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I N D E X

DEFENSE WITNESS:	PAGE:
SIMON COLE	
Direct Examination by Mr. Burt	7
Cross Examination by Ms. Jimenez	95
Further Examination by Mr. Burt	127
Further Examination by Ms. Jimenez	142
ERIC GILKERSON	
Direct Examination by Mr. Darrow	158
Cross Examination by Mr. Philipsborn	203
GOVERNMENT EXHIBITS:	SHOWN:
5 - 10-17-17 SOP for Friction Ridge Prints	95
10 - Accuracy & Reliability of Fingerprint Decisions	44
11 - Repeatability and Reproducibility	44
12 - Measuring what Fingerprint Examiners Sufficient	44
17 - DOJ Proposed Language	100
18 - Biological Variability	100, 108
19 - Quantifying Weight of Evidence	100, 109
21A - Gilkerson CV	159
21B - Gilkerson Summary of Testimony	159
21C- Lab Report	159
21D - Gilkerson Power Point	159
DEFENDANT EXHIBITS:	
A2 - More than Zero Cole 2005	62

	INDEX CONTINUED:	
1		
2	A30 - Emerging Paradigm Swofford 2015	81
3	A33 - Department of Army Info. Paper	82
4	A39 - SWGFAST Documents	54, 120
5	A53 - NSFS Inconsistent Terminology	127
6	A58 - NCFS Ensuring Forensic Analysis	85
7	C5 - IAI Commentary	118
8	D1 - Cole Declaration	10, 48
9	D2 - Cole Curriculum Vitae	10
10	D7 - Need for a Research Culture Gertner 2011	89
11	D8 - Grandfathering Evidence	61
12	D10 - Splitting Hairs? Cole 2011	75
13	E7 - Strengthening Forensic Science	207
14	E10 - SWGTREAD Response to Questions	213
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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(The Court opened at 8:05 a.m.)

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THE CLERK: Your Honor the matter before the Court is criminal number 1-12, United States of America versus Donald Fell. The government is represented by Sonia Jimenez and William Darrow. The defendant is present by, is represented by Michael Burt, John Philipsborn, Kerry DeWolfe and Laura Rogers. And we are here for a motions to exclude opinion testimony and evidence which are identified on the docket as documents 814, 815, 816, 817, 819 and 827.

THE COURT: Morning.

MR. BURT: Good morning.

THE COURT: What's the best plan this morning?

MR. BURT: Your Honor, we have Dr. Cole that we'd start with. And then we had one more witness that we are going to have a discussion about before we put him on that may shorten that, that last witness.

THE COURT: Okay.

MR. BURT: And then I think we're done.

1 THE COURT: So at least on these issues the
2 government rests? I mean, you've put on the people that
3 you're going you put on on fingerprints and fiber and --

4 MR. DARROW: Yes, Your Honor. The remaining
5 witness is the footwear witness. And as counsel indicated,
6 we've been going back and forth about that witness a little
7 bit. But as to -- and we still -- well, there's a second
8 medical examiner as to the New York body.

9 THE COURT: A whole other issue, right.

10 MR. DARROW: Exactly. And there's the DNA is a
11 whole other issue for September as well. But as to the
12 fingerprint and the fiber, yes.

13 THE COURT: And the sort of limited issue of Dr.
14 Morrow's observations.

15 MR. DARROW: Yes, as to the ME in Rutland, yes.

16 THE COURT: Got it, okay. Good. All set.

17 MR. BURT: Your Honor, on the exhibits, I think
18 when we were discussing the exhibits relating to the A
19 exhibits I referenced A77. And there is no A77. So just to
20 be clear on the record on that.

21 THE COURT: Okay.

22 MR. BURT: And then, secondly, as to Sandra Koch's
23 exhibits, I've discussed with Mr. Darrow the exhibits, and
24 I'm now in a position to move to admit Exhibits B1 through
25 38, excluding 19 and 20.

1 MR. DARROW: No problem, Your Honor.

2 THE COURT: All right. So I'll admit 1 through 38
3 with the exception of 19 and 20.

4 MR. BURT: Thank you. And we're prepared to call
5 Dr. Cole.

6 THE COURT: Great.

7 S I M O N C O L E, The Witness, after being
8 duly sworn, was examined and testified as follows:

9 THE COURT: Morning. You've been very patient.
10 I've seen you in the back of the room for a couple of days.
11 I appreciate you staying with us.

12 THE WITNESS: Thank you, Your Honor.

13 DIRECT EXAMINATION BY MR. BURT:

14 Q. Good morning.

15 A. Good morning.

16 Q. Could you introduce yourself to the Court and tell the
17 Court what your business or profession is, please?

18 A. My name is Simon Cole. C-O-L-E. And I'm a Professor
19 of Criminology Law and Society at the University of
20 California, Irvine.

21 Q. Could you tell us a little bit about your professional
22 background, educational background?

23 A. Yeah. I have a Ph.D. in Science and Technology Studies
24 from Cornell University. Science and technologies study is
25 an interdisciplinary field composed of history, sociology,

1 philosophy and policy studies of scientific knowledge and
2 technological systems and artifacts. My main dissertation
3 research in that area was on fingerprint identification.

4 Q. All right. And when did you receive your Ph.D. Degree?

5 A. That was in 1998.

6 Q. You said you did your dissertation work in fingerprint
7 evidence?

8 A. On the history of fingerprint evidence. So I was
9 interested in how it evolved, how it became sort of the
10 dominant system of criminal identification. And I was
11 interested in the sociological question of how latent print
12 examiners got people to trust them as expert witnesses.

13 Q. All right. And what, your dissertation was completed
14 in what year?

15 A. Again, 1998.

16 Q. And from that point forward tell us what you did in
17 terms of your occupation?

18 A. Well, then I embarked on an academic career. I had a
19 post-doctoral fellowship for a year. I had a position in,
20 sorry, I had a post-doctoral fellowship for two years. I
21 had a visiting researcher position for a year. I had a
22 position in industry.

23 And then about five years later I started as an
24 assistant professor at the University of California, Irvine.
25 And then I've been promoted up through the ranks to full

1 professor.

2 Q. And what do you teach generally at UC Irvine?

3 A. So we teach, we teach undergraduates, master students
4 and doctoral students in criminology, law and society.

5 I teach courses on, I have a course on forensic
6 science in society. I have a course on surveillance in
7 society, a course on the death penalty, a course on
8 miscarriages of justice. Those are all undergraduate
9 courses.

10 Q. I assume being a professor there's some requirement
11 that you continue to publish?

12 A. Yes. It's a publisher perish system. It's a research
13 intensive position.

14 Q. And what fields of the research have you focused on
15 since receiving your degree and as you continued on and
16 became a professor?

17 A. My main area of research is the history and sociology
18 of forensic science and criminal identification. Again,
19 fingerprint identification is my primary area of research,
20 although I've done lots of research on other areas as well.

21 Q. In addition to research and writing on the area of
22 forensic science in general, and fingerprinting, have you
23 also been involved in other aspects of forensic education or
24 forensic standard setting or committees involved with
25 forensic science?

1 A. Yes. I'm a member of the Human Factor Subcommittee of
2 The National Commission on Forensic Science, which I believe
3 you've heard a little bit about here.

4 Q. And what is the focus of that subcommittee, The
5 National Commission Subcommittee?

6 A. Anything involving the human element of forensic
7 science.

8 Q. And does The National Commission have appointed members
9 and then non-appointed members?

10 A. Yes. The National Commission has probably 30 or 40
11 appointed members. I am not one of those Commissioners.
12 Then it has about five or six subcommittees. And the
13 subcommittees are composed of both commissioners and some
14 outside people who they invite to join the subcommittee.

15 Q. And what is the subcommittee you are on tasked on doing
16 or studying?

17 A. Again, anything involving the human element. So, for
18 example, the document that I believe you've already
19 discussed on task relevant information in forensic science
20 that was a product of the Human Factor Subcommittee that was
21 then submitted to the Commission. And they adopted it.

22 Q. That was the document that listed what are task
23 relevant and what are not task relevant items?

24 A. It, it mainly talked about the importance of forensic
25 scientists using only task relevant information and trying

1 to not know task irrelevant information to the extent
2 possible.

3 Q. Now, in front of you there is a binder of material. If
4 you have that I think it's marked Exhibit D1 through 10?

5 A. Yes.

6 Q. Correct? Does tab 1 contain an accurate copy of your
7 CV?

8 A. Tab two does.

9 Q. Tab two?

10 A. Yeah.

11 Q. Okay. And tab 1, what is that document?

12 A. That's my affidavit.

13 Q. All right. Your declaration in this case?

14 A. Yes.

15 Q. Dated May 31, 2016?

16 And your CV, does it contain an accurate account
17 of the various publications that you have authored?

18 A. Yes.

19 Q. It also contains a list, does it not, of a number of
20 cases in which you have testified as an expert?

21 A. Yes.

22 Q. When did you begin your work as an expert witness?

23 A. 1999.

24 Q. And what, on what occasion?

25 A. That was in the case United States versus Mitchell in

1 the Eastern District of Pennsylvania.

2 Q. Was that one of the first modern admissibility hearings
3 on fingerprint identification?

4 A. Yes. I believe it was the first admissibility
5 challenge to fingerprint evidence in the post-Daubert era.

6 Q. And were you the only -- were you a defense expert in
7 that case?

8 A. Yes.

9 Q. Were there other experts who testified as well besides
10 yourself?

11 A. Yes.

12 Q. Have you, since that time, continued to testify in
13 admissibility hearings, first of all?

14 A. Yes.

15 Q. Daubert admissibility hearings on fingerprint evidence
16 admissibility?

17 A. Yes.

18 Q. Approximately how many times?

19 A. If I can refer to this?

20 Q. Sure.

21 A. So, more than 20 times.

22 Q. And is that in both state and federal courts?

23 A. Yes.

24 Q. Now, have you, as indicated in your resume, also done a
25 certain amount of teaching on the issue of fingerprint

1 testimony, fingerprint evidence, fingerprint literature?

2 A. Yes. I've done continual, sorry, continuing legal
3 education seminars on forensic evidence and fingerprint
4 identification.

5 Q. In front of what audiences? Just characterize for me
6 is it defense, prosecution, judges, forensic audiences?
7 Give me some sense of that.

8 A. It's largely defense attorneys. There have also been
9 occasions of mixed groups of attorneys, forensic
10 practitioners. Judges, a very small number of times.
11 Prosecutors only once.

12 Q. You were here when Miss Gische testified?

13 A. Yes.

14 Q. She, I believe, testified that she participated in a
15 seminar that was put on by The National Institute of
16 Standards and Technology on, in 2015 concerning error
17 management. Are you familiar with that seminar?

18 A. Yes.

19 Q. Did you present as well?

20 A. Yes, I did.

21 Q. Are you and Miss Gische on any committees together?

22 A. Yes. We are both on The American Academy of Forensic
23 Science Standards Board, Friction Ridge Consensus Group.

24 Q. What does that group do?

25 A. She mentioned that she is chair of the Friction Ridge

1 Subcommittee of the OSAC. That's O-S-A-C. That's the
2 Organization of Scientific Area Committees. And they will
3 write standards and submit them to a standard developing
4 organization.

5 So The American Academy of Forensic Science Body
6 that we are both on is going to be that standard developing
7 organization.

8 Q. So that your function would be to review the standards
9 put out by her subcommittee to see whether they are
10 appropriate for acceptance within the scientific community?

