

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PASCO COUNTY
CRC14-00216CFAES

STATE OF FLORIDA

V.

CURTIS J. REEVES

Filed For Record
Pasco County, Florida
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Willa H. Reeves-Sowles
Clerk & Comptroller
Pasco County, Florida

**STATE'S DAUBERT MOTION TO EXCLUDE
THE TESTIMONY OF DEFENSE EXPERT DR. DONNA COHEN, PH.D.**

COMES NOW, BERNIE McCABE, State Attorney for the Sixth Judicial Circuit in and for Pasco County, Florida, by and through the undersigned Assistant State Attorney, hereby respectfully request this Honorable Court to enter an order excluding the testimony and opinions of Dr. Donna Cohen Ph.D. (Cohen) and as good cause would show:

For the purpose of this motion the State adopts the objections and the legal argument of the State's Motion In Limine To Exclude The Testimony Of Defense Expert Dr. Donna Cohen, PH.D.

In addition to the State's initial objections to Dr. Cohen's testimony, the State objects to her opinion in the immunity hearing in the above-styled case. The summary of the State's position regarding her opinion includes the following.

Summary of State's Position

- ***Dr. Cohen's testimony and opinions fail to meet the Daubert standard for admissibility.***

Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 589, 113 S.Ct. 2786 (1993) (The objective of the gatekeeping role is to ensure that expert testimony, in order to be admissible, must not only be relevant, but reliable.)

Kumho Tire Co., Ltd v. Carmichael, 526 U.S. 137, 1195 S. Ct. 1167 (1999) (Daubert's general principles apply to expert testimony based on specialized knowledge, training or experience.)

Rule 90.702 (Requires that the evidence or testimony assist the trier of fact to understand the evidence or to determine a fact in issue.)

- ***Dr. Cohen's testimony and opinions is based on unreliable methodology, i.e. solely on the self-serving statements of the Defendant.***

Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 113 S.Ct. 2786 (1993) (The objective of the screening is to ensure that testing, in order to be admissible, must not only be relevant, but reliable.)

Mitchell v. State, 965 So.2d 246, 251 (Fla. 4th DCA 2007) (Dr. Edney's proffered testimony boils down to a statement that, based upon what Mitchell told him, Mitchell reasonably believed that he had to defend himself or be killed. There is nothing in his testimony which concerns a subject beyond the common understanding of the average person. If the jury believed Mitchell, then it would find that he acted in self-defense. Thus, the issue is not one on which expert testimony should be permitted. It merely allowed an expert witness to bolster Mitchell's credibility which is improper. Acosta v. State, 798 So.2d 809, 810 (Fla. 4th DCA 2001). And it improperly introduces Mitchell's self-serving statements which are otherwise inadmissible hearsay. See Lott v. State, 695 So.2d 1239, 1243 (Fla.1997))

Rule 90.702 (The testimony is the product of reliable principles and methods; and the witness has applied the principles and methods reliably to the facts of the case.

- ***Assuming Dr. Cohen is qualified to testify in the area of "aging", she may only testify about matters within the scope of her expertise.***

See, City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 562 (11th Cir. 1998) (explaining "the expert [must be] qualified to testify competently regarding the matters he

intends to address" (alteration added; citations omitted)

- ***Dr. Cohen's testimony and opinions is not based on her knowledge but merely on a subjective belief that the Defendant "reasonably" believed his own vulnerability.***

Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 590 113 S.Ct. 2786 (1993) (However, an expert's opinion must be based upon "knowledge," not merely a "subjective belief or unsupported speculation.")

- ***Dr. Cohen's testimony and opinions is based on facts that are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions.***

Frances v. State, 970 So. 2d 806, 814 (Fla. 2007) (Expert testimony should be excluded when the facts testified to are such nature as not require any special knowledge or experience in order for the jury to form its conclusion.)

V.C. v. State, 63 So. 3d 831, 832-33 (Fla. 3d DCA 2011) (We briefly address V.C.'s first two arguments. Section 90.704, Florida Statutes (2009), provides that an expert may base his or her opinion on facts made known to him or her at or before trial. And although the statute specifically authorizes opinions based on evidence the expert did not personally observe, see *Dorbad *833 v. State*, 12 So.3d 255, 257 (Fla. 1st DCA 2009), such testimony "should be excluded when the facts testified to are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions." *Id.* at 258 (quoting *Boyer v. State*, 825 So.2d 418, 419-20 (Fla. 1st DCA 2002)).

- ***Dr. Cohen's testimony and opinions will not aid or assist the fact-finder in understanding or determining a material issue or fact.***

Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993) (Relevancy is found where the expert's theory is tied sufficiently to the facts of the case and the expert's testimony assists the trier in resolving a factual dispute.)

Kumho Tire Co., Ltd v. Carmichael, 526 U.S. 137, 156 1195 S. Ct. 1167 (1999) (The trial court had to decide whether this particular expert had sufficient specialized knowledge to assist the jurors "in deciding the particular issues in the case." 4 J. McLaughlin, Weinstein's Federal Evidence ¶ 702.05[1], p. 702-33 (2d Ed.1998))

Salomon v. State, 267 So.3d 25, 31 (Fla. 4th DCA 2019) (Whether self-defense applies in a given case is a classic question that jurors are well equipped to handle. Expert opinion inadmissible)

County of Volusia v. Kemp, 764 So.2d 770, 773 (Fla. 5th DCA 2000) (Expert opinion inadmissible. ... must assist trier of fact in understanding the evidence or in determining a fact in issue. If expert testimony merely relays matters that are within the common understanding of the jury or tells the jury how to decide the case it should not be admitted.)

Rule 90.702 (Requires that the evidence or testimony assist the trier of fact to understand the evidence or to determine a fact in issue.)

- ***Dr. Cohen's testimony and opinions are not beyond the common understanding of the average person.***

Salomon v. State, 267 So.3d 25, 32 (Fla. 4th DCA 2019) (Expert witnesses expressing an opinion whether the use of force was justified in a self-defense case is not proper, because when the jury's decision turns on the credibility of witnesses the expert's testimony impinges on the province of the jury. An opinion under these circumstances turns on an evaluation of the credibility of witnesses, which is up to the jury, not experts.)

Mills v. Redwing Carriers, Inc., 127 So. 2d 453, 456 (Fla. 2d DCA 1961) (Consequently the opinion of an expert should be excluded where the facts testified to are of a kind that do not require any special knowledge or experience in order to form a conclusion, or are of such character that they may be presumed to be within the common experience of all men moving in ordinary walks of life.)

Mitchell v. State, 965 So. 2d 246, 251 (Fla. 4th DCA 2007) (In order to be helpful to the trier of fact, expert testimony must concern a subject which is beyond the common

understanding of the average person. Expert testimony should be excluded where the facts testified to are of such a nature as not to require any special knowledge or experience in order for the jury to form conclusions from the facts. ... the court correctly excluded "expert" testimony that the defendant could have considered himself under attack at the time of the murder, as the subject was not beyond the jury's common experience.)

County of Volusia v. Kemp, 764 So.2d 770, 773 (Fla. 5th DCA 2000) (Expert opinion inadmissible. ... must assist trier of fact in understanding the evidence or in determining a fact in issue. If expert testimony merely relays matters that are within the common understanding of the jury or tells the jury how to decide the case it should not be admitted.)

Rule 90.702 (Requires that the evidence or testimony assist the trier of fact to understand the evidence or to determine a fact in issue.)

- ***Dr. Cohen's testimony and opinions is only connected to the data she reviewed by the ipse dixit of her own testimony.***

Kemp v. State, 280 So.2d 81, 89 (Fla. 4th DCA 2019) (A court may conclude that there is simply too great an analytical gap between the data and the opinion offered.)

Summary of State's Argument

The opinions by Cohen, agreeing with defense counsel's hypothetical question "I'm a 70-something-year-old, and I'm in a quiet place or maybe a noisy place or a dark place, but I'm seated, and somebody who doesn't appear to me to have any sort of malady, perfectly healthy, is larger than me - if they're coming after me and attacking me, is it reasonable for me as a 70-year-old - describing what I did to you? Is it reasonable for me to perceive my own vulnerability?" exceeds the scope of her expertise, will not aid the jury in deciding a fact in issue, improperly bolsters the credibility of the Defendant, is not beyond the common understanding of the jury and serves only as a conduit for inadmissible evidence.

The various other personal opinions made during her testimony allegedly in support of the above-opinion are not

relevant and will only mislead or confuse the jury, will not be helpful to the jury, invades the province of the jury, and individual or collectively only improperly serves as a conduit of inadmissible evidence.

Her response to the allowed hypothetical question by defense counsel is merely a subjective believe or an unsupported speculation, based solely on the self-serving statements of the Defendant, that the Defendant reasonable perceived his own vulnerability.

Though not proffered during the immunity hearing, she did opinion during her deposition that under the circumstances it was "reasonable" for the Defendant to shoot Oulson. Again, her opinion is based solely on the self-serving statements of the Defendant and invades the province of the jury.

Daubert "Gatekeeping" Inquiry

The Daubert "gatekeeping" inquiry requires the court to make the following factual determinations.

- That the expert's opinion will assist the trier of fact through specialized expertise to determine a fact in issue.
- The expert is qualified to testify competently regarding the matters he/she intends to address.
- The expert may only testify about matters within the scope of his expertise.
- The opinion is based on sufficient facts and data.
- The opinion is a product of reliable principles and methods.
- The expert is reliably applying those principles and methods to the facts of the case.

It is the proponent of the expert that has the burden to explain how the expert's experience led to the conclusion he reached, why that experience was sufficient basis for the particular opinion(s) and just how that experience was reliably applied to the facts of the case. Kemp v. State, 280 So.3d 81, 90 (Fla. 4th DCA 2019)

Factual Summary

This offense occurred on January 13, 2014 inside Theater #10 at the Cobb Grove 16 Movie Theatres, 6333 Wesley Grove Blvd, Wesley Chapel, Pasco, FL.

The Defendant is charged by Information with Murder in the second degree and Aggravated Battery.

The State took the deposition of defense expert Dr. Donna Cohen, Ph.D. on June 30, 2016. See Exhibit #1, attached. **(In the Matter Of: State of Florida VS Curtis Reeves, Sworn Deposition of Donna Cohen, June 30, 2016.)** (Cited as Depo. Pg. ____)

Prior to the immunity hearing, the State filed its Motion In Limine To Exclude The Testimony Of Defense Expert Dr. Donna Cohen, Ph.D. The defense responded to said motion and the State filed a reply brief. The Court has not previously ruled on the State's original motion. The State's initial motion to exclude the testimony of Cohen was based on her sworn deposition in this case.

At the Defendant's immunity hearing on February 20, 2017, the Defendant claimed self-defense pursuant to FSS 776.012.

The Defendant called Dr. Donna Cohen Ph.D. as an aging expert. See Exhibit #2, attached. (Immunity Hearing Transcript, Volume 2, pages 192-233) (Cited as Pg. ____ Ln. ____) She testified she studies "vulnerability" because having a handle on understanding how to build resilience to help support people who have excess disabilities who probably will not get too much better and to help them understand that process ... Vulnerability has many meanings ... So here we're talking about the ways that we can understand how to keep people from doing things that will hurt themselves ... really don't know what they can do to take care of themselves. Pg. 209 through Pg. 210 Ln. 1-21.

Prior to offering the above-testimony at the immunity hearing, Cohen was not asked, nor did she volunteer the various materials she reviewed in preparation of testifying in this case. She only stated she reviewed various treatises, textbooks, articles, documents, and summary of panel discussions and interviewed the Defendant.

She testified she has been "qualified to testify as an expert in the field of aging. She stated she has been qualified to testify in terms of older people who have been financially

exploited, abused, older people whose family members are contesting their will, cases where competency is - or capacity which the scientists attest to, and a series of cases that deal with nursing home abuse and neglect, and a number of cases dealing with suicide and the use of medications, and other cases dealing with situations where caregivers had killed care recipients and did not kill themselves and go through the legal system." Pg. 220 Ln. 17-25 through Pg. 221 Ln. 11.

She testified at her deposition that she has never been listed or testified as an expert in a case involving strictly a homicide where the defendant does not suffer from depression, dementia or Alzheimer's not in a caregiving situation. She states it is her first time testifying in a criminal case such as R. Reeves. See Exhibit #1, attached, Depo. Pg. 18.

She responded "no" when defense counsel asked her if she agreed that none [of the above] has anything to do with the issue of ... perceiving his or her vulnerability. Pg. 221 Ln. 6-11. She explained "But people who are being abused are quite frequently afraid of what's happening to them, so that issue of vulnerability and recognition - they're vulnerable in recognizing they have no control to get out of the situation." Pg. 221 Ln. 18-22.

At the close of her testimony, in response to defense counsel's third hypothetical question - "I'm a 70-something-year-old, and I'm in a quiet place or maybe a noisy place or a dark place, but I'm seated, and somebody who doesn't appear to me to have any sort of malady, perfectly healthy, is larger than be - if they're coming after me and attacking me, is it reasonable for me as a 70-year-old - describing what I did to you? Is it reasonable for me to perceive my own vulnerability?" She responded yes. Pg. 226 Ln. 10-19.

