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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Case No. 3:17-cr-00168-MO
)	
v.)	
)	
ANTONIO LEWIS HOWARD,)	December 19, 2017
)	
Defendant.)	Portland, Oregon
_____)	

Oral Argument

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL W. MOSMAN

UNITED STATES DISTRICT COURT CHIEF JUDGE

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I N D E X

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1 (P R O C E E D I N G S)

2 MS. JARRETT: Good morning, Your Honor. This is
3 3:17-cr-168, United States v. Howard. Julia Jarrett,
4 representing the government, and with me at counsel table is
5 Leah Bolstad. The defendant is present and in custody and
6 represented by his counsel. This is the time and place set for
7 an expert Rule 104 hearing, and the government is ready to
8 proceed.

9 THE COURT: Thank you.

10 Is the defense also ready?

11 MS. VALENTINE: We are, Your Honor.

12 THE COURT: I want to give you some tentative
13 thoughts, and then we'll hold our hearing. I assume you're
14 going to call a witness. Is that your plan for today?

15 MS. VALENTINE: Yes, Your Honor. Dr. Reisberg is
16 right out in the hallway.

17 THE COURT: All right. So the critical document
18 we're working off is the defendant's notice of expert witness,
19 because that's the -- just to be clear, that's the universe of
20 statements the witness can make. I'm not going to allow him to
21 say things that aren't in his witness statement.

22 And if I'm right, he makes five basic factual
23 assertions in that statement. The first -- or I might call it
24 five topic areas he wants to cover. The first is the concept
25 of confirmation bias. And I don't know what to say about that

1 yet, I guess, because we haven't heard a lot about it, but it's
2 not the subject of a real specific challenge by the United
3 States nor the subject of the production of any studies.

4 The second is clothing bias.

5 So I'm looking at a couple of things here, like I
6 would in almost any *Daubert* hearing. One, is this a person
7 with expertise in a subject matter that is susceptible to this
8 kind of expert testimony. That's No. 1. And No. 2 is does
9 that testimony fit our case -- well, does it fit the expertise
10 and our case.

11 So clothing bias, there's a lot you can say about
12 clothing bias, I'm just not sure it fits our case very well.
13 What's been talked about clothing bias, at least as far as this
14 witness a little, is the idea that if there's a lineup or a
15 show-up or something like that and the person to do the
16 identifying is aware of the subject's clothing, they're going
17 to be driven to pick people with similar or the same clothing.

18 And here that's not quite our case. It's a different
19 setting. So I'll just be interested to see how that gets
20 explained.

21 The third topic area is witness degree of certainty.
22 And that's the idea that the witness's degree of certainty
23 doesn't predict very well whether they'll be right in their
24 identification. And I think that fits *Daubert* just fine as a
25 subject matter area and might well fit our case. It requires a

1 bit of an extrapolation. That is, the actual studies are again
2 in the area of lineups and show-ups and the like, and this is a
3 different setting, but it seems like you can reasonably
4 extrapolate from the one setting to the other. If a witness's
5 certainty in a lineup doesn't reflect their accuracy, then it's
6 not much of a stretch to take the same studies as an expert and
7 extrapolate them to a closely related setting like the facts of
8 our case.

9 So I'm a little less concerned there about fit,
10 although I am concerned about what conclusion he actually wants
11 to make. In your witness statement, you say he will testify
12 about scientific research that has asked whether a witness's
13 degree of certainty is a reliable indicator of accuracy.

14 Well, that bare statement doesn't tell us anything.
15 You know, if he took the stand and said, "Yes, there is
16 research that asks whether a witness's degree of certainty
17 relates to accuracy," we wouldn't have told the jury anything
18 useful.

19 So I assume he has a conclusion he wants to make.
20 That's not in his witness statement, so the better practice
21 would have been to put his conclusion in his witness statement,
22 not his question.

23 And then his conclusion, you know, here we do have a
24 request for the underlying studies, and they have been
25 produced, and I'm not sure what to say about what those studies

1 would support as a conclusion. Certainly they don't well
2 support a sort of a categorical statement that there's no
3 relationship, since in some settings there is and some there
4 isn't. So we'll see what his conclusion is.

5 The fourth topic is police witness accuracy. And
6 again, that's certainly -- seems to be a subject matter that's
7 okay under *Daubert* and matches this witness's expertise. There
8 is once again the requirement of extrapolation. The studies
9 are in the area of lineups and show-ups, and this is neither.
10 And I'm more concerned than I was with the degree of certainty
11 studies about the need to extrapolate here. And so I'll be
12 interested to hear how one can justify saying that police
13 officer performance and accuracy in lineups and show-ups
14 relates to this setting which is neither a lineup nor a
15 show-up; how does your witness make the connection between the
16 two.

17 And then the last topic sort of advertised in his
18 statement is what I'll just call face-to-photo or face-to-video
19 accuracy. And once again, it's almost certainly okay under
20 *Daubert* as a topic area matching the witness's expertise. The
21 fit is fine -- that is, the topic matches our case really well.

22 So now the only question is the study that was
23 provided to support this doesn't -- as I read the study, the
24 only study provided to support it, it just says there's a
25 better way to do face-to-video ID that doesn't tell us about

1 the performance at all of face-to-photo, you know,
2 nondouble-blind face-to-photo IDs. It just doesn't tell us
3 anything. So I'm concerned there. And I thought we had this
4 nailed down until I saw the study which doesn't support any
5 conclusion that face-to-photo is subject to problems. And to
6 the degree the study just says there's a better way to do this
7 than what we're going to ask the jury to do, then that doesn't
8 help this jury. So we'll see where we get with that.

9 So those are the five statements. I hope I haven't
10 missed any statement or topic area. And those are my
11 *Daubert*-related concerns about each of the five.

12 So let's call your witness and see where we get.

13 MS. VALENTINE: Thank you. Thank you, Your Honor. I
14 actually did want to clarify one thing for you, if that's
15 possible.

16 THE COURT: Sure.

17 MS. VALENTINE: As you were going through and you
18 were talking about the studies and whether or not they actually
19 supported these particular opinions or whether or not they were
20 relevant to our case, as we were talking to Dr. Reisberg, it
21 actually essentially occurred that there was a bit of a
22 miscommunication, and it's probably more of a function of a
23 lawyer trying to communicate with a scientist.

24 And as Dr. Reisberg was kind of looking through it
25 and as we were talking about it, he realized that these were

1 studies that he provided to say -- that had specific points
2 that would support his opinion, but they were not the sole
3 authority on the topic. And he does -- these are good articles
4 to actually illustrate certain points, and some of the points
5 that weren't considered irrelevant, those are also points that
6 he was not planning on necessarily getting into.

7 THE COURT: Well, let's see where this goes.

8 MS. VALENTINE: But the other part of it is that, you
9 know, we did provide the Court and the government quite a while
10 ago with a copy of his CV, which is quite extensive. So there
11 are quite a number of articles, presentations that he has made
12 in more than 30 years in this field, and it was more having an
13 actual example for us, but these are not the only reports that
14 he was relying on.

15 THE COURT: Right. I mean, that's the issue with
16 expert, particularly social science expert testimony is
17 typically the opponent of such an expert isn't required to cull
18 through 30 years of speeches and articles and guess which ones
19 are going to be important. That's why we hold these hearings,
20 so that we can know in advance and not have any lawyer be
21 disadvantaged by a witness who can pull out of a 30-year
22 treasure trove almost anything he needs on the fly without
23 having a chance to review the study before the trial starts.

24 So let's go ahead and hear from your witness.

25 MS. VALENTINE: Thank you, Your Honor.

1 The defense calls Dr. Daniel Reisberg.

2 THE CLERK: Please come forward. Raise your right
3 hand.

4
5 DANIEL REISBERG, Ph.D.
6 called as a witness in behalf of the Defendant, being first
7 duly sworn, is examined and testifies as follows:

8
9 THE CLERK: Please be seated. Please pull your chair
10 all the way forward and state your full name and spell your
11 last name for the record.

12 THE WITNESS: My name is Daniel Reisberg, and it's
13 R-e-i-s-b-e-r-g.

14 THE COURT: Go ahead.

15 MS. VALENTINE: Thank you.

16 Your Honor, I do want to clarify. Would you like
17 more background on Dr. Reisberg's training, experience,
18 education as well? I just want to make sure. I can go through
19 that.

20 THE COURT: No, thank you. I've reviewed it
21 carefully. Go ahead.

22 MS. VALENTINE: Okay. Thank you.
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DIRECT EXAMINATION

BY MS. VALENTINE:

Q. Good morning, Dr. Reisberg.

A. Good morning.

Q. Dr. Reisberg, could you at least for the benefit of the record, could you state your name, where you work, and what your occupation is.

A. Sure. My name is Daniel Reisberg, and I am on the faculty at Reed College here in Portland. I am a professor in the psychology department. I hold an endowed chair in the psychology department.

Q. And Dr. Reisberg --

THE COURT: Just a second. Is his microphone even on?

THE CLERK: It is.

THE COURT: All right. There you go. Keep your voice up, if you could. Thank you.

THE WITNESS: I will do my best.

THE COURT: That's better. Thank you.

Go ahead.

MS. VALENTINE: Thank you. And, Your Honor, is it okay if I sit? I just wasn't sure.

THE COURT: No, that's fine.

BY MS. VALENTINE: (continuing)

Q. Dr. Reisberg, what degrees do you actually possess?

1 A. I have a bachelor's, master's, and Ph.D., all in
2 psychology. The master's and Ph.D. are in what's called
3 experimental psychology, which is the scientific research end
4 of the field, in contrast to the mental health end of
5 psychology.

6 Q. And Dr. Reisberg, have you been asked to be a witness in
7 this particular case?

8 A. Yes, I have.

9 Q. And have you written a report in this case?

10 A. No, I have not.

11 Q. And is there any particular reason why?

12 A. You didn't ask me for a report.

13 Q. And although you have not written a report, have you had
14 discussion about the areas in your expertise that you may be
15 able to offer an opinion on?

16 A. Yes, I have.

17 Q. And before submitting the notice, did we also ask you to
18 review it to make sure that these are areas which you feel
19 comfortable offering an opinion on?

20 A. Yes, you did.

21 Q. Now, Dr. Reisberg, have you testified as an expert before?

22 A. Yes, I have.

23 Q. And approximately how many times?

24 A. I don't have an exact number testifying as an expert on
25 and off for probably the last 20 or maybe even 30 years. In

1 some years it's as few as six or seven times in the year, and
2 sometimes it may be as many -- some years it may be as many as
3 12 or 15 times in the year.

4 Q. Dr. Reisberg, have you offered similar opinions in the
5 past as to this case? And let me back that up. Have you
6 testified in the area of clothing bias?

7 A. Yes, I have.

8 Q. Have you testified in the past in the area of whether or
9 not a police officer is better at identification than an
10 average citizen?

11 A. I testified on that point and on a number of other issues
12 in which what was at issue was whether a police officer has
13 some privilege or advantage in how they perceive, how they
14 remember.

15 Q. Have you testified about the different factors that can
16 inform or maybe go into an identification?

17 A. Yes, I certainly have.

18 Q. Have you testified about whether their -- a witness's
19 degree of certainty does not necessarily relate to reliability?

20 A. Yes, I've testified on that topic.

21 Q. All the topics that are covered in the notice of your
22 testimony, have you testified previously on these topics?

23 A. I'm not sure at this instant that I remember every single
24 topic that was covered, but I believe the answer is yes, I've
25 testified on all of those topics in state and federal court at

1 various points in the past.

2 Q. We'll go through those momentarily, but Dr. Reisberg, when
3 you give these opinions, are they based just on your lecturing
4 or are they based on a study or other types of research?

5 A. If I may, let me make sure we're using the words in the
6 same way. I have opinions about many things. I would not
7 waste the Court's time with my personal opinions. In testimony
8 I do everything I can to essentially transmit for the Court
9 well-established scientific claims that are rooted in many
10 studies and which I hope may, in one way or another, be useful
11 for the finder of fact.

12 Q. Dr. Reisberg, the opinions -- when you offer these
13 opinions, and especially ones that are based upon studies, are
14 these studies held up to falsifiability?

15 A. Oh, absolutely, yes. They have to be.

16 Q. And are they -- is there a method in which they are
17 conducted that could withstand scrutiny?

18 A. Let me make sure I understand the question. There is no
19 single method that is used in any science, and in fact one of
20 the important features of science is that you always want to
21 come at an issue from several different angles, just to make
22 certain that you're not getting a particular answer just
23 because you asked the question in a perhaps foolish way or a
24 perhaps unusual way. And so there is no single method.

25 On the other hand, there is certainly a well-defined

1 and rigidly enforced set of practices that govern how the study
2 is going to unfold, no matter what its specific method, and
3 those principles basically are what define science.

4 Q. In these studies, are they subject to -- do they have an
5 error rate that must be acceptable, an acceptable margin of
6 errors?

7 A. In any sort of quantitative research, the data have to be
8 run through carefully defined statistical analyses, and those
9 analyses are aimed at, in essence, measuring what the likely
10 error rate is. And then as part of the quality control within
11 the field, studies are simply not taken seriously unless the
12 error rate is demonstrably by calculation from statistical
13 procedures at a suitably low level. You can flesh that out if
14 you want, but the best answer is yes, there is a known error
15 rate, and we make sure we stay way south of that known error
16 rate.

17 Q. And are they also subject to peer review?

18 A. Absolutely. They have to be.

19 Q. And are they generally accepted in the scientific
20 community? I would say -- well, I think in the field, is
21 that --

22 A. Let me answer carefully. Scientists rather deliberately
23 go looking for areas of disagreement. That's how we find out
24 where there may be weak spots in our claims. That's where we
25 find out that we need new data. I would always in testimony

1 or, for that matter, something I would be writing, try to be
2 very clear about only discussing those things that have
3 achieved general acceptance because they've been through peer
4 review, because they've been checked and cross-checked, and if
5 it turns out in testimony I'm asked questions for which there's
6 not general acceptance, I always would do my best to make it
7 clear when we're straying into areas that are in one way or
8 other contested.

9 Q. Okay. Dr. Reisberg, I will ask you, the articles that you
10 provided to the Court, have all of those essentially withstood
11 the process that you've described?

12 A. Certainly all three of those articles are published in
13 high-quality, peer-reviewed, well-regarded, broadly cited
14 journals, prominent journals in the field, so they've been
15 through that process.

16 In addition, all three of those articles are relying,
17 in turn, on a large number of prior studies which also have
18 been through that same process, but also have been out and
19 available to the scientific community long enough to allow the
20 process of scrutiny and cross-checking to unfold. So yes is
21 the fast answer.

22 Q. Now, Dr. Reisberg, in your notice, you had stated -- or we
23 had talked about that the question could be whether a witness's
24 degree of certainty is a reliable indicator of whether or not
25 the identification is accurate or not. Is that correct?

1 A. That's right.

2 Q. And what would your answer to that be?

3 A. The answer essentially varies. There are specific
4 circumstances and specific types of judgments for which
5 someone's degree of certainty is wonderfully informative, so
6 that to put it in concrete terms, when somebody says they're
7 certain in those circumstances, you know you can rely on their
8 answer. There is also a much broader range of circumstances in
9 which there is essentially little and often zero correspondence
10 between how certain someone says they are and the likelihood of
11 an accurate response. And so the relation between certainty
12 and accuracy quite simply varies a lot.

