

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

2008-3 P 114

UNITED STATES OF AMERICA,

v.

DYLAN M. WARD,
JOSEPH R. PRICE,
and
VICTOR J. ZABORSKY,

Defendants.

Criminal Nos. 2008-CF1-26996
2008-CF1-27068
2008-CF1-26997

Judge Lynn Leibovitz

Status Hearing – May 5, 2010

**DEFENDANTS' JOINT RESPONSE TO THE GOVERNMENT'S
OMNIBUS MOTION *IN LIMINE* REGARDING CERTAIN DESIGNATED
DEFENSE EXPERT WITNESSES AND DEFENDANTS' OPPOSITION TO A
FRYE HEARING ON DEFENSE EXPERTS**

On April 19, 2010, the Government filed an "Omnibus Motion in Limine Regarding Certain Designated Defense Expert Witnesses." In that Omnibus Motion, the Government expressed objections to the following expert witnesses who had been designated by the Defendants: (1) Dr. Farzad Najam, (2) Al Yonovitz, (3) Dr. Jeffrey Smith, (4) Rod Englert, and (5) Dr. Henry Lee. At a status hearing held on the same date, the Defendants announced that they did not intend to call Mr. Yonovitz as an expert witness. At that time, the Government also withdrew its objections to Dr. Smith, Mr. Englert, and Dr. Lee pending anticipated interviews with those witnesses.

The Government has maintained its objection to Dr. Najam, a cardiac surgeon. The defense intends to call Dr. Najam as an expert witness on the anatomy, operation, and functioning of the human heart. Dr. Najam is expected to offer an expert opinion, to a reasonable degree of medical certainty, that the stab wound that transected Mr. Wone's

Case: 2008 CF1 026997



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aorta would have incapacitated Mr. Wone almost instantaneously. In its Omnibus Motion, the Government seeks a *Frye* hearing regarding the admissibility of this expert testimony by Dr. Najam. In support of that request, the Government claims that it “has not been able to identify a scientific methodology generally accepted in the relevant scientific community upon which Dr. Najam’s opinion is based.” (Gov’t Mot. at 5.)

At the April 23, 2010, status hearing, the Court questioned the Government’s reasons for requesting a *Frye* hearing regarding Dr. Najam, an experienced cardiac surgeon whose qualifications are not in question and whose proffered opinion relates directly to his area of professional expertise. The Court directed the Government to submit a pleading by April 30, 2010, stating more precisely why a *Frye* hearing is warranted in these circumstances. The Government did not file a supplemental pleading on April 30, 2010. For the reasons set forth below, the Defendants submit that a *Frye* hearing regarding the expert testimony of Dr. Najam is unnecessary and ask that the Government’s request for such a hearing be denied.

ARGUMENT

The admission of expert testimony in the District of Columbia is governed by a two-tiered analysis requiring, first, that the testimony satisfy an admissibility threshold, and second, that “the probative value of the testimony must outweigh its prejudicial impact.” *Ibn-Tamas v. United States*, 407 A.2d 626, 632 (D.C. 1979). The admissibility threshold for expert testimony is defined by the following three-part test:

- (1) [T]he subject matter must be so distinctively related to some science, profession, business or occupation *as to be beyond the ken of the average layman*;
- (2) the witness must have sufficient skill, knowledge, or experience in that field . . . as to . . . *aid the trier in [the] search for truth*; and

- (3) expert testimony is inadmissible if the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert.

Dyas v. United States, 376 A.2d 827, 932 (D.C. 1977) (citations omitted) (emphasis in original). As to the first criterion, the expert may not speak to matters in which “the jury is just as competent to consider and weigh the evidence and draw the necessary conclusions.” *Lampkins v. United States*, 401 A.2d 966, 969 (D.C. 1979). As to the second criterion, “[t]he determination of . . . competence to render an expert opinion . . . must depend on the nature and extent of [the expert’s knowledge]. It does not depend on his claim to [a] title.” *Jenkins v. United States*, 307 F.2d 637, 643 (D.C. Cir. 1962) (*en banc*). As we understand the Government’s arguments, it does not challenge Dr. Najam’s qualifications or the nature of his proposed expert testimony under either of the first two *Dyas* requirements.