The trial in the above-styled cause is scheduled to begin on October 19, 2020.

The State reasonable anticipates the Defendant will continue to claim self-defense and will call Dr. Donna Cohen Ph.D. as aging expert. Dr. Cohen testified at the immunity hearing. See, Exhibit 2, attached. (Immunity Hearing Transcript, Volume 2, pages 192-233)

Based on the facts of the case, the State anticipates that the Court will give the 2014 Standard Jury Instruction on Justified Use of Force, 3.6(f) which will include the following

two excerpts.

1. A person is justified in using deadly force if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another.
2. In deciding whether defendant was justified in the use of deadly force, you must judge him by the circumstances by which he was surrounded at the time the force was used. The danger facing the defendant need not be actual; however, to justify the use of deadly force, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoid only through the use of that force. Based upon appearances, the defendant must have actually believed that the danger was real.

This case will turn entirely on how the jury will evaluate the testimony of the Defendant (post-Miranda statement) and various theater patron eyewitnesses to the shooting.)

The State objects to Cohen's testimony, specifically including the below testimony.

Major Opinions

Opinion #1

The State objects to any questioning by the defense which directly or indirectly asks for an opinion regarding the reasonableness of the Defendant perceiving is "vulnerability" at the time of the shooting.

In response to defense counsel's third hypothetical question "I'm a 70-something-year-old, and I'm in a quiet place or maybe a noisy place or a dark place, but I'm seated, and somebody who doesn't appear to me to have any sort of malady, perfectly healthy, is larger than be - if they're coming after me and attacking me, is it reasonable for me as a 70-year-old - describing what I did to you? Is it reasonable for me to perceive my own vulnerability? She responded yes.

Opinion #2

Though not proffered in the immunity hearing, Cohen previously testified in her deposition that under the circumstances it was reasonable for the Defendant to shoot Oulson. Depo. Pg. 87

Argument

Daubert Standard

In July, 2013 the Florida Legislature enacted 90.702, FSS setting forth the Daubert standard to govern the admissibility of both expert scientific testimony and opinions and lay opinions. F.S.A. Section 90.702, Amended by Laws 2013, c. 2013-107, Section 1, eff. July 1, 2013.

Florida Courts have recognized that The Federal Rules of Evidence may provide persuasive authority for interpreting the counterpart provisions of the Florida Evidence Code. See *Sikes v. Seaboard Coast Line R.R.*, 429 So.2d 1216, 1221 (Fla. 1st DCA 1983) (citing Charles W. Ehrhardt, *A Look at Florida's Proposed Code of Evidence*, 2 Fla. St. U.L.Rev. 681, 682-83 (1974)). Yisrael v. State, 993 So.2d 952, n.7 (Fla. 2008)

The federal courts have long used the Daubert standard to govern the admissibility of scientific testimony and opinions. In federal Court, Federal Rule of Evidence 702 governs the admissibility of expert testimony in federal courts. Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993); Kumho Tire Co., Ltd. V. Carmichael, 256 U.S. 137, 119 S.Ct. 1167 (1999). Under Daubert, a federal district court applying Rule 702 is charged with the gate-keeping role of ensuring that scientific evidence is both relevant and reliable. 509 U.S. at 589-95.

The helpfulness standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility. 509 U.S. at 591-92. Thus if the proposed scientific evidence is not helpful in that the proposed science does not advance the inquiry in question, then the evidence does not meet the helpfulness standard. Reliability, on the other hand is grounded in the methods and procedures of science. 509 U.S. at 590.

The trial judge is to consider "whether the reasoning or

methodology underlying the testimony is scientifically valid" and "whether that reasoning or methodology properly can be applied to the facts in issue." Id. at 592-93. In making this determination, the following factors are considered: (1) "whether it can be (and has been) tested," (2) "whether the theory or technique has been subjected to peer review and publication," (3) "the known or potential rate of error," and (4) "general acceptance" in the "relevant scientific community." Id. at 593-94. Although this is a flexible inquiry, the trial judge's focus "must be solely on principles and methodology, not on the conclusions that they generate." Id. at 594-95. When determining the admissibility of expert testimony, "[t]he district court is not obligated to hold a **Daubert** hearing." Clay v. Ford Motor Co., 215 F.3d 663, 667 (6th Cir.2000).

The Proponent of expert testimony has the burden to prove the foundation by *preponderance of the evidence*. 509 U.S. at 592, n.10.

Here, Cohen will rely on her specialized knowledge, training and experience to conduct her analysis of the data/facts and to subsequently render her opinions. The "gatekeeping" function identified in Daubert applies equally to expert opinions based on specialized knowledge, training and experience. 509 US at 589.

In Kumho Tire, the Supreme Court further held that gatekeeping obligation extends not just to scientific testimony, but also to technical or other specialized knowledge, including testimony base on an expert's own experience. Kumho Tire Company, LTD, 526 U.S. 137, 149 119 S.Ct. 1167 (1999)

"In Daubert, this Court held that Federal Rule of Evidence 702 imposes a special obligation upon a trial judge to "ensure that any and all scientific testimony ... is not only relevant, but reliable." 509 U.S., at 589, 113 S.Ct. 2786. The initial question before us is whether this basic gatekeeping obligation applies only to "scientific" testimony or to all expert testimony. ...

For one thing, Rule 702 itself says:

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill,

experience, training, or education, may testify thereto in the form of an opinion or otherwise."

This language makes no relevant distinction between "scientific" knowledge and "technical" or "other specialized" knowledge. It makes clear that any such knowledge might become the subject of expert testimony. In *Daubert*, the Court specified that it is the Rule's word "knowledge," not the words (like "scientific") that modify that word, that "establishes a standard of evidentiary reliability." 509 U.S., at 589-590, 113 S.Ct. 2786. Hence, as a matter of language, the Rule applies its reliability standard to all "scientific," "technical," or "other specialized" matters within its scope. We concede that the Court in *Daubert* referred only to "scientific" knowledge. But as the Court there said, it referred to "scientific" *148 testimony "because that [wa]s the nature of the expertise" at issue. *Id.*, at 590, n. 8, 113 S.Ct. 2786. 526 U.S. at 147-48.

"Neither is the evidentiary rationale that underlay the Court's basic *Daubert* "gatekeeping" determination limited to "scientific" knowledge. *Daubert* pointed out that Federal Rules 702 and 703 grant expert witnesses testimonial latitude unavailable to other witnesses on the "assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Id.*, at 592, 113 S.Ct. 2786 (pointing out that experts may testify to opinions, including those that are not based on firsthand knowledge or observation). The Rules grant that latitude to all experts, not just to "scientific" ones." 526 U.S. at 147.

"We conclude that *Daubert*'s general principles apply to the expert matters described in Rule 702. The Rule, in respect to all such matters, "establishes a standard of evidentiary reliability." 509 U.S., at 590, 113 S.Ct. 2786. It "requires a valid ... connection to the pertinent inquiry as a precondition to admissibility." *Id.*, at 592, 113 S.Ct. 2786. And where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, see Part III, *infra*, the trial judge must determine whether the testimony has

"a reliable basis in the knowledge and experience of [the relevant] discipline." 509 U.S., at 592, 113 S.Ct. 2786." U.S. at 149.

The Legislature's adoption of the *Daubert* standard reflected its intent to **prohibit "pure opinion testimony, as provided in *Marsh v. Valyou*, 977 So.2d 543 (Fla.2007)[.]"** Ch. 13-107, § 1, Laws of Fla; see Charles W. Ehrhardt, 1 Fla. Prac., Evidence § 702.3 (2014 ed.) ("In adopting the amendment to section 90.702, the legislature specifically stated its intent that the *Daubert* standard was applicable to all expert testimony, including that in the form of pure opinion.") (footnote omitted). *Booker v. Sumter County Sheriff's Office/North American Risk Services*, 166 So.3d 189, 191 (Fla. 1st DCA 2015) § 90.702, Fla. Stat.

Florida Evidence Code

Rule 402 Relevancy

"To be legally relevant, evidence must pass the tests of materiality (bearing on a fact to be proved), competency (being testified to by one in a position to know), and legal relevancy (having a tendency to make the fact more or less probable) and must not be excluded for other countervailing reasons. Pearson, *Ungarbling Relevancy*, Fla.Bar J. 45 (1990)." *Sims v. Brown*, 574 So.2d 131, 134 (Fla. 1991)

Rule 702

90.702. Testimony by experts

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case. FLA. STAT. § 90.702 (2015)

In 2019, the Florida Supreme Court adopted Ch. 2013-107, § 1, Law of Fla. (2013), which amended sections 90.702 (Testimony by experts) and 90.704 (Basis of opinion testimony by experts), Florida Statutes, of the Florida Evidence Code to replace the *Frye*¹ standard for admitting certain expert testimony with the *Daubert*² standard, the standard for expert testimony found in Federal Rule of Evidence 702. In re Amendments to Florida Evidence Code, 278 So.3d 551, 552 (2019) (footnotes omitted)

As in the federal courts, in fulfilling the gate-keeping function the trial judge must make a factual determination that the expert's opinion will assist the trier of fact in understanding or determining a fact or issue. In addition, the court must find that the opinion is based on sufficient facts and data, the opinion is the product of reliable principles and methods, and the witness is reliably applying those principles and methods to the facts of the case.

Expert testimony is admissible only if the testimony is given by "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education." *Perez v. City of Sweetwater*, No. 16-24267-CIV-ATTONAGA/Goodman, 2017 WL 8231079 (USDC S.D. Florida 2017) (Order signed by Cecilia M. Altonaga, US District Judge on 7/14/17) (pg. 2)

"Assuming an expert is qualified to testify, the expert may testify only about matters within the scope of his or her expertise. See *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998) (explaining "the expert [must be] qualified to testify competently regarding the matters he intends to address" (alteration added; citations omitted)); *Feliciano v. City of Miami Beach*, 844 F. Supp. 2d 1258, 1262 (S.D. Fla. 2012) ("Determining whether a witness is qualified to testify as an expert requires the trial court to examine the credentials of the proposed expert in light of the subject matter of the proposed testimony." (internal quotation marks and citations omitted)). The inquiry is not stringent; "so long as the expert is minimally qualified, objections to the level of the expert's expertise go to credibility and weight, not admissibility." *Pleasant Valley Biofuels, LLC v. Sanchez-Medina*, No. 13-23046-CIV, 2014 WL 2855062, at *2 (S.D. Fla. June

23, 2014) (internal quotation marks and citation omitted). Id. at 2.

Even though an expert witness is qualified under section 90.702 other evidentiary rules are applicable. Unless an expert's testimony is **relevant** to a fact or issue, it is not admissible. Sunbeam Television Corp. v. Mitzel, 83 So.3d 865, 876 (Fla 3d DCA 2012)

The witness must possess **specialized knowledge** concerning the discrete subject related to the expert opinion to be presented. ... The expert must have adequate experience with the subject matter. Chavez v. State, 12 So.3d 199, 205-6 (Fla, 2009)

"The Court of Appeals for the Eleventh Circuit has set forth a three-prong inquiry encompassing the requirements of Daubert and its progeny and Rule 702. Under the three-prong inquiry, a court determining the admissibility of expert testimony must consider whether

(1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue." Frazier, 387 F.3d at 1260 (citations omitted).

The proponent of the expert opinion bears the burden of establishing qualification, reliability, and helpfulness by a preponderance of the evidence. 509 U.S. at 592, n.10.

"[I]f the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.'" Frazier, 387 F.3d at 1261.

"Method" Under Daubert and Rule 90.702

The Court's inquiry under Rule 702 must focus on the **methodology**, not the conclusions, but the Court is not required to admit opinion testimony only connected to existing data by an expert's unsupported assertion. See Daubert, 509 U.S. at 595.; Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

"[T]he test under *Daubert* is not the correctness of the expert's conclusions but the soundness of his methodology." *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995) ("*Daubert II*"). However, an expert's opinion must be based upon "knowledge," not merely "subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590, 113 S.Ct. 2786. Nothing in *Daubert* requires a court "to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert," and "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). Kemp v. State, 280 So.3d 81, 89(Fla. 4th DCA 2019)

However, a witness who has principally relied on experience to form his opinion "must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." Frazier, 387 F.3d at 1261. The Court is not required to "admit opinion evidence that is connected to existing data only by the ***ipse dixit*** of the expert." 526 U.S. at 1179).

"There are four requirements for deciding the admissibility of expert testimony:

- (1) that the opinion evidence be helpful to the trier of fact;
- (2) that the witness be qualified as an expert;
- (3) that the opinion evidence can be applied to evidence offered at trial; and
- (4) that evidence, although technically relevant, must not present a substantial danger of unfair prejudice that outweighs its probative value.