13 Q. Now, Dr. Reisberg, was in your -- did you think it your
14 position to actually answer definitively whether or not this is
15 a good identification or 100 percent reliable?

16 A. Let me answer with care. In this case and in any case, I
17 have no opinion about the accuracy of a particular
18 identification. The science would not allow me that kind of
19 claim for reasons we can discuss, and I assume the Court would
20 not allow me that claim if I wanted to make it. So the
21 limitations of the science and the limitations of the Court I
22 think are perfectly in tune on that point.

23 Q. And so it was more of an opportunity to explore the
24 factors that may affect the reliability?

25 A. That's right. I mean, I try to think of my testimony as

1 basically educational in nature so that the trier of fact can
2 understand the psychological science that bears on the facts at
3 hand and then the finder of fact can either use or, if they
4 prefer, not use that framework as a way of making up their own
5 assessment of the facts.

6 Q. And Dr. Reisberg, what do you use to inform yourself of
7 the different factors that may affect certainty and
8 reliability?

9 A. I guess a two-part answer. In any case, I certainly want
10 to look at the case facts as a way of ascertaining what aspects
11 of the science might be relevant, and so just as a quick
12 example, if a case unfolds in full daylight, I would not waste
13 the Court's time talking about how human eyeballs work at low
14 light levels, that sort of thing. But once I've ascertained
15 what aspects of the science might be helpful, then what I draw
16 on is dozens, if not hundreds, probably thousands of studies,
17 many of which are directly on the point, many of which provide
18 methodological or statistical foundation for studies that are
19 on the point, many that fill in the relevant biology so that we
20 can make sure that our claims make biological sense in light of
21 how the nervous system works. So it's got to be a very broad
22 fabric of scientific evidence. That's just the way scientific
23 claims are made.

24 Q. Dr. Reisberg, just directing you in this case, what did
25 you review in preparation for this case?

1 A. I have seen -- I'm not sure that I'll remember everything,
2 but I've seen videos taken at the bus station, I believe on two
3 different dates. I've seen videos taken at a TriMet station.
4 I've also seen, I'm going to estimate, perhaps 30 or 40 pages
5 of police reports. I believe that is either close to all or
6 perhaps all.

7 Q. And did you also review still images, still images from --

8 A. Yes, I did.

9 Q. -- particular videos?

10 A. Yes, I did.

11 Q. And so in the realm of this case, what are factors that
12 could affect a witness's degree of certainty and reliability?

13 A. I'm not certain how specific you want me to be, but from a
14 scientific perspective, I guess it would be useful to divide
15 the evidence as I perceived it into two broad categories. One
16 would be that there is factors that would influence the
17 officer's memory for having seen the very first video, the one
18 in which apparently a gun was placed on the ground, I mean,
19 what would influence the judge's -- the officer's ability to
20 remember that video and then use that memory in order to decide
21 some days later that a man he saw on the street was the same
22 person as he had seen in the video. And for that we can think
23 through issues of what do we know about face recognition, what
24 do we know about the information that you need in order to
25 recognize a face. We would also want to think through the

1 impact of the passage of time. We would also want to think
2 through factors that are known to influence judgments like
3 that -- for example, clothing bias -- and then as a separate
4 matter, once the officer had selected this person, detained
5 this person, then there's a separate set of scientific
6 questions that hinge on the accuracy and the reliability
7 through which a police officer or anyone else is able to match
8 a particular face of a person, perhaps a person standing right
9 in front of them, against a low-quality video image.

10 Q. The factors that you have identified, are there actual --
11 is there science on these areas?

12 A. There is certainly science pertinent I believe to
13 absolutely every one of the points I just mentioned: impact of
14 the passage of time, the information one needs to recognize a
15 face, studies specifically targeted at clothing bias, studies
16 specifically targeted at how accurately people can recognize a
17 face from a low-quality video. All of those points are issues
18 that have been pursued, you know, in some detail in scientific
19 respects.

20 Q. Dr. Reisberg, can you give some examples of how these
21 studies are completed or how they're conducted?

22 A. Sure. As I testified a moment ago, I mean, there is no
23 single method that is always used, and so there's going to be a
24 diversity of methods. Broadly speaking, many of the studies
25 are going to be conducted in some sort of controlled laboratory

1 setting. The obvious advantage of that kind of approach is
2 that you can set things up with exactly the measures that you
3 want, exactly the comparisons that you want, you can make sure
4 that extraneous factors are not on the scene and so on. And
5 it's that control over the circumstances that gives you what
6 you can think of as scientific muscle.

7 And then there's a separate rather broad category of
8 studies that are conducted in real-world settings. Often those
9 are studies conducted in partnership with law enforcement, so
10 that you look at how real witnesses to real crimes remember
11 faces, for example. And there you obviously don't have control
12 because those events unfold as they unfold, but of course in
13 those cases there is zero question about realism, obviously
14 those are real cases, and essentially what you do is then use
15 those studies as a way of, you know, cross-checking studies in
16 one category against studies in the other category.

17 So I guess just to give you a specific illustration,
18 we know the passage of time matters because we can either look
19 at real crimes or cases we set up in a laboratory and ask how
20 accurate is the identification if the ID effort is made after
21 five minutes, after an hour, after five hours, after two days.
22 Those are straightforward questions to ask, and it's going to
23 be data of that type that would illustrate, for example, I
24 mean, the impact of the passage of time.

25 Q. Dr. Reisberg, can you perhaps -- how, for instance, would

1 you measure memory as it relates to this? And I guess just
2 perhaps an example of one of these things would be as far as --
3 related to a specific topic, how that study is conducted to
4 essentially withstand scrutiny.

5 A. Certainly what you want to do in any study is make sure
6 that there is no cues or suggestions to a witness or to your
7 research participants about how you want them to respond, how
8 they should respond. You don't give them any sort of
9 indications in advance of what the answer is likely to be. You
10 want to make sure that the answer is firmly and clearly coming
11 from their own perception, from their own memory.

12 You then certainly want to make sure that you measure
13 their response, that you document their response immediately.
14 There's standards for how you collect the data, how you store
15 the data, how you document the data.

16 But with regard to how do you measure memory, it's
17 always going to depend on what aspect of memory you're looking
18 to measure. But if, for example, we're talking about faces,
19 then what you need to do is to keep track of two different
20 types of errors. Sometimes I should put somebody in front of
21 you who is familiar, and if you say, "Nope, never seen that guy
22 before," that's a mistake. On the other hand, if I put
23 somebody in front of you who is not familiar, and you say,
24 "Yes, I know that person," that's a mistake, and those types of
25 mistakes have different profiles or influence different

1 factors. So it's important to keep them separate.

2 So you cannot measure accuracy just in terms of a
3 single number. In fact, you need four numbers: How often do
4 people say yes when the answer should be yes, how often do they
5 say no when the answer should be no, and on through the other
6 two combinations.

7 THE COURT: I'm going to pause you right there.

8 So this isn't going to be particularly helpful to the
9 challenge I have today, which is to decide what specific
10 opinions in our trial this witness -- you're going to ask this
11 witness to offer and what specific studies support those
12 opinions.

13 MS. VALENTINE: Okay.

14 THE COURT: So, in fact, my greatest concern in any
15 case, not this one in particular, is to have a witness who will
16 talk sort of in the abstract, somewhat vaguely about hundreds
17 or thousands of studies teaching him things that he knows and
18 can say to a jury.

19 So I need you to move to the specific points you want
20 him to make to this jury and what the specific studies are that
21 support that.

22 MS. VALENTINE: Certainly.

23 THE COURT: Let's do them one at a time.

24 MS. VALENTINE: Thank you.

25

1 BY MS. VALENTINE: (continuing)

2 Q. Now, Dr. Reisberg, were there certain biases that you
3 think could have affected the identification in this case?

4 A. Yes, there are.

5 Q. And let's start with Officer McDonald.

6 A. You're going to have to help me. Officer McDonald, I
7 believe, was the officer who first spotted the defendant and
8 said, "Yeah, I think that's the guy from the video." Have I
9 got that right?

10 Q. Yes.

11 A. Yes.

12 Q. What factors -- what biases were triggered -- could be
13 triggered that would lead perhaps even to a misidentification?

14 A. I'm not sure I'm going to count them all as biases, but
15 certainly let's start with the fact that the officer had seen a
16 video that I would regard as very poor quality. And we could
17 think through in some detail what are the specific features of
18 the face that you need in order to make a reliable
19 identification, and we could work through in detail whether
20 those features were visible in the surveillance video.

21 My own opinion, if it's admissible, is that those
22 features were not visible in the surveillance video, but others
23 make up their own minds about what is or isn't visible in that
24 video.

25 We would also want to think through exactly what the

1 impact is of the passage of time. For example, if I may, the
2 government suggested in their brief that there wasn't enough of
3 a passage of time to be of a concern, and that's just flatly
4 false in the face of the scientific evidence. Forgetting
5 happens immediately. Forgetting happens the moment an event is
6 over, and in fact the greatest proportion of the forgetting
7 happens immediately after the event. And it's also crucial
8 that the exact speed of forgetting is dependent on how clear,
9 how well established the memory is in the first place.

10 And so the points I just mentioned -- the poor
11 quality of the video and the passage of time -- need to be
12 considered as a package because the poor-quality video pretty
13 much is going to create a situation in which the forgetting
14 would be appreciably faster than it would be if the officer had
15 started out seeing a clear video.

16 Then I guess as a separate matter, the officer seems
17 to have been influenced by the fact that he recognized the
18 clothing of the man he subsequently saw, a pattern that's
19 typically referred to as clothing bias. Here I think we can
20 start with the common sense point that it should be obvious
21 that somebody can be influenced by clothing, and certainly one
22 can find police reports in which the witness says flat out,
23 "Gee, I don't recognize the guy, but the sweatshirt is right,"
24 or something like that.

25 What the science adds on that particular point,

1 though, is I guess two issues. One of them is that the power
2 of clothing bias, the effect of clothing bias is often
3 unconscious. And I can walk through the science of how we know
4 that if you need me to, but this is a situation in which
5 someone says, "Yeah, the clothing was familiar, but I was able
6 to set that aside and make up my mind based on just looking at
7 the face."

8 Someone might try to make that claim, but there's no
9 scientific reason to take that claim seriously, and so the
10 unwitting, the automatic, the unconscious nature of clothing
11 bias is something fortunately I think that science can make a
12 contribution here.

13 And then the other point in which I think the science
14 can make a contribution is that clothing bias, just like the
15 other factors I've mentioned, interacts with other factors.
16 And so the impact of clothing bias would be stronger thanks to
17 the fact that this is after a passage of time with a very
18 poor-quality video to begin with, and so those would be factors
19 that would make clothing bias more influential than it might
20 otherwise be.

21 So there, I guess, at a relatively quick pace is the
22 science that I think bears on that first identification.

23 Q. And Dr. Reisberg, would there also be -- thinking about
24 Officer Harris, who was asked to stop Mr. Howard, would there
25 be an area of confirmation bias?

1 A. Certainly once one officer says to another, "I think this
2 is the guy," or "Pretty sure this is the guy," once one officer
3 says to another there's reason to detain or perhaps arrest this
4 guy, that's exactly the sort of thing you would not want to do
5 in testing somebody's memory, because, I mean, as I testified
6 earlier, part of the way you make sure that you have an
7 accurate assessment of someone's memory is that you want to
8 take steps in events to make sure that you don't signal to them
9 what answer you're expecting or what answer you're hoping for,
10 what answer you think is likely. You want to be silent on all
11 of those issues so that you make sure that whatever response
12 you get from a participant in a study or, you know, a police
13 officer in this case, is truly without contamination, coming
14 from their own perception, their own memory. And so the more
15 communication there would have been between the officers, the
16 greater the danger of that. The communication could have in a
17 variety of ways compromised the reliability of any subsequent
18 ID.

19 Q. And Dr. Reisberg, the articles that you had provided, the
20 three various articles, which articles contribute to what
21 you've stated?

22 A. Well, I mean, let's take them one by one. The paper by
23 Gary Wells and John Wixted is the most recent summary of a very
24 large pattern of research, a lot of which is focused on IDs,
25 not all of which is focused on IDs, examining what we can learn

1 from somebody's expressions of certainty in regard to any
2 memory judgment and ID and beyond. And I would think that the
3 science that's reflected in that paper and the much broader
4 pattern of scientific evidence that that paper participates in
5 would help us if the officers were now to tell us that they are
6 totally certain in that identification, or even if they were to
7 tell us at the time that they were totally certain, that paper
8 would be relevant to that issue.

9 The paper on -- I think it's called *The Thin Blue*
10 *Line*, speaks to a different issue of whether police officers
11 are in some fashion protected from the various factors and
12 influences that operate on anyone else's memory. And there is
13 a number of studies, some looking at identification evidence,
14 some looking at other patterns of evidence, that tell us, I
15 think to no one's surprise, that police officers are human,
16 they have the same eyeballs, the same nervous system as anybody
17 else, and therefore are prone to the same biases, the same
18 influences.

19 In addition, there's a number of studies specifically
20 surveying police officers to find out the degree to which they
21 understand various forms of biases and factors that can
22 compromise their accuracy and the degree to which they guard
23 against those factors, and the evidence is pretty clear that
24 police officers are not in general prepared to guard against
25 those influences.

1 And I guess the other strand that is in that paper is
2 a question of whether some of the training that police officers
3 may have gotten somehow makes them more accurate as perceivers,
4 more accurate in their memory. And the evidence there is
5 uneven. There's certainly points in which the training does
6 pay off so that officers are better with regard to some aspects
7 of crime observation. But as far as I can see, for the issues
8 relevant to this case, the overall pattern of evidence suggests
9 no advantage at all for police officers.

10 Q. Now, Dr. Reisberg, in particular, I believe it was *The*
11 *Thin Blue Line*, that paper did deal a lot with lineup
12 situations and identifications in lineups?

13 A. Yes. I mean, that's certainly a large part of the
14 evidence.

15 Q. And is there anything that can actually be gleaned from
16 the science of lineups that would actually make it relevant to
17 a point -- Well, let me back up.

18 Will this opinion -- for instance, some of the
19 results that came across in *The Thin Blue Line*, are they
20 essentially applicable only to lineup situations?

21 A. Good heavens, no.

22 Q. And so because a study deals with lineups, does it mean
23 that you can essentially throw it out and say that it has no
24 relevance on any other type of identification scenario?

25 A. If I may, let me give you a two-part answer. First of

1 all, *The Thin Blue Line* paper does not limit itself to lineups.
2 There's other types of evidence that are considered there.

3 But then more directly to your question, lineups are
4 one of the well-regarded ways to test someone's memory for
5 faces. It's a particular procedure for testing somebody's
6 memory for a face. And what you can learn from lineup studies
7 is both how a lineup might go at some point in the future but
8 what you can learn from lineup studies is also a much broader
9 pattern of evidence, a much broader pattern of conclusions
10 about how people remember faces or how well people remember
11 faces, what kinds of mistakes people are likely to make when
12 remembering faces. And so lineup studies do tell you about
13 lineup procedures, but they also tell you so much more general
14 lessons about face memory.

15 Q. Dr. Reisberg, in dealing with this case, the passage of a
16 week from seeing a poor-quality video to seeing a real-life
17 person, how essentially does that affect memory and recall?

