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7 SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____

8 THE PEOPLE OF THE STATE OF) Case No.
9 CALIFORNIA,)
)
10 Plaintiff,) MOTION TO ADMIT EXPERT
TESTIMONY)
11) ON PSYCHOLOGICAL FACTORS
12 vs.) AFFECTING THE SUGGESTIBILITY,
) MEMORY AND ABILITY TO PERCEIVE
13) AND COMMUNICATE OF A CHILD
) WITNESS
14 Defendant.) Date:
) Time:
15) Dept:
)

16 **SCOPE OF DEFENSE EXPERT WITNESS TESTIMONY**

17 The defense will move to qualify Dr. _____, as an expert
18 witness. Dr. _____ has previously qualified as an expert in
19 California courts, for both prosecution and defense clients, in
20 such areas as:

21 1. The factors that exist in Child Sexual Abuse
22 Accommodation Syndrome exist in cases of false accusations also.

23 2. Psychological factors that can cause memory to be
24 influenced by suggestibility. This testimony is based on over 90
25 years of research on memory and suggestibility.

26 3. Psychological factors present in interviewing techniques
27 that can cause memory to be influenced by suggestions.

28 4. Evaluation of the reliability of psychological

1 methodology used in other experts' opinions. For example, in the
2 formation of the concepts of Child Sexual Accommodation Syndrome.

3 The expert will not express an opinion as to the credibility
4 of any child witness in this case nor will he/she express an
5 opinion that any child witness in this case was subjected to
6 suggestive or coercive influences during any interviews.

7 I

8 WHAT IS SUGGESTIBILITY?

9 As succinctly stated by researchers, suggestibility in the
10 context of child witnesses "concerns the degree to which
11 children's encoding, storage, retrieval, and reporting of events
12 can be influenced by a range of social and psychological
13 factors." (Ceci and Bruck, Suggestibility of the Child Witness:
14 A Historical Review and Synthesis Vol. 113 Psychological Bulletin
15 403, 404 (1993).) The factors noted by Ceci and Bruck that can
16 influence a child witness's suggestibility, in terms of what
17 happens when the child is interviewed concerning sexual abuse
18 include repeating questions, asking misleading questions, asking
19 leading questions, conducting the interview in an accusatory
20 atmosphere, reinforcing the child's answers, chastising the
21 child's failure to disclose, prolonging the interview, conducting
22 multiple interviews, and source misattribution. (Id., pp. 418-
23 425.)

24 II

25 STATUTORY AUTHORITY FOR THE INTRODUCTION 26 OF EXPERT TESTIMONY ON THE ISSUES OF MEMORY, PERCEPTION AND COMMUNICATION.

27 Evidence Code §780(c) provides statutory authority for the
28 introduction of evidence by the defense on the issues of capacity

1 to perceive, recollect and/or to communicate any matter about
2 which he testifies:

3 "Except as otherwise provided by statute, the court or
4 jury may consider in determining the credibility of
5 a witness any matter that has any tendency in reason
6 to prove or disprove the truthfulness of his
7 testimony at the hearing, including but not limited to
8 any of the following. . .(c) The extent of his capacity
9 to perceive, to recollect, or to communicate any matter
10 about which he testifies."

11 This code section is encompassed by CALJIC 2.20, which provides
12 in pertinent part:

13 "In determining the believability of a witness you
14 may consider anything that has a tendency to prove or
15 disprove the truthfulness of the testimony of the
16 witness, including but not limited to any of the
17 following:

18 The extent of the opportunity or ability of the witness
19 to see or hear or otherwise become aware of any matter
20 about which the witness testified:

21 The extent of the witness to remember or to communicate
22 any matter about which the witness testified."

23 III

24 DEFENDANT'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

25 Due Process, under both the United States Constitution, and
26 the California Constitution, requires that an accused person have
27 a right to full and fair presentation of evidence that might
28 influence the determination of guilt. (United States
Constitution, Amendments V, VI, and XIV; California Constitution,
Article I, Section 15; Taylor v. Illinois (1988) 484 U.S. 400,
408; Chambers v. Mississippi (1973) 410 U.S. 284 [exclusion of
evidence vital to a defendant's defense constituted a denial of a
fair trial in violation of constitutional due process
requirements.]