Anderson v. State, 786 So.2d 6, 8 (Fla. 4th DCA 2000) (quoting *Holiday Inns, Inc. v. Shelburne*, 576 So.2d 322, 335 (Fla. 4th

DCA 1991)) (footnote omitted). In order to be helpful to the trier of fact, expert testimony must concern a subject which is beyond the common understanding of the average person. *State v. Nieto*, 761 So.2d 467, 468 (Fla. 3d DCA 2000). Expert testimony should be excluded where the facts testified to are of such a nature as not to require any special knowledge or experience in order for the jury to form conclusions from the facts. *Johnson v. State*, 393 So.2d 1069, 1072 (Fla.1980)." *Mitchell v. State*, 965 So.2d 246, 251 (Fla. 2007)(... the court correctly excluded "expert" testimony that the defendant could have considered himself under attack at the time of the murder, as the subject was not beyond the jury's common experience.)

Here, Cohen was qualified as an expert on aging. She was asked to determine, if in her opinion, under the circumstances the Defendant found himself, was it reasonable for him to perceive his own vulnerability. At the immunity hearing she explained the method he used to come to this conclusion.

She stated as follows:

- Reviewed various treatises, textbooks, articles, documents, and summary of panel discussions. Pgs. 216 - 220
- Interviewed the Defendant. Pg. 223

She did not identify any other material she reviewed.

After viewing the above-identified material and interviewing the Defendant she agreed with defense counsel "I'm a 70-something-year-old, and I'm in a quiet place or maybe a noisy place or a dark place, but I'm seated, and somebody who doesn't appear to me to have any sort of malady, perfectly healthy, is larger than be - if they're coming after me and attacking me, is it reasonable for me as a 70-year-old - describing what I did to you? Is it reasonable for me to perceive my own vulnerability?" Pg. 226.

At her deposition she identified she reviewed the following material videos (Depo. Pgs. 45, 59-60, 138), Paso Sheriff Office reports (Depo. Pgs. 63, 112), X-Ray and MRI reports (Depo. Pg. 122), witness statements (Depo. Pg. 57), photographs (Depo. Pg. 115) and interviewed Mrs. Reeves (Depo. Pg. 93)

At her deposition she admitted that even though she reviewed the above-material, she did not rely on any of those materials, her opinion is based solely on her interview of the Defendant. (Depo. Pgs. 83-84)

At her deposition she explained her method in determining that it was reasonable for the Defendant to perceive his own vulnerability and how, under the circumstances it was reasonable for the Defendant to shoot Oulson. An excerpt of that testimony is as follows:

Pg. 83

Q All right. Let me ask you this:

4 In regard to Mr. Reeves, the threat assessment
5 that you conducted, I guess that's the way I'll phrase it,
6 and then the opinions that you derived from that threat
7 assessment interview, the perception by Mr. Reeves of -- to
8 the extent that he was threatened was self-reported by
9 Mr. Reeves, correct?

10 A Correct.

11 Q Okay. Do you have any other information other
12 than what Mr. Reeves self-reported to you in making the
13 opinions you just talked about?

14 Because we talked about his perception.

15 A Correct.

16 Q All right. Is there any other information?

17 A I have a narrow area of expertise in terms of
18 perceived vulnerability of this old, disabled man.
19 In reviewing the case, there's lots of background
20 information. It is not relevant to his perception of the
21 potential, the severity, the violence, that tragic day in
22 Cobb Theater.

23 Q Would it be correct to say that what you told me
24 is based upon your opinion as his perception of exactly
what

25 Mr. Reeves told you his perception was. You didn't change

Pg. 84

that in any way.

2 A Of course not.

3 Q Okay. So if Mr. Reeves took the stand and said,
4 "I felt this way. I felt this way. I felt this way," A
5 through Z, you would take the stand and say "A through Z,"
6 right? Because you don't have any other information other
7 than what he told you.

8 A The point that's critical here --

9 Q Mm-hmm.

10 A -- is a violent response of Mr. Reeves --

11 Q Mm-hmm.

12 A -- who is sick and scared and old and is scared to
13 death 'cause he can't take care of himself --
14 Q Mm-hmm.
15 A -- is the reason he used his gun and killed
16 Mr. Oulson. That is the relevant issue. An old man who
17 can't defend himself, just like lots of old people out
18 there, he is not to be looked at as a cop. He is to be
19 looked at as an old, sick man who can't find any way out of
20 a situation.
21 What he believes -- and he says it multiple times
22 to Proctor and he said it multiple other times -- he did
23 not
24 plan to do this, but he also knew that he could not protect
25 himself.
26 So the issue that Mr. Reeves would say A to Z, and

Pg. 85

as you presented it, I would interpret that in terms of
2 perception of vulnerability of an old, sick man, consistent
3 with perceptions of vulnerability of lots of old people who
4 can't take care of themselves.
5 Q Your opinion, as far as the perception of
6 Mr. Reeves, that is no different than the perception that
7 Mr. Reeves holds.
8 Your opinion is the same opinion that Mr. Reeves
9 also holds. Mr. Reeves says, "I'm an old man. I can't
10 defend myself. He's going to beat the crap out of me. I'm
11 scared." That's his perception.
12 A And it's also the perception of lots of older
13 people.
14 Q Okay. But we're talking about Mr. Reeves.
15 A I know. But he's an old man.
16 Q Okay.
17 A And the perceptions of vulnerability and being
18 hurt are common in the older population who are
19 characterized as a vulnerable population.
20 Q Okay. And that is relevant how in this particular
21 case?
22 A I don't understand --
23 Q Okay.
24 A -- the question.
25 Q We have Mr. Reeves, on January 13th, 2014, holding

Pg. 86

certain beliefs that you've already articulated for us,
2 right? His perceptions.
3 You asked him specifically what were his beliefs
4 and perceptions in the theater.
5 A Right.
6 Q And you've told us that.
7 A Correct.
8 Q Okay. Based on that, you've rendered an opinion
9 that, based on those perceptions, that, what? His
10 perceptions are valid?
11 I'm trying to determine why your testimony is any
12 different than Mr. Reeves' testimony on the stand.
13 A My testimony is as an expert in the area of
14 aging --
15 Q Yes.
16 A -- and with the subspecialties of violence and
17 threat assessment, where I am interpreting the sequence of
18 events that occurred that scared the crap out of this
person
19 and what he couldn't do. So that I'm providing that kind of
20 limited expertise.
21 This is why he was so scared.
22 And when you look at threat assessment areas and
23 you look at what happened, he was physically unable.
24 Q Mm-hmm.
25 A He was old. He had no control of the situation.

Pg. 87

A Given what happened --
2 Q Mm-hmm..
3 A -- he is being threatened by a younger man coming
4 over the seat towards him, threatening. He is back in his
5 seat. He can not escape.
6 Q Yes, ma'am.
7 A There is no way, given the imminence of
8 Mr. Oulson's violent action, potentially damaging -- to
9 move.
10 He couldn't move.
11 Q Mm-hmm.
12 A He was trapped and scared to death. He had no
13 other choice than to do what he did because there were no
14 other options in that fast sequence of events.

15 Q So your opinion of what he did was reasonable.
16 Is that your opinion?
17 A Given the circumstances, he had no other choice.
18 Q I'm going to ask one more time.
19 Is your opinion what Mr. Reeves did, shooting
20 Mr. Oulson, was reasonable under the circumstances as you
21 know them?
22 A Yes.
23 Q Is that your opinion?
24 A Yes. See Exhibit #2, attached. (**In the Matter Of:**
State of Florida VS Curtis Reeves, Sworn Deposition of Donna
Cohen, June 30, 2016.) (Depo. Pgs. 83-87)

It is absolutely clear from her deposition testimony that the opinion she offered at the immunity hearing is based solely on the self-serving statements of the Defendant. Her method is nothing more than interviewing the Defendant and forming a subjective belief of "reasonableness".

The method described by Cohen is a superficial version of the methods used by the experts in Salomon and the Kemp cases, which were found by the courts to be unreliable.

In Salomon, [T]he experts reviewed witness statements and other evidence in the case, personally interviewed some witnesses, and essentially opined on the issue of whether the use of deadly force was reasonable, and therefore justifiable under the law. ... The State expert testified his method was he evaluated what the witnesses said. He evaluated the facts of the case. He looks at the perspective of the Defendant, the perspective of the witnesses ... then look at implicit biases ... biases within people ... look at independent witnesses and look at what are the facts. "It is all a part of the totality of the circumstances when we look and we evaluate what the witnesses are telling us." Salomon v. State, 267 So.3d 25, 31-32 (Fla. 4th DCA 2019)

In Kemp, [T]he expert testified his method was eyeballing the shape of the crash damage on a vehicle to determine if the vehicle that made the impact was breaking. "[Expert's] repeated invocation of the magic words "training and experience" was insufficient, without more to establish the reliability of his opinion under Daubert." Kemp v. State, 280 So.3d 81, 89 (Fla. 4th DCA 2019)

Rule 90.702 required that the testimony is the product of reliable principles and methods; and the witness has applied the

principles and methods reliably to the facts of the case.

Cohen's explanation as to how her experience can reliable be applied to the facts in this case does not sufficiently satisfy Daubert's requirement that the experts method at arriving at her opinion is reliable.

Cohen failed to explain how her experience led to the conclusion she reached, why her experience is a sufficient basis for the opinion and how that experience is reliably applied to the facts of this case. Her explanation as to how her experience is reliably applied to the facts of this case is supported merely by her subjective belief or unsupported speculation. 509 U.S. at 590. As the court in Kemp noted "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." Kemp v. State, 280 So.3d 81, 89(Fla. 4th DCA 2019)

Cohen's testimony is inadmissible. Rule 90.403

"Helpfulness" Under Daubert and Rule 90.702

"Expert testimony is admissible only if "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." FED. R. EVID. 702(a). Expert testimony is helpful if it "concerns matters that are beyond the understanding of the average lay person," but expert testimony generally is not helpful "when it offers nothing more than what lawyers for the parties can argue in closing arguments." *Frazier*, 387 F.3d at 1262-63 (citations omitted). Thus, while "[a]n expert may testify as to his opinion on an ultimate issue of fact[,] ... [a]n expert may not ... merely tell the jury what result to reach." *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990) (alterations added; citations omitted). Similarly, an expert "may not testify to the legal implications of conduct; the court must be the jury's only source of law." *Id.* (citations omitted).

Expert opinion testimony is admissible under section 90.702 only when it will assist the trier of fact in understanding the evidence or in determining a fact in issue. Subject matter must be of a nature of which the jury does not have basic knowledge. See, State Farm Mut. Auto Ins. Co. v. Bowling, 81 So.3d 538, 540 (Fla. 2nd DCA 2012)

If a fact is so basic and so well known that the expert opinion would not aid the jury in its deliberation, the expert testimony is not admissible. Jordan v. State, 694 So.2d 708, 717 (Fla 1997) (That an "elderly woman approached in public by a man with a gun will be terrified" is not a proper subject for expert testimony since it is a subject persons know as a result of their "common experience".), Florida Power Corp. v. Barron, 481 So. 2d 1309, 1310 (Fla 2nd DCA 1986) (Reversible error to admit human factor expert's testimony where there were no unusual circumstances in the case; "Because the importance and validity of the testimony of an expert witness are increased in the mind of the jury, allowing an expert witness to testify to matters of common understanding creates the possibility that the jury will foregoing independent analysis of the facts when it does not need assistance in making that analysis. This is particularly true when there are not unusual or complicated circumstances surround the incident about which the expert testifies"), Mitchell v. State, 965 So. 2d 246, 251 (Fla. 4th DCA 2007) (Opinion that defendant reasonably believed that he had to defend himself or be killed which was based entirely on defendant's self-serving statements was inadmissible because "there is nothing in his testimony which concerns a subject beyond the common understanding of the average person".)

"To be admissible, expert testimony must "assist the trier of fact in understanding the evidence or in determining a fact in issue" § 90.702, Fla. Stat (2017). We have also described this quality of expert testimony as being "helpful to the trier of fact." Anderson v. State, 786 So.2d 6, 8 (Fla. 4th DCA 2000) (quoting Holiday Inns, Inc. v. Shelburne, 576 So.2d 322, 335 (Fla. 4th DCA 1991)). Whether self-defense applies in a given case is a classic question that jurors are well equipped to handle. As we wrote in Mitchell v. State:

In order to be helpful to the trier of fact, expert testimony must concern a subject which is beyond the common understanding of the average person. Expert testimony should be excluded where the facts testified to are of such a nature as not to require any special knowledge or experience in order for the jury to form conclusions from the facts.

965 So.2d 246, 251 (Fla. 4th DCA 2007) (internal citation omitted). Here, the experts' opinions on the viability of self-

defense necessarily involved their estimation of the credibility of the competing witnesses, a determination squarely within the wheelhouse of the jury as the finder of fact." Salomon v. State, 267 So.3d 25, 31 (Fla. 4th DCA 2019)

Here, the case is not sufficiently technical in nature that an expert could assist or aid the jury. The shooting was captured on video, which the jury can interpret the content without the aid of an expert's testimony. The Defendant made post-Miranda statements, which the jury is quite capable of determining the "truthfulness" of the statements. The scene of the shooting was photographed, which the jury is quite capable of associating the evidence at the scene with the Defendant's statement and various other witnesses in the theater at the time of the shooting and making their own determination as to the "reasonableness" of the Defendant perceiving his own vulnerability and the shooting of Oulson.