18 A. We've known a lot about how forgetting proceeds for the
19 last 150 years, and two points are clear for basically any
20 example of forgetting. One of them is that it starts
21 immediately after the event, and the other is that the speed of
22 forgetting is uneven. The summary that's routinely given is
23 that the amount of forgetting in the first hour is greater than
24 the amount in the second hour, and the amount of forgetting in
25 the second hour is greater than in the third hour, and so on.

1 Exactly how that pattern unfolds, though, varies from case to
2 case and varies in particular according to how well established
3 memory was in the first place.

4 And so if it's a face that you know really well
5 because it's somebody you've seen day after day, perhaps for
6 months -- and I can flesh out the research details if you
7 like -- but if it's that kind of face, it will still be true
8 that the forgetting starts immediately. It will still be true
9 that the forgetting is most rapid at the start, but the
10 forgetting will, in truth, be gradual.

11 On the other hand, if it's a face that you saw only
12 briefly or if it's a face that you never saw clearly in the
13 first place, as, for example, a face in a very low-quality
14 video image, again the forgetting is going to happen
15 immediately, again the forgetting is going to be more rapid at
16 the start than it is later on, but in that case the path of the
17 forgetting is going to be relatively steep, with a lot of
18 information loss very quickly.

19 Q. And Dr. Reisberg, in looking at perhaps a very
20 poor-quality video and then trying to match it up with a known
21 picture or a known person, how does that process work?

22 A. Let me make sure I understand. So we're now talking no
23 longer about a memory issue but having a real live person side
24 by side with a video?

25 Q. Yes.

1 A. Or perhaps side by side with a still image from a video so
2 it's no longer a memory issue, it's just a matching issue.

3 As a separate domain, it's a domain that's been
4 studied in some detail, and in particular we know what the
5 accuracy level is in that arena, and so we know, to put it
6 bluntly, whether those matches are reliable or not. And quite
7 simply, they're not anywhere close to reliable.

8 Studies that have specifically examined how
9 accurately people can recognize a face to a video give you
10 differing results because it depends, to no one's surprise, on
11 is the video blurred a little bit, is the video blurred a lot,
12 but overall the rate of error in those studies is -- I don't
13 think I've ever seen a rate of error below 17 or 18 percent,
14 and the rate of error in those studies is often as high as 30
15 and 40 percent.

16 And so it really does seem, for reasons that we can
17 work through -- the science here is detailed -- but it really
18 looks like a human's ability to do this side-by-side matching
19 of here's a real person, here's a video of poor quality,
20 there's just no reliability in the process. The error rate is
21 very high.

22 Q. And is there -- is that borne out in the studies that you
23 have provided?

24 A. Certainly the Burt study that I gave included an initial
25 step of gathering data to establish baseline accuracy. The

1 study then turns into a fairly, I think, wonderful Bayesian
2 analysis -- I assume I'm not going to try to walk the Court
3 through a Bayesian analysis, because I hope I insult no one if
4 I say I may be the only one in the room that knows what a
5 Bayesian analysis is, but the point of that paper is what's up
6 front, which is the descriptive data looking at how accurately
7 people recognize a face from a video if the video is of low
8 quality and, for that matter, if the person is wearing any sort
9 of disguise.

10 Q. Now is there anything in that paper that perhaps talks
11 about like maybe what a person -- perhaps how a person recalls
12 features for an unknown face?

13 A. I mean, this is going to be a domain in which I think in
14 order to understand that paper, one needs to put it into the
15 broader context. I don't recall that paper specifically
16 talking about individual features that were used. Certainly
17 that paper includes a study in which there was a disguise, and
18 so in order to understand the paper, one would need to put it
19 into the context of what do we know about what makes a disguise
20 more effective, less effective.

21 And on that issue, some of the scientific results I
22 think confirm common sense. I mean, I don't think you need a
23 scientist to tell you that if someone is wearing a mask that
24 covers the lower half of their face, then of course that's
25 going to interfere with face memory. But I also think the

1 science of disguises provides some unexpected results. For
2 example, the science is quite clear that if somebody is wearing
3 a hat and it's pulled down relatively low on -- again, in ways
4 that I'm happy to walk through if you like, that turns out to
5 have a marked impact on accuracy and turns out to be a
6 reasonably effective disguise. And so in order to understand
7 the impact of disguise as described in that paper, one would
8 need to understand that in the context of other research.

9 Q. Does that paper also include anything perhaps about what
10 would -- an example of having a person look and see at what
11 point they would be able to recognize and make an
12 identification of a person?

13 A. That paper doesn't include that issue, although that issue
14 of basically someone looking at a video and trying to decide is
15 it good enough to make an ID or not, I mean, that specific
16 issue in which people are evaluating the clarity of the video
17 has been pursued by other studies that we can walk through if
18 you like.

19 Q. Dr. Reisberg, in dealing with how a person will make a
20 face-to-video identification, are there also perhaps even
21 biases that come in?

22 A. Oh, absolutely.

23 Q. And what kind of biases affect that?

24 A. The answer is going to be a list. I mean, one of the
25 things the science is clear on is that when the quality of

1 information available to your eye is poor, that's going to be a
2 setting in which you rely more and more on pretty much any
3 other type of information that you can gain access to. I mean,
4 basically the recognition judgments are in some way
5 opportunistic. If the visual information isn't good, you go
6 looking for other modes of information. For example, clothing
7 bias would play a role there, or certainly if anyone had
8 suggested to you, "Probably there is a match here," or
9 suggested to you the opposite, "I don't think there's a match
10 here," those influences would have a larger impact by virtue of
11 the fact that the visual input itself is not very good, so
12 you're going to essentially be vulnerable -- more vulnerable to
13 those outside influences.

14 Q. Dr. Reisberg, is there an assistance to the jury in this
15 type of situation where we have officers that are going to say,
16 "Hey, we looked at the video, then we looked at Mr. Howard, we
17 thought they were the same, but you know what? You're going to
18 be free to just kind of look and you'll be able to see the
19 differences as well." Is that an actual opinion, as far as
20 that kind of sufficiency, is that based in science, the thought
21 that well, a person would be able to look at the video and look
22 at the person themselves and make their own conclusion?

23 A. Let me answer carefully to make sure that I'm
24 understanding the question.

25 Is -- if the issue is can we rely on the jury's being

1 accurate in deciding whether a video is clear enough to make an
2 ID, the answer is yes and no. I mean, obviously the jury will
3 be able to -- I assume the jury will be able to see the video,
4 they'll be able to make a judgment whether it seems cloudy to
5 them, whether it seems clear to them, but on the more specific
6 issue of will the jury be able to decide if the video is clear
7 enough to support a reliable ID, there is scientific evidence
8 on exactly that point, and the scientific evidence suggests
9 that in the context of a courtroom trial in which the jury
10 knows the trial is underway, the jury has the defendant in
11 plain view, the science pretty powerfully suggests the jury
12 would be very generous interpreting the video and would be far
13 too willing to say yes, it's good enough to make an ID, even if
14 it's not good enough to make an ID.

15 Q. And so could the same be said for perhaps the jury even
16 judging the credibility of a witness in accuracy or certainty,
17 so to speak?

18 A. So I will always defer to the jury in making their own
19 decisions about the credibility of the witness. Certainly we
20 can at least let the jury know what science tells us about the
21 information we may or may not be able to gain from a witness's
22 demeanor or the information you may or may not be able to gain
23 from the witness's statements of certainty. I mean, I'm happy,
24 willing to inform the jury on the science of those points. I
25 have informed juries in other courtrooms on those points. How

1 the jury uses that information in forming their own opinions,
2 it's up to them.

3 Q. Well, let me just ask you also, kind of more to a specific
4 point, is there anything that would relate to how -- perhaps
5 the error rate in a side-by-side viewpoint of a distorted image
6 and an actual person?

7 A. Again, I'm not totally sure I'm understanding the
8 question, but there certainly is something that is sometimes
9 referred to as the illusion of clarity or the illusion of
10 transparency, in which if a person knows what a video is
11 supposedly showing, if the person knows what the video -- I
12 mean, the individual who is allegedly depicted in the video, if
13 the person knows those things about the video, that seems to
14 create a fairly reliable illusion in which the person believes
15 the video is clearer than it is.

16 And what's going on there, I guess, in common sense
17 terms is once you know exactly what you're looking for, that's
18 the shape of his chin, or that's the shape of his eyebrows or
19 something like that, you can essentially talk yourself into
20 believing that you can see them. I mean, that's not the
21 language of the science, but that's more or less how it plays
22 out in common sense terms. But the results are quite clear
23 that once someone knows what is allegedly there to be seen in
24 the video, that's what produces the illusion in which the video
25 is judged to be clearer than it really is.

1 Q. And in this case, could -- is it possible that Officers
2 McDonald, Harris, and other officers had an illusion of
3 clarity?

4 A. Oh, absolutely. Police officers are at the end of the day
5 humans. They are vulnerable to the same illusions as anyone
6 else.

7 Q. And has the science borne out that informing about the
8 illusion of clarity is actually helpful to a fact finder?

9 A. I'm not quite sure how to decide what is or is not helpful
10 to a fact finder. I'm guessing that that's more a legal matter
11 than a scientific matter.

12 What I can tell you is that letting people know about
13 the illusion of clarity does not make the illusion go away. I
14 mean, everybody is still fooled even though you're know you're
15 likely to be fooled.

16 Q. And is the illusion of clarity maybe a common sense kind
17 of phenomenon that you've heard? You know, is that something
18 that a lot of people just can necessarily unpack without
19 understanding the science of it?

20 A. I'm not sure I can give you a direct answer, but what I
21 can certainly tell you is that when I teach my college students
22 about this material, they find it quite surprising.

23 Q. Okay. And have you also testified in this area?

24 A. Yes, I have.

25 Q. And there is -- this area, is that contained in any of the

1 studies that you've provided?

2 A. No. I was not anticipating we would be covering this
3 issue in testimony, so I did not provide any of the studies
4 that speak to it.

5 Q. Dr. Reisberg, in this particular case, we have officers
6 that have made an identification, and is it a common thought
7 that police officers may have -- may be better at observing
8 certain things?

9 A. It is certainly a common thought, a common thought into
10 law in some jurisdictions.

11 Q. And -- but is there science to suggest that that may not
12 be the case?

13 A. Again, as I testified earlier, the data patterns --

14 THE COURT: That's all right. You asked that
15 earlier. He answered it fully.

16 MS. VALENTINE: Okay. All right.

17 Your Honor, may I have just a moment?

18 THE COURT: Certainly.

19 (There is a pause in the proceedings.)

20 MS. VALENTINE: Your Honor, I'll pass the witness at
21 this time.

22 THE COURT: You may inquire.

23 MS. JARRETT: One moment, Your Honor.

24 (There is a pause in the proceedings.)

25

1 CROSS-EXAMINATION

2 BY MS. JARRETT:

3 Q. Dr. Reisberg, good morning.

4 A. Good morning.

5 Q. I have three studies in front of me, and just to remind
6 you of the names of studies, because I know you're probably
7 more familiar with the authors, *The Thin Blue Line-Up* by
8 Annelies Vredeveldt.

9 A. Yes.

10 Q. *Comparing the Defendant -- Comparing the Defendant to*
11 *Images of the Culprit*, by Burt Thompson and others, and *The*
12 *Relationship between Eyewitness Confidence and Identification*
13 *Accuracy*, by Wixted and Wells.

14 A. Yes.

15 Q. Which of those three studies addresses what specific
16 features of a face are helpful to make an identification?17 A. I don't believe that specific issue is addressed. Give me
18 a moment to think about that, but I don't believe that issue is
19 addressed in those papers.20 Q. Which of these specific studies address the effects on
21 memory of the passage of time?22 A. Again, I don't believe that specific point is covered in
23 those papers.

24 Q. Which of these specific studies addresses clothing bias?

25 A. That point is certainly not covered in those papers.

1 Q. And which of these studies addresses confirmation bias?

2 A. Again, I'd have to pause. I don't recall whether --
3 excuse me -- if the Wixted and Wells paper talks about various
4 forms of confirmation bias, I don't at this moment recall.

5 Q. Does it draw any conclusions about confirmation bias?

6 A. If I recall correctly, they do talk about the things that
7 can go wrong and can inflate someone's confidence. And they
8 may or may not use the terminology of "confirmation bias," but
9 certainly one of the things that can inflate confidence is a
10 form of confirmation bias. I just don't recall whether they
11 used that term in that paper or not.

12 Q. Which of these three studies discusses comparing a person
13 in front of you, like in person, to a video?

14 A. I believe the studies on that point are alluded to in the
15 second of the three papers you mentioned, the --

16 Q. *Comparing the Defendant to Images of the Culprit?*

17 A. Yes. In that particular study they used photographs
18 compared to videos, but they talk about other earlier studies
19 that compare a live person to a video.

20 Q. But this specific study doesn't actually perform any
21 research or analysis on --

22 A. On that particular point, that's right.

23 Q. And which of these particular studies discusses the
24 illusion of clarity?

25 A. As I testified earlier, I had not realized we were going

1 to be going down that path, so I did not include any papers on
2 that point.

3 Q. What about whether a jury can rely on the video? You
4 testified about the jury being able to see the video themselves
5 in the courtroom. Which of these studies addresses any type
6 of --

7 A. I think the science that's relevant there is the science
8 on perceived clarity, and as we just discussed, I did not
9 anticipate that we were going to be talking about that, so it's
10 not included in those papers.

11 Q. I want to look a little bit closer at the *Comparing the*
12 *Defendant to Images of the Culprit* study.

13 A. Okay.

14 Q. When was this study done? Do you recall?

15 A. I don't remember the publication date or, more to the
16 point, the submission date.

17 Q. So I have a copyright date of 2017. Does that --

18 A. That sounds right. The journal process is sadly slow, so
19 what one would look at is usually a footnote somewhere in the
20 paper of when it was first submitted.

21 Q. May of 2017, I believe. Does that sound right?

22 A. That sounds plausible.

23 Q. And in this study you talked about how it's not really the
24 conclusions of the study that's informing your opinion but
25 rather the raw data that they found at the beginning of the

1 experiments.

2 A. I'm not sure what you're thinking of in conclusions. I
3 mean, that paper had a larger agenda of trying to recommend a
4 particular method for evaluating videos, and in order to
5 provide some illustrative data to work with in evaluating their
6 own method, they conducted a study which provided the factual
7 foundation for their Bayesian analysis.

8 Q. But the purpose of the experiments here was to explore the
9 possible forensic utility of a mock witness filler-control
10 test?

11 A. Certainly the main goal was exactly that, that's right.

12 Q. So they did not provide any type of meaningful analysis on
13 the actual raw data but rather put it through their base
14 control and looked at the base rate and probability of guilt to
15 come to their conclusions?

16 A. I don't know what you mean by "meaningful analysis." They
17 certainly did the appropriate analysis of the two experiments
18 they report there, and they provide the relevant descriptive
19 statistics. If I recall, they also provide the relevant
20 analytical statistics, but all of that is, as we just agreed,
21 en route to their -- what happens to be their larger purpose in
22 that study.

23 Q. And, in fact, they acknowledge that their identification
24 rates are lower than those typically found in prior studies?

25 A. That's right, that's right. And that's one of the reasons

1 I wanted that study in your view, was that in some ways that's
2 sort of the more optimistic view of how well people can
3 recognize faces from videos.

4 Q. So the conclusion of this is not that people -- the
5 takeaway from the study is not how good people are at
6 identifying or not, but what information can be gleaned from
7 various combinations of identifications?

