

IN THE  
**Supreme Court of Pennsylvania**  
No. 26 WAP 2022

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**COMMONWEALTH OF PENNSYLVANIA,**

*Appellee,*

*vs.*

**RICKEY MCGINNIS,**

*Appellant.*

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*On appeal from the judgment of the Superior Court of Pennsylvania in No.16 WDA 2020, affirming the December 4, 2019, judgment of the Court of Common Pleas of Allegheny County in No. CP-02-CR-0011014-2018*

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**BRIEF FOR *AMICI CURIAE* THE INNOCENCE NETWORK  
AND THE PENNSYLVANIA INNOCENCE PROJECT  
IN SUPPORT OF APPELLANT RICKEY MCGINNIS**

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## TABLE OF CONTENTS

I.	Interest of <i>Amici</i> .....	1
II.	Introduction.....	3
III.	Argument.....	5
	A. Scientific studies have demonstrated that people are susceptible to false or mistaken memories .....	7
	B. The admissibility of false memory expert testimony should be decided at the trial court’s discretion .....	11
IV.	Conclusion.....	15

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Barlow v. State</i> , 507 S.E.2d 416 (Ga. 1998) .....	4, 14
<i>Commonwealth v. Delbridge</i> , 855 A.2d 27 (Pa. 2003) .....	14
<i>Commonwealth v. McGinnis</i> , 2021 WL 2652690 (Pa. Super. June 28, 2021) .....	3, 4, 5
<i>Commonwealth v. Walker</i> , 92 A.3d 766 (Pa. 2014) .....	3, 4, 5, 7, 10, 11, 14
<i>Commonwealth v. Yale</i> , 249 A.3d 1001 (Pa. 2021) .....	6
<i>DeLong v. State</i> , 2006 WL 3334061 (Tex. App. Nov. 16, 2006) .....	14
<i>Frye v. United States</i> , 293 F. 1013 (D.C. Cir. 1923) .....	5, 6, 14, 15
<i>Holmes v. South Carolina</i> , 547 U.S. 319 (2006) .....	6
<i>Jenkins v. Commonwealth</i> , 308 S.W.3d 704 (Ky. 2010) .....	4, 14
<i>State v. Black</i> , 437 P.3d 1121 (Ore. 2019) .....	4, 14
<i>State v. Sargent</i> , 738 A.2d 351 (N.H. 1999) .....	4, 14
<i>State v. Speers</i> , 98 P.3d 560 (Ariz. Ct. App. 2004) .....	14

## Rules

Pennsylvania Rule of Appellate Procedure 531 .....	1
Pennsylvania Rule of Evidence 702 .....	5, 14

## Other Authorities

Elizabeth Loftus, <i>Memory Faults and Fixes</i> , ISSUES IN SCIENCE AND TECHNOLOGY 41, 43 (2002) .....	7, 8, 9, 10, 13
Larry Trent Roberts, The National Registry of Exonerations, <a href="https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5614">https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5614</a> .....	11
Mark L. Howe and Lauren M. Knott, <i>The Fallibility of Memory in Judicial Processes: Lessons From the Past and Their Modern Consequences</i> , MEMORY, 23:5, 633-34 (2015) .....	7, 8, 9, 10, 12
Richard A. Wise, Giuseppe Sartori, Svein Magnussen, and Martin A. Safer, <i>An Examination of the Causes and Solutions to Eyewitness Error</i> , FRONTIERS IN PSYCHIATRY, 5:102 (2014) .....	13

## I. Interest of *Amici*

The Innocence Network and the Pennsylvania Innocence Project (“*Amici*”) submit this brief as *amici curiae* under Pennsylvania Rule of Appellate Procedure 531(a) in support of Appellant Rickey McGinnis.<sup>1</sup>

The Innocence Network (the “Network”) is an association of independent organizations dedicated to providing *pro bono* legal and investigative services to incarcerated people for whom evidence discovered post-conviction can provide conclusive proof of innocence. The 71 current members of the Network represent hundreds of people with innocence claims in the 50 states, the District of Columbia, and Puerto Rico, as well as Australia, Argentina, Brazil, Canada, Ireland, Israel, Italy, the Netherlands, the United Kingdom, and Taiwan.<sup>2</sup> The Network

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<sup>1</sup> In accordance with Pennsylvania Rule of Appellate Procedure 531, the *Amici* certify that no party’s counsel authored this brief in whole or in part and no party contributed financially to the preparation and submission of this brief.