Cohen's ultimate opinion, agreeing "...that "I'm a 70-something-year-old, and I'm in a quiet place or maybe a noisy place or a dark place, but I'm seated, and somebody who doesn't appear to me to have any sort of malady, perfectly healthy, is larger than be - if they're coming after me and attacking me, is it reasonable for me as a 70-year-old - describing what I did to you? Is it reasonable for me to perceive my own vulnerability?" does not assist the fact-finder in deciding a material dispute. The opinion contains no facts, which concerns a subject matter that is beyond the common understanding of the average person. The opinion is based solely on the Defendant's self-serving hearsay statement he made to her.

Cohen's Testimony Exceeds The Scope Of Her Expertise

Cohen testified she has been "qualified to testify as an expert in the field of aging. She stated she has been qualified to testify in terms of older people who have been financially exploited, abused, older people whose family members are contesting their will, cases where competency is - or capacity which the scientists attest to, and a series of cases that deal with nursing home abuse and neglect, and a number of cases dealing with suicide and the use of medications, and other cases dealing with situations where caregivers had killed care recipients and did not kill themselves and go through the legal system." Pg. 220 Ln. 17-25 through Pg. 221 Ln. 11

Her specialized knowledge, skill, or training does not make

her any more qualified to determine the "reasonableness" of the Defendant's mental state or conduct than the jury.

'Reasonableness' is a legal concept that the jury is capability of determining without the aid of an expert.

Rule 90.704 Reliance on Inadmissible Evidence.

Under section 90.704, an expert may rely on facts or data that have not been admitted, or are not even admissible, when those underlying facts are of a type reasonably relied upon by experts in the subject to support the opinions expressed.

In Mitchell the court found that Dr. Edney's proffered testimony boils down to a statement that, based upon what Mitchell told him, Mitchell reasonably believed that he had to defend himself or be killed. There is nothing in his testimony which concerns a subject beyond the common understanding of the average person. If the jury believed Mitchell, then it would find that he acted in self-defense. Thus, the issue is not one on which expert testimony should be permitted. It merely allowed an expert witness to bolster Mitchell's credibility which is improper. *Acosta v. State*, 798 So.2d 809, 810 (Fla. 4th DCA 2001). And it improperly introduces Mitchell's self-serving statements which are otherwise inadmissible hearsay. See *Lott v. State*, 695 So.2d 1239, 1243 (Fla.1997). Mitchell v. State, 965 So.2d 246, 251 (Fla. 4th DCA 2007)

Rule 90.403 Exclusion On Grounds Of Prejudice Or Confusion

As with other evidence, expert testimony is subject to a section 90.403 balancing. Sunbeam Television Corp. v. Mitzel, 83 So.3d 865, 876 (Fla 3d DCA 2012) (The district court excluded this testimony of industry discrimination as irrelevant and prejudicial stating that "the conclusion by [Plaintiff's expert] of institutionalized discrimination in the United States concert promotion industry is not relevant to the issues in Plaintiff's case and would only serve 'to interject substantial unfair prejudice into the case' and confuse the jury by directing its attention from the issues in this case.")

In addition to determining the reliability of the proposed testimony, Daubert instructs that Rule 702 requires the Court to

determine whether the evidence or testimony assists the trier of fact in understanding the evidence or determining a fact in issue. See Daubert 509 U.S. at 591. This consideration focuses on the relevance of the proffered expert testimony or evidence. The Court explained that to satisfy this relevance requirement, the expert testimony must be "relevant to the task at hand." Daubert, 509 U.S. at 591.

An expert opinion based exclusively on hearsay or other inadmissible evidence is generally excluded under section 90.403 because its probative value is outweighed by the danger of unfair prejudice. Linn v. Fossum, 946 So. 2d 1032 (Fla. 2006); Doctors Co. v. State, Dept. of Ins., 940 So. 2d 466, 470 (Fla. 1st DCA 2006) (No abuse of discretion to exclude testimony of insurance expert based on conversations with party's attorney and actuary. The opinion, "if allowed, would have been based on inadmissible hearsay.")

"Despite logically relevant evidence being admissible under Section 90.402, and not being excluded under any of the exclusionary rules in the Code, it is inadmissible under section 90.403 when its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence." Charles W. Ehrhardt, *Florida Evidence* § 403.1, pg.229 (2019 ed.)

Exclusion of relevant evidence

"[P]roper application of section 90.403 requires a balancing test by the trial judge. Only when the unfair prejudice substantially outweighs the probative value of the evidence must the evidence be excluded." Alston v. State, 723 So.2d 148, 156 (Fla.1998).

"Unfair prejudice" has been described as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Brown v. State, 719 So.2d 882, 885 (Fla.1998) (quoting Old Chief v. United States, 519 U.S. 172, 180, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997)). This rule of exclusion "is directed at evidence which inflames the jury or appeals improperly to the jury's emotions." Steverson v. State, 695 So.2d 687, 688-89 (Fla.1997). In performing the balancing test to determine if the unfair prejudice outweighs the probative value of the evidence, the trial court should consider the need for

the evidence, the tendency of the evidence to suggest an emotional basis for the verdict, the chain of inference from the evidence necessary to establish the material fact, and the effectiveness of a limiting instruction. *Taylor v. State*, 855 So.2d 1, 22 (Fla.2003). The trial court is obligated to exclude evidence in which unfair prejudice outweighs the probative value in order to avoid the danger that a jury will convict a defendant based upon reasons other than evidence establishing his guilt." McDuffie v. State, 970 So.2d 312, 326-27 (Fla. 2007)

Conclusion

The court's gatekeeping role ensures the reliability and relevance of the expert's testimony offered into evidence.

1. Her opinions on the reasonableness of the Defendant's conduct and perception is an impermissible legal conclusion and not admissible.
2. Her method of determining the reasonableness of the Defendant's perception and of the shooting is unreliable and exceeds the scope of her proffered expertise, i.e. "aging" expert.
3. Her opinions are based solely on the self-serving statements of the Defendant.
4. Her opinions invade the province of the jury.
5. Her opinions do not aid the jury in deciding a material fact at issue, but only tells the jury how to decide a particular fact in issue.

Dr. Cohen's testimony should be excluded in its entirety.

WHEREFORE, the State of Florida respectfully requests the Court to enter its Order excluding any and all testimony of Dr. Donna Cohen, Ph.D. and to instruct the attorney for the Defendant, and any witnesses, not to mention or refer, or interrogate concerning, or attempt to convey to the jury in any manner, either direct or indirect, any of the above mentioned

facts without first obtaining permission of the Court outside the presence and hearing of the jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing State's Daubert Motion To Exclude The Testimony Of Defense Expert Dr. Donna Cohen, Ph.D. was furnished to Richard Escobar, Esq., Attorney for the Defendant, at 2917 West Kennedy Blvd., Suite 100, Tampa, FL 33609-3163, by U.S. Mail or Personal Service this 24th day of June, 2020.

BERNIE McCABE, State Attorney
Sixth Judicial Circuit of Florida

By: 

Glenn L. Martin, Jr.
Assistant State Attorney
Bar No. 435988
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Clearwater, FL 33758
(727) 464-6221

EXHIBIT #1

1
2 IN THE CIRCUIT COURT FOR PASCO COUNTY, FLORIDA

3 CASE NO. CRC14-00216CFAES

4 STATE OF FLORIDA

5 vs.

6 CURTIS J. REEVES,

7 Defendant.
8 _____/

9
10 DEPOSITION OF: DONNA COHEN.

11 DATE: June 30, 2016, 9:03 a.m.

12 PLACE: Escobar & Associates
13 2917 West Kennedy Blvd, Suite 100
Tampa, FL 33609.

14 REPORTED BY: Donna M. Kanabay RMR, CRR, FPR,
15 Notary Public,
State of Florida at large.
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1 a result of wandering or being hurt outside, not directly by
2 a caregiver.

3 Q And I guess that falls into your research and your
4 previous testimony regarding guidelines set up for living --
5 senior living facilities, caregiving facilities, how to make
6 people secure and safe.

7 Is that what we're talking about?

8 A Yes, sir.

9 Q Okay. Has really nothing to do with, quote, a
10 homicide like we have in this particular situation --

11 A That's correct.

12 Q -- with Mr. Reeves.

13 A But I wanted to clarify --

14 Q That is fine.

15 A -- one case.

16 Q Any others?

17 A Okay. You pointed out 37, case 37 on 14, and
18 then --

19 Q Yes, ma'am. It's a wrongful death --

20 A Right.

21 Q -- so I don't know what that is.

22 A That again had to do with either an elopement or
23 likely an elopement in these cases. That was back in 2004,
24 so ...

25 Case number 38 on page 15 is an elopement, a

1 wrongful death.

2 Q I'm not familiar with the term "elopement" as
3 you're using it within your profession.

4 What is that?

5 A Elopement means wandering away.

6 Q Okay. So again, the same thing we talked about
7 before.

8 A Yes, sir.

9 Q Okay. So based on my questioning and as an expert
10 in this particular case, you have not been listed or
11 testified as an expert in a case involving strictly a
12 homicide where the defendant does not suffer from
13 depression, dementia or Alzheimer's not in a caregiving
14 situation, correct? This is your first time testifying in a
15 criminal case such as Mr. Reeves'.

16 A Correct.

17 Q Okay. I made some assumptions when I asked that
18 question, so I'm going to -- I'm going to follow up on that
19 so I make sure that your answer is correct.

20 Have you met Mr. Reeves?

21 A Yes, sir.

22 Q Did you provide or perform or administer or stand
23 by, whatever term you want to use, any type of tests,
24 assessments to Mr. Reeves to determine any type of motor
25 skills, cognitive behavior attributes at all?

1 Q Mm-hmm.

2 A And I think that, from Mr. Reeves' point of view,
3 where he's assessing the situation, he chose not to escalate
4 it and wanted help from the manager to deal with what was
5 some kind of interchange.

6 I don't know how long it lasted.

7 Q And do you know how many times Mr. Reeves
8 contacted or had contact with Mr. Oulson before going to the
9 manager?

10 A There was an extended interaction. I don't
11 believe it was multiple interactions.

12 Q Did you watch the video?

13 A I watched the video.

14 Q All right. And did you see how many times
15 Mr. Reeves leaned over and was in very close proximity of
16 Mr. Oulson even though you can't see him in the frame?

17 MR. MICHAELS: I'm going to object and ask her
18 not to answer the question.

19 If you want to show her the video, certainly
20 she can review it and tell you what she saw.

21 If you want to ask her what she remembers or
22 not, I guess that's a different question.

23 MR. MARTIN: That is a different question.

24 BY MR. MARTIN:

25 Q Do you remember how many times Mr. Reeves leaned

1 perceptions of control were zero because there was no place
2 he could go. And he perceived imminent threat and severe
3 threat. And as an old man, unable to protect himself in
4 this situation, he was scared and had no other alternative
5 in his mind than to pull the gun.

6 So his age, his disability and the probability of
7 threat, the severity of the threat, play into this old man
8 who was cornered.

9 Q You mentioned some facts to me. And I'm just
10 going to ask you the source of the information that you
11 provided.

12 What is the source of the information that a cell
13 phone was thrown?

14 A Mr. Reeves, in his interview in the police car
15 afterwards -- it was obviously immediately after. Everybody
16 was in a state of shock at that point -- knew that he had
17 been hit by something, and that the cell phone was found at
18 his feet, and so he alluded to probably the cell phone.

19 My -- so that again I'm approaching this from his
20 perception of vulnerability because he made the action.

21 Q I know, but you've stated this as facts. You
22 stated that he threw the cell phone. And then just a moment
23 later you indicated having been hit in the head with a cell
24 phone.

25 So where are you getting your information that the

1 And the issue is what he perceives as his imminent
2 danger --

3 Q Okay.

4 A -- and why he acted the way he did.

5 Q All right. You mentioned another fact. And you
6 stated as a fact that Mr. Oulson was standing on his chair,
7 starting to climb over.

8 What is your source of --

9 A I'm reporting --

10 Q Where did you get that information?

11 A From Mr. Reeves. I'm reporting it based upon
12 Mr. Reeves telling me his perception.

13 Forgive me if the use of the word "fact" becomes
14 confusing.

15 Q I just want to know the source of the information.

16 A Mr. Reeves.

17 Q All right. No other place.

18 A I don't have a clear memory, because I didn't look
19 at it recently, of the enhanced surveillance tape, which
20 suggests that something was thrown.

21 But again, my expertise is on Mr. Reeves'
22 perception.

23 Q When you say the enhanced tape, what tape are we
24 talking about?

25 A Enhanced video.

1 Q All right. Suggesting something was thrown?

2 A There was an original theater surveillance video
3 and BeckTech enhanced surveillance video.

4 Q Okay.

5 A And again, these videos are very difficult to look
6 at, given the quality of the videos and the ability to
7 identify what objects are there.