11 A. That's my understanding.

12 Q. Okay. And is that work just beginning?

13 A. Yes.

14 Q. How long have you been a member of that sub or
15 committee?

16 A. A couple of months.

17 Q. All right. And have any standards yet been proposed by
18 Miss Gische's subcommittee for evaluation by your group?

19 A. Yes. I believe she mentioned she sent us one standard.

20 Q. And there -- is it anticipated there's going to be more
21 forthcoming?

22 A. Yes.

23 Q. Is there any timeline on that?

24 A. We have a meeting a week from Monday. And I believe
25 what we're going to get is the list of standards that we

1 should expect to get. Not the standards themselves.

2 Q. In your CV you list numerous published writings on
3 fingerprint evidence, correct?

4 A. Yes.

5 Q. Some of those are published in law review articles,
6 correct?

7 A. That's correct.

8 Q. Some of them are published in forensic journals?

9 A. A small number, yeah.

10 Q. And how would you characterize what you're researching
11 in those articles? What are the topics of interest? I
12 realize it's fingerprint evidence, but is there some sort of
13 focus?

14 A. Well, a number of different topics. The early work, as
15 I said, was on the history of fingerprint identification.
16 And then also the sort of sociological question of how
17 fingerprint examiners sort of achieve credibility and get
18 people to trust and believe them.

19 That then led to an interest in the validity of
20 fingerprint identification, what is the scientific validity
21 behind the claims of these experts. And that's been a major
22 area of research for me for the past 15 years or so.

23 Q. And does that focus of research require you to become
24 familiar with and knowledgeable about evidence written by the
25 fingerprint community itself?

1 A. Yes. I'm interested in the scientific literature that
2 supports the claims, the scientific knowledge claims that
3 they are making.

4 Q. And do you also, in your field, study the legal aspects
5 of the forensic science issues you're studying, for
6 instance, the Daubert case and cases following or not
7 following Daubert, and things of that nature?

8 A. Yes. I've also written extensive articles about the
9 legal admissibility question, analyses of admissibility
10 opinions and so on.

11 Q. Now, you said that your dissertation was completed in
12 1998. And was your dissertation eventually published?

13 A. Yes. The dissertation then -- that research was then
14 published as a book in 2010 called Suspect Identities.

15 Q. Is that this book I'm holding up?

16 A. Yes.

17 Q. By Harvard University Press?

18 A. Yes.

19 Q. Has this book won any awards?

20 A. Yes. It won the Rachel Carson Award from the Society
21 for Social Studies of Science.

22 Q. What is the focus of this book? I mean, what is the
23 message that -- if there is just one single message of the
24 book, what were you trying to get across?

25 A. The, the focus of the book was sort of the historical

1 process by which fingerprint identification kind of emerged
2 as the dominant technology for criminal identification over
3 rival systems of identification.

4 Q. And did that, researching that issue take you back
5 early in the history of fingerprinting, use of
6 fingerprinting evidence?

7 A. Yes, I went -- yes, I went back to the earliest uses of
8 fingerprint evidence in courts.

9 Q. Which, how far back was that?

10 A. That's late 19th Century.

11 Q. All right. And what, when you were looking into that
12 issue, the historical basis for fingerprint evidence, did
13 you have occasion to look at the early literature in the
14 forensic field on fingerprint evidence?

15 A. Yes.

16 Q. That is, literature written by fingerprint examiners
17 themselves?

18 A. Yes.

19 Q. What are the sources back then historically of that
20 literature? What kind of publications were you studying?

21 A. There were scientific publications in journals like
22 Nature, which is still with us today. Books, as some of you
23 may know Francis Galton, who is a very well known
24 statistician, did research on fingerprint identification in
25 the late 19th Century.

1 Q. And how did, historically, fingerprint evidence find
2 its way into the courtroom? How would you characterize
3 that?

4 A. It found its way into the courtroom in -- fingerprint
5 identification was not developed for forensics. It was
6 developed for criminal recordkeeping, for telling whether
7 somebody had a criminal record.

8 And so it was ten print identification was the
9 original use. And then this sort of side use for forensics
10 was developed. And so in some criminal cases where prints
11 were found at crime scenes these identification clerks who
12 worked with the criminal records were brought in as expert
13 witnesses to try to associate the crime scene print with a
14 criminal, with a set of known prints taken from a suspect.

15 Q. And in the literature, the historical literature, was
16 there a recognition of any differences between the use of
17 fingerprints for criminal record purposes and the use of
18 latent prints in terms of whether those were different tasks
19 or the same tasks or was it just a, any recognition at all
20 that there was some difference there?

21 A. I think there was. Henry Faulds, that's F-A-U-L-D-S,
22 whose credited as one of the main founders of fingerprint
23 identification, noted very early on the difference between a
24 full set of 10 inked prints and a single, what we would
25 today call a latent print. And he called a smudge on an

1 object. And he noted that there was a lot less information
2 in this single latent print than in the 10 prints.

3 And so the, your ability to associate sets of
4 prints would be different from a set of 10 prints than from,
5 say, a single latent print.

6 Q. Prior to the use of the latent print aspect of
7 fingerprint evidence in court, was there a research base or
8 a scientific study of whether examiners could reliably and
9 validly conduct those comparisons?

10 A. No. There were no studies at that time trying to
11 determine how accurate a fingerprint examiner was at
12 associating a latent print with, with a known print.

13 The studies that existed at that time were sort of
14 observations of the friction ridge skin, some research
15 attempting to estimate the variability of the minutiae
16 points and the pattern types, some research on the
17 persistence question, do they stay the same over a lifetime.
18 And then a lot of people saying we could maybe use this for
19 criminal identification or for forensic identification.

20 THE COURT: This is like 1900 that we're talking
21 about?

22 MR. DARROW: This is, yeah, 1880 through 1910,
23 roughly.

24 Q. So when, when the fingerprint, the use of latent
25 fingerprint evidence, when did it first start being used in

1 court?

2 MS. JIMENEZ: Your Honor, excuse me, I'm going to
3 object to the witness going into the substantive area of his
4 testimony until he's been proffered to the Court as an
5 expert.

6 THE COURT: I've been kind of thinking about that.
7 One of the standards, which I looked at, had to do with this
8 whole business of vouching in experts. And the --

9 MR. BURT: Yes.

10 THE COURT: -- I've always been queasy about it.
11 And with the, I think it was the government's exhibit, I've
12 become queasier. But I don't want to -- there's no jury
13 here and I don't want to hold things up unnecessarily.

14 Is there any dispute as between the two of you as
15 to whether Dr. Cole is an expert in the field of fingerprint
16 analysis?

17 MS. JIMENEZ: Yes, there is a dispute from the
18 government and I would like to take the witness on voir
19 dire.

20 THE COURT: Sure. Why don't we take a break and
21 do that, not a break, but your call.

22 MS. JIMENEZ: Thank you.

23 MR. BURT: Sure. Well, does the Court want a
24 proffer from me as to what the field of expertise is?

25 THE COURT: I think I've heard it, unless it's

1 something different than what he said.

2 MR. BURT: Okay. That's fine. Thanks.

3 THE COURT: Sure.

4 VOIR DIRE BY MS. JIMENEZ:

5 Q. Good morning, Dr. Cole.

6 A. Good morning.

7 Q. You are not a latent print examiner, correct?

8 A. That's correct.

9 Q. You don't purport yourself to be a latent print
10 examiner?

11 A. That's correct.

12 Q. You don't have any, you've never gone through a
13 training course in how to do a latent print examination and
14 comparison, correct?

15 A. Correct.

16 Q. You have not conducted any of your own research or set
17 up a research study as it relates to the analysis and
18 comparison of fingerprints; is that correct?

19 A. I have done a research project on the comparison of
20 prints by an AFIS System. That's an Automated Fingerprint
21 Identification System. So I don't know if that would be
22 included in your question.

23 Q. But you haven't done a study, a research study as it
24 relates to a human doing an examination and a comparison
25 between a latent and a known print, correct?

1 A. Not correct. I am a coauthor with Professor John Vokey
2 on a study of college students matching prints.

3 Q. And the college students are not trained latent print
4 examiners, correct?

5 A. That is correct.

6 Q. You consider yourself to be a sociologist and a
7 historian of science and technology, correct?

8 A. Yes.

9 Q. You essentially review the literature as it relates to
10 fingerprint examination and then you write articles about
11 what you've read in the literature, correct?

12 A. That's one thing that I do, yes.

13 Q. You, you said that you have other areas that you have
14 done research and studies on. Do you testify in those areas
15 or have you only testified with respect to latent prints?

16 A. I've only testified with respect to latent prints.

17 Q. And how much are you paid when you testify?

18 A. \$200 an hour.

19 Q. And you have testified for the defense, correct, in all
20 your testimony?

21 A. Yes.

22 Q. And you've testified several times for Mr. Burt as
23 well, correct?

24 A. Yes.

25 Q. You talked about the instances where you have testified

1 in court, however you have been excluded from testimony by
2 several courts as well, correct?

3 A. That's correct.

4 Q. Back in, maybe one of the earlier instances is back in
5 2001 the government actually challenged your testimony in a
6 Frye hearing, correct, in People v Hyatt?

7 A. Yes.

8 Q. That was a state court in New York, correct?

9 A. Yes.

10 Q. And so because it was state they worked under the Frye
11 Standard, fair to say?

12 A. Yes.

13 Q. And, although, I guess you do some research into legal
14 areas, but you do not have a law degree, correct?

15 A. Correct.

16 Q. And so at this hearing in New York in People v Hyatt
17 you admitted that you weren't a scientist in the traditional
18 sense of the word, correct?

19 A. I don't have the transcript here, but that may be so.

20 Q. Would it be helpful to you to look at the opinion as we
21 go through these questions?

22 MR. BURT: Judge, I'm going to object. This seems
23 more in the nature of a discovery deposition not restricted
24 to qualifications. So I don't think what a New York Trial
25 Court Judge did in 2001 under a Frye standard is going to

1 help the Court assess qualifications. We are trying to move
2 this along. I'm not sure really it gets to the gist of
3 qualifications here.

4 MS. JIMENEZ: Well, I'm asking him at the moment
5 specifically about various statements that he made during
6 that particular Frye hearing. But absolutely, I think it's
7 relevant to the Court's consideration whether or not an
8 expert has been qualified by a different court. It's not in
9 and of itself the deciding factor for the Court, but it's
10 certainly relevant to this Court what other decisions have
11 been made and based on what statements he made in that
12 testimony, if there was testimony, or what the findings of
13 the court were are certainly relevant as one of the factors
14 for the Court to consider.

15 MR. BURT: He said he's been qualified at least 20
16 times in state and federal courts, including cases
17 subsequent to this New York case in a federal court.

18 In the United States versus Mitchell the Court of
19 Appeals for the Third Circuit described Dr. Cole as
20 eminently qualified. I think the Court has enough
21 information to rule. And the rest of it goes to weight.
22 And if she wants to spend her time on cross on New York
23 Trial Court decisions in 2001 she should be entitled to do
24 so. But at this point I really don't see how this helps the
25 Court.

1 THE COURT: All right. I want a balanced
2 presentation. I will allow you to ask the question and I'll
3 overrule the objection. Is it a written decision or just
4 the Judge's ruling at the end of the colloquy?

5 MS. JIMENEZ: It is an unpublished -- the
6 reference that I'm using is an unpublished decision from the
7 Supreme Court of New York reviewing the District Court's
8 decision in which is discussed the cross examination and
9 testimony of Dr. Cole.

