

**CAUSE NO. 1187210**

**STATE OF TEXAS**

**VS.**

█ **W** █ **F** █

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**IN THE 184<sup>th</sup>**

**DISTRICT COURT**

**HARRIS COUNTY, TEXAS**

**MEMORANDUM OF AUTHORITIES  
IN SUPPORT OF  
MOTION FOR FUNDS**

COMES NOW the Defendant above named, by and through his attorney of record, Daphne L. Pattison, and files this Memorandum of Authorities in Support of Motion for Funds to aid in the preparation of his defense and in support thereof would show unto the Court as follows:

**STATEMENT OF FACTS**

**I.**

That the Defendant is indigent and without funds to pay the expenses of his defense, wherefore the above named attorney has been appointed to represent him.

**II.**

The Defendant is charged with Aggravated Assault.

**III.**

The only evidence linking the Defendant to the alleged crime in this cause is the eye witness testimony of two people. There was no weapon found on the Defendant and no weapon found in his hotel room. The procedure used by the police for identification of the Defendant was an on scene Ashow-up. In this procedure, the person arrested by the police is shown to the victim by himself rather than in a Aline-up. There is no other evidence corroborating the identification.

#### **IV.**

The facts of this case, specifically including but not limited to the identification procedure used by the police, raise the issue of the fallibility of eye witness testimony. The identification is particularly suspect in this case because of the procedure used by the police.

#### **V.**

The interests of justice mandate that the Defendant be permitted to present evidence regarding the fallibility of eye witness testimony in general and in the circumstances of this case. The only viable evidence of the fallibility of eye witness testimony is the testimony of an expert in this field.

#### **VI.**

The defense hereby proffers that an expert in the field of eye witness testimony can provide information to the jury about various psychological factors that may affect the reliability of eyewitness identification, and the expert can provide information to help counter some common misconceptions about the process. The process involves several phases: The first phase is the perception of the event. The physical circumstances affecting that observation are generally known to laymen, such as lighting, distance, and duration. But psychological factors may also influence the accuracy of the perception. The expert witness could explain to the jury the results of experimental studies showing that perception may be affected by such factors as the observer's state of mind, his expectations, his focus of attention at the time, the suddenness of the incident, the stressfulness of the situation, and differences in the race and/or age of the observer and the observed. There are substantial decreases in accuracy when the two persons are of different races or ages.

## **VII.**

The next phase of the process is memory. The expert witness can explain that the evidence showing that memory is not merely a passive recording event, producing an imperishable reproduction of the scene perceived; rather, it is both a selective and constructive process, in which old elements fade and are lost while new elements X subsequent information or suggestions -- are unconsciously interwoven into the overall recollection until the subject cannot distinguish one from the other. The last step is retrieval. The expert witness can review the studies establishing that recall may be affected by such factors as the subject=s expectations, his suggestibility, the phrasing of the questions asked of him, and even the size and type of the photographs shown.

## **VIII.**

The expert witness can further explain to the jury that empirical research has undermined a number of widespread lay beliefs about the psychology of eyewitness identification, e.g. that the accuracy of a witness=s recollection increases with his certainty, that accuracy is improved by stress, that cross-racial factors are insignificant, and that the reliability of an identification is unaffected by the presence of a weapon or violence at the scene. Lastly, the expert witness can tie these issues to the case at hand by informing the jury which psychological factors apply to the present case.

## **IX.**

The Defendant has located several experts in this field. At this time, the Defendant requests the necessary funds to retain an expert to evaluate this case. If the expert provides a report which would justify trial testimony, then the Defendant would promptly present a motion for funds to retain the expert for trial testimony. The Defendant needs \$1,000 in order to retain an expert to evaluate the case.

## STATEMENT OF LAW

### A. ADMISSIBILITY OF EXPERT TESTIMONY ON THE FALLIBILITY OF EYEWITNESS

#### X.

Rule 702 of the Rules of Criminal Evidence provides that an expert may testify to his opinion or otherwise if he has scientific, technical, or other specialized knowledge which will assist the trier of fact to understand the evidence or to determine a fact in issue. This is a very broad standard. Certainly, an expert testifying regarding the key evidence in the case qualifies as providing information which will assist the trier of fact. The United States Supreme Court has recognized that the vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instance of mistaken identification.≡ United States v. Wade, 388 U.S. 218, 228 (1967).