8 Q Would your opinion that you just gave change at
9 all if you later believed or learned that Mr. Reeves was not
10 hit in the face with a fist or the cell phone was not thrown
11 or he was not hit with the cell phone; simply a bag of
12 popcorn was tossed in his face?

13 A No.

14 Q Would your assessment change?

15 Take all those facts away and just leave a bag of
16 popcorn being tossed at Mr. Reeves.

17 A Those aren't all the observations.

18 Mr. Reeves perceived that he was being -- going to
19 be attacked --

20 Q Mm-hmm.

21 A -- was going to be beat up, and had no way out.

22 Q Okay.

23 A So regardless of your presumption, there are a
24 series of events that say he perceived, he was too old, too
25 sick, too physically compromised --

1 letting them know that this can occur. Homicide can occur
2 without homicide-suicide.

3 Q All right. Let me ask you this:

4 In regard to Mr. Reeves, the threat assessment
5 that you conducted, I guess that's the way I'll phrase it,
6 and then the opinions that you derived from that threat
7 assessment interview, the perception by Mr. Reeves of -- to
8 the extent that he was threatened was self-reported by
9 Mr. Reeves, correct?

10 A Correct.

11 Q Okay. Do you have any other information other
12 than what Mr. Reeves self-reported to you in making the
13 opinions you just talked about?

14 Because we talked about his perception.

15 A Correct.

16 Q All right. Is there any other information?

17 A I have a narrow area of expertise in terms of
18 perceived vulnerability of this old, disabled man.

19 In reviewing the case, there's lots of background
20 information. It is not relevant to his perception of the
21 potential, the severity, the violence, that tragic day in
22 Cobb Theater.

23 Q Would it be correct to say that what you told me
24 is based upon your opinion as his perception of exactly what
25 Mr. Reeves told you his perception was. You didn't change

1 that in any way.

2 A Of course not.

3 Q Okay. So if Mr. Reeves took the stand and said,
4 "I felt this way. I felt this way. I felt this way," A
5 through Z, you would take the stand and say "A through Z,"
6 right? Because you don't have any other information other
7 than what he told you.

8 A The point that's critical here --

9 Q Mm-hmm.

10 A -- is a violent response of Mr. Reeves --

11 Q Mm-hmm.

12 A -- who is sick and scared and old and is scared to
13 death 'cause he can't take care of himself --

14 Q Mm-hmm.

15 A -- is the reason he used his gun and killed
16 Mr. Oulson. That is the relevant issue. An old man who
17 can't defend himself, just like lots of old people out
18 there, he is not to be looked at as a cop. He is to be
19 looked at as an old, sick man who can't find any way out of
20 a situation.

21 What he believes -- and he says it multiple times
22 to Proctor and he said it multiple other times -- he did not
23 plan to do this, but he also knew that he could not protect
24 himself.

25 So the issue that Mr. Reeves would say A to Z, and

1 as you presented it, I would interpret that in terms of
2 perception of vulnerability of an old, sick man, consistent
3 with perceptions of vulnerability of lots of old people who
4 can't take care of themselves.

5 Q Your opinion, as far as the perception of
6 Mr. Reeves, that is no different than the perception that
7 Mr. Reeves holds.

8 Your opinion is the same opinion that Mr. Reeves
9 also holds. Mr. Reeves says, "I'm an old man. I can't
10 defend myself. He's going to beat the crap out of me. I'm
11 scared." That's his perception.

12 A And it's also the perception of lots of older
13 people.

14 Q Okay. But we're talking about Mr. Reeves.

15 A I know. But he's an old man.

16 Q Okay.

17 A And the perceptions of vulnerability and being
18 hurt are common in the older population who are
19 characterized as a vulnerable population.

20 Q Okay. And that is relevant how in this particular
21 case?

22 A I don't understand --

23 Q Okay.

24 A -- the question.

25 Q We have Mr. Reeves, on January 13th, 2014, holding

1 certain beliefs that you've already articulated for us,
2 right? His perceptions.

3 You asked him specifically what were his beliefs
4 and perceptions in the theater.

5 A Right.

6 Q And you've told us that.

7 A Correct.

8 Q Okay. Based on that, you've rendered an opinion
9 that, based on those perceptions, that, what? His
10 perceptions are valid?

11 I'm trying to determine why your testimony is any
12 different than Mr. Reeves' testimony on the stand.

13 A My testimony is as an expert in the area of
14 aging --

15 Q Yes.

16 A -- and with the subspecialties of violence and
17 threat assessment, where I am interpreting the sequence of
18 events that occurred that scared the crap out of this person
19 and what he couldn't do. So that I'm providing that kind of
20 limited expertise.

21 This is why he was so scared.

22 And when you look at threat assessment areas and
23 you look at what happened, he was physically unable.

24 Q Mm-hmm.

25 A He was old. He had no control of the situation.

1 Q Mm-hmm.

2 A He had an aggressive, angry, threatening
3 individual.

4 Q Mm-hmm.

5 A And it was reasonable that he did what he did
6 'cause he had no other choice than to be potentially badly
7 beaten or worse.

8 Q All right. So one of your opinions is that his
9 conduct was reasonable under the circumstances as he knew
10 it.

11 A He had no other --

12 Q Is that your opinion?

13 A My opinion is he had no other choice, given what
14 happened.

15 Q Than what?

16 A Pardon?

17 Q Than what? He had no other choice than what?

18 A I already described --

19 Q No, no.

20 A -- the areas.

21 Q No, no.

22 He had no other choice than, what? Walk up and
23 leave? Call on his phone to the police? Shoot Mr. Oulson.

24 A He couldn't --

25 Q What did he have no other choice to do?

1 literature, scientific literature, to refer to the immediate
2 consequences of a presenting situation. So that suicide can
3 be imminent. Homicide can be imminent. And there are
4 things you do when faced with a situation that is about to
5 occur or has a high probability of occurring with a high
6 level of severity.

7 Q Okay.

8 MR. MICHAELS: May we go off for a moment?

9 MR. MARTIN: Mm-hmm.

10 (A discussion was held off the record.)

11 BY MR. MARTIN:

12 Q Okay. Let's talk about Mrs. Reeves.

13 In February of 2016, did you have an occasion to
14 interview Vivian Reeves?

15 A Yes, I did.

16 Q And was that here at the office of Mr. Escobar and
17 Mr. Michaels?

18 A Yes.

19 Q And about how long did that interview take place,
20 length of time?

21 A Not quite a half an hour.

22 Q Did you take notes?

23 A No, I did not.

24 Q Was it tape recorded?

25 A No, sir.

1 or not the aging process affected Mr. Reeves' ability to
2 exercise judgment in response to the stimulus in the
3 theater?

4 Remember we talked about judgment, plan. How do
5 you respond? Is it good? Is it bad? Do I run? Do I hide?
6 Fight or flight? All those are judgment things. So that's
7 why I'm asking.

8 Did the aging process in your opinion in any way
9 affect Mr. Reeves' judgment in how he responded to the
10 stimuli on January 13th, 2014?

11 A My opinion is that the aging process did not
12 affect his judgment.

13 Q Some of these, we've already covered. I'm sure
14 you're thankful for that.

15 A Oh, gosh, yes.

16 Q Okay. Let's go now, change topics a little bit.
17 Let's talk about the material that you reviewed -- I'm
18 sorry -- the material that was provided to you for review in
19 this particular case.

20 Were you provided a set of police reports? Pasco
21 County Sheriff's Office?

22 A Yes.

23 Q Did they include the tech service reports?

24 A I believe so, yes.

25 Q Okay. Did they include --

1 A It was in the concession area, yes.

2 Q Okay. Black and white photos? So he and
3 Mrs. Reeves in the concession area?

4 A Yes.

5 Q All right. Color still photos of Mr. Reeves at
6 the complaint desk; I'll call it the manager's desk?

7 A No color. Everything was black and white that I
8 had.

9 Q Okay. Were you shown a video of him walking from
10 the area of Theater 10 up to the complaint desk where he
11 made the complaint?

12 A The video was him going out of the theater. There
13 was no video of him --

14 Q I know what you're talking about now.

15 Any other photographs of -- I'll call the crime
16 scene -- inside the theater, after the shooting, dealing
17 with where he was seated, where evidence was located,
18 anything like that, were you shown or provided?

19 You can look at your list. Just tell me what you
20 were provided.

21 A All I have is the listing, and the complete Pasco
22 report which had the various photographs.

23 I did not focus on after the shooting occurred
24 'cause I was focused entirely on Mr. Reeves.

25 Q All right. Well, let's go to the video then.

1 that would suggest that Mr. Reeves was the aggressor in this
2 case?

3 A I am not aware of testimony that he was the
4 aggressor.

5 Q Okay. Did you receive medical records regarding
6 X-rays and MRIs?

7 A Yes.

8 Q Other than the X-rays and the MRIs, did you review
9 any other medical records of Mr. Reeves, like from his
10 personal physician or anything like that?

11 A No, sir.

12 Q So just the X-ray and the MRIs?

13 A Right. The interpretation.

14 Q Yeah. The one-page reports for each one, for each
15 knuckle, each thumb.

16 A Right.

17 Q Okay.

18 A Correct.

19 Q Did you review any medical records regarding his
20 hip replacement?

21 A No, sir.

22 Q Or his hospital records --

23 A No.

24 Q -- for that?

25 Did you interview any of his doctors?

EXHIBIT #2

1 know, as the trier of fact, you will accept or
2 reject just like any other person sitting over there
3 in the jury box.

4 THE COURT: Exactly.

5 MR. MARTIN: So I think that's the way we'll do
6 it.

7 THE COURT: Okay. Is that okay?

8 MR. MARTIN: That's good with me.

9 THE COURT: All right, Judge. Thank you. Mr.
10 Michaels?

11 MR. MICHAELS: Defense calls Dr. Donna Cohen.

12 THE BAILIFF: Step this way, stand right here.
13 Face the clerk, raise your right hand to be sworn.
14 (Thereupon, the witness was duly sworn on oath.)

15 THE BAILIFF: Come have a seat up here. Adjust
16 the mic. Speak in a loud and clear voice for the
17 Court.

18 THE COURT: You may proceed, Counselor.

19 DIRECT EXAMINATION

20 BY MR. MICHAELS:

21 Q. Please state your name.

22 A. Donna Cohen.

23 Q. And what is your occupation, please?

24 A. I'm a professor of tenure at the University of
25 South Florida.

1 Q. And how long have you been at the university of
2 South Florida?

3 A. Since June 17, 1992.

4 Q. What is your current title there?

5 A. Professor and Head of Violence and Injury
6 Prevention Unit.

7 Q. And what school is that part of?

8 A. That's part of a college called College of
9 Behavioral and Community Sciences, and I'm in the
10 Department of Child and Family Studies, which is one of
11 several departments.

12 Q. And what does that have to do with the issue of
13 aging?

14 A. What, my appointment?

15 Q. Yes.

16 A. I was specifically hired by the University of
17 South Florida in 1992 to come in as professor and
18 chairman of the then Department of Aging and Mental
19 Health, which was subsequently combined in about 2011
20 with some other aging groups, so I was actually brought
21 in to run the department.

22 I also, the year I was hired, was made head of
23 the Aging Studies Ph.D. Program, and I was also the
24 founder of the USF Institute on Aging. So that my role
25 was to actually develop aging research, training, and

1 service.

2 Q. Let's talk about your educational background.
3 Undergrad?

4 A. Duke University, Bachelor of Science in
5 Biology.

6 Q. What's the next degree?

7 A. The next degree was a master's in 1973 in
8 psychology with a specialization in human development and
9 aging, and that was followed by a Ph.D. They normally
10 have a master's in a Ph.D. sequence.

11 Q. What school was that?

12 A. That was at the University of Southern
13 California.

14 Q. And so how would you describe what your
15 specialty was?

16 A. I came into the field of aging because I was
17 excited about the opportunities. It was a growing field
18 at that time, and I would describe my activities as
19 focused in on the biopsychosocial aspects of aging.

20 I have my specializations in elder abuse, in
21 the dementias, and several other areas, including
22 violence.

23 Q. And so how long have you worked in the field of
24 aging?

25 A. Actually worked in the field of aging, since

1 1975, because I was -- at that time I got my Ph.D., but I
2 was also working full time at the Brentwood Veterans
3 Administration Center in LA on aging issues.

4 Q. Could you walk me through what your various
5 positions were before you got to USF?

6 A. The work I did at the Veterans Administration
7 was a prelude to going off to the University of
8 California, Los Angeles to do some work with one of the
9 professors there.

10 Then I went on to the University of Washington
11 in Seattle where I went from an assistant to an associate
12 professor in the Department of Psychiatry in that aging
13 program.

14 After that, I was recruited to the Albert
15 Einstein College of Medicine in Montefiore Medical Center
16 where I was awarded a professorship and continued to
17 develop aging programs, get grants, and left Einstein --

18 Q. Now, before we get there --

19 A. Sure.

20 Q. -- you talked about developing the aging
21 program and getting grants?

22 A. Right.

23 Q. What do you mean by that?

24 A. Fundamental to developing a program is to go to
25 various funding sources, federal, state, and otherwise.

1 The prestigious guess being the National Institute of
2 Health, the National Institute of Mental Health, so it
3 means writing grants.

