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IN THE SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

DOCKET NO. 29 EAP 2021

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

DANTE BROWN,

Appellant.

BRIEF OF *AMICI CURIAE* THE INNOCENCE PROJECT AND THE PENNSYLVANIA INNOCENCE PROJECT IN SUPPORT OF APPELLANT DANTE BROWN

Appeal From The August 1, 2021 Judgment Of The Superior Court Of Pennsylvania (No. 667 EDA 2020) Affirming The January 27, 2020 Judgment Of Sentence Of Philadelphia County, Court Of Common Pleas, Criminal Trial Division At CP-51-CR-0006326-2017.

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INTEREST OF *AMICI CURIAE*

The Innocence Project and the Pennsylvania Innocence Project submit this brief as *amici curiae* under Pennsylvania Rule of Appellate Procedure Rule 531(a) in support of Appellant Dante Brown.[1]

The Innocence Project, Inc. is a non-profit organization dedicated to providing pro bono legal and related investigative services to indigent people whose innocence may be established through post-conviction DNA testing. To date, the work of the Innocence Project and affiliated organizations has led to the exoneration by post-conviction DNA testing of more than 375 people.

The Pennsylvania Innocence Project is a non-profit organization with offices in Philadelphia and Pittsburgh that provides legal and investigatory services to indigent clients who are innocent, were wrongfully convicted, and are fighting to secure their freedom. The Pennsylvania Innocence Project has helped secure freedom for more than 20 innocent people across the Commonwealth who have together served more than 450 years in prison for crimes they did not commit.

In addition to post-conviction litigation, the Innocence Project and the Pennsylvania Innocence Project work to prevent future miscarriages of justice by identifying the causes of wrongful convictions, including eyewitness

[1] Undersigned counsel consulted with attorneys at the Innocence Project's Strategic Litigation Department in preparing this brief for *amici curiae*.

misidentification, participating as *amicus curiae* in cases of broader significance to the criminal legal system, and advancing legislative and administrative reforms to improve the truth-seeking function of the criminal legal system. As leading advocates on behalf of the wrongfully accused, *amici* have a compelling interest in ensuring that courts aptly evaluate the admissibility of expert testimony in cases where such testimony may aid jurors in evaluating the evidence.

The proper admission of relevant expert testimony is of particular significance in cases where the expert can assist jurors in assessing the reliability of eyewitness evidence, as such evidence is known to be "*among the least reliable* forms of evidence[,]" *United States v. Brownlee*, 454 F.3d 131, 142 (3d Cir. 2006) (alteration in original) (citation omitted), and has contributed to 69% of wrongful convictions identified through post-conviction DNA testing. Alexis Agathocleous, *How Eyewitness Misidentification Can Send Innocent People to Prison* (Apr. 15, 2020), *available at* https://innocenceproject.org/how-eyewitness-misidentification-can-send-innocent-people-to-prison/ (last accessed Nov. 22, 2021); *see also* The National Registry of Exonerations, *% Exonerations by Factor*, *available at* https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx (last accessed Nov. 24, 2021) (just under one-third (805) of 2870 exonerations list mistaken eyewitness identification as a contributing cause).

Due to the nature of their work, *amici* have a particular interest in ensuring that judges and jurors utilize valuable scientific expert testimony in cases—like this one—that implicate the reliability of an eyewitness's perception, memory, cognition, and recall. The admission of such expert testimony, when relevant, would promote due process and reduce the risk of wrongful conviction due to juror misunderstandings and common, yet false, assumptions made about eyewitness evidence.

STATEMENT OF THE CASE

This is an appeal from the April 2021 judgment of the Superior Court of Pennsylvania affirming Mr. Brown's December 2019 conviction in the Philadelphia County Court of Common Pleas. Mr. Brown timely filed a Petition for Allowance of Appeal. This Court granted Mr. Brown's Petition and limited review to the question of whether the Superior Court erred by precluding expert testimony regarding blood alcohol content and its effect upon memory and perception on the ground that it was an impermissible assessment of witness credibility.

