# Sample Motion in Limine to Preclude the Government from Misleading the Jury in Its Closing Argument with Respect to the Factors Affecting the Reliability of Eyewitness Evidence:

In many cases, trial courts exclude expert testimony on the factors affecting the reliability of eyewitness evidence on the grounds that the subject matter is not “beyond the ken” of the average juror, or in other words, that the findings of the scientific community are common sense. Implicit in this determination by a trial court that the scientific findings are common sense is that they are also *true* – otherwise expert testimony would be critical to counteract the false guidance of common sense. Despite acknowledgement by courts of the accuracy of the scientific findings that were the subject of the proffered testimony, however, prosecutors routinely make arguments in closing that directly contradict those findings.

We’ve all heard the classic closing argument that goes something like this: “We all remember where we were on September 11. Traumatic events have a way of sticking in our minds with heightened clarity. As Ms. X told you, she will *never forget the face* of the man who robbed her at gunpoint that day. The image of the defendant’s face is burned in her mind forever.” Etc. But the research shows the opposite – while it may be true that most of us recall clearly where we were physically located on September 11, the uncontroverted findings of the scientific community reveal that high levels of stress diminish our ability to recall faces, even when we are confident that we recall them accurately. Other factors like the presence of a weapon, and cross-racial identifications, make human memory of faces even less reliable.

This motion takes the position that the prosecutor should not be permitted to have it both ways – namely, to prevent the defense from introducing expert testimony about empirically proven factors that make eyewitness IDs less reliable (e.g., stress, weapon focus, etc.), and at the same time to take advantage of the court’s preclusion of that expert testimony in order to argue the opposite of what that evidence would have shown. Courts should affirmatively preclude arguments that contradict what they have ruled to be true as a matter of common sense. To do otherwise is to permit the prosecution to mislead the jury, which expressly intrudes upon the defendant’s right to due process and a fair trial.

CAPTION – COURT OF JURISDICTION

STATE :

: Criminal Case No. ####-##

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v. : Judge XXXXX

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: Trial Date: ####

XXXXX XXXXX :

DEFENDANT’S MOTION IN LIMINE TO PRECLUDE THE GOVERNMENT FROM MISLEADING THE JURY WITH RESPECT TO THE FACTORS AFFECTING THE RELIABILITY OF EYEWITNESS EVIDENCE

**DEFENDANT XXXXX**, through counsel, respectfully moves the Court for an Order in Limine barring the Government from making arguments that contradict well- settled scientific findings on the factors affecting the reliability of eyewitness evidence. DEFENDANT, in his EXPERT NOTICE, sought to introduce into evidence expert testimony on scientific research on a collection of factors that are known to diminish the reliability of eyewitness evidence, as well as research on the unreliability of witness confidence as a predictor of accuracy. The government argued that all of these factors are not properly the subject of expert testimony because they are a matter of common sense.[1](#_bookmark0) In so doing, the government effectively conceded that it does not dispute the sources of unreliability about which the expert would have testified. Accepting the government’s arguments, the Court ruled that the subject matter of the proffered testimony is true as a matter of common sense. Having so ruled, the Court should not permit the government to take a contrary position and mislead the jury in its closing argument by making arguments that contradict the uncontroverted findings of the scientific research that the Court has excluded from evidence, when DEFENDANT has

1 DEFENDANT renews his objection to this interpretation of the applicable standard for the admissibility of expert testimony, which requires only that the testimony would be helpful to the jury. Fed. R. Evid. 702.

been deprived of the opportunity to meaningfully respond to such mischaracterizations with substantive evidence.

**ARGUMENT**

1. **The Right to a Fair Trial Prohibits the Government from Misleading the Jury**

The Fifth and Sixth Amendments to the United States Constitution guarantee DEFENDANT the right to a fair trial and due process of law. A central tenet of those core constitutional protections is the fundamental rule that prohibits the government from misleading the jury. *See Morrison v. United States*, 547 A.2d 996 (D.C. 1988) (“It is improper for an attorney to make an argument to the jury based on facts not in evidence or not reasonably inferable from the evidence.”); *see also Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (holding that obtaining a conviction “through a deliberate deception of court and jury” is “as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation”). It is fundamental that “[i]t is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw,” and it is plain error for the prosecutor to do so. *United States v. Young*, 470 U.S. 1, 7 n.5 (1985) (citing *ABA Standards for Criminal Justice*, Standard 3-5.8(a)); *Coreas v. United States*, 565 A.2d 594, 602 (D.C. 1989) (holding it “plain error for [the] prosecutor to misstate and mischaracterize evidence”) (citing *Lewis*