<sup>2</sup> The member organizations for *amicus* brief purposes include the Actual Innocence Clinic at the University of Texas School of Law; After Innocence; Alaska Innocence Project; Arizona Justice Project; Boston College Innocence Program; California Innocence Project; Center on Wrongful Convictions; Connecticut Innocence Project/Post-Conviction Unit; Duke Center for Criminal Justice and Professional Responsibility; Exoneration Initiative; George C. Cochran Innocence Project at the University of Mississippi School of Law; Georgia Innocence Project; Hawai’i Innocence Project; Idaho Innocence Project; Illinois Innocence Project; Indiana University McKinney Wrongful Conviction Clinic; Innocence Delaware; Innocence Project; Innocence Project Argentina; Innocence Project at University of Virginia School of Law; Innocence Project Brasil; Innocence Project London; Innocence Project New Orleans; Innocence Project of Florida; Innocence Project of Texas; Italy Innocence Project; Korey Wise Innocence Project; Loyola Law School Project for the Innocent; Manchester Innocence Project; Michigan Innocence Clinic; Mid-Atlantic Innocence Project; Midwest Innocence Project;

and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network advocates for reform designed to enhance the truth-seeking functions of the criminal-justice system to prevent future wrongful convictions.

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.

Due to the nature of their work, the Network and the Pennsylvania Innocence Project have a particular interest in ensuring that judges and jurors use valuable scientific expert testimony in cases that implicate the reliability of a

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Montana Innocence Project; New England Innocence Project; New York Law School Post-Conviction Innocence Clinic; North Carolina Center on Actual Innocence; Northern California Innocence Project; Office of the Ohio Public Defender, Wrongful Conviction Project; Ohio Innocence Project; Oklahoma Innocence Project; Oregon Innocence Project; Osgoode Hall Innocence Project; Proyecto Inocencia de Puerto Rico; Rocky Mountain Innocence Center; Taiwan Innocence Project; Thurgood Marshall School of Law Innocence Project; University of Arizona Innocence Project; University of British Columbia Innocence Project at the Allard School of Law; University of Miami Law Innocence Clinic; Wake Forest University Law School Innocence and Justice Clinic; Washington Innocence Project; West Virginia Innocence Project; and Wisconsin Innocence Project.

witness's perception, memory, cognition, and recall. The admission of such expert testimony, when relevant, promotes due process and reduces the risk of wrongful conviction due to juror misunderstandings and common, yet false, assumptions made about the testimony of witnesses.

## II. Introduction

The issue before the Court is whether a trial court may admit general expert testimony about the science of false memories. Advances in the scientific study of memory have demonstrated that “memory is, by definition, fallible at best and unreliable at worst” because the complex process of encoding, consolidating, and retrieving memories can lead to the creation of entirely false memories – that is, memories of events that never occurred. Mark L. Howe and Lauren M. Knott, *The Fallibility of Memory in Judicial Processes: Lessons From the Past and Their Modern Consequences*, *MEMORY*, 23:5, 633-34 (2015). Given the complexity of memory creation, expert testimony is a critical tool to educate jurors about the underlying science and to dispel any misconceptions jurors may have about how we remember. In fact, in *Commonwealth v. Walker*, 92 A.3d 766, 782-84 (Pa. 2014), this Court recognized the importance of expert testimony in the context of mistaken eyewitness identification, which is based on the same fundamental science about memory and perception as false memories.