1 IV

2 **EXPERT TESTIMONY ON PSYCHOLOGICAL FACTORS AFFECTING**
3 **A CHILD WITNESS'S SUGGESTIBILITY, CAPACITY TO PERCEIVE,**
4 **RECOLLECT, OR COMMUNICATE HAS BEEN FOUND**
5 **ADMISSIBLE IN FEDERAL COURTS, AND BY ANALOGY IN**
6 **CALIFORNIA COURTS AS WELL.**

7 **A. ROUSE CASE**

8 In United States v. Rouse (8th Cir. 1997) 111 F.3d 561, the
9 defendants were convicted of aggravated sexual abuse of children
10 under twelve years of age. The crucial issue at trial was
11 whether the child victims testified from their own memory of the
12 events or from a false memory induced by the interrogation
13 methods to which the children were subjected. The defense
14 presented the testimony of a psychologist concerning "the ways in
15 which the reliability of children's allegations of physical or
16 sexual abuse may be tainted by adult questioning practices that
17 suggest false answers or even implant false memories," such as by
18 leading questions, repeated questions, play therapy, and
19 communicating adult assumptions that cause a child to give what
20 he or she perceives is the correct answer, use of rewards, etc.
21 (Id., at p. 570.) The trial court precluded the expert from
22 testifying that a practice of suggestibility had been employed by
23 the interviewers in that case and that the victims' accusations
24 of sexual abuse were not credible. On review, the appellate
25 court determined that "A qualified expert may explain to the
26 jury the dangers of implanted memory and suggestive practices
27 when interviewing or questioning child witnesses, but may not
28 opine as to a child witness's credibility," thus approving the
lower court's rulings. (Id., at p. 571.) The appellate court in
a previous opinion in the same case found such evidence passed

1 the reliability test of Daubert v. Merrell Dow Pharmaceuticals,
2 Inc. (1993) 509 U.S. 579. To the same effect is United States v.
3 Reynold (9th Cir. 1996) 77 F.3d 253, 254 (reviewing court
4 affirmed district court's rulings allowing the defense to present
5 expert testimony on memory and suggestibility of young children).
6 The type of expert testimony found admissible in Rouse is exactly
7 the type of testimony Defendant proposes to be admitted here.

8 **B. MCDONALD CASE**

9 In People vs. McDonald (1984) 37 Cal.3d 351, the Supreme
10 Court held that the trial court prejudicially abused its
11 discretion in excluding expert testimony on psychological factors
12 affecting the accuracy of eyewitness testimony. (Id. at 376).
13 The court rejected the grounds on which the trial court premised
14 the exclusion of such testimony, which were that it would invade
15 the province of the jury, standard CALJIC 2.21 would sufficiently
16 alert the jury to problems in eyewitness testimony; the proposed
17 expert testimony would violate Evidence Code §352, and it was not
18 sufficiently "scientific enough at this point in time."

19 The McDonald court found that expert testimony which simply
20 informs the jury of certain psychological factors that may impair
21 the accuracy of a typical eyewitness identification "falls well
22 within the broad statutory description of 'any matter that has
23 any tendency in reason' to bear on the credibility of a witness"
24 (37 Cal.3d 351, 366, citing Evidence Code Section 780). Such
25 testimony was found to be sufficiently beyond common experience
26 such that it would assist the trier of fact within the meaning of
27 Evidence Code §801. (Id., at p. 369.) The expert testimony
28 which Defendant seeks to admit in this case is exactly the type

1 approved in McDonald in an analogous context, i.e., a discussion
2 of psychological factors which can impair the memory and
3 perception of a witness, which bears on his or her credibility.
4 McDonald remains the law in this state. (See e.g., People v.
5 Gaglione (1994) 26 Cal.App.4th 1291, 1301 ["It is undisputed that
6 expert testimony on the psychological factors affecting the
7 reliability of eyewitness testimony is admissible in a criminal
8 case," citing McDonald].)