*v. United States*, 541 A.2d 145, 146-47 (D.C. 1988)). Further, the prosecutor is not “an ordinary party to a controversy,” but has an elevated duty “to refrain from improper methods calculated to produce a wrongful conviction.” *Berger v. United States*, 295 U.S. 78, 88 (1935). When the government “prosecutor’s [closing] argument constitute[s] a clear misstatement of the evidence,” it is prosecutorial misconduct, and as such,

reversible error. *Lewis v. United States*, 541 A.2d 145, 147 (D.C. 1988). In short, the government is bound by a strict duty to refrain from misleading the jury with respect to the evidence presented at trial.

# The Court and the Parties Are on Record Acknowledging That Certain Factors Are Known To Diminish the Reliability of Eyewitness Evidence

In this case, the Court and the parties are in agreement that a specific set of factors are known to reduce the reliability of eyewitness testimony, and the Court denied DEFENDANT’s motion to introduce expert testimony on the specific factors at play in this case on grounds that the uncontroverted findings of the scientific community on those factors are matters of common sense. With respect to the effects of high levels of stress and the presence of a weapon, the government argued in its opposition motion not that it disagrees that those factors diminish the reliability of eyewitness evidence, but that the *fact* that they do is true as a matter of common sense, thereby conceding that fact.

Similarly, the government argued and the Court ruled that it is so commonly known that stress and the presence of a weapon make eyewitness evidence less reliable, that expert testimony on the subject would not assist the jury in assigning weight to the evidence.

The government made the same concession and the Court made a similar ruling with respect to the lack of correlation between the confidence of a witness and the accuracy of her identification. As such, both parties and the Court are on record in their agreement that high levels of stress and the presence of a weapon make eyewitness identifications less reliable, and that a high level of confidence or certainty is not a reliable predictor of the accuracy of a witness’s identification.[2](#_bookmark1) Any statement or implication to the contrary

2 Courts have also acknowledged this to be true. The Court of Appeals “and other courts have repeatedly recognized the unreliability of identifications made on the basis of brief observation under stressful conditions.” *In re L.G.T.,* 735 A.2d 957, 962 (D.C. 1999) (Schwelb, J., concurring dubitante) (citing

would overtly mislead the jury on the critical question of the reliability of the lead government witness.

# The Court Should Preclude the Government from Taking Advantage of the Court’s Ruling and Misleading the Jury with Respect to the Factors Affecting the Reliability of Its Key Witness

As a precautionary measure to prevent a constitutional violation on the specific facts of this case, the Court should issue an order precluding the government from making misrepresentations relating to the factors affecting the reliability of its key witness in its closing argument. The Court of Appeals held that comments by a prosecutor in closing regarding the credibility of a witness are “unquestionably improper” if not grounded in the evidence. *Finch v. United States*, 867 A.2d 222, 227 (D.C. 2005). Similarly, when the government “ask[s] the jury to draw inferences that the evidence simply w[ill] not bear” with regard to the testimony of a witness, the argument is improper and should be precluded. *McClellan v. United States*, 706 A.2d 542, 553 (D.C.

cases); *see also Jones v. United States*, 918 A.2d 389, 409 (D.C. 2007) (weighing the eyewitness’s reliability in light of the fact that she was “only able to view her assailant for a limited amount of time, during an extremely traumatic event”). And “it is human nature for a person toward whom a gun is being pointed to focus his attention more on the gun than on the face of the person pointing it.” *Raheem v. Kelly*, 257 F.3d 122, 138 (3d Cir. 2001); *see also United States v. Singleton*, 702 F.2d 1159, 1179 (D.C. Cir. 1983) (Skelly Wright, J., dissenting) (“Where a weapon is brandished it tends to capture a good deal of attention, thereby reducing the ability to recognize and to recall details about an assailant.”).

