

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division -- Felony Branch**

UNITED STATES OF AMERICA	:	
	:	Criminal Case No. 5147-03
	:	
v.	:	Judge Bayly
	:	
	:	Trial: December 8, 2004
RALPH JOHNSON	:	

MOTION TO PRESENT A DEFENSE TO THE JURY

Mr. Ralph Johnson, through counsel, respectfully moves this Honorable Court to permit him – in accordance with his rights under the Fifth and Sixth Amendments to the United States Constitution to due process, to compulsory process, to present a defense, to a jury trial, and to the equal protection of the law, see U.S. Const. amends. V and VI – to present his defense of misidentification through the testimony of Dr. Steven Penrod, an expert in the study of eyewitness identification. Dr. Penrod’s testimony “is designed to educate the jury so that their lay understanding will be informed by appropriate psychological considerations,” Mindombe v. United States, 795 A.2d 39, 48 (D.C. 2002). Dr. Penrod’s testimony will give the jury the tools it needs to intelligently assess the reliability of the eyewitness identification evidence presented by the prosecution.

By filing this motion, Mr. Johnson does not concede that he has any burden to justify the exercise of his fundamental constitutional rights at trial. Rather, it is the government and the Court that must establish a legitimate, compelling interest to curtail his rights to due process, to compulsory process, to present a defense to a jury trial, and to equal protection. No such interest exists. Here, where the government’s case turns wholly on eyewitness identification evidence, and where Mr. Johnson is raising a defense of misidentification, Dr. Penrod’s testimony is relevant and material. Moreover, Dr. Penrod’s testimony satisfies the requirements for the

admission of expert testimony under Dyas v. United States, 376 A.2d 827 (D.C. 1977), especially if these requirements are applied in the relaxed manner as they are applied in instances where the prosecution proffers expert testimony.

In support of this Motion and upon information and belief, counsel states the following:

1. The government's case against Mr. Johnson rests entirely on identification evidence by two eyewitnesses: (1) W-1, who viewed the startling, violent shooting at issue while under the influence of alcohol, and, eight days later, purported to identify Mr. Johnson as the gunman from a simultaneous, non-blind photo array; and (2) W-4, who did not view the shooting and only saw a man running from the vicinity of the scene with a gun in his waistband; thirteen months after the charged crime, W-4 purported to identify Mr. Johnson as this man from a simultaneous, non-blind photo array (the same array viewed by W-1).
2. The government has no other evidence linking Mr. Johnson to this shooting – no statements from Mr. Johnson, no gun, no blood spatter, and no DNA.
3. In order to litigate his defense of misidentification, Mr. Johnson retained an expert, Dr. Steven Penrod, a professor of psychology at the John Jay Criminal College of Justice and a preeminent expert in the field of memory and eyewitness identification. See Curriculum Vitae of Dr. Steven Penrod (Appendix S to Mr. Johnson's Supplemental Memorandum of Points and Authorities in Support of a Motion to Suppress Identification Evidence and to Compel Disclosure of Exculpatory Information (hereinafter "Motion to Suppress Supplement"), dated October 29, 2004).
4. On November 16, 2004, Mr. Johnson provided the government with notice pursuant to Rule 16(b)(1)(C) that he intended to call Dr. Penrod to testify both at his

suppression hearing and if need be at trial. See Notice of Expert Testimony, dated November 16, 2004. The government never requested this expert notice, but Mr. Johnson provided it voluntarily in order to minimize any need to delay his trial.

5. In his Expert Notice, Mr. Johnson set forth Dr. Penrod's extensive qualifications. See Notice of Expert Testimony, dated November 16, 2004, at 1-2. Mr. Johnson also detailed, point by point, the scientific findings that Dr. Penrod would cover in his testimony, and the relevance of these findings to Mr. Johnson's case. Id. at ¶¶ A-L.¹ These topics included the general functioning of perception and memory, the effect of high stress, exposure duration, weapon focus, the ingestion of alcohol, the weak correlation between confidence and accuracy, best practices in identification procedures, the misinformation effect, and the deterioration of memory. Id.²

6. The scientific findings that Dr. Penrod would testify about at trial would be very helpful to the jury and are not within the ken of the average D.C. Juror. Indeed, a recent survey of 1000 potential jurors in the District of Columbia demonstrates that many D.C. jurors do not understand the factors that can undermine the reliability of an eyewitness

