Affidavit

Filed by R. Edward Geiselman, PhD,

I was contacted by Attorney Bruce Anton during July of 2008 about serving as an expert in the appellate matter of *David Lynn Carpenter vs. The State of Texas* (Case No. xx xxx, Court of Criminal Appeals). It was my understanding that the focus of my analysis was to examine the potential misidentification of David Carpenter by eyewitness Tessica Rainey. In the ensuing weeks, I reviewed police reports, trial transcripts, and six photographs from this case.

Expert's Relevant Background

I have been qualified to offer expert testimony about issues concerning eyewitness psychology in more than 300 criminal trials and hearings in multiple states spanning the past 17 years. I have reviewed over 600 criminal cases for both trial and appellate courts where eyewitness issues were central. In addition, I have participated in the analysis and critiquing of police interviews and identification procedures, and I have served as an investigative interviewer for law enforcement on cold cases. I have published over 100 research papers concerning a wide variety of issues related to memory with an emphasis on eyewitness memory recall. Those publications are listed on my curriculum vita that is attached to this affidavit.

I co-developed a standardized protocol for interviewing victims and witnesses of crimes called the Cognitive Interview. Elements of this protocol formed part of the basis for the DOJ guidelines on handling and preserving eyewitness evidence published in 1999 (U.S. DOJ, "Eyewitness Evidence: A guide for law enforcement," 1999) as well as the follow-up training materials published in 2003 (U.S. DOJ, "Eyewitness Evidence: A Trainer's Manual for Law Enforcement," 2003). I am certified as an instructor with the Department of Homeland Security.

Relevant Facts of this Case

It is my understanding that on August 28, 1991, Tessica Rainey (then age 16) was driving a car down a street on her way to school in the morning when she saw a man running across a lawn from a house where an alarm was sounding. The man was running to a car parked on the street. Ms. Rainey described her observation of this scene as lasting approximately 5-to-10 seconds. She reported that her car passed the man's car facing in opposite directions and she viewed the man briefly as he entered his driver's side door. Later in the day, she learned that someone had been killed at this location so she contacted the police and she was interviewed. The case became a cold case until 1997 when David Carpenter became a suspect. In October of 1997, Tessica Rainey was asked to view a set of six photographs that included David Carpenter. Ms. Rainey made an identification of Mr. Carpenter and she subsequently identified him at his trial in March of 1999.

Relevant Issues from Eyewitness Psychology

Given the facts of this case, it is my opinion as an expert witness qualified in eyewitness psychology that there is a substantial likelihood that the identification of

David Carpenter by Tessica Rainey is unreliable. The substantive areas of concern include the following:

a. Opportunity for view.
b. Time lag to identification procedure.
c. Psychological identification bias.
d. Identification reaction time.
e. Carry-over effects to in-court identification.
f. Eyewitness confidence versus identification accuracy.
g. Impermissibly biased photo lineup.

The scientific basis for my opinion is the extensive literature from eyewitness psychology that is referenced in part in R. E. Geiselman, *Eyewitness Expert Testimony (2nd Ed)*, 1996, American College of Forensic Psychology Press. The full research base consists of thousands of studies and experiments published in scholarly social-science and police-science journals.

General Factors

Opportunity for view. Ms. Rainey was driving with her brother in the car. Her attention likely was focused on the man she saw running when she heard an alarm. It is likely that her only exposure to the man's face was the brief moment when her car passed the man's car on the street. Research shows that face recognition improves with exposure times from one to fifteen seconds. The conditions for Ms. Rainey's view of the man would have been far from optimal.

Time lag to identification procedure. Ms. Rainey was asked to view photographs in October of 1997 to possibly identify the man she saw briefly back in August of 1991. This was a cold case with a time lag of 6 years. Research shows that face memory deteriorates with time just as other forms of memory fade with time. Six years is an inordinate length of time to support a reliable identification, especially based on a brief exposure time.