4 I was successful in getting them to set up a
5 geriatric psychiatry program in aging. I was successful
6 in setting up the University of Washington -- the very
7 first training program for post-ops in psychology and in
8 psychiatry, so the job you have when you come into a
9 position is to actually develop the programs through
10 grants and other sources.

11 You also are responsible for developing
12 educational programs for the various individuals and
13 doing training on the outside with a wide range of
14 professionals from dentistry to pharmacy to medicine to
15 almost any field, because aging is a multidisciplinary
16 program.

17 Q. And what do you mean by "a multidisciplinary
18 program." What are the various disciplines within the
19 umbrella of aging?

20 A. What makes aging an exciting and unique field
21 is that it relies upon a -- multiple perspectives. It's
22 not like you're doing research on cancer or heart
23 disease.

24 Aging is accompanied by a series of biological
25 and psychological and social and cultural changes. It's

1 a field where you have to have a specialty, mine being
2 psychology, but the field and the institutes that are
3 around the country and the ones that I developed require
4 bringing together a variety of medical professionals,
5 bringing together everybody from public administrators to
6 nursing to social work to pharmacy so that the field
7 requires multidisciplinary, a multiple-discipline
8 approach so that you can actually work with individuals
9 who are changing in various ways.

10 Q. Now, you said Albert Einstein. Where is the
11 next place?

12 A. After Einstein, I was recruited to the
13 University of Illinois, Chicago. I believe that was
14 1985, and there I was a professor in the College of
15 Public Health. I was also Deputy Director of the
16 University's Institute on Aging. And again, had similar
17 responsibilities to develop programming and do education.

18 After UFC, I was recruited to come to USF to
19 head up their Department of Aging and Mental Health.

20 Q. What year was that again?

21 A. I believe that was 1992.

22 Q. And tell me, are you a member of any sort of
23 professional associations that deal with aging?

24 A. Yes, many.

25 Q. Okay. Tell us about them.

1 A. The American Psychological Association, which
2 is a huge association of psychologists, has sections on
3 aging and sections on law, neuropsychology, and I
4 actually held some offices in that division which dealt
5 with aging on human development.

6 Q. What sort of offices did you hold?

7 A. I was in charge of -- I was a member of their
8 executive committee. I was in charge of setting up
9 policy and programming for the division.

10 Q. Okay. And what other professional
11 associations?

12 A. The Gerontological Society of America.

13 Q. What's that?

14 A. It's, again, the premier gerontology, aging
15 society in this country. And it's composed, again, of
16 multiple disciplines from the biology of aging to the
17 psychology of aging, sociology of community and public
18 health issues.

19 The other organizations include the other range
20 of the American Association of Suicidology. Older people
21 have very, very high rates of suicide, and recently were
22 higher than even children and teenagers. There, I was
23 not only a board member, but I was a clinical director,
24 again developing the association's mission to approve
25 research, education and training.

1 I'm trying to remember all of the other
2 associations. There are many of them.

3 Q. Okay.

4 THE WITNESS: May I just request a glass of
5 water, please?

6 MR. MICHAELS: Can we get her some water or
7 should I get my bottle?

8 May I approach the witness, Your Honor?

9 THE COURT: You may.

10 BY MR. MICHAELS:

11 Q. What about this: The American College of
12 Forensic Examiners Institute, American Board of
13 Psychological Specialties, diplomate in medical
14 psychology?

15 A. Right. That's an organization that, again, has
16 a wide range of professionals from the microforensics to
17 the macroforensics. And there I have presented at their
18 meetings, have peer-reviewed papers for them for their
19 journal.

20 And again, it's -- with all of these
21 organizations, the challenge is to be a professional
22 leader in the field and develop programming.

23 Q. Let's go over some honors and awards.

24 Regional awards, Future Scientists of America,
25 National Science Teachers of America, 1965.

1 What is that one for?

2 A. That's for my very early years when I was first
3 developing my scientific interest. And at that time for
4 that age group it was a nice feather in the cap.

5 Q. Bausch and Lomb Science Award Medal?

6 A. That was a prestigious award for some work I
7 was doing on psychology with aging.

8 Q. NINCHD Traineeship?

9 A. That's a precious commodity that people can get
10 in the field that really pays your expenses for your
11 graduate education. And at that time, like I said, aging
12 was a growing field, and the government was investing a
13 fair amount of money. One way to get through graduate
14 school was to be awarded one of these fellowships.

15 Q. And do they just give them out to anybody that
16 asks? How do you get that fellowship?

17 A. You have to go through an credentialed school
18 like the University of Southern California and have
19 letters of support from various individuals.

20 Q. Honorable Mention from the American Medical
21 Writers Association for "The Loss of Self; A Family Guide
22 for Alzheimer's Disease" in the category of Best Trade
23 Book.

24 What's that about?

25 A. One of the critical issues as a leader in the

1 field was not only to educate students -- undergraduate,
2 graduate students and fellows -- but also to play a role
3 in public education, and our editor at the time suggested
4 that we compete for that award. And it was an honorable
5 mention, but it was an indication that the book was
6 making a difference.

7 Q. Founder's Award, Alzheimer's Association?

8 A. That's a favorite of mine. Back in the '80s,
9 eight different groups of professionals and families came
10 together and established what was then the Alzheimer's
11 Disease and Related Disorder Society under Gerald Stone.

12 It later was changed to Alzheimer's Disease
13 Association, and the founder award was given in honor of
14 being one of many professionals who worked with -- put
15 that together.

16 I also went on to help develop the
17 International Alzheimer's Society.

18 Q. Metropolitan Chicago's Health Care Council
19 Award for Health Care Management, 1988.

20 What is that?

21 A. That was an award where I was nominated for the
22 community service that I was doing in Chicago on behalf
23 of the university and the service to the community -- the
24 greater community of Chicago, Illinois.

25 Q. 1988 Listed "100 Women Shaping Chicago's

1 Future"?

2 A. That was another award that the dean of my
3 college had nominated me for, again, in recognition of
4 going above and beyond the typical academic duties and
5 being responsive to the needs of older people in the
6 community.

7 Q. Special Citation, 39th Annual Progressive
8 Architectural Award, Design of Architectural
9 Interventions and Day Care Settings for Older Persons?

10 A. That, again, is another special award. One of
11 the disciplines that I didn't mention in the field of
12 aging is, in fact, environmental and architectural
13 issues.

14 Working with Stanley Tigerman, (phonetic) who
15 was Dean of the College of Architecture at the University
16 of Illinois, Chicago, and four of his faculty and two of
17 my faculty, we developed a project to enhance the ability
18 of older people in day care settings.

19 This is for people who have physical as well as
20 cognitive kinds of issues. And the project really led to
21 the esthetic transformation of the day care center from
22 just a place with bars and seats and desks to a place
23 where there were rails with photographs with supportive
24 devices, for everything from where you hung your hat to
25 where you ate, and it just created this kind of

1 environment.

2 And the Progressive Architecture Award is
3 probably one of the premier awards that you could get for
4 that.

5 I was not the lead on that. I was the mentor,
6 sponsor, and Mark Rankatowski (phonetic), who was one of
7 Stanley Tigerman's students at the time.

8 Q. Annual Author's Award at the University of
9 South Florida in 1995?

10 A. I'm sorry?

11 Q. Annual Author's Award, University of South
12 Florida?

13 A. Again, it's -- the University recognizes
14 individuals who publish. And the provosts takes very
15 special pride in maintaining of a library of books each
16 year of the productions of faculty members.

17 Q. Who's Who in Medicine and Health Care, 1997.
18 What's that one about?

19 A. That's a listing, again, based upon meeting
20 certain credentials and certain levels of productivity in
21 your field.

22 Q. When you say "certain credentials and certain
23 levels of productivity," what exactly are you talking
24 about?

25 A. The reference is really to the number and

1 quality of one's publications, and it also rests upon
2 your reputation from giving talks and other kinds of
3 things. But it's really primarily representative of your
4 national and international presence on the basis of the
5 awards of your work.

6 Q. Honors Undergraduate Medallion, University of
7 South Florida?

8 A. That's another special one that really
9 recognizes that I have taught in the honors college for a
10 number of years and developed the first aging courses
11 ever given in the honors college, and the fact of getting
12 another medallion. But I just completed 22 years of
13 teaching in the honors college and the courses have been
14 extremely well received and well rated.

15 Q. Founders Commemorative Award, National
16 Alzheimer's Association, Chicago, 1998?

17 A. That was another celebration of the
18 (inaudible.)

19 THE COURT REPORTER: I'm sorry. Could you
20 repeat the last part of your answer?

21 THE WITNESS: That was another commemorative
22 event celebrating the establishment of the
23 Alzheimer's Association.

24 BY MR. MICHAELS:

25 Q. 2010, USF Ambassador's Apple Polishing Award?

1 A. That's exactly what it is, an Apple Polishing
2 Award. Students vote for the faculty who made the
3 biggest difference in their careers at USF. It's a
4 special kind of commemoration, and the numbers of faculty
5 who get those are relatively few.

6 Q. And let's talk about articles, monographs, and
7 books that have been published that you have authored or
8 co-authored.

9 How many do you think there are out there?

10 A. Probably in the neighborhood of 10 books, and
11 probably -- with things that are now in press, maybe 180
12 to 185 articles.

13 Q. And are any of those articles peer reviewed?

14 A. Most of them are. Some of them are book
15 chapters, but most of the article are peer reviewed.

16 Q. What do you mean by peer reviewed?

17 A. Peer reviewed refers to the process, whether
18 it's in a grant or a publication, where you submit
19 something and your product, in this case a journal
20 article, is reviewed anonymously by usually two to three
21 to four individuals. And those individuals will make a
22 decision about whether it's worthy of publications being
23 revised and then published.

24 The -- there are different kinds of journals,
25 but the only ones that I published that are not peer

1 reviewed are ones that I specifically tailored for the
2 public and the community. So we could advance the
3 knowledge of the public about aging issues and not just
4 the professionals in the university.

5 MR. MICHAELS: Judge, at this time, without
6 objection by the State, I would move into evidence
7 what's been marked as Defense Exhibit Number 7,
8 which is the CV of Dr. Cohen.

9 THE COURT: Okay. What exhibit number is that?

10 MR. MICHAELS: It was our Exhibit Number 7.
11 We've premarked them. There may be some gaps, but
12 we would will be filling them up as we go along.

13 THE COURT: Well, they have to come in
14 numerically, whatever way they come in.

15 MR. MICHAELS: Is this 4 or 5?

16 THE CLERK: 5.

17 MR. MICHAELS: Madam Clerk informed me it's
18 actually Number 4.

19 BY MR. MICHAELS:

20 Q. Now, you said a couple of times that you do
21 what you do because it's necessary to educate students
22 regarding aging.

23 What do you mean by that? Why does a
24 student -- doesn't a student know that people get older
25 and they can see it on their own? Why do you have to

1 educate them regarding that issue?

2 A. Students coming into the university as
3 undergraduates have very little experience with aging.
4 They've barely learned what it's like to grow up and be
5 friends with the opposite gender. They know aging
6 through their grandparents, perhaps, or having cared for
7 a sick parent or whatever, but their knowledge of aging
8 is really nonexistent.

9 In fact, the deans were very surprised that
10 students were flocking to the courses to take it. And
11 the challenge here is to show them that there's a science
12 to aging, that there's a clinical component to aging,
13 that there's a societal mandate to further our knowledge
14 of aging, and that there are a series of ethical issues
15 and cultural issues with the growth of the population.

16 It astounds them to know that -- give data, you
17 know, at different times, but roughly now there are 15
18 percent of the population 65 and over. That's about 44
19 million Americans by 2050.

20 That number is going to almost double to be 25
21 percent of the population, 88 million people. So, to
22 them, it's a way of showing them that this is a major
23 portion of the population, and someday they're going to
24 join it.

25 Because the children of today are the aged of

1 tomorrow, and the aged of today were the children of
2 yesterday, and getting them to understand the
3 developmental issues that they will be facing and our
4 country will be facing because the growth is going to
5 continue to explode.

6 Q. When you say "developmental issues," what is it
7 that you're talking about?

8 A. We're talking about the biological process,
9 undergrad.

10 Q. Let's talk about that for a moment.

11 The biological process, what do you mean by
12 that?

13 A. Again, to tie that into your previous question,
14 the students get excited about biomedical issues or
15 psychological issues, but they have no understanding of
16 what actually happens to people post adolescence and the
17 issues that confront people as they go into adulthood to,
18 you know, 18 to 24; then adulthood which goes to about
19 55, 60; then looking at late life and understanding how
20 genes can determine what happens to you as you grow
21 older.

22 That the education you get makes a difference
23 in how you grow older, to describe to them the kinds of
24 things they need to do today to keep from getting sick
25 tomorrow.

1 The health issues that will affect them in the
2 middle and later stages of life could be directly tied to
3 things that happened to them now. Roughly one-quarter of
4 adolescents have high blood pressure and high
5 cholesterol, and these are issues that are critical to
6 them growing older.