¹ At the time Mr. Johnson filed this Expert Notice, the government had indicated that its case against Mr. Johnson was based on the testimony of two witnesses, W-1 and W-2. Since that Expert Notice was filed, government has abandoned any reliance on W-2 (implicitly conceding, as Mr. Johnson had argued, that W-2's identification of Mr. Johnson was solely the product of a suggestive lineup) and has disclosed the existence of a new witness, W-4. With the exception of Dr. Penrod's testimony about unfair lineups, which no longer pertains, the government's eleventh hour substitution of witnesses does not affect the content of the testimony from Dr. Penrod that Mr. Johnson seeks to put before the jury.

² Based on the government's recent disclosures that both W-1 and W-4 knew who Mr. Johnson was from the neighborhood and had each seen him 3 times over a six month period prior to the instant shooting, Mr. Johnson now also provides notice that Dr. Penrod will testify about the relevant phenomenon of "unconscious transference" – a documented distortion of memory where an eyewitness mistakenly identifies as the culprit someone that they have seen in another context or setting.

identification or the effects that procedures used to elicit eyewitness identification evidence can have on the reliability of that evidence. See Attached Results of Survey conducted by Peter D. Hart Research Associates, Inc., February 2004.³ The questions in the survey were written with the assistance of Dr. Elizabeth Loftus, a Distinguished Professor of psychology at the University of California, Irvine, another leading expert in this area of psychological research, and conducted by professional pollsters using standard methodologies.

7. For example, according to the survey
 - a. 54% of potential jurors polled do not understand that memory is a reconstructive event and that the act of remembering is not like replaying a video recording. See question 11.
 - b. 62% of potential jurors polled do not understand the effect the presence of a weapon will likely have on an eyewitness' ability to make a reliable identification. See question 7.
 - c. 57% of potential jurors polled do not understand the weak correlation between eyewitness confidence and accuracy. See question 5.
 - d. 70% of potential jurors polled do not understand the import of telling an eyewitness viewing a photo array that the suspect may or may not be included in the array. See question 10(b).
 - e. 61% of potential jurors polled do not understand that the procedure of showing an eyewitness photographs sequentially minimizes relative

³ It was Mr. Johnson's intention to attach the result of the Survey as an exhibit to his Motion to Suppress Supplement. By mistake, however, only the questions without the responses were attached as Exhibit L to that pleading.

judgments and enhances the reliability of the eyewitness' selection. See question 10(b).

- f. 52% of potential jurors polled do not understand that conducting a doubleblind identification procedure – i.e., where the person conducting the identification procedure is unaware of the identity of the suspect – precludes subconscious cues to the witness and enhances the reliability of the eyewitness' selection. See question 10(b).

8. In response to Mr. Johnson's Expert Notice, the government inexplicably filed a non-responsive "Opposition" to Mr. Johnson's use of expert testimony. See Government's Opposition to Defendant's Use of Expert Testimony, dated November 19, 2004. In this Opposition, the government attributed arguments to Mr. Johnson that he had never made,⁴ and even cited to a non-existent "Defendant's Motion In Limine."⁵ ignored arguments that Mr. Johnson has made in pleadings in this case,⁶ and failed to cite

⁴ For example, the government asserted that it was the defense position that this Court should analyze novel scientific testimony under the "recent" Supreme Court decision, Daubert v. Merrell Dow Pharmaceutical, Inc., 509 U.S. 579 (1993). See Government's Opposition to Defendant's Use of Expert Testimony, dated November 19, 2004, at 3 n.1. Mr. Johnson has never made this argument and agrees that, if a special test for "novel" scientific testimony were applicable to Dr. Penrod's testimony (which is based on thirty years of research by experts in his field), Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) would set forth the relevant standard for its admission. But see pp. 11-12 infra (noting that the Court of Appeals has suggested that the test for admission of expert testimony is set forth exclusively by Dyas v. United States, 376 A.2d 827 (D.C. 1977)).

⁵ See Government's Opposition to Defendant's Use of Expert Testimony, dated November 19, 2004, at 10 (citing to "Defendant's Motion In Limine at 9").

