No.

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT ANDERSON,
Petitioner,
v.

TERI KENNEDY,
Warden, Pontiac Correctional Center,
Respondent.

Petition for a Writ of Certiorari to the United States District Court for the Northern District of Illinois, Eastern Division

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether this Court's decision in *Holmes v. South Carolina*, 547 U.S. 319 (2006, clearly establishes that a defendant's due process right to present evidence is violated by a state rule which arbitrarily excludes expert testimony on eyewitness identification merely because there is evidence of defendant's guilt apart from the eyewitness identification.

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The order of the Court of Appeals for the Seventh Circuit, denying the certificate of appealability is unpublished. A copy of this order is reproduced in Appendix A. (App. 3). The order of the United States District Court for the Northern District denying the motion for reconsideration is also unpublished and is reproduced in Appendix B. (App. 5). The memorandum opinion and order of the United States District Court for the Northern District of Illinois is cited as *Anderson v. Kennedy*, No. 18 C 4916 (N.D. Ill. Apr. 4, 2019) and reproduced in Appendix C, (App. 8). The opinion of the Illinois Appellate Court for the First District affirming Robert Anderson's conviction is cited as *People v. Anderson,* 2017 IL App (3d) 1222640.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its order on March 19, 2020. This court has jurisdiction under 28 U.S.C. Sec. 1254(1). The United States District Court for the Northern District of Illinois, Eastern Division had jurisdiction over Robert Anderson's

habeas petition under 28 U.S.C. § 2254.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, amend. XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case involved the murders of Robert Lilligren and Moises Reynoso, who both died of multiple gunshot wounds. (R. VI, 162, 211-12). Robert Anderson, who gave no statement to the police and who did not testify at trial, was convicted based upon the identifications of two police eyewitnesses who chased but lost sight of the killer, and based upon other, circumstantial evidence. No confessions or inculpatory statements were introduced.

The Motion in Limine

Prior to trial, the defense moved in limine to introduce the testimony of Dr. Solomon Fulero, a Ph. D. psychologist and expert on eyewitness identification. (C.L.R. II, 429-37). The motion stated that Dr. Fulero would have testified to "common misperceptions regarding eyewitness identifications." He would also have testified to "factors relevant to the present case," including: (1) "confidence is not related to accuracy,"(2) "stress of the presence of a weapon reduces the reliability of identification," (3) "eyewitnesses overestimate time frames," and (4) the "problem of cross-racial identifications." (C.L.R. II, 429).

The trial court denied the motion because he believed there was going to be "strong circumstantial evidence on the route of flight and recovery of gun and positive gunshot residue that support the identification. So the case isn't going to rise or fall on the identifications of the police officers alone." The court also relied upon the fact that the eyewitnesses were police officers who were "trained to observe." (R. III, 13).

The Trial

Sergeant Paul M. Sedlacek testified. (R. V, 109). On March 5, 2003, shortly before midnight, he was working with Officer Jeong Park, in uniform, and in a marked squad car. (R. V, 110-11). At that time, the officers received a call concerning a well being check on the Clark Gas Station attendant at Irving and Sacramento. (R. V, 111).

When the officers arrived at the Gas Station, they both got out of the car. (R. V, 112). As Sedlacek was exiting the car, he heard shots fired from his left, to the west of where he was standing.. There were five or six shots. As Sedlacek looked to his left, he saw a silver vehicle parked in the rear parking lot of the Leader Liquors. (R. V, 113). A person was

standing by the rear passenger's side next to trunk firing into the vehicle. (R. V, 113). The person looped around the back of the trunk, stood next to tire on the driver's side and fired one shot at the driver, who appeared to be trying to get out of the car. (R. V, 113-14). Sedlacek saw the shooter's face at that point, but not clearly enough to make an identification. (R. VI, 9-10, 51-52).

Sedlacek described the shooter as wearing a dark jacket and dark pants. He was 60 to 65 feet away. (R. V, 114). The area was well lit, but his view was obstructed by a chain link fence. (R. V, 114-15).

After the last shot, the shooter began to run in the alley, heading eastbound toward the officers, but on the other side of the chain link fence. The officers ran parallel to his flight path, heading toward an opening in the chain link fence. (R. V, 115). At one the shooter passed within 10 to 12 feet of Sedlacek. The hood on the shooter's face fell back, and Sedlacek got a look at the face for "no more than a second." (R. V, 117). His view of the face was a full frontal view with the hood down. (R. V, 58-59).

Based upon that one second look at the shooter's face, Sedlacek identified Robert

Anderson in open court. Sedlacek admitted that he was "fixated" on the gun in the shooter's gloved right hand. Sedlacek did not see the shooter's left hand. (R. V, 117).

Sedlacek claimed that he recognized the shooter's face but could not remember his name at the time. (R. V, 21). During the chase Sedlacek heard Park describe the shooter over the radio as a male black in all black or all dark clothing. (R. VI, 61-62). Park did not describe the shooter as wearing a black parka. Park did not describe shooter as wearing a black parka with fur around the hood. Park did not say that the shooter had gloves on. (R. VI, 62). Sedlacek did not himself give any additional description of the shooter. (R. VI, 63-64).

Sedlacek and Park chased the shooter, going eastwards. (R. V, 117). As he was chasing the shooter, Sedlacek heard screaming. (R. V, 118). Sedlacek then ran back to the scene of shooting. (R. V. 118-19). Park went a few houses further and then followed Sedlacek back to the scene. (R. V, 61). A white female was screaming and running around. Sedlacek chased her down and brought her back to the scene of the shooting. (R. V, 119). Her name was Roberta Stiles. (R. V, 121, 127). Shortly afterwards, other squad cars arrived on the scene. (R. V, 120).

In the car, Sedlacek saw the two victims. Both were bleeding. One was inside the car, and other person was laying out between the door and the car. (R. V, 120). Sedlacek recognized the victim on the driver's side because he had interacted with him in the past. (R. V, 120). He identified this person from a photograph as Moises Reynoso. (R. V, 123). Sedlacek identified the person in the passenger seat as Robert Lilligren. (R. V, 123).

About fifteen minutes after the shooting, Sedlacek saw Robert Anderson in the back of police vehicle which arrived at the scene of the shooting. (R. V, 121-22). Sedlacek identified Robert Anderson as the shooter. He saw Robert Anderson vomit. (R. V, 122-23). Sedlacek was directed to look at the man in back of the police vehicle by Sergeant Matt Kennedy or Lieutenant Regnier. (R. V, 73-74).

Sedlacek claimed that he knew Robert Anderson as "Nookie." (R. V, 124). On July 1, 2001, in the early morning hours, Sedlacek saw Robert Anderson with Terry Hill and Moises Reynoso in the 7-Eleven parking lot on Irving and California. (R. V, 124).

On cross-examination, Sedlacek testified that he arrested Robert Anderson in July of

2001. (R. VI, 10). The arrest was for the aggravated battery of a man named Edward Binabi. (R. VI, 11). Anderson was charged together with Terry Hill and Moises Reynoso. (R. VI, 13).

Sedlacek testified that during the prior investigation he was within several feet of Robert Anderson for about two hours in a lighted police station. (R. VI, 26-27). He was face to face with Robert Anderson several times during that day. (R. VI, 27). He also testified against Robert Anderson in the trial of the Binabi case held on April 18th, 2002. (R. VI, 28). In that case, he identified Robert Anderson in open court. (R. VI, 29).

Between the time Sedlacek observed the shooter and the showup identification of Robert Anderson, Sedlacek did not report on the radio that the shooter was Robert Anderson, or that the shooter was nicknamed "Nookie." (R. VI, 66). He did not tell either Sergeant Kennedy or Lieutenant Regnier that he knew the shooter, had previously arrested him, and/or had testified against him in court. (R. VI, 74-75).

Sedlacek admitted that in his case report, he did not check the box which would have indicated that he witnessed the offense. (R. VI,

35). He also did not write in the report that the shooter had turned and given Sedlacek a full frontal view of the shooter's face. (R. VI, 67). Nor did he write in the report that he had seen a glove on the right hand of the shooter. (R. VI, 68-69, 77).

In his case report, which was written several hours after the incident, Sedlacek wrote that the shooter was a male black wearing a dark jacket. (R. VI, 69-70). He did not write that the shooter was wearing a parka with a hood and a fur collar. (R. VI, 70-71). He did not write that the shooter was wearing gloves. (R. VI, 71).

Sedlacek was interviewed by detectives at the station. He could not remember if he told the detectives that the shooter was wearing a parka. (R. VI, 80-81). He might have told the detectives the jacket the offender was wearing had a hood. (R. VI, 81-82). He did not think he told them that there was fur around the collar of the hood. (R. VI, 81-82). He could not recall whether he told the detectives that the offender wore gloves. (R. VI, 82).

Officer Jeong Park testified. (R. VI, 105). He was officer Sedlacek's partner when they went to do the well being check at the Clark station on Irving Park by Sacramento. (R. VI,

107). He also heard shots fired, looked to his left, and saw a person shooting into a silver car. (R. VI, 109).

Park testified as the shooter ran away, Park ran parallel to the shooter, along a fence. (R. VI, 110-11). Park claimed that the hood came off the shooter's head and that as the shooter turned around, Park got a good look at the shooter's face from 10 to 15 feet away. The shooter had a gun in his right hand. (R. VI, 111). He was wearing gloves. (R. VI, 113). Park identified the shooter as Robert Anderson. (R. VI, 111-12).

As Park and Sedlacek were chasing the shooter, they heard loud screaming coming the scene of the shooting. They returned to the scene of the shooting. (R. VI, 114). When Park returned to the scene, he attempted to calm the screaming woman, Roberta Stiles. (R. VI, 114-15). He also observed the shooting victims in the car. (R. VI, 115-16). About twenty minutes later, Park identified Robert Anderson, who was sitting in squad car, as the shooter. (R. VI, 116-17). Anderson was vomiting. (R. VI, 117).

Park testified that during the time after he saw the face of the shooter, Sedlacek never said that he knew the shooter. (R. VI, 153-54).

Joseph Castillo testified. (R. VIII, 3). Around midnight, March 6, 2003, he was on patrol, in uniform and in a marked squad car. (R. VIII, 5). At that time he heard a radio transmission by other officers announcing shots fired. (R. VIII, 5-6). He heard officer Park saying over the radio: "Male black in all dark clothing." (R. VIII, 36-37). Then he heard Officer Park say: "731, we lost him in the alley, one block east of the gas station. If someone can secure our car, well, it's the gas station lot, when we heard the victim screaming.' (R. VIII, 37).

Castillo drove towards Leader Liquors, at Sacramento and Irving. (R. VIII, 6-7). He got out of his car on the corner of California and Belle Plaine to search for the wanted offender. (R. VIII, 7-8). As he was walking south down an alley between California and Mozart, he saw a subject running down a gangway. (R. VIII, 8-9). The subject was wearing a black parka type jacket. (R. VIII, 10). Castillo had no doubt that the jacket was a parka. He saw the fur around the collar. (R. VIII, 45).

Castillo called: "Police. Stop." (R. VIII, 9-10). The subject ignored him (R. VIII, 9) and kept running. (R. VIII, 10-12). As a squad car approached the subject, Castillo saw the subject drop something from his right hand. (R. VIII,

12). Castillo placed the subject into custody. (R. VIII, 12).

Castillo recovered some black gloves and a checkbook from the ground. (R. VIII, 12-13). The check book was right next to the gloves. It was not a checkbook in the name of Robert Anderson. (R. VIII, 51-52). It might have been a checkbook in the name of Mark Irwin. (R. VIII, 52).

Castillo claimed he gave the gloves and checkbook to the crime lab personnel but could not remember when and where he did so. (R. VIII, 60-62). Before he turned the items over to the crime lab, he kept then in his right pocket. (R. VIII, 63-64).

Officer Jeffrey Merrifield testified. (R. VIII, 84). He confirmed the identification of Robert Anderson by officers Park (R. VIII, 88-89) and Sedlacek (R. VIII, 89-90). He also testified that after each identification, Anderson vomited. (R. VIII, 89, 90).

Officer Rick Nigro testified. (R. VIII, 95). After searching gangways in the area of the shooter's possible flight path (R. VIII, 102-03), he saw some footprints in the snow on the side of a garage. (R. VIII, 104). On the roof of the garage, he found a semiautomatic black handgun laying

in the snow. (R. VIII, 105-06). An evidence technician recovered the gun. (R. VIII, 106-07).

It was stipulated that crime scene technicians were unable to take videotapes of the crime scene because of blowing snow and freezing temperatures. There were also stipulations to the chain of custody for shell casings found on the ground in the snow around the car where the victims were shot; for bullets recovered from the body of Moises Reynoso; for the gloves and the checkbook and check register in the name of Mark A. Irwin; as well as to the gun, the magazine, and the parka. (R. VIII, 4-8). It was also stipulated that no fingerprints suitable for comparison were found on the gun, the magazine, and the cartridge cases. (R. VIII, 11-12). Kurt Zielenski, a firearms examiner, testified that the cartridge cases and fired bullets were fired by the gun recovered from the garage rooftop. (R. VIII, 28-30).

Mary Wong, an expert on gun shot residue, testified. (R. VIII, 41). She testified that one of the gloves contained four unique particles which indicated that it was either in the vicinity of a discharged firearm or came in contact with primer gunshot residue related items. (R. VIII, 52). The other glove contained particles characteristic of background samples. (R. VIII,

53). She also tested the cuffs of both sleeves of the parka. (R. VIII, 53-56). Both cuffs only contained particles characteristic of background samples. (R. VIII, 56). On cross-examination, Wong admitted that there was no way to determine when the gunshot residue particles were deposited on the gloves. (R. VIII, 68, 71-72).

The jury convicted Robert Anderson of both murders and he was sentenced to life in prison.

Appellate Proceedings

The Illinois Appellate Court affirmed. *People v. Anderson,* 2017 IL App (3d) 1222640. On the issue of the admissibility of the expert's testimony, the court, relying upon the Illinois Supreme Court's decision in *People v. Lerma*, 2016 IL 1184964 (*Lerma* II), held that the expert's testimony was properly excluded because Robert Anderson's conviction "does not rest solely upon the identification made by Officers Sedlacek and Park." The court noted that there was physical and circumstantial evidence outside of the identification testimony. *Anderson*, 2017 IL App (3d) 1222640, ¶ 86.

After the Illinois Supreme Court denied Robert Anderson's petition for leave to appeal, Robert Anderson filed a timely habeas petition,

alleging that the Illinois courts had violated the clearly established rule of *Holmes v. South Carolina*, 547 U.S. 319 (2006) that probative defense evidence may not excluded merely because of the strength of the prosecution's other evidence.

The district court below rejected this argument, holding that *Holmes* was not relevant because the defense evidence excluded was "fact evidence implicating a third party in the crime" and that *Holme*s was "simply not relevant to a decision to exclude expert testimony." (App. 26).

The district court reasoned that because expert testimony is evaluated based upon whether it is "helpful" to a jury, the trial court was free to consider this question "in light of the evidence the trier of fact has to consider." (App. 27).

Apparently equating the "other evidence" the jury had to consider with the strength of the prosecution case, the court went on to hold that the evidence was not "helpful" because some of the factors in the case – distance, obstructed views, time to observe" could be evaluated without the help of expert testimony, the expert testimony was properly excluded. (App. 27-28). The district court did not discuss the other

factors discussed by the expert, such as weapon focus, certainty, and cross racial identification. The district court denied the petition and declined to grant a certificate of appealability. (App. 30-31).

Robert Anderson's motion for reconsideration was denied. (App. 8). The Seventh Circuit also declined to grant a certificate of appealability. (App. 3).

REASONS FOR GRANTING THE PETITION

I.

THIS COURT SHOULD GRANT THE PETITION TO DETERMINE WHETHER THIS COURT'S DECISION IN *HOLMES V. SOUTH* CAROLINA CLEARLY ESTABLISHES THAT A DEFENDANT'S DUE PROCESS RIGHT TO PRESENT A DEFENSE IS VIOLATED WHENEVER RELEVANT DEFENSE EVIDENCE IS EXCLUDED BASED UPON THE STRENGTH OF THE STATE'S CASE RATHER THAN UPON THE MERITS OF THE EVIDENCE

This Court should grant certiorari to determine whether this Court's decision in *Holmes v. South Carolina*, 547 U.S. 319 (2006) clearly establishes that a state court cannot exclude otherwise admissible testimony (in this case expert testimony on eyewitness identification) merely because there is additional evidence of defendant's guilt apart

from the identification. The decision of the district court below which held that this principle was not clearly established, decided this question in way which "conflicts with relevant decisions of this Court." U.S. Sup. Ct. R. 10 (c) on whether federal law is "clearly established" for *habeas* purposes.

Robert Anderson's petition was filed after April 24, 1996, and is therefore governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254. *Woodford v. Garceau*, 538 U.S. 202, 210 (2003). Under AEDPA, this court should grant relief when the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). "[C]learly established Federal law" includes only the Supreme Court's "applicable holdings," not its dicta. See *Carey v. Musladin*, 549 U.S. 70 (2006). There need not be a narrow Supreme Court holding precisely on point, however. A state court can render a decision that is "contrary to" or an "unreasonable application" of

Supreme Court law by "ignoring the fundamental principles established by [that Court's] most relevant precedents." *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007).

A state court's decision is " 'contrary to' federal law if it fails to apply the correct controlling Supreme Court authority or comes to a different conclusion ... [from] a case involving materially indistinguishable facts." *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002) (citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)). A state court's decision is an "unreasonable application" of Supreme Court law if "the state court correctly identifies the governing legal principle ... but unreasonably applies it to the facts of the particular case." *Bell*, 535 U.S. at 694. This Court has held that "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Williams v. Taylor*, 529 U.S. 362, 409 (2000).

Here, the Illinois courts have adopted a rule that the admission of expert identification testimony depends upon whether there is evidence of a defendant's guilt apart from the eyewitness identifications. This rule was

"contrary to" and "unreasonably applied" the due process holding of *Holmes* and this Court's holdings on a defendant's right to present relevant evidence.