10 MR. BURT: Excuse me, that cannot be right. The
11 New York Supreme Court is a trial court.

12 THE COURT: Yeah, no. I understand.

13 MR. BURT: There is no District Court in New York.
14 So I don't know what she's talking about.

15 THE COURT: You mean, like an appellate division
16 or something?

17 MS. JIMENEZ: Yeah, I apologize. I did misstate
18 that. That's right. New York does everything kind of
19 backwards. It's 2001 Westlaw 1750613 for the record.

20 THE COURT: So how about I just read the ruling,
21 wouldn't that cover the ground?

22 MS. JIMENEZ: I can just read the Court the ruling
23 if the Court would like.

24 THE COURT: Sure.

25 MS. JIMENEZ: I think the, what I was interested

1 in was the testimony. But basically the Court said what Dr.
2 Cole -- well, let's see, let me back up. The Court said,
3 even applying the Federal Court's Daubert Standard what Dr.
4 Cole has offered here is junk science. He is essentially
5 playing the role of a Doubting Thomas without demonstrating
6 any documented facts or evidence to support his conclusions.

7 And skipping to the last line, what Dr. Cole has
8 offered here is interesting but too lacking in scientific
9 method to even bloody the field of fingerprint analysis as a
10 generally accepted scientific discipline. For these reasons
11 the Court precludes Dr. Cole from testifying as an expert in
12 this case.

13 THE COURT: All right. Well, you can't accuse
14 that judge of being shy.

15 MS. JIMENEZ: Yeah, true.

16 THE COURT: Why don't we continue on. I mean, as
17 I listen to the discussion, the analogy that occurs to me is
18 you don't have to be a singer to write a music review. And
19 it's important that the voice is coming from inside the
20 establishment, such as Miss Gische, who was very experienced
21 and compelling, be confronted from voices that come from
22 outside the establishment, otherwise we'd only hear one
23 position.

24 But why don't we continue on with voir dire and
25 then I'll make a ruling about whether I would sustain an

1 objection to expert testimony from Dr. Cole.

2 MS. JIMENEZ: Thank you, Your Honor.

3 Q. And that's, People v. Hyatt isn't the only court where
4 your testimony has been excluded, correct?

5 A. Correct.

6 Q. You've been excluded in other admissibility hearings,
7 correct?

8 A. Are you asking whether I'm -- so those are two
9 different things, being excluded from testifying at the
10 admissibility hearing or having a hearing and then being
11 excluded from trial.

12 Q. Well, right now the question is, have you been excluded
13 from testifying at an admissibility hearing?

14 A. I believe I have, yes.

15 Q. I think you testified in McCluskey that you had been --
16 you gave an offer of proof but were not allowed to testify
17 at an admissibility hearing in State of Missouri versus
18 Stevenson, correct?

19 A. Yes.

20 Q. And then you have additionally been precluded from
21 testifying at trial as well, correct?

22 A. Yes.

23 Q. And in one instance in the California case of People v.
24 Lugo, although you were excluded from testifying at trial,
25 the Court found that you should not be permitted to give

1 testimony which challenged the scientific validity of
2 fingerprint evidence under Daubert. Do you recall that?

3 A. I don't recall those exact words. And I would want to
4 look at that opinion as to whether that's precluding me from
5 testifying entirely or about that particular issue.

6 In some of the California Courts they said you can
7 testify about -- they restricted the scope of my testimony
8 essentially.

9 Q. Okay. You also were excluded in California in People v
10 Carradine as well. Do you recall that case?

11 A. I recall that case. And I'm not -- I don't recall
12 being precluded from testifying in that case. I do recall
13 testifying at the admissibility hearing.

14 Q. Do you recall the Court saying that he didn't see the
15 relevance of the anecdotal evidence that you testified to
16 and that he would then preclude you from testifying in front
17 of the jury?

18 A. No, I don't recall that.

19 Q. When you testified in United States v. McCluskey, that
20 was the New Mexico case in 2012, where Mr. Burt was counsel,
21 you recall that case, correct?

22 A. I do.

23 Q. The Court essentially limited your qualification in
24 comparison to what was asked for finding, he struggled a
25 little bit with the words, but ultimately said, quote, I

1 would say he is a scholar and is an expert in a survey of
2 the studies and the literature in the area of fingerprint
3 evidence, do you recall that?

4 A. That is from the transcript of the voir dire like this.
5 There was then a written ruling holding that I could testify
6 in that case, as I understand it.

7 Q. And you did testify?

8 THE COURT: Is that Mitchell that we're talking
9 about?

10 MS. JIMENEZ: That's McCluskey.

11 THE COURT: McCluskey. All right. And where is
12 that case?

13 MS. JIMENEZ: It was out of New Mexico. And I'm
14 referring to the actual transcript which, at page 169 of the
15 transcript, there are several different rulings that come
16 out of that. I can provide the Court with those citations.
17 I don't have them written in my notes right at the moment.

18 Q. And your testimony in Mitchell, that you already
19 mentioned, you were qualified as an expert in the field of
20 science and technology studies with particular expertise
21 regarding the fingerprint profession, correct?

22 A. I, I don't have independent recollection of how I was
23 qualified in Mitchell. I know that my testimony was
24 admitted in the end.

25 Q. With respect to your work reviewing the publications

1 and studies written about fingerprint evidence, have you
2 read every single study that's been published in the area of
3 fingerprint evidence?

4 A. No.

5 THE COURT: Why don't we look for an end point?

6 MS. JIMENEZ: That was may last question, Your
7 Honor. I was just checking my notes.

8 THE COURT: You are reading my mind. Go ahead.

9 MS. JIMENEZ: I apologize. I didn't mean to talk
10 over you. I have no further questions. The government does
11 object to him being qualified to testify in this hearing.

12 He has nothing of value to add related to latent fingerprint
13 comparison or analysis. He can't give the Court information
14 on what the examination that Kira Glass did, the
15 documentation related to the analysis and how to read that
16 documentation because he simply doesn't have that training.

17 And so to the extent that he is not a fingerprint
18 examiner I would suggest to the Court that his testimony is
19 not relevant for purposes of this hearing.

20 If the Court is considering hearing his testimony
21 I would simply ask that the Court do something similar to
22 the nature of what was done in McCluskey in qualifying his
23 expertise simply in a survey of the literature, which is
24 basically what he's testified to, that he reads various
25 studies and then he writes publications that analyze or look

1 at or comments on those particular studies.

2 And I think that's a limited area and that's the
3 limit of any testimony that he could offer if the Court is
4 going to hear his testimony.

5 MR. BURT: Judge, the Mitchell case that the
6 government cites extensively in their moving papers in this
7 case considered Mitchell's claim that the trial court had
8 precluded the fact finder from hearing Dr. Cole's testimony
9 as well as other defense experts.

10 And the Third Circuit ruled as follows, if
11 Mitchell were to -- and they ultimately said, the trial
12 court didn't preclude the experts, including Dr. Cole, from
13 testifying. But the Court went on to say this, quote, if
14 Mitchell were correct that his experts, who were undoubtedly
15 qualified to offer their expert opinions, were precluded
16 from testifying in opposition to the government's experts,
17 our holding in United States versus Velasquez, 64 Fed. 3rd
18 843, 844 would obligate us to vacate Mitchell's conviction
19 and remand for a new trial at which their testimony would be
20 heard. But our review of the record does not disclose that
21 Mitchell's experts were excluded or the scope of their
22 testimony improperly limited.

23 So we have a circuit court precedent that says it
24 would be reversible error to exclude testimony in the
25 Velasquez test. A case that the Third Circuit cites deals

1 exactly with the situation the Court alluded to. And it
2 involved the question of the admissibility of law professors
3 who had studied the issue of handwriting analysis.

4 And the Velasquez case said exactly what you said
5 earlier, which is, we can't restrict the debate to just the
6 examiners. In other words, if, if you did that you would
7 have things like astrology being admitted.

8 If we said, well, only astrologists can testify
9 about astrology and no one else can study the topic of
10 whether that's science or not, we'd have all kinds of junk
11 science coming into court.

12 The idea that what Dr. Cole is offering is junk
13 science is absurd. And it's absurd because the Department
14 of Justice itself, in the documents we cited to the Court in
15 reply, have adopted the very positions that Dr. Cole has
16 written about in his writings, including the concept that
17 you shouldn't be talking about no error rates. That's a
18 thing he's been writing about since the early, at least year
19 2000.

20 And many other aspects of his research and
21 writing, as the Court will see, have been adopted, not only
22 by the Department of Justice itself in its writings before
23 the Court, but also by the National Research Council which
24 cites Dr. Cole's book in its 2009 book as authority for its,
25 for its conclusion that fingerprint evidence is not

1 scientifically validated.

2 His work is accepted and cited by the FBI itself
3 in its standards. It was cited by Miss Gische. Miss
4 Gische's Subcommittee in her comment -- in their
5 commentaries to whether the Department of Justice standard
6 of reporting conclusions is valid or not. One of the
7 authorities cited is Dr. Cole's literature.

8 So Dr. Cole has a lot to offer to the Court. And
9 the Court shouldn't restrict him. The expertise in terms of
10 his knowledge of the scientific literature on fingerprint
11 evidence is solid. And it will be kept within proper
12 bounds. If there are certain questions that we ask that the
13 government thinks intrudes into the expertise of fingerprint
14 examiner --

15 THE COURT: All right.

16 MR. BURT: -- they can certainly object, but it's
17 not an occasion for wholesale exclusion of his testimony at
18 this point.

19 THE COURT: All right. I'll overrule an objection
20 to Dr. Cole's expert testimony for the following reasons:
21 What we're here to talk about today and this week is
22 methodology not particular results. Miss Gische was
23 appropriately and carefully insulated from any exposure or
24 testimony to the particular details of fingerprint
25 identification. In this case that wasn't her role.

1 And she was very careful, as was the government
2 questioning her, not to ask her about whether that
3 identification was correct or not or whether there were
4 technical errors. And, similarly, her testimony was about
5 the history and methodology and the recent criticism and to
6 some extent the backing off of the certainty, which
7 certainly I grew up with, regarding fingerprint
8 identification. When I was young it was the gold standard.
9 I mean, it was in the air. These people would go to jail on
10 the basis of a thumb print. I remember those times. Nobody
11 really questioned it.

12 Now there's some push back. And, and some debate
13 and some modification of the certainty of the opinions
14 offered. And I think from what I've heard Dr. Cole has
15 information that's valuable in that regard. He's published
16 a book published by the Harvard University Press, which is a
17 serious organization. And he serves on committees and
18 writes frequently. And he's a tenured professor at a
19 national level university.

20 So I think he meets the criteria for testifying
21 regarding the methodology of this particular discipline.

22 MR. BURT: Thank you, Your Honor.

23 THE COURT: Why don't we proceed.

24 Q. So, doctor, how did -- you mentioned the lack of a
25 research base historically. And so how did fingerprint

1 evidence of latent print examinations find its way into the
2 courtroom historically?

3 A. Well, if we stick with the United States, that was
4 around 1910, 1911. And the earliest cases which dealt with
5 the question of should this evidence be admitted or not, the
6 earliest judicial opinions essentially relied on two
7 arguments.

8 One is that all fingerprints are unique. And the
9 second was that fingerprint examiners say that they are
10 accurate in matching them.

11 Q. All right. And --

12 THE COURT: Can I interrupt, just because I want
13 to understand the points of agreement? As to fingerprints
14 to be unique, has that proved to be true through the
15 decades?

16 THE WITNESS: I think it's one of those things
17 that can't be proved, but it's not in dispute. So it's an
18 assumption.