On May 15, 2017, Mr. Brown and off-duty Pennsylvania State Trooper Ryan Lowry had an altercation in a McDonald's drive-through line at approximately 2:30 a.m. Trial Court Opinion, at 2. Both were arrested after the incident. *Id.* After arriving at the Police Detention Unit approximately three hours after the incident, a breathalyzer test was conducted and revealed that Mr. Lowry's blood alcohol content

(BAC) was 0.18%—more than double the legal limit for driving under the influence in Pennsylvania.[2]

Mr. Brown moved to present expert testimony from Dr. Lawrence J. Guzzardi, an expert in pharmacology and toxicology, about Trooper Lowry's probable blood alcohol concentration at the time of the incident and how the off-duty officer's level of intoxication would have reasonably affected his perceptions, judgment, and memory. Petition for Allowance of Appeal, Exhibit C. The Commonwealth did "not necessarily contest" Dr. Guzzardi's qualifications, but it nevertheless moved to preclude his testimony. Commonwealth's Motion in Limine To Preclude Evidence, at6. It argued that Dr. Guzzardi's testimony was offered solely to cast doubt on Trooper Lowry's credibility. *Id.* On January 9, 2019, the Honorable Tamika Lane granted the Commonwealth's motion to preclude the doctor from testifying at Mr. Brown's trial, citing little more on the record than general agreement with the Commonwealth's position. N.T. 1/9/19, 6-7.

[2] The general impairment level under Pennsylvania law is any BAC reading of at least .08 percent (the standard level for impairment in most states) to not more than .10 percent within two hours after the individual has operated a vehicle. 75 Pa. C.S. § 3802(a). A general impairment may also apply to undetermined BAC levels. *Id.*

SUMMARY OF ARGUMENT

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). With roots in both the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, *id.*, this guarantee embodies the Constitution's commitment to ensuring that the criminally accused may contest their guilt or demonstrate their innocence. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."). Indeed, this Court recently acknowledged that "'[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense.'" *Commonwealth v. Yale*, 249 A.3d 1001, 1012 (Pa. 2021) (quoting *Chambers*, 410 U.S. at 302).

As this Court has also recognized, to help prevent wrongful convictions, trial courts must examine and, when relevant, allow the accused to submit evidence from qualified experts about the science of memory, perception, and recall. *Commonwealth v. Walker*, 92 A.3d 766 (Pa. 2014). While *Walker* involved the admissibility of expert testimony regarding eyewitness *identification* evidence, this Court found that scientific testimony regarding an eyewitness's memory and perception is an appropriate area of expert testimony. *Id*. at 791. In allowing such

expert testimony, this Court made clear that expertise regarding witness memory, recall, and perception is beyond the ken of the average layperson and can assist jurors in evaluating the *reliability*—not the credibility—of eyewitness testimony. *Id*. at 789. Because "juries are generally unaware of [the] deficiencies in human perception and memory" and thus give great weight to eyewitness testimony, experts are critical for juries to understand how environmental factors can affect the eyewitness evidence presented to them. *Id*. at 788 (internal quotation omitted).

Accordingly, courts across the country now routinely allow expert testimony regarding the science of memory, perception, and recall as such science can help a juror understand why a witness who may be confident and adamant that their version of events is true, might nonetheless be mistaken about critical facts. For example, research demonstrates that "highly stressful situations . . . interfere with eyewitness memory." Third Circuit Task Force, *2019 Report of the United States Court of Appeals for the Third Circuit Task Force on Eyewitness Identifications*, 92 Temp. L. Rev. 1, 79 (2019).

To ensure the integrity of jury verdicts and prevent the wrongful conviction of innocent people implicated by potentially unreliable eyewitness testimony, the constitutional right to present a complete defense requires that expert testimony should be admitted in trials where the proffered testimony is relevant, meets the requirements of Pennsylvania Rule of Evidence 702, and will help factfinders

"mak[e] more accurate and just determinations regarding guilt or innocence." *Walker*, 92 A.3d at 780. Courts therefore should allow the defense to admit testimony from qualified experts as it relates to issues of memory and cognition. To the extent there is any concern that, in a particular case, certain aspects of expert testimony might infringe on a jury's province, the appropriate approach is to limit the scope of the testimony to prevent such infringement or, as necessary, issue appropriate jury instructions regarding the distinction between the jury's and the expert's respective roles, rather than preclude the proffered expert testimony in its entirety as the trial court did here.