The United States Constitution guarantees criminal defendants "a meaningful opportunity" to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) In the context of a criminal trial, an accused's right to present a defense derives from the Sixth Amendment. A central component of a defendant's right to present a defense is the right to offer the testimony of witnesses. *Taylor v. Illinois*, 484 U.S. 400, 409 (1988). Because expert testimony often forms a critical part of a defendant's presentation of evidence, the exclusion of expert testimony may might violate a defendant's Sixth Amendment right to present a defense. *United States v. Vasilakos*, 508 F.3d 401, 410 (6th Cir. 2007).

In *Holmes*, the United States Supreme Court reviewed a due process challenge to a South Carolina rule which precluded a defendant from presenting evidence that another person had committed the crime "'where there is strong evidence of [a defendant's] guilt, especially where there is strong forensic

evidence.' " 547 U.S. at 329, quoting *State v. Holmes*, 361 S.C. 333, 342 (2006). The Court held that South Carolina's rule violated due process:

> "Under this rule, the trial judge does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt. Instead, the critical inquiry concerns the strength of the prosecution's case: If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues."
>
> 547 U.S. at 329.

The Court concluded that the rule lacked any legitimate purpose and was arbitrary because it confused the issue of the probative value of the proffered defense evidence with the probative value of the prosecution's case:

> "Just because the prosecution's evidence, if credited, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case. And where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact and that the South Carolina courts did not purport to make in this case."
>
> 547 U.S. at 330.

These statements are clearly holding, not dicta, and state the fundamental principles involved. Although the evidence in *Holmes* happened to involve evidence of third party culpability, the nature of the evidence had no bearing on the fundamental principle that defense evidence may not be excluded based upon the strength of the prosecution's case.

The Illinois courts, just like the South

Carolina courts, have adopted a rule that expert testimony on eyewitness identification may be excluded where there is "physical and circumstantial evidence outside of the identification testimony" that supports the identification. In this case, the trial judge who excluded the expert's testimony specifically relied upon his perception that there was going to be "strong circumstantial evidence on the route of flight and recovery of gun and positive gunshot residue that support the identification," which meant to him, that the case was not going to "rise or fall on the identifications of the police officers alone."

Relying upon the Illinois Supreme Court's statement in the leading case of *People v. Lerma*, 2016 IL 118496, ¶ 26 that expert testimony is "relevant and appropriate" where eyewitness testimony is the "only evidence of defendant's guilt," the Illinois appellate court below similarly found that the trial court had appropriately excluded the evidence because "defendant's conviction does not rest solely on the identification made by Officers Sedlacek and Park," and therefore, "unlike *Lerma*, there was physical and circumstantial evidence outside of the identification testimony that supported defendant's conviction." *People v. Anderson*,

2017 IL App (1st) 122640, ¶ 86.

The rule adopted by the Illinois courts. just like the rule of evidence adopted by South Carolina, confuses the probative value of the proffered expert testimony with the other circumstantial evidence in the case which, *if credited*, would provide support for a guilty verdict. Illinois' rule directly conflicts with the clearly established rule in *Holmes*, misapplies *Holmes*'s fundamental principles, and therefore merits review by this Court.

The district court below claimed that *Holmes* did not "clearly establish" the Illinois rule violated due process, because *Holmes* only applied to fact witnesses and not to expert witnesses:

> "Any similarity between the *Holmes* principle and the state courts' decisions disappears in the face of the undeniable substantive difference between fact evidence and expert evidence. The relevance of fact evidence is assessed relative to the legal elements of the ultimate question to be decided. Assessment of relevance to a particular legal claim

can generally be made without a broader evidentiary context. Hence, the principle in *Holmes* prohibiting weighing of the relevance of various pieces of evidence. By contrast, the relevance of expert evidence is assessed relative to whether it helps the trier of fact determine a fact in issue that is relevant to the ultimate question. Whether expert evidence helps the trier of fact can only be assessed in light of the other evidence the trier of fact has to consider. Without evidentiary context, "helpfulness" has no meaning."

"Furthermore, factual context is especially relevant to determining the "helpfulness" of expert testimony on the reliability of eyewitness identification in particular. As many courts have noted, lay jurors have personal experience with common circumstances relevant to the reliability of eyewitness identification—e.g., distance, obstructed views, time to observe. Notably, all of these factors were present in Anderson's case. This is in

> contrast to *People v Lerma* where the Illinois Supreme Court affirmed reversal of the trial court's exclusion of expert testimony because in that case the only evidence against the defendant was eyewitness identification that occurred in circumstances that might not cause a lay juror to question its reliability without assistance from expert testimony. Unlike the defendant in Lerma, it was possible for Anderson to make a case for the unreliability of the eyewitness identification through aggressive cross examination and argument, without the need for expert testimony on this issue."

The district court's distinction between fact evidence and expert evidence was fundamentally mistaken and misapplied this Court's holding in *Holmes*.

First, contrary to the district court's conclusion, the admissibility of fact evidence and expert witness evidence *both* depend upon other evidence in the case.

For example, in *Holmes*, the admission

evidence of third party culpability depended upon a showing that such evidence related to the other evidence in the case, such as the facts of the murder and the relationship between the third party suspect and the murder victim. But this consideration of other evidence was analytically distinct from the issue of whether the prosecution had overwhelming evidence of Holmes' culpability – such as the DNA evidence which persuasively linked him to the crime. The first inquiry did not violate due process, and the second inquiry did.

In this case the relevance and probative value of the proffered expert testimony obviously depended on other facts. For example, had the prosecution's case rested solely upon physical evidence and/or a confession, and not on eyewitness identifications, the expert's testimony would obviously be irrelevant and inadmissible. But this question is analytically distinct from the question of whether the admissibility of the expert's testimony should depend upon the strength of the prosecution's case apart from the eyewitness identifications. Just as the admissibility of the third party culpability evidence should not have depended upon the existence of strong DNA evidence, so the admissibility of Dr. Fulero's testimony

should not have depended upon the existence of other circumstantial evidence implicating Robert Anderson.

Second, contrary to the district court's conclusion, the "helpfulness" of expert testimony, while it also depends upon the facts of the case, does not depend upon the *strength* of the state's case.

The district court was correct that the jury may have able, without expert testimony, to evaluate certain weaknesses in the eyewitness identifications, such the distances, the weather conditions, and the opportunity to view. But under the general rule as to the admissibility of expert testimony adopted in *Lerma*, Dr. Fulero's testimony as to other factors bearing upon the reliability of the identification, such as weapon focus, certainty, or cross racial identification should have been admissible, and would have been admissible, apart from the other circumstantial evidence. The weaknesses in the eyewitness evidence had nothing to do with the strength of the rest of the prosecution's evidence, which the Illinois courts unconstitutionally used to exclude Dr. Fulero's testimony.

Moreover, the district court's reasoning

in this case to "helpfulness" conflicts with a decision of the United States Court of Appeals for the District of Columbia Circuit, *See In re L.C.*, 92 A.3d 290, 296–97 (D.C. Cir. 2014)(in light of *Holmes*, trial judge cannot exclude expert testimony as "uphelpful based on the perceived strength of the opponent's evidence").

Therefore, this court should grant the petition for writ of certiorari.

II:

THE PETITION RAISES AN ISSUE OF NATIONWIDE IMPORTANCE, INVOLVING WHETHER CONSISTENT WITH HOLMES, STATES MAY ARBITRARILY EXCLUDE EXPERT TESTIMONY AS TO THE RELIABLE OF EYEWITNESS IDENTIFICATIONS BASED UPON THE STRENGTH OF THE PROSECUTION CASE, AN ISSUE UPON WHICH THE COURTS ARE CURRENTLY SPLIT

This court should also grant the petition for writ of certiorari because the decision of the the Seventh Circuit endorsing the district court below conflicts with "a decision of another court of appeals on the same important matter" and has "conflicted with a decision by a state court of last resort" U.S. S. Ct. Rule 10(a). Moreover, the issue presented is also of nationwide importance because of the salience of expert eyewitness identification testimony and its impact upon wrongful convictions.

There is a major, deep, and widening split among state and federal courts as to whether the

admissibility of expert witness testimony should depend upon the strength of the prosecution's case. The Illinois "other evidence" rule is followed, with some variations, in other jurisdictions which admit expert testimony on eyewitness identification. See, e.g., *United States v. Moore*, 786 F.2d 1308, 1313 (5th Cir. 1986)(expert testimony admissible only in a case in which the "sole testimony is casual eyewitness identification"); *People v. McDonald*, 37 Cal. 3d 351, 377, 690 P.2d 709, 727 (1984)(expert testimony should be admissible where "eyewitness identification" of the defendant is a "key element" of the prosecution's case but is not "substantially corroborated by evidence giving it independent reliability"); *State v. Wright*, 147 Idaho 150, 158, 206 P.3d 856, 864 (Ct. App. 2009)(expert testimony should be admitted where eyewitness identification of the defendant is a "key element" of the prosecution's case but is not "substantially corroborated by evidence giving it independent reliability"); *People v. Young*, 7 N.Y.3d 40, 46, 850 N.E.2d 623, 627 (2006)(excluding expert testimony because corroborating evidence significantly diminished the importance of the proffered expert testimony). This rule has been described as the rule of "limited admissibility." *McMullen v. State*, 714 So. 2d 368, 371 (Fla.

1998)(rejecting "limited admissibility" in favor of a general abuse of discretion standard).

Other jurisdictions admit expert testimony even where there is evidence corroborating eyewitness identification. See, e.g, *State v. Guilbert*, 306 Conn. 218, 263, 49 A.3d 705, 738 (2012)("we do not believe that a defendant should be precluded from presenting such testimony merely because the state has presented other evidence of guilt"); *McMullen v. State*, 714 So. 2d 368, 371 (Fla. 1998)(rejecting "limited admissibility" in favor of a general abuse of discretion standard); *Com. v. Christie*, 98 S.W.3d 485, 488 (Ky. 2002)(adopting abuse of discretion standard and rejecting rule that it is only an abuse of discretion to exclude testimony where there is no substantial evidence corroborating the eyewitness identification); *Bomas v. State*, 412 Md. 392, 419, 987 A.2d 98, 114 (2010)(expert testimony may be admissible whether the prosecution's case "rests solely on eyewitness identification or not"); *State v. Henderson*, 208 N.J. 208, 297, 27 A.3d 872, 925 (2011) *holding modified by State v. Chen*, 208 N.J. 307, 27 A.3d 930 (2011)(expert testimony admissible if usual criteria for admission are met); *United States v. Brien*, 59 F.3d 274, 277 (1st Cir. 1995)(court unwilling to adopt blanket

rule that testimony will be admitted or excluded).

But, more importantly, the smaller number of courts which have considered whether *Holmes* means that a court denies a defendant due process where expert testimony on eyewitness identification is excluded based on corroborative evidence, are also split. Some courts have concluded that *Holmes* precludes exclusion of expert testimony on this basis, and some have not. *Compare In re L.C.*, 92 A.3d 290, 296–97 (D.C. Cir. 2014)(in light of *Holmes*, trial judge cannot exclude expert testimony as "uphelpful based on the perceived strength of the opponent's evidence"); *State v. Guilbert*, 306 Conn. 218, 263, n. 44 (noting that it is arguable that excluding expert testimony because of corroborative evidence might deprive of a defendant of his right to a meaningful opportunity to present a complete defense under *Holmes*); *with People v. Goodwillie*, 147 Cal. App. 4th 695, 730, 54 Cal. Rptr. 3d 601, 629 (2007)(holding that *Holmes* does not apply to the California limited admissibility rule because the defendant is not precluded from presenting his defense of misidentification, whereas the defendant in *Holmes* was precluded from presenting the defense of third party

culpability). *Cf.* *Ferensic v. Birkett*, 501 F.3d 469, 478 (6th Cir. 2007)(precluding eyewitness expert from testifying deprived petitioner of his constitutional right to present a defense).

This issue is also of nationwide importance because this Court, like others, has long been cognizant of the importance and the fallibility of eyewitness identification. *See*, e.g., *Perry v. New Hampshire,* 565 U.S. 228 (2012) ("[w]e do not doubt either the importance or the fallibility of eyewitness identifications"); *United States v. Wade,* 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. [United States Supreme Court] Justice [Felix] Frankfurter once said: 'What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure.' "); see also *Perry v. New Hampshire, supra*, at 730–31 (Sotomayor, J., dissenting) ("[the United States Supreme] Court has long recognized that eyewitness

identifications' unique confluence of features—their unreliability, susceptibility to suggestion, powerful impact on the jury, and resistance to the ordinary tests of the adversarial process—can undermine the fairness of a trial"); *Watkins v. Sowders,* 449 U.S. 341, 352, (1981) (Brennan, J., dissenting) (" '[Eyewitness] testimony is likely to be believed by jurors, especially when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all. All the evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says "That's the one!" ' "); *Kampshoff v. Smith,* 698 F.2d 581, 585 (2d Cir.1983) ("There can be no reasonable doubt that inaccurate eyewitness testimony may be one of the most prejudicial features of a criminal trial. Juries, naturally desirous to punish a vicious crime, may well be unschooled in the effects that the subtle compound of suggestion, anxiety, and forgetfulness in the face of the need to recall often has on witnesses. Accordingly, doubts over the strength of the evidence of a defendant's guilt may be resolved on the basis of the eyewitness' seeming certainty when he points to the defendant and exclaims with

conviction that veils all doubt, '[T]hat's the man!' "); *State v. Ledbetter,* 275 Conn. 534, 577, 881 A.2d 290 (2005) ("courts are not blind to the inherent risks of relying on eyewitness identification"), *cert. denied*, 547 U.S. 1082 (2006); *State v. Tatum,* 219 Conn. 721, 733, 595 A.2d 322 (1991) ("[t]he dangers of misidentification are well known and have been widely recognized by this court and other courts throughout the United States"); *State v. Wright,* 147 Idaho 150, 157, 206 P.3d 856 (App.2009) ("[i]n recent years, extensive studies have supported a conclusion that eyewitness misidentification is the single greatest source of wrongful convictions in the United States").

Moreover, it has been increasingly recognized in the scientific literature that mistaken eyewitness identification is the leading cause of wrongful convictions in the United States. See, e.g., *Eyewitness Identification Task Force, Report to the Judiciary Committee of the Connecticut General Assembly* (February 8, 2012) p. 4 ("Mistaken eyewitness identification is the leading cause of wrongful convictions in the United States. It is now undisputed that nationwide, within the past [fifteen] years, 289 persons convicted of serious crimes—mainly murder and sexual assault—have been

exonerated of those crimes by DNA evidence. More than 75 percent of those convictions rested, in significant part, on positive, but false, eyewitness identification evidence. These figures do not include, of course, the many convictions for crimes that did not involve DNA evidence; e.g., the drive-by shootings, the street muggings, the convenience store robberies, and the homicides and sexual assaults for which no DNA evidence may be available."); see also S. Gross et al., "Exonerations in the United States 1989 Through 2003," 95 J.Crim. L. & Criminology 523, 542 (2005) (citing study demonstrating that 64 percent of wrongful convictions involved at least one erroneous eyewitness identification); J. McMurtrie, "The Role of the Social Sciences in Preventing Wrongful Convictions," 42 Am.Crim. L.Rev. 1271, 1275 n. 17 (2005) (citing to study revealing that erroneous identifications have accounted for up to 86 percent of convictions of persons ultimately exonerated by DNA testing); S. Thompson, "Eyewitness Identifications and State Courts as Guardians Against Wrongful Conviction," 7 Ohio St. J. Crim. L. 603, 634 (2010) ("[m]istaken identification continues to present a serious danger of convicting innocent persons, especially in violent crime cases, and meanwhile the guilty perpetrators remain at large unbeknownst to the public"); G. Wells et

al., supra, at 22 Law & Hum. Behav. 605 ("[i]n addition to the experimental literature, cases of proven wrongful convictions of innocent people have consistently shown that mistaken eyewitness identification is responsible for more of these wrongful convictions than all other causes combined").

The scientific causes of mistaken eyewitness identification have become increasingly well known. See, e.g., S. Clark, "A Re-examination of the Effects of Biased Lineup Instructions in Eyewitness Identification," 29 Law & Hum. Behav. 395, 395–96 (2005); K. Deffenbacher et al., "Forgetting the Once–Seen Face: Estimating the Strength of an Eyewitness's Memory Representation," 14 J. Experimental Psychol.: Applied 139,147–48 (2008); K. Deffenbacher et al., "Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference," 30 Law & Hum. Behav. 287,306 (2006); K. Deffenbacher et al., "A Meta–Analytic Review of the Effects of High Stress on Eyewitness Memory," 28 Law & Hum. Behav. 687, 699–704 (2004); A. Douglass & N. Steblay, "Memory Distortion in Eyewitnesses: A Meta–Analysis of the Post–Identification Feedback Effect," 20 Applied Cognitive Psychol.

859, 864–65 (2006); S. Kassin et al., "On the 'General Acceptance' of Eyewitness Testimony Research: A New Survey of the Experts," 56 Am. Psychologist 405, 405–406 (2001); J. Pozzulo & R. Lindsay, "Identification Accuracy of Children Versus Adults: A Meta–Analysis," 22 Law & Hum. Behav. 549, 549–50 (1998); N. Steblay et al., "Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta–Analytic Comparison," 27 Law & Hum. Behav. 523, 535–37 (2003); N. Steblay et al., "Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta–Analytic Comparison," 25 Law & Hum. Behav. 459, 464 (2001); N. Steblay, "Social Influence in Eyewitness Recall: A Meta–Analytic Review of Lineup Instruction Effects," 21 Law & Hum. Behav. 283, 284, 294–96 (1997); N. Steblay, "A Meta–Analytic Review of the Weapon Focus Effect," 16 Law & Hum. Behav. 413, 413, 420–22 (1992).