Psychological Identification bias. Eyewitnesses are known to show a bias toward making a selection from an identification procedure when the true perpetrator of the crime is present. Somewhat over half of all eyewitnesses make a selection when it can be confirmed later that the correct person was not included in the identification procedure. In the Carpenter case, Ms. Rainey likely assumed that the police had a suspect in this cold case when they appeared with the photographs after 6 years. Research shows that a standard police admonishment will mitigate this bias but will not eliminate the bias. Given the bias, it is critical that the identification instrument be fair (see below).

Identification reaction time. Scientists in eyewitness psychology have long searched for a reliable indicator of accuracy in an eyewitness's identification. Few have been isolated but the time taken by an eyewitness to make a selection has been found to reliably predict accuracy – the longer the time taken, the less likely the identification is accurate. Both Officer Penrod and Tessica Rainey testified that she took approximately 10 minutes to make her selection of David Carpenter. Very few eyewitnesses will take more than a few seconds to make their selections. Although she testified that she "did not want to pick the wrong one," it appears that Ms. Rainey was making what is known as a "relative judgment." With a relative judgment, the eyewitness simply selects the photo of a person who most closely resembles her memory for the suspect. This is not a

positive identification of a specific person. Ms. Rainey is said to have eliminated two of the photos immediately and then studied the remaining four photos for several minutes. Research shows that this unusual amount of inspection time coupled with the apparent relative-judgment strategy likely reflects an unreliable identification. Quick positive identifications are more likely to be accurate.

Carry-over effects to court. Research shows that most eyewitnesses will continue to select the person she selected the first time whether or not the initial identification was accurate. In this case, Ms. Rainey continued to identify Mr. Carpenter in court two years after viewing the set of photographs. This consistency should not necessarily be taken as an indication of accuracy, especially given the circumstances of the first identification.

Confidence and identification accuracy. The typical eyewitness situation results in a weak and unreliable relationship between the eyewitness's expressed confidence and the accuracy of the identification. In most circumstances of daily life, confidence does predict the accuracy of a memory but not in the eyewitness situation where the memories are fragile and many factors independently affect the eyewitness's feeling of confidence. The biased photo lineup in this case (see below) likely contributed to Ms. Rainey's unreliable sense of confidence about her identification of Mr. Carpenter. Research shows that when one photograph stands out from the rest because of an unfair test construction, the witness often shows an unwarranted sense of confidence. This is especially dangerous in such cases because most jurors rely heavily on the eyewitness's expressed confidence at trial.

Impermissibly Biased Photo Lineup

One of the standard tests for fairness of a lineup requires that the suspect not stand out perceptually from the alternatives. This test has been studied extensively by researchers and it appears in the 1999 federal guidelines for police handling of eyewitness evidence. It was revealed in the cross examination of Ms. Rainey at trial that the photo lineup in this case was impermissibly biased. She acknowledged that the photograph of David Lynn Carpenter was "of poorer quality" and "pinkish" relative to the other photographs. Given that six years had passed since her exposure to the apparent perpetrator in this case, any quality differential of the photographs could have critically biased her identification. Specifically, Ms. Rainey most likely would have been influenced (either consciously or unconsciously) by any age-related differences in the pictures. The police should have matched the quality of the other five photos with the apparent quality of the Carpenter photo. Research has shown that a biased photo lineup is worse than a single-photo show-up because it gives the eyewitness a false sense of reliability in her selection.

The biased nature of the photo lineup was not limited to the pictures themselves. The trial testimony of Ms. Rainey revealed that when she turned over the picture of David Carpenter to sign the back, someone else already had signed the reverse side of that picture. It is very possible that Ms. Rainey took this pre-existing signature to indicate that someone else already had identified the same picture that she had now selected. Research shows that post-identification feedback can have powerful effects on the eyewitness. It is very likely that Ms. Rainey selected Mr. Carpenter because of the biased nature of the pictures and that selection was then reinforced when she saw the pre-existing signature on the reverse side of the photograph.

Summary Conclusion

Based on my review and analysis of the documents and materials that I was provided, it is my opinion that there is a substantial likelihood that the eyewitness identification of David Carpenter by Tessica Rainey is unreliable. Particularly troubling is the impermissibly biased photo lineup.

Submitted,

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