

Part B of Motion to MOTION TO SUPPRESS EYEWITNESS IDENTIFICATION

(With Request for Hearing and to Adduce Testimony by Defense Expert Witness)

by Jeralyn E. Merritt, January 1997, U.S. v Timothy McVeigh

B. Request for Expert Testimony at Evidentiary Hearing

Defendant further requests that Dr. Elizabeth F. Loftus be allowed to testify as an expert in eyewitness identification at the hearing on Defendant's Motion to Suppress Eyewitness Identification.

..... Trial courts have broad discretion to admit expert testimony over the objection that such would improperly invade the province of the jury. The expert testimony that defendant seeks to admit to the Court at a hearing on his Motion to Suppress Eyewitness Identification pertains to research and theory concerning memory, the reporting of memory, and the variables known to influence memory and memory reports. The testimony is not based on a clinical evaluation of the eyewitnesses in this case and will not be presented as "facts" about this case. It is designed to provide scientific information that may assist the trier of fact in interpreting contested adjudicative facts: statements of witnesses as to who and what they saw and what happened.

Under Rule 702 of the Federal Rules of Evidence, and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), scientific expert testimony is admissible if it is based upon "scientific knowledge" and will assist the trier of fact to understand or determine a fact in issue. *Daubert*, at 2796. The proffered testimony must rest on a reliable foundation and be relevant to the task at hand. *Id.*, at 2797. See, also, *United States v. Jordan*, 924 F. Supp. 443 (W.D.N.Y.; 1996).

A consideration of the requirements for admission of expert testimony with the

facts of this case demonstrate the propriety of allowing Dr. Loftus to testify as an expert at the hearing on Mr. McVeigh's Motion to Suppress Eyewitness Identification.

1. The Witness is Personally Qualified

It is beyond dispute that Dr. Elizabeth Loftus is personally qualified as an expert in the fields of eyewitness identification, memory and recall. Her *Curriculum Vitae*, which is attached as Exhibit B, amply demonstrates that she is an expert, possessing "sufficient skill, knowledge, or experience in the field of psychology as to make it appear that her opinion or inference will probably aid the trier in the search for truth." Strong, *McCormick on Evidence* §13 (4th Ed. 1992); Fed. R. Evid. 702. Dr. Loftus received her Ph.D. in psychology from Stanford University in 1970, is a full Professor at the University of Washington, where she has been on the faculty since 1973, and has taught numerous courses on the psychology of perception, memory and recall. She has given hundreds of lectures on related subjects, and, as shown on her *Curriculum Vitae*, has published hundreds of articles as well as several textbooks on the subject. Dr. Loftus has qualified and testified as an expert on eyewitness identification in over 200 civil and criminal trials nationally. She is recognized world-wide as a pre-eminent expert in the field of eyewitness identification, memory and recall.

2. Proffer of Testimony

In addition to the matters on pages 8-15 of this motion, Dr. Loftus would be prepared to testify to the following:

(1) Reliable studies show that there is a weak correlation between witness confidence and reliability of identification. Gary L. Wells and Donna M. Murray, *Eyewitness Confidence, in Eyewitness Testimony* 165 (Gary L. Wells et. al., eds. Cambridge University Press 1984). Yet most lay persons believe that the more "certain"

the identification, the more reliable the identification. Loftus & Doyle, *supra*, at 2.

Jurors overbelieve eyewitnesses, have difficulty reliably differentiating accurate from inaccurate eyewitnesses and are not adequately sensitive to aspects of witnessing and identification conditions. A recent study also found that a major source of juror unreliability is reliance on witness confidence, which is a dubious indicator of eyewitness accuracy even when measured at the time an identification is made. Further, expert psychological testimony on the factors that influence eyewitness memory appears to reduce juror reliance on confidence and enhance use of other factors known to affect memory. Steven Penrod and Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation, Psychology, Public Policy and Law*, 1995, Vol. 1, No.4, 817-845.

(2) Contrary to average juror expectations, stress actually decreases rather than increases accuracy of perception, with subsequent distortion of recall.

(3) Empirical studies have demonstrated that pooling of information by eyewitnesses poses a danger that a witness' memory of the perpetrator will be unduly influenced by the recall of other participants involved in the pool, resulting in an identification which is not based upon the individual memory of the witness but rather upon the group determination of the features of the perpetrator.