ARGUMENT

THE CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE INCLUDES THE ABILITY TO PRESENT RELIABLE, RELEVANT, SCIENTIFIC TESTIMONY FROM QUALIFIED EXPERTS ON ISSUES RELATED TO WITNESSES' MEMORY AND PERCEPTION

A. The Right to Present a Complete Defense, Including the Right to Present Expert Testimony, is Clearly Established Under the United States and Pennsylvania Constitutions

The Sixth and Fourteenth Amendments to the United States Constitution guarantee people charged with crimes "a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 320 (2006); *see also Chambers*, 410 U.S. at 294 ("The right of an accused in a criminal trial to due process

is, in essence, the right to a fair opportunity to defend against the State's accusations."); *In re Oliver*, 333 U.S. 257, 273 (1948) ("A person's right to . . . an opportunity to be heard in his defense . . . [is] basic in our system of jurisprudence"). This right is fundamental to our criminal justice system and includes "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary . . . ." *Washington v. Texas*, 388 U.S. 14, 19 (1967).

Culminating with its recent decision in *Yale*, this Court has likewise consistently acknowledged criminal defendants' right to present evidence in support of their defense as fundamental to due process under Article 1, Section 9 of the Pennsylvania Constitution. *Yale*, 249 A.3d at 1002; *see also, e.g.*, *Commonwealth v. Scott*, 436 A.2d 161, 163 (Pa. 1981) ("To deny an accused the opportunity to present relevant and competent evidence in his defense would constitute a violation of his fundamental constitutional right to compulsory process for obtaining witnesses in his favor and to a fair trial."); *Commonwealth v. Walzack*, 360 A.2d 914, 920-21 (Pa. 1976) ("Once it is determined that the proffered evidence was both relevant and competent, due process requires its admission . . . . It is inconsistent with fundamental principles of American jurisprudence to preclude an accused from offering relevant and competent evidence to dispute the charge against him."); *Commonwealth v. Jackson*, 324 A.2d 350, 354-55 (Pa. 1974) ("The right to

compulsory process encompasses the right to meet the prosecution's case with the aid of witnesses . . . which [is] fundamental to a fair trial.").

B. Expert Testimony Involving Eyewitness Memory and Cognition Helps Factfinders Grasp Complex, Counterintuitive Issues about the Reliability of the Eyewitness's Testimony and Does Not Invade the Jury's Province

To effectuate this fundamental, constitutional right to present a complete defense, testimony from qualified experts should be admitted when relevant and when Rule 702's requirements are met. This includes expert testimony in cases involving eyewitness evidence. In 2014, this Court reversed prior precedent that barred expert testimony about the psychological factors that affect eyewitness accuracy, acknowledging at the outset of its historic decision that eyewitness evidence is "arguably the most powerful form of evidence." *Walker*, 92 A.3d at 779.

In *Walker*, this Court acknowledged that while "cross-examination and advocacy in closing argument may be common methods to unearth falsehoods and challenge the *veracity* of a witness, it is less effective in educating the jury with respect to the *fallibility* of eyewitness identification." *Id.* at 786 (emphasis added). Those tools are not a replacement for an expert who can educate the jury about often-counterintuitive science regarding memory and perception so that jurors are less likely to misapprehend the accuracy of eyewitness testimony about critical factual circumstances at issue in trial. *See id.* Simply put, "the reliance of courts on the power of cross-examination, both on its own and as a sufficient substitute for expert

testimony [regarding eyewitness memory and recall], has no support in the literature." Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 Stetson L. Rev. 727, 774 (2007).