19 THE COURT: So with the 10 point cards, for
20 example, the cards made under ideal controlled
21 circumstances, if you did a test with a qualified examiner,
22 shuffled the cards, and gave her 50 sets to match up, she
23 would mostly do it, right?

24 THE WITNESS: You would think so, although that
25 test hasn't really been done. But, yes, you would think

1 that a 10 print card is a lot more information than a latent
2 print.

3 THE COURT: All right. So really what we're
4 arguing about is what to do with the imperfect print?

5 THE WITNESS: That is correct.

6 THE COURT: Okay.

7 Q. And you said one of the claims made was uniqueness,
8 correct?

9 A. Correct.

10 Q. And what was the other one?

11 A. Fingerprint examiners say they can do this accurately.

12 Q. Okay. Now, in your --

13 A. Or, in fact, with 100 percent accuracy.

14 Q. In your writing, writings you have referred to
15 something called the fingerprint examiner's fallacy, do I
16 have that right?

17 A. Yes.

18 Q. And tell the Court what that is and what you mean by
19 the fingerprint examiner's fallacy?

20 A. That was simply my way of describing the reasoning from
21 uniqueness to accuracy to say, well, all human friction
22 ridge skin is unique, therefore, fingerprint examiners must
23 be 100 percent accurate at making associations between
24 impressions of friction ridge skin.

25 And I argue that that's a fallacy. Accuracy

1 doesn't follow from uniqueness. To take a, take an example,
2 all human faces are unique, but we don't reason from that
3 that eye witness identification is always accurate. We ask
4 questions about the accuracy of eye witness identification.

5 Q. And when you say you've maintained that position, that
6 position was considered by the National Research Council in
7 their exploration of forensic science in 2009, was it not?

8 A. Yes. The National Research Council Report of 2009 has
9 a passage expressing, I believe, that very same idea, that
10 uniqueness does not -- and persistence do not establish
11 accuracy.

12 Q. Is the passage you're referring to at page 143 where
13 they say quote, some scientific evidence supports the
14 presumption that friction ridge patterns are unique to each
15 person and persist unchanged throughout a lifetime.

16 Uniqueness and persistence are necessary conditions for
17 friction ridge identification to be feasible, but those
18 conditions do not imply that anyone can reliably discern
19 whether or not two friction ridge impressions were made by
20 the same person.

21 Uniqueness does not guarantee the prints from two
22 different people are always sufficiently different that they
23 cannot be confused or that two impressions made by the same
24 finger will always be sufficiently similar to be discerned
25 as coming from the same source.

1 The impression left by a given finger will differ
2 every time because of inevitable variation in pressure which
3 change the degree of contact between each part of the ridge
4 structure and the impression medium. None of these
5 variabilities of features across the population of fingers
6 or of repeated impressions left by a single finger has been
7 characterized, quantified or compared.

8 So is that the passage you were referencing?

9 A. Yes.

10 Q. So is it now generally accepted, within the scientific
11 literature, including the literature written by fingerprint
12 examiners themselves, that the issue to be considered is not
13 simply uniqueness and persistence, but also accuracy?

14 A. Yes and no. I think it's noteworthy that you didn't
15 hear Miss Gische testify that all fingerprints are unique,
16 therefore, we know they are accurate. So I think that she
17 agrees with me on that point.

18 There are latent print examiners all over the
19 country, I think, who are not convinced and continue to say
20 reason from uniqueness to accuracy.

21 Q. All right. How about in the scientific community, and
22 more broadly within the field, say, represented by
23 non-fingerprint examiners, and including the National
24 Research Council and other people who write on these issues?

25 A. Well, I think scientists understand the, this argument

1 that accuracy does not follow from uniqueness. And I think
2 the NRC Report, which is a committee of prestigious
3 scientists mostly, not all scientists, convened by a
4 scientific institution is representative of that view of
5 scientists.

6 Q. Can you give the Court a sense of who is writing on the
7 issue of reliability and validity of fingerprints? In other
8 words, just the different voices? You mentioned the NRC.
9 Of course there's the fingerprint examiners themselves who
10 write about these topics, correct?

11 A. Correct.

12 Q. Who else? Who else weighs in on these issues from the
13 broader scientific community?

14 A. There are forensic statisticians who write about this,
15 who have published on this. There are some legal scholars
16 who take an interest and have written on this. Some of them
17 have dual degrees, scientific training, some of them don't.

18 Q. Forensic statisticians, are these Ph.D. level
19 statisticians who specialize in the analysis of forensic
20 evidence, but also have technical expertise in statistics?

21 A. Yes.

22 Q. Who would be an example of some of the writers in that
23 area?

24 A. So an example would be Professor Franco Taroni who is a
25 professor at the University of Lausanne in Switzerland.

1 Alex Biedermann, that's B-I-E-D-E-R-M-A-N-N, whose also at
2 Lausanne.

3 Q. Now, in the field of the legal scholars who are
4 writing, who are those folks, just in terms of their
5 backgrounds?

6 A. Well, I think probably the major source is the Treatise
7 Modern Scientific Evidence, which is, you know, a major
8 evidence, U.S. Law Evidence Treatise.

9 The original authors were Professor David Faigman,
10 that's F-A-I-G-M-A-N, at Hastings Law School. Michael Saks,
11 that's S-A-K-S, at Arizona State. David Kaye, K-A-Y-E, who
12 is now at Pennsylvania State Law School.

13 Q. So --

14 A. Faigman has a Master's Degree in Psychology. Saks has
15 a Ph.D. in Psychology. And that, that treatise has an
16 extensive chapter on fingerprint identification.

17 Q. We have that marked and in evidence, the chapter from
18 the Faigman book, and it indicates that, part of that
19 chapter is written by David Stoney. Is he an academician or
20 what is his background?

21 A. David Stoney is a forensic scientist with a Ph.D. in
22 Forensic Science, I believe, from the University of
23 California, Berkeley. And he's now in private practice.

24 Q. So he's an examiner, he's somebody with qualifications
25 as an examiner?

1 A. He's a general forensic scientist. I think he would
2 consider himself primarily a microscopist, but he also --

3 THE COURT: I'm sorry, what's that word?

4 THE WITNESS: A microscopist.

5 THE COURT: What does that mean?

6 THE WITNESS: He looks through microscopes.

7 THE COURT: Oh, all right. That's a broad field.

8 THE WITNESS: Yeah. But he, he's trained to look
9 at latent prints. He's published articles about latent
10 prints. And so, yes, he wrote this scientific, half of that
11 chapter, and then the people I mentioned wrote the legal
12 half.

13 Q. And does, does Dr. Stoney address in the, his half of
14 that chapter, which is in evidence here, what his views are
15 on the validity, scientific validity question?

16 A. Yes.

17 Q. What does he say?

18 A. The Stoney chapter in Modern Scientific Evidence, which
19 was first published in 1997, was one of the first
20 publications to raise these issues about we don't have
21 validation studies measuring how accurate fingerprint
22 identification is. And we also don't have ways of
23 quantifying the probative value of a fingerprint
24 association.

25 Essentially just saying we don't have -- what we

1 have for DNA, at that time in 1997, we do not have for
2 fingerprints.

3 Q. And you said those concerns were first raised at around
4 what time period?

5 A. Well, that was published in 1997.

6 Q. So walk us through from 1997 forward to whether that
7 was a voice in the woods or other people joined in that
8 debate and how ultimately that debate has evolved to the
9 present situation?

10 A. Well, a number of academics began taking similar
11 positions after 1997. I was one of them. Most of them were
12 professors. None of them were latent print practitioners,
13 unless you count Stoney, for a period of time.

14 And at that time it was said that this position
15 was simply held by professors. Right. No one would, no one
16 in the fingerprint community.

17 Anyway, that view has become more and more
18 mainstream and shared by more and more people. I think, you
19 know, I think the turning point is, again, 2009 with the
20 publication of the NRC Report where this committee, which
21 didn't have a position on these questions before they became
22 the committee, essentially endorsed that perspective.

23 Q. And from that point forward, how has the, how have the
24 positions within the scientific community evolved as to the
25 reliability issues?

1 You said first there was just law professors then
2 along comes the NAS Report in 2009, then how did it change,
3 if it did, in terms of who was joining the debate and what
4 was being said?

5 A. Well, a great deal has changed. Statements by the
6 Department of Justice, by say the Friction Ridge
7 Subcommittee, which we heard about, they no longer make this
8 uniqueness argument. They no longer claim the error rate is
9 zero. Some of them no longer claim that absolute certainty
10 is an acceptable way of reporting results.

11 I think there's a recognition of the need for
12 validation studies and an understanding of what a validation
13 study should look like.

14 Q. What is a validation study within the meaning of
15 Daubert, as you understand it?

16 A. I think the simplest way is it's an attempt to measure
17 or estimate the, the proportion to which a latent print
18 examiner gets the right answer versus the wrong answer.

19 Q. So is it synonymous with accuracy, is that what
20 we're --

21 A. Yeah, I think the -- yes, I would call it an accuracy
22 study.

23 Q. And how does -- how do accuracy studies relate to error
24 rate?

25 A. I think that they're in some sense the same thing. If

1 you do an accuracy study you are measuring or estimating the
2 accuracy of, of this test that they are doing, this analysis
3 of latent prints, how often it gets right answers and how
4 often it gets wrong answers.

5 Those are numbers. And those numbers are, in some
6 sense, your measurement or estimate of the error rate.

7 Q. You were in court when Ms. Gische was talking about
8 these three studies that the government has marked as an
9 exhibit, Exhibits 10, which is the Ulery study, Accuracy and
10 Reliability of Forensic Latent Fingerprint Decisions. 11 is
11 Ulery's statement, Repeatability and Reproducibility of
12 Decisions by Latent Fingerprint Examiners. And 12 is
13 Measuring what Latent Fingerprint Examiners Consider
14 Sufficient Information for Individualization Determinations.
15 You're familiar with these three studies?

16 A. Yes.

17 Q. She said that these were not validation studies. Do
18 you agree or disagree with that statement?

19 A. I believe that the --

20 MS. JIMENEZ: I object to that characterization.
21 I don't believe that was her testimony.

22 MR. BURT: I think she did say that.

23 THE COURT: I'll recall it as best as I can, okay.

24 MR. BURT: Sure.

25 Q. Go ahead.

1 A. I believe that the first -- the first study that you
2 mentioned, the 2011 Proceedings of the National Academy of
3 Science Study has the design of a validation study.

4 Q. Okay. And what does that mean in terms of what this
5 study brings us to in terms of validating the accuracy of
6 latent fingerprint examinations?

7 A. Well, I think it's, it was the first study that had the
8 correct design to be a validation study. I would agree with
9 Miss Gische that you wouldn't take one study and say
10 something has been validated. Generally, you would want to
11 see more studies and other designs and replications and so
12 on.

13 So I, if somebody wanted to characterize that as a
14 significant first step I would agree with that.

15 Q. And why is it only a significant first step? Why can't
16 we say, well, there's been a study now addressing accuracy
17 and, therefore, the Daubert testability factor has been
18 established?

19 A. Well, the Daubert -- whether the testability factor has
20 been established is for the Court and not for me. The,
21 generally in science one wants to see more than one study.
22 One wants to see replications. And there are legitimate
23 questions about the, about various methods that were used in
24 that study that some people might want to address and maybe
25 improve upon.

1 Q. So is it your position that it's a good first step, but
2 we're not there yet in terms of saying that we, we now have
3 the scientific basis to conclude that latent fingerprint
4 comparisons are valid?