8 A. Perhaps that's what you take away from the study. I think
9 there's more that one can plausibly take away from that study.
10 I think there's many lessons one can draw from the paper.

11 Q. But it's certainly what the authors concluded from the
12 paper, isn't it?

13 A. Again, their overarching purpose is to develop and argue
14 in favor of a particular error rate for evaluating video.

15 Q. Was there any control done in this study to compare other
16 types of identifying -- other types of identifying people from
17 pictures and videos?

18 A. I'm not sure what you mean, nor am I sure how that's
19 germane. I mean, they collected the data for a particular
20 purpose, to establish some baseline facts that they could then
21 use in analysis.

22 Q. Certainly. But if you're trying to extrapolate from this
23 data to other contexts, a control group showing other types or
24 maybe the more common types would be relevant in determining
25 whether this data is better than that or not?

1 A. Well, the way you ended that sentence is exactly right. I
2 mean, what control groups you need depends on what comparisons
3 you're ultimately hoping to describe or pursue, and for their
4 purposes, for the comparisons they want, there was no reason
5 for a control group. And indeed for my purposes in submitting
6 that paper to you, there was no reason for a control group. It
7 was utterly beside the point for that purpose. Certainly
8 crucial for other purposes.

9 Q. So what conclusions do you draw from this study?

10 A. As I testified earlier, I mean, for me, I offer that paper
11 as an illustration both as a means of giving you access to the
12 broader literature, given the fact that that is a 2017 and
13 therefore recent paper and therefore can cite the broader
14 literature, but in addition they provide their own data that
15 give us a sense of the level of accuracy we can reasonably
16 expect when people are matching a face to a video. And if I
17 recall correctly, the error rate was in the ballpark of
18 17 percent in the condition that I believe is the most
19 relevant.

20 Q. And, again, we have no comparison data to show; we just
21 have this one study. We have no control group or comparison
22 data to show the accuracy of this data?

23 A. Forgive me, but I don't know what you're talking about. I
24 mean, one needs a control group when one is arguing about a
25 specific comparison. One doesn't need a control group as a

1 matter of a religious ritual. What controls you need depend on
2 what claims you are seeking to make.

3 Q. So --

4 A. I mean, they also didn't run a group of five-year-olds as
5 a comparison. That just has nothing to do with their study.

6 Q. But what we can draw from this study is how accurate
7 people are as looking at five pictures and comparing it to a
8 three-second video?

9 A. What one can draw from that study is an illustration of
10 indeed the accuracy level in those circumstances, and then one
11 puts that into the broader fabric of other studies that give us
12 a larger sense of the accuracy of people matching faces to
13 videos.

14 Q. You stated that you have testified about many of these
15 topics before.

16 A. Yes, I have.

17 Q. Have you testified about this topic to a jury before?

18 A. I certainly have testified about the ability to interpret
19 video images and still images in a variety of cases.

20 Q. Before a jury?

21 A. I do not at this moment recall which of those were
22 pretrial, which were trial, and which of those for trial were
23 bench trials and which were jury. I just don't remember.

24 Q. I have some questions about *The Thin Blue Line-Up* study.

25 A. Okay.

1 Q. Is it more accurate to say this is literature review as
2 opposed to a study?

3 A. It's not a study. It was a paper published as part of a
4 many-part forum in which leading experts in the field were
5 invited by the journal's editors and by me -- actually, I am
6 the journal's editor -- to provide a summary of the state of
7 the art and to help us understand which scientific results are
8 plausibly ready for use in the courtroom. And specifically
9 authors were encouraged to talk about which scientific results
10 might be limited in ways that make them not yet ready for use
11 in the courtroom.

12 Q. So in this literature review, it states that "the research
13 shows that police officers perform either equally well or worse
14 than civilians on perpetrator identification lineups," with one
15 exception. Do you recall that?

16 A. Yes. They overlooked some other exceptions, but yes, that
17 is the broad pattern of the day.

18 Q. And the one exception that this literature review cites is
19 that "detectives specialized in covert observations were
20 significantly more likely than both civilians and uniformed
21 police to identify the perpetrator from a target-present
22 lineup."

23 A. That's correct.

24 Q. Do you remember why -- do you recall what this literature
25 review stated about why police might be more subject to -- or

1 equally as subject as civilians to lineup error?

2 A. I mean, my recollection is that the paper talks about
3 whether police officers have beliefs or training that might
4 somehow reduce their error rates. The paper also mentions
5 appropriately sensibly that police officers have the same
6 eyeballs and nervous system as anyone else.

7 Q. It also says that may be the result of police officers
8 being more likely to choose someone from the lineup?

9 A. Yes. In fact, the studies that show a difference between
10 police officers and civilians tend to show a slightly higher
11 error rate for police officers because they're basically too
12 quick to make a choice. And in terms of the different types of
13 errors that we were talking about earlier, they're inclined to
14 make the error in saying, "Yes, that's the guy," when the
15 correct answer should be no. In my terms, they produce false
16 alarm errors.

17 Q. Well, this says they're more likely to choose someone from
18 the lineup, meaning they're more likely to select someone from
19 the panel of people put in front of them?

20 A. That's right.

21 Q. So that's one of the factors that could influence why a
22 lineup would -- could be flawed?

23 A. I don't have a clue why you think that claim follows from
24 what we've been discussing.

25 Q. Well, the response bias is one of the factors that could

1 lead to a lineup being less effective?

2 A. Less effective than what?

3 Q. Or lead to less accurate identifications.

4 A. Certainly a bias towards making a choice can produce an
5 increased number of errors.

6 Q. But when you don't have a lineup, you don't have a lineup
7 of five people in front of you to choose from, that is not an
8 issue; is that correct?

9 A. No, that's totally wrong. If one has a response bias
10 toward, in my terminology, a low-response criterion, so that
11 you are, in essence, over-ready to say, "Yes that's the guy,"
12 that response bias would apply to a lineup, to a single-person
13 show-up, to a chance encounter on the street. The nature of
14 response biases is that they are going to shape how you behave
15 in a wide range of settings. So there's nothing specific there
16 to lineups.

17 Q. The study also discusses, as you previously testified,
18 that police officers can report more crime-relevant information
19 and they may be better at that?

20 A. That's correct. That's the one relatively consistent
21 advantage that police officers have. They know within a scene
22 basically where to point their eyes.

23 Q. I'm sorry. Say that again.

24 A. They know within a scene where to point their eyes.

25 Q. But even that data, this concludes, is not -- there's not

1 really great agreement among experts on?

2 A. I don't know if you'd say not great agreement on it. I
3 only know of a small number of studies that make that point.
4 It's not clear that those studies are all that well known. I
5 testified earlier I try to be careful about what's generally
6 accepted. I think that study is not often enough replicated or
7 well enough known to say it's counted as general acceptance. I
8 mean, I believe the study is correct, but I want to, I mean,
9 wrap some question around it, just as the author of that paper
10 wrapped some question around it.

11 Q. They say experts do not actually agree on this topic at
12 all?

13 A. Yes.

14 MS. JARRETT: No further questions, Your Honor.

15 THE COURT: Any redirect?

16 MS. VALENTINE: Yes, Your Honor.

17 Your Honor --

18 THE COURT: Yes?

19 MS. VALENTINE: -- may I approach the witness?

20 THE COURT: Yes.

21 MS. VALENTINE: Thank you.

22

23 REDIRECT EXAMINATION

24 BY MS. VALENTINE:

25 Q. Dr. Reisberg, I just handed you -- I handed you what's

1 been marked as Defense Exhibit 130, which is a copy of your CV;
2 Exhibit No. 131, which is the *Comparing the Defendant to Images*
3 *of the Culprit*; 132, which is *The Relationship Between*
4 *Eyewitness Confidence and Identification Accuracy*; and 133,
5 which is *The Thin Blue Line*.

6 And do you recognize these?

7 A. Yes, I do.

8 Q. Now, Dr. Reisberg, when you give an opinion, are you
9 relying solely on -- well, in this particular case you have
10 given three articles, but are you relying just solely on those
11 articles for the basis of your opinion?

12 A. Oh, absolutely not. I couldn't.

13 Q. And your vitae, does that include essentially your
14 professional career? And probably not in total, but it may be
15 a representation.

16 A. Yes. I hate to think that my entire career could be
17 boiled down to just these 21 pages, but yes, it is a good
18 representation of many of the crucial features of my
19 professional career.

20 Q. And is this vitae up-to-date?

21 A. I -- broadly, yes. It is always subject to change. I
22 don't know if the most recent papers, the most recent
23 presentations are included. It's dated September 2016, so I'm
24 going to guess that it's going to be somewhat out of date.

25 So yes, I mean, it's -- the list of publications on

1 page 8 needs to be expanded a bit. There's new publications,
2 new papers underway, but, I mean, certainly the vast majority
3 of what's here is accurate.

4 Q. Now, Dr. Reisberg, all the publications that are included
5 in your vitae, what did you -- what kind of process was
6 involved in writing the books? And I don't necessarily mean
7 like the whole editing process, but where did you get the
8 information to include in your books?

9 A. I mean, the information has to come from material I
10 learned in part of my formal education, master's and Ph.D.,
11 certainly has to include the reading that I am required to do
12 in order to make sure I stay current in the field. It's going
13 to include things that I learned by going to professional
14 meetings, as I do, you know, at least once or twice every year.

15 It's also going to include the feedback that I've
16 received, since the process of academic publishing is never
17 going to be something in which you send something to the
18 publisher and you're done with it. You send something to the
19 publisher and it goes through the process of peer review. And
20 so I don't know that everything on this list, but certainly the
21 vast majority of what's on this list was sent to a publisher,
22 was then reviewed by other professional colleagues who know
23 this material as well as I do, who understand the methods and
24 statistics as well as I do, and then they provide feedback --
25 typically ferocious feedback -- and so then the writing is

1 improved on the basis of what they've said.

2 It's also the case that for some of the books,
3 including my 2014 book, which is essentially aimed at the legal
4 profession, that book was also reviewed by a number of
5 attorneys who wanted to make sure that everything I said was
6 sensible and coherent from their professional expertise.

7 Q. In forming an opinion, would you be relying perhaps on
8 your knowledge of what you have written in some of your books
9 or scholarly publications?

10 A. I would certainly be relying on that. I'd suspect I'd
11 also rely on science that I know well that I may not have
12 written about.

13 Q. And in that realm, would that be perhaps what you know
14 perhaps as a professor and your courtroom -- I'm sorry, your
15 classroom assignment syllabus?

16 A. Yes, it's going to include those things. It's also going
17 to include things that I have to deal with in my professional
18 capacity as a journal editor. It's going to include things
19 that I've read in preparation for books I'm working on but
20 perhaps which I've chosen not to include in the books. I read
21 more broadly and then choose which things to convey in the
22 book. So it's certainly going to come from all those sources.

23 Q. And Dr. Reisberg, looking at page 2 of 130, which is your
24 CV, you have two books at No. 7 and No. 12 dealing specifically
25 with memory and cognition.

1 A. I'm not quite sure --

2 Q. I'm sorry, No. 7 on page 2.

3 A. If you're looking at the paper by Reisberg, Rappaport and
4 O'Shaughnessy -- Are we looking at the same place?

5 Q. Yes.

6 A. Yes.

7 Q. No. 7.

8 A. Yes.

9 Q. Memory was one of the topics in that?

10 A. Yes. It's a specialized form of memories called working
11 memory, but yeah, I've -- I mean, that's one of the many things
12 I've written over the years about memory function.

13 Q. And there's also one at No. 13 -- or No. 12 on that page?

14 A. Yes. I mean, I've written a number of things about visual
15 memory and memory for faces in particular, and also I've
16 written things about identification procedures and biases in
17 identification procedures.

18 Q. Dr. Reisberg, is there anything from your publications
19 that would include confirmation bias?

20 A. I've written extensively about confirmation bias. I think
21 most recently confirmation bias is covered in some detail in
22 the first, second, third, fourth, fifth, sixth, and seventh
23 editions of my textbook aimed at students. It's also covered
24 extensively in the 2014 book I wrote for the justice system. I
25 believe it's also covered in the intro psych book I've worked

1 on over the years. So yes, confirmation bias is amply covered
2 in many things I've written.

3 Q. What about clothing bias?

4 A. Clothing bias is described I believe in the 2014 book.

5 Q. Could you find the 2014 book on your CV for us?

6 A. Sure. It is entry 83 on page 8.

7 Q. Dr. Reisberg, in looking at -- earlier Mrs. Jarrett had
8 asked where in certain studies a particular issue was. The
9 ones that were not necessarily alluded to directly, mentioned
10 in that study, have you written or published on those other
11 topics?

12 A. Yes, I have.

13 Q. And are they all included in your CV?

14 A. I'm trying to reflect back on what we've been talking
15 about in the last hour or two, and I believe but I am not
16 certain that everything we've discussed this morning is
17 reflected in my publications. And the largest portion of it
18 would be in the 2014 book, which is, of course, a book
19 basically designed to convey these materials I hope in a
20 fashion that is useful for law enforcement and the courts.

21 Q. Dr. Reisberg, in looking at Exhibits 131, 132, and 133,
22 are there any footnotes in those particular studies?

23 THE COURT: This really isn't going to help. You're
24 looking at a legal question. I mean, he doesn't have to -- he
25 can rely on a wide number of things potentially for his

1 testimony, and which of the things he's talked about today
2 he'll be allowed to rely on is the question for the Court.

3 So he's referenced his own writings, but you don't
4 need to limit him to his own writings. He's referenced
5 studies. You don't need to limit him to those. You don't need
6 to limit him to footnotes in those studies. He's referenced
7 150 years of memory studies.

8 So the universe of things he can potentially rely on
9 is almost as big as the universe, and the question for me is
10 how much of that will he get to rely on. So asking him this
11 isn't really helpful because if at the end of the day he's not
12 limited to what he produced or what you produced, then his
13 options are virtually limitless.

14 MS. VALENTINE: Well, Your Honor, can I probably just
15 ask two more questions about this?

16 THE COURT: Go ahead.

17 BY MS. VALENTINE: (continuing)

18 Q. Now in the studies are there other studies or experiments
19 that are referenced?

20 A. The answer is yes, and it's a requirement of scientific
21 publication that papers must be written in a fashion so that
22 readers not only can understand them but will understand them
23 in the context of other relevant studies, and on that basis it
24 would be a flaw and perhaps a fatal flaw in a scientific paper
25 if you failed to include the comments that would appropriately

1 situate that paper within other related sources of evidence.

2 Q. Although -- just in the studies that you've provided,
3 although a particular word or phrase may not have been used, is
4 there any study -- I take that back.

5 Anything in your testimony, is there any reference
6 that was not made in any of the three studies?

7 A. I'm not sure I understand. One point we have covered --

8 THE COURT: Let me ask it this way. Do you believe
9 that all of the opinions you've rendered so far today can be
10 found either in the three studies or in the studies those three
11 studies cite?

12 MR. CASSINO-DUCLOUX: I'm sorry, Your Honor. I
13 didn't mean to interrupt you.

14 THE COURT: Well, then don't.

15 Go ahead.

16 THE WITNESS: I think the answer is no.

17 THE COURT: All right.

18 THE WITNESS: I can explain it.

19 THE COURT: You can follow up. I was just asking the
20 question I needed to know from that.

21 Go ahead. Any further redirect?

22 BY MS. VALENTINE: (continuing)

23 Q. When you were -- when the judge asked his question, you
24 said no. What can you recall that is not included in the
25 studies?