Scientific findings as to the weaknesses of eyewitness identification which have now generally been accepted by courts include: (1) there is at best a weak correlation between a witness' confidence in his or her identification and its accuracy, *United States v. Williams,* 522 F.3d 809, 811 (7th Cir.2008); *United States v.*

Brownlee, 454 F.3d 131, 142 n. 9, 144 (3d Cir.2006); *United States v. Stevens,* 935 F.2d 1380, 1400 (3d Cir.1991); *United States v. Moore,* 786 F.2d 1308, 1312 (5th Cir.1986); *People v. McDonald,* 37 Cal.3d 351, 369, 690 P.2d 709, 208 Cal.Rptr. 236 (1984), overruled in part on other grounds by *People v. Mendoza,* 23 Cal.4th 896, 4 P.3d 265, 98 Cal.Rptr.2d 431 (2000); *Johnson v. State,* 272 Ga. 254, 256 n. 2, 526 S.E.2d 549 (2000); *People v. Young,* 7 N.Y.3d 40, 43, 850 N.E.2d 623, 817 N.Y.S.2d 576 (2006); see also *State v. Ledbetter,* 275 Conn. 534, 576, 881 A.2d 290 (2005) *cert. denied*, 547 U.S. 1082 (2006), (2) the reliability of an identification can be diminished by a witness' focus on a weapon, *United States v. Brownlee,* 454 F.3d 131, 136–37 (3d Cir. 2006); *United States v. Smith,* 736 F.2d 1103, 1106 (6th Cir.), cert. denied, 469 U.S. 868 (1984); *United States v. Lester,* 254 F.Supp.2d 602, 612 (E.D.Va.2003); *People v. Cornwell,* 37 Cal.4th 50, 78, 80, 117 P.3d 622, 33 Cal.Rptr.3d 1 (2005), overruled in part on other grounds by *People v. Doolin,* 45 Cal.4th 390, 198 P.3d 11, 87 Cal.Rptr.3d 209 (2009); *Benn v. United States,* 978 A.2d 1257, 1271 (D.C.2009); *Commonwealth v. Christie,* 98 S.W.3d 485, 490 (Ky.2002), (3) high stress at the time of observation may render a witness less able to retain an accurate perception and

memory of the observed events, *United States v. Downing,* 753 F.2d 1224, 1231 (3d Cir.1985); *United States v. Smith,* 621 F.Supp.2d 1207, 1216 (M.D.Ala.2009); *State v. Chapple,* 135 Ariz. 281, 294, 660 P.2d 1208 (1983); *Brodes v. State,* 279 Ga. 435, 438, 614 S.E.2d 766 (2005); *People v. Young,* 7 N.Y.3d 40, 43, 850 N.E.2d 623, 817 N.Y.S.2d 576 (2006); *State v. Bradley,* 181 Ohio App.3d 40, 44, 907 N.E.2d 1205, appeal denied, 122 Ohio St.3d 1480, 910 N.E.2d 478 (2009); and (4) cross-racial identifications are considerably less accurate than same race identifications, *United States v. Rodriguez–Felix,* 450 F.3d 1117, 1124 n. 8 (10th Cir.), *cert. denied*, 549 U.S. 968 (2006); *United States v. Harris,* 995 F.2d 532, 535 (4th Cir.1993); *United States v. Smith,* 621 F.Supp.2d 1207, 1215 (M.D.Ala.2009); *United States v. Graves,* 465 F.Supp.2d 450, 456 (E.D.Pa.2006); *United States v. Lester,* 254 F.Supp.2d 602, 612 (E.D.Va.2003); *People v. McDonald,* 37 Cal.3d 351, 368, 690 P.2d 709, 208 Cal.Rptr. 236 (1984), *overruled in part on other grounds by People v. Mendoza,* 23 Cal.4th 896, 4 P.3d 265, 98 Cal.Rptr.2d 431 (2000); *State v. Copeland,* 226 S.W.3d 287, 302 (Tenn.2007).

And just as courts have increasingly come to the conclusion that the mistaken identifications are the leading cause of wrongful

convictions, there is an equally growing consensus that expert testimony on the causes of mistaken identification, is, in part, the cure. See, *Ferensic v. Birkett,* 501 F.3d 469, 482 (6th Cir.2007) ("expert testimony on eyewitness identifications ... is now universally recognized as scientifically valid and of aid [to] the trier of fact for admissibility purposes" [internal quotation marks omitted]); *United States v. Smithers,* 212 F.3d 306, 313 (6th Cir.2000) (noting that "the science of eyewitness perception has achieved the level of exactness, methodology and reliability of any psychological research" [internal quotation marks omitted]); *United States v. Moore,* 786 F.2d 1308, 1312 (5th Cir.1986) ("This [c]ourt accepts the modern conclusion that the admission of expert testimony regarding eyewitness identifications is proper.... We cannot say [that] such scientific data [are] inadequate or contradictory. The scientific validity of the studies confirming the many weaknesses of eyewitness identification cannot be seriously questioned at this point." [Internal quotation marks omitted.]); *United States v. Downing,* 753 F.2d 1224, 1242 (3d Cir.1985) (noting "the proliferation of empirical research demonstrating the pitfalls of eyewitness identification" and that "the consistency of the results of these studies is

impressive" [internal quotation marks omitted]); *United States v. Feliciano,* United States District Court, Docket No. CR–08–0932–01 PHX–DGC, 2009 WL 3748588 (D.Ariz. November 5, 2009) ("[t]he degree of acceptance [of the scientific data on the reliability of eyewitness identifications] within the scientific community ... is substantial"); *People v. McDonald,* 37 Cal.3d 351, 364–65, 690 P.2d 709, 208 Cal.Rptr. 236 (1984) ("[E]mpirical studies of the psychological factors affecting eyewitness identification have proliferated, and reports of their results have appeared at an ever-accelerating pace in the professional literature of the behavioral and social sciences.... The consistency of the results of these studies is impressive, and the courts can no longer remain oblivious to their implications for the administration of justice." [Citations omitted.]), overruled in part on other grounds by *People v. Mendoza,* 23 Cal.4th 896, 4 P.3d 265, 98 Cal.Rptr.2d 431 (2000); *Brodes v. State,* 279 Ga. 435, 440–41, 614 S.E.2d 766 (2005) (scientific validity of research studies concerning unreliability of eyewitness identifications is well established); *State v. Henderson,* 208 N.J. 208, 218, 27 A.3d 872 (2011) (noting that, "[f]rom social science research to the review of actual police lineups, from laboratory experiments to

DNA exonerations, [scientific research and studies demonstrate] that the possibility of mistaken identification is real," that many studies reveal "a troubling lack of reliability in eyewitness identifications," and that "[t]hat evidence offers convincing proof that the current test for evaluating the trustworthiness of eyewitness identifications should be revised"); *People v. LeGrand,* 8 N.Y.3d 449, 455, 867 N.E.2d 374, 835 N.Y.S.2d 523 (2007) ("[E]xpert psychological testimony on eyewitness identification [is] sufficiently reliable to be admitted, and the vast majority of academic commentators have urged its acceptance.... [P]sychological research data [are] by now abundant, and the findings based [on the data] concerning cognitive factors that may affect identification are quite uniform and well documented...." [Citation omitted; internal quotation marks omitted.]); *State v. Copeland,* 226 S.W.3d 287, 299 (Tenn.2007) ("[s]cientifically tested studies, subject to peer review, have identified legitimate areas of concern" in area of eyewitness identifications); *Tillman v. State,* 354 S.W.3d 425, 441 (Tex.Crim.App.2011) ("[E]yewitness identification has continued to be troublesome and controversial as the outside world and modern science have cast doubt on this crucial

piece of evidence.... [A] vast body of scientific research about human memory has emerged. That body of work casts doubt on some commonly held views relating to memory...." [Internal quotation marks omitted.]); *State v. Clopten,* 223 P.3d 1103, 1108 (Utah 2009) ("empirical research has convincingly established that expert testimony is necessary in many cases to explain the possibility of mistaken eyewitness identification"); *State v. Dubose,* 285 Wis.2d 143, 162, 699 N.W.2d 582 (2005) ("[o]ver the last decade, there have been extensive studies on the issue of identification evidence").

Several of these issues, extremely pertinent to the facts of petitioner's case, would have been addressed by Dr. Fulero's excluded testimony. In particular, Dr. Fulero would have testified to the importance of "weapons focus"—a salient issue in view of the officers' admission that they identified petitioner based upon a one second view of his face at a time when their attention was focused upon the gun in his hand. Moreover, Dr. Fulero would have also testified as to the unreliability of cross-racial identifications in a case where two non-black police officers were attempting to identify a black suspect. Finally, he would have testified that certainty has only a very weak correlation with accuracy.

It should also be noted, although it is not dispositive, that the corroborative evidence relied upon by the courts below was relatively weak, consisting of petitioner's presence on the "flight path," the discovery of a weapon along the flight path, and gunshot residue evidence which was inconsistent and strongly disputed. Robert Anderson gave no statement, and no other witnesses or physical evidence corroborated the disputed identifications.

Robert Anderson is not asking this Court to grant the petition to review the question of whether due process requires the admission of expert testimony on eyewitness identification in all cases. Robert Anderson is asking the Court to grant the petition to review the question of whether due process permits a court arbitrarily to exclude otherwise relevant and probative defense evidence merely because the prosecution has additional evidence of guilt. If courts can limit expert testimony to the small minority of eyewitness identification cases in which the only evidence against a defendant consists of eyewitnesses, the dangers of wrongful conviction will not substantially decrease.

Therefore, this court should grant the

petition for certiorari.

III:

IN THE ALTERNATIVE, THIS COURT SHOULD GRANT THE PETITION FOR LEAVE TO APPEAL UNDER ITS SUPERVISORY POWER , BUT REMAND TO THE SEVENTH CIRCUIT WITH INSTRUCTIONS TO GRANT A CERTIFICATE OF APPEALABILITY

In the alternative, this court should grant the petition for leave to appeal and remand with a supervisory order to the Seventh Circuit to grant a certificate of appealability. By denying a certificate of appealability the Seventh Circuit "sanctioned such a departure by a lower court as to call for an exercise of the Court's supervisory power." U.S. S. Ct. Rule 10(a).

A habeas petitioner is entitled to a Certificate of Appealability where, as here, he has made a substantial showing of the denial of constitutional right. 28 U.S.C. § 2253 (c)(2). Specifically, a petitioner must show that "reasonable jurists could debate (or for that matter agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v.*

McDaniel, 529 U.S. 473, 484 (2000) (quotations and citations omitted); see also *Arrendondo v. Huibregtse*, 542 F.3d 1155, 1165 (7th Cir. 2008); *Wilson v. O'Leary*, 895 F.2d 378,381 (7th Cir. 1990) (discussing the Certificate of Appealability's predecessor, the Certificate of Probable Cause To Appeal under § 2254 prior to the 1996 Anti-Terrorism and Effective Death Penalty amendments). Bases upon which Certificates of Appealability have been issued include: (1) the District Court decided novel, complex or substantial issues when adjudicating a claim, *Houston v. Lack*, 487 U.S. 266, 269 (1988) (question of first impression in District); *Julius v. Jones*, 875 F.2d 1520, 1525-26 (11th Cir.) (state courts refused to reach merits of Brady claim); (2) the legal or factual rationale for the District Court's ruling is unclear, see *Barefoot v. Estelle*, 463 U.S. 880, 894 n.4 (1983); (3) proper adjudication of the claim may require additional evidentiary development, see *Fleming v. Kemp*, 794 F.2d 1478 (11th Cir. 1986), *Smith v. Wainwright*, 737 F.2d 1036, 1037 (11th Cir. 1984) (certificate granted because District Court "refused to hold an evidentiary hearing to develop the true factual setting in which ... claim must be judged"); and (4) a reasonable doubt exists to whether the district court fully and fairly adjudicated the matter

given its actions and that of the State. 2-35 Fed. Habeas Prac. & Proc. § 25.4.

In this case, for the reasons given in Points I and II, reasonable jurists could certainly differ (or more likely would agree) that *Holmes* clearly established a right to have the admissibility of defense evidence considered without reference to the strength of the state's case. Moreover, the District of Columbia Circuit, which is surely composed of reasonable jurists, agrees that *Holmes* precludes the exclusion of expert testimony based upon the strength of the prosecution case. See *In re L.C.*, 92 A.3d 290, 296–97 (D.C. Cir. 2014).

Therefore this court should grant the petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT ANDERSON

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 19-2329

ROBERT ANDERSON,
PETITIONER-APPELLANT
v.
TERI KENNEDY,
RESPONDENT-APPELLEE

[March 19. 2020]

Before

MICHAEL S. KANNE, Circuit Judge
DIANE S. SYKES, Circuit Judge

Appeal from the United States District Court
for the Northern District of Illinois, Eastern
Division

No. 18 C 4916

Thomas M. Durkin,

Judge

ORDER

Robert Anderson has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a ertificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 18 C 4916

ROBERT ANDERSON,
PETITIONER,
v.
TERI KENNEDY,
Warden, Pontiac Correctional Center,
RESPONDENT

[June 13. 2019]

Judge Thomas M. Durkin

ORDER

Robert Anderson has filed a motion to reconsider the Court's denial of his petition for habeas corpus and a certificate of appealability. R. 14. That motion is denied.

Anderson argues that the Court "made a manifest error of law by ignoring and omitting all reference to *Kubsch v. Neal*, 838 F.3d 845, 858 (7th Cir. 2016) (en banc), which was cited by both parties and extensively discuss[ed] in [Anderson's] reply." R. 14 at 2. According to Anderson, the Court should "grant the motion for reconsideration to consider the effect of the Kubsch factors on the issue in this case and whether the state court's action violated the fundamental principles *Kubsch* identified in [the Supreme Court cases of] *Chambers*, *Green*, *Crane*, *Rock*, and *Holmes*." Id. at 7.

The line of cases discussed in *Kubsch* established a criminal defendant's right to present evidence "essential" to "a defense." 838 F.3d at 858 ("the proffered evidence must be essential to the defendant's ability to present a defense"). The Seventh Circuit analyzed this line of cases and distilled "lessons" for applying that right. Id.

Although the Court did not expressly discuss *Kubsch i*n denying Anderson's petition, the Court did not ignore it. Indeed, one of the cases underlying Kubsch was *Holmes v. South Carolina*, which formed the primary basis of Anderson's petition and which the Court discussed in detail. See R. 12 (*Anderson v.*

Kennedy, 2019 WL 1489123, at *1 (N.D. Ill. Apr. 4, 2019)). In addressing *Holmes*, the Court held that the right established by the line of cases summarized in *Kubsch* was not applicable in this case because that line of cases addressed exclusion of fact evidence, whereas Anderson's petition concerned the exclusion of expert testimony. Agreeing with decisions of the Ninth and Sixth Circuits (as well as at least one district court), this Court held that *Holmes* and the other *Kubsch* cases do not clearly establish a right to present expert testimony on eyewitness identification. See R. 12 at 12-13 (citing *Schroeder v. Premo*, 712 Fed. App'x 634, 636 (9th Cir. 2017); *Thomas v. Heidle*, 615 Fed. App'x 271, 282 (6th Cir. 2015); *Stroud v. Brewer,* 2018 WL 3417326 (E.D. Mich. July 13, 2018)). And since only a clearly established constitutional right can be the basis to grant a habeas petition, the Court denied Anderson's petition. In light of that holding, it was necessary for the Court to apply the *Kubsch* factors.

Therefore, Anderson's motion for reconsideration because the Court did not apply the *Kubsch* factors is denied.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 18 C 4916

ROBERT ANDERSON,
PETITIONER,
v.
TERI KENNEDY,
Warden, Pontiac Correctional Center,
RESPONDENT

[June 13. 2019]

Judge Thomas M. Durkin

MEMORANDUM OPINION AND ORDER

A jury found Robert Anderson guilty of four counts of first-degree murder. He is serving a life

sentence at the Pontiac Correctional Center in Illinois, in the custody of Warden Teri Kennedy.

Anderson, represented by counsel, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Warden answered the petition seeking its dismissal. R. 9. For the following reasons, Anderson's petition is denied and the Court declines to issue a certificate of appealability.

Background

Moises Reynoso and Robert Lilligren were shot and killed just after midnight on March 6, 2003. By chance at the time of the shooting, two police officers were across the street about 60-65 feet away. When the officers heard the initial shots, they looked up and saw the final shots. The shooter then ran towards the officers, but the officers were separated from the shooter by a chain-link fence. The shooter's hood fell back from his head as he ran past the officers, and they were momentarily able to see his face from about 10-15 feet away. They also saw that the shooter was wearing gloves and holding a gun. One officer recognized the shooter but could not immediately remember his name. It was lightly

snowing at the time. See R. 10-9 at 138 (XXXXXX-138:6-7) (first officer testimony); R. 10-10 at 108 (YYYYY-108:11) (second officer testimony).

The officers eventually found a hole in the fence and chased the shooter until he was still about feet ahead of one officer and 25-30 feet ahead of the other. At that point, the officers heard screaming (which proved to be a friend of the victims) causing them to turn and head back to the scene of the shooting. One officer broadcast a description of the shooter over the police radio:

"male black, all black—or all dark clothing."

See People v. Anderson, 72 N.E.3d 726, 732 (Ill. App. Ct. 1st Dist. 2017). The Illinois appellate court noted that Anderson "admits on appeal that he is of 'African-American ancestry' but appears to be 'Caucasian or Hispanic.'" Id. at 742.

Four minutes later, Anderson was stopped by other officers several blocks from the scene of

the shooting. The arresting officer also retrieved a pair of gloves he saw Anderson drop. Approximately 15 minutes later, both officers who initially gave chase identified Anderson as the shooter as he sat in a police car. During trial, one of the officers testified that he later remembered he had arrested Anderson about 18 months prior. In that instance, the officer was face to face with Anderson several times for about two hours in a well-lit police station.

Later that night, another officer attempted to retrace the shooter's likely path from the scene of the shooting to where Anderson was arrested. Following foot prints in the snow, that officer discovered a gun on the roof of a garage. Forensic testing matched the gun to the bullets found at the scene of the shooting. There were no fingerprints on the gun or bullet casings. One of Anderson's gloves tested positive for gunshot residue, but samples taken from his coat sleeves did not.

Reynoso's sister testified that he used to be friends with Anderson but they had stopped spending time together. Nevertheless, the sister

testified, Anderson continued to come looking for Reynoso, and Reynoso avoided him, one time asking the sister to tell Anderson that Reynoso wasn't home.