5 A. In some sense I think what's -- what are enough
6 validation studies is in some sense I think a legal and a
7 policy question. That is the first study that has the
8 design of a validation study.

9 Q. The second study, the one entitled Repeatability and
10 Reproducibility, does that study go to validity or to
11 reliability? And if there's a difference between the two
12 would you explain it to the Court?

13 A. That study goes to reliability in the, in the technical
14 sense. Right. Which means the ability of different
15 examiners to reach the same result and the ability of an
16 individual examiner to reach the same result, you know, on a
17 second occasion.

18 Q. And how is it different from validity in a scientific
19 sense?

20 A. So validity, again, is their ability to get the correct
21 answer.

22 Q. You have an analogy in your writing about a stopped
23 clock that I think illustrates that point. Do you recall
24 that?

25 A. Right. So a -- well, a stopped clock is accurate twice

1 a day. But, you know, reliability would, I don't know if
2 that's actually the best analogy, so reliability would mean
3 that you and I both reached the same result, but it doesn't
4 say anything about whether that result is correct.

5 Q. And the last study, The Measuring what Latent Print
6 Examiners Consider Sufficient Information for
7 Individualization Determinations, is that a validity study?

8 A. No. I don't think that purports to be a validity
9 study. That's a study of an interesting and important
10 question about latent print analysis. Right. It's a study
11 of the, of the analysis phase of ACE-V, of the process of
12 marking up.

13 So it's, it's a perfectly important scientific
14 question, but it's not a validation study. And I don't
15 think it claims to be one.

16 Q. The study itself said, the study revealed substantial
17 differences among examiner's annotations. We cannot tell
18 whether this is due to differences in how examiners see and
19 interpret the data or merely to differences in how they
20 document their interpretation.

21 And then they say, courts are now more frequently
22 requiring that examiners demonstrate their basis for
23 conclusions during discovery, admissibility and trial.
24 Examiners are rarely trained specifically on how to
25 interpret, select and record features in a standard

1 reproducible manner. Consistently applying to rigorously
2 defined methods of performing and documenting ACE-V would
3 result in a more transparent process which could be more
4 readily validated in research or in operations.

5 Do you agree with that statement?

6 A. I don't disagree with -- I don't find anything
7 objectionable in it. It's not, it's not a view that I
8 independently evolved or take myself.

9 Q. Now -- and why not?

10 A. Oh, no, I don't have an opinion. I just, it's a
11 scientific paper. I didn't write the paper. I don't have
12 any objections to it, I'm not -- but I don't want to claim
13 it.

14 Q. Is it true, as they state in this paper, courts are now
15 more frequently requiring that examiners demonstrate their
16 basis for conclusions?

17 A. I don't know if that's true actually. That's an
18 empirical question that we'd have to look at courtrooms all
19 around the country to see. It is true that there are now
20 published standards like the SWGFAST standards that call for
21 contemporaneous documentation that would allow another
22 examiner to understand the reasoning process and the basis
23 for the conclusion. How that plays out in the courtrooms
24 around the country I don't know.

25 Q. Now, let me ask you about your declaration. This is

1 Exhibit 1, correct?

2 A. Yes.

3 Q. Tab 1 in that exhibit. What were you asked to do in
4 this case?

5 A. I was asked to review a large amount of discovery and
6 to, to offer an opinion as to the methodology and whether
7 that was consistent with sort of contemporary standards.

8 Q. Okay. Were you also asked to render an opinion on
9 whether claims of individualization were scientifically
10 defensible? This is at page 18 of your declaration.

11 A. Oh, page 18?

12 Q. Yes.

13 A. I don't know if I was asked to render an opinion, but I
14 did render one.

15 Q. Okay. And, lastly, at page 28, were you asked to
16 address the question of whether the methodology used by the
17 FBI in this case had been scientifically validated?

18 A. Yes. I did render an opinion on that.

19 Q. Now, the first thing you were asked to do was to look
20 at the requirement of adequate documentation, correct?

21 A. Yes.

22 Q. And your declaration at page 7 states the requirement
23 of adequate documentation has not been met. Did you reach
24 that opinion?

25 A. Yes.

1 Q. Could you explain to the Court the basis for that
2 opinion?

3 A. The main issue was this issue of documenting the
4 reasons behind the conclusion. And from what we heard
5 earlier I was sort of surprised that that does not include
6 documentation of the known print, that it only includes
7 documentation of the unknown. That seems inconsistent with
8 the SWGFAST standard which says you have to explain the
9 basis for the conclusion and your findings in both the known
10 and the unknown.

11 Q. All right. And the SWGFAST standard is the
12 documentation standard you're referencing?

13 A. Yes.

14 Q. Okay. So was that one basis for your opinion that the
15 documentation was not adequate in this case?

16 A. Yeah. The SWGFAST standard and the expert, the report
17 of the expert working group convened by NIST that Miss
18 Gische was a member of.

19 Q. What position did they take on documentation?

20 A. They also made a very similar recommendation for
21 documentation that, again, explained the reasoning process
22 that leads the examiner to the conclusion.

23 Q. Did the issue of documentation become more focused on
24 as a result of the Mayfield case?

25 A. Yes. I believe it did.

1 Q. And why was that?

2 A. Well, one, I think, I think one reason is it was hard
3 to do a post-mortem on the Mayfield case or any error when
4 you don't have documentation. If you simply have an
5 examiner who says I thought they came from the same source,
6 and now I'm told they didn't, it's hard to know where the
7 process went wrong. It's hard to know whether it was maybe
8 you might not even be able to distinguish deliberate fraud
9 from an honest error if there's no, you know, if all they
10 say is these two came from the same source.

11 I think the second reason is Mayfield was just a
12 kind of trigger for general improvement in the field of
13 latent prints. And documentation is one obvious area where,
14 where there was room for improvement.

15 Q. Now, you saw during the testimony of Miss Gische
16 reference to the photos which are in the OIG Report on the
17 Mayfield investigation. And they had a markup of both the
18 known and the latent with points of identity numbered?

19 A. Yes.

20 Q. You've seen those types of charts before?

21 A. Yes.

22 Q. And I think in response to my bringing that issue up
23 the government asked on re-direct examination, well, those
24 markups were not done as part of routine case analysis, but
25 they were requested to be done, according to the OIG Report,

1 after this issue was being explored.

2 But does the fact that the FBI created, was able
3 to create those documents indicate some ability to create
4 that sort of documentation, regardless of why it was
5 created, whether it was part of casework or it was done in
6 response to somebody asking the FBI, please document the
7 basis of your opinion, does it indicate an ability to
8 provide adequate documentation?

9 A. Of course. They can provide markups, charted, charted
10 enlargements I believe they are called, like that.

11 Q. All right.

12 THE COURT: Can I push back a little bit? As I
13 understand the problem, as Miss Gische explained it to me,
14 and I caught on the second time, in a typical fingerprint
15 case, maybe we have a gun with a fingerprint on it and
16 everybody in this room had access and the question is which
17 one of us left his or her print on the gun, right? That
18 would be a sort of common scenario, fair enough?

19 THE WITNESS: Yes.

20 THE COURT: So the points of importance on the
21 latent print on the gun is only one print, it's a reasonable
22 task to use the little colored marker or the tiny stylist
23 point to sort out the points of interest. But it's a kind
24 of thankless and monumental task to do that for the prints
25 for every single one of us because most of them are easily,

1 you know, we exclude Mr. Burt very quickly because he has a
2 hole in the wrong place. So is it your perspective that
3 proper documentation would require the known to, every
4 single known to have the same level of attention given to
5 the latent?

6 THE WITNESS: It would seem to me it would only
7 have to be the known to which that latent is being
8 associated.

9 THE COURT: Right. So the discards, the
10 exclusions, no need to do it for those?

11 THE WITNESS: That seems reasonable to me.

12 THE COURT: Right.

13 THE WITNESS: It's not my place to set standards
14 for the discipline.

15 THE COURT: Well, no, but your place is to
16 criticize the existing practice.

17 THE WITNESS: That would be my interpretation of
18 what the SWGFAST standard says.

19 THE COURT: Which is that the, that the known for
20 which matches the latent should have the same level of
21 documentation?

22 THE WITNESS: Well, SWGFAST just says the known.
23 It doesn't say the known for which. But I would understand
24 it to mean --

25 THE COURT: We have a lot of knowns, otherwise we

1 don't really have a problem, right?

2 THE WITNESS: So I would understand it to be the
3 known for which.

4 THE COURT: Okay. Thanks.

5 MR. BURT: I want to, if I could have one moment,
6 Your Honor?

7 THE COURT: Sure.

8 Q. Could I have the Elmo? I want to show you a portion of
9 Exhibit A39. Is this the SWGDAM standard for documentation
10 document that you were referencing in your testimony?

11 A. No, it's the SWGFAST document.

12 Q. SWGFAST, I'm sorry. I continuously miss that. This is
13 what you were referencing, right?

14 A. Yes.

15 Q. And in that document they give an example of the kind
16 of detail for a latent that they consider adequate
17 documentation in terms of just a description of what the
18 examiner is observing, correct? This is their figure one,
19 an example of an annotated legible copy of a latent print
20 from a lift card demonstrated in more detail documentation
21 of the analysis.

22 A. Yes.

23 Q. Did you see this kind of documentation in this case as
24 you reviewed the, the disk with all the photographs and the
25 underlying case file?

1 A. So, if we're referring to the handwritten sort of
2 narrative below the photograph?

3 Q. Yes.

4 A. Then, no.

5 Q. Okay. And then on page four of the standard it says,
6 under Comparison, documentation that records the information
7 relied upon during comparison shall be made for each
8 comparison. Documentation of the comparison relies on both
9 the latent and the known print. Then it goes on to define
10 that documentation includes similarities and
11 dissimilarities, correct?

12 A. Yes.

13 Q. Did you understand Miss Gische to be saying that they
14 don't comply with that portion of the standard that relates
15 to the known print?

16 A. It seemed not. And I was surprised by that. My
17 interpretation of this language had always been that, that
18 you would need to mark the corresponding features in, in the
19 known print to show that which features you thought
20 corresponded with the features that you saw in the unknown
21 print.

22 Q. Okay. And then a separate part of the standard states,
23 if the examiner changes the of value decision this shall be
24 documented. The reason for changing the of value decision
25 shall also be documented. Any conclusions reached up to the

1 point the examiner changes the of value decision shall be
2 documented.

3 Was that standard followed in this case with
4 respect to the change in position between the Smith
5 examination and the later examination by Miss Glass and her
6 reviewer?

7 A. Well, that language would seem to me to apply to the
8 situation that we heard about where the no value conclusion
9 was changed. It wasn't changed by a single examiner. It
10 was changed by a different examiner. But, nonetheless, this
11 language would seem to apply to it.

12 It would seem to me that documentation would be
13 doubly important in that case because, as was discussed
14 here, there could be two reasons, at least two reasons for
15 the change in the no value determination.

16 Miss Gische referred to changing standards between
17 2002 and 2016. But she was a little vague on what it was
18 that changed. But she primarily referred to knowledge about
19 the rarity of features.

20 So it could be that what changed is knowledge --
21 is knowledge about rarity. And Miss Glass thought that
22 features in the latent were so common that she could never
23 make an identification decision from them. That's one
24 explanation.

25 I had always, I usually think of a no value

1 determination as a smudge or an illegible print, a print
2 that's too smudgy, it doesn't have enough features to render
3 an identification decision.

