

**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	:	

**REPLY IN SUPPORT OF MOTION
TO PRESENT A DEFENSE TO THE JURY**

In its Opposition to Mr. Johnson’s Motion to Present a Defense, the government makes four unfounded arguments in an effort to preclude Mr. Johnson from providing the jury – via expert testimony – with the tools it needs to evaluate intelligently the government’s scant evidence in this case: the testimony of two purported eyewitnesses. None of these arguments justify the abrogation of Mr. Johnson’s constitutional rights 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.

First, the government conclusorily asserts that the proffered expert testimony is “not beyond the ken of a layperson.” See Government’s Continual Opposition, dated December 6, 2004, p. 1. But, in so doing, the government wholly ignores the hard evidence – from a recent professionally conducted poll of potential D.C. jurors – proffered by Mr. Johnson. This evidence establishes that the average D.C. juror does not know how to assess the reliability of eyewitness identification evidence, and demonstrates that the government’s supposition is simply incorrect.

Second, the government asserts that Mr. Johnson’s case should not be governed by the Court of Appeals’ decision in Mindombe v. United States, 795 A.2d 39, 42 (D.C. 2002), where the government’s use of expert testimony was upheld, but instead by the Court of Appeals’

decision in Hager v. United States, 856 A.2d 1143 (D.C. 2004), where the preclusion of a defense expert was affirmed. See Government’s Continual Opposition pp.1-2. But, given that the legal analysis in these two cases is essentially same, this argument has no force – unless, that is, the government is advocating the creation of a double standard for the admission of prosecution and defense experts, a standard which would violate the due process, compulsory process, jury trial, and equal protection guarantees of the United States Constitution.

Third, the government asserts that there is no need for expert testimony because the government’s two eyewitnesses “are not strangers.” See Government’s Continual Opposition p.2. To clarify, this is not a case where the government is claiming that its eyewitnesses are close friends or relatives of Mr. Johnson and where expert testimony may be of limited utility. Rather, in this case, the government witnesses have each made curiously similar claims to have seen Mr. Johnson three to four times in passing over a six month period. Even accepting these eyewitnesses’ claims as true (in contravention of the presumption of innocence), the study of eyewitness identification has documented distortions of memory where an eyewitness mistakenly identifies as the culprit someone that they have seen in another context or setting, especially where, as here, the witness claims only a passing familiarity with the suspect. Just as in a stranger identification case then, the questions in this case are (1) whether the government’s eyewitnesses – in the context of this startling, fast-paced shooting – were able to perceive, retain and recall the features of the culprit and (2) how the identification procedures used to elicit their identifications promoted or undermined the reliability of this evidence. The jury cannot address these questions intelligently without expert testimony.

Fourth and finally, the government asserts, citing Hager, that “when eyewitness testimony is corroborated, the exclusion of expert testimony is not an abuse of the court’s

discretion. 865 A.2d at 1149.” Government’s Continual Opposition p. 2. It is far from clear that a court may justify a decision to curtail a defense and preclude expert testimony based on the existence of corroborating evidence. Cf. Manson v. Braithwaite, 432 U.S. 98, 118 (1977) (noting that, in evaluating the admissibility of identification evidence, the majority opinion properly “avoids the pitfall” of relying on corroborating evidence and “correctly relies only on appropriate indicia of the reliability of the identification itself”) (Stevens, J. concurring). But, legal arguments aside, the government’s argument fails on the facts, because it has no corroborating evidence in this case. Unlike in Hager, where “pivotal” fingerprint evidence also supported the jury’s determination of the defendant’s guilt, 856 A.2d at 1149, the government has no physical evidence implicating Mr. Johnson in the charged crime. The government’s case rests entirely on the testimony of two eyewitnesses, both of whom had minimal opportunity to view the culprit, were subjected to faulty identification procedures, and are currently cooperating with the government. At the very least, two questionable eyewitnesses who “corroborate” each other cannot be the type of corroboration either envisioned by the Court of Appeals in Hager, or sufficient to curtail Mr. Johnson’s fundamental constitutional rights.

WHEREFORE for all of these reasons and for the reasons set forth in Mr. Johnson’s initial motion, Mr. Johnson’s Motion to Present a Defense to the Jury must be granted.

Dated: December 7, 2004

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply in Support of 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 7th day of December, 2004.

J. Christopher McKee