Yet, in this case, the trial court appeared to adopt a blanket prohibition on this subject of expert testimony. *Commonwealth v. McGinnis*, 2021 WL 2652690 at \*7 (Pa. Super. June 28, 2021) (“Furthermore, we reject Appellant’s assertion that

expert testimony about false memories is admissible under Section 5920(b)(4).”). The *Amici* respectfully suggest that the fundamental science about memory and perception that the Court accepted in *Walker* is the same science at issue here, and the Court should reach the same conclusion about the admissibility of related expert testimony.

Courts around the country increasingly are recognizing the potential pitfalls of trial outcomes that hinge on a witness’s uncorroborated memory and, accordingly, the importance of allowing expert testimony to educate jurors about the science of memory and perception. As noted above, in *Walker*, this Court reversed the Commonwealth’s previous *per se* ban on eyewitness expert testimony, bringing Pennsylvania in line with the clear trend among courts in other jurisdictions. *See Walker*, 92 A.3d at 782-84 (collecting cases that demonstrate the “clear trend among state and federal courts permitting the admission of eyewitness expert testimony, at the discretion of the trial court”). And because the science of memory and perception underlying eyewitness identification is the same science as is at issue with false memories, several state supreme courts have extended the rationale for allowing eyewitness expert testimony to false-memory testimony. *See, e.g., State v. Black*, 437 P.3d 1121, 1130-31 (Ore. 2019); *Jenkins v. Commonwealth*, 308 S.W.3d 704, 712 (Ky. 2010); *State v. Sargent*, 738 A.2d 351, 354 (N.H. 1999); *Barlow v. State*, 507 S.E.2d 416, 418 (Ga. 1998).

The Superior Court’s apparent adoption of a *per se* ban on false-memory expert testimony runs counter to this trend. *McGinnis*, 2021 WL 2652690 at \*7.

Judge Bowes, in fact, opted to file a concurring opinion rather than to join the majority out of concern “that the Majority’s words may be construed as a blanket prohibition against the admission of false memories testimony under §5920.” *Id.* at \*9. This Court should reject any application of a *per se* ban on false-memory expert testimony for the same reason the Court rejected such a ban in *Walker*. The categorical preclusion of such evidence increases the risk of wrongful conviction. Instead, the Court should leave such expert testimony to the tried and true methods by which the admissibility of other expert testimony is determined: by assessing the qualification of the expert and then by assessing the reliability of that expert’s methodology under Pennsylvania Rule of Evidence 702 and *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923).

### III. Argument

In *Walker*, this Court highlighted the “pressing concern for the legal system and society” presented by mistaken eyewitness identification. *Walker*, 92 A.3d at 780. The concern that failures of memory and perception would lead to mistaken eyewitness identification and wrongful convictions is no less dire in the context of false memories, where a witness might unknowingly testify about events that never occurred. Just as with eyewitness identification, the admission of expert testimony related to false memories is one way to aid jurors “in making more accurate and just determinations regarding guilt or innocence.” *Id.*

Allowing expert testimony about false memories, subject to the requirements of the Pennsylvania Rules of Evidence and the test under *Frye*, serves two critical

purposes. First, by introducing this type of evidence, the defendant is able to exercise his or her constitutionally guaranteed right to a complete, meaningful defense. *Holmes v. South Carolina*, 547 U.S. 319, 320 (2006); *see also Commonwealth v. Yale*, 249 A.3d 1001, 1020 (Pa. 2021) (noting “the need for a defendant to present a complete defense, which is a constitutionally protected right”).<sup>3</sup> Second, and the focus of this brief, expert testimony about the science of memory and perception and the factors that can lead to the creation of false memories equips jurors with the essential knowledge necessary to assess the credibility of witnesses, make a determination as to innocence or guilt, and prevent wrongful convictions.

The science of memory creation is complex and often counterintuitive. The average juror likely will have misconceptions that appropriate expert testimony can dispel. Accordingly, just as it did with eyewitness expert testimony, this Court should adopt a rule that the admission of relevant expert testimony regarding the creation of false memories should be at the trial court’s discretion and governed by the applicable rules of evidence and the *Frye* test.

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<sup>3</sup> The *Amici* acknowledge that the Court’s order granting allowance of appeal does not include “any question of constitutional dimension.” Accordingly, the *Amici* are not presenting a constitutional argument in this brief but note the important due process implications of decisions regarding the admissibility of evidence proffered by a defendant in a criminal case.