The jury convicted Anderson on the basis of this evidence. Prior to trial, Anderson moved to introduce expert testimony, supported by a brief, see R. 10-2 at 181-88, and oral argument, see R. 10-7 at 95-109. In his brief, Anderson argued that his expert would testify to the following:

(1) Common misperceptions regarding eyewitness identifications, including the following factors relevant to the present case: confidence is not related to accuracy, stress of the presence of a weapon reduces the reliability of identification, eyewitnesses overestimate time frames, detail salience (unusual details grab attention but detract overall), the problem of cross racial identifications, the effect of time on the reliability of identifications and the forgetting curve, the impact of partial disguising features such as a hat covering hair, and global

versus detailed eight or build versus facial features).

(2) Certain identification procedures can reduce the accuracy of: eyewitness identifications, including the following factors relevant to the present case: (A) suggestivity/bias, and the effects of post-identification feedback.

(3) The generally accepted theory of memory in the field of psychology and how it applies to eyewitness identifications (dispelling common misconceptions about memory working like a videotape and memories being "etched" onto your brain, explaining the process how events can be "remembered" differently than they actually occurred)

(4) Factors associated with verified cases of misidentification and as observed in this particular case.

(5) The eyewitnesses in the present case are not reliable based on the factors in this case.

R. 10-2 at 181-82. The trial court considered the briefs and heard oral argument but did not have the expert testify at a preliminary hearing. The trial court denied the motion reasoning:

"[T]his case, also contains what could be considered strong circumstantial evidence on the route of flight and recovery of gun and positive gunshot residue that support the identification. So the case isn't going to rise or fall on the identifications of two police officers alone. . . .

In my view . . . [the] matter at issue, identification, is not beyond the ken of the average juror.

. . .

Expert testimony is not admissible, on matters of common knowledge unless the subject is difficult to understand and explain. Once again my view is that a matter of identification is a matter of common knowledge which can be argued effectively either way and

which is supported by a [well-settled] jury instruction . . . .[1]

1 The jury was instructed in relevant part as follows:

When you weigh the identification testimony of a witness, you should consider all the facts and circumstances in evidence, including, but not limited to, the following:

The opportunity the witness had to view the offender at the time of the offense.

The witness's degree of attention at the time of the offense. The witness's earlier description of the offender.

The level of certainty shown by the witness when confronting the defendant.

The length of time between the offense and the identification confrontation.

R. 10-14 at 154 (BBBBBB-154).

This is a situation where I don't think the witness' experience and qualifications are beyond that of the average juror's and I don't

feel that it will aid the jury in reaching its conclusion. I feel it would possibly confuse the jury and possibly mislead the Jury. . . .

A court should carefully consider the necessity and relevance of the expert testimony in light of the facts of the case before admitting it for the jury's consideration. . . . So when I consider [the] facts [of this case] and compare them against some of the facts in cases where an expert could have been used to aid the jury, I don't—I think the facts cut in favor of the State on this particular case.

R. 10-7 at 106-08.

The appellate court affirmed:

"Here, defendant's conviction does not rest solely on the identification made by Officers Sedlacek and Park. . . . The trial court weighed the facts and circumstances of this case and correctly concluded that the conclusion to be reached would not "rise or fall on the identification of two police officers alone." . . .

Here, the trial court did not abuse its discretion in prohibiting the defense from

presenting expert witness on identification testimony, especially where Dr. Fulero would be commenting on the "reliability" of these witnesses, which is clearly a function of the jury, not a purported expert.

The trial court conducted a meaningful inquiry of the expert witness and the content to which he would testify at a hearing on defendant's motion and, in its discretion, denied the motion. The record shows that the trial court balanced the probative value against the possible prejudice that may arise from allowing this expert to testify. In addition, the jury was given an instruction on how to weigh eyewitness identification testimony. Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 2000). Therefore, we find that the trial court's decision was not arbitrary or unreasonable and does not amount to an abuse of discretion.

People v. Anderson, 72 N.E.3d at 747-48, *appeal denied*, 84 N.E.3d 365 (Ill. 2017), and *cert. denied sub nom. Anderson v. Illinois*, 138 S. Ct. 336 (2017).

During closing argument, Anderson's counsel addressed facts about the scene that could undermine the officers' identification of Anderson:

> Because they want you to think like this, because there are two officers who basically say they were able to look from the middle of the gas station lot, through a chain link fence, [past] these trees, [past] the street, [past] the sidewalk, into that parking lot behind Leader Liquors, and they were able to see a man dressed in all dark clothing firing a gun.
>
> And they told you not only were they able to see a man firing a gun, but we were able to see his face. I put this jacket on, ladies and gentlemen, when Officer Sedlacek was on the stand. I won't do it again, but I encourage you folks when you get back there, put it on, stand at the other end of the jury room, turn sideways, put the hood up, and see if [any one] of you can identify the face of the person who is in that coat.

R. 10-14 at 63-64 (BBBBBB-63:18–64:10).

In his opening statement, defense counsel also several times described the weather at the time of the shooting and pursuit as a "driving snowfall." See, e.g., R. 10-9 at 35 (XXXXX-36:3). He did not make such an argument in closing, presumably because this characterization was contradicted by the officers' testimony.

Analysis

Anderson raises only one issue in his petition: whether exclusion of the expert on the reliability of eyewitness identification violated his Due Process rights. A writ of habeas corpus may be granted "with respect to any claim that was adjudicated on the merits in State court proceedings" only if "the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

28 U.S.C. § 2254(d)(1).

The Warden points out that the Supreme Court has not established a right to present expert testimony on the reliability of eyewitness

identification, and the Seventh Circuit has held such testimony is generally properly excluded. See *United States v. Carter*, 410 F.3d 942, 950 (7th Cir. 2005) ("[T]he credibility of eyewitness testimony is generally not an appropriate subject matter for expert testimony because it influences a critical function of the jury—determining the credibility of witnesses." (quoting *United States v. Hall*, 165 F.3d 1095, 1107 (7th Cir. 1999)); see also *United States v. Welch*, 368 F.3d 970, 973 (7th Cir. 2004) ("In attempting to show that the district court did abuse its discretion, Welch faces an uphill battle against the long line of Seventh Circuit cases holding that district courts did not commit abuses of discretion by excluding expert testimony regarding the reliability of eyewitness identifications."). This argument, however, ignores more recent Seventh Circuit holdings indicating an openness to such testimony. See *Jimenez v. City of Chicago*, 732 F.3d 710, 722 (7th Cir. 2013).

("Whether expert testimony regarding witness perception, memory, reliability, and deception could assist a properly-instructed jury in its task

of evaluating trial testimony is controversial." (citing Hall, 165 F.3d at 1118 (Easterbrook, J., concurring in judgment) ("Jurors who think they understand how memory works may be mistaken, and if these mistakes influence their evaluation of testimony then they may convict innocent persons . . . . That a subject is within daily experience does not mean that jurors know it correctly.") (emphasis in original))).

In any event, Anderson does not contend that there is a clearly established right to present expert testimony on eyewitness reliability to a jury. See R. 11 at 2 ("Robert Anderson does not argue he has a constitutional right to present expert testimony on eyewitness identification. . . .").

Rather, Anderson's petition asserts his right to present a defense generally, as that right is set forth in *Holmes v. South Carolina*, 547 U.S. 319 (2006). See R. 11 at 2 (Anderson argues "only that the Illinois courts violated his due process rights under *Holmes*, by excluding such testimony because of the perceived strength of the state's case."); see also R. 1 at 33 ("The

holding of the Illinois appellate court 'ignored' the 'fundamental principles' established by *Holmes*."). Anderson contends that Holmes stands for the principle that the probative value of defense evidence may not be assessed relative to the strength of the prosecution's evidence. See id. at 34. Anderson argues that the state appellate court violated Holmes when it discounted the probative value of the expert's testimony regarding the reliability of eyewitness testimony because "there was evidence of [Anderson's] guilt apart from the eyewitness identifications." Id. at 33.

Anderson's analysis, however, skips prior steps in the proper analysis of whether a state court evidentiary ruling violates Due Process. Due Process "guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes*, 547 U.S. at 324; see also id. at 325 ("the defendant[] [has a] right to put on a defense"). "This right is abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." Id. at 324. In other words, "the Constitution thus

prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote." Id. at 326.

With respect to the admissibility of expert testimony regarding eyewitness reliability, the

Illinois Supreme Court has explained:

In Illinois, generally, an individual will be permitted to testify as an expert if his experience and qualifications afford him knowledge which is not common to lay persons and where such testimony will aid the trier of fact in reaching its conclusion. In addressing the admission of expert testimony, the trial court should balance the probative value of the evidence against its prejudicial effect to determine the reliability of the testimony. In addition, in the exercise of its discretion, the trial court should carefully consider the necessity and relevance of the expert testimony in light of the particular facts of the case before admitting that testimony for the jury's consideration. This court has held that expert testimony is only necessary when the subject is both particularly within the witness's

experience and qualifications and beyond that of the average juror's, and when it will aid the jury in reaching its conclusion. Expert testimony addressing matters of common knowledge is not admissible unless the subject is difficult to understand and explain. When determining the reliability of an expert witness, a trial court is given broad discretion.

People v. Lerma, 47 N.E.3d 985, 992 (Ill. 2016) (internal citations and quotation marks omitted) (emphasis added). This focus on whether an expert's testimony will assist the trier of fact "in light of the particular facts of the case" is also present in federal law. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993) (Whether "evidence or estimony [will] 'assist the trier of fact to understand the evidence or to determine a fact in issue' . . . . goes primarily to relevance. The consideration has been aptly described . . . as one of 'fit.'"); *Owens v. Auxilium Pharm., Inc.*, 895 F.3d 971, 973 (7th Cir. 2018) ("Because Dr. Abbas's testimony did not fit the facts of the case, it was not likely to assist the trier of fact to understand the evidence or to determine a fact in issue."); *Florek v.*

Village of Mundelein, 649 F.3d 594, 602- 03 (7th Cir. 2011) ("In other words, expert testimony is more likely to satisfy Federal Rule of Evidence 702's requirement that it 'assist the trier of fact to understand the evidence or determine a fact in issue' when something peculiar about law enforcement (e.g., the tools they use or the circumstances they face) informs the issues to be decided by the finder of fact. . . . And when the testimony is about a matter of everyday experience, expert testimony is less likely to be admissible."); see also *Poulter v. Cottrell, Inc.*, 2014 WL 5293595, at *4 (N.D. Ill. June 24, 2014) ("Helpfulness is sometimes phrased as a matter of 'fit' between the suggested testimony and the issue that it is meant to support. . . . If the issue is 'peculiar,' expert testimony is more likely to be informative and helpful, whereas, 'when the testimony is about a matter of everyday experience, expert testimony is less likely to be admissible.'" (quoting *Florek*, 649 F.3d at 602-03)). In both Illinois and federal law, courts are to determine the probative value of expert testimony with regard to whether the testimony will assist the trier of

fact in the context of the facts of the case as a whole. In order to prevail on his petition, Anderson would have to demonstrate that Illinois's rule governing admission of expert testimony "serve[s] no legitimate purpose or [is] disproportionate to the ends that [it is] asserted to promote." *Holmes*, 547 U.S. at 326. But he makes no such argument. Rather, Anderson's argument is based on a superficial analogy between this rule and the principle set forth in *Holmes* that state courts may not exclude defense evidence because the prosecution's evidence is sufficient to convict. He argues that both the state trial and appellate courts violated this principle by excluding the expert testimony on the basis that Anderson's verdict would "not rise or fall on the identification of the two police officers alone" because there was other evidence of Anderson's guilt. See R. at 4, 31.

But *Holmes* reversed a trial court's decision to exclude fact evidence implicating a third party in the crime. It is simply not relevant to a decision to exclude expert testimony. Any similarity between the Holmes principle and the state courts' decisions disappears in the face of

the undeniable substantive difference between fact evidence and expert evidence. The relevance of fact evidence is assessed relative to the legal elements of the ultimate question to be decided.

Assessment of relevance to a particular legal claim can generally be made without a broader evidentiary context. Hence, the principle in *Holmes* prohibiting weighing of the relevance of various pieces of evidence. By contrast, the relevance of expert evidence is assessed relative to whether it helps the trier of fact determine a fact in issue that is relevant to the ultimate question. Whether expert evidence helps the trier of fact can only be assessed in light of the other evidence the trier of fact has to consider. Without evidentiary context, "helpfulness" has no meaning.

Furthermore, factual context is especially relevant to determining the "helpfulness" of expert testimony on the reliability of eyewitness identification in particular. As many courts have noted,

> lay jurors have personal experience with

common circumstances relevant to the reliability of eyewitness identification—e.g., distance, obstructed views, time to observe. Notably, all of these factors were present in Anderson's case.

This is in contrast to *People v Lerma* where the Illinois Supreme Court affirmed reversal of the trial court's exclusion of expert testimony because in that case the only evidence against the defendant was eyewitness identification that occurred in circumstances that might not cause a lay juror to question its reliability without assistance from expert testimony. Unlike the defendant in *Lerma*, it was possible for Anderson to make a case for the unreliability of the eyewitness identification through aggressive cross examination and argument, without the need for expert estimony on the issue.

In any case, to the extent Anderson argues (1) that the appellate court misapplied the Illinois

rule regarding exclusion of expert testimony, or (2) that the Supreme Court would disagree with Illinois's rule regarding the relevance of expert evidence, those arguments are beside the point.

Rather, the salient point here is that the right set forth in *Holmes* is not relevant, or at least not clearly relevant, to interpretation of a rule governing potential exclusion of expert testimony. Thus, Anderson has not identified a "clearly established" right that was violated in his case. Other courts have reached similar conclusions. See *Schroeder v. Premo*, 712 Fed. App'x 634, 636 (9th Cir. 2017) ("Schroeder has not shown that this exclusion of the testimony was contrary to, or an unreasonable application of, clearly established federal law relating to broad principles of admissibility of evidence in criminal proceedings. Schroeder has also failed to demonstrate the existence of any contradictory clearly established law governing the more specific proposition of admissibility of expert testimony on eyewitness identification. Indeed, we have consistently affirmed the exclusion of this type of expert testimony under less- demanding, less-

deferential tests than the one AEDPA imposes on reviewing federal courts."); *Thomas v. Heidle*, 615 Fed. App'x 271, 282 (6th Cir. 2015) ("The Supreme Court has not directly spoken on the law applicable to the circumstances of this case. And we can grant relief only if we conclude that the exclusion of Loftus's testimony in this particular case was 'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.' Present-day case law demonstrates that fair-minded jurists still disagree on the exclusion of expert testimony on eyewitness identification, even when it is effectively excluded on a blanket basis."); *Stroud v. Brewer*, 2018 WL 3417326 (E.D. Mich. July 13, 2018) ("[T]he Supreme Court has never held that a state trial court's exercise of discretion to exclude expert testimony violates a criminal defendant's constitutional right to present a defense. Habeas relief is not warranted on this claim."). Therefore, Anderson's petition is denied.

Lastly, the Court declines to issue a certificate of appealability pursuant to 28

U.S.C. § 2253(c)(2). Rule 11(a) of the Rules Governing § 2254 Cases provides that the district court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." See *Gonzalez v. Thaler*, 132 S.Ct. 641, 649 n.5 (2012). To obtain a certificate of appealability, a habeas petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This demonstration "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); see also *Lavin v. Rednour*, 641 F.3d 830, 832 (7th Cir. 2011). For the reasons discussed, Anderson has not made such a showing. Accordingly, certification of Anderson's claim for appellate review is denied.

Conclusion

For the foregoing reasons, Anderson's petition, R. 1, is denied. The Court also declines to issue a certificate of appealability.

APPENDIX A

IN THE SUPREME COURT OF ILLINOIS

No. 121923

PEOPLE OF THE STATE OF ILLINOIS,

PLAINTIFF-APPELLANT

v.

ROBERT ANDERSON, DEFENDANT-APPELLEE

[May 24, 2017]

Disposition: Petition for leave to appeal denied.

APPENDIX B

IN THE APPELLATE COURT OF ILLINOIS

FIRST DISTRICT, SECOND DIVISION

No. 1–12–2640

PEOPLE OF THE STATE OF ILLINOIS,

PLAINTIFF-APPELLANT

v.

ROBERT ANDERSON, DEFENDANT-APPELLEE

[January 31, 2017]

OPINION

JUSTICE PIERCE delivered the judgment of the court, with opinion.

¶ 1 Defendant Robert Anderson was convicted of four counts of first degree murder (720 ILCS 5/9–1(a)(1) (West 2012)) related to the shooting

deaths of Moises Reynoso and Robert Lilligren. Defendant was subsequently sentenced to life in prison. Defendant now appeals and raises eight issues: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) the trial court erred in admitting hearsay testimony; (3) the trial court erred by precluding defense counsel from questioning Officer Jeong Park as to whether he would describe defendant as "black"; (4) the trial court erred when it excluded evidence of defendant's prior acquittal for an unrelated charge; (5) the trial court erred in denying defendant's motion *in limine* for expert testimony on eyewitness identification; (6) the trial court abused its discretion in denying defendant's motion for new trial in light of allegedly newly discovered evidence; (7) the prosecutor's remarks in closing argument were prejudicial and denied defendant a fair trial; and (8) the trial court erred in denying his request for a new trial based on his allegations of ineffective assistance of counsel. For the following reasons, we affirm the judgment of the trial court.

¶ 2 BACKGROUND

¶ 3 On March 6, 2003, Moises Reynoso and Robert Lilligren were shot to death as they sat in a vehicle in the parking lot behind Leader

Liquors, just north of the intersection of Irving Park Road and Sacramento Avenue in Chicago.

¶ 4 Shortly before midnight on March 5, 2003, Chicago police officers Paul Sedlacek and Jeong Park received a call requesting a well-being check on the attendant of the Clark Gas Station at the intersection of Sacramento Avenue and Irving Park Road. The officers arrived at the gas station in less than a minute. As the officers got out of their car, they heard gunshots coming from a parking lot on the west side of Sacramento Avenue across from the gas station.

