

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :  
 :  
v. : CASE NO. 21-cr-263 (TSC)  
 :  
RUSSELL DEAN ALFORD, :  
 :  
Defendant. :

**REPLY TO THE RESPONSE: MOTION IN LIMINE TO PRECLUDE PROFFERED  
EVIDENCE OF INATTENTIONAL BLINDNESS**

The government respectfully files this reply to the defendant’s response to the government’s motion *in limine* to preclude expert testimony concerning “inattentive blindness.”

There are multiple reasons this Court should not permit the defendant to sponsor expert testimony in this case. Although the government does not contest Dr. Ward’s education, training, or experience, the proposed opinion testimony would not be reliable, relevant, or admissible. The defendant has not identified a single federal criminal case in which expert testimony of “inattentive blindness” was admitted. And the defendant has not produced any statistics, reports, or studies demonstrating that the phenomenon of “inattentive blindness” is quantifiable, stable, or subject to differentiation amongst people. Nor has the defendant produced any articles, statistics, or information demonstrating that the inattentive blindness findings are statistically significant, or applicable here. In short, the “inattentive blindness” evidence is neither relevant nor reliable under Fed. R. Evidence 702 or *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993). The Court should either grant the motion to preclude the proposed opinion testimony or, in the alternative, hold a *Daubert* hearing.

The statistics allegedly demonstrating the phenomenon of inattentive blindness are inconsistent, variable, non-quantifiable, and limited to controlled settings not applicable here.

In the original study popularizing the concept of inattention blindness, *The Invisible Gorilla*, almost 60% of the participants in the study “saw” the invisible gorilla. See Janelle K.

Seegmiller, Jason M. Watson, David L. Strayer. Individual differences in susceptibility to inattention blindness. *Journal of Experimental Psychology: Learning, Memory, and Cognition*, 2011, referenced in Science Daily, Missing the gorilla: People prone to ‘inattention blindness’ have a lower working memory capacity,

<https://www.sciencedaily.com/releases/2011/04/110418083249.htm#:~:text=The%20Utah%20psychologists%20got%20results,and%2042%20percent%20did%20not.> More troubling, the popularizers of the concept readily acknowledge that “there have been no experimental studies of inattention blindness in real-world conditions.” Chabris, Weinberger, Fontaine, Simons, *You do not talk about Fight Club if you do not notice Fight Club: Inattention blindness for a simulated real-world assault*, *i-Perception*, 150-153 (2011), attached as Exhibit A. In their attempt to recreate “real-world conditions,” the authors used students in a controlled setting with a specific, and artificial, task of counting the times a person touched their head as they chased the person around a pre-determined course. *Id.* Notwithstanding the controlled and artificial nature of the recreation, 56% of the participants noticed the orchestrated “unexpected” event. *Id.*, at 152.

More fatal to the defendant’s position here, the authors also readily acknowledge that one “hallmark of inattention blindness is that increasing the effort required by the primary task decreases noticing of unexpected events.” *Id.* Here, however, there is no primary task with which Mr. Alford was tasked on January 6, 2021. Put another way, there is no evidence, or suggestion, that Mr. Alford was so consumed by a task at the Capitol (like driving while texting or counting basketball passes while a fake gorilla passes through) that he wouldn’t or couldn’t

notice expected and ubiquitous events in his field of vision.<sup>1</sup>

Moreover, the controlled circumstances of the experimental settings have no application to the events of January 6, 2021, where Alford spent hours in and around the U.S. Capitol, and went inside the U.S. Capitol. Indeed, Dr. Ward's own publication, *Inattentional blindness reflects limitations on perception, not memory: Evidence from repeated failures of awareness*, demonstrates the artificial circumstances under which the concept was tested. In her study, Dr. Ward had observers view moving black and white L and T shapes on a TV screen, counting the number of times that a subset crossed the display's midline. See Ward and Scholl, *Inattentional blindness reflects limitations on perception, not memory: Evidence from repeated failures of awareness*, *Psychon Bull. Rev.* 22:722–727 (2015). The unexpected event was a gray cross appeared in the display. In layman's terms, the participants were asked to watch and count L's and T's on a screen and the experimenters inserted a gray cross on the screen. In other words, Dr. Ward's experiments involving participants instructed to concentrate on two variables, and their resulting non-observation of one other object, does not translate to the events of January 6, 2021 where the defendant, in his own words, went to D.C. to attend the Trump rally. The inattentional blindness studies thus do not "fit" with the facts and circumstances of the events at issue here.

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<sup>1</sup> Proponents of the concept of inattentional blindness also readily acknowledge that "Many variations in the nature of the unexpected object influence noticing rates: size, color, semantic content, and distance from the attentional focus. Moreover, the primary-task demands (i.e. current cognitive load; and top-down factors like the observer's goals or attentional set contribute to inattentional blindness." See Kreitz, Furley, Memmert, and Simmons, *Inattentional Blindness and Individual Differences in Cognitive Abilities*. <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0134675>, last accessed August 18, 2022.

A further deficiency in the “inattentive blindness” literature is the inability to identify who is, and is not, susceptible to the attention gaps and under what circumstances those events are perceived, or not perceived. Proponents of the concept acknowledge that:

Typically, some people fail to notice unexpected objects while others detect them instantaneously. Whether this pattern reflects stable individual differences is unclear to date. In particular, hardly anything is known about the influence of personality on the likelihood of inattentive blindness.

Kreitz, Schnuerch, Gibbons, and Memmert, *Some See It, Some Don't: Exploring the Relation between Inattentive Blindness and Personality Factors*,

<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0128158>, last accessed, August 18, 2022.

In short, the concept of inattentive blindness is an unquantified concept that simply repeats a commonsense notion: people distracted by highly focused concentration may not observe things they might see if they weren't distracted. A person texting on his iPhone while driving may not see a deer dart suddenly in front of his car. A jury does not need expert testimony to understand this notion. Therefore, the evidence is not an appropriate subject for expert testimony. Because inattentive blindness experts cannot say who is, and is not, susceptible to greater or lesser distraction, and in which numbers, the evidence is unreliable.

Moreover, the defendant has offered no connection between the proffered testimony and the facts of this case. The proffered expert has not performed any examination or testing of the defendant, much less testing of the defendant in circumstances that might parallel those of January 6, 2021, at the U.S. Capitol. Testimony that is unconnected to the facts of the case and purports only to explain that some people do not perceive certain things under certain circumstances falls far short of the requirements of Rule 702. This will especially be the case if

the defendant chooses not to testify: without testimony from him about *what* he failed to notice, Dr. Ward's testimony about *why* people fail to notice things will be unhelpful to the jury, Fed. R. Evid. 702(a), and the risk of confusing the issues and misleading the jury will outweigh any marginal probative value of her testimony. Fed. R. Evid. 403.

WHEREFORE, the government respectfully requests that this Court grant the motion for a pre-trial determination that expert testimony concerning the concept of inattention blindness is inadmissible in this case, or, in the alternative, conduct a *Daubert* hearing.<sup>2</sup>

Respectfully submitted,

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<sup>2</sup> The government further suggests that the nature of the testimony, Dr. Ward is being offered as a teaching expert, further disconnects the proposed testimony from the facts of the case. *See Miller v. Holzmamm*, 563 F. Supp. 2d 54, fn. 41 (D.D.C. 2008).

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