**A. Scientific studies have demonstrated that people are susceptible to false or mistaken memories.**

It may be tempting to view memory recall as opening a file on a computer that consists of a fully self-contained image or video recording. But that is not how our brains store memories. “All memory involves reconstruction. We put together pieces of episodes that are not well connected, and we continually make judgments about whether a particular piece belongs in the memory or not.” Elizabeth Loftus, *Memory Faults and Fixes*, ISSUES IN SCIENCE AND TECHNOLOGY 41, 43 (2002).<sup>4</sup> Memories of both adults and children “are fragmentary, contain amnesic gaps, information is often out of order, contain guesses, unconscious inferences and often contain incorrect details.” Howe and Knott, *The Fallibility of Memory in Judicial Processes* at 644. Further, we rarely recognize the potential inaccuracy of our memories because the brain “automatically adds in plausible details, outside of conscious awareness . . . [as] part of the complex memory construction process.” *Id.*

The continual reconstruction of memories makes them susceptible to “post-event information,” that is, “details, ideas, and suggestions that come along after an event has happened.” Loftus, *Memory Faults and Fixes* at 43. This new information integrates with prior experiences to “form a smooth and seamless memory” that results in people having “great difficulty telling which facts came

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<sup>4</sup> Elizabeth Loftus, Ph.D., is a professor at the University of California, Irvine School of Law, and this Court cited to her scholarship in reaching its decision in *Walker*.

from which time.” *Id.* The blending of experiences and information that is central to the brain’s memory reconstruction process not only can distort memories of actual events, but it can also create entirely false memories. *Id.* For example, studies of false memory creation have found people recalling “nonexistent broken glass and tape recorders, a clean-shaven man as having a mustache, straight hair as curly, stop signs as yield signs, hammers as screwdrivers, and even something as large and conspicuous as a barn in a bucolic scene that contained no buildings at all.” Elizabeth F. Loftus, Ph.D. and Jacqueline E. Pickrell, BA, *The Formation of False Memories*, PSYCHIATRIC ANNALS 25:12, 720 (1995).

Research has identified a number of factors that can lead to false memories, particularly in children: (1) reinforcement, (2) repetition of questions, (3) co-witness information, (4) inviting speculation, and (5) introducing new information. Howe and Knott, *The Fallibility of Memory in Judicial Processes* at 637. Reinforcement takes the form of either praising (positive reinforcement) or criticizing (negative reinforcement) a child’s answers to questions. *Id.* at 637-38. For example, an interviewer who believes sexual abuse may have taken place might inadvertently (or even intentionally) praise a child’s answers that conform to that belief or criticize contrary answers. *Id.* at 638. Repetition of questions is another form of negative reinforcement where an interviewer repeats questions to get a different answer from the child. *Id.* Co-witness information serves as a type of peer pressure, in which an interviewer tells the child that other purportedly affected children have opened up about their abuse. *Id.*

Interviewers may invite speculation, principally, by asking children to imagine what happened or to act out what might have taken place with the help of an anatomical doll. *Id.* at 638-39. Imagination, however, “has been a fruitful way to lead people to false memories.” Loftus, *Memory Faults and Fixes* at 44. “An insinuation or assertion that something happened can make someone believe that something happened: a false belief. Imagination supplies details that add substance to the belief. Rehearsal of these details can help to turn the false belief into a memory illusion,” which refers to a false belief that an individual actually appears to recall, as if it happened. *Id.* Finally, asking questions about new information supplied by the interviewer, rather than by the child, can result in the child integrating that information into its memories. Howe and Knott, *The Fallibility of Memory in Judicial Processes* at 639.

The repetition of these interviewing techniques across multiple interviews can further cement the false memory in the child’s mind and compound the potential for inaccuracies. *Id.* “Misinformation not only becomes incorporated into children’s subsequent reports but also tends to increase fabrication rates that do not always directly mirror the content of the misleading information.” *Id.* Consequently, even unintentionally suggestive interviewing techniques could not only lead to the false incorporation of misinformation into a child’s memories, but also the creation of new fabrications whole cloth that do not appear to directly relate to the questions asked by the interviewer.