1 A. I believe that of the topics we have discussed this
2 morning, the only topic that is not reflected in these studies
3 is the research on what we've been talking about as the
4 illusion of clarity or the illusion of transparency. To the
5 best of my knowledge, that is the sole thing this morning that
6 cannot be located either through these papers or through the
7 scientific studies cited in these papers.

8 MS. VALENTINE: Thank you.

9 THE COURT: Is that all you have?

10 MS. VALENTINE: Yes, Your Honor. No further
11 questions.

12 THE COURT: I have just a couple of questions.

13

14 EXAMINATION

15 BY THE COURT:

16 Q. One of our goals, sir, is to try to get a handle on what
17 it is you'll tell this jury and then why you think you know it.

18 And so I'm going off of something you didn't write.

19 I don't know if you have it in front of you.

20 THE COURT: Does the witness have in front of him the
21 notice of expert witness?

22 MS. VALENTINE: No, Your Honor, but I do have it and
23 I can --

24 THE COURT: Could you forward that to the witness.

25 MS. VALENTINE: Sure.

1 THE COURT: Thank you.

2 MS. VALENTINE: (Handing.)

3 THE COURT: Is that your only copy?

4 MS. VALENTINE: Your Honor, I believe Mr. --

5 THE COURT: Then you can just stand next to the
6 witness while I ask this question so you can read along.

7 BY THE COURT: (continuing)

8 Q. So I'm at the top of page 3. Really it's on page 3 that
9 we get the list of what counsel, I think, believes are the five
10 topics they'll want to ask you about at trial.

11 And the third one, if you'll see there on the third
12 line says, "He will also testify about the scientific research
13 that has asked whether a witness's degree of certainty is a
14 reliable indicator of whether an identification is accurate or
15 not."

16 And as you can see, that doesn't state a conclusion
17 or an opinion. So I'm curious what your opinion is going to be
18 on that subject.

19 A. I mean, I hope I was clear on this earlier. The only view
20 that I think can be sustained in light of the scientific
21 evidence is that there is a narrow set of circumstances in
22 which someone's degree of confidence is indicative of accuracy.
23 At the moment one is outside of that range of circumstances,
24 the relationship between confidence and accuracy is at best
25 highly variable, with the most common departure from what you

1 might think of as a close correspondence being overconfidence,
2 and with the scientific research helping us to understand with
3 some detail where that overconfidence comes from.

4 Q. And then you've offered in support of that Wixted and
5 Wells?

6 A. Wixted and Wells are -- that paper is aimed at trying to
7 define exactly what they refer to as the pristine circumstances
8 in which confidence does have probative value.

9 Q. Right, which wasn't quite my question. I was just asking
10 if that's the study you're offering in support of this general
11 conclusion.

12 A. That study and the studies that they are drawing from.

13 Q. And that's where you get the idea that you've just
14 referenced, that under pristine conditions, confidence may
15 relate to accuracy; otherwise maybe not?

16 A. Certainly the phrase "pristine conditions" is their
17 phrase.

18 Q. What's yours?

19 A. I'm happy to respect the usage of my colleagues, and I
20 would be happy to talk about pristine circumstances.

21 Q. I'm just trying to get at what you are going to say to the
22 jury.

23 A. I probably would not use the word "pristine." I would
24 probably use something that may be more familiar to jurors.
25 But that's certainly the idea, that there are limited and

1 special circumstances in which confidence is informative.

2 THE COURT: Thank you very much.

3 You can take your seat, Counsel.

4 MS. VALENTINE: (Complies.)

5 THE COURT: And you can be excused. You're done with
6 your testimony. Thank you very much, sir.

7 THE WITNESS: Your Honor, I have these exhibits --

8 THE COURT: You can just leave them right there.

9 That's fine.

10 If you're willing to stay around, we may end up
11 making conclusions about the proper scope of your testimony.
12 It might save you time to hear it, but you're not required to
13 stay for any reason.

14 THE WITNESS: If I can stay, Your Honor, I'd be happy
15 to.

16 THE COURT: Thank you very much, sir.

17 Well, of course, *Daubert* hearings in criminal cases
18 are very different than civil cases, and we see that here
19 today. In a civil case, you know, we would have carefully
20 nailed down the precise statements a witness is going to offer
21 and the precise studies he would rely on. And the idea that a
22 witness would testify in reliance just on a body of literature,
23 while perfectly appropriate in almost any social science
24 setting, is something the civil rules try to avoid so that
25 there's production in advance.

1 And the idea is that for any expert -- perhaps for
2 social science experts more than any other -- there's a certain
3 inherent -- there's a problem with a witness who can call upon
4 a wide body of research previously undisclosed to support
5 opinions when challenged. And so the various rules there try
6 to avoid that problem by cabining the witness within a set of
7 statements and supporting studies.

8 The criminal rules don't do that. The criminal rules
9 really start with if there's going to be an expert -- not on
10 insanity but more generally an expert witness -- that the most
11 the government typically can start with, if it also has done
12 the same, is request a witness statement.

13 And so that's been produced, and that witness
14 statement is designed to be the cabin, the much larger cabin in
15 a criminal case, for the witness's testimony.

16 And the only issue here with the statement is that
17 it's certainly very conclusory. It's not descriptive. It's
18 really just reciting labels of topics that might be covered.

19 We went a little further in this case because counsel
20 referred to studies for things the witness might say, and then
21 those were produced. But it's not my intent to limit the
22 witness to only testify to things supported by the three
23 studies. The motion to compel, which I granted, didn't seek
24 studies in support of every opinion in the notice of expert
25 witness. It sought studies in support of just some of those

1 opinions, and I guess specifically police officer accuracy as
2 identifiers, certainty as it relates to accuracy, and similar
3 to the first one I described, police officer types of error,
4 presumably in the area of identification.

5 So unless -- I guess this is one of the things I can
6 hear the government on. Unless I'm mistaken on that, I'm not
7 requiring this witness to rely on those three studies for
8 confirmation bias or clothing bias. I think it is important
9 that the witness rely on those studies for the topics they were
10 said to support.

11 So then the next question becomes can the witness
12 rely not only on the studies but on the citations in those
13 studies for testimony on those subjects.

14 I'll hear argument on that. So really I want to nail
15 down the law we're applying to how much this witness can say
16 before we make decisions about the fit and other classic
17 *Daubert* issues about the witness's testimony.

18 Ms. Jarrett.

19 MS. JARRETT: Your Honor, under Rule 7 -- first of
20 all, I agree with the Court's assessment that the motion to
21 compel does not identify or request specific studies related to
22 clothing bias or confirmation bias.

23 The Court is, however, under the Rule 702 of the
24 Federal Rules of Evidence, charged with evaluating the evidence
25 that -- or the opinion testimony that the expert wishes to

1 discuss at trial. And without understanding the bases for
2 those, that evidence, if it's just broadly "in my experience"
3 or "in my 30-year career," it's very difficult for the Court as
4 well as for us to identify whether that evidence -- whether the
5 testimony is based on sufficient facts or data, the testimony
6 is a product of reliable principles and methods, and the expert
7 has reliably applied the relevant principles and methods to the
8 facts of this case.

9 THE COURT: So if this witness says there are
10 hundreds, perhaps thousands of studies on confirmation bias,
11 and those thousands of studies generally say the following four
12 things, and goes on to opine about confirmation bias in that
13 way, you're not claiming there's a disclosure or production
14 problem with that, you're just saying it's a straight-up
15 problem with 702, right?

16 MS. JARRETT: Well, I think there is a disclosure
17 problem in terms of how the Court is going to analyze it under
18 702, how it's going to actually evaluate that evidence.

19 THE COURT: You're not saying there's been any
20 violation of pretrial criminal disclosure rules?

21 MS. JARRETT: Correct.

22 THE COURT: Rather it's just an inadequate -- it's an
23 inadequate expression of an opinion under *Daubert* and 702?

24 MS. JARRETT: Yes, Your Honor.

25 THE COURT: All right. And so your argument about

1 whether this witness can talk -- let's start with confirmation
2 bias. You heard his testimony, and he didn't rely really on
3 specific identified studies that he went through any careful
4 exegetics, he just grouped them as a body of literature he's
5 very familiar with and then said what that body of literature,
6 along with his own research and knowledge, has taught him about
7 confirmation bias.

8 Why is that inadequate under *Daubert*?

9 MS. JARRETT: Well, the only thing that I heard the
10 witness testify about confirmation bias was that when one
11 officer says something to another, that's not testing someone's
12 memory, and that with more communication there's a greater
13 danger of a mistaken identity.

14 So I would argue that that doesn't follow -- it's a
15 varied argument, where I argue it doesn't fit the facts of the
16 case because in this circumstance, although Officer McDonald
17 communicated to Officer Harris that he believed that there was
18 someone coming that was from the video, Officer Harris was
19 viewing the photo himself and wasn't relying on his memory to
20 make that determination. He pulled up the photo himself to
21 make that comparison.

22 So when the witness says that he doesn't want to do
23 it in testing someone's memory, that's not a relevant factor
24 here.

25 THE COURT: Well, the witness also adverted at least

1 perhaps glancingly to the issue of confirmation bias as it
2 relates to the jury's ability to sit in a courtroom where
3 certain assumptions have been made by others and pristinely
4 independently draw their own conclusions. I think he'd want to
5 testify about that problem to the jury also.

6 MS. JARRETT: I'm certain that he would, but that's
7 the existence in every single criminal case where you have a
8 jury hearing from the government, hearing from the defense,
9 hearing from witnesses.

10 THE COURT: Well, the fact that it's a problem in
11 every case doesn't make it a *Daubert* issue. I mean, what's
12 wrong with him saying that as an example of confirmation bias?

13 MS. JARRETT: I think that that is not helpful to the
14 jury. No. 2 in the factors that we cited in our brief under
15 702: The scientific, technical or other specialized knowledge
16 that will help the trier of fact to understand the evidence.

17 I don't think that an expert witness testifying that
18 every jury in every criminal case is going to have some bias is
19 going to be helpful to the trier of fact, to the jury in
20 determining that, and in fact --

21 THE COURT: Why not?

22 MS. JARRETT: -- jury instructions caution against
23 those type of biases. We instruct the jury on the proof beyond
24 a reasonable doubt, which is there to --

25 THE COURT: I don't understand why it wouldn't be

1 helpful. Why wouldn't it be helpful for the jury to hear from
2 an expert that the task you're going to ask them to do -- reach
3 an independent conclusion about whether this defendant is the
4 man in a photo -- is going to be one that's infected already by
5 an inevitable bias towards prior conclusions made by others in
6 the case? Why wouldn't that be helpful to the jury to know
7 that?

8 MS. JARRETT: Twofold, Your Honor. I think that a
9 lot of this is first common sense and can be extrapolated -- or
10 can be explored on cross-examination. This is the very type of
11 thing that the facts of the case -- you can say, "Officer
12 Harris, didn't you" --

13 THE COURT: Who are you going to ask on
14 cross-examination the question of how earlier conclusions might
15 lead to confirmation bias by the jury?

16 MS. JARRETT: My point is, Your Honor, you don't need
17 to --

18 THE COURT: I'm just trying to get at you said it
19 could be explored on cross. Of whom?

20 MS. JARRETT: On cross-examination of the officers.
21 So the questions would be of the nature of, "You testified that
22 you had heard from Officer McDonald about this person in
23 advance, and then you made these decisions." So it shows it's
24 a pattern, and then it's common sense from the jury to
25 understand these principles of --

1 THE COURT: All right. So one of your arguments is
2 it doesn't help because it's common sense.

3 What are your other arguments?

4 MS. JARRETT: As to confirmation bias or the other --

5 THE COURT: Confirmation bias.

6 MS. JARRETT: There's also the jury instructions,
7 Your Honor, that tells the jury they must evaluate things based
8 on the credibility of the witnesses, and they have the ability
9 to make those own determinations themselves. It even cautions
10 against placing greater emphasis on the testimony of police
11 officers. That's Jury Instruction No. 10.

12 So the jury is already receiving a number of cautions
13 with -- in relation to witness testimony.

14 THE COURT: All right. Thank you.

15 Ms. Valentine, your witness statements on the subject
16 of confirmation bias gives us this much information: That your
17 witness will talk about confirmation bias. Can you be a little
18 more specific about what you want the witness to say on the
19 subject of confirmation bias?

20 MS. VALENTINE: Certainly. And I also needed to
21 clarify. When the government had asked for what information
22 Dr. Reisberg was relying on for his opinion, the other thing
23 that they actually asked for was his book, because that is
24 something that we indicated would be -- and this is, Your
25 Honor, the 2014 book that he did mention on the stand.

1 In getting the information to the government, we
2 requested that our office actually purchase the book to give a
3 copy to the government, but we could not get it. But the
4 government was made aware that that 2014 book is also -- also
5 contains a great -- a lion's share of the information that
6 Dr. Reisberg would be testifying about, and that should be also
7 considered.

8 THE COURT: We need to do a little bit better than
9 referencing a book to know what this witness is going to tell
10 the jury. That's why I'm asking you right now to tell me what
11 you want this witness to tell the jury on the subject of
12 confirmation bias.

13 MS. VALENTINE: Certainly, Your Honor.

14 Well, Your Honor, with confirmation bias, it was one
15 of the -- well --

16 THE COURT: Here's what I want you to do.

17 MS. VALENTINE: Sure.

18 THE COURT: The question I just asked, you're going
19 to answer it this way: You're going to say, "I'm going to ask
20 him to tell the jury the following on confirmation bias, one,
21 two, three."

22 What are they? What's one?

23 MS. VALENTINE: Your Honor, I'm going to ask him to
24 inform the jury that confirmation bias is a factor in tainting
25 an identification, especially one in this matter.

1 THE COURT: Which is the first identification it
2 taints?

3 MS. VALENTINE: Your Honor, it would be -- there was
4 an exchange in particular with -- between Officers McDonald and
5 Harris when they found someone, and they were talking and the
6 language that was used is essentially textbook confirmation
7 bias. So it would actually go into both the identification of
8 Officer Harris and Officer McDonald.

9 THE COURT: So that's one, that initial decision that
10 this was their guy --

11 MS. VALENTINE: Yes, Your Honor.

12 THE COURT: -- you believe is affected by
13 confirmation bias, and you'll have your witness talk about how?

14 MS. VALENTINE: Yes.

15 THE COURT: What else?

16 MS. VALENTINE: Your Honor, even actually what Your
17 Honor was even informing about as far as being helpful to the
18 jury to understand that we have to be careful about
19 confirmation bias of guilt in the trial. And, Your Honor, in
20 particular, the defense would definitely like to -- the other
21 confirmation bias, Your Honor, is that having a trial of
22 Mr. Antonio Howard and knowing that they're going to see a
23 video and that they think that this is the person, that is in
24 itself -- in and of itself a confirmation bias that the jury
25 needs to be aware of.

1 THE COURT: That's two. Any others?

2 MR. CASSINO-DUCLoux: May I consult, please?

3 THE COURT: Certainly. Absolutely.

4 (There is a pause in the proceedings.)