7 So it's really taking them through the various
8 biologic systems and helping them understand that people
9 change at different rates. You don't necessarily grow
10 old and grow sick, but as you grow old, the risk for
11 disease increases.

12 Impairments and disabilities which keep you
13 from functioning become a higher-risk issue, and even if
14 you live life relatively healthy, the average American is
15 going to spend 11 years frail before they die.

16 Q. Is that part of what you do to study the
17 vulnerability of the elder population people over 60?

18 A. Yes, study the vulnerability, because that's a
19 handle to understand how to build resilience to help
20 support people who have excess disabilities who probably
21 will not get too much better and to help them understand
22 that process.

23 Q. When you say vulnerability, describe what it is
24 that you mean by that term.

25 A. Vulnerability has many, many meanings.

1 Vulnerability refers on one level to your ability to
2 function safely without getting hurt.

3 Q. So let's talk about that particular aspect.
4 Are you talking about physiological changes in the
5 elderly population?

6 A. I'm talking about physiologic changes, yes.

7 Q. When you say to function without getting hurt,
8 what do you mean by that?

9 A. The older population, as I said, is at higher
10 risk for a variety of physical and mental changes.
11 They're at higher risk for chronic illness. They're at
12 higher risk for excess disabilities, which means the
13 vulnerability can't be compensated for easily, and it
14 affects their frame of mind.

15 So here we're talking about the ways that we
16 can understand how to keep people from doing things that
17 will hurt themselves. There's many older people who have
18 chronic illnesses because of skeletal issues, muscular
19 issues, changes in their organ systems including
20 cardiovascular, endocrine systems that really don't know
21 what they can do to take care of themselves.

22 There's a whole science which has grown up
23 around this issue of geriatric medicine, and the number
24 of well-known textbooks in geriatric medicine really take
25 this issue to heart.

1 Q. And can you name any of them today?

2 A. Yes, there's a Brocklehurst Handbook of --
3 Textbook of Geriatric Medicine and Gerontology.

4 Q. How does that deal with the issue of
5 vulnerability of the aging population?

6 A. That and many other textbooks really are
7 providing the -- and I think the Brocklehurst is in its
8 eighth edition, at this point. They lay out the changes
9 that occur in the aging process at the bio and
10 psychosocial level, and they provide the basis for
11 clinical care; what is it that clinician has to do,
12 whether that person is a social worker, nurse and/or
13 rehabilitation therapist, so it's really laying out the
14 science of the field.

15 There are other textbooks, and probably one of
16 the most prominent is the Handbook of Physiology,
17 Exercise, Health and Aging by Michael Taylor which really
18 lays out very specifically the issues around exercise and
19 maintenance of health in older people from young ages --
20 young, old being those who are under 65 to the older
21 population, you know, 80s and 90s, so it's a
22 comprehensive text.

23 Q. Certainly he doesn't suggest that if one
24 exercises, they aren't aging?

25 A. Pardon?

1 Q. Certainly he doesn't suggest that if one is
2 exercising, one is not aging?

3 A. Of course not.

4 Q. What other studies in regard to the subject of
5 vulnerability of the elderly and kind of realization of
6 that vulnerability?

7 A. One of the most common changes with aging is
8 the loss of muscular functioning, and that actually
9 starts, you know, in the 40s, but progresses at a rapid
10 rate as you get into your 60s and 70s and beyond.

11 There are some very specific changes that make
12 people vulnerable. Genes do have some role in how your
13 muscles change, but with advancing age there is
14 significant loss of muscle mass.

15 Muscles don't replicate themselves. Red blood
16 cells do, skin cells do, so when you lose muscle mass,
17 that's not going to be replaced.

18 There are different kinds of muscle fibers.
19 There are high twitch and low twitch. The high twitch
20 ones send messages to the brain very, very quickly.
21 In -- with advancing age, the conduction velocity of
22 nerves from muscles to the brain and back to the muscles
23 slows down significantly.

24 When people lose muscle mass, they lose
25 different kinds of muscles, and muscle quality changes.

1 Muscle quality refers to specific fibers, and that's
2 actually a better indication of muscular strength than
3 just mass.

4 Other things that happen are different kinds of
5 pain. Back pain, spine pain, actually can change the way
6 your brain responds to pain which affects your ability to
7 keep your balance and walk, so...

8 MR. MARTIN: Excuse me, Judge. I'm going to
9 object to that testimony that is far from afield.
10 This is more along the lines of medical testimony.

11 In fact, you might even remember that we heard
12 very similar testimony from Dr. Foley who is, in
13 fact, a medical doctor. She does not qualify to
14 render that type of an opinion or to make that type
15 of testimony.

16 MR. MICHAELS: Judge, certainly as a Ph.D. in
17 the field of aging, she can rely on treatises and
18 textbooks that she read to form an opinion or to
19 give testimony. That's, frankly, what she's doing
20 here.

21 MR. MARTIN: She rendered a medical diagnosis,
22 Judge.

23 MR. MICHAELS: I don't think she diagnosed
24 anyone.

25 THE COURT: Okay. I will overrule that.

1 THE WITNESS: (Indiscernible) research paper.

2 BY MR. MICHAELS:

3 Q. So explain what you were saying that -- how do
4 the -- this physical degenerative process or physical
5 inability to do what you did before as a younger person,
6 how does that affect one's psychological makeup in terms
7 of feelings of vulnerability?

8 A. It has a very dramatic effect, because when you
9 think about having lost strength, having problems with
10 balance, having more fat which has replaced the muscle
11 mass, weight gain, instability coupled with, you know,
12 other kinds of diseases, whether they're vascular or
13 endocrine, like diabetes, makes life very, very
14 difficult.

15 The simple act of walking and the simple act of
16 going up steps are affected. And if you have circulation
17 problems and you've got decreased musculature
18 coordination and muscle mass, it's very difficult to
19 negotiate the environment and you're at high risk for
20 lots of things, the most common of which is falls.

21 30 to 50 percent of people over the age of 65
22 fall every year, and people who break a hip when they
23 fall have a high likelihood of falling again and doing
24 more serious damage.

25 So these kinds of aging changes coupled with

1 other pathologic changes impair the individual's ability
2 to do everything from navigate their environment with
3 steps to getting in and out of bed, to pursue their
4 hobbies and to even walk up on the curb of the sidewalk
5 because there's constant concern and fears of not just
6 falling, but getting hurt.

7 Q. What about fears of the outside world,
8 interacting with strangers and that sort of thing?

9 A. There's a -- a literature that specifically
10 looks at the vulnerabilities that people perceive who are
11 older, and there are some gender differences. Women
12 perceive being much less safe living in their communities
13 because they're less able to protect themselves, to run
14 away.

15 So that the issues of vulnerability, our
16 perceptions of: How safe am I in my home? How safe am I
17 when I walk out on the street? How safe am I if someone
18 comes and grabs my purse, and how safe am I if someone
19 comes after me with a knife?

20 Q. Are the aging population, the elderly -- are
21 they more susceptible to be the victim of crimes from the
22 literature that you've studied?

23 A. The data depends upon age and sex and the type
24 of crime. Older men are more likely to -- well, first of
25 all, older people aren't out running around the way

1 younger people are. They're generally in their community
2 and more subdued environments, so the fear really is
3 around: How safe am I in my home and in my community?

4 When it comes to burglaries, men are more
5 likely to be attacked than woman, so that the -- and it
6 depends where you live. When you're in communities where
7 there's a high crime rate, the fears of older people are
8 significantly high, much higher than the young.

9 Q. Now, let's talk about some of the publications
10 that you've listed in your CV.

11 Number 25, Eisdorfer & Cohen. 1980. Issue of
12 Biological and Psychological Deficits in the Aging.

13 A. That was a -- early in my career, was a review
14 of the major kind of changes which occur in the biologic
15 systems as well as the psychology of systems, so we're
16 talking about everything from the organ changes that I
17 spoke about to changes in one's mood, one's affect, one's
18 anxiety, one's fears and one's ability to cope with the
19 environment. So it was a review of what we knew at that
20 time in 1985.

21 Q. Were you able to correlate an increase in fear
22 with a perspective that that person is no longer as
23 physically able as they once were?

24 A. The -- that's a theme that runs through the
25 field. I mean, it's with degenerative changes. There

1 are psychological effects which increase anxiety and
2 concern, and the 1985 article was not so much dealing
3 with the perceptions of older people as much as the later
4 work that we did.

5 Q. Eisdorfer & Cohen. 1983. Health and
6 Retirement, Retirement and Health: Background and future
7 directions. Policy issues in Work and Retirement.

8 A. That was, again, an early article which was
9 examining the literature of how health impacts people's
10 decisions to retire, and that's really one of the most
11 prominent reasons that people leave the work force when
12 they're older.

13 Q. Here's one from 2006. Older Adults and
14 Terrorism. Brown, Cohen & Kohlmaier.

15 A. That was a chapter -- responder's first texts
16 on terrorism dealing with older people. I was
17 Dr. Brown's mentor at that time, and we were examining
18 the responses -- the perceptions of fear and the
19 responses to fear and interventions to deal with those
20 fears of older people living in the community.

21 This was post-9/11, and older people are
22 extremely vulnerable when it comes to whether it's
23 man-made or natural disasters, and the consequences can
24 be everything from traumatic brain injury to death.

25 Q. And are they more vulnerable because they're

1 older?

2 A. Because they're older and they're impaired and
3 unable to control their environment.

4 Q. So an individual doesn't have to be in a
5 wheelchair to feel that he or she is more vulnerable as
6 an elder adult?

7 A. Not at all. The issue really has to do with
8 whether the older person perceives something threatening
9 such as a terrorist attack, whether that occurs, and
10 their inability to defend themselves or to take safe
11 actions if a threat is occurring.

12 Q. Okay. Now, what did you do in this particular
13 case? What sort of materials did you review for our
14 office and Mr. Reeves' case?

15 A. A variety of materials. I went through the
16 latest versions of the various premier textbooks, not
17 just the Brocklehurst, but the Oxford Handbook of
18 Geriatric Medicine which is, again, in its Fifth or Sixth
19 edition.

20 I went through Chris Castle's classic textbook
21 on geriatric medicine.

22 William Hazard and Jeff Holter, and some other
23 co-editors have, again, a classic textbook in multiple
24 editions, and each of these are really considered tomes
25 in their field.

1 I also reviewed a series of articles on the
2 different kinds of physiologic vulnerabilities that older
3 people have, and Michael Taylor's book on Exercise of
4 Physiology was one.

5 Tim Doherty did a very nice analysis of
6 Sarcopenia and aging. Sarcopenia refers to the loss of
7 muscle mass and its profound effect on one's abilities to
8 walk and move around and be safe.

9 I also reviewed two very important documents
10 that had to do with the importance of older people, even
11 those with chronic illness and impaired, to do some
12 exercise.

13 And the American Association of Sports Medicine
14 and the American Heart Association came out with a report
15 in 2003, which is a summary of a panel's recommendations
16 for what kinds of exercises should be done to promote the
17 ability to locomote, navigate, the ability to stay
18 healthy with cardiovascular disease or other kinds of
19 things.

20 There was another panel that came out, work by
21 Nelson at the University of South Carolina, who did a
22 public health panel report looking at exercise and
23 healthy aging and public health. And there were a series
24 of other articles that -- journal articles that I looked
25 at at that point.

1 I also re-reviewed the very important document
2 that came out of the -- not the Institute of Medicine,
3 but came out of the National Research Council, which is
4 part of the national academies. The Academy of
5 Engineering, there's the Institute of Medicine, as well
6 as the National Academy of Sciences Program, and that was
7 specifically elder abuse risks and the impact and what
8 could be done about it.

9 The two editors of a huge panel of respected
10 scientists and community leaders was led by a very
11 prominent Bob Wallace, who is the chairman of -- at the
12 University of Iowa, and Richard Beasley, who was at the
13 University of Virginia.

14 And again, this was a panel of at least 50 to
15 60 people. This was a 2003 document that really covers
16 the field pretty extensively.

17 Q. Have you been qualified to testify as an expert
18 in any court in the field of aging?

19 A. Yes.

20 Q. Okay. And where would that be?

21 A. I've been qualified to testify in terms of
22 older people who have been financially exploited, abused,
23 older people whose family members are contesting their
24 wills, cases where competency is -- or capacity which the
25 scientists attest to, and a series of cases that deal

1 with nursing home abuse and neglect, and a number of
2 cases dealing with suicide and the use of medications,
3 and other cases dealing with situations where caregivers
4 had killed care recipients and did not kill themselves
5 and go through the legal system.

6 Q. None of that has anything to do, it seems, with
7 the issue of vulnerability and an elder citizen
8 perceiving his or her vulnerability. Would you agree
9 with me on that?

10 A. Not -- I don't think -- I don't think I would
11 agree with you when it comes to financial exploitation.

12 Q. Okay. And tell me how that's related, then.

13 A. Individuals who are at risk for abuse -- and
14 I'll give you the numbers, one in 10 Americans over the
15 age of 65 suffer some kind of abuse, from psychological
16 to financial to physical to sexual abuse, and the numbers
17 are not exactly known because not everybody reports it.

