in fact falls squarely within the Court’s discretion. See, e.g., Dyas v. United States, 376 A.2d 827, 831 (D.C. 1977), cert. denied, 434 U.S.

973 (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. The Court of Appeals reaffirmed and reinforced its holding in Dyas that

expert testimony regarding the factors that undermine eyewitness identification evidence may be admitted by a trial court Green v. United States. The Court explained that

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 1042, 1050-51 (D.C. 1998).

The Court of Appeals in Green further held that “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, 1149 (D.C. 2004), 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. 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. at 1149.

Here, the government’s case turns on a single cross-racial identification by a stranger.

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 recovery of stolen property two and a half hours after the incident in an abandoned house near [DEFENDANT] and the unreliable testimony of two homeless men. This is not the sort of corroboration on which the government can hang its hat; obviously, in order to find that the government has sustained its burden of proof, it is critical that the jury credit the stranger identification of [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, [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..

* + 1. Developments in the Social Sciences Over the Last Three Decades Demand a Fresh Analysis of This Question

The 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 on the Court of Appeals’ assessment of the state of the relevant 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”).

Since the “renaissance of research” on the factors at issue in this case in the same decade as the judicial opinions on which the government would have this Court base its decision were rendered, “a scientific literature has accumulated.” Id. In the course of that accumulation of

scientific literature, points of broad consensus have emerged with respect to the effects of a collection of discrete factors on the reliability of eyewitness evidence. See Meissner & Brigham,

supra, at 4 (finding that “most now agree that the [cross-race impairment] phenomenon is reliable

across cultural and racial groups”); Deffenbacher et al., supra, at 694 (finding sufficient research

now amassed to “provide clear support for the hypothesis that heightened stress has a negative impact on eyewitness identification accuracy”); Kassin et al., On the “General Acceptance” of

Eyewitness Testimony Research: A New Survey of the Experts, 56 Amer. Psychol. 405, 410 (2001)

(finding continued research on “weapon-focus” effect had led to dramatic increase in general acceptance of its reliability, at 87% among experts by 2001, as compared to only 57% in 1989); People v. LeGrand, 867 N.E.2d 374, 377 (N.Y. 2007) (“these findings [of eyewitness researchers] –

produced through sound, generally accepted experimentation techniques and theories, published in scholarly journals and subjected to peer review – have over the years gained acceptance within the scientific community”). In particular, on the subject of the cross-race effect, the Court of Appeals acknowledged in In Re As.H., 851 A.2d at 460,

[i]t is well established that there exists a comparative difficulty in recognizing individual members of a race different from one's own.” ELIZABETH LOFTUS, EYEWITNESS TESTIMONY § 4.9 (3d ed. 1997 & Supp.1999); see State v. Cromedy, 158 N.J. 112, 727 A.2d 457, 461-68 (1999) (discussing at length the difficulties in cross-racial identification and mandating a jury instruction on the subject in some cases); John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207 (2001).

To exclude expert testimony here on the basis of Dyas and its progeny would be to ignore

the complete history of eyewitness research, which has spanned the three decades since that decision was issued. As the Court of Appeals acknowledged in Nixon with respect to the general

acceptance of “battered women syndrome” since Ibn-Thomas was decided sixteen years prior, times

change, as does the state of the sciences. Because Dyas and the litany of other cases on which the

government relied in urging exclusion of expert testimony hinge on an obsolete assessment of the state of the relevant science, this Court must conduct its own analysis of the science and render a

decision on that basis. Upon doing so, it will be clear not only that the science has matured and attained general acceptance, but further that, as the Supreme Court of Tennessee recently observed, “[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 (quoting Jacqueline McMurtrie, The Role of the Social Sciences in

Preventing Wrongful Convictions, 42 Am. Crim. L. Rev. 1271, 1273 (2005)).

* + 1. Developments in the Case Law Point to a Clear Trend Toward Admissibility of Eyewitness Expert Testimony

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, as [DEFENDANT] does here, 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 24 years prior, 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 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, as noted above, the Court of Appeals has acknowledged that danger of relying on mistaken eyewitness identification evidence, In Re As. H., 851 A.2d at

460, 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, and specifically endorsed the

scientific validity of the cross-race effect about which Dr. Brigham will testify, In Re As. H., 851

A.2d at 460. 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).

