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5
6 SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____

7
8 THE PEOPLE OF THE STATE OF) Case No.
CALIFORNIA,)
9)
Plaintiff,) MOTION TO ADMIT EXPERT
10 TESTIMONY)
11 vs.) ON PSYCHOLOGICAL FACTORS
12) AFFECTING THE SUGGESTIBILITY,
PERCEIVE) MEMORY AND ABILITY TO
13) AND COMMUNICATE OF A CHILD
14 Defendant.) WITNESS
15) Date:
16) Time:
17) Dept:
18)

19 **SCOPE OF DEFENSE EXPERT WITNESS TESTIMONY**

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

- 24 1. The factors that exist in Child Sexual Abuse
25 Accommodation Syndrome exist in cases of false accusations also.

1 that can influence a child witness's suggestibility, in terms of
2 what happens when the child is interviewed concerning sexual
3 abuse include repeating questions, asking misleading questions,
4 asking leading questions, conducting the interview in an
5 accusatory atmosphere, reinforcing the child's answers,
6 chastising the child's failure to disclose, prolonging the
7 interview, conducting multiple interviews, and source
8 misattribution. (Id., pp. 418-425.)
9

10 II

11 STATUTORY AUTHORITY FOR THE INTRODUCTION

12 OF EXPERT TESTIMONY ON THE ISSUES OF MEMORY,

13 PERCEPTION AND COMMUNICATION.

14
15 Evidence Code §780(c) provides statutory authority for the
16 introduction of evidence by the defense on the issues of
17 capacity to perceive, recollect and/or to communicate any matter
18 about which he testifies:

19 "Except as otherwise provided by statute, the court or
20 jury may consider in determining the credibility of
21 a witness any matter that has any tendency in reason
22 to prove or disprove the truthfulness of his
23 testimony at the hearing, including but not limited to
24 any of the following. . .(c) The extent of his capacity
25 to perceive, to recollect, or to communicate any matter
about which he testifies."

1 This code section is encompassed by CALJIC 2.20, which provides
2 in pertinent part:

3 "In determining the believability of a witness you
4 may consider anything that has a tendency to prove or
5 disprove the truthfulness of the testimony of the
6 witness, including but not limited to any of the
7 following:

8
9 The extent of the opportunity or ability of the witness
10 to see or hear or otherwise become aware of any matter
11 about which the witness testified:

12
13 The extent of the witness to remember or to communicate
14 any matter about which the witness testified."

15
16 **III**

17 **DEFENDANT'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.**

18 Due Process, under both the United States Constitution, and
19 the California Constitution, requires that an accused person
20 have a right to full and fair presentation of evidence that
21 might influence the determination of guilt. (United States
22 Constitution, Amendments V, VI, and XIV; California
23 Constitution, Article I, Section 15; Taylor v. Illinois (1988)
24 484 U.S. 400, 408; Chambers v. Mississippi (1973) 410 U.S. 284
25 [exclusion of evidence vital to a defendant's defense

1 constituted a denial of a fair trial in violation of
2 constitutional due process requirements.)
3

4 IV

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

10
11 A. ROUSE CASE

12 In United States v. Rouse (8th Cir. 1997) 111 F.3d 561, the
13 defendants were convicted of aggravated sexual abuse of children
14 under twelve years of age. The crucial issue at trial was
15 whether the child victims testified from their own memory of the
16 events or from a false memory induced by the interrogation
17 methods to which the children were subjected. The defense
18 presented the testimony of a psychologist concerning "the ways
19 in which the reliability of children's allegations of physical
20 or sexual abuse may be tainted by adult questioning practices
21 that suggest false answers or even implant false memories," such
22 as by leading questions, repeated questions, play therapy, and
23 communicating adult assumptions that cause a child to give what
24 he or she perceives is the correct answer, use of rewards, etc.
25

1 (Id., at p. 570.) The trial court precluded the expert from
2 testifying that a practice of suggestibility had been employed
3 by the interviewers in that case and that the victims'
4 accusations of sexual abuse were not credible. On review, the
5 appellate court determined that "A qualified expert may explain
6 to the jury the dangers of implanted memory and suggestive
7 practices when interviewing or questioning child witnesses, but
8 may not opine as to a child witness's credibility," thus
9 approving the lower court's rulings. (Id., at p. 571.) The
10 appellate court in a previous opinion in the same case found
11 such evidence passed the reliability test of Daubert v. Merrell
12 Dow Pharmaceuticals, Inc. (1993) 509 U.S. 579. Tot he same
13 effect is United States v. Reynold (9th Cir. 1996) 77 F.3d 253,
14 254 (reviewing court affirmed district court's rulings allowing
15 the defense to present expert testimony on memory and
16 suggestibility of young children). The type of expert testimony
17 found admissible in Rouse is exactly the type of testimony
18 Defendant proposes to be admitted here.