4 Those are two different, pretty different
5 situations. And I think it would be useful to know which
6 one it was. And the lack of -- as far as I -- anything I've
7 seen, we don't have any documentation that tells us which
8 situation it is, which seems like a fairly important thing.

9 Q. And --

10 THE COURT: Let me, maybe we can kind of move on
11 from this issue. It reminds me of eighth grade algebra,
12 right, where the teacher says show your work, show your
13 work. Well, you won't do so, well, if you don't show your
14 work, but that doesn't shake the foundations of algebra. We
15 don't say algebra is not true because the mathematician
16 doesn't show the work.

17 Doesn't this go to problems in a particular case
18 rather than to the, the methodology of fingerprint
19 identification as a whole? That some people document well,
20 some people document hastily, but we don't throw the whole
21 thing out because an examiner doesn't write it all down?

22 THE WITNESS: I think you're correct, that it
23 doesn't go to the accuracy in a certain sense. On the other
24 hand, many bodies, including the National Research Council,
25 the NIST Expert Group, have all sort of ringingly called for

1 better documentation. And they give lists of reasons why
2 documentation is -- we need documentation.

3 And you're right, accuracy isn't one of them.
4 It's transparency, learning about the causes of errors and
5 things of that nature.

6 THE COURT: All right.

7 Q. And to follow-up on the Court's point, there are really
8 two issues here, right? One is whether the science, in
9 general, is valid, right? Not the science. That assumes
10 the question. But whether fingerprint examiner comparisons
11 are valid within the meaning of Daubert in some general
12 sense. That's one issue, right?

13 A. Yes.

14 Q. The second issue, under the rules is, are the examiners
15 following the -- regardless of general reliability, in other
16 words, if you assume that a field is reliable if certain
17 standards are in place, and they follow those standards, you
18 still got to follow the standards. And the second issue is,
19 did the examiner follow the standards of the profession,
20 right? That's a separate issue?

21 A. Yes.

22 THE COURT: And that's not particularly a Daubert
23 issue. That's either cross-examination or weight or
24 potentially admissibility at trial, but it's not really a
25 Daubert issue?

1 MR. BURT: I think it's a Rule 702 issue because
2 the rule says, did the examiner follow the standards of the
3 field. In other words, what were the standards applied, but
4 that's a legal issue.

5 THE COURT: I think I understand the problem.
6 Let's find another topic.

7 MR. BURT: Sure.

8 Q. Now, I want to talk to you about error and the
9 characterization of error. In your declaration you
10 characterize the change in the opinion from, that Smith and
11 his reviewer reached, identifying Mr. Lee to those prints.
12 And then Glass and her reviewer coming in and saying,
13 actually, that print has no value as an error, correct?

14 A. Yes.

15 Q. And why did you characterize it as an error as opposed
16 to it's just merely a difference of opinion?

17 A. Well, it seems to me self-evident that it's an, that
18 it's an error. The no value determination is a yes or no
19 question. The answer changed from yes to no. That seems to
20 me an error.

21 If, if you deny that that's an error then you're
22 saying that both yes and no are correct answers to the
23 question of whether the latent had value.

24 And it's notable that, not only did Mr. Smith say
25 it had value, he said that Mr. Lee, I believe it was, was

1 the only -- was the source of the print. No one else in the
2 world could be the source of that print except Mr. Lee.

3 So it's a much further claim. In fact, the
4 subsequent analysis says that's not even a latent value.

5 Q. Now, has there been, in these admissibility hearings,
6 debate about what is an error and has that debate changed as
7 time has gone on?

8 A. Yes. There's been a long history of debate about
9 error. And we heard earlier this week a lot about the zero
10 error rate and so on.

11 So 15 years ago the FBI was testifying in these
12 hearings that the error rate was zero and going on national
13 television and saying the error rate was zero. And this was
14 before Mayfield, but we knew about errors in latent print
15 identification.

16 Now, the way that that claim was made was by
17 dividing error into two things called methodological error
18 rate and practitioner error rate. And saying, well, it's
19 the methodological error rate is zero and the practitioner
20 error rate is whatever it is.

21 That rhetorical move of splitting error into those
22 two things has now been recognized as inappropriate even by
23 the Department of Justice in their recent proposed uniform
24 language for testimony and reports.

25 Q. Okay. And did that claim, that there is a zero error

1 rate, find its way into the opinions of courts considering
2 the issue of admissibility, at least when these challenges
3 first started to be brought?

4 A. Yes. Unfortunately these claims of a zero error rate
5 were then sort of echoed in legal opinions.

6 Q. You've written about the Havvard decision?

7 A. Yes.

8 Q. And you, one of your articles, if you look at Exhibit
9 8, is called Grandfathering Evidence: Fingerprinting,
10 Fingerprint Admissibility Rulings From Jennings to LLera
11 Plaza and Back Again, correct?

12 A. Yes.

13 Q. In which you explored developments from -- Jennings was
14 the first case that admitted fingerprint evidence?

15 A. Yes, in --

16 Q. Back in --

17 A. -- 1911, yeah.

18 Q. And LLera Plaza was the two decisions by Judge Pollak
19 first placing restrictions on and then not placing
20 restrictions on fingerprint evidence?

21 A. That's correct.

22 Q. And as part of that article you discuss the Havvard
23 decision, correct?

24 A. Yes.

25 Q. And you address the issue in your publication there of

1 whether -- two things that were stated in Havvard. One is
2 that as the government claims there is zero error rate,
3 correct?

4 A. Yes.

5 Q. And the second is whether adversarial testing can
6 substitute for empirical testing?

7 A. Right.

8 Q. So talk about those two issues. First of all why, how
9 do we know that there's no zero error rate?

10 A. We know that there's no zero error rate because there
11 have been errors. We know that there's no, that there's no
12 zero error rate because no scientific process or test has a
13 zero error rate.

14 The, it's, it's sort of a truism of probability
15 and statistics that the probability of an event can never be
16 one, you know, can never be 100 percent and it can never be
17 zero. There's always a probability no matter how small of
18 an error.

19 Q. You -- go ahead?

20 A. I'm done.

21 Q. Were you finished? All right.

22 You conducted a study in 2005 which is in evidence
23 as Exhibit A2 called, More Than Zero: Accounting for Error
24 in Latent Fingerprint Identification, correct?

25 A. Yes.

1 Q. And was that published after the error in the Mayfield
2 case?

3 A. Yes. It was published in 2005.

4 Q. And did you document other errors in fingerprint cases
5 besides the Mayfield case?

6 A. Yes, I did.

7 Q. How many?

8 A. There were 22 listed in that article.

9 Q. Okay. And since that article was published has anyone
10 had any dispute that you accurately described these cases as
11 erroneous cases?

12 A. I suppose there's been some dispute over the, the
13 Callins case especially which some people argue was a case
14 of fraud, which I wasn't really trying to capture.

15 Q. Did you exclude cases of fraud from your exploration of
16 errors?

17 A. I endeavored to, yes.

18 Q. And why?

19 A. Because I wasn't interested in deliberate fraud. That
20 no one disputes that somebody could engage in deliberate
21 fraud in fingerprint identification. What was disputed at
22 that time was whether a well qualified, well intentioned
23 examiner could make an error. And that whole article was a
24 critique of this zero error rate argument.

25 Q. And initially what was the reception to this article,

1 this More Than Zero Article from the fingerprint community?

2 A. I don't know actually.

3 Q. Did eventually the position that it's inappropriate to
4 be talking about zero error rates find its way to be
5 generally accepted, not only within the scientific
6 community, but within the fingerprint community?

7 A. Yes. Again, a significant development was published
8 this year is the Department of Justice's Proposed Uniform
9 Language for Testimony and Reports, which lists among
10 statements that should not be made, zero error rate.

11 Q. Now, the second thing you talked about in this
12 grandfathering article was whether adversary testing could
13 be a substitute for scientific testing, correct?

14 A. That's correct.

15 Q. And what, why can't we just say, well, fingerprint
16 evidence has been subject to testimony in the courtroom and
17 that's some testing and so that's good enough?

18 A. Yeah, so that's the argument that each criminal trial
19 like this one constitutes an experiment testing the accuracy
20 of the fingerprint decision made by the fingerprint
21 examiner. And if the -- presumably if the jury believes the
22 fingerprint examiner then that means the fingerprint
23 identification is right, was right. And so the trials
24 constitute the scientific experiment testing, measuring
25 accuracy essentially. And that was another argument made by

1 FBI in these early admissibility challenges.

2 A hundred years of testing they called it, right.
3 Those weren't scientific tests. Those were criminal trials
4 in criminal cases.

5 The flaw in this reasoning, of course, is that we
6 don't know the truth of who left this print in a criminal
7 trial. We could, we could be wrong and convict the wrong
8 person and we wouldn't know it.

9 Nobody comes to us at the end of a criminal trial
10 and says you've got it right or you've got it wrong.

11 Q. There's been some talk here about proficiency tests.
12 And I think Miss Gische said that we don't have an
13 acceptable -- we don't yet have an established acceptable or
14 unacceptable error rate. Do you recall her testimony?

15 A. Yes.

16 Q. Do you agree with that?

17 A. I don't disagree with that um, if that's her position.
18 The difficulty I have is saying that and then saying, but we
19 know it's highly accurate. So to me saying how accurate it
20 is is the same as saying what you think the error rate is.

21 So if you say, I think it's highly accurate that's
22 a, behind that word highly, those words highly accurate has
23 to be some kind of number that has to mean you think it's
24 90 percent accurate or 95 percent accurate or 99.9 percent
25 accurate. There has to be some kind of number that you're

1 thinking of behind that. And if the, if there is a number
2 then that's the error rate.

3 So -- now, it may not be the real error rate, but
4 it's your estimate of the error rate or your best estimate
5 of the error rate. So what concerns me is saying there
6 can't be an error rate and yet I also want to say it's
7 highly accurate. It strikes me as trying to have it both
8 ways.

9 One thing I noted in her language was that she
10 said these studies show us that fingerprint examiners can
11 reach accurate conclusions. I believe she said that twice.
12 Now -- so words matter.

13 Now, taken literally, fingerprint examiners can
14 reach accurate conclusions. That could simply mean that
15 they reach an accurate conclusion once, right.

16 THE COURT: Like me if I looked at it.

17 THE WITNESS: Yeah, you could reach an accurate
18 conclusion and so could I. So taken literally that's all it
19 means.

20 I think we all know that's not what she meant.
21 She meant they reach accurate conclusions at some high rate.
22 But then we need to know what rate that is. What rate does
23 she think we reach accurate conclusions.

24 Q. And have the studies been done to answer that question
25 I guess is the ultimate question?

1 A. Well, that comes down to whether you think the Ulery
2 Study answers that question. And you have to decide whether
3 you think it does.

4 THE COURT: Which study?

5 THE WITNESS: The first Ulery study, 2011 study.

6 Q. That's Exhibit 10, Government's Exhibit 10 I think?

7 A. Yes.

8 Q. Yeah. So there was mention of proficiency tests. Do
9 existing proficiency test data accurately measure the
10 accuracy of forensic fingerprint identification?

11 A. Okay. So there's a lot of semantic confusion between
12 proficiency tests and validity studies because in some sense
13 they, they look very similar. They consist of giving a
14 latent print examiner some kind of test materials where you
15 know the correct answer and seeing if they get, they get the
16 correct answer.

17 Classically proficiency tests are not for the
18 purpose of validation. They are for the purpose of
19 measuring whether the examiners in your lab are competent,
20 right.

21 And so, so the answer I think is that when there
22 were no validation studies people like me looked at
23 proficiency test data as the best available data on the
24 accuracy of latent print examiners.