⁶ For example, the government conclusorily asserts in its "Opposition" that the scientific findings that Dr. Penrod will testify about are not "beyond the ken of the average juror," See Government's Opposition to Defendant's Use of Expert Testimony, dated November 19, 2004, at 11, when in fact, a number of studies and the local survey of 1000 potential jurors cited above and in Mr. Johnson's Motion to Suppress Supplement (at p. 15) demonstrates that this is so.

to any scientific authority more recent than 1993 and, with one exception, any legal authority more recent than 1994. Mr. Johnson does not perceive any obligation to respond to the government's procedurally improper and ultimately empty "Opposition."

9. The Court ruled that Mr. Johnson could not call Dr. Penrod as an expert at the hearing on his motion to suppress the identification evidence in his case.

10. In addition, after denying Mr. Johnson's motion to suppress, the Court indicated that it was not inclined to allow Dr. Penrod to testify at trial.

11. Mr. Johnson is now filing the instant motion to preserve his fundamental rights under the Constitution to rights to due process, to compulsory process, to present a defense, to a jury trial and to equal protection. However, in so doing, he does not concede that he has any obligation to justify the exercise of these rights; rather it is obligation of the government or the Court to justify the curtailment of these rights.

ARGUMENT

ADMISSION IN THIS CASE OF EXPERT TESTIMONY REGARDING THE RELIABILITY OF EYEWITNESS IDENTIFICATION EVIDENCE AND PROCEDURES USED BY THE GOVERNMENT TO ELICIT THIS EVIDENCE IS COMPELLED BY THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION.

A. Where the government has staked its case on eyewitness testimony, Mr. Johnson has a right to defend himself by probing the reliability of that testimony.

The government has charged Mr. Johnson with murder, and staked its case against Mr. Johnson on the testimony of two eyewitnesses: one who purportedly saw the shooting and eight days later identified Mr. Johnson as the gunman, and one who did not see the shooting but purportedly saw someone, identified as Mr. Johnson thirteen months later, fleeing from the scene

while putting a gun in his waistband. There is no other evidence connecting Mr. Johnson to this case – no blood spatter, no fingerprints, and no DNA.

Mr. Johnson has a right to defend himself against the government’s charge of murder. He has the right to subject the government’s proof to the crucible of adversarial testing, and “the right to present the [his] version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies.” Washington v. Texas, 388 U.S. 14,19 (1967); see also Crane v. Kentucky, 476 U.S. 683, 690 (1986) (the Constitution guarantees . . . ‘a meaningful opportunity’ to present a complete defense.”). These rights are founded in the Fifth and Sixth Amendments to United States Constitution, which in turn guarantee Mr. Johnson the rights to due process, to compulsory process, to present a defense, and to have the government’s proof meaningfully evaluated by a jury. See U.S. Const. amends. V and VI. In this case, where the government seeks to convict Mr. Johnson based solely on the testimony of two eyewitnesses, these constitutional guarantees ensure Mr. Johnson’s ability to probe the reliability of the observations of the government’s eyewitnesses and the reliability of the procedures used to elicit their identifications evidence.

To be sure, Mr. Johnson’s right to defend himself is not wholly unbounded. The Court may enforce evidentiary rules that regulate the admission of evidence and ensure that the evidence the jury hears is both relevant and reliable. But these rules, on their face or as applied, see Point C infra, may not be arbitrary or disproportionate to the interests at stake. See Rock v. Arkansas, 483 U.S. 44, 55 (1987). Furthermore, when the government seeks to limit the admission of evidence or testimony by the defense, the government’s interest in preclusion must be subject to “close scrutiny” in “recogni[tion] of the fundamental nature” of the defendant’s

constitutional rights to present a defense. King v. United States, 550 A.2d 347, 353 (D.C. 1988) (internal citations omitted); see also Martin, 606 A.2d 120, 127 (D.C. 1991) (en banc) (same).

Certainly, the evidence that Mr. Johnson seeks to present to the jury at his trial – the testimony of Dr. Penrod about factors, present in this case, that can impact eyewitness reliability – is relevant. Just as evidence of an external impediment or distortion of eyewitness perception or memory – for example, evidence that the eyewitness was not wearing his or her glasses, or that the eyewitness was cued to select Mr. Johnson from a photo array – would be relevant, so too is the evidence of the internal or psychological impediments and distortions. Nor does it matter that the identification evidence that Mr. Johnson seeks to challenge comes from an eyewitness. Indeed, it is beyond question that if the evidence in question were fingerprint evidence, or DNA evidence, or gun-powder residue evidence, or a host of other types of testimony dealing with the proper collection of prosecution evidence by the police, the defense would have a right to present testimony – including expert testimony – to challenge reliability of that evidence and the method of its collection.