5 MS. VALENTINE: Your Honor, the third one is also it
6 was Officer Lehman that initially had shown the video to
7 Officer McDonald and his -- well, his team. After Officer
8 McDonald decided that Mr. Howard matched that person, he then
9 sent it to Officer Lehman. So there is going to be also
10 confirmation bias with the identification from Officer Lehman,
11 because he's hearing now from two officers, "Hey, yeah, this is
12 the guy."

13 THE COURT: All right. That's three. Am I missing
14 any others?

15 MS. VALENTINE: No, Your Honor.

16 THE COURT: All right. Of the three we just talked
17 about, No. 1 and No. 3 are classic uses of the concept of
18 confirmation bias for which your witness is free to testify.
19 Unfortunately, we're not in a position to cabin that with
20 specific studies, but that will just be a fruitful subject for
21 the discussion among all the attorneys who examine the witness.

22 The middle one raises concerns that Ms. Jarrett has
23 referenced, and that is that I don't think it's useful to this
24 jury to say that confirmation bias is an issue on -- in every
25 criminal case as to guilt or innocence. But we don't need to

1 worry about that in this case because there's a more specific
2 sort of example of the possibility of confirmation bias because
3 the -- I assume the United States is going to be asking the
4 jury in a sense to make their own identification.

5 Am I right about that?

6 MS. JARRETT: Yes, Your Honor.

7 THE COURT: All right. And so that's one where
8 having heard at trial prior conclusions and identifications
9 made by others, and in particular in positions of authority,
10 I'm going to allow the witness to explain to the jury the
11 concept of confirmation bias as it relates to the jury's own
12 identification decisions, not guilt decisions --

13 MS. VALENTINE: Right.

14 THE COURT: -- which every jury has to make, but
15 identification decisions. Understood?

16 MS. VALENTINE: Yes, Your Honor.

17 THE COURT: Clothing bias, what are you going to ask
18 this witness to say?

19 MS. VALENTINE: Oh, Your Honor, clothing bias in this
20 case I think is going to be more of an issue because there is a
21 memory issue, and that is the time frame --

22 THE COURT: Sure, I get the interrelationship, but
23 what are you going to ask the witness to say to the jury on
24 clothing bias?

25 MS. VALENTINE: Oh, Your Honor, that would it have a

1 greater impact on this identification.

2 THE COURT: So basically what he said today, that
3 where there's low initial identification, some things,
4 including clothing bias, can enhance the possibility of error?

5 MS. VALENTINE: Yes, Your Honor.

6 THE COURT: All right. That's fine.

7 The degree of certainty of witnesses as it relates to
8 reliability, I asked him what his conclusion was. Is that
9 basically what you want to have him tell the jury?

10 MS. VALENTINE: Yes, Your Honor.

11 THE COURT: Your response, Ms. Jarrett, as to whether
12 that's useful to this jury? He's going to say there's certain
13 conditions where witness certainty does correlate positively to
14 reliability of identification, but outside those circumstances,
15 it tanks.

16 MS. JARRETT: Your Honor, the government believes
17 that that would be helpful to the jury to hear.

18 THE COURT: All right. I'll allow that on the
19 subject of degree of certainty.

20 On police officer accuracy, I guess I'm not entirely
21 sure what you want this witness to say.

22 MS. VALENTINE: Your Honor, it's really I think
23 more -- kind of like an information, because while the
24 government may think that some of these issues are common
25 sense, I think a lot of times the issue of police officer

1 accuracy or a layperson actually may be counterintuitive.

2 THE COURT: I don't think that's the real argument
3 you're facing. I think the government's argument is that the
4 principal factor that seems to lead to low police officer
5 accuracy isn't present in this case, therefore the ability to
6 extrapolate that conclusion from the setting in which we find
7 it in the studies that have been given us is poor.

8 MS. VALENTINE: Well, Your Honor, some of the things
9 actually -- Your Honor, this study is relevant, and also I even
10 think possibly -- well, having Dr. Reisberg explain the
11 position of the paper or what the studies show, that police
12 officers are no more accurate than another person or an average
13 citizen in making a determination. While this is not a lineup
14 case, it was stated that we can use still the science behind
15 it.

16 Your Honor, there is also --

17 THE COURT: Thank you.

18 Just a moment.

19 (Discussion held off the record.)

20 THE COURT: I'm sorry. Go ahead.

21 MS. VALENTINE: Your Honor, there's actually another
22 issue that the study brings up that I think should be explained
23 by Dr. Reisberg, and the reason why I say that is because it
24 may actually come up during the trial in cross-examination,
25 because there were certain suggestions made to the police

1 department on conducting identifications in a certain way.
2 Those are also in line with the suggestions of the paper. With
3 those not necessarily being followed, even though the officers
4 may be aware that they are just as subject to bias as the
5 average person --

6 THE COURT: The paper is talking about improved
7 methods for conducting lineups.

8 MS. VALENTINE: That's correct, Your Honor.

9 THE COURT: So you're saying those improved methods
10 for conducting lineups weren't followed in this case?

11 MS. VALENTINE: Yes.

12 THE COURT: Well, there wasn't a lineup.

13 MS. VALENTINE: Your Honor, but it's not only about a
14 lineup. It's actually --

15 THE COURT: Well, I understand your argument, but --
16 all right. Thank you.

17 MS. VALENTINE: Thank you, Your Honor.

18 THE COURT: Thank you very much. That's all I need
19 to hear on that.

20 So you've got some rough idea of what the witness
21 wants to say about police officer accuracy, and you have some
22 of your arguments I'm sure you'd make on cross about the fit
23 for the extrapolation being made here. Is that a
24 cross-examination issue or a true *Daubert* issue?

25 MS. JARRETT: Your Honor, this is a true *Daubert*

1 issue because it really goes to helpfulness to the jury as well
2 as confusion to the jury. So if we're talking about something
3 that's a lineup issue, it suggests -- about police officer
4 accuracy, that suggests to the jury that there's an issue with
5 police officer accuracy that is present in this case.

6 THE COURT: Well, we're talking about two things.
7 We're talking about a lineup issue as it relates to the study
8 provided you on this subject. The witness, of course, doesn't
9 feel tethered to that study in knowing other things about
10 police officer accuracy. So do you believe he should be
11 tethered to that study in his trial testimony?

12 MS. JARRETT: Yes, Your Honor. We asked for studies
13 that support the testimony, and this is what we were given, so
14 this is what we're basing our objections on.

15 THE COURT: So if he is so tethered, then why is that
16 testimony not -- why doesn't it pass *Daubert*?

17 MS. JARRETT: Well, as Your Honor said, the principal
18 factor in the problems with lineups is not present in this
19 case. And so it's really difficult to extrapolate from that.

20 THE COURT: Well, you asked the witness that, and he
21 said it wasn't difficult to extrapolate.

22 MS. JARRETT: But that was based on his other
23 knowledge and other studies that he's using to inform his
24 opinion.

25 THE COURT: If we only had this study to go on, it's

1 necessarily difficult to extrapolate?

2 MS. JARRETT: Yes, Your Honor.

3 THE COURT: Just because that's all we know?

4 MS. JARRETT: This is -- right, correct.

5 THE COURT: All right. Thank you.

6 Your response?

7 MS. VALENTINE: Yes. Your Honor, contrary to what
8 the government says, actually these studies that are referenced
9 in *The Thin Blue Line* paper is -- will have to infer knowledge
10 upon the people that are relying and reading on this study to
11 glean information.

12 And, Your Honor, I liken it to a particular brief.
13 If I were to submit a brief to Your Honor and I were to cite a
14 particular case, it's incumbent upon me to know what everything
15 in that case stands for that would impact the trial or the
16 issue that we have.

17 THE COURT: All right. Thank you.

18 It's incumbent on you because of the rules related to
19 how we read and write briefs. So the real question here isn't
20 is there a universe cited -- is there a body of knowledge cited
21 in the study that includes further opinions than the bare one
22 expressed in the study itself. The answer to that is obviously
23 yes.

24 The question is is it the rule of criminal law that a
25 witness in this witness's position is limited by this study.

1 And I think the answer to that question is no. As I read the
2 rules regarding what you have to do as a defense attorney with
3 your expert, I don't think it's limited in that way. Maybe it
4 should be, I just don't think that it is.

5 So on police witness accuracy, I think what we've
6 been talking about is a fruitful subject of cross, and yet I
7 think the testimonies offered today on police witness accuracy
8 ought to be allowable trial testimony.

9 Then the last one is, to use a shorthand phrase,
10 face-to-photo identification problems, which includes what you
11 ought to know about faces in order to make such
12 identifications, et cetera.

13 It's as I said at the start. All of that is normal
14 *Daubert*-approved testimony. The only issue is that none of it
15 is really found in the study provided. And with some
16 reluctance I'll say that I've already crossed that bridge on
17 police witness accuracy to say that the witness has sort of
18 briefly discussed this in the witness statement and now here
19 today, and although it doesn't match the study provided
20 perfectly, it does match the witness statement, and so I'll
21 allow that general body of testimony.

22 Yes, Ms. Jarrett? Go ahead.

23 MS. JARRETT: Your Honor, I'd also like to point out
24 that the specific -- the witness elaborated on what aspects of
25 the face could -- or briefly touched on what aspects of the

1 face might be --

2 THE COURT: Actually, the witness never talked about
3 that, other than to say there are aspects of the face that are
4 important, but never gave us what those were.

5 MS. JARRETT: Correct. And my point is, Your Honor,
6 he mentioned that this exists. We don't know anything else
7 about it. Defense counsel's burden is to show -- it's the
8 defense counsel's burden here and they didn't elicit any
9 further testimony on that, so we have no further information
10 about what his basis is, what his conclusions are, or anything
11 else other than this topic exists.

12 THE COURT: I'm looking at that along with what you
13 said in your witness statement, Ms. Valentine. I guess I am
14 concerned. I mean, I'm certainly unwilling to limit your
15 witness to the specific study -- so you've won that fight --
16 but there has to be something that tells us now this close to
17 trial -- that's the whole point of expert disclosure -- what
18 your witness is going to say.

19 What you said in your study is that he'll testify
20 about scientific research, examining how accurate observers are
21 in comparing a face currently in view to a face seen in a
22 photograph.

23 Well, one, that states no conclusions or opinions, so
24 we don't yet know, and at the end of the testimony I've heard
25 today, we still don't know what opinion this witness will have.

1 We know that he thinks there are problems, but we don't know
2 what those problems are or how to apply those problems to the
3 facts of this case.

4 Your response?

5 MS. VALENTINE: Yes, Your Honor. And I apologize.
6 That was the mistake of defense counsel. I thought that I had
7 elicited that testimony. So I apologize that I did not
8 specifically.

9 I do know that I did ask Dr. Reisberg about perhaps
10 some of the things that would affect, especially to a poorly
11 illustrated -- or poor video image.

12 Dr. Reisberg, if asked, would talk about the science
13 that shows --

14 THE COURT: Let's do this. Let's take a short lunch
15 break, and we'll pick this up again at 1:00. And I'll think
16 about whether to supplement the testimony or not.

17 I'll see you all at 1:00.

18 THE CLERK: This court is in recess.

19 (A lunch recess is then taken.)

20 THE COURT: All right. Here is where we are so far
21 and here's what I'm going to do to wrap this up.

22 I've mentioned the differences between criminal and
23 civil disclosures on experts, and that criminal law has as its
24 basic fundamental limitation the witness statement required by
25 the Federal Rules of Criminal Procedure, and only in cases

1 where that's vague or really nonspecific can such testimony be
2 stricken.

3 Here we have a statement that is vague and
4 nonspecific in many particulars, and it's certainly not the
5 best practice to go this way, but we've gotten this far. I
6 think that if maybe it had been teed up differently, I would
7 have focused on that more, but here we are at a hearing that
8 I'm now allowing the witness statement to be supplemented by
9 hearing testimony, and have concluded for most of it that the
10 combination also satisfies *Daubert* -- not only disclosure but
11 *Daubert*.

12 And so I'm allowing -- so the limitation at trial is
13 going to be essentially the testimony we heard today, which is
14 really a windfall for the defendant in some ways, because
15 that's an expansive addition to the witness statement.

16 So I'm allowing, limited by the contours of what was
17 testified to today, the testimony at trial on confirmation bias
18 and clothing bias, witness certainty as it relates to
19 reliability, and police witness accuracy.

20 I have excluded on -- before this even started the
21 question of the confirmation bias issues that might relate to
22 the issue of guilt but allowed it on the issue of the
23 confirmation bias on identification.

24 And I'm further excluding, since it just came up
25 today, and since the witness and counsel readily admitted that

1 it had never been adverted to earlier, the testimony on -- I
2 wish I could remember the term of art the witness used, but
3 it's on the idea that there's an illusion of clarity and
4 transparency as regard to photos.

5 Do you remember the word?

6 MS. VALENTINE: Your Honor, I think you've hit it
7 right on. The illusion of clarity.

8 THE COURT: Of clarity? Oh, that's a lucky hit for
9 me. I don't usually remember that that well.

10 So that testimony is brand-new, it's not been
11 foreshadowed in any way prior to, and it wasn't really
12 testified to today, and it's new enough that I'm not going to
13 allow the witness to testify to that.

14 I recognize that it could be viewed as a subcategory
15 of confirmation bias as it relates to photographs, but still
16 it's brand-new, and I'm not going to allow it.

17 What that leaves us with is that the other thing that
18 was advertised in the witness statement is the fifth one that
19 we talked about, how a face in view compared to a video or
20 photograph can create problems for observers. Actually, what
21 would be said on that isn't described at all in the witness
22 statement. We heard a little bit about that from the witness
23 already, and counsel has admitted that she intended to get into
24 it and didn't, so that's an issue I don't want to face on some
25 future date.

1 I think there are three issues in play here on
2 whether I'm going to allow the witness to take the stand again
3 and talk about that so that today's testimony can limit the
4 trial testimony. And I'd call that centrality, notice, and
5 fairness.

6 Centrality is is this a big issue for trial. And
7 obviously it is. This is the trial. The identification issues
8 is the whole trial. So it's a very central issue.

9 Notice and fairness means are we doing this far
10 enough in advance of trial, and is it such a shocking new thing
11 that there's not time to get ready.

12 There is time to get ready, and it's not anything
13 really surprising. It's the sort of thing that is related to
14 everything else the witness is going to say.

15 So I'm going to have you recall the witness.

16 Would you come forward, sir.

17 MS. VALENTINE: Your Honor, I apologize. Right after
18 we got released, Dr. Reisberg did inform us he is due in county
19 court at 1:30 to testify.

20 THE COURT: He'll be fast.

21 THE WITNESS: If I may, I just got notice that they
22 plan to call another witness before me, so it's not exactly
23 1:30.

24 MS. VALENTINE: Oh, okay. All right.

25 THE WITNESS: But I'll be fast.

1 THE COURT: You're still under oath, sir. If you'd
2 take the stand.

3 (The witness retakes the witness stand.)

4 THE COURT: And you can phrase your question however
5 you like. What I want you to do is just -- you have a witness
6 statement that says that your witness is prepared to testify
7 about scientific research specifically examining how accurate
8 observers are in comparing a face currently in view to a face
9 seen only in a video or photograph, and I just want the witness
10 to tell us -- I want you to have the witness tell us what he's
11 going to say on that.

12 MS. VALENTINE: Certainly.

13

14 FURTHER DIRECT EXAMINATION

15 BY MS. VALENTINE:

16 Q. Dr. Reisberg, in talking about -- is there an error rate
17 from making a face photo -- making an in-person or good photo
18 to a low-quality or high-quality video?