¶ 5 Officer Sedlacek heard five or six shots initially. The shots came from the center of the parking lot behind Leader Liquors where a silver car was parked. A man, who was later identified as defendant, was standing near the rear passenger's side, next to the trunk, firing approximately five shots into the vehicle. Defendant then moved around the back of the vehicle, stood next to the tire on the driver's side, and fired one shot at the driver who appeared to be trying to exit the vehicle. Defendant was 60 to 65 feet away from the officer in a well-lit area. There was a six-foot tall chain link fence between Officer Sedlacek and defendant, but he could easily see through it. Officer Sedlacek saw defendant's face but not clearly enough to make

an identification. Officer Sedlacek testified defendant was wearing a dark jacket and dark pants. Reynoso was the driver of that car, and Lilligren was the passenger.

¶ 6 After firing the last shot at Reynoso, defendant ran east along the alley toward the gas station where the officers were. A chain link fence enclosed the area, and the officers had to find a hole in the fence so that they could access the alley. The officers also ran east, parallel to defendant, until they found the opening in the fence, at the far northeast corner of the gas station parking lot. The officers had to run around the mini-mart, which was about 20 feet wide, and could not see the defendant while he was behind it.

¶ 7 When defendant ran past the officers, he turned his head and looked at them. Officer Sedlacek was able to see defendant's face from approximately 10 to 15 feet away for about a second. Defendant's hood had fallen from his head when he turned, giving Officers Sedlacek and Park a full-frontal view of his face. There were street lights in the alley. Officer Park also saw the defendant was wearing gloves and holding a gun in his right hand. Officer Park radioed that defendant was running eastbound in the alley north of Irving Park Road.

Defendant had a gun in his right hand. Officer Sedlacek testified that he "fixated on that gun [and] did not observe his left hand." Officer Sedlacek testified that at the time of the shooting, he recognized defendant's face but could not remember his name.

¶ 8 The officers chased defendant east through the alley to Richmond Street, where defendant turned north. By the time he turned, defendant was 25 to 30 feet in front of Officer Sedlacek and about 15 feet ahead of Officer Park, who saw defendant heading east into a gangway about mid-block on Richmond Street. When the officers reached Richmond Street, they heard "panicked shrieking" that was "[e]xtremely loud, as loud as someone could shriek." The officers turned around and ran back to where the shrieking came from. When they arrived back at the scene of the shooting they found Roberta Stiles screaming "my cousin, my cousin." Officer Park broadcasted defendant's description over the police radio as a "male black, [wearing] all black—or all dark clothing." Officer Park testified that in the "heat of the moment, I saw a person wearing all black, running eastbound, carrying a gun. That's what I went [with] on the air."

¶ 9 The officers observed Reynoso, the driver of the car, lying on the ground next to the car, bleeding from a gunshot wound to the head. He was pronounced dead at the scene. Lilligren, who was seated in the passenger's seat of the vehicle, was also bleeding. Officer Sedlacek testified that he recognized Officer Reynoso from previous interactions.

¶ 10 Chicago police officer Joseph Castillo arrested defendant about four minutes after Officers Park and Sedlacek stopped chasing him. He was apprehended by Officer Castillo after a foot chase through a gangway and a parking lot. During the chase, Officer Castillo saw defendant throw something down, which he recovered and identified as a pair of black gloves. Along with the gloves, Officer Castillo recovered a checkbook that did not bear defendant's name.

¶ 11 Approximately 15 minutes after the shooting, defendant was placed in a squad car and brought back to the scene. Officer Sedlacek was instructed to look inside the car to see if he could identify defendant as the shooter. Officer Sedlacek "looked inside, the offender looked at me, I said, 'Yes, that's the person I saw shoot.' " After Officer Sedlacek identified defendant as the shooter, defendant vomited in the car. Officer Park viewed defendant in the back of the

police car separately and also identified defendant as the shooter. Defendant again vomited after he was identified as the shooter by Officer Park.

¶ 12 Officer Sedlacek testified that he recognized the defendant but could not initially recall his name. He later discovered that he had arrested defendant, along with Reynoso and Terry Hill, in an unrelated case in July 2001. Officer Sedlacek testified and identified defendant at the trial for defendant's unrelated case, which took place a little less than a year before the shooting in this case. He knew defendant as "Nookie." Officer Sedlacek also identified photographs of Hill, whom he knew as "Terry," and a photograph of Jesus Quinones, whom he knew as "Blood." He stated he saw defendant, Reynoso, and Hill in the early morning hours of July 1, 2001, when he arrested all of them for aggravated battery in an unrelated incident. Officer Sedlacek testified that during the prior investigation he was face-to-face with defendant several times and was within several feet of defendant for about two hours in a lit police station.

¶ 13 Between the time Officer Sedlacek observed the shooting and the show-up identification of defendant, he did not report on the radio that the shooter was defendant or that the shooter was

nicknamed “Nookie.” He did not tell the superior officers at the scene that he knew defendant and had previously arrested him. Officer Park also testified that Officer Sedlacek never indicated that he knew defendant from a previous arrest.

¶ 14 In Officer Sedlacek's incident report, he listed himself and Officer Park as people who discovered and reported the crime but did not check the box indicating they witnessed the crime. Officer Sedlacek wrote that he “saw an individual standing next to a silver car, firing a handgun into the vehicle,” and that person was “a male black in his 20's wearing a dark jacket.” The report did not include the fact that Officer Sedlacek saw the front of the man's face as he was running past the officers in the alley. The report also did not include that the man was wearing gloves and did not detail that the man was “wearing a parka with the hood up and fur trim around the hood.” Officer Sedlacek did not include the information that the man stood near the rear passenger's side tire or that he looked both ways before firing the last shot. The additional information that defendant had vomited after he was identified as the shooter was also not included in Officer Sedlacek's report.

¶ 15 Officer Castillo testified he was on duty on March 6, 2003. Officer Castillo was working alone, in uniform, and driving an unmarked squad car. Just after midnight, Officer Castillo heard a radio call announcing shots fired near the intersection of Sacramento Avenue and Irving Park Road. The description given was "male black in all dark clothing." He then heard Officer Park make another radio call stating "731, we lost him in the alley, one block east of the gas station. If someone can secure our car, well, it's the gas station lot, when we heard the victim screaming." Officer Castillo was only a few blocks away. He drove down California Avenue to Belle Plaine Avenue, one block north of Irving Park Road. He stopped, walked west on Belle Plaine Avenue until he reached the north-south alleyway between California Avenue and Mozart Street, and walked south through the alley.

¶ 16 Defendant then ran out from an east-west gangway at 4035 North Mozart Street into the alley where Officer Castillo was walking. Officer Castillo was approximately 10 feet away from defendant when he came out of the gangway. Defendant was wearing dark clothing, a "[b]lack parka type jacket." Defendant fit the description Officer Castillo heard over the radio. Officer

Castillo yelled at defendant to stop and announced "police," but defendant continued running. When Officer Castillo first saw defendant, he did not notice if defendant had anything in his hands.

¶ 17 Officer Castillo chased defendant, who ran onto California Avenue. Defendant ran south through a parking lot located on the northwest corner of California Avenue and Irving Park Road and was stopped by another police car. As the police car was approaching, Officer Castillo saw defendant throw a pair of black gloves, which he later recovered. Officer Castillo then placed defendant into custody. Officer Castillo also recovered a checkbook that was found next to the gloves. The checkbook was not in defendant's name, and Officer Castillo did not see it drop from defendant's hands. Officer Castillo put the gloves and checkbook in his pocket and later turned them over to the evidence technicians. Officer Castillo showed Chicago police sergeant Rick Nigro the gangway that he saw defendant run out of.

¶ 18 Sergeant Nigro then drove to the scene of the shooting and attempted to retrace defendant's steps from the shooting to the gangway. Sergeant Nigro walked east from the scene of the shooting through the alley where the

radio broadcast had reported defendant was running. He conducted a systematic search of the gangways and alleyways and looked for footprints in the snow. He searched for approximately one hour and eventually "saw some footprints on the side of [a] garage," which led him to search for a gun in that area. The garage was located at 4036 North Mozart Street. Sergeant Nigro climbed to the second level of a neighboring porch so he could see the roof of the garage. From the higher vantage point, he could see "a hole in the snow" in the middle of the roof. He called for a ladder, climbed on top of the roof, and found a semiautomatic handgun.

¶ 19 Chicago police forensic investigator Jim Shadir and his partner, Arthur Oswald, photographed the gun as it was found and then inventoried the weapon. The gun was a black .40–caliber Beretta model 8040 Cougar F, which had a defaced serial number. The gun was in slide lock, which meant that all the bullets that were in the weapon had been expended. Investigator Shadir also recovered an empty black .40–caliber Smith and Wesson magazine from the gun. There were no latent fingerprints on the gun, the magazine, or the cartridge cases.

¶ 20 Investigators Shadir and Oswald also processed the scene of the shooting at

approximately 12:53 a.m. Investigator Shadir photographed the crime scene and recovered one .40–caliber Smith and Wesson cartridge case on the ground in the snow near the driver's side door of the vehicle, and five .40–caliber Smith and Wesson cartridge cases on the ground in the snow near the passenger's side of the vehicle. Shadir inventoried the cartridge cases to be submitted for forensic analysis. While at the scene, he also received a pair of black gloves and a checkbook from Officer Castillo, which he inventoried for analysis. Investigator Shadir then went to the hospital where Lilligren was taken and recovered and inventoried Lilligren's jacket.

¶ 21 Dr. John Scott Denton, former Cook County medical examiner, performed an autopsy on Lilligren and stated that he been shot three times. None of the gunshot wounds were close range. Dr. Denton concluded that Lilligren was struck by at least two, possibly three, different gunshots and concluded that the gunshot wound to the back of Lilligren's head caused his death. The manner of death was homicide.

¶ 22 Dr. Denton reviewed the autopsy of Reynoso. Reynoso suffered 11 gunshot wounds. Three bullets were recovered from his clothing,

and two more bullets were recovered from his body. Each of the bullets was inventoried. None of the gunshot wounds were at close range. The first gunshot wound was located in Reynoso's chest, on the right side. A second gunshot wound was located at the left lateral chest, and a third gunshot wound was just below the second at the left lateral chest. A fourth gunshot wound was located at the right side of Reynoso's back, just below the shoulder blade. A fifth gunshot wound was located in his back and entered through the eleventh rib on the right side. A sixth gunshot wound was the result of a bullet that went through the right chest and exited through the abdomen. A seventh gunshot wound was located in the right forearm. An eighth gunshot wound was located on the left hand, which had numerous injuries on the palm and fingers, which were classified as defensive wounds. A ninth gunshot wound, a graze, was located at the left upper arm. A tenth gunshot wound was located at the back left of Reynoso's head. This bullet traveled through the scalp, bone, and brain and lodged in the bone behind the left ear. Dr. Denton determined that Reynoso died from multiple gunshot wounds, and the manner of death was homicide. The location of the gun relative to the victims' bodies could not be determined, only the course the

bullet took once it had entered the bodies. It was Dr. Denton's opinion that some of the bullets fired at Reynoso may have caused more than one wound.

¶ 23 Chicago police forensic investigator Steven Duffy went to the medical examiner's office on March 6, 2003, and received an envelope containing the bullets recovered from Reynoso's body. Investigator Duffy then submitted those bullets for forensic testing.

¶ 24 Forensic scientist Kurt Zielinski specializes in firearms identification for the Illinois State Police lab and supervised the testing performed on the recovered firearm, magazine, cartridge casings, and bullets. The firearm and magazine were capable of holding 11 bullets, 10 in the magazine and 1 in the chamber of the firearm. Forensic testing revealed that all six of the cartridge cases found next to the vehicle and all five bullets recovered from the victims' bodies and clothing were fired from the same gun found by Sergeant Nigro on the garage roof.

¶ 25 Forensic scientist Mary Wong specializes in trace chemistry for the Illinois State Police lab. Wong tested the black knit gloves for gunshot residue. One glove tested positive for the presence of gunshot residue. The other glove

"had two unique particles and some consistent particles" but not enough to make a positive finding. Defendant's coat was tested for gunshot residue and samples taken from the cuffs of both sleeves revealed "they both contained particles of background samples which [led] to a conclusion that the sample areas may not have been in the vicinity of a discharged firearm" but the samples taken from the jacket did not test positive for the unique particles of gunshot residue. Wong testified that the absence of gunshot residue may have been the result of particles having been removed by activity. Wong stated that wind, moisture, and friction from brushing up against something could all remove gunshot residue or prevent it from being deposited. Wong added that a difference in fabric may also account for gunshot residue being deposited on one item but not another. The absence of gunshot residue was only on the specific areas tested, and it could not be concluded that there was a complete absence of gunshot residue on defendant's jacket.

¶ 26 Lorena Reynoso, Reynoso's sister, testified that approximately 10 days before the shooting, she was home with Reynoso in the evening and there was a knock at the door. She answered the door and saw defendant with two people she

knew as "Blood" and "Terry." Lorena knew defendant by the nickname "Nookie." Lorena had known defendant for three years and had lived with him and his family for approximately three months in 2000. Defendant asked Lorena where Reynoso was. Lorena then had a conversation with Reynoso, after which she returned to the door and told defendant and the other two men that Reynoso was not home, so they left. Defendant had previously come to the house looking for Reynoso on five to seven separate occasions, beginning in November or December 2002. A few of those times defendant came with "Blood" and "Terry." Each time defendant came looking for Reynoso, it was approximately 7 p.m. Prior to late 2002, Reynoso and defendant had been friends and spent time together every day. They stopped spending time together around November or December 2002.

¶ 27 Reynoso and Lorena had another brother, Renee, who was also friends with defendant. Renee also stopped spending time with defendant in November or December 2002. When defendant came by asking for Reynoso, he did not ask for Renee.

¶ 28 Lorena testified that she did not tell anyone about these visits until January 2005, when she was interviewed by Assistant State's Attorney

Brogan and a State's Attorney investigator about an unrelated case. At the time Lorena was on probation for concealing a fugitive, an ex-boyfriend. Additionally, two of her ex-boyfriends had been charged with murder, one of which was the fugitive Lorena was charged with concealing.

¶ 29 After the State rested, the court denied defendant's motion for a directed verdict.

¶ 30 Roberta Stiles testified on defendant's behalf. Stiles was Lilligren's aunt. She testified that before midnight on March 5, 2003, she saw Lilligren on Irving Park Road near the intersection of Francisco Avenue. She and Lilligren went to a friend's house to eat and then went to the gas station on Irving Park Road. The attendant was not there, so she went to a payphone to call the police. Lilligren then went to her friend Rex's apartment, located above the rear parking lot of Leader Liquors. Before they walked up the stairs, Reynoso drove up, parked the car, and joined them. Stiles, Lilligren, and Reynoso all went to Rex's apartment. After a few minutes, she went to the bathroom, and Lilligren and Reynoso left. She heard gunshots coming from outside. When she went outside she saw Reynoso lying face down in the snow outside the open driver's side door of his car. She ran to Reynoso, turned him over, and saw that he had

a blue cell phone in his hands. She took the phone. Lilligren was in the passenger side of the car; after she saw him, she started screaming and became hysterical. She tried to make a call on Reynoso's cell phone but could not get the call to go through.

¶ 31 Stiles ran through the alley towards her family's home at 4012 North Richmond Street. She screamed when she arrived at the house, and her mother and brother came out. She did not remember if there were any police cars around at that time. Officers eventually approached her when she was in the alley. She did not remember if those were the first officers she spoke to that night. She went back to the scene with the officers. She did not remember how long she stayed at the scene or which officer she gave Reynoso's cell phone to. She told officers that she, Reynoso, and Lilligren were in Rex's apartment above the back parking lot. She also spoke with a detective sometime later but did not remember when. Stiles spoke with defense counsel and his investigator, Josh Byrne, about a report that Byrne had created. She did not remember if she was given a copy of that report. The report was a written account of an interview of Stiles which she signed. In that report, she stated she saw Reynoso face down in the snow

but did not see anyone running in the alley or any police cars in the area, including in the gas station parking lot. This interview took place in January 2008.

¶ 32 Stiles testified that she did not witness the shooting and did not remember many things that happened that night. Sergeant David Betz was taking notes as she talked to him, and she told him that she had been in a bar earlier that night. Stiles testified that she did not remember if she told Sergeant Betz that she was with Lilligren in the apartment above the parking lot before the shooting. She stated, "I don't remember everything. I mean this was almost nine years ago." She added she was not looking at the gas station parking lot when she ran by it. She testified she remembered everything leading up to the shooting, but after seeing Lilligren shot in the head, "[y]ou're not going to remember who is around, who you're talking to."

¶ 33 In rebuttal, the State called Sergeant David Betz, who testified he spoke with Stiles at the scene of the shooting at approximately 12:40 a.m., and the conversation took place in a squad car because of the weather. He stated Stiles had a strong odor of alcohol and cigarettes. She told him she had been drinking at a bar down the street earlier that night. Stiles told him that

when she saw Lilligren she started screaming for the police, and they arrived immediately. She never told Betz she had been in an apartment above Leader Liquors that night, and she did not give him the names of anyone who lived in that building.

¶ 34 Chicago police detective Dino Amato also testified in rebuttal. He interviewed Stiles at 4:00 a.m. on March 21, 2003. The interview took place at her home with two other detectives present. Stiles told him that she met up with Lilligren on Irving Park Road, after she had just left a bar, and they went to the gas station together. She also told Detective Amato that the police arrived immediately after she found Lilligren shot in the car. She added that she called the police when she could not find the gas station attendant; she then went to Riza Dauti's house. She stated she was there with Lilligren and Reynoso. She went to the bathroom, heard shots fired, and then went outside and found that Lilligren and Reynoso had been shot. She did not tell the detectives that she ran down the alley after finding the shooting victims or that she spoke with her family at her house. Detective Amato testified that the detectives attempted to find someone in the apartments above the Leader Liquors parking lot on the

night of the shooting but could not gain access because the entrance door was locked. The State rested.

¶ 35 The jury found defendant guilty on both counts of first degree murder and sentenced him to life imprisonment. He now appeals.