Moreover, Dr. Penrod’s testimony about psychological factors that impact the reliability of eyewitness identification evidence is sufficiently reliable to be admitted at trial and evaluated by the jury. The fact that Dr. Penrod will be testifying as an expert does not foreclose admission of his testimony. To the contrary, the Court of Appeals has emphasized that “[t]he defense should be free to introduce appropriate expert testimony,” and that “[e]xpert opinion evidence generally should be admitted whenever it will not mislead the jury and will prove useful in understanding the facts in issue.” Clifford v. United States, 532 A.2d 628, 632 (D.C. 1987); cf. Mindombe v. United States, 795 A.2d 39, 47 (D.C. 2002) (noting “the dangerousness of disallowing expert testimony for the purposes of jury education and clarification when such is

called for by the facts and evidence presented”). In order to demonstrate that expert testimony is “appropriate,” the party proffering the testimony need only satisfy the test set forth by the Court of Appeals in Dyas v. United States, 376 A.2d 827 (D.C. 1977). Mr. Johnson easily meets this test.

B. Dr. Penrod’s Testimony satisfies the test for admission of Expert Testimony under Dyas.

In order to testify under Dyas, an expert must (1) address a subject matter that is “so distinctly related to some science, profession, business or occupation as to be beyond the ken of the average layman”; (2) “have sufficient skill, knowledge or experience in the field or calling as to make it appear that his opinion or interference will probably aid the trier of fact in his search for the truth” and (3) have a legitimate basis for his testimony, that is “the state of the pertinent art or scientific knowledge” must “permit a reasonable opinion to be asserted.” 376 A.2d at 832.⁷

First, the subject matter of Dr. Penrod’s testimony is beyond the ken of the average D.C. juror. This deficiency of knowledge and understanding has been acknowledged by the Court of Appeals. See Hager, 856 A.2d 1143, 1147-48 (D.C. 2004) (“Despite the fact that jurors may be familiar from their own experience with factors relevant to the reliability of eyewitness observation and identification, it cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror.”) (quoting People v. Lee, 750 N.E.2d 63, 66-67 (N.Y. 2001)). Moreover, this Court has the benefit of survey data that provides local

⁷ The test in Dyas was developed in response to an effort by a defendant to call an expert regarding the factors that affect the reliability of eyewitness identifications, but it upheld exclusion of that expert only based on “the particular proffer made and in the concrete setting of that case.” Green v. United States, 718 A.2d 1042, 1051 (D.C. 1998). It did not purport to “exclude expert testimony about the reliability of eyewitness identification for all purposes and under all circumstances.” Id.

corroboration for the long-standing expert assertion (see, e.g., articles cited in Motion to Suppress Supplement at pp. 15-16) that the scientific findings about the reliability of eyewitness identifications are not within the ken of the average juror. See Attached. The D.C. survey demonstrates that, even if D.C. jurors generally understand that eyewitnesses can be wrong, they cannot necessarily identify and/or do not necessarily understand the complex causes of eyewitness error.⁸ Cf. Mindombe 795 A.2d at 43 (expert testimony on behavior of sexually abused children is admissible even though it is “well within the knowledge of an average juror that any child who has not disclosed the whole truth of a story may in fact be fabricating part of the story . . . [because] the psychological dynamics of a victim of child sexual abuse . . . are generally not within the knowledge of the average juror”) (internal citations and quotations omitted).

Second, Dr. Penrod is qualified to testify as an expert in this area of scientific study. A review of Dr. Penrod’s curriculum vitae reveals qualifications of the highest caliber. See Curriculum Vitae of Dr. Steven Penrod (Appendix S to Mr. Johnson’s Motion to Suppress Supplement). Dr. Penrod is one of the preeminent experts in this field. He has twenty-five years of experience as a university professor. He has received a number of honors and award for his research. He has no less than 100 peer reviewed publications to his name over the past 25 years. He has also engaged in innumerable trainings and lecture series around the country to educate the bench, the bar and the general public about the empirical findings of the forensic psychologists who study eyewitness identification evidence. Dr. Penrod participated in one such training for the Superior Court in 2002 at the invitation of Judge Ross. The judicial education seminar was entitled “An Analysis of the Truth,” and Dr. Penrod gave a presentation called

⁸ Of course, to extent that local courts have previously speculated about what D.C. jurors understand, the survey demonstrates that these speculations were incorrect and unfounded.