1. THE PROFFERED SUBJECTS OF EXPERT TESTIMONY ARE GENERALLY ACCEPTED BY SCIENTISTS IN THE FIELD[1](#_bookmark0)
	1. The Government Limits Its Response to The Cross-Race Effect, Thereby Conceding the General Acceptance of Other Subjects Included in the Proffer

1 Notably, the government makes no challenge to and thus concedes Dr. Brigham’s impeccable credentials.

In its response to [DEFENDANT]’s motion to admit expert testimony on cross-racial identification, stress, the presence of violence, weapon focus, exposure duration, lighting conditions, and eyewitness time estimates, the government limited its objection to the topic of

cross-racial identifications. (Govt.’s Opp. Mtn.) As a result, the government effectively and wisely concedes the general acceptance and admissibility of expert testimony on the remaining factors.

There is no legitimate basis for the government to contest the scientific validity or broad general acceptance among the scientific community on the topics proffered. See, e.g., Deffenbacher et al.,

Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory, 28 L. Hum. Behav. at

694 (2004 review of all the scientific literature available to date, found “clear support for the hypothesis that heightened stress has a negative impact on eyewitness identification accuracy”); Charles A. Morgan et al., Accuracy of Eyewitness Memory for Persons Encountered During

Exposure to Highly Intense Stress, 27 Intl. J. L. & Psych. 265, (2004) (in field study of special

forces soldiers, presence of stress made false identification more than five times more likely than in substantially identical low-stress condition, when witnesses had lengthy opportunity to view and were presented with photo array 24 hours following observation): Kassin et al., On the “General

Acceptance” of Eyewitness Testimony Research: A New Survey of the Experts, 56 Amer.

Psychologist 405, 413-14 (2001) (2001 survey found a “strong consensus” among eyewitness researchers on weapon-focus, exposure duration, and the cross-race bias, among other factors). The consensus among social scientists with expertise in the factors affecting eyewitness reliability proffered for testimony in this case is broad and uncontroverted, which the government acknowledges by opting only to challenge the general acceptance of the cross-race effect.

* 1. The Government’s Frye Analysis With Respect to the Cross-Race Effect is

Fundamentally Flawed

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

“first and foremost” on the irrelevant assertion that “psychologists do not ‘generally accept’ the proposition that juries rely too heavily on eyewitness testimony.”[2](#_bookmark1) (Govt.’s Opp. Mtn. 9) 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 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;

2 Even if true (which the defense contests), one explanation for the lack of consensus 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 no basis for such an opinion by the very nature of their expertise.

general acceptance means general acceptance.

* 1. The Cross-Race Effect Is Supported by Broad Consensus Among Experts, and the Government’s Attack is Wholly Without Foundation
		1. The Government’s Unsupported Opinion That the Cross-Race Effect is “Not Significant” Has No Effect on Its General Acceptance

The first basis of the government’s attack on the general acceptance of the cross-race effect is its own unfounded assertion that “if whites misidentifies [sic] whites 2% of the time, and whites misidentify blacks 3% of the time, the differences are not significant.” (Govt. Opp. Mtn. 12) Given that the government has no specialized knowledge by which to determine what is scientifically “significant,” and further that the government offers no citations in support of the above rumination, the Court should be content to ignore this “argument” against the general acceptance of the cross- race effect among experts in the field, which the government parrots throughout its response – particularly, as above, given that the full universe of experts flatly disagrees with the government, which stands alone on this contention. See Meissner & Brigham, supra, at 4 (finding that “most

now agree that the [cross-race impairment] phenomenon is reliable across cultural and racial groups”); Kassin et al., supra, at 413-14 (finding “strong consensus” among experts on the existence

and reliability of the cross-race effect).

* + 1. The Illinois “Field Study” Was Fatally Flawed and the Resulting Report is Devoid of Scientific Merit

The second basis for the government’s attack on the reliability and general acceptance of the cross-race effect is the so-called “field study” commissioned by the legislature of the state of Illinois in 2006. (Govt. Opp. Mtn. 13) That “study” was conducted by the Chicago Police Department and its general counsel Sheri Mecklenburg, a non-scientist, for the unrelated purpose of comparing the

effectiveness of competing types of lineup procedures.[3](#_bookmark2) It was never subjected to peer review or any other semblance of scientific scrutiny, and has now been flatly dismissed as fundamentally flawed and devoid of scientific merit by a panel of social science luminaries, including a Nobel Laureate psychologist. 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 a “variable confound” with “devastating

consequences for assessing the real-world implications of this particular study”) (emphasis added).