19 A. There is certainly a known error rate. The exact value
20 varies according to factors, including the factors we talked
21 about earlier today, but I can certainly testify about what the
22 range of values is as a way of helping the jury understand, I
23 mean, are we talking about a trivial risk, a huge risk, or
24 somewhere in between. Those numbers are available.

25 Q. And are there certain factors that you would also testify

1 in having that rate?

2 A. Yes. And as I said a moment ago, the exact error rate
3 varies according to certain factors, and the factors would
4 include things like the delay to making the identification,
5 whether the person was wearing any sort of disguise, including
6 a hat, and we can talk about why that matters as a disguise,
7 including exactly how the identification was eventually
8 solicited, what the procedure was for soliciting that. All of
9 those factors have a bearing on exactly what the error rate is.

10 I have to say the error rate matching faces to video
11 is never low. It's always quite high.

12 Q. And is there an issue with clarity of image as well?

13 A. Yes, certainly. I mean, one needs to consider the overall
14 clarity of the image. One also needs to consider whether
15 specific attributes that are central to face recognition happen
16 to be visible or not visible in that particular view. So one
17 can be more fine grained than just an overall impression of how
18 good or bad the quality is.

19 Q. Are there certain factors that are central to the process
20 of face recognition?

21 A. Certainly, yes.

22 Q. And what would you say that those factors are?

23 A. The factors that matter most commonly when you're
24 recognizing somebody who is not familiar to you is what's
25 referred to as the external shape of the head, and that turns

1 on facts and ways that I assume are transparent. It's things
2 like how long is the face or not, what is the shape of the
3 hair, are the ears particularly prominent. One would certainly
4 want to ask whether those things are visible, both with a
5 concern about image quality and with a concern about disguise.

6 In addition, the moment a face becomes at all
7 familiar, people shift to what are referred to as the interior
8 features of the face, and that refers to a somewhat complex
9 pattern of relationships, you know, things like spacing of the
10 eyes relative to the size of the nose, things like that.
11 That's what really matters for face recognition, and again one
12 would need to ask whether those things are visible in the image
13 at hand, both with a concern about the quality and with a
14 concern about disguise.

15 Q. And Dr. Reisberg, does this also fit into a realm of
16 confirmation bias or is it something that could affect
17 confirmation bias?

18 A. Certainly the error rate in any circumstance is going to
19 be influenced by the various forms of confirmation bias, and
20 since that's just, you know, true across the board,
21 confirmation bias would also matter here.

22 MS. VALENTINE: Thank you. No further questions.

23 THE COURT: You may inquire.
24
25

1 FURTHER CROSS-EXAMINATION

2 BY MS. JARRETT:

3 Q. Dr. Reisberg, part of the summary describes the witness's
4 opinions. Since we're getting into those today, it also is to
5 describe the bases and reasons for these opinions.

6 So what is the basis for your opinion that the
7 influence of a hat in terms of the external shape of the head,
8 changing face heights?

9 A. I mean, there's a number of studies. I think the classic
10 studies done by Alan Baddeley compared people's recognition of
11 perpetrators whose faces were in plain view except for the fact
12 that some were wearing hats, some were not. If I recall
13 correctly in the study, sometimes the hat was present or absent
14 during the original crime, sometimes it was present or absent
15 during the subsequent identification procedure, and the
16 recognition accuracy went down significantly when the hat was
17 in play in one or the other of those views.

18 That sits side by side with other evidence that
19 explores rather directly whether people rely on face height as
20 sort of a referenced dimension in evaluating other
21 relationships somehow. So there's theoretical work looking at
22 face height and then directly applied work looking at presence
23 or absence of a hat.

24 Q. So you cited one study for the theoretical evidence. What
25 are the bases for your opinion that there's this other evidence

1 applying it?

2 A. I mean, the study by Alan Baddeley is the one who applies
3 it directly to identification procedures. The study on the
4 theoretical stuff comes from a number of sources like Nancy
5 Kanwisher has done some of that research -- K-a-n-w-i-s-h-e-r.
6 Mike Burton -- B-u-r-t-o-n -- has done some of that research.
7 I'd have to think about who the other researchers are in that
8 domain.

9 Q. Do you have any specific studies that you can point us to,
10 because I'm sure they have, as you do, a large body of work.

11 A. At this moment -- I didn't realize we were going down this
12 path. I haven't thought of any specific studies.

13 Q. What about any studies contrary to the conclusion that
14 this might be a factor?

15 A. To the best of my knowledge, I've never seen any.

16 Q. What about criticisms of the way that these studies were
17 conducted?

18 A. To the best of my knowledge, I've never seen any.

19 Q. You know, I don't have these studies in front of me, so
20 can you tell us about the error rates of these studies?

21 A. Unfortunately, I don't remember that detail. I wasn't
22 prepared to -- didn't realize we were going to be going into
23 this level of detail today, so I don't have that immediately
24 available to me.

25 Q. What about what governs face recognition as to feature

1 analysis? What is the basis for your opinion on that?

2 A. There's a large body of research that examines the fact
3 that -- not just examines but documents the fact that face
4 recognition is very heavily influenced by what are referred to
5 as configurational cues. Some of the evidence comes from
6 scientific experiments in which you deliberately change the
7 configuration with a significant effect on face recognition.
8 Other studies come from other -- other data comes from studies
9 in which you present individual features on their own, and you
10 find that recognition accuracy for individual features is quite
11 poor, even though the face itself is familiar. So, again, it's
12 going to be a range of studies.

13 Q. You said in a large body of work. You know, obviously
14 that's not something that we can evaluate as a whole, but are
15 there specific studies or maybe even literature used to collect
16 the studies as to the configuration of the face?

17 A. I guess if I was going to go looking for this work, where
18 I might begin is a review chapter by Gillian Rhodes,
19 R-h-o-d-e-s. It's a chapter in a larger volume we called *The*
20 *Oxford Handbook of Cognitive Psychology*, edited by Daniel
21 Reisberg, R-e-i-s-b-e-r-g.

22 Q. And what about the individual features? What's the basis
23 for your opinion that individual features on their own can
24 affect identification?

25 A. I'm not quite sure what you mean. Certainly there's a

1 common sense argument that distinguishing marks like scars and
2 tattoos. I don't think you need science to tell you that those
3 things are often quite influential.

4 The non-effect of individual features is going to be
5 work cited in the Rhodes review chapter. I believe some of the
6 classic work in that domain is done by Martha Farah, F-a-r-a-h.

7 But, again, I didn't realize we were going to be at
8 this level of detail, so I don't have the bibliographic
9 information at my fingertips.

10 Q. And I don't have them either.

11 What studies do you have that are critical of some of
12 the -- maybe Gillian Rhodes' work there?

13 A. I think there's widespread agreement that there is a
14 reliance on configurational cues. There's some disagreement
15 about whether that's only true for faces or whether other
16 recognition systems might also rely on configuration. There's
17 also some disagreement about whether there's a single face
18 recognition process or multiple.

19 But on the base issue, the fundamental issue of
20 whether face recognition tends to be configurational, I think
21 is generally accepted in the field.

22 Q. What about external features, shape of head and hairstyle?
23 Are you relying on any scientific studies?

24 A. That's primarily Mike Burton's work -- B-u-r-t-o-n -- and
25 the reliance on external features is found quite consistently

1 when you're recognizing -- trying to identify somebody who is
2 not familiar to you. As you become more familiar with their
3 face, you rely more and more on internal features.

4 If I recall correctly, you'll also find the relevant
5 science on that in my 2014 book. I think you'll find the
6 science on most of these issues in my 2014 book.

7 Q. How many pages is that book?

8 A. I don't remember. There is a chapter, however, on faces
9 and face memory, so you will not have difficulty finding it.

10 Q. What -- and then you say it's common sense that people can
11 recognize common marks like tattoos and scars?

12 A. That's correct.

13 Q. Do you have a scientific basis for that or is that just
14 based on your common sense?

15 A. I think it's a matter of common sense that it's a matter
16 of common sense.

17 Q. The error rate you put at between 17 percent and
18 40 percent?

19 A. Yes.

20 Q. Is there some type of literature review that would put
21 that together?

22 A. You have the relevant paper. The 17 percent number is
23 from the paper that I supplied for you. You earlier quoted the
24 bit from that paper saying the error rate was lower than is
25 ordinarily found. That's the place I would go to see the

1 17 percent and the fact that that's, in essence, the low end of
2 the range.

3 Q. What about the high end of the range?

4 A. The studies that I mentioned will include the various
5 studies that go after that point. I think the 40 percent
6 number probably comes from an early paper by Kemp, which had
7 carefully trained, attentive, well-motivated store clerks doing
8 a side-by-side comparison of a face and a photo, sort of the
9 same kind of task that, say, TSA does in the airport.

10 Q. What about how the clarity of an image affects
11 identification? Has that been tested in a laboratory setting
12 that you can point us to?

13 A. You have the relevant data. Certainly in the paper I
14 supplied for you there is a direct comparison of higher-quality
15 and lower-quality images. That's not manipulation that's
16 unique to that paper, but it's certainly in that paper.

17 Q. But as you said, that's not really representative of --
18 that data is certainly different than what has been seen in
19 other papers?

20 A. That's right. Their error rate is lower than the error
21 rates observed in other papers.

22 MS. JARRETT: Nothing further, Your Honor.

23 THE COURT: Any redirect?

24 MS. VALENTINE: Briefly, Your Honor.

25

1 FURTHER REDIRECT EXAMINATION

2 BY MS. VALENTINE:

3 Q. Dr. Reisberg, I think you mentioned that everything that
4 you testified about is in your book.

5 A. I don't know about everything, but certainly a large
6 quantity of it. The book is also by now -- I mean, the
7 publication date is three years back, the writing of it was
8 four years back, so there's far more recent studies, but I
9 believe, sort of reflecting back over where we've been in the
10 last couple hours, I believe pretty much everything we've
11 talked about is covered in that book.

12 MS. VALENTINE: Thank you.

13 No further questions, Your Honor.

14 THE COURT: All right. So let's be clear. You'll
15 prevail on Ms. Shumway to give you a transcript of the hearing.
16 And for the witness and the lawyers, if it wasn't said out loud
17 today, it's not going to be said out loud at trial.

18 MS. VALENTINE: Your Honor, may I just clarify one
19 other point as well?

20 THE COURT: Yes. Of the witness or me?

21 MS. VALENTINE: Oh, with you, Your Honor. I
22 apologize.

23 THE COURT: Go ahead.

24 You need to run, sir?

25 THE WITNESS: Yeah, I probably should. Thank you,

1 Your Honor.

2 THE COURT: Thank you.

3 MS. VALENTINE: Your Honor, when we actually provided
4 all of the studies to Ms. Jarrett and Ms. Bolstad on
5 December 4th, 2017, they were actually provided by email a pdf.
6 Also, Mr. Cassino-DuCloux says, "In his testimony, Dr. Reisberg
7 will also be relying on information contained in the book he
8 wrote, *The Science of Perception and Memory: A Pragmatic Guide*
9 *for the Justice System*. My request to purchase this book was
10 denied, but it is available on Amazon."

11 So I just think that it was an unfair statement that
12 all we provided to the government were just the three -- the
13 three studies, and that the government had no other -- no other
14 information to look outside of that.

15 Mr. Cassino-DuCloux also listed two particular cases,
16 *State v. Lawson/James* -- or I'm sorry, one case, and he did
17 order a copy of that transcript because it's actually out of
18 Oregon state court, and that was also forwarded to the
19 government.

20 MS. BOLSTEAD: No, it wasn't.

21 MS. VALENTINE: Oh, I'm sorry. We had not received
22 that, but we did not cover anything, I believe, that was in
23 that.

24 THE COURT: All right. I appreciate that
25 clarification, although as to whether your witness would be

1 limited to those three studies, you've won that fight. So he's
2 not so limited. We do have a limit. It's a pretty expansive
3 limit. It's testimony here today. That's the limit.

4 And that doesn't mean that you're limited to the
5 cross you gave today. You know, it's just -- the limit is just
6 to try to put on some idea, some notice in fairness about what
7 an expert -- they're notoriously difficult to pin down -- what
8 they'll say.

9 So you know your limit, but you're not limited by
10 your cross today.

11 MS. JARRETT: Yes, Your Honor. May I make a brief
12 argument?

13 THE COURT: On what subject?

14 MS. JARRETT: Your Honor raised the differences
15 between civil disclosure for experts and criminal disclosure
16 for experts.

17 THE COURT: Right.

18 MS. JARRETT: So I wanted to make a brief argument on
19 that point.

20 I do note the Court has this executive gate-keeping
21 function, and it is governed in part by Rule 16(A)(1)(g). In
22 Rule 16, it states that the expert's summary must describe the
23 witness's opinions, the bases and reasons for these opinions,
24 and the witness's qualifications.

25 Obviously, there's no dispute about the witness's

1 qualifications, but the expert witness's summary is woefully
2 vague on both the witness's opinions and the bases and reasons
3 for these opinions.

4 As Your Honor has gotten into today, we have been
5 able to expand on the actual opinions, but these bases and
6 reasons for opinions have been cited today by the witness and
7 by defense counsel as his broad understanding or a large body
8 of work or a variety of conferences that he's attended. We
9 have no way of actually knowing what those bases and reasons
10 for his opinions are.

11 We tried to get into on this last point, we get some,
12 you know, a few of the studies, which I think can be helpful as
13 to these points, but as to the others, there really is not the
14 bases and reasons for these opinions.

15 Furthermore, I think that the rules of evidence
16 reflect the need for having these bases and opinions. In Rule
17 705, it discusses whether the expert needs to testify to the
18 bases and opinions before offering their opinion testimony, and
19 the rule says no, they don't have to offer that because it can
20 be subject to cross-examination. But in the 1972 proposed
21 rules amendment, it says this assumes the cross-examiner has
22 the advance knowledge essential for effective
23 cross-examination, and these safeguards are reinforced by the
24 discretionary power of the judge to require preliminary
25 disclosure in any event.

1 So these are the types of safeguards in criminal
2 cases that gives the Court discretion to require this type of
3 disclosure when we're really down at this late in the game,
4 down to brass tacks as to what the bases of these opinions are.

5 Furthermore, in the 1993 amendment, it was amended to
6 avoid an arguable conflict with Rule 26 of the Federal Rules of
7 Civil Procedure, but also Rule 16 of the Criminal Procedure, to
8 show that there is required disclosure in advance of trial for
9 the bases and reasons of an expert's opinion. When there's a
10 serious question of admissibility, disclosure may be needed by
11 the Court before deciding whether and to what extent the person
12 should be allowed to testify.

13 The concern the government has here is that by
14 allowing the witness to testify as to his entirety of his
15 knowledge over his career, there really is -- there's a limit
16 as to certain topics that he discussed today, but there's no
17 means for us to have an effective cross-examination as to the
18 bases of his opinions, and there's really no information for
19 the Court to make a decision under 702 and the *Daubert* factors
20 as to whether those are -- whether their testimony is based on
21 sufficient facts or data, whether the testimony is product of
22 reliable principles and methods, and whether the expert
23 reliably applied those principles and methods of the case -- to
24 the case. Simply because we just don't know what those
25 principles and methods are when we refer to the vast body of

1 his work, large body in that area, there's not the specific --
2 specifics that both the government and the Court need to know
3 in assessing this expert's testimony.