¶ 36 ANALYSIS

¶ 37 Defendant argues he was not proven guilty of the murders of Reynoso and Lilligren beyond a reasonable doubt because Officer Sedlacek's and Officer Park's identifications were insufficient to support his convictions beyond a reasonable doubt. Defendant also questions Officer Sedlacek's credibility because he was unable to identify defendant by name at the scene and in his incident reports.

¶ 38 On appeal, when the defendant challenges the sufficiency of the evidence, the reviewing court must determine, after viewing the evidence in the light most favorable to the State, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A reviewing court affords great deference to the trier of facts and does not retry the

defendant on appeal. *People v. Smith*, 318 Ill.App.3d 64, 73, 251 Ill.Dec. 639, 740 N.E.2d 1210 (2000). "[A] reviewing court must allow all reasonable inferences from the record in favor of the [State]." *People v. Cunningham*, 212 Ill.2d 274, 280, 288 Ill.Dec. 616, 818 N.E.2d 304 (2004). A criminal conviction will not be reversed "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt." *People v. Graham*, 392 Ill.App.3d 1001, 1009, 331 Ill.Dec. 507, 910 N.E.2d 1263 (2009).

¶ 39 It is within the function of the trier of fact to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence. Id. It is not the duty of the trier of fact to accept any possible explanation that favors the defendant's innocence and "elevate it to the status of reasonable doubt." *People v. Siguenza–Brito*, 235 Ill.2d 213, 229, 336 Ill.Dec. 223, 920 N.E.2d 233 (2009). A reviewing court will not substitute its judgment for that of the trier of fact. *People v. Sutherland,* 223 Ill.2d 187, 242, 307 Ill.Dec. 524, 860 N.E.2d 178 (2006).

12¶ 40 Here, defendant alleges that the identification testimony of both Officers

Sedlacek and Park was insufficient to support his conviction. Illinois applies the following factors to assess identification testimony: (1) the opportunity the witness had to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the identification confrontation; and (5) the length of time between the crime and the identification confrontation. *Neil v. Biggers*, 409 U.S. 188, 199–200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); *People v. Slim*, 127 Ill.2d 302, 307–08, 130 Ill.Dec. 250, 537 N.E.2d 317 (1989). "A single witness' identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification." *Slim*, 127 Ill.2d at 307, 130 Ill.Dec. 250, 537 N.E.2d 317.

3¶ 41 With respect to the first and second factors, the witness's opportunity to observe the offender during the incident and the degree of attention, defendant argues that Officers Sedlacek and Park would not have enough time, as they were chasing him through the alley, to see his face and be able to correctly identify him. Defendant adds both officers testified that they were looking at the gun in his hand as they were

chasing him. However, both officers testified that as defendant was running, his hood fell back, allowing them to see an unobstructed view of his face from a distance of 10 to 12 feet away in a well-lit alley. They positively identified him only 15 to 20 minutes later. We find Officers Sedlacek and Park had ample opportunities to view defendant, and they testified to a degree of detail that would allow the jury to make a determination as to the appropriate weight to be given their identification testimony.

¶ 42 Third, we consider the accuracy of the witness's description of defendant. The officers witnessed defendant, who was armed, kill two people and gave chase. While Officer Park's description of defendant was somewhat general, the description of the fleeing offender given over the radio was accurate to the extent that it matched the defendant running through the neighborhood gangways within four minutes of the shooting in close proximity to the scene. Fourth, we consider the level of certainty the witness demonstrates in identifying defendant as the offender. Both officers identified defendant without hesitation shortly after seeing his face in the alley. Finally, we consider the amount of time between the commission of the crime and the identification. As stated, the

officers identified defendant about 15 to 20 minutes after the shooting. After considering all five *Biggers* factors, we find the officers' identification testimony to be reliable. Officer Sedlacek's inability to recall defendant's name at the scene in no way impugns his credibility or his subsequent identification of defendant.

¶ 43 Defendant further argues that outside of the identification testimony provided by Officers Sedlacek and Park, very little evidence linked him to the murder of Reynoso and Lilligren. We disagree.

¶ 44 Officers Sedlacek and Park witnessed the shooting and then chased defendant through the alley. During this chase, the officers were able to see a full-frontal view of defendant's face in well-lit conditions. Officer Sedlacek recognized defendant but did not remember his name. In less than five minutes, defendant was apprehended four blocks from the scene of the shooting. The gun used in the shooting was recovered from the roof of a garage located in the path the shooter took when chased by the police between the scene of the shooting and where defendant was first seen by Officer Castillo. Officer Castillo observed defendant throw a pair of black gloves on the ground, which later tested positive for gunshot residue. Lorena Reynoso

testified that her brother and defendant had been friends, but in the months leading up to the murder, Reynoso did not want to speak to defendant when he came to his home looking for him.

¶ 45 Defendant was seen running from the area of the shooting and matched the general description of the offender. Defendant's flight from Officer Castillo and the officers who witnessed the shooting is considered evidence of his guilt. Defendant was identified as the shooter less than 15 minutes afterwards. He was wearing clothing that matched the clothing worn by the shooter. The murder weapon was found on the route the shooter took when running from the scene to where he was first observed by Officer Castillo minutes after the shooting. Viewing the evidence in the light most favorable to the State, as we must, we find that the totality of the evidence was more than sufficient to establish defendant's guilt beyond a reasonable doubt.

¶ 46 Defendant has also attacked the sufficiency of the physical evidence, the lack of conclusive trace material, the checkbook found alongside the gloves, and the lack of DNA evidence. The jury resolved the evidence in favor of the State,

and we cannot say it was the act of an irrational jury.

¶ 47 Defendant next argues that the trial court erred when it denied his motion *in limine* to preclude the State from introducing hearsay evidence that Reynoso was avoiding defendant. The trial court denied this motion and ruled that the State could introduce evidence that, after defendant knocked on Lorena's door, Lorena went and spoke with her brother, came back to the door, and told defendant that her brother was not home.

¶ 48 At trial, Lorena testified that approximately a week and a half before Reynoso's death, she was at home with him when defendant came to her door with two other men she knew as “Blood” and “Terry.” Defendant asked where Reynoso was. Lorena went back and spoke with Reynoso and then returned to the door and told defendant that Reynoso was not there.

45¶ 49 Reviewing courts generally use an abuse of discretion standard to review evidentiary rulings rather than review them *de novo*. *People v. Caffey*, 205 Ill.2d 52, 89, 275 Ill.Dec. 390, 792 N.E.2d 1163 (2001). Defendant argues that this court should review this issue using the *de*

novo standard and states "an appellate court should review *de novo* where the trial judge's decision 'involves a legal issue and did not require the trial court to use its discretion regarding fact-finding or assessing the credibility of witnesses.' " *People v. Aguilar*, 265 Ill.App.3d 105, 109, 202 Ill.Dec. 485, 637 N.E.2d 1221 (1994). This exception to the general rule of deference applies in cases where "a trial court's exercise of discretion has been frustrated by an erroneous rule of law." *People v. Williams*, 188 Ill.2d 365, 369, 242 Ill.Dec. 260, 721 N.E.2d 539 (1999).

¶ 50 In *People v. Caffey*, 205 Ill.2d 52, 89, 275 Ill.Dec. 390, 792 N.E.2d 1163 (2001), the defendant also requested the reviewing court to apply a *de novo* standard to evidentiary rulings regarding hearsay. Our supreme court rejected this argument and stated,

"The decision whether to admit evidence cannot be made in isolation. The trial court must consider a number of circumstances that bear on that issue, including questions of reliability and prejudice. [Citation.] In this case, the trial court exercised discretion in making these evidentiary rulings, *i.e.*, the court based these rulings on the specific circumstances of this case and not on a

broadly applicable rule." Id. at 89–90, 275 Ill.Dec. 390, 792 N.E.2d 1163.

Here, the trial court based its ruling on the circumstances of the case and therefore, following Caffey, we reject defendant's argument that the trial court's decision to admit the testimony of Lorena should be reviewed *de novo*, and instead, we will apply the abuse of discretion standard.

6¶ 51 "Evidentiary rulings are within the sound discretion of the trial court and will not be reversed unless the trial court has abused that discretion." *People v. Reid*, 179 Ill.2d 297, 313, 228 Ill.Dec. 179, 688 N.E.2d 1156 (1997); Caffey, 205 Ill.2d at 89, 275 Ill.Dec. 390, 792 N.E.2d 1163. An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. *Caffey*, 205 Ill.2d at 89, 275 Ill.Dec. 390, 792 N.E.2d 1163; *People v. Illgen*, 145 Ill.2d 353, 364, 164 Ill.Dec. 599, 583 N.E.2d 515 (1991).

¶ 52 Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted." Ill. R. Evid. 801(c) (eff. Jan. 1, 2011). A statement is an oral or written

assertion, or non-verbal conduct of a person if it is intended by the person as an assertion. Ill. R. Evid. 801(a) (eff. Jan. 1, 2011). Assertive conduct, as well as actual statements, may constitute hearsay. People v. Orr, 149 Ill.App.3d 348, 362, 102 Ill.Dec. 772, 500 N.E.2d 665 (1986). A statement that is offered for some other reason, not to prove the truth of the matter asserted, is generally admissible because it is not hearsay. *People v. Hill*, 2014 IL App (2d) 120506, ¶ 51, 380 Ill.Dec. 815, 9 N.E.3d 65.

¶ 53 Defendant argues that the only purpose of Lorena's testimony was to assert that Reynoso had made a statement to Lorena that he was fearful of the defendant. However, Lorena did not testify to any statement by Reynoso or that Reynoso made any assertion of fear. She simply testified, that approximately a week and a half before Reynoso's death, she was at home with her brother. Defendant came to her door with two other men she knew as "Blood" and "Terry." Defendant asked where Reynoso was. Lorena was asked the following questions and gave the following answers:

"Q: "After they asked if [Reynoso] was home, did you have a conversation with [Reynoso]?"

A: "Right."

Q: "After that conversation with [Reynoso], did you then talk to [defendant]?"

A: "Right."

Q: "What did you say to [defendant]?"

A: "That [Reynoso] wasn't there."

Q: "Did those three individuals then leave at that point?"

A: "Right."

¶ 54 The testimony complained of here is not hearsay, as there is no mention of assertive conduct by Reynoso, nor does it contain any verbal conversation that took place between Reynoso and Lorena. She did not testify to anything that could be considered assertive conduct, let alone conduct that could be considered as an assertion offered to prove the truth of some relevant fact.

7¶ 55 The defendant further argues that Lorena's testimony was prejudicial because the State offered no further evidence to suggest motive other than this incident. The State is not required to prove motive in order to convict the defendant of first degree murder. *People v. Shack*, 396 Ill. 285, 292, 71 N.E.2d 633 (1947). Furthermore, prejudice to the defendant is one

of the factors weighed by the trial court and is taken into consideration with the relevance of the testimony.

¶ 56 The trial court limited the testimony to what Lorena said and did, and the content of her discussion with Reynoso was not permitted. Therefore, we find that the trial court did not abuse its discretion in allowing the testimony of Lorena.

8¶ 57 Defendant next argues that the trial court erroneously precluded defense counsel from cross-examining Officer Park regarding whether or not he would describe defendant as "black." The following exchange took place during the trial:

"[Defense counsel]: If you—the defendant over there, the guy you identified. If you were—if you were going to identify that person for those people right now, would you—

State: Objection, Judge.

The Court: Sustained.

[Defense counsel]:—would you say that person was black?

State: Objection.

The Court: Sustained.

[Defense counsel]: That's how you would describe that person, is black?

State: Objection.

The Court: Sustained."

¶ 58 Defendant argues that by sustaining the prosecutor's objections to this line of questioning, the trial court erred because it precluded him from cross-examining Officer Park about the description he gave of the offender whom he later identified to be defendant. Defendant argues, without elaboration, that his sixth amendment right to cross-examination was violated when the court precluded defense counsel from cross-examining Officer Park as to whether he would describe defendant as "black." Defendant argues that Officer Park's response to this inquiry would go to his credibility and the reliability of his identification. We disagree.

¶ 59 Again, defendant claims that this issue should be reviewed *de novo*. For the reasons already stated, we review this issue for abuse of discretion.

910¶ 60 Defendant correctly asserts that the sixth amendment to the Constitution guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him. U.S. Const., amend. VI. Confrontation means "more than being allowed to confront the witness physically." *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). This right applies to federal and state proceedings. *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

1112¶ 61 We recognize defendant's sixth amendment right, but note that while a trial court may not deprive a defendant of the right to question witnesses, it may limit the scope of cross-examination. *People v. Frieberg*, 147 Ill.2d 326, 357, 168 Ill.Dec. 108, 589 N.E.2d 508 (1992). The latitude permitted on cross-examination is left largely to the discretion of the trial court, and its determination will not be overturned absent a clear abuse of discretion that resulted in manifest prejudice. *People v. Herrera*, 238 Ill.App.3d 284, 290, 179 Ill.Dec. 435, 606 N.E.2d 267 (1992). Here, defendant was not precluded from cross-examining Officer Park. Defense counsel cross-examined Officer Park at length. Defendant was merely precluded from pursuing this line of questioning.

¶ 62 While the State did not offer the basis of its objection to this line of questioning, and the trial court did not give its reason for sustaining those objections, we can determine from the record before us that the evidence defendant was attempting to elicit during Officer Park's cross-examination was not relevant.

¶ 63 Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Ill. R. Evid 401 (eff. Jan. 1, 2011). Irrelevant evidence is inadmissible. Ill. R. Evid 402 (eff. Jan. 1, 2011). The question seemingly asked to impeach Officer Park's credibility was, "If you—the defendant over there, the guy you identified. If you were—if you were going to identify that person for those people right now, would you—" "—would you say that person was black," was asking Officer Park to identify the race of the defendant at the time of the trial. The admissibility of evidence that is collateral to an issue in a case and that is intended to affect the credibility of a witness rests within the sound discretion of the trial court, and the decision to exclude certain collateral evidence will not be disturbed absent an abuse of discretion. See *People v. Renslow*, 98 Ill.App.3d 288, 293–

94, 53 Ill.Dec. 556, 423 N.E.2d 1360 (1981); *People v. Stack*, 311 Ill.App.3d 162, 178–79, 243 Ill.Dec. 770, 724 N.E.2d 79 (1999).

¶ 64 Officer Park testified that he "saw him shooting into a car, and he was running with a gun, and I did my best, gave a description" that described the shooter as "a male" "dressed in all black, and he was a male black." Each individual juror was able to observe defendant's appearance in open court and presumably made independent determinations as to whether the defendant fit the description given at the time of the shooting ("male black"). It is within the function of the trier of fact to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence. *People v. Graham*, 392 Ill.App.3d 1001, 1009, 331 Ill.Dec. 507, 910 N.E.2d 1263 (2009).

¶ 65 As defendant acknowledges in his brief, the attempted impeachment of Officer Park was complete simply when he admitted his prior description of defendant as "black" and looking at the defendant. Defendant admits on appeal that he is of "African–American ancestry" but appears to be "Caucasian or Hispanic." Defendant argues, "[e]ither answer Park could

have given would have damaged his credibility: Had he answered that he would describe Anderson as black he would have appeared to be a liar, and had he answered he would describe Anderson as white or Hispanic he would have contradicted one of the few details of his prior description." Although the court did not permit defense counsel to ellicit testimony from Officer Park regarding his opinion of defendant's race, defendant was not restricted from cross-examining Officer Park about the description he relayed over the radio as the events were unfolding. Defendant made his point by highlighting Officer Park's radio description as the offender being "black" and allowing the jury to draw their own conclusion as to whether this tended to support a conclusion that defendant was the offender Officer Park saw that evening. The issue of whether defendant fit the description Officer Park gave during the incident was addressed by the defendant in opening statement and thoroughly exhausted during the trial. There is no question the jury understood the point. Therefore, we find that the trial court did not abuse its discretion in precluding Officer Park from testifying about whether he would, at trial, describe defendant as "black."

¶ 66 Defendant also argues that the trial court erred when it precluded defendant from cross-examining Officer Sedlacek about whether defendant was acquitted in a prior case. Defendant argues that his sixth amendment right was also violated by this ruling.

¶ 67 On direct examination, Officer Sedlacek was asked whether he "recognized the defendant from before." Officer Sedlacek responded, "[y]es, sir." When asked what defendant's nickname was, Officer Sedlacek replied, "Nookie." On cross-examination, defense counsel questioned Officer Sedlacek about how and why he was familiar with defendant "from before." Officer Sedlacek testified that he previously arrested defendant along with Hill and Reynoso in July 2001 for the aggravated battery of a man named Edward Binabi. That trial was held on April 8, 2002, and Officer Sedlacek testified at that trial.

¶ 68 The State objected and during a discussion with the court, the defense stated it was attempting to cross-examine Officer Sedlacek as to the fact that defendant was acquitted of the aggravated battery charge, and the defense wanted to elicit this testimony to establish that Officer Sedlacek had a motive to falsely identify defendant in this case. The trial court ruled that the acquittal was not relevant.

¶ 69 Defendant again argues that this issue should be reviewed *de novo*. However, as we have stated the review of an evidentiary ruling will be reviewed under the abuse of discretion standard.

14¶ 70 As previously stated, the sixth amendment right to cross-examination is not without limit. "A judge may limit the scope of cross-examination, and unless the defendant can show his or her inquiry is not based on a remote or uncertain theory, a court's ruling limiting the scope of examination will be affirmed." *People v. Tabb*, 374 Ill.App.3d 680, 689, 312 Ill.Dec. 470, 870 N.E.2d 914 (2007). "The admissibility of evidence rests within the discretion of the trial court, and its decision will not be disturbed absent an abuse of that discretion." *People v. Pikes*, 2013 IL 115171, ¶ 12, 376 Ill.Dec. 314, 998 N.E.2d 1247.