The Court of Appeals has also recognized, “[e]ven if the witness professes certainty, ‘it is well recognized that the most positive eyewitness is not necessarily the most reliable.’” *In re As.H.*, 851 A.2d at 460 (quoting *Crawley v. United States*, 320 A.2d 309, 312 (D.C. 1974)); *see also Jones*, 918 A.2d at 409 (quoting *Crawley*). Moreover, “witnesses tend to become more and more ‘certain’ as the case progresses, especially if the police rely on their identifications.” *In re L.G.T*., 735 A.2d at 962 (Schwelb, J., concurring dubitante); *see also id.* at 962 n.2 (“‘Indeed, experience establishes that an uncertain identification becomes more and more positive at every stage of the proceeding through the trial itself.’”) (quoting *In re Dwayne W*., 109 Daily Wash. L. Rptr.1901, 1906 n.11 (Super.Ct.D.C. 1981)); *see also In re As.H*., 851 A.2d at 462

n.10 (“‘[W]here ... the police consider an individual to be a possible perpetrator and a witness makes an initially ambiguous identification, there may develop a process of mutual bolstering which converts initial tentativeness into ultimate certainty.’”) (quoting *In re Dwayne W.,* 109 Daily Wash. L. Rptr. at 1906); *State*

1. *Long*, 721 P.2d 483, 490 (Utah 1986) (noting that “as eyewitnesses wend their way through the criminal justice process, their reports of what was seen and heard tend to become more accurate, more complete and less ambiguous in appearance”) (internal quotation marks and citation omitted); *United States v. Butler*, 636 F.2d 727, 733 (D.C. Cir. 1980) (Bazelon, J., dissenting) (describing “a growing confidence in the testimony on the part of the witness” as a signaling “the danger of a mistake in memory”).

1997). Here, DEFENDANT asks that the Court preclude the government from affirmatively tainting the trial proceedings with incorrect characterizations of the reliability of the evidence in its closing argument, contrary its position earlier in this trial.

# The witness will “never forget that face.”

Several variations of the common witness claim that “I’ll never forget that face” are routinely relied upon by prosecutors in an effort to bolster the reliability of eyewitness evidence in jurors’ analyses. The statement is typically coupled with a statement about how a witness would never forget the face of the person who committed some traumatic act, with the clear implication that the violent or traumatic nature of the event makes the face of the perpetrator “imprinted” on the mind of the victim of the act. *See, e.g.*, *Osorio*

*v. Conway*, 496 F.Supp.2d 285 (S.D.N.Y. 2007) (citing prosecutor’s argument that witness would “never forget the face” of perpetrator because witness believed it was last face she was “ever going to see on this earth”). In some cases, it is framed with an observation that “we all remember where we were on September 11,” with the implication that memories are better when associated with acutely memorable, traumatic events. As above, the uncontroverted findings of the scientific community show that the violent or traumatic nature of an event actually makes witnesses’ ability to recall *faces*, in particular, significantly *less* reliable. A witness may well recall where she was physically located on September 11, or the day Kennedy was shot – or the day she was robbed at gunpoint – but a wealth of scientific research demonstrates that memory for faces is something different altogether. [CITE to Expert Notice/Reply Motion to Admit Expert Testimony.]

The government in this case should be precluded from using any characterization in its closing argument that in any way states, suggests, or implies that the traumatic, violent, or stressful nature of the alleged event might tend to make the eyewitness evidence any more reliable, in direct contradiction of the scientific research.

# The witness is “100% certain.”

Another commonplace tactic in government closing arguments is a reference to the level of certainty reported by a witness about the accuracy of her identification, as a means of bolstering the strength of the evidence in jurors’ analyses. *See, e.g.*, *State v. Harrison*, 2007 WL 4465587, \*4 (La. App. 2007) (citing witness claiming to be “a hundred and ninety-nine point ninety two thousand percent sure” of identification accuracy). Because the government conceded that the opposite is true in arguing to preclude expert testimony on the scientific research that shows confidence to be an unreliable predictor of eyewitness accuracy, the Court should preclude the government from using any characterization in its closing argument that in any way states, suggests, or implies that the level of confidence of the witness makes the identification more reliable. [CITE to government pleadings arguing/conceding that scientific findings are common sense.]

# An Affirmative Order Precluding the Government from Making These Misrepresentations Is Critical under These Facts

* + 1. **Defense counsel has been stripped of the ability to meaningfully respond to government misrepresentations.**

If the government is permitted to argue that the factors affecting the reliability of eyewitness testimony are contrary to what has been demonstrated by the scientific research, defense counsel is left with no recourse to correct those misstatements prior to

juror deliberations, aside from simply claiming the opposite to be true. The corruption of the jury’s deliberative process with such mischaracterizations cannot be cured by defense counsel’s own arguments, as counsel has been precluded from introducing an authoritative source to serve as the basis for the counter-argument. The result of this evidentiary constraint would be to reduce the final arguments to a battle of unsupported, conflicting opinions regarding the reliability of the central evidence of the case, while affirmatively withholding from the jury’s view the fact that there exists uncontroverted scientific evidence that validates the defense position and refutes the government position.