20 **B. MCDONALD CASE**

21 In People vs. McDonald (1984) 37 Cal.3d 351, the Supreme
22 Court held that the trial court prejudicially abused its
23 discretion in excluding expert testimony on psychological
24 factors affecting the accuracy of eyewitness testimony. (Id. at
25 376). The court rejected the grounds on which the trial court

1 premised the exclusion of such testimony, which were that it
2 would invade the province of the jury, standard CALJIC 2.21
3 would sufficiently alert the jury to problems in eyewitness
4 testimony; the proposed expert testimony would violate Evidence
5 Code §352, and it was not sufficiently "scientific enough at
6 this point in time."

7 The McDonald court found that expert testimony which simply
8 informs the jury of certain psychological factors that may
9 impair the accuracy of a typical eyewitness identification
10 "falls well within the broad statutory description of 'any
11 matter that has any tendency in reason' to bear on the
12 credibility of a witness" (37 Cal.3d 351, 366, citing Evidence
13 Code Section 780). Such testimony was found to be sufficiently
14 beyond common experience such that it would assist the trier of
15 fact within the meaning of Evidence Code §801. (Id., at p.
16 369.) The expert testimony which Defendant seeks to admit in
17 this case is exactly the type approved in McDonald in an
18 analogous context, i.e., a discussion of psychological factors
19 which can impair the memory and perception of a witness, which
20 bears on his or her credibility. McDonald remains the law in
21 this state. (See e.g., People v. Gaglione (1994) 26 Cal.App.4th
22 1291, 1301 ["It is undisputed that expert testimony on the
23 psychological factors affecting the reliability of eyewitness
24 testimony is admissible in a criminal case," citing McDonald].)
25

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

12 "The court in People vs. McDonald (1984) 37 Cal.3d
13 351, 208 Cal.Rptr. 236, 690 P.2d 709 suggested a
14 better approach by which a defendant may challenge the
15 reliability of the evidence against him. In McDonald
16 the defendant challenged the trial court's ruling
17 excluding expert testimony on factors which affect the
18 reliability of eyewitness identifications. The
19 Supreme Court reviewed the extensive case law and
20 professional literature on the subject of the high
21 probability of error in eyewitness identification.
22 (id., at pp. 363-365, 208 Cal.Rptr. 236, 690 P.2d
23 709.) The court concluded, `The consistency of the
24 results of these studies is impressive, and the courts
25 can no longer remain oblivious to their implications

1 for the administration of justice.' (Id., at p. 365,
2 208 Cal.Rptr. 236, 690 P.2d 709.) Next, the court
3 reviewed the defendant's offer of proof and determined
4 that the expert's proffered testimony was beyond the
5 common knowledge of jurors and thus was a proper
6 subject for expert testimony. Finally, the court
7 reviewed the circumstances under which it would be
8 error to exclude such testimony. The court held,
9 'when an eyewitness identification of the defendant is
10 a key element of the prosecution's case but is not
11 substantially corroborated by evidence giving it
12 independent reliability, and the defendant offers
13 qualified expert testimony on specific psychological
14 factors shown by the record that could have affected
15 the accuracy of the identification but are not likely
16 to be fully known to or understood by the jury, it
17 will ordinarily be error to exclude that testimony.'
18 (Id., at p. 377, 208 Cal.Rptr. 236, 690 P.2d 709.)

19
20 We prefer this approach to that proposed by amici,
21 which would immunize an accused child molester when
22 the only witness against him is the victim. A
23 defendant may, under current law, offer expert
24 testimony to challenge the victim's testimony in
25 appropriate cases, preserving the jury's right to make

1 ultimate determinations on the credibility of the
2 witness. (McDonald, supra, 37 Cal.3d at p. 377, 208
3 Cal.Rptr. 236, 690 P.2d 709.)" (People v. Harlan
4 (1990) 222 Cal.App.3d at p. 452.)

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

11 **CONCLUSION**

12
13 Current case law allows the use of expert testimony for
14 both the defendant and the prosecution in the defined areas of
15 expertise in which Dr. _____ has previously qualified as an
16 expert. Dr. _____'s opinion concerns the suggestibility of
17 child witnesses and the psychological factors affecting their
18 memory, perception and ability to communicate only. The expert
19 will not attempt to usurp the fact finder's function by forming
20 an opinion as to whether the alleged victim in this case is a
21 false accuser or has been subjected to coercive influences.
22 **His/her** testimony falls within the limits of the seminal cases
23 of McDonald and Rouse.

24 Dated:

25 Respectfully submitted,

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Attorney for Defendant