¶ 71 The fact that defendant was acquitted of the aggravated battery charge does not alone suggest that Officer Sedlacek had a motive or bias to falsely identify defendant as the shooter in this case. Officer Sedlacek testified about other facts of defendant's aggravated battery case during direct examination, including that he had previously arrested defendant in 2001, that Reynoso and Hill were also charged in the

same case, and that he testified at the aggravated battery trial on April 18, 2002. Officer Sedlacek added that he had responded to the scene of an alleged battery on June 27, 2001 and spoke to the victim and that Chicago Police Detective Murphy was a witness to the altercation. Officer Sedlacek arrested defendant on July 1, 2001, and had him transported to the police station. While there, Officer Sedlacek sat face-to-face with defendant in a well-lit room for approximately two hours. Officer Sedlacek testified further on cross-examination that he first recognized defendant in this case when he was 10 to 12 feet away from defendant chasing him in the alley.

¶ 72 In *People v. Buckner*, 376 Ill.App.3d 251, 255, 315 Ill.Dec. 87, 876 N.E.2d 87 (2007), this court examined whether the trial court properly limited cross-examination for bias where the State's DNA expert was serving an 18–month supervision for unearned overtime pay, including overtime pay for working on the defendant's case. This court ruled the evidence failed to show that the witness had either the motive or the ability to falsify her testimony and noted that the proffered "evidence must give rise to the inference that the witness has something to lose or gain by testifying." Id.

¶ 73 In this case, the argument proffered by the defendant that because defendant was acquitted in the aggravated battery case involving Officer Sedlacek, Officer Sedlacek had a motive to "either consciously or subconsciously" falsely identify defendant is pure conjecture and did not tend to establish that Officer Sedlacek harbored any bias towards defendant. Notably, defendant did not deny the arrest or the circumstances surrounding the aggravated battery, instead choosing to focus on Officer Sedlacek's previous arrest of defendant, the time he spent with him, and how this familiarity should have caused him to identify defendant by name at the scene.

¶ 74 Officer Sedlacek's testimony regarding defendant's prior arrest was not elicited by the State as other crimes evidence. Rather, it was raised by defendant for the first time on cross-examination. The State, on direct examination, merely asked Officer Sedlacek whether he recognized defendant. It was defense counsel that delved further into the circumstances surrounding that prior meeting. Officer Sedlacek's only role in the prior case was that he arrested defendant based on the victim's complaint. This testimony is simply part of his ordinary duties as a police officer and without more does not establish grounds to infer bias as

a result of an acquittal. Therefore we cannot say that the trial court abused its discretion in denying defendant's request.

1516¶ 75 Even if the trial court should have admitted testimony regarding defendant's acquittal in the aggravated battery case, the court's failure to allow this testimony is harmless error. To determine whether an error is harmless beyond a reasonable doubt we must consider (1) whether the error contributed to the defendant's conviction, (2) whether the other evidence in this case overwhelmingly supported the defendant's conviction, and (3) whether the excluded evidence would have been duplicative or cumulative. *People v. Blue*, 205 Ill.2d 1, 26, 275 Ill.Dec. 376, 792 N.E.2d 1149 (2001).

¶ 76 The evidence of defendant's acquittal would not have been cumulative or duplicative. In addition, as discussed, the other evidence in this case, both physical and circumstantial, overwhelmingly supports defendant's conviction. We also fail to see how the exclusion of testimony regarding defendant's acquittal in an unrelated aggravated battery case would contribute to his conviction.

17¶ 77 Defendant next argues that the trial court erred when it denied his motion *in*

limine to introduce the testimony of an expert witness on eyewitness identification. Prior to trial, defendant moved *in limine* to allow testimony by Dr. Solomon Fulero, an expert on eyewitness testimony. After arguments, the trial court denied the motion.

¶ 78 A criminal defendant's right to due process and a fundamentally fair trial includes the right to present witnesses on his or her own behalf. *People v. Lerma*, 2014 IL App (1st) 121880, ¶ 35, 385 Ill.Dec. 537, 19 N.E.3d 95 (Lerma I); *People v. Wheeler*, 151 Ill.2d 298, 305, 176 Ill.Dec. 880, 602 N.E.2d 826 (1992). "In Illinois, generally, an individual will be permitted to testify as an expert if his experience and qualifications afford him knowledge which is not common to lay persons and where such testimony will aid the trier of fact in reaching its conclusion." *People v. Enis*, 139 Ill.2d 264, 288, 151 Ill.Dec. 493, 564 N.E.2d 1155 (1990). Expert testimony addressing matters of common knowledge is not admissible "unless the subject is difficult to understand and explain." *People v. Becker*, 239 Ill.2d 215, 235, 346 Ill.Dec. 527, 940 N.E.2d 1131 (2010). In addressing the admission of expert testimony, the trial judge should balance the probative value of the evidence against its prejudicial

effect to determine the reliability of the testimony. *Enis*, 139 Ill.2d at 290, 151 Ill.Dec. 493, 564 N.E.2d 1155. Furthermore, the necessity and relevance of the expert testimony should be carefully considered in light of the facts of the case. Id.; *People v. Tisdel*, 338 Ill.App.3d 465, 468, 273 Ill.Dec. 273, 788 N.E.2d 1149 (2003) ("Trial courts should carefully scrutinize the proffered testimony to determine its relevance—that is, whether there is a logical connection between the testimony and the facts of the case."). Relevant and probative testimony should be admitted, whereas misleading or confusing testimony should not be admitted. *Tisdel*, 338 Ill.App.3d at 468, 273 Ill.Dec. 273, 788 N.E.2d 1149. When determining the reliability of an expert witness, the trial judge is given broad discretion. *Enis*, 139 Ill.2d at 290, 151 Ill.Dec. 493, 564 N.E.2d 1155. Therefore, we review the trial court's decision to admit evidence, including expert witness testimony, for an abuse of that discretion. *Becker*, 239 Ill.2d at 234, 346 Ill.Dec. 527, 940 N.E.2d 1131. Arbitrary, fanciful, or unreasonable decisions by the trial court constitute an abuse of discretion. Id.

¶ 79 In *People v. Lerma*, 2016 IL 118496, 400 Ill.Dec. 20, 47 N.E.3d 985 (Lerma II), our

supreme court was presented with a similar issue. The defendant was convicted of first degree murder after the evidence established that defendant, known as "Lucky," approached the front steps of a home where he shot two people. The female victim dragged the critically wounded male victim into the house. The male victim, in the presence of his father (who came onto the scene after hearing gunshots and his son's screaming) and the female victim, stated that "Lucky" shot me. There was testimony that "Lucky" lived across the street from the house where the victims were shot, one victim had been friends with "Lucky" for years, and "Lucky" had been fighting with a member of one of the victim's family. The two victims were African–American while the defendant was Hispanic. Id. ¶ 5. The identification of defendant as the shooter was established through the testimony of the surviving victim and the father of the deceased victim about the dying declaration of the decedent.

¶ 80 The trial court initially denied defendant's motion *in limine* seeking to present the testimony of Dr. Fulero, an expert witness on eyewitness identification. Defendant submitted a detailed motion containing Fulero's proposed testimony, consisting of a summary of the

relevance of that testimony to the issues in that case and a detailed report authored by Dr. Fulero. Id. ¶ 8. After examination, the trial court denied this motion, finding that the eyewitnesses who identified "Lucky" knew him prior to the shooting and therefore were less likely to "misidentify someone they have met or know or [have] seen before than a stranger." The trial court also found that because the eyewitnesses knew the defendant, Dr. Fulero's testimony was irrelevant and "ran the risk" of "operating as his opinion on the credibility" of the eyewitnesses. (Internal quotation marks omitted.) Id. ¶ 10. During the trial, defendant renewed his request for expert testimony and stated he had secured a different expert who would be able to testify regarding eyewitness testimony. Id. ¶ 14. The trial court again rejected this motion, citing the same reasons given in the denial of the first motion. Id. ¶ 16.

¶ 81 During trial, after the State had presented the eyewitness testimony, defense counsel renewed his motion to call an identification expert. Id. ¶ 14. Because Dr. Fulero had since passed away, defense counsel tendered a report authored by Dr. Geoffrey Loftus, an expert in the field of human perception and memory, in support of his renewed motion. Dr. Loftus's

report tracked the content of Dr. Fulero's report, except in two instances. First, Dr. Loftus stated that he would not "issue judgments" about whether witnesses' memories or assertions were correct and that any part which implied the unreliability of the eyewitness should not be construed as meaning that the defendant was innocent. Second, Dr. Loftus's report discussed the issues involved with acquaintance identifications. Id. ¶ 14.The trial court denied the renewed motion stating that his denial was "consistent with the reasons * * * set forth in detail when [the court] made the ruling on your similar motion with respect to Dr. Fulero." (Internal quotation marks omitted.) Id. ¶ 16. Defendant was convicted and appealed.

¶ 82 On appeal, this court reversed the trial court's ruling denying the admission of expert testimony of the matter of eyewitness identification and remanded the case. *Lerma* I, 2014 IL App (1st) 121880, 385 Ill.Dec. 537, 19 N.E.3d 95. This court found because the trial court "failed to conduct a meaningful inquiry" (internal quotation marks omitted) into the proposed testimony of Dr. Loftus, instead relying on its reasons for denying the admission of Dr. Fulero's testimony, it committed reversible error. Id. ¶ 37. This court stated, "We also find it

difficult to accord the customary degree of deference to the trial court's discretion in this case because the trial court, in relying on its prior ruling, explained itself with little more than a series of conclusions based on its personal belief." Id. ¶ 38. The State appealed.

¶ 83 Our supreme court found the issue to be addressed as "whether the trial court abused its discretion in denying defendant's request to allow Dr. Loftus's expert testimony on the reliability of eyewitness identifications." *Lerma* II, 2016 IL 118496, ¶ 24, 400 Ill.Dec. 20, 47 N.E.3d 985. Before addressing the merits of the State's argument, the *Lerma* II court recognized that the research concerning eyewitness identification is well-settled and well-supported and "in appropriate cases a perfectly proper subject for expert testimony." Id.

¶ 84 The *Lerma* II court began its analysis by stating that "this is the type of case for which eyewitness testimony is both relevant and appropriate" given that the only evidence of the defendant's guilt was the eyewitness identifications made by two witnesses. Id. ¶ 26. There was no physical evidence and no confession or other incriminating statements. The court held that the trial court abused its discretion in denying defendant's request to

admit Dr. Loftus's expert testimony, finding the trial court's reasoning to be troublesome and stating, "even if [the trial court's reasoning] is defensible as to Dr. Fulero's expected testimony, it is not defensible as to Dr. Loftus's expected testimony," where Dr. Loftus's report addressed two important issues not addressed by Dr. Fulero: the acquaintance identification and his statement that he would not include any opinion on the credibility of any witness or identification. Id. ¶ 28.

"As discussed above, what we have in this case is the trial court denying defendant's request to present relevant and probative testimony from a qualified expert that speaks directly to the State's only evidence against him, and doing so ***747 **59** for reasons that are both expressly contradicted by the expert's report and inconsistent with the actual facts of the case. A decision of that nature rises to the level of both arbitrary and unreasonable to an unacceptable degree, and we therefore find that the trial court's decision denying defendant's request to admit Dr. Loftus's expert testimony was an abuse of discretion." Id. ¶ 32.

¶ 85 The court further found that the error was not harmless because "there [was] no question that the error contributed to the defendant's

conviction," it could not "be said that the other evidence in the case overwhelmingly supported the defendant's conviction," and "the excluded testimony from [the expert] was neither duplicative nor cumulative of other evidence, as the jury in this case heard precisely nothing in the nature of expert eyewitness testimony." Id. ¶ 33.

¶ 86 We find *Lerma* II distinguishable from the instant case. Here, defendant's conviction does not rest solely on the identification made by Officers Sedlacek and Park. Not only did the officers see defendant shoot the victims, they chased him through an alley. After they lost sight of him, another officer saw the defendant who was wearing clothes that matched a radio broadcast that described the shooter, running through a gangway and alley near the shooting, and defendant was detained four blocks from the shooting only four minutes after it had occurred. In addition, defendant was seen throwing down a pair of black gloves that later tested positive for gunshot residue. Additionally, the murder weapon was found on the route between where Officers Sedlacek and Park chased defendant and where Officer Castillo later observed him running. Defendant was then identified separately by both Officer Sedlacek and Officer

Park only 20 minutes after the shooting. The trial court weighed the facts and circumstances of this case and correctly concluded that the conclusion to be reached would not "rise or fall on the identification of two police officers alone." Unlike *Lerma*, there was physical and circumstantial evidence outside of the identification testimony that supported defendant's conviction.

¶ 87 Furthermore, unlike *Lerma*, there was no report submitted by Dr. Fulero in this case, nor did the defense submit a detailed motion containing the proposed testimony of Dr. Fulero or a summary of the relevance of that testimony to the issues in this case. Instead, the defense submitted a generalized motion indicating that Dr. Fulero would testify to common misconceptions regarding eyewitness identifications, the accuracy of eyewitness identifications and the effect of suggestivity or bias, how memory effects eyewitness identification, "factors associated with verified cases of misidentification and as observed in this particular case," and that "the eyewitnesses in the present case are not reliable based on the factors in this case."

¶ 88 Here, the trial court did not abuse its discretion in prohibiting the defense from

presenting expert witness on identification testimony, especially where Dr. Fulero would be commenting on the "reliability" of these witnesses, which is clearly a function of the jury, not a purported expert. The trial court conducted a meaningful inquiry of the expert witness and the content to which he would testify at a hearing on defendant's motion and, in its discretion, denied the motion. The record shows that the trial court balanced the probative value against the possible prejudice that may arise from allowing this expert to testify. In addition, the jury was given an instruction on how to weigh eyewitness identification testimony. Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 2000). Therefore, we find that the trial court's decision was not arbitrary or unreasonable and does not amount to an abuse of discretion.

¶ 89 Even if this was the type of case for which expert eyewitness testimony was relevant and appropriate, which it is not, the trial court's denial of defendant's request is a harmless error. To determine whether an error is harmless beyond a reasonable doubt we must consider (1) whether the error contributed to the defendant's conviction, (2) whether the other evidence in this case overwhelmingly supported the defendant's

conviction, and (3) whether the excluded evidence would have been duplicative or cumulative. *Blue*, 205 Ill.2d at 26, 275 Ill.Dec. 376, 792 N.E.2d 1149.

¶ 90 While Dr. Fulero's testimony would not have been cumulative or duplicative, the exclusion of his testimony cannot be said to have contributed to defendant's conviction. As discussed, the other evidence in this case, both physical and circumstantial, overwhelmingly supports defendant's conviction.

25¶ 91 Defendant also argues that the trial court erred when it denied his motion for a new trial where he presented newly discovered evidence that the murders were committed by Jesus Quinones and Angel Rosa.

¶ 92 At the hearing on his motion for a new trial defendant argued there was newly discovered evidence that Jesus "Blood" Quinones and Angel "JR" Rosa committed the murders. This evidence consisted of inculpatory hearsay statements made by Quinones and Rosa admitting to committing the murders of Reynoso and Lilligren, and exculpating defendant. After an extensive evidentiary hearing, the trial court denied defendant's motion for a new trial based on newly discovered evidence. The trial court

ruled the newly presented evidence was not of such a conclusive character as to warrant a new trial because the evidence against defendant at trial was not closely balanced. The trial court further ruled that the evidence allegedly establishing that the murders were committed by Quinones and Rosa was not "newly discovered" because it was "known by maybe even the defendant according to one of the witnesses prior to trial," and because it could have been discovered prior to trial in the exercise of due diligence. The trial court finally noted that this evidence was immaterial.

¶ 93 Reynoso and Lilligren were murdered on March 5, 2003. Defendant's trial began on November 2, 2011. Quinones, also known as "Blood," died in March 2004, and Rosa, also known as "JR," died in August 2007.

¶ 94 To warrant a new trial based on newly discovered evidence, the evidence must (1) have been discovered since the trial, (2) must be of such a character that it could not have been discovered prior to trial with the exercise of due diligence, (3) must be material to the issue and not merely cumulative, and (4) must be of such a conclusive character that it will likely change the result on retrial. *People v. Gabriel*, 398 Ill.App.3d 332, 350, 338 Ill.Dec. 607, 924 N.E.2d

1133 (2010). The trial court's denial of a motion for a new trial based on newly discovered evidence will be reversed on appeal if the trial court abused its discretion. *People v. Villareal*, 201 Ill.App.3d 223, 229, 147 Ill.Dec. 77, 559 N.E.2d 77 (1990).

¶ 95 Defendant presented the testimony of five witnesses, four of who were his friends and one who was his sister. All of the witnesses, except his sister, claimed to have heard one or both of the alleged shooters, Quinones or Rosa, admit to committing the murders of Reynoso and Lilligren. Quinones and Rosa, who are now deceased, were also friends with the defendant.

¶ 96 Anela Pehlivanovic testified that in the summer of 2003, she asked "Blood" what was going on with defendant's murder case, and "Blood" said, "[w]e took care of that anything [*sic*] nigga." Anela did not know who the "we" "Blood" spoke of referred to and admitted "we" could have meant "Blood" and defendant. Anela also testified the reason she never told defendant what "Blood" said, even though she visited defendant in prison, was because the "we" defendant referred to may have meant the defendant. This statement did not exclude defendant's participation in the murders and

was not conclusive enough to change the result at retrial. Furthermore, the evidence was known before trial and through due diligence could have been discovered prior to defendant's trial. The trial court properly denied defendant's motion regarding Anela's testimony.

¶ 97 James Jones testified that both "Blood" and "JR" confessed to him several months after these murders took place. James was contacted by defendant's sister, Susan, after defendant was convicted. She contacted James because defendant (after he began to proceed *pro se* posttrial) gave her a list of names of people who may have information. Since defendant knew to ask James for information regarding the murders, this information could have been discovered before the trial. The trial court properly denied defendant's motion regarding James's testimony.

¶ 98 Mercedes Rodriguez testified that three days after the murders, "Blood" and "JR" confessed to committing the murders. Rodriguez visited defendant nine times prior to his trial, but after both "Blood" and "JR" had died, and never told defendant or anyone else about the confessions. Despite this, she did not come forward until nine and a half years after the murders took place. Her testimony may also

have been discovered through due diligence prior to trial, and the trial court properly denied defendant's motion regarding Rodriguez's testimony.