“Mistaken Identification: Why do we get it wrong?” Finally, Dr. Penrod has testified countless times on the proffered topics in courts across the country.

Third, there is an adequate foundation in the scientific knowledge to support Dr. Penrod’s testimony. The factors that influence eyewitness memory and perception have been the subject of scientific study for over three decades now, and there is a large volume of research – research which has been cited favorably by the Court of Appeals⁹ – that supports the findings (identified in Mr. Johnson’s Expert Notice) about which Dr. Penrod will testify. Moreover, any skepticism or disagreement this Court has with respect to these scientific findings is not a proper basis to preclude Mr. Johnson from presenting Dr. Penrod’s testimony to the jury. See Clifford, 532 A.2d 628, 639 (D.C. 1987). “Short of pure speculation, the degree of certainty with which a particular expert witness proffers an opinion goes to the weight of the testimony, not to its admissibility, and the weight to be given an expert opinion is for the jury to decide.” Id. at 639¹⁰; see also Allen v. United States, 603 A.2d 1219, 1225 (D.C. 1992) (probative evidence should not be excluded because of ‘crabbed notions of relevance or excessive mistrust of juries’).

It is far from clear that Dr. Penrod’s testimony has to satisfy the requirement for the admission “novel scientific testimony” under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) in addition to the test for the admission of expert testimony under Dyas. The Court of Appeals has suggested that Dyas overrides Frye when expert testimony is at issue. Hager v. United States, 856 A.2d at n. 14 (“Although we are a Frye jurisdiction, our cases involving the

⁹ See Green, 735 A.2d at 961-63 (Schwelb, J. concurring dubitante); In re AS. H., 851 A.2d 456, 460 (D.C. 2004).

¹⁰ Indeed, in Clifford the Court of Appeals noted that even though the Court’s skepticism regarding the proffered expert’s testimony “was not unreasonable” that such doubt could not constitute a valid basis for preclusion of the expert testimony where the “proffered testimony was not purely speculative . . . he administered tests . . . and appeared willing to explain his conclusions in scientific terms.” 532 A.2d at 639.

admission of expert testimony have rested on the discretion of the trial judge, rather than on the admissibility of “novel scientific evidence”). And in any event, as noted above, this area of research, although perhaps new to the D.C. Superior Court, is hardly “novel,” having been the subject of intense study for three decades. But even if Frye did apply to Dr. Penrod’s testimony, Mr. Johnson could easily demonstrate that the scientific findings covered by Dr. Penrod’s testimony have gained “general acceptance in the particular field in which it belongs.” 293 F. at 1014. A 2001 survey of 64 experts in the field of eyewitness research was conducted precisely to aid courts in making the determination that various scientific findings are generally accepted. See Saul M. Kassin et al., On the “General Acceptance” of Eyewitness Testimony Research: A New Survey of the Experts, 56 Am. Psychol. 405 (May 2001). This survey covers all the scientific findings about which Dr. Penrod will testify.

Because Dr. Penrod’s testimony satisfies the test for admission under Dyas, it would be an abuse of this Court’s discretion and a violation of Mr. Johnson’s fundamental constitutional rights to due process, to compulsory process, to present a defense, to a jury trial if the Court were to preclude this testimony.

C. This Court cannot apply a more stringent standard for admission of Dr. Penrod’s testimony simply because he is being called to testify for the defense.

The even-handed application of the Dyas standard for the admission of expert testimony is compelled by constitutional protections of due process and equal protection embodied in the Fifth Amendment to the United States Constitution. U.S. Const. amend V¹¹; see also Washington v. Texas, 388 U.S. at 24 (condemning evidentiary rules that “discriminat[e] between the ability of the prosecution and the defense to call the same person as a witness”) (Harlan, J.,

¹¹ The equal protection clause under the 14th Amendment is not applicable to D.C. residents, but they receive the same constitutional protection under the Fifth Amendment. See Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Smith v. United States, 460 A.2d 576, 578 n.3. (D.C. 1983).

concurring). Indeed, these rights were included in the constitution precisely to counteract common law restrictions on the presentation of evidence by defendants. See, e.g., Washington v. Texas, 388 U.S. at 20 (discussing the history of the right to compulsory process). Accordingly, this Court should not scrutinize the admissibility of Mr. Johnson's expert to a greater degree than it would scrutinize the admission of a government expert. Indeed, if any inequality in the application of Dyas were warranted, it should be militated in Mr. Johnson's favor, given the constitutional concerns at issue. See Point A supra.