(4) Studies support the existence of a phenomenon called "photo bias identification" if the witness has created a composite picture, and a mental process called "blending" which can reinforce the composite if there have been subsequent photo identifications, resulting in the identification of someone who looks more like the composite than the actual perpetrator.

(5) The photographic lineup process itself contains a high degree of suggestibility

which is not generally understood by lay persons, and explanation of the psychological factors involved in the photographic lineup process would assist the trier of fact in determining the validity of an identification. Reliable psychological studies have shown that eyewitnesses who had publicly stated their choice stayed with even incorrect choices 78% of the time. Loftus & Doyle, *supra*, at 92.

(6) Memory is not a static concept but is continually changing, as influenced by subsequent events, the mind's need to fill in memory gaps, and by suggestion, both overt and subtle. Most lay witnesses do not understand the constructive process involved in memory; such knowledge would assist the trier of fact in resolving the identification issue.

(7) Studies show that there is a phenomenon known as the "forgetting curve", i.e., the effect of time on memory as it relates to identification. Memory weakens at a non-constant rate with the passage of time, with most of the forgetting taking place within the first hours following the event, and certainly within the first few days following the event.

(8) An initial identification made by an eyewitness may influence that eyewitness's later identifications and perceived memories of the event. Several reliable studies have shown that once an identification is made from a photo spread, an eyewitness may make an erroneous in-court identification based upon the face initially identified in the photo spread, rather than based upon the face actually seen during the event. Jurors may understand the general nature of this phenomenon, but the average lay person does not comprehend the magnitude of its impact on eyewitness memory.

3. The Proffered Testimony Fits the Facts of This Case

A defendant seeking admission of expert testimony must make an on-the-record detailed proffer to the court, including an explanation of precisely how the expert's

testimony is relevant to the eyewitness identifications under consideration. There should be a fit "between the scientific research presented...and the disputed factual issues of [the]case" in order to admit the testimony. *United States v. Downing*, 753 F.2d 1224, 1226 (3rd. Cir. 1984). The offer of proof should establish the presence of factors which have been found by researchers to impair the accuracy of eyewitness identifications. *Id.*, at 1242.

In this case, the Court can readily find such factors and their "fit" to the facts at issue. Two of the challenged witnesses, Mr. Donahue and Mr. Skrdla, were supremely confident of their identifications, notwithstanding (as to Mr. Donahue) significant differences between the description of the person he saw and Timothy McVeigh, and (as to Mr. Skrdla) the lack of details he could remember surrounding the encounter and the fact that the gas station was very busy at that moment in time. These witness' expression of confidence in their identifications "fit" the proffered expert testimony regarding the negative correlation between witness confidence and accuracy of identification.

Likewise, the exposure of all of the challenged witnesses to Mr. McVeigh's picture and image, as well as to publicity surrounding this case, prior to the time they made their identifications, fits the proffered testimony concerning the effect of such publicity and prior exposure to the suspect's image on the reliability of their identifications. Mr. Ferris was under a great deal of stress and is a very emotional person. This witness' stress "fits" the proffered testimony on the detrimental impact stress has on eyewitness identification.

All of the challenged witnesses underwent identification procedures involving composite drawings or photo line-ups, and were exposed to the image of Timothy

McVeigh prior to their identification of him. The presence of the phenomenon of identifications through composite drawing and photo line-ups "fits" the proffered testimony regarding "photo bias" and "blending."

This case also involves at least two challenged witnesses, Elliott and Kessinger, who shared information between themselves and another potential witness, Vicki Beemer, about their recollections of the appearance of Robert Kling. These facts "fit" with the proposed testimony on the "pooled information" phenomenon .

In addition, a significant period of time elapsed between the time of the events or observations, the witness' identifications of Mr. McVeigh, and the present time. For Mr. Tipton, it was over six months from his single encounter with a person who resembled Mr. McVeigh to his identification of him. For the others, it was weeks or months. Even as to Mr. Kessinger, the government waited ten days, and until all of the world had seen the face of Timothy McVeigh before asking him to make an identification. These facts "fit" with testimony concerning the forgetting curve.