#### XI.

The Texas Supreme Court addressed the issue of the testimony of an eye witness expert in Jordan v. State, 928 S.W. 2d 550, (Tex. Cr. App. 1996). The Court held that a psychologist's testimony as to factors affecting reliability of eyewitness identification was helpful on the issue of eyewitness reliability and was thus relevant, even though psychologist did not testify as to every conceivable factor that might affect reliability of eyewitness identification in case. The psychologist answered questions about specific facts of case and how they might be affected by factors to which he testified, stated his opinion about reliability of eyewitness identifications at issue, and identified facts in case that he believed impacted those identifications.

This concern began in California with People vs. McDonald, 37 Cal.3d 351, 208 Cal. Rptr. 236, 690 P.2d 709, 46 A.L.R. 4<sup>th</sup> 1011 (1984), the California Supreme Court unanimously held that

it was error for the trial court to have excluded expert witness testimony regarding eye witnesses, because Awhen 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, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony.≡

## **XII.**

Judge Bazelon pointed out that the Acourts regularly protest their lack of interest in the reliability of identification as opposed to the suggestivity that may have prompted them, arguing that reliability is simply a question of fact for the jury. There already exists, however, great doubts--if not firm evidenceX about the adequacy and accuracy of the process. Unquestionably, identifications are often unreliableX perhaps consistently less reliable than lie detector tests, which we have in the past excluded for unreliability.≡ United States vs. Brown, 461 F.2d 134, 145-146, fn.1 (D.C. Cir. 1972).

## **XIII.**

A traditional way of bringing scientific information to the attention of the judicial system, of course, is by the testimony of expert witnesses. AA number of researchers using a variety of methods have found that people intuitively believe that eyewitness confidence is a valid predictor of eyewitness accuracy.≡ Wells & Murray, Eyewitness Confidence, in Eyewitness Testimony: Psychological Perspectives, pp. 159, citing five recent studies. Empirical research has also demonstrated the issues discussed herein related to cross-racial identification.

## **XIV.**

In People vs. McDonald, supra, the court found the testimony of an expert on eyewitness

testimony was so crucial as to require reversal, given the absence of any other evidence connecting the defendant with the crime. Such is exactly the situation in this Defendant=s case. An expert in this field would have knowledge not intuitive to a jury which would bear directly on the facts and circumstances of this case. The psychologist=s testimony and some experimental data indicate that there exists no relationship between the confidence that a witness has in his or her identification and the actual accuracy of that identification, and this factor is specifically tied to the evidence in this case. The testimony regarding cross-racial identifications is also specifically tied to this case.

## **B. FUNDING OF EXPERT ON EYE WITNESS TESTIMONY**

### **XV.**

The Sixth Amendment to the United States Constitution gives the accused the right to the Assistance of Counsel for his defense. To counter the unfettered ability of the State to investigate and bring experts to testify against the Defendant, the Defendant must be allowed the funds necessary to adequately prepare his defense to the allegations brought by the State.

### **XVI.**

The testimony of the witness regarding eyewitness identifications is necessary to the formulation of the defense in this cause. In fact, it will more that likely be the only evidence pertaining to his defense. Given the fact that the State=s only evidence against the defendant is eyewitness testimony, this evidence in the form of expert testimony is crucial. If the court agrees with California that the testimony is crucial, the court must authorize the funding of the witness. Even if the court does not find the evidence Acrucial,≅ the court should authorize the funding to assist the Defendant in adequately presenting a defense.

## **CONCLUSION**

**XVII.**

The granting of this request for funds to retain and expert on eye witness identifications is required by due process, equal protection, jury trial, counsel and compulsory guarantees of the United States Constitution Amendments Six and Fourteen.

**RESPECTFULLY SUBMITTED,**

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