In a number of instances the prosecution has enjoyed liberal application of the Dyas standard. For example, police narcotics "experts" presented by the prosecution are regularly permitted to testify by trial courts with minimal or no showing that (1) jurors insufficiently understand how drugs deals are conducted, or (2) that the "state of the art" provides adequate foundation for the testimony of the "expert." This liberal admission policy has in turn been endorsed by the Court of Appeals. See, e.g., Owens v. United States, 688 A.2d 399, 404 (D.C. 1996) (drug expert necessary to inform jurors about "runners" and "holders"); Blakeney v. United States, 653 A.2d 365, 369 (D.C. 1995) (drug expert necessary to show that drug dealers use pagers to sell drugs).

Similarly, experts on such subjects such as "the behavior of sexually abused children" and the behavior of battered women have been deemed a proper basis for testimony by prosecution experts. See Mindombe v. United States, 795 A.2d 39, 42 (D.C. 2002); Nixon v. United States, 728 A.2d 582 (D.C. 1999). The standard that the Court of Appeals endorsed in Mindombe is instructive: "such expert testimony is admissible in cases where the government successfully proffers that the facts and evidence to be presented at trial are likely to be inconsistent with a lay juror's expectations as to how a child sexual abuse victim should respond

to such a traumatizing event.” 795 A.2d at 43 (emphasis added). Thus, according to the Court, no actual data demonstrating juror ignorance or misconceptions – as has been provided to this Court – is required to justify the admission of expert testimony.

Moreover, the endorsement in Mindombe of an expert opinion that is founded on clinical research – i.e., that is based on interviews of patients and which is not subject to replication and testing – further demonstrates how low the bar is for admission of expert testimony under Dyas. If the expert testimony in Mindombe is admissible under Dyas as sufficiently reflective of the state of the art, certainly the scientific findings about which Dr. Penrod will testify – based on empirical data from experiments that can and have been replicated – must be admissible.

The Court in Mindombe explained that, “it is only fair that jurors are made aware of the differences in children’s cognitive processes . . . because of the reality that child victims of sexual abuse do have a range of responses and the jury’s possible misconception of the same. . . .” 795 A.2d at 52. As in Mindombe, the proffered testimony here is well beyond the expertise of a lay juror, and thus it is “only fair” in the case before this Court that expert testimony be admitted to counter lay jurors’ expectations and beliefs regarding eyewitness identifications;¹² indeed, the subject matter of the testimony proffered by Dr. Penrod is far more “distinctively related to some science, profession, business or occupation” than the resident narcotics testimony permitted in Owens and Blakeney or the “sexual abuse” profiling testimony permitted in Mindombe.

In short, the due process and equal protection guarantees of the United States Constitution compel the even-handed application of the Dyas standard, and, if Dyas is applied in

¹² In addition, the Court in Mindombe emphasized that “[v]ictim’s should be allowed the opportunity to explain to a jury, through a qualified expert, the reasons for conduct which would otherwise be beyond the average juror’s understanding.” 795 A.2d at 43. Surely, the rights of “victims” cannot exceed the rights of a defendant in a criminal trial.

this case to Mr. Johnson's expert as it is applied to any number of experts proffered by the government in criminal cases, Mr. Johnson must be permitted to present Dr. Penrod's testimony to the jury at his trial.

Dated: December 3, 2004

Respectfully Submitted,

J. Christopher McKee
Vida B. Johnson
Public Defender Service
633 Indiana Ave. NW
Washington, DC 20004
(202) 628-1200

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion to Present a Defense to the Jury has been sent by facsimile to the Felony Section of the Office of the United States Attorney, Assistant United States Attorney, Blanche Bruce, 555 Fourth Street, N.W., Washington, D.C., 20530, on this the 3rd day of December, 2004.

J. Christopher McKee