9 The McDonald model of presenting appropriate expert
10 testimony has been endorsed in child molest cases where the
11 defendant wishes to attack the reliability of the evidence
12 against him, thus providing further support for the admission of
13 the expert testimony at issue in this case. For example, in
14 People v. Harlan (1990) 222 Cal.App.3d 439, the defense moved to
15 prevent testimony of a child on the grounds that studies showed
16 their testimony was unreliable. The court stated to do so would
17 virtually insulate child molesters and the use of expert
18 witnesses as used in the McDonald case was the preferred method
19 for public policy reasons. The court stated:

20 "The court in People vs. McDonald (1984) 37 Cal.3d 351,
21 208 Cal.Rptr. 236, 690 P.2d 709 suggested a better
22 approach by which a defendant may challenge the
23 reliability of the evidence against him. In McDonald
24 the defendant challenged the trial court's ruling
25 excluding expert testimony on factors which affect the
26 reliability of eyewitness identifications. The Supreme
27 Court reviewed the extensive case law and professional
28 literature on the subject of the high probability of
error in eyewitness identification. (id., at pp. 363-
365, 208 Cal.Rptr. 236, 690 P.2d 709.) The court
concluded, '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.' (Id., at p. 365, 208
Cal.Rptr. 236, 690 P.2d 709.) Next, the court reviewed
the defendant's offer of proof and determined that the

1 expert's proffered testimony was beyond the common
2 knowledge of jurors and thus was a proper subject for
3 expert testimony. Finally, the court reviewed the
4 circumstances under which it would be error to exclude
5 such testimony. The court held, 'when an eyewitness
6 identification of the defendant is a key element of the
7 prosecution's case but is not substantially
8 corroborated by evidence giving it independent
9 reliability, and the defendant offers qualified expert
10 testimony on specific psychological factors shown by
11 the record that could have affected the accuracy of the
12 identification but are not likely to be fully known to
13 or understood by the jury, it will ordinarily be error
14 to exclude that testimony.' (Id., at p. 377, 208
15 Cal.Rptr. 236, 690 P.2d 709.)

16 We prefer this approach to that proposed by amici,
17 which would immunize an accused child molester when the
18 only witness against him is the victim. A defendant
19 may, under current law, offer expert testimony to
20 challenge the victim's testimony in appropriate cases,
21 preserving the jury's right to make ultimate
22 determinations on the credibility of the witness.
23 (McDonald, supra, 37 Cal.3d at p. 377, 208 Cal.Rptr.
24 236, 690 P.2d 709.)" (People v. Harlan (1990) 222
25 Cal.App.3d at p. 452.)

26 Also see People v. Gray (1986) 187 Cal.App.3d 213, 220 [in child
27 abuse case, expert testimony concerning the traits or
28 characteristics of a child who has been sexually abused
admissible as akin to expert testimony informing the jury of
certain factors that may affect an eyewitness identification a la
McDonald].)

CONCLUSION

Current case law allows the use of expert testimony for both
the defendant and the prosecution in the defined areas of
expertise in which Dr. _____ has previously qualified as an
expert. Dr. _____'s opinion concerns the suggestibility of
child witnesses and the psychological factors affecting their
memory, perception and ability to communicate only. The expert
will not attempt to usurp the fact finder's function by forming

1 an opinion as to whether the alleged victim in this case is a
2 false accuser or has been subjected to coercive influences.
3 His/her testimony falls within the limits of the seminal cases of
4 McDonald and Rouse.

5 Dated:

6 Respectfully submitted,
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10 _____
11 Attorney for Defendant
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