Other courts around the country have similarly acknowledged the counterintuitive nature of memory science as it relates to eyewitness evidence. For example, the Oregon Supreme Court recognized that "[b]ecause many of the [factors that impact memory] are either unknown to the average juror or contrary to common assumptions, expert testimony is one method by which the parties can educate the trier of fact concerning [the factors] that can affect the reliability of eyewitness identification." *State v. Lawson*, 291 P.3d 673, 696 (Ore. 2012). Likewise, upon broadly revising its evidentiary rules and jury instructions on eyewitness evidence, the New Jersey Supreme Court found that laypeople generally "do not intuitively understand all of the relevant scientific findings" about the fallibility of eyewitness memory and concluded that "there is a need to promote greater juror understanding of those issues." *State v. Henderson*, 27 A.3d 872, 911 (N.J. 2011).

Here, as noted, the trial court precluded Dr. Guzzardi's testimony based on its view that, *inter alia*, Dr. Guzzardi's testimony would amount to opinion evidence regarding Trooper Lowry's credibility. N.T. 1/9/19, 6-7. Accordingly, the jury did

not hear testimony from an expert about how the Trooper Lowry's blood alcohol content at the time of the incident might have impacted his memory.

While *amici* do not take a position on the ultimate admissibility of Dr. Guzzardi's testimony, what is clear is that the trial court did not properly consider the difference between the reliability of a witness's memory and the separate question of whether the witness's testimony is credible. As eyewitness misidentification cases demonstrate, witnesses can be credible but still inaccurate. An expert can explain the well-established reasons why the jury should carefully consider the accuracy of the eyewitness testimony without offering any opinions regarding the purported eyewitness's subjective belief in his or her truthfulness. Common misconceptions—such as a witness's confidence positively correlating with accuracy[3]—can be corrected through expert witness testimony. As one court aptly explained, "[t]he function of the expert here is not to say to the jury—'you should believe or not believe the eyewitness.'" *United States v. Hines*, 55 F.Supp.2d 62, 72 (D. Mass. 1999). "All that the expert does is provide the jury with more

[3] Current scientific literature consistently demonstrates that the correlation between confidence and accuracy occurs only in limited circumstances and is otherwise weak to nonexistent. *See Lawson*, 291 P.3d at 704-05 (summarizing scientific findings on this factor). Indeed, there is vast consensus among this nation's leading scientists that "eyewitness confidence is malleable and influenced by factors unrelated to accuracy." Saul Kassin, et al., *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, American Psychologist 56(5), 405, 410 (May 2001).

information with which the jury can then make a more informed decision." *Id.* This Court has emphasized that "[e]vidence should be liberally admitted at trial." *Yale*, 249 A.3d at 1023. Careful consideration of the admissibility of expert testimony where liberty is at stake is required by this Court's and the United States Supreme Court's recognition of the constitutional right to present a complete defense, as well as this Court's recognition in *Walker* of the critical role of expert testimony in assisting jurors in understanding issues related to memory and cognition. To the extent that the trial court was concerned that certain aspects of the expert's testimony might infringe on the jury's role in assessing credibility, which it likely would not for the reasons discussed above, consideration should have been given to limiting the scope of the testimony, and/or instructing the jury as to their exclusive role as the factfinders, rather than simply precluding the expert testimony in its entirety.

CONCLUSION

In light of the constitutional right to present a complete defense, trial courts should err in favor of admitting relevant testimony from qualified experts in criminal cases, particularly relating to issues of memory and cognition and put in place appropriate limitations if necessary.

Respectfully submitted,

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Dated: November 24, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Pa. R. App. P. 531(b)(3) and Pa. R. App. P. 2135(d), this is to certify that the foregoing Brief of *Amicus Curiae* the Pennsylvania Innocence Project complies with the word count limit set forth in Rule 531(b)(3). This Brief contains **2,729** words, excluding those sections exempted by Pa. R. App. P. 2135(b).

I further certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: November 24, 2021

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PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing document (Brief of *Amici Curiae*) upon the persons and in the manner indicated below, which satisfies the requirements of Pa. R. App. P. 121 and will within 7 days file paper copies with the Pennsylvania Supreme Court:

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