On the merits of the Illinois study – which has been trumpeted by prosecutors across the United States in a last-ditch effort to refute the otherwise uncontroverted consensus on a broad range of topics relating to eyewitness memory – the same panel went on to observe that “the design [of the Illinois study] guaranteed that most outcomes would be difficult or impossible to interpret.” Id. at 2. Another eminent expert in the field of eyewitness research, psychologist Gary Wells,

characterized the study’s methodology as “extremely problematic.” 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”). Dr. Wells described the

results of the Illinois study as “far out of line with other field studies of eyewitness identification involving eyewitnesses to actual crimes,” and in light of that striking incongruity, even raised a question about whether results not supporting the author’s agenda might have been “suppressed.” Id. Indeed, in an addendum to the same report and in response to criticism by Dr. Wells and others,

3 The same study is alternatively referred to as the “Mecklenburg Report,” after its author.

its author admitted that certain results reflecting poorly on status quo procedures were omitted.

Sheri H. Mecklenburg, Addendum to the Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedure, 8 n.3 (June 19, 2006) (“Although there were in fact filler identifications in simultaneous lineups in those two jurisdictions, those filler identifications were tentative and therefore under the coding employed by the two analysts, were not reported as actual filler identifications.”).

With respect to the report’s claim that its protocols were approved by scientists, including Dr. Wells himself, Dr. Wells described that as “one claim…that I can state unequivocally to be false, or at least terribly misleading.” Gary Wells’ comments on the Mecklenburg Report, supra. In

the choice and unmistakable words of another leading expert, in a Frye hearing before Your Honor

earlier this year, Dr. Steven Penrod asserted that “anybody who would want to rely upon the data generated in that [Illinois] study is a fool.” Transcript of Frye Hearing, United States v. Lane, Crim.

No. F18768 (Apr. 18, 2007).

In short, the Illinois report is at best junk science, and at worst the creation of a police advocate whose “sole purpose was to inject confusion into the debate about the efficacy of sequential double-blind procedures and to thereby prevent adoption of the reforms,” presumably to deflect attention from a systemic wrongful conviction problem plaguing the state of Illinois. See

Timothy P. O’Toole, What’s the Matter With Illinois? How an Opportunity Was Squandered to

Conduct an Important Study on Eyewitness Identification Procedures, Champion 18 (Aug. 2006).

Further, the study was not designed to test the cross-race effect, but its author merely reported incidentally that the observed cross-race effect in that unscientific endeavor was quite at odds with the effect observed in every peer-reviewed study published to date. Under any analysis, the Court

should follow the unequivocal guidance of the scientific community and dismiss the report, and any claims relying on it, as wholly devoid of scientific value.

* + 1. The Government’s “Theorization” That High Stress Might Enhance Memory is Contradicted by 30 Years of Targeted Social Science

The government also feebly asserts, without citation, that “Some theorize that the higher stress of a violent crime increases, rather than decreases, one’s focus and memory.” (Govt. Opp. Mtn. 16) Presumably, in this next in its series of baseless, unreferenced ruminations, the government means to suggest that the presence of stress might serve to mitigate the cross-race effect by enhancing the reliability of eyewitness memory generally. Fortunately, this has been tested at length and in depth over the last 30 years, and the opposite conclusion – namely that the presence of stress diminishes the reliability of eyewitness recall even further – is broadly agreed upon by the community of scientists with expertise in this area of eyewitness memory. See, e.g., Deffenbacher

et al., supra, at 694 (surveying 30 years of research and finding “clear support for the hypothesis

that heightened stress has a negative impact on eyewitness identification accuracy”).

* + 1. New Field Studies Bear Out the Same Effects Reported From Laboratory Studies

The subject of stress provides a convenient segue into another of the government’s unfounded assertions, namely that the “laboratory” nature of some of the studies relied upon by researchers leaves open the question of their applicability in the “real world.” (Govt. Opp. Mtn. 16) (“The defense makes the unwarranted assumption that results from studies of eyewitnesses are applicable to forensic witnesses.”). Fortunately, this concern was impressively addressed by Morgan et al., in a field study carefully tailored to test the effects of stress on recall in a real-world eyewitness scenario. Morgan et al., Accuracy of Eyewitness Memory for Persons Encountered

During Exposure to Highly Intense Stress, supra.

In that field study, Morgan and colleagues partnered with a military survival training program to test the reliability of eyewitness memory after participants were subjected to an interrogation scenario, where each witness observed his or her interrogator face-to-face for a full 40 minutes, in a well-lit room, and after 24 hours was asked to identity the person who had conducted the interrogation from a lineup. Remarkably, only 34% of test subjects from the high-stress condition could accurately identify their interrogator in a photo lineup the following day, which was well under half the accuracy rate for those in a low-stress condition that was otherwise identical. Id.