It is the Court’s duty to provide “a lamp to guide the jury’s feet in journeying through the testimony in search of a legal verdict.” *See Brodes v. State*, 614 S.E.2d 766, 769 (Ga. 2005) (reversing conviction due to jury instruction incorrectly citing witness confidence as indicator of reliability). To leave the jury in the dark to parse through the fundamentally conflicting opinions of counsel, where clear evidence exists that bolsters one position while undermining the other, would constitute an abrogation of that fundamental duty. If the government disagreed with DEFENDANT’s proffered expert opinion, the appropriate mechanism to refute it would have been either cross-examination of the expert defense witness, or a rebuttal witness of its own (though it is unclear that any such witness exists, given the unanimity of scientific opinion on the proffered subjects). Instead, the government conceded the substance of the proffered testimony, and should not be permitted to argue in conflict with that position now.

# The government’s mischaracterization would likely exacerbate juror misunderstanding.

If the government is permitted to argue or imply that high levels of stress and trauma make eyewitness testimony more reliable, or that confidence is a reliable predictor of accuracy, it will likely play into existing ignorance among jurors about how these factors actually affect the evidence at issue. In DEFENDANT’s reply motion to the government’s motion opposing expert testimony, DEFENDANT cited polling data demonstrating that many jurors do not understand the relationship between high levels of stress or witness confidence to the accuracy of an identification, and in many cases believe the opposite of the scientific findings to be true; in fact only a marginal percentage of potential jurors polled correctly understood the factors at issue here. *See* Schmechel et al., Beyond the Ken? Testing Jurors’ Understanding of Eyewitness

Reliability Evidence, 46 Jurimetrics J. 177 (2006). If the government is allowed to argue

that these factors make identifications more reliable, contrary to the scientific research, there is clear reason to expect that existing juror ignorance will be compounded by misrepresentations by the government that imply that the erroneous views of many jurors are correct, which introduces the acute danger of corrupting the factfinding process as jurors apply false beliefs in their analysis of the central evidence in this case.

If the Court does not find juror polling data persuasive, it need only to look to the 212 DNA exonerations of innocent individuals, most of whom were convicted precisely as a result of jurors’ inability to accurately evaluate eyewitness testimony. *See* The Innocence Project, [www.innocenceproject.org](http://www.innocenceproject.org/) (click on “Eyewitness Misidentification”

under “Understand the Causes”) (showing over 75% of wrongful convictions resulting from faulty eyewitness evidence) (as of Feb. 5, 2008); Brandon Garrett, *Judging Innocence*, 108 Columbia L. Rev. 55, 60 (2007) (in 79% of 200 DNA exonerations

studied, erroneous eyewitness testimony was introduced); National Institute of Justice*, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, Dep’t of Justice Pub. No. NCJ 161258, at 24 (1996) (in majority of wrongful conviction cases reviewed, “eyewitness testimony was the most compelling evidence”); *see also* Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14(2) L. & Hum. Behav. 185, 190 (1990) (“This study clearly demonstrates that jurors are insensitive to the factors that influence eyewitness memory…”). Though the Court found that jurors do not require expert testimony in this case to elucidate the factors affecting the reliability of eyewitness evidence, it cannot ignore the widespread problem of wrongful convictions that result from jurors overestimating the reliability of eyewitness testimony. In light of these statistics, the Court cannot reasonably conclude that jurors are such experts in the science of perception and memory that they are impervious to misleading arguments. The Court should not introduce the risk of exacerbating the systemic injustice of wrongful convictions by permitting the prosecutor to affirmatively mislead jurors with respect to the value of the pivotal evidence in this case.

**CONCLUSION**

WHEREFORE for the reasons set forth above and for any other reasons that may appear to this Court, **DEFENDANT XXXX** respectfully requests that this Court issue an Order in Limine precluding the Government from making representations with respect to the reliability of any witness’s testimony, explicit or implicit, which contradict the uncontroverted findings of the scientific community and on which this Court has

precluded expert testimony on the basis of its finding that the research is true as a matter of common sense.

Respectfully Submitted,

Counsel for **DEFENDANT XXXX**