25 I think now that you have studies like the Ulery

1 Study there's no reason to use the proficiency test data.

2 The Ulery data is better data.

3 Q. Okay. Now, the, one of the questions you were asked to
4 address in your declaration was whether the ACE-V
5 methodology, referring now to page 28, whether the ACE-V
6 methodology has been validated. First of all, is ACE-V a
7 methodology?

8 A. I've never thought it's a methodology, but -- so, no,
9 but it was, it's been too exhausting to argue about it.

10 What people, you know, what's the definition of a
11 methodology gets to be a really arcane argument.

12 Q. And the NRC says it has not been validated, correct?

13 A. The NRC Report says it's not a validated methodology.

14 Q. And is there any debate about that in the literature at
15 this point? Does everybody agree with that?

16 A. It depends on who you mean by everybody. I think lots
17 of fingerprint practitioners do not agree with that and
18 think it's valid.

19 Q. Does the -- well, within the broader scientific
20 community what is the consensus, if there is one?

21 A. I'm not aware of a scientific critique of that
22 statement by the NRC.

23 Q. Okay. You were also asked to give an opinion on
24 whether claims of identification to absolute certainty are
25 scientifically validated. And I believe you explained your

1 opinion that such claims are not validated. Is there any
2 dispute about the issue in the literature at this point?

3 A. Yes. Yes. There are latent print practitioners who
4 continue to claim that claims of absolute certainty are okay
5 and they publish them.

6 Q. Are there -- outside the claims of those people, what
7 is, is there a consensus in the literature both -- and by
8 literature I mean the standards, the new DOJ proposed
9 standards, the NRC people who are not practicing fingerprint
10 examiners but who are writing about this?

11 A. Yeah. Well, some very important authorities now say
12 you should not make claims of absolute certainty. It's a
13 big theme of the NRC. It's in, it's in the NIST Expert
14 Working Group Report. It's in the DOJ Proposed Uniform
15 Language on testimony and reports. It's in the FBI
16 documents that were discovered here about the statement that
17 they want to make that sort of makes gestures to you
18 shouldn't make claims to absolute certainty.

19 Q. Now, the statements that are being proposed by the
20 Department of Justice in terms of, okay, given where we are
21 at this stage in the, in the research realm we've got to
22 phrase the opinion in a certain way, and they've proposed
23 this language, but what is the language they are proposing?
24 And have you responded in writing, or otherwise, to whether
25 that's an appropriate standard?

1 A. Yeah. I'd like to look at the language if that's
2 possible.

3 Q. Sure. Let me give you that. I believe it is in, it's
4 Exhibit 58 and 59. May I approach the witness?

5 THE COURT: Of course.

6 MR. BURT: Thank you.

7 Q. I'll open that up in 59.

8 A. So this is from the Department of Justice Proposed
9 Uniform Language for Testimony and Reports for the Forensic
10 Latent Print Discipline.

11 And the proposed language here for an
12 identification is as follows: The examiner may state or
13 imply --

14 THE COURT: You got to give her a break. Go a
15 little slower.

16 THE WITNESS: All right. May state or imply that
17 an identification is the determination that two friction
18 ridge prints originated from the same source because there
19 is sufficient quality and quantity of corresponding
20 information such that the examiner would not expect to see
21 that same arrangement of features repeated in another
22 source.

23 While an identification to the absolute exclusion
24 of all others is not supported by research, studies have
25 shown that as more reliable features are found in agreement

1 it becomes less likely to find that same arrangement of
2 features in a print from another source.

3 And I believe the language in the FBI document
4 stating how it wants to report its results is the same
5 language.

6 Q. All right. If I could, I want to put that up on the
7 Elmo so that as we talk about it everyone can look at it.

8 So that, was that proposal published on, in early
9 June of this year?

10 A. Yes. The DOJ document was published in June.

11 Q. And in your binder there -- and was there a public
12 comment period that's still in play where they put that out
13 on their web and they say if people want to comment here's
14 the period of time in which to do so?

15 A. Yes. This proposed language was put out for public
16 comment.

17 Q. And did you submit a proposed modification of the
18 language?

19 A. No, I submitted a public comment.

20 Q. Okay. Is that contained in tab three of the binder?

21 A. Yes.

22 Q. And did other people as well also submit commentary on
23 this proposed language?

24 A. Yes.

25 Q. Tab four, do you recognize that document?

1 A. Yeah, that's the commentary by Simon Gittelson.

2 Q. And who is she or he?

3 A. She is a forensic statistician who is employed by the
4 National Institute of Standards and Technology.

5 Q. All right. And tab five, do you recognize that
6 document?

7 A. This is a public comment by the International
8 Association for Identification.

9 Q. Tab six?

10 A. This is a public comment by the Innocence Network and
11 the Innocence Project.

12 Q. Okay. Let's focus first of all on your comment in tab
13 three which you state at the outset of your written comment,
14 the reviewer is a member of the Human Factor Subcommittee
15 National Commission on Forensic Science. The comments are
16 the reviewer's own and do not necessarily represent the
17 views of the Human Factor Subcommittee. And then you
18 proceed to analyze your critique of the proposed language,
19 correct?

20 A. Correct.

21 Q. What is a critique? What's wrong with this DOJ
22 language, proposed language?

23 A. So, in some sense this language is progress. We're
24 trying to get away from the older statements that were used
25 in the latent print discipline which were this person is the

1 source of this latent print. It is the source of this
2 latent print essentially. No probability that anybody else
3 could be, could be the source.

4 So just briefly, my first criticism of this
5 statement is it's, it's not clear whether or not it is a
6 statement of absolute certainty or whether it's what I would
7 call a probabilistic statement that admits that there's a
8 probability that they are from a different source.

9 If you look at the statement and stop right after
10 the word, source, you would say, this is a non-probabilistic
11 statement. They are simply saying that, that they originate
12 from the same source. There's no probability that they
13 could originate from different sources.

14 Then there's some other words that seem to be
15 trying to make it probabilistic, but they don't do a good
16 enough job. And one of the reasons for that is taking
17 away -- is that, if you look at the second sentence they
18 say, okay, we're taking, we're not going to say to the
19 absolute exclusion of all others.

20 So this is a common move in rewriting statements
21 like this and say, okay, I'm going to say they come from the
22 same source, but I'm not going to say they come from the
23 same source to the exclusion of all others.

24 Q. And linguistically and to a lay jury what is the
25 difference between those two formulations?

1 A. I don't think there is any difference, either logically
2 or logistically or to anyone who hears it. If you say two
3 things come from the same source you are saying they are
4 coming from the same source to the exclusion of all others.

5 So I think taking away the word, to the exclusion
6 of all others, is, you know, it doesn't change anything.
7 It's not a concession in a sense.

8 You then look at the second half of that sentence
9 and it says, studies have shown that as more reliable
10 features are found in agreement it becomes less likely to
11 find that same arrangement of features in a print from
12 another source. Essentially what that means is the more
13 minutiae points you find in common the less likely it is
14 that they come from different sources.

15 That's intuitively true. It's even supported by
16 some research that just prints with more features are more
17 discriminating than prints with less features, but I don't
18 see what that tells us about the probability that the prints
19 come from different sources.

20 And then the second half of the first sentence is,
21 is just vague. The examiner would not expect to see that
22 arrangement of features repeated in another source. That's,
23 again, not telling us what the probability is that you
24 would -- that they come from different sources.

25 Q. And is that because there is no research out there

1 telling us what the probability is?

2 A. Probably, yes.

3 Q. Okay. Anything else in terms of, you know --

4 A. I mainly focused on the need to have a probabilistic
5 statement that clearly states that, that there's some
6 probability that they come from the same source and that
7 there's some probability that they come from different
8 sources. To me that's what I think is the important thing.
9 So that's what I tried to focus on in this statement.

10 Q. And are other people that, in these comments that are
11 in the tabs I identified, are they reaching a contrary
12 conclusion or is it a different perspective or how would you
13 characterize it?

14 A. In the tabs I think they are -- some of them are
15 reaching similar conclusions. Not the International
16 Association for Identification I don't think.

17 Q. Right. But the NIST researcher?

18 A. Yes. The NIST researcher, Dr. Gittelsohn, is also
19 making the point that it needs to be probabilistic, but
20 she's writing like a statistician and not like a social
21 scientist.

22 Q. Okay. Now, --

23 THE COURT: Did you propose a paragraph yourself
24 that might work?

25 THE WITNESS: I did not.

1 THE COURT: I mean, lawyers often complain about
2 the lack of clarity in proposed jury instructions. And so I
3 always say, hey, let's see yours and there's usually a
4 deafening silence.

5 All right. That was not really a question.

6 Q. One of the articles in your binder there, tab 10 is
7 called Splitting Hairs? Evaluating Split Testimony as an
8 Approach to the Problem of Forensic Expert Evidence. And is
9 it true that that paper was exploring recent responses to
10 these Daubert challenges in which courts have grappled with
11 what the limitation in language should be in light of the
12 issues being raised about the science?

13 A. Yes. This, this article was about cases in which
14 courts had responded to challenges to latent print evidence,
15 not through admissibility, but through limitations on the
16 testimony.

17 Q. And was some of the solutions that were being reached
18 by courts, well, okay, we'll take away to the absolute
19 exclusion of everybody else and we'll substitute it for a
20 reasonable degree of scientific certainty or reasonable
21 degree of fingerprint examiner's certainty in the
22 fingerprint field and then weren't there other cases in the
23 ballistic comparison forensic field that were saying, well,
24 I'm only going to let the examiner testify that he's sure to
25 a standard of more probable than not, those types of

1 solutions is what you are exploring here?

2 A. Yeah. So these are cases where the courts have banned
3 essentially some, some words such as to the exclusion of all
4 others, a hundred percent certainty, individualization. And
5 in some cases they've allowed other words. And as you
6 mentioned, reasonable degree of scientific certainty was a
7 common one.

8 Q. Practical impossibility. That practical impossibility
9 language was part of the NIST Standard, right? And isn't it
10 true that some courts are saying, well, we'll just allow
11 them to say, they can't say to exclusion of everybody in the
12 world, but they can say it's, it's a practical impossibility
13 that somebody else could have contributed this print?

14 A. Did you say the NIST Standard?

15 Q. If I did I was in error.

16 A. Right. So --

17 Q. I meant the --

18 A. So it's part of the SWGFAST Standard is the practical
19 impossibility.

20 Q. So that was another solution?

21 A. Yes.

22 Q. Did that approach to the problem change somewhat when
23 the National Commission on Forensic Science issued the
24 position paper on reasonable degree of scientific certainty?

25 Has anybody explored, since that consensus statement was

1 issued, essentially condemning that sort of approach, have
2 there been any courts that have grappled with the issue
3 after that National Commission Paper?

4 A. So the National Commission on Forensic Science issued a
5 statement saying courts should not use the term reasonable
6 degree of scientific certainty any more. And forensic
7 practitioners should not use it any more. It's a term that
8 has no meaning in science. It's a legal term that lawyers
9 imagine is a scientific term, but it's not.

10 That's a, now an adopted recommendation of the
11 National Commission on Forensic Science. I have no idea
12 what effect that's had on the ground level of courts.

13 Q. But prior to that being issued, you did have a series
14 of opinions which came up with these, as you call, split
15 testimony opinions, where they say we're going to allow the
16 examiner to testify, but they are not going to be allowed to
17 state absolute certainty and we'll put some spin on the
18 language that will fix the problem essentially?