18 But people who are being abused are quite
19 frequently afraid of what's happening to them, so that
20 issue of vulnerability and recognition -- they're
21 vulnerable in recognizing they have no control to get out
22 of the situation.

23 Q. Does that have -- is that elder person's
24 ability to perceive a situation and make a decision on
25 what to do based on his or her perception?

1 A. Hopefully they can do something about it, but
2 if I understand your question -- would you repeat it just
3 to make sure?

4 Q. I don't think I could repeat it.

5 A. If I -- okay. If I understood it, it's that
6 the older person who's in a potentially threatening
7 situation where they're being hit, they're being
8 neglected, family members are taking money from them,
9 recognize that they're vulnerable and threatened, but
10 they also recognize that they're embarrassed because it
11 may be a family member.

12 They also know there's very little they can do
13 about it, particularly, if they're constrained by
14 multiple impairments and disabilities.

15 Q. In this case, you interviewed Mr. Reeves,
16 correct?

17 A. Yes.

18 Q. Tell us about that interview. Where did that
19 take place?

20 MR. MARTIN: Your Honor, at this time, I'm
21 going to object to her describing or going into the
22 interview of Mr. Reeves.

23 THE COURT: All right.

24 MR. MARTIN: There's some additional argument
25 if you want it, but, I mean, that's my base --

1 MR. MICHAELS: She's not going to say what
2 Mr. Reeves said. She's just going to say she
3 interviewed him.

4 THE COURT: What is your --

5 MR. MARTIN: Well, what Mr. Reeves said,
6 there's certainly nuances that may come into play,
7 but we need to ferret those out.

8 THE COURT: All right. For purposes of the
9 moment, we will -- I will overrule it.

10 BY MR. MICHAELS:

11 Q. Did you interview Mr. Reeves?

12 A. Yes, I did.

13 Q. And where did that take place?

14 A. That took place in your law office.

15 Q. And how long did that interview last?

16 A. An hour and a half plus.

17 Q. Okay. Now, let me ask you a hypothetical:

18 If an individual was healthy and robust when he
19 was younger, and over the years suffered degenerative
20 changes to his body, and that person had some kind of
21 cognitive recognition of those degenerative changes,
22 would that person perceive his own vulnerability in a
23 one-on-one stressful situation?

24 A. Yes.

25 MR. MARTIN: Your Honor, I'm going to object to

1 the hypothetical, assuming facts not in evidence,
2 the specific part that is not in evidence is that he
3 had cognitive ability -- awareness of those medical
4 issues.

5 I know we've had the testimony from Dr. Foley,
6 but he embellished upon that in this hypothetical
7 because we have no testimony whatsoever as to
8 exactly what and to what extent Mr. Reeves had any
9 knowledge of any of this.

10 So I object to the form of the question for
11 that very limited purpose when he added cognitive
12 recognition, because we've had no testimony as of
13 yet of that.

14 MR. MICHAELS: Judge, that's the very nature of
15 a hypothetical. He doesn't want me to ask if she
16 formed an opinion based on Mr. Reeves' interview. I
17 know he doesn't want me to ask that, so I'm asking a
18 hypothetical.

19 I'll change the hypothetical a little bit if it
20 will make the prosecutor more comfortable.

21 BY MR. MICHAELS:

22 Q. Let me ask it to you this way, Dr. Cohen:

23 If -- and this is a hypothetical -- if I'm a
24 person who was very active through my 40s and through my
25 50s, and then as I got to be 50, 60 and 70 all of a

1 sudden I wake up in the morning and my knees hurt a
2 little bit. I wake up in the morning and I can't ride my
3 bike like I used to. I wake up in the morning and I
4 can't run like I use to.

5 I wake up in the morning and I'm having trouble
6 with my hands, my joints. My shoulder hurts, my feet
7 hurt, my back hurts, and I realize this because I'm going
8 through this, and now I'm 70, and I've been through that.

9 I've been healthy, I've been okay, and now I'm
10 getting a little weaker as I go, and I realize these
11 things are happening to me because I feel them every day.

12 Am I a person -- as a 70-something-year-old, as
13 an elder citizen, am I somebody who's going to be --
14 first, let's say -- let me ask you this way: Is that a
15 person that's going to be more vulnerable than like a
16 40-year-old?

17 A. Yes.

18 Q. Well --

19 MR. MARTIN: Excuse me, Judge. I object to --
20 we're talking about more vulnerable than what?

21 I mean, we have to have a hypothetical that is
22 based on the facts that are in evidence. So when we
23 talk about more vulnerable, we haven't talked about
24 vulnerable as to what?

25 Vulnerable stepping out of the shower and

1 slipping and falling? Twisting my knee when I get
2 out of my car? I mean, more vulnerable is so broad.
3 How are we supposed to know what the answer is?

4 MR. MICHAELS: Did he want me to ask if I'm
5 sitting in a movie theater and a six-foot guy
6 attacked me? I'll be happy to ask that.

7 MR. MARTIN: Okay. Hopefully that was tongue
8 in cheek.

9 BY MR. MICHAELS:

10 Q. I'm a 70-something-year-old, and I'm in a quiet
11 place or maybe a noisy place or a dark place, but I'm
12 seated, and somebody who doesn't appear to me to have any
13 sort of malady, perfectly healthy, is larger than me --
14 if they're coming after me and attacking me, is it
15 reasonable for me as a 70-year-old -- describing what I
16 did to you?

17 Is it reasonable for me to perceive my own
18 vulnerability?

19 A. Yes.

20 MR. MARTIN: Your Honor, again, I'm going to
21 object because we don't have any of those facts in
22 evidence.

23 What you've heard from Dr. Cohen is her ability
24 and her research deals with vulnerability, and if
25 you listen carefully to what she said her research

1 was, it was vulnerability -- so that society would
2 recognize vulnerability so industries and cottage
3 industries could be set up in order to take care of
4 those individuals so they wouldn't hurt themselves.

5 That's what her research is about. That's what
6 she has testified to, and now we're adding -- all of
7 a sudden, we've got people coming at them and people
8 are going to attack them. She's never, ever, ever
9 indicated there's any research in which she has done
10 that.

11 It's only recognizing the elderly are
12 vulnerable and society has to recognize that,
13 because we are becoming an older society and we need
14 to develop the industry in order to take care of
15 them. That's her research. And how it applies to
16 this particular case I fail to understand.

17 MR. MICHAELS: It's like somebody inventing a
18 seat belt and then say they can't talk about the
19 nylon they used to invent it. She's talking about
20 her research. She's talking about -- certainly, the
21 great breadth of literature. She's mentioned
22 several authors she's depending on. She's been
23 doing this for 40 years.

24 What the prosecutor says is true, that's part
25 of what she does, but she's doing something else

1 here and she's trying to educate the public for
2 other reasons, too. Not just so somebody doesn't
3 slip and fall in a nursing home because she's
4 designed a shower rug a non-slip floor. But it's so
5 that society becomes aware that older people are
6 more vulnerable and they should not be picked on by
7 other people that are bigger, stronger and younger,
8 because that part of society also has a
9 responsibility.

10 And I think she -- that's what Dr. Cohen is
11 also trying to educate the public and these students
12 on. So that's my argument, Judge.

13 THE COURT: All right. Mr. Martin's objection
14 really rings to me to be a Daubert-type objection.
15 At least that's kind of what I'm hearing.

16 I'm going to overrule at this point for reasons
17 we've already discussed. And any ruling I make as
18 to that issue, I'm not -- is for this -- the
19 purposes of this hearing.

20 As far as hearing further testimony and the
21 proffers, I'm not going to make any. I'm not going
22 to be held to the same exact procedure. Should we
23 have further proceedings such as a jury trial in
24 this case, we will have to readdress issues such as
25 that.

1 Again, obviously I'm the trier of fact here for
2 Daubert, Frey, determinations, so I'm going to --
3 we're going to proceed in the manner that we
4 indicated previously, so I'm going to overrule.

5 MR. MARTIN: Thank you, Judge.

6 BY MR. MICHAELS:

7 Q. So your answer was would an individual in that
8 situation be vulnerable, number one?

9 A. Yes. And it goes right to the heart of Michael
10 Taylor's analysis of physiologic changes with aging.

11 There are four different kinds. There's the
12 ones that are total, like high hearing, vision at some
13 point. Then there are those that are structural like
14 muscle mass.

15 Then there are changes in efficiency, like the
16 conducting velocity that I referred to with the
17 nerve/brain connection. And the fourth is the incapacity
18 to respond to highly stressful situations.

19 Q. What do you mean by that?

20 A. Referring to the fact that the -- it's not just
21 the muscles that are changing, that there's systemic
22 changes. And the various parts of the body work together
23 so that you can be healthy or function.

24 What happens is that the fourth kind of change
25 really refers to the fact that the system -- the body's

1 system can't mobilize itself as efficiently or as quickly
2 to respond to stress.

3 MR. MICHAELS: Thank you.

4 May I have a moment, Your Honor?

5 THE COURT: You may.

6 MR. MICHAELS: I don't have any further
7 questions of Dr. Cohen.

8 Thank you.

9 THE COURT: Cross?

10 MR. MARTIN: I would ask a favor of the Court:
11 Could we take five minutes and let Mr. Garcia and I
12 have a discussion somewhere in private? I think
13 then I'll know how I want to proceed based on the
14 Court's ruling.

15 And based on the testimony that we've heard, I
16 may have a certain direction that I want it go, and
17 I think a five-minute break would help me with that
18 and I would greatly appreciate it.

19 THE COURT: Okay. I will allow that.

20 MR. MARTIN: Thank you, Judge, very much.

21 THE WITNESS: We'll take five minutes.

22 MR. MARTIN: Thank you.

23 (Recess taken.)

24 THE BAILIFF: All rise.

25 Court is back in session.

1 You may be seated. Thank you.

2 MR. MARTIN: Judge, thank you for the five
3 minutes.

4 After speaking with my colleagues -- and I know
5 that you indicated that my last objection sounded
6 like a Daubert and Frey. Who knows where we're at
7 now in the State of Florida as of Friday.

8 But the bottom line is, Judge, I think, at this
9 point, in order to preserve the appellate record,
10 I'm going to ask that you consider my Motion in
11 Limine to exclude the testimony of Defense expert,
12 Dr. Donna Cohen -- to consider that, along with my
13 reply to the Defense response to my motion, and I
14 will -- and I'm sure you're going to say, "Same
15 ruling," or whatever, and then once you do that, I
16 will have no cross of Dr. Cohen.

17 THE COURT: Okay. Any input as to that?

18 MR. ESCOBAR: No, Your Honor.

19 THE COURT: All right. I'm going to reserve,
20 as I indicated, on that issue, and so I am going to
21 overrule and deny the State's Motion in Limine at
22 this time.

23 MR. MARTIN: I'm a little confused, because you
24 said you were going to reserve and then deny it.

25 THE COURT: No, I'm going to -- we're not going

1 to go forward -- I mean, I'm not going to address
2 it.

3 MR. MICHAELS: Correct.

4 THE COURT: So I'm going to --

5 MR. MARTIN: I think what we decided in this
6 process is that you'll take it under advisement.

7 THE COURT: Uh-huh.

8 MR. MARTIN: You'll make a determination as to
9 whether or not your initial role as a Judge and how
10 you're going to fulfill that as to whether or not it
11 would be admissible. And then once you make that
12 determination, then, as the trier of fact, you will
13 apply the rules as the trier of fact, and you, at
14 your own discretion, can either accept or reject her
15 testimony just like any other trier of fact would.

16 THE COURT: Correct.

17 MR. MARTIN: Okay. That's acceptable to the
18 State.

19 THE COURT: And as far as further, my only
20 concern with reserving on that is that I don't want
21 that to be an open invitation for more submissions
22 by either side on that issue at this point.

23 MR. MARTIN: No.

24 THE COURT: You know, I'm good with that, and
25 we'll-- we'll have a little bit more discussion as

1 to what's the appropriate analysis in light of the
2 fact that Supreme just ruled Friday, but in my brief
3 overview of it, it appears that we fall back to
4 Frey. So...

5 MR. ESCOBAR: Which is an easier standard.

6 THE COURT: Correct.

7 MR. MARTIN: Colleagues differ on that, so I
8 don't know, but hopefully in a week we'll have some
9 guidance.

10 THE COURT: Let's hope.

11 MR. MARTIN: Let's hope.

12 THE COURT: Either way, I'm going to reserve --

13 MR. MARTIN: Thank you, Judge.

14 THE COURT: -- as to that.

15 MR. MARTIN: All right.

16 THE COURT: So no further cross?

17 MR. MARTIN: No, ma'am. I'm going to rely on
18 my motion, and then let you decide as we discussed.

19 THE COURT: Okay. May this witness be
20 released?

21 MR. ESCOBAR: Yes, Your Honor.

22 THE COURT: Thank you.

23 Dr. Cohen, you're free to go.

24 THE WITNESS: Thank you.

25 (Witness excused.)