¶ 99 The testimony of Irving Gonzalez establishes that all the substance of the purported testimony from Anela, James, and Rodriguez was known before trial. Gonzalez testified that "JR" confessed to him in August 2007. "JR's" confession involved two shooters, a claim which is discredited by the eyewitness testimony and the physical evidence in this case. The ballistics evidence conclusively determined that only one gun was used to commit these murders. Gonzalez's testimony was impeached by the physical evidence and would not have conclusively changed the outcome of the retrial. Gonzalez further testified that he told one of defendant's attorneys, defendant, and defendant's wife of the alleged confession. Defendant's sister also heard Gonzalez tell defendant's attorney about the alleged confession, and she then informed the defendant. Therefore, this was not newly discovered evidence but was evidence known before the trial occurred. The trial court properly denied defendant's motion regarding Gonzalez's testimony.

¶ 100 Defendant's sister, Susan, states that she never heard anyone confess, but she did hear Gonzalez tell defendant's attorney that "Blood" and "JR" confessed, and she was "pretty sure" she told defendant about this the next time she visited him in jail. She visited defendant about 20 times in 2009 and in 2011, right before defendant's trial.

¶ 101 Each of the four witnesses claim that the murders of Reynoso and Lilligren were confessed to and committed by two people, yet the eyewitness testimony and physical evidence definitively disproves this assertion. Therefore, in each instance the trial court was correct in concluding that the evidence would not have conclusively changed the result of the retrial because none of the alleged confessions by "Blood" or "JR" tended to negate defendant's participation in the murder.

¶ 102 The trial court properly denied defendant's motion for a new trial based on newly discovered evidence. Here, the evidence defendant could have been discovered prior to trial through due diligence and was not of such a conclusive character that it would likely change the result on retrial. The evidence presented by the five witnesses that came forward would not have

likely changed the outcome of the trial in light of the entirety of the evidence presented.

28¶ 103 Defendant also argues that all of the above testimony would be admissible based on either *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), or Illinois Rule of Evidence 804(b)(3) (eff. Jan. 1, 2011). Under Chambers, there are four factors used to evaluate admissibility. The four aspects of a hearsay statement which tend to make the statement admissible are: (1) it was made spontaneously to a close acquaintance shortly after the crime occurred, (2) it was corroborated by other evidence, (3) it was self-incriminating and against declarant's interest, and (4) there was adequate opportunity for cross-examination of the declarant. *Chambers*, 410 U.S. at 300–01, 93 S.Ct. 1038. The Chambers factors are merely guidelines to admissibility; the presence of all four factors is not required. People v. Tenney, 205 Ill.2d 411, 435, 275 Ill.Dec. 800, 793 N.E.2d 571 (2002).

¶ 104 Defendant argues that Rodriguez's testimony satisfies three of the four *Chambers* factors and should be admissible. We disagree. Her testimony was not corroborated by other evidence, and there is not an adequate opportunity to cross-examine either Quinones or

Rosa, thus making her hearsay testimony unreliable even if Quinones allegedly told her days after the murder that he and Rosa had committed the murders.

¶ 105 Under Illinois Rule of Evidence 804(b)(3) (eff. Jan. 1, 2011), a statement of an unavailable declarant is admissible if it is a:

"statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

While both alleged declarants are unavailable, there are no "corroborating circumstances [to] clearly indicate the trustworthiness of the statements." *Id.*

¶ 106 We find that the trial court did not abuse its discretion in denying defendant's motion for

a new trial based on the testimony provided during the hearing. The testimony of all the witnesses could have been discovered before trial and was not so conclusive as to change the outcome of the trial.

29¶ 107 Next, defendant argues that the prosecutor deprived defendant of a fair trial when he made prejudicial comments during closing argument. Specifically, defendant claims that the prosecutor accused defense counsel of being "very good" at "trying to confuse the witnesses about case reports and supplemental reports and all this stuff," that defense counsel tried to ***751 **63** "distort as much as possible," that defense counsel was "exaggerating to make it look like reasonable doubt and they couldn't have seen what they saw" and that the defense "was just going to throw it out there anyway." Regarding Stiles, the State argued that the defense was "trying to have her sign something so they could argue to you that she didn't see the police at all." Lastly, the State accused defense counsel of wanting the police to kill innocent people, saying that defense counsel, "thinks that the police should be shooting at everybody out there." An objection to this last comment was sustained.

3031323334¶ 108 Courts allow prosecutors great latitude in making closing arguments. P*eople v. Cisewski*, 118 Ill.2d 163, 175, 113 Ill.Dec. 58, 514 N.E.2d 970 (1987). A prosecutor may comment on the evidence and all reasonable inferences from the evidence. *People v. Pasch*, 152 Ill.2d 133, 184, 178 Ill.Dec. 38, 604 N.E.2d 294 (1992). A closing argument must be viewed in its entirety, and the challenged remarks must be viewed in their context. *People v. Glasper*, 234 Ill.2d 173, 204, 334 Ill.Dec. 575, 917 N.E.2d 401 (2009). Argument that serves no purpose but to inflame the jury constitutes error. Blue, 189 Ill.2d at 127–28, 244 Ill.Dec. 32, 724 N.E.2d 920. Statements will not be held improper if they were provoked or invited by the defense counsel's argument. *People v. Kirchner*, 194 Ill.2d 502, 553, 252 Ill.Dec. 520, 743 N.E.2d 94 (2000).

¶ 109 There is a conflict regarding the correct standard for reviewing a prosecutor's remarks during argument. *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 32, 382 Ill.Dec. 436, 12 N.E.3d 715. In *People v. Wheeler*, 226 Ill.2d 92, 121, 313 Ill.Dec. 1, 871 N.E.2d 728 (2007), and *People v. Sims*, 192 Ill.2d 592, 615, 249 Ill.Dec. 610, 736 N.E.2d 1048 (2000), our supreme court suggested that we should review this issue *de*

novo. In *People v. Hudson*, 157 Ill.2d 401, 441, 193 Ill.Dec. 128, 626 N.E.2d 161 (1993), however, the court suggested that we should review this issue for an abuse of discretion. We need not take a position in this case, as defendant's claim fails under either standard.

¶ 110 The above complained of comments from the prosecutor were made during rebuttal argument, were invited by defense counsel's closing argument, and were a reasonable response to defense counsel's arguments. The defense asserted that the police were lying for their own convenience so that they did not have to perform a proper police investigation. The prosecutor's comment about defense counsel thinking "that the police should be shooting at everybody out there" was ultimately sustained. These remarks were also provoked by defendant's closing argument. Defense counsel questioned Officer Sedlacek's and Officer Park's credibility by stating:

"Two guys who, for the life of me to this day, if, in fact, they saw what they claim they saw, how do you not shoot this guy? How do you not fire one shot at a guy that you just saw kill two people? And Sedlacek said, you know, I'm not a killer. Well, you know, you're a policeman who you've just witnessed, according to you, a double

murder, and you're within 10 feet of this guy as he's carrying a gun and he turns in your direction and you don't fire off a shot. Think about that, ladies and gentleman. Does that make sense? Neither one of these guys. Neither one."

¶ 111 Viewing the prosecutor's closing argument *in toto*, we find that the prosecutor's comments were not prejudicial and did not deprive defendant of a fair trial.

3536¶ 112 We also reject defendant's argument that the State attempted ***752 **64**to define reasonable doubt and shift the burden of proof to the defendant. The State commented that the burden of proof was not "some kind of Everest that we have to scale." Defense counsel's objection to this remark was sustained. The State also argued that there was "no other explanation" of the gunshot residue evidence, and an objection to this statement was overruled. The State further added that defendant was the "unluckiest man in the world."

¶ 113 In *People v. Thompson*, 2013 IL App (1st) 113105, ¶¶ 86–94, 375 Ill.Dec. 370, 997 N.E.2d 681, this court held the State's comment that the reasonable doubt standard was not a "mystical

magical burden" was not error. The first remark made by the State regarding the burden of proof was sustained by the trial court. The argument that there was "no other explanation" for the gunshot residue evidence does not shift the burden to the defendant. The prosecutor was merely highlighting unimpeached evidence that had been admitted. Furthermore, claiming the defendant was the "unluckiest man in the world" was invited by the defense closing argument claiming defendant was at the wrong place at the wrong time and falsely identified. These comments do not amount to unfair prejudice to the defendant.

37¶ 114 Defendant next asserts the State committed prejudicial error by arguing, "[c]ounsel talks about, well, why we didn't do a lineup. It's not fair to Robert Anderson. Well, there is a reason why, and you heard that reason during the trial. Because what if it's the wrong guy? Because what if it's the wrong guy? What do we say to the victim's family then? Well, sorry, we did a whole lineup." The defense then objected and was overruled. The State continued, "We did a whole lineup and it took us about three hours or a couple hours to get the lineup together, but you know what, it wasn't him and, sorry, we didn't

catch him that night." This argument was in direct response to defendant's argument that show-up identifications were flawed and unreliable. The prosecution was merely emphasizing that show-up identifications are done in emergency situations when a suspect is caught quickly after an offense to confirm his identity by a witness, because if the witness states that the suspect was not the offender, the police can quickly begin searching for the correct offender. The prosecution was demonstrating the consequences of using a traditional lineup under the circumstances of this investigation. These comments were not inflammatory or prejudicial.

38¶ 115 Finally, defendant asserts he was prejudiced by the State arguing that a guilty verdict was the only way to make defendant "accept responsibility for what he did that night," and they should "tell him that his murdering days are over." The trial court sustained the objections to these remarks.

¶ 116 These rebuttal comments, similar to our view of the other claimed improper prosecutorial comments, did not unfairly prejudice defendant when viewed in context and in their totality. Most of the comments were invited by the

defense closing, and none were so prejudicial to deny defendant a fair trial.

39¶ 117 Defendant claims the trial court erred in denying his motion for a new trial because he received ineffective assistance of trial counsel. Defendant specifically contends trial counsel was ineffective for failing to ask for a limiting instruction in regard to evidence of defendant's prior arrest, failing to introduce DNA evidence, and failing to make a better offer of proof for the eyewitness expert testimony.

65 ¶ 118 To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient and (2) counsel's actions resulted in prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *People v. Evans*, 209 Ill.2d 194, 220, 283 Ill.Dec. 651, 808 N.E.2d 939 (2004). Under the first prong, a defendant must demonstrate that his attorney's performance fell below an objective standard of reasonableness. *Evans*, 209 Ill.2d at 220, 283 Ill.Dec. 651, 808 N.E.2d 939. Under the second prong, prejudice is shown where there is a reasonable probability that the result would have been different but for counsel's alleged deficiency. Id. Failure to satisfy either prong of the *Strickland* test

precludes a finding of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052.

¶ 119 In analyzing the first claim, that trial counsel was ineffective for failing to ask for a limiting instruction in regard to evidence of defendant's prior arrest, we find defendant suffered no prejudice. There is not a reasonable probability that the result of the trial would have been different had the jury received an instruction stating that defendant's aggravated battery case should only be considered to suggest that Officer Sedlacek had a motive to falsely identify defendant. The more effective, but unsuccessful, use of this arrest was defense counsel's ability to present the jury with facts tending to diminish the police officer's identification testimony because the previous contact with defendant would indicate that he should have recognized defendant at the time of the incident and his arrest. The acquittal was not the important point: it was the officer's purported familiarity with the defendant that defense counsel skillfully brought before the jury.

¶ 120 Defendant next asserts counsel was ineffective by failing to introduce DNA evidence. Defendant has likewise failed to establish that

he suffered prejudice as a result of defense counsel's failure to introduce this evidence or that it was not simply trial strategy.

¶ 121 Defendant claims he was excluded as a DNA donor to the gloves that tested positive for gunshot residue. However, this is not the case. Dr. Reich interpreted the DNA evidence as excluding defendant from the DNA found on one of the two gloves. He was not excluded as a donor on the other. The State could have rebutted this conclusion through presenting the conclusions of the Illinois State Police DNA report, which did not exclude defendant as a donor of the DNA found on both gloves. Dr. Reich also testified it was possible that defendant wore both gloves.

¶ 122 However, Dr. Reich, the DNA expert, testified at the hearing for a new trial and admitted that he extensively cut and pasted his reports. The trial court found Dr. Reich to be one of the most "incredible experts" it had ever seen testify. The defense attorney also testified at this hearing and stated that once he realized the State was not going to introduce DNA evidence and that Dr. Reich had credibility issues, he made a strategic decision not to introduce the DNA evidence and instead argue that the State's failure to introduce DNA evidence was a weakness in their case. The record, in our view,

supports the finding that defense counsel's failure to introduce this evidence was a valid trial strategy and not unreasonable. See *People v. Orange*, 168 Ill.2d 138, 153, 213 Ill.Dec. 589, 659 N.E.2d 935 (1995) (noting that a decision which involves a matter of trial strategy will generally not support a claim of ineffective representation).

66 ¶ 123 Lastly, the eyewitness testimony expert was not excluded because of an inadequate offer of proof from defense counsel. The trial court, exercising its discretion, made this decision after looking at the entirety of the evidence presented and the probative and prejudicial value of the proffered testimony. The eyewitness and physical evidence, while some of it circumstantial, supported defendant's conviction. Therefore, defendant was not prejudiced by the arguments counsel made in defendant's offer of proof in support of allowing expert eyewitness testimony.

¶ 124 CONCLUSION

¶ 125 Based on the foregoing, we affirm the judgment of the trial court.

¶ 126 Affirmed.

Justice Hyman and Justice Mason concurred in the judgment and opinion.

All Citations

2017 IL App (1st) 122640, 72 N.E.3d 726, 411 Ill.Dec. 38

APPENDIX C

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT – CRIMINAL DIVISION

No. 03-CR-7356-01

[May 19, 2011]

THE COURT:

Every -- every factual circumstance can cut two ways, and the main part of your argument, Mr. Beuke, where you indicate that the officers -- I don't know that the officers knew the defendant from prior occasions or if one of the officers may have had some contact with the Defendant on a prior occasion and it is a valid argument that the officer would have put out the name of the Defendant in the initial 911 tape, however, that -- that cuts both ways.

Normally when there's some type of a description that's going out on the radio, the officers would have to presume that not everyone

else in the district or the area would know the Defendant and they would want to get a physical description out there first so that other officers may find someone that matches the description who may not know who the Defendant is. So it also may -- makes perfect sense that the officers knowing the Defendant's name, if that be the truth, and I don't know if it is, or the nickname would not necessarily supply that information initially but would supply a physical description on the 911 tape.

So I don't know that that fact -- that's one fact that relates to the case. I've read all the cases and I've now looked at the case that the State cited wherein Muskegon, Michigan applied an analysis and denied the testimony of Doctor Fulero. The cases that I have reviewed extensively are, in fact, the Aguilar case. I even took a look at the Allen case which was cited in Aguilar and have read Becker and the other case that the State – Pelo that the -- that the State cited.

And Justice Steigmann's analysis in Pelo is given high weight. Justice Steigmann is a scholar of the law and teaches judicial education, well respected Appellate Court judge with many, many years of service in the system. In fact, I can

even remember back in the old days when Judge Steigmann would be a summer judge at 26th and California when before the days that we had floaters and things like that and backup judges they would bring in judges from downstate to preside in these courtrooms at 26th and California during the summer. Steigmann was one of those judges.

But I have the Supreme Court case Becker and they -- they provide some pretty good guidelines for analysis between the case at bar, Robert Anderson, as well as how these facts stack up against some of the facts of the other cases that were cited.

The time limit to the identification is, in fact, extremely short, much shorter even than Aguilar. The Anderson case, this case, also contains what could be considered strong circumstantial evidence on the route of flight and recovery of gun and positive gunshot residue that support the identification. So the case isn't going to rise or fall on the identifications of two police officers alone.

In addition, it is relevant that the witnesses are police officers. You can't look at these things in a vacuum. They are trained to

observe. They're always looking for something. Of course, the argument could be made they're only human and they can make mistakes also and that argument most likely will be made and it can be made without the aid of an expert witness to try to explain to a jury what that -- there can be errors in identification.

In applying the tests that are laid out in Becker, the trial court does not err in barring expert testimony where the matter at issue is not beyond the ken of the average jury. In my view that's -- that's applicable here. The matter at issue, identification, is not beyond the ken of the average juror.

Two. Expert testimony is not admissible on matters of comnon knowledge unless the subject is difficult to understand and explain. Once again my view is that a matter of identification is a matter of common knowledge which can be argued effectively either way and which is supported by a jury instruction which has been the subject of litigation over the years and is now refined to the point where it's given in one specific format with all the factors that need to be analyzed to aid the jury in determining whether the identification is suspect or not. So armed with those

types of things in my view this is a matter of common knowledge and is easy to understand and explain and doesn't require expert testimony.

Thirdly. An expert's testimony is only necessary when the subject is both particularly within the witness' experience and qualifications and beyond that of the average juror's when it will aid the jury in reaching its conclusion. Scientific expertise being more or less the -- the example that would be so relevant or so -- the type that that expert testimony is needed. This is a situation where I don't think the witness1 experience and qualifications are beyond that of the average juror's and I don't feel that it will aid the jury in reaching its conclusion. I feel it would possibly confuse the jury and possibly mislead the jury. So that's -- that's a third reason I -- I'm weighing on the side of the State.

A court should carefully consider the necessity and relevance of the expert testimony in light of the facts of the case before admitting it for the jury's consideration. And again in terms of the facts of the case, we have two witnesses, police witnesses basically making an on view. We have a Defendant supposedly coming towards them before he breaks for a different direction and

ultimately in the pursuit is lost in the pursuit so there's some moment of -- moment in time where they do not have him in their view but he's captured a short distance away relatively quickly.

So when I consider those acts and compare them against some of the facts in cases where an expert could have been used to aid the jury, I don't -- I think the facts cut in favor of the State on this particular case.

And then lastly, which I do all the time, I always conduct a balancing test to determine whether the probative value of the reliability of the expert testimony, how that weighs against barring that testimony against any prejudicial effect and my view is that the --in conducting that balancing test, the probative value denying the expert's testimony outweighs any prejudicial effect that would inure to the Defendant as a result of him not being called.

So for all those reasons the Defense motion to present identification expert testimony through Doctor Fulero will be respectfully denied.