at 272 (finding an accuracy rate of 76% “true positives” in the photo-spread method for low-stress subjects). A full 68% of subjects from the high-stress condition affirmatively chose the wrong person from a photo-spread, which was over five times the error rate of subjects in the low-stress condition. Id. (reporting 12% false positives from the low-stress condition when selecting the

interrogator from a photo-spread). When the same eyewitness factors frequently tested in laboratory studies have been subjected to the rigors of a methodologically sound field study, they have served only to reinforce the well-settled findings of the laboratory studies. The government’s argument that the findings of “academic/laboratory researchers” are inapplicable in the forensic context is without foundation, again relying on nothing more than its own bald assertion.[4](#_bookmark3) (Govt. Opp. Mtn. 16)

* + 1. The Government Misunderstands the Proffered Testimony on the

4 The government also curiously argues that “[b]ecause identification procedures generally involve people who are of the same race as the perpetrator, ‘it is not obvious that…testimony [on cross-race identification] is actually relevant in a real criminal case.’” (Govt. Opp. Mtn. 15) (internal citations omitted). Of course, in this case, relevance of testimony concerning the cross-race effect cannot seriously be disputed where the sole witness upon whose identification the government seeks to rely is white and Mr. Mack is African-American.

Quantitative Component of the Cross-Race Effect

As a last resort, the government cites one final article for an irrelevant proposition, namely that, notwithstanding the well-documented impairment that members of one race experience when attempting to identify members of another race, there are “more correct identifications in cross- racial situations than incorrect ones.” (Govt. Opp. Mtn. 15) This purported attack on the proposed testimony does not address the proffered substance of the expert testimony; Dr. Brigham would merely testify that an impairment exists, and that research definitively shows that members of one race are less accurate when attempting to identify members of another, with a quantification of that effect that is supported by the extensive research findings cited above, and other peer-reviewed research that might be appropriate. The defense has not suggested that Dr. Brigham would testify or otherwise imply, contrary to his own research findings, that there are not “more correct identifications in cross-racial situations than incorrect ones.” As a result, the government’s final lunge falls far short of undermining the general acceptance of the proffered testimony, by avoiding its substance altogether.

In the absence of any scientific support for its attack on the general acceptance of cross-race impairment among experts in the relevant field, and the absence of any attack whatsoever on the other subjects of the proffered testimony, the defense has met its burden as the proponent of the evidence to meet the requirements for admission under Frye/Dyas. See United States v. Porter, 618

A.2d 629, 633-34 (D.C.1992) (“[U]nder Frye, the proponent of a new technology must demonstrate by a preponderance of the evidence that th[e] technology has been generally accepted in the relevant scientific community…”).

1. DR. BRIGHAM’S TESTIMONY WOULD UNQUESTIONABLY BE HELPFUL TO ELUCIDATE THE FACTORS AFFECTING THE RELIABILITY OF THE

EYEWITNESS EVIDENCE IN THIS CASE

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. Brigham is uniquely situated, as an expert with over 30 years of experience researching these same topics, to “assist the jury in understanding the evidence.” As such, the Court should admit the testimony.

* 1. The Proffered Testimony Cannot Be Both “Common Sense” and Beyond the Comprehension of Scientists

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. Mtn. 6) The

defense does not presume that the Court requires a lesson in logic, but it is fundamental that a proposition and its opposite cannot both be true. See, e.g., Jeroen van Rijen, Aspects of Aristotle’s

Logic of Modalities 32 (1989) (“that both A and not-A are the case…is obviously impossible). Yet 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 [DEFENDANT]’s expert proffer, and as supported at length above, experts in the field have identified certain well- settled effects that contradict common sense on those same points.

* 1. Empirical Data Reveal That D.C. Jurors Do Not Understand the Factors Affecting Eyewitness Reliability In This Case, and Thus They Are “Beyond the Ken”

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 cross-racial identification.” 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. Indeed, a poll of eligible jurors in the District of

Columbia – the same poll relied upon by the Supreme Court of Tennessee in finding the same

factors “beyond the ken” – reveals that many District jurors do not understand the cross-race impairment, the effects of stress and violence on recall, weapon focus, eyewitness time estimates, or exposure duration, as a matter of common sense. Timothy P. O’Toole et al., supra, at 28-29;

Schmechel et al., Beyond the Ken? Testing Jurors’ Understanding of Eyewitness Reliability

Evidence, 46 Jurimetrics J. 177 (2006) (relying on the same poll, citing variances between juror

expectations and expert findings on the listed factors).

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.

* 1. Cross-Examination and Other Traditional Tools Have Been Shown to Be Insufficient to Educate the Jury With Respect to Eyewitness Reliability

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

WHEREFORE, based on the arguments set forth above and in [DEFENDANT]’s initial pleading and for any other reasons that may appear to the Court, [DEFENDANT] respectfully requests that this Court grant his Motion In Limine to Admit Expert Testimony, and permit Dr. Brigham to present the proffered testimony.

Respectfully submitted,