4 Furthermore, we cannot effectively apply the *Daubert*
5 test because a lot of these -- his testimonies are drawing
6 conclusions from other studies. Well, his conclusions have not
7 been subject to peer review. His own conclusions drawn from
8 these have not gone through the vigorous journal process to
9 have any degree of reliability for the jury to hear and rely
10 upon it.

11 THE COURT: Thank you.

12 I'm sympathetic to those arguments, in the sense that
13 I think the system that we set up to allow effective
14 cross-examination in this context is inadequate, but it is the
15 system.

16 And so I think there are two problems with what
17 you've suggested, maybe three. One is that it conflates
18 specifically identifying certain studies with identifying the
19 basis for the opinion. Those aren't the same thing. He did
20 identify the basis for his opinion. It wasn't a specific
21 study; it was hundreds of studies. That doesn't mean that he
22 didn't identify the basis for his opinion. It's preferable to
23 identify specific studies, but my concern is that if we said,
24 "We want you to identify the studies you rely on," that we'd
25 get a list of 300 studies and you wouldn't have advanced the

1 ball very much for your own purposes, but he would have met the
2 requirement to identify the basis for his opinion.

3 So I -- we have had an inquiry here today into the
4 basis for his opinion. He identifies a wide body of
5 literature. That's a problem, but it is a basis. And
6 Ms. Valentine in general terms inquired about that body of
7 literature, whether it was grounded in falsifiable hypotheses
8 and subject to replication and tested for error rates and
9 subjected to peer review and accepted widely in the community,
10 and he answered all those questions. So he did, I think,
11 establish as the basis for his opinion a foundation that's
12 acceptable under *Daubert*.

13 Now it does create significant but not insuperable
14 problems for cross-examination. So one is readily available to
15 you, and you've asked about it, and that is if a witness says,
16 "I'm relying on a wide body of research on confirmation bias
17 that says, generally speaking, the following things," it's not
18 incredibly difficult to find out if that wide body of research
19 that's been relied upon has been disagreed with by other
20 experts. And you asked about that, and had there been
21 disagreement, he would have been under an obligation to
22 identify it. So there's that possibility when a witness does
23 what a witness did here, which is not cite a specific study but
24 cite a body of literature.

25 And then we've done something else that makes the

1 problem of cross-examination less problematic than it typically
2 would be for a witness who wants to rely on a big body of
3 literature to say something, and that's we've been specific
4 about what the witness can say, and that narrows the search for
5 people who might disagree with it or reasons it might be wrong.

6 And then finally it's my experience with juries that
7 they remain less impressed with witnesses who say things like
8 "the science shows" or "the studies show," compared to
9 witnesses that have a specific study. There's a certain
10 heightened persuasiveness in relying on a specific study that
11 says something instead of being just vague and imprecise about
12 how you know something. So there is that issue in this case.

13 MS. JARRETT: Qualification on that, Your Honor. Is
14 the witness then permitted at trial to identify specific
15 studies that he's relying on to which the government has not
16 had prior notice of his reliance?

17 THE COURT: I appreciate you asking that question. I
18 was going to say I think I've answered it, but I'm glad you
19 raised it because I want to be crystal clear about that. The
20 answer to that question is no. If he didn't say it today, he
21 doesn't get to say it at trial.

22 So if you press him on the vagueness of his answer,
23 he doesn't get to say, "Well, as a matter of fact, today I
24 remember a specific study I didn't tell you about in December."
25 That won't be allowed. There's got to be some way, given the

1 nature of this witness statement, there's going to be some way
2 to put some limits on his room to maneuver on cross in order to
3 create the fairness and notice that the rules require. The way
4 I've used here is the transcript.

5 And then finally -- I might be wrong about this, and
6 so I'll let you make a record on it if I am, but I don't recall
7 that the government -- the thrust of the government's argument
8 before today being this witness statement is so inherently
9 inadequate that you should require a better witness statement
10 in order to meet the sort of implied production requirements of
11 the Federal Rules of Criminal Procedure, as supplemented by 702
12 through 705. And that's partly why we got to a hearing, you
13 know, with this issue being more latent than patent, and that's
14 why in part I've reached the decision to allow expansion of the
15 witness statement by oral testimony, but then limit the witness
16 to oral testimony at trial.

17 But you've raised a good issue, and that is not only
18 do I need to cover the production and disclosure requirements
19 but *Daubert*. And I feel that the testimony today on the
20 subjects I've limited the witness to satisfy the fundamental
21 104 requirements *Daubert* imposes.

22 MS. JARRETT: Your Honor, there's some points in
23 which the witness testified that it's obvious or it's common
24 sense, and therefore it would seem that that would not be
25 helpful to the jury. Is the witness -- will he be permitted to

1 testify as to these common sense factors?

2 THE COURT: Your response?

3 MS. VALENTINE: Your Honor, I actually only recall
4 one common sense standard, and that was the one just now that
5 he said about tattoos and scars. I think in a lot of ways it
6 was --

7 THE COURT: He used the phrase five times in the
8 hearing, either "common sense" or "to no one's surprise."

9 MS. VALENTINE: Oh, okay.

10 THE COURT: Five times during the hearing. So I'm
11 going to -- I'm not going to allow the witness to testify to
12 things that he admits everybody knows without scientific
13 background.

14 MS. VALENTINE: Oh, and that's not a problem, Your
15 Honor.

16 THE COURT: Thank you.

17 Anything further from the United States today?

18 MS. VALENTINE: Your Honor --

19 THE COURT: Just a moment.

20 MS. VALENTINE: Oh, sorry.

21 MS. JARRETT: Your Honor, in light of the Court's
22 decision to allow expert testimony into the accuracy of police
23 officers, we do now object to Jury Instruction No. 10, which is
24 duplicative, essentially duplicative of an instruction now
25 coming from the expert witness and the Court saying police

1 officers are no different than everyone else.

2 THE COURT: Well, almost all the jury instructions
3 pick up something that's been talked about at trial. That's
4 kind of the point. So I don't know why that's the issue.

5 MS. JARRETT: To expand upon the point, Your Honor,
6 there's also testimony you heard from the witness that there
7 are studies that say that police officers actually are more
8 skilled at certain things than other people. So that -- it
9 seems to be contradictory, and an instruction from the
10 Court would --

11 THE COURT: Right. I will certainly not give 10
12 until we've had a further discussion about it, in light of the
13 trial evidence.

14 MS. JARRETT: Thank you, Your Honor.

15 THE COURT: Thank you for raising the issue. I'll be
16 watching for that during trial.

17 Anything further from the defense?

18 MS. VALENTINE: Your Honor, I did just want
19 clarification.

20 THE COURT: Yes.

21 MS. VALENTINE: If Dr. Reisberg said, "Well, that
22 goes into the area of common sense, but not essentially" -- I
23 just want to make sure that if there's something that he's
24 asked about where it's not necessarily in the studies but it is
25 just common sense, that he could possibly, you know, say that

1 it's common sense but not necessarily expound on it. I just
2 don't want it to seem as if he is hiding the ball on something
3 if he's saying that it's common knowledge.

4 THE COURT: Thank you.

5 If he's asked about it, you mean on cross?

6 MS. VALENTINE: Yes, Your Honor.

7 THE COURT: Then yeah, that opens the door. That's a
8 different issue.

9 MS. VALENTINE: Okay.

10 THE COURT: But not on direct.

11 And I don't know why we'd be talking about the
12 ability to identify people with scars and tattoos anyway in
13 this case.

14 MS. VALENTINE: Right.

15 THE COURT: Anything further from the defense today?

16 MR. CASSINO-DUCLoux: Yes, Your Honor.

17 THE COURT: Go ahead, sir.

18 MR. CASSINO-DUCLoux: It's on separate issues.

19 THE COURT: Yes?

20 MR. CASSINO-DUCLoux: The Court was taking two pieces
21 of defense evidence under advisement until the government and I
22 had a chance to confer about it.

23 THE COURT: Yes.

24 MR. CASSINO-DUCLoux: That was No. 104 and 101. I
25 excised the tapes, and I believe that the government is going

1 to agree to the admission -- the preadmission of those pieces
2 of evidence.

3 THE COURT: As they've been --

4 MR. CASSINO-DUCLoux: Excised.

5 THE COURT: Yes?

6 MS. BOLSTEAD: Your Honor, that is true. I want to
7 put the Court -- I just want to give the Court notice of
8 something that might catch you by surprise in trial.

9 The government has no objection to what the defense
10 is offering as 101 and 101-A, the transcript of 101. No
11 objection.

12 104 is the audio. We have no objection to that, and
13 we have no objection to the transcript of that audio at 104-A.
14 But within that audio, the officers talk about how Mr. Howard,
15 or the suspect, is with a group, smoking a crack pipe in a
16 parking lot. Previously, the defense had moved to exclude drug
17 evidence. My conference with Mr. Cassino-DuCloux this morning
18 was no, no, they want that portion in. We have no objection to
19 it. I just want the Court to be aware that's a defense
20 exhibit.

21 THE COURT: Is that right?

22 MR. CASSINO-DUCLoux: Yes, Your Honor.

23 THE COURT: I mean, it's right that you want to go
24 ahead and play that portion that she's just discussed?

25 MR. CASSINO-DUCLoux: That's correct. We --

1 THE COURT: That's fine. That's your call.

2 MR. CASSINO-DUCLoux: Thank you.

3 The other -- I've -- I'm sorry, Your Honor. The only
4 piece of other evidence -- or the other issue I wanted to
5 discuss was Mr. Howard's motion for a Christmas furlough which
6 this Court said it would consider. I've made a motion. I
7 would like to have Mr. Howard be released Christmas -- I put on
8 there Christmas Eve, to spend Christmas Day with his mother.

9 I spoke with Probation. His probation officer is not
10 available and out of the district. John Bodden said whatever
11 this Court orders, he would make happen. I realize that by --
12 you know, Christmas Eve falls on a Sunday, and, you know, I'm
13 not expecting a government agency to work on Christmas Day.

14 The statute allows for Mr. Howard's release to an
15 appropriate person. Previously my office -- a client has been
16 released to my office to take them to psychological visits or
17 to take them to see other types of experts. And so given that
18 Probation probably can't make this happen as a reality, I would
19 take it upon myself, Your Honor, if Your Honor would release
20 Mr. Howard, to pick Mr. Howard up at noon on Christmas Day and
21 then drive him to his mother's house. I'd wait around until
22 around 4:00 and then I'd drive him right back to the jail and
23 turn him in if you would release him for a Christmas Day
24 furlough.

25 THE COURT: And you would stay with him?

1 MR. CASSINO-DUCLoux: Yes. I spoke to -- yes, I
2 would stay with him.

3 THE COURT: All right. That's fine.

4 MR. CASSINO-DUCLoux: Thank you, Your Honor.

5 I would like to ask this Court, request that the
6 Marshals Service have him moved to the -- he's at Columbia
7 County. That's an hour and a half away. So by the time I
8 picked him up and took him to his mother's house, it would be
9 time to turn around and come back. So I would like to ask the
10 Court to ask the Marshals Service to move him to Multnomah
11 County, where I could just pick him up at Multnomah County and
12 drop him off at Multnomah County.

13 THE COURT: Would that work?

14 THE MARSHAL: Yes, sir.

15 THE COURT: All right. We'll do that.

16 Yes, Ms. Bolstad?

17 MS. BOLSTEAD: Your Honor, the government does oppose
18 this. As a matter of community safety, the government opposes
19 the defendant being released. Also this defendant was in
20 warrant status for a significant portion of time between arrest
21 warrant issuing from Multnomah County. His probation officer
22 told him to show up; he didn't. He was arrested in a traffic
23 stop. So I think he's a flight risk.

24 But my bigger concern is community safety, including
25 the safety of the female -- the girlfriend in his life. We

1 have recorded jail calls from this defendant telling these
2 women -- yelling at them violently, saying that when he is
3 released, he will beat the shit out of them.

4 So I have concerns about him getting out for any
5 period of time. This is a serious-anger-issue defendant. He
6 has broken his hand previously in custody because of his
7 failure to control his impulses.

8 THE COURT: I share those concerns. I normally
9 wouldn't even consider this. My ruling has extended this case
10 from when he thought he'd have a ruling on his guilt or
11 innocence before Christmas until after. So normally I wouldn't
12 have considered it at all, but against this defendant's
13 objection, I extended this from before Christmas to after.
14 That's the only reason I've considered it at all in this case.
15 It's an exceptional circumstance that I wouldn't normally take
16 into account.

17 And I wouldn't have required the probation officer to
18 do anything, but if you're willing to make this sacrifice and
19 make it brief like this, and the marshals is willing to make it
20 work out of Multnomah County, where it's in and out, then I'm
21 sure you'll tell your client how much trouble he'd be in if he
22 messes up with this.

23 MR. CASSINO-DUCLoux: Yes, Your Honor.

24 THE COURT: Then we'll make it happen.

25 MS. BOLSTEAD: Could we have contact restrictions on

1 who he's allowed to visit?

2 THE COURT: Are you going to go to one place? Right?

3 MR. CASSINO-DUCLoux: Going to his mother's house,
4 Your Honor, and that's where we shall stay.

5 THE COURT: And you want it limited as to who he
6 shall see there?

7 MS. BOLSTEAD: Correct. If he's seeing his mother,
8 that's fine. If he's seeing other young women who can come to
9 his mother's house as well, we object.

10 THE COURT: All right. I think that's a fair
11 objection.

12 MR. CASSINO-DUCLoux: So only his mother can be
13 there? Is that what I am understanding?

14 THE COURT: Who lives at the house?

15 MRS. ANGELA HOWARD: Nobody lives there with me.

16 THE COURT: Who?

17 MRS. ANGELA HOWARD: There's nobody.

18 THE COURT: Who -- I'm sorry. Who will be there
19 Christmas Day?

20 MRS. ANGELA HOWARD: My other son is coming up on the
21 train to visit. His name is Deandre Howard.

22 THE COURT: So three people at the house?

23 MRS. ANGELA HOWARD: Yeah. I think my mother might
24 be coming to visit, or my sister, too. So I'm not sure. But
25 there's nobody else going to be there.

1 THE COURT: All right. So my limitation is that the
2 maximum of five people -- your mother, your sister, your son,
3 you, this defendant -- can be in the house. No other visitors
4 during that four-hour window. You can have visitors before and
5 after that may show up -- neighbors, friends, et cetera -- but
6 no other people can be there during those four hours.

7 MRS. ANGELA HOWARD: That's fine.

8 MR. CASSINO-DUCLoux: Yes, sir.

9 THE COURT: All right. Anything else, Mr. DuCloux?

10 MR. CASSINO-DUCLoux: No other questions, Your Honor.

11 Thank you. Nothing further. Thank you.

12 THE COURT: Thank you. We'll be in recess.

13 THE CLERK: Court is in recess.

14 (Proceedings concluded.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway

December 20, 2017

BONITA J. SHUMWAY, CSR, RMR, CRR
Official Court Reporter

DATE

MR.**CASSINO-DUCLOUX:****[17]** 57/11 71/1 104/15

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MRS. ANGELA**HOWARD: [5]** 109/14

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MS. BOLSTEAD: [5]

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MS. JARRETT: [35]

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MS. VALENTINE: [71]

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THE COURT: [141]**THE MARSHAL: [1]**

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THE WITNESS: [9]

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