Although children may be as capable as adults of reliably remembering events, the scientific literature, as discussed above, clearly indicates that, when subjected to suggestive interviewing techniques, there is an unsettling potential that a child's memory, no matter how genuinely believed, may not be based on reality and could form the basis for a wrongful conviction.

Moreover, studies have shown that “it is virtually impossible to tell the difference between a real memory and one that is a product of imagination or some other process.” Loftus, *Memory Faults and Fixes* at 42. To make matters worse, “there is a powerful misconception in society generally that the more details one can recall and the more specific they are, the more likely it is for that memory to be accurate. . . . Research contradicts this, however, and in fact the greater the detail the greater the likelihood of error.” Howe and Knott, *The Fallibility of Memory in Judicial Processes* at 644. To evaluate witness testimony – particularly a child witness's testimony – jurors must understand the science at work; otherwise, their assessment of credibility and truth will be impaired from the start. Given the complexity and often counterintuitive nature of memory creation, educating the jury with expert testimony is critical.

Since *Walker*, we have seen the power of expert testimony in furthering the goal of preventing wrongful convictions in Pennsylvania. For example, Pennsylvania Innocence Project client Larry Trent Roberts was tried and convicted of homicide in Dauphin County in 2007 based on the testimony of three

eyewitnesses.<sup>5</sup> Due to the prior ban on expert testimony regarding eyewitness identifications, Mr. Roberts could not present the jury with information about the science of memory and perception. Mr. Roberts' conviction was later vacated and, at his 2019 retrial, this Court's decision in *Walker* allowed the trial court to exercise its discretion to decide whether to admit expert testimony regarding the eyewitness identifications. The court did so, and Mr. Roberts was acquitted, underscoring the power of providing the jury with the tools to evaluate witness testimony through the lens of science.

**B. The admissibility of false-memory expert testimony should be decided at the trial court's discretion.**

This Court's analysis of eyewitness expert testimony in *Walker* is instructive here, and the Court should apply the same reasoning to expert testimony regarding false memories. In *Walker*, the Court noted that the previous *per se* ban on expert testimony regarding eyewitness identification was based on the view that such testimony would "invade the province of the jury in making credibility determinations[.]" *Walker*, 92 A.3d at 784. The Court rejected this, however, explaining that

[e]xpert testimony on relevant psychological factors which may impact eyewitness identification, however, does not directly speak to whether a particular witness was untrustworthy, or even unreliable, as the expert is not rendering an opinion on whether a specific witness is

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<sup>5</sup> Larry Trent Roberts, The National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5614>.

accurate in his or her identification. Rather, such testimony teaches – it provides jurors with education by which they assess for themselves the witness’s credibility. In light of the demonstrated misconceptions that jurors and other lay persons may possess regarding the infallibility of eyewitness identification, and ideas contrary to “common sense,” such as the correlation between certainty and accuracy, use of expert testimony in appropriate cases will permit jurors to engage in the process of making credibility determinations with full awareness of limitations that eyewitness testimony may present.

*Id.* The Court further explained that cross-examination and closing arguments are not effective ways of educating the jury about the fallibility of eyewitness identification. “If permitting expert testimony on relevant factors impacting eyewitness identification does not go to credibility, but to educating the jury, and if such factors are possibly not known or understood, or even misunderstood, by jurors, then the more effective way of educating the jury is not through the eyewitness him or herself, but through the presentation of such testimony by an expert when appropriate.” *Id.* at 786.