4. The Subject Matter is Proper.

The prosecution may argue that the subject of Dr. Loftus' proffered testimony, the frailties inherent in the psychological processes of perception, memory and recall, is not a proper subject matter for expert testimony. However, cases so holding, such as *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973), no longer govern the admissibility of such testimony. Noting that the "rigid *Frye/Amaral* test" has been supplanted by the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, test, the Ninth Circuit described the appropriate inquiry as follows: "whether such testimony is relevant, and if so, whether the theory propounded is trustworthy and scientifically valid." *United States v. Amador-Galvan*, 9 F.3d 1414, 1418 (9th Cir. 1993). As noted by the Supreme Court in *Daubert*,

the court must also assess the proposed testimony under Rule 403, which permits the exclusion of relevant testimony if its probative value is outweighed by the danger of unfair prejudice, confusing the issues, or misleading the jury.

5. The Expert Testimony Is Relevant and Highly Probative

This case involves the largest act of alleged domestic terrorism in United States history. There are no eyewitnesses to the offense. No one can positively identify Mr. McVeigh at the scene of the bombing or driving from Kansas to Oklahoma. Only one witness, Mr. Dunlap, saw anyone resembling Mr. McVeigh in Oklahoma City on April 19, 1995. The evidence against Mr. McVeigh is almost entirely circumstantial.

This is not a case such as that described in *United States v. Harris*, 995 F.2d 532 (4th Cir. 1993), where the jury "could pick and choose from an evidentiary cornucopia".

The scientific insights which Dr. Loftus can offer into the weight that should be accorded to this testimony will be crucial to the court's and jury's appreciation of the facts. Psychological research has advanced and a growing number of courts have recognized that psychologists can make an important contribution to the trier of fact's evaluation of eyewitness testimony. *See, e.g., United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985); *United States v. Smith*, 736 F.2d 1103 (6th Cir.), *cert. denied*, 469 U.S. 868 (1984). Judges and juries frequently are unaware that eyewitnesses do not function as videotape recorders, but rely instead on a complex process of perception, memory, and retrieval which is vulnerable at every stage. Loftus & Doyle, *Eyewitness Testimony: Civil and Criminal*, §11.02 (1992). Very few lay persons are aware of the fact that the stress can actually impede perception. *See State v. Chapple*, 660 P.2d 1208 (Ariz. 1983). Fewer are aware of the special difficulties associated with trying to identify a person when there has been significant prior exposure to publicity and the person's photograph and

image.

Dr. Loftus is prepared to testify that identifications of a person following massive publicity of his face and image is particularly vulnerable to error, that high levels of stress can actually impede an eyewitness's ability to perceive, that sharing of information between witnesses can seriously impair the reliability of an identification, and that "post-event information" (such as the viewing of a photograph of a suspect numerous times) can actually modify a witness's memory of what was perceived at the time of the crime.

Each of these areas has been held to be a proper area of expert testimony. *See, e.g.,* Brian L. Cutler & Steven D. Penrod, *Mistaken Identification: The Eyewitness, Psychology and the Law* (1995).]

Moreover, in cases like the present one, where there is not a cornucopia of other evidence establishing guilt, exclusion of expert testimony has been held to be an abuse of discretion. *See State v. Chapple, supra; United States v. Smith*, 736 F.2d 1103 (6th Cir. 1984).

6. The Evidence Has No Unfair Prejudicial Effect

Despite its probative value, Dr. Loftus's testimony could be excluded if its probative value was substantially outweighed by the danger of unfair prejudice or if it would consume undue amounts of time, mislead or confuse the trier of fact, or surprise the opposing party. *Fed. R. Evid. 403*. None of these considerations is present here. Dr. Loftus will not be offering an opinion concerning whether any witness' identification is accurate. Instead, she will outline for the court, and if necessary thereafter, the jurors, the general principles of psychological knowledge which illuminate the problems of eyewitness performance. *See State v. Chapple, supra*.

7. The Government Has Adequate Notice

The prosecution has sufficient time to prepare a response to Dr. Loftus' testimony. A hearing date has not yet been scheduled. Thus, the government cannot allege the prejudice noted in *United States v. Curry*, 977 F.2d 1042 (7th Cir. 1992), *cert. denied sub nom. Holland v. United States*, 113 S. Ct. 1357 (1993) (notice of the proposed proffer of expert testimony given four days before trial was prejudicial to the government and would have justified its exclusion).

8. Additional authority

As and for additional authority, defendant submits the Court's opinion in *United States v. Michael Norwood*, 939 F.Supp 1132 (D.N.J.) decided September 6, 1996, and attached hereto as Exhibit "C".

WHEREFORE, Defendant McVeigh prays for the relief requested, and for such other and further relief as to the Court seems just and proper in the premises.

Respectfully submitted,

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