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## Newsletters

### 6th Circuit Finds ID Expert Improperly Excluded, Overturns Robbery Conviction

From *Daubert Report* on 6/2/00

CINCINNATI — A district court erred in excluding testimony by an eyewitness identification expert in a bank robbery trial, a split panel of the Sixth Circuit U.S. Court of Appeals ruled May 8 (United States of America v. James Smithers, No. 98-1722, 6th Cir.).

In a 2-1 ruling, the appeals court vacated the conviction of James Smithers and remanded to the U.S. District Court for the Eastern District of Michigan for a new trial.

Smithers was indicted on one count of bank robbery after teller Debra White identified him from a photo spread and identified a car registered to him as the one used in the robbery of the Monroe Bank and Trust in Terence, Mich. Two other eyewitnesses, Teresa Marino, the teller who was robbed, and Timothy Wilson, a customer in the bank, were unable to pick out Smithers' picture from the photo spread.

#### **Motion *In Limine***

Smithers filed a motion *in limine* to determine the admissibility of testimony by Dr. Solomon Fulero, an eyewitness identification expert. After the jury was empaneled, the court heard argument on the motion, then denied it, saying that whatever the expert would say about eyewitness identification was within the jury's "common knowledge."

The government then presented its case, including eyewitness testimony from Marino, White and Wilson, all of whom identified Smithers as the robber. In addition, Marino and White testified that the robber had no distinguishing features.

After the government rested, Smithers renewed his motion *in limine* and offer of proof regarding the expert testimony. After oral argument, U.S. Judge Avern Cohn denied the motion, finding that it was "late in the day"; that the testimony was "not a scientifically valid opinion"; that admission of the testimony would be "tantamount to the Court declaring the defendant not guilty as a matter of law"; that without the eyewitness testimony "I don't think there's enough here to go to the jury"; and that going to the jury without the expert testimony "makes it a more interesting case."

Smithers was convicted and sentenced to 41 months' imprisonment. He appealed, challenging the exclusion of the expert testimony.

#### **'Gamesmanship'**

Reversing and remanding, the Sixth Circuit held first that Judge Cohn engaged in "gamesmanship" and revealed a "troubling disregard for this Defendant's rights" by explaining that he was interested in seeing what a jury would do absent the expert testimony because it would make the trial "more interesting" and stating that Smithers could seek a new trial if he were convicted.

"The district court's reasoning that it could indulge in this experiment because Smithers could 'always appeal' ironically turned this trial into a laboratory experiment where the judge felt free to play with evidentiary variables at the cost of the Defendant's rights," the panel said. "Basing an evidentiary decision on personal curiosity rather than on applicable case law and the rules of evidence is a patent abuse of discretion."

Moreover, the panel said, Judge Cohn erred in failing to conduct a Daubert hearing before excluding Fulero's testimony.

The panel noted that the science and methodology employed by Fulero was accredited by the Sixth Circuit in its ruling in U.S. v. Smith (736 F.2d 1103 [6th Cir. 1984]).

### 'Jurisprudential Movement'

"In Smith, this Court not only noted the jurisprudential movement toward admitting psychological studies of eyewitness experts in general, but praised the qualifications and scientific methods of this same expert witness, Dr. Fulero," the court said.

Had the judge conducted a hearing, the panel said, "it may have deemed Dr. Fulero's testimony scientifically valid."

The court also rejected Judge Cohn's conclusion that Smithers' proffer was "too late in the day," finding it an insufficient basis for excluding the evidence and noting that Smithers filed his motion *in limine* a month before trial.

"The district court should have conducted a hearing under Daubert and analyzed the evidence to determine whether Dr. Fulero's proposed testimony reflects scientific knowledge, and whether the testimony was relevant and would have aided the trier of fact," the panel concluded. "Based on its failure to perform the correct legal analysis — the Daubert analysis — as well as its 'experiment' rationale for excluding the testimony, the find that the district court abused its discretion."

The majority opinion was written by U.S. Judge Algenon L. Marbley of the Southern District of Ohio, sitting by designation, and joined by Circuit Judge Ransey Guy Cole Jr.

### Dissent

In a dissent, Circuit Judge Alice M. Batchelder said that the decision to exclude Fulero's testimony "should be affirmed on the basis of Smithers's delay in proffering it in its specifics to the court and Government."

Moreover, Judge Batchelder said, "the way in which the district court conducted its analysis of the admissibility of Dr. Fulero's testimony was not abusive of the court's discretion."

Finally, the judge expressed her reluctance "to admit the expert testimony of social scientists with the same deference given to the testimony of those in the physical sciences."

Smithers is represented by Andrew N. Wise of the Federal Public Defenders Office in Detroit. The government is represented by Kathleen M. Neri of the U.S. Attorney's Office in Detroit.

Opinion available

doc# 30-000526-005

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Revision date: Fri Jun 2 01:42:01 CDT 2000