Instead, the Government appears to frame its objection to Dr. Najam’s testimony around the third *Dyas* criterion, which asks whether the state of a pertinent field permits any reasonable expert opinion to be asserted. The third criterion is applied most often in cases that involve a new or novel scientific technique or method. See *Jones v. United States*, 548 A.2d 35, 39 (D.C. 1988); *Drevenak v. Abendschein*, 773 A.2d 396, 417-418 (D.C. 2001). In that context, District of Columbia courts apply the “general acceptance” test set forth in *Frye v. United States*, 54 U.S. App. D.C. 46, 293 F. 1013 (1923), which requires the proponent of expert testimony to demonstrate by a preponderance of the evidence that the technique of the expert has been generally accepted in the relevant scientific community. See *Bahura v. S.E.W. Investors*, 754 A.2d 928, 943 (D.C. 2000). As the court in *Frye* explained, “[w]hile courts will go a long way in admitting expert

testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.” *Frye*, 293 F. at 1014. The “members of the relevant scientific field will include those whose scientific background and training are sufficient to allow them to comprehend and understand the process and form a judgment about it.” *United States v. Porter*, 618 A.2d 629 (D.C. 1992) (citations omitted).

One need only read the *Frye* standard to conclude that the Government’s challenge to Dr. Najam’s testimony under the third *Dyas* criterion is utterly meritless. Dr. Najam’s proposed testimony is not based on a cutting-edge methodology that has yet to be accepted in the pertinent scientific community. Dr. Najam is a cardiac surgeon. He operates on human hearts. As a result, he has extensive expertise on the anatomy and functioning of the heart. His expertise allows him to form and articulate opinions concerning how a heart’s functioning will be affected by a particular event. Here, Dr. Najam will provide an expert opinion concerning how the wound inflicted upon Mr. Wone’s aorta would affect the operation of Wone’s heart and, in turn, whether and for how long Wone could remain conscious while experiencing heart trauma of this nature. These are precisely the issues that cardiac surgeons face daily.

Based on the objections to Dr. Najam’s testimony that have been articulated by the Government in court, it appears that the Government’s opposition is based not on any scientific methodology that underlies Dr. Najam’s opinions, but rather reflects the Government’s resistance to the substantive opinion that Dr. Najam will offer. That is not a valid objection to expert testimony. As the District of Columbia Court of Appeals has

explained, "[t]he *Frye* analysis, however, begins and ends with the acceptance of a particular scientific methodology and not the acceptance of a particular result or conclusion derived from that methodology." *United States v. Jenkins*, 887 A.2d 1013, 1022 (D.C. 2005) (citations omitted). Because there is no contested (or contestable) issue regarding the scientific methodology on which an experienced cardiac surgeon such as Dr. Najam will rely in rendering an opinion concerning the effect that a particular wound would have on the functioning of a human heart, the Government's request for a *Frye* hearing is misplaced and should be denied.

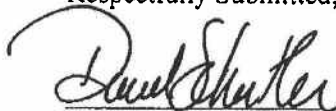
In further response to the Government's suggestion at the April 23, 2010, hearing that Dr. Najam's opinion is outside the mainstream view among heart experts, we note that Dr. Najam's expert opinion in this case has been confirmed for the defense by Dr. Andrew Wechsler, one of the leading cardiothoracic surgeons in the United States. Dr. Wechsler has reviewed Dr. Najam's disclosure and concurs with it fully. Dr. Wechsler has also been noticed by the defense as an expert witness in this case. His CV and his Rule 16 disclosure are set forth in Exhibit A.

CONCLUSION

For the reasons set forth above, the Defendants respectfully request that the Government's request for a *Frye* hearing with respect to Dr. Najam's expert testimony be denied.

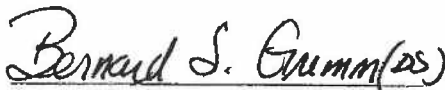
Dated: May 3, 2010

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading, Defendants' Joint Response to Government's Omnibus Motion in Limine Regarding Certain Designated Defense Experts was served via fax and hand, this 3rd day of May, 2010 upon:

Glenn L. Kirschner, Esq.
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David Schertler



SCHERTLER & ONORATO, L.L.P.

April 28, 2010

VIA ELECTRONIC AND FIRST CLASS MAIL

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United States Attorney's Office
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Re: United States v. Dylan Ward, et al., Case No. 2008 CF1 26997

Dear Glenn, Pat and Rachel:

We are writing on behalf of Defendant Dylan Ward in the above-captioned case to provide you with expert disclosure pursuant to Superior Court Criminal Rule 16(b)(1)(C).