The science underpinning mistaken eyewitness identification is fundamentally the same as the science of false memories—that “memory is, by definition, fallible at best and unreliable at worst.” Howe and Knott, *The Fallibility of Memory in Judicial Processes* at 633-34. The two phenomena, in fact, overlap. For example, in *Young v. State*, the Supreme Court of Alaska reconfigured its test for the admissibility of eyewitness identifications, in part, to account for research showing that “feedback from other witnesses can influence a witness’s memory of an event and that such feedback can cause witnesses to form false memories of details.” *Young*, 374 P.3d 395, 425 (Alaska 2016). Similarly, in *State v. Chen*, the

Supreme Court of New Jersey held that, where there is evidence that an identification was made under suggestive circumstances, trial courts must hold a preliminary hearing to determine the admissibility of the identification because “[c]o-witness feedback may cause a person to form a false memory of details that he or she never actually observed.” *Chen*, 27 A.3d 930, 938 (N.J. 2011). Both mistaken eyewitness identification and false memories demonstrate the brain’s susceptibility to distorting memories or fabricating false memories based on post-event information. Loftus, *Memory Faults and Fixes* at 43 (stating that “post-event information” integrates with earlier memory data to “form a smooth and seamless memory” that makes it difficult to discern truth from fiction); Richard A. Wise, Giuseppe Sartori, Svein Magnussen, and Martin A. Safer, *An Examination of the Causes and Solutions to Eyewitness Error*, FRONTIERS IN PSYCHIATRY, 5:102 (2014) (stating that, similar to the false memories, “post-event information supplied by the police, prosecutors, media, other eyewitnesses, family, and friends can alter not only an eyewitness’s memory of the crime but also the eyewitness’s memory of the perpetrator of the crime”).

The issue with false memories, therefore, similar to eyewitness identification, is not the *credibility* of the witness. Indeed, in most cases the witness truly believes his or her testimony to be true. Rather, the question becomes the *accuracy or reliability* of the testimony.

Just as with eyewitness identification, expert testimony that educates a jury about the circumstances in which memories might contain inaccurate components

or even be entirely fabricated empowers the jury to understand better the facts presented to it and make credibility determinations. Indeed, several state supreme courts in other jurisdictions have concluded that expert testimony about false memories is admissible at the discretion of the trial court. *See, e.g., State v. Black*, 437 P.3d 1121, 1130-31 (Ore. 2019); *Jenkins v. Commonwealth*, 308 S.W.3d 704, 712 (Ky. 2010); *State v. Sargent*, 738 A.2d 351, 354 (N.H. 1999); *Barlow v. State*, 507 S.E.2d 416, 418 (Ga. 1998). Additional state appellate courts have found similarly. *See, e.g., DeLong v. State*, 2006 WL 3334061 (Tex. App. Nov. 16, 2006); *State v. Speers*, 98 P.3d 560, 567 (Ariz. Ct. App. 2004).

As this Court has already held in the context of a child's competence to testify, the potential of false memories, particularly those influenced by suggestive questioning, is "a legitimate question for examination in cases involving complaints of sexual abuse made by young children." *Commonwealth v. Delbridge*, 855 A.2d 27, 39 (Pa. 2003).

While the *Amici* take no position on the propriety of the trial court's ruling prohibiting the admission of Dr. Chambers' testimony in this case, they urge the Court to reject any rule that such testimony is *per se* inadmissible. For the reasons the Court relied on in *Walker*, the *Amici* believe the proper approach is to leave the admissibility question to the tried and true methods by which the admissibility of other expert testimony is determined: by assessing the qualification of the expert and then by assessing the reliability of that expert's methodology under Pennsylvania Rule of Evidence 702 and *Frye*.

#### IV. Conclusion

Expert testimony on the science of memory and perception, and specifically the creation of false memories, equips jurors with the knowledge they need to make just decisions on guilt or innocence and furthers the goal of preventing wrongful convictions. Accordingly, the *Amici* ask the Court to reject the Superior Court's application of a *per se* prohibition on false-memory expert testimony and, instead, adopt a rule that such expert testimony is at the trial court's discretion and subject to the Pennsylvania rules of evidence and *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923).

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

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## **CERTIFICATION OF WORD COUNT**

I certify that this brief includes 4,045 words as calculated with the word-counting feature of Microsoft Word and including the parts of the brief specified in Pennsylvania Rule of Appellate Procedure 2135(a).

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## **PROOF OF SERVICE**

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