In this regard, Mr. Ward may call *Andrew S. Wechsler, MD*, to provide expert testimony regarding the description of the physical parts of the human heart and its surrounding vessels (the Great arteries and veins), how the heart and the vascular system function (including the electrical system that stimulates the heart muscle), his experience as a cardiac surgeon with injuries to the heart and the surrounding great vessels, including trauma to the heart and great vessels. Dr. Wechsler is a professor of Cardiothoracic Surgery at Drexel University College of Medicine. Dr. Wechsler's *Curriculum Vitae* is attached.

1. Dr. Wechsler will testify regarding the anatomy and physiology of the human heart and human vascular system as it works in conjunction with the heart. He will testify that the heart is a hollow muscular organ responsible for pumping blood throughout the body's vascular system and that the heart accomplishes this through repeated and rhythmic contractions separated by periods of refilling. The average human heart beats about 72 beats per minute. He will explain that the heart is enclosed in a sac called the pericardium. The superficial part of this sac is called the fibrous pericardium. The pericardium protects the heart and anchors its surrounding structures. It is located anterior to the vertebral column and posterior to the sternum. The heart has a mass of between approximately 250 grams and 350 grams. The heart is composed of three layers—the superficial layer, called the epicardium, the middle layer, called the myocardium, and the third layer called the endocardium. The heart has four chambers, two atria and two ventricles. The atria are the chambers that receive blood and the ventricles are the chambers that discharge blood. Dr. Wechsler will explain that the

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April 28, 2010
Page 2 of 3

aortic root is the part of the ascending aorta closest to the heart beginning at the aortic annulus and extending to the sinotubular junction.

2. Dr. Wechsler will testify specifically about the stab wound to the chest and heart of Mr. Wone. Based on his review of the autopsy report, photographs, and related medical records, he will say that the stab wound located at Mr. Wone's upper chest, 15" below the top of the head, would have caused unconsciousness and incapacitation instantaneously, within a matter of three seconds. Dr. Wechsler will describe the path of this wound through the skin, muscle, cartilage and other body tissues. He will also explain that the wound perforated the front of the pericardial sac and penetrated into the heart at the aortic root, which is where the heart meets the aorta. Because blood flowing from the heart to the aorta is under such tremendous pressure, the instant the aortic root was pierced by the knife, the blood would have gushed out immediately into the pericardial sac and caused the pericardial sac to fill up with blood within a second (essentially a "heartbeat") and caused what is referred to as pericardial tamponade. Pericardial tamponade (also called cardiac tamponade) is a condition in which fluid or blood accumulates in the pericardium (the sac in which the heart is enclosed) and the compression within the pericardial sac would have compressed and constricted the heart so that it would stop pumping blood. In this case massive amounts of blood would have filled Mr. Wone's pericardium within a second causing pressure on the heart which is not compatible with life. This pressure would have caused the vena cavae, right atrium, right ventricle and left atrium of Mr. Wone's heart to be compressed, immediately, preventing the flow of any blood into the heart. Because of the almost immediate impact of the wound on Mr. Wone's heart, which would have resulted in the lack of any blood to his brain, Mr. Wone would lose consciousness, within seconds after the knife penetrated the aortic root, rendering him unable to respond to any external stimuli or defend himself in any way.
3. Dr. Wechsler will also testify that the stab wound to the heart would have been characterized by a large amount of internal bleeding and a relatively small amount of external bleeding. Because the knife initially entered the body through the skin and muscle, those tissues would have retracted back after the knife was withdrawn and blood would have flown internally, it would have been prevented to some degree from flowing out of the body. The elasticity of the skin and soft tissues will narrow or even close the slit-like injury created by stabbing, preventing substantial amount of external hemorrhaging.


Dr. Wechsler's opinions in this regard will be based on his expertise and experience specializing in cardiac surgery and his review of the discovery documents and evidence in this case.

Mr. Ward reserves the right to present additional expert opinion testimony based upon the future production of documents, materials or the results of any additional testing by the

Glenn L. Kirschner, Esq.
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Rachel Carlson-Lieber, Esq
April 28, 2010
Page 3 of 3

Government, Defendants, or third-parties. If you have any questions, please do not hesitate to contact me at (202) 628-4199.

Very truly yours,

A handwritten signature in black ink, appearing to read "David Schertler", with a stylized flourish at the end.

David Schertler
Counsel for Dylan Ward