19 A. Yes. And you may have such cases after that. It's
20 just that reasonable degree of scientific certainty will be
21 a less available solution.

22 THE COURT: This going to be generational? In
23 other words, a whole generation of judges and lawyers felt
24 comfortable saying it and those people will retire and then
25 something different will come along.

1 Q. You cite in that article at Page 465 a trial court
2 ruling where the Court ruled that the fingerprint examiner
3 should not be, should not be allowed to testify that they
4 have identified the right middle finger of Pope to the
5 exclusion of all others, or that they have made a positive,
6 absolute or certain identification. Instead, they will be
7 allowed to testify that the fingerprint found in this case
8 is consistent with the known fingerprint found on the right
9 middle finger of Pope, right? That was one solution, in
10 this time period before that National Standard about
11 condemning scientific certainty got issued, right?

12 A. Yes.

13 Q. And then you also talk about other cases like the
14 approach in the McVeigh case in which the Court disallowed
15 any testimony about the conclusions of, I think there was a
16 handwriting analyst, correct?

17 A. The McVeigh case?

18 Q. Yes.

19 A. I believe that -- so that's not in the article?

20 Q. It is.

21 A. Where are you then?

22 Q. Yes.

23 A. What page?

24 Q. This is at Page 464.

25 A. Yes.

1 Q. Where you talked about the Hines/McVeigh approach?

2 A. Yes.

3 Q. What is that approach?

4 A. Oh, just point out similarities and not draw any
5 inference from them.

6 Q. So the examiner would say, here's the mark up, 15
7 points or whatever, and then the conclusion is left for the
8 jury?

9 A. That's right.

10 Q. Okay. So why isn't that the solution to the problem of
11 lack of science in latent fingerprint examinations?

12 A. The McVeigh solution?

13 Q. Well, that or any of these other solutions that are
14 being proposed or that have been adopted by courts up to the
15 point in time when you wrote this article?

16 A. Well, I think these solutions are better than allowing
17 the witness to say that they are absolutely certain. But
18 there are critiques of these solutions as well.

19 And the critique of, of just showing the
20 similarities would be that, that a jury doesn't know what
21 inference to make from, from a finding of similarity of 15
22 minutiae points.

23 To note that I need to know something about the
24 rarity of 15 minutiae points, right. So an easy example is
25 finding, finding consistency in AB-O blood type between two

1 people is a lot less significant than finding consistency in
2 13 DNA alleles. But can the jury know that? Does the jury
3 know that difference when it comes to, say, friction ridge
4 features?

5 And same argument with consistent with. What's
6 the jury supposed to, supposed to make of that?

7 Q. Right. So that issue, same issue comes up in the
8 discussion we had yesterday about fiber evidence, right?
9 You, you say to the jury, well, they are consistent, but if
10 they don't know the prevalence of how many other things out
11 there are consistent it's sort of meaningless?

12 A. That's right.

13 Q. Okay. And how about the solution of reasonable degree
14 of fingerprint examiner's certainty or practical
15 impossibility, why isn't that a legitimate way to deal with
16 this lack of science problem?

17 A. Oh, well, as I said before, because that's sort of a
18 statement that has no meaning. It's just kind of like, I
19 believe one evidence scholar called it a talismanic
20 invocation. It's like some magic words that you say that
21 don't mean anything.

22 So evidence scholars have never liked those words.
23 And now the National Commission has sort of endorsed that
24 perspective.

25 Q. Now, there was, through Miss Gische, she mentioned an

1 article that was written by the, Mr. Swofford I think his
2 name is?

3 A. Yes.

4 Q. Called The Paradigm Shift in Fingerprint, I forget the
5 exact title. I think it's Exhibit 30, A30, The Emerging
6 Paradigm Shift in Epistemology of Fingerprint Conclusions.

7 Are you familiar with that article?

8 A. Yes, I am.

9 Q. And what does he write about there in terms of what the
10 emerging shift is?

11 A. The emerging shift is the shift to a probabilistic
12 understanding of a fingerprint association. That it can
13 never be certain, that it always has to be understood
14 probabilistically.

15 Q. Are you familiar with the position statement, the Army
16 Information Paper, Use of the Term Identification in Latent
17 Print Reports, Exhibit A33?

18 A. Yes, I am.

19 Q. And what is the nature of that proposal? How does that
20 differ from the DOJ proposal?

21 A. So that's the, the U.S. Army Crime Laboratory's
22 proposed statement for the results of their latent print
23 analyses. They may have changed their name from U.S. Army
24 Crime Laboratory to something else.

25 Q. So they say the problem can be fixed by putting it in

1 this form the latent print on X. and the record fingerprint
2 bearing the name X. have corresponding ridge detail. The
3 likelihood of observing this amount of correspondence when
4 two impressions are made by different sources is considered
5 extremely low.

6 From a scientific standpoint what is the
7 objection, if there is one, to that proposal?

8 A. Did you want me to explain the difference between this
9 and the DOJ statement --

10 Q. Yeah, if you would. Sure.

11 A. -- and the FBI statement first?

12 Q. Yeah, that might be good.

13 A. Which I think is two-fold. First, that it explicitly
14 states that there is a likelihood or a probability that they
15 come from different sources.

16 And the second is it's not clear in the language
17 here, but it's clear from the paper, that they are not going
18 to use the word identification or individualization any more
19 because they think -- well, I think that's because they
20 think that those words are, sort of connote absolute
21 certainty, identification and individualization.

22 You wanted to know what the criticism of this
23 statement is?

24 Q. Yeah, if there is one.

25 A. Yeah, so the potential criticism of this is that it

1 stated a probability that they come from different sources
2 in words. A verbal statement, it's extremely low. And they
3 can't tell you what number stands behind those words.

4 Q. So the jury is just left with -- there's no validation
5 for what that number is, as Miss Gische said, no statistical
6 studies at this point that they can use to sort of inform
7 that what extremely low means?

8 A. I don't think it's just the jury. It's also the
9 scientific community saying, we'd like to know what, what
10 number it is that you're, that you think is appropriate to
11 use the verbal characterization, extremely low. Right. Is
12 it one in a thousand, is it one in a million, is it one in a
13 billion.

14 Q. So in light of the fact that the Army takes this
15 position, and obviously this researcher is part of the
16 latent fingerprint community itself, right?

17 A. Yes.

18 Q. He's not an academic researcher. He's a fingerprint
19 examiner, and yet the FBI proposing different language, you
20 have the DOJ proposing language that sounds similar to what
21 the FBI is proposing, is there at this point in history a
22 generally accepted definition for how opinions should be
23 stated, even within the field itself? Put aside the
24 academic debates from other scientists, but within the field
25 of fingerprint examiners themselves is there a consensus of,

1 of how to state opinions other than a consensus about you
2 can't state absolutes and you can't imply zero error rates?

3 A. There does not appear to be a consensus on reporting
4 results.

5 Q. Okay.

6 THE COURT: All right. We've been at it two
7 hours. It's a little after 10. Why don't we take a break.
8 I want to make certain that Miss Jimenez has plenty of time
9 for cross.

10 MR. BURT: Yes. And I'm about to wrap it up. So
11 a break would be good and then we can finish up.

12 THE COURT: Good. Then you'll, you are not
13 terribly pressed? What time do you have to be out of here
14 to get home?

15 THE WITNESS: 1:30 or 2.

16 THE COURT: 1:30 or 2. We'll get you out easily
17 by lunchtime, right? Does that sound reasonable?

18 MR. BURT: Yes. And as I think I indicated to the
19 Court I have to leave by noon to make my flight. I
20 absolutely have to get back to San Francisco.

21 THE COURT: All right. Good enough. Ten minutes.

22 MR. BURT: Thank you.

23 (The Court recessed at 10:06 a.m. and resumed at
24 10:20 a.m.)

25 EXAMINATION CONTINUED BY MR. BURT:

1 Q. Doctor, I want to put up a for a moment Exhibit A58,
2 which is the National Commission on Forensic Science,
3 Ensuring that Forensic Analysis is Based on Task Relevant
4 Information. This generated from your subcommittee?

5 A. That's correct.

6 Q. Okay. And it talks in here about specific things that
7 are not task related or task relevant, correct?

8 A. Yes.

9 Q. How are those categories arrived at?

10 A. Well, the basic categories are task relevance and task
11 irrelevance. And task relevance is something that you need
12 to do the scientific task that you are assigned to do. And
13 something that's task irrelevant is something that you don't
14 need in order to do the scientific task that you are
15 assigned to do.

16 So Miss Gische gave the example of the surface
17 that a latent print is found on. That might be task
18 relevant.

19 So this document left it up to the disciplines to
20 make their own definitions of what they think is task
21 relevant and irrelevant for their discipline and to engage
22 in that process. And it gave some examples of, what we
23 thought were sort of easy examples of task irrelevant
24 things.

25 Q. And easy examples in the sense that everyone would

1 agree that the kinds of information that are listed in this
2 document are not task relevant?

3 A. Correct.

4 Q. Now, in your declaration in this case you mention a
5 contextual bias problem with regard to Miss Glass knowing
6 the results reached by Mr. Smith before he did his
7 examination, correct?

8 A. Yes.

9 Q. And you heard Miss Gische testify that currently in the
10 FBI they don't, except in special situations, do blind
11 verification?

12 THE COURT: They do or they don't?

13 MR. BURT: They do not.

14 THE COURT: That's what I thought, yeah.

15 THE WITNESS: That's correct.

16 Q. And what is the issue in, that you are focused on in
17 your declaration in terms of the contextual bias problem
18 with one examiner knowing the results of the other before
19 they do the exam?

20 A. So one potential source of bias that's talked about in
21 the bias literature, in addition to these on the screen, is
22 the knowledge that, that another examiner has reached a
23 conclusion which might bias you toward thinking that that
24 conclusion is probably correct.

25 So that's the kind of bias that was discussed in

1 the OIG Report about the Mayfield case. And, you know, an
2 interesting example of that is the defense examiner,
3 Mr. Moses, the suggestion is he may have been biased by
4 knowing that three examiners had reached an identification
5 conclusion. And you notice he was -- to the extent that you
6 think that expert witnesses are biased towards the party
7 that calls them, right, he corroborated this erroneous
8 identification conclusion that was against the interest of
9 the party that called him.

10 So it -- you could suggest, as the judge did
11 earlier this week, and I did in my 2005 article, More Than
12 Zero, that it seems like the bias of knowing what another
13 examiner has reached might even be more powerful than the
14 supposed bias towards the party that calls him.

15 Q. In other words, you would think as a defense expert he
16 would be leaning in the direction of finding no match and
17 yet he was informed that three FBI examiners had matched
18 Mayfield's prints and you're saying that his bias or the
19 suggestion would be the bias from knowing that information
20 really sort of overrode his bias leaning toward I want to do
21 something in favor of the defense here?

22 A. You could suggest that bias might have functioned in
23 that way. Of course we can't know whether bias was an issue
24 in that case at all. Right. We can't know what was in his
25 mind.

1 THE COURT: He probably doesn't know.

2 THE WITNESS: He probably doesn't know.

3 Q. I notice in that NIST 2005 seminar that you and
4 Miss Gische, we have some of the abstracts of the papers,
5 and there was a lot of talk in that seminar about how do we
6 prevent contextual bias by using things such as lineups.

7 You familiar with that literature and those papers?

8 A. Yes.

9 Q. And what is being proposed there? What are people
10 saying should be done?

11 A. Well, yes. There's a lot of talk about bias. I would
12 say there's, you know, widespread agreement in forensic
13 science that we should try to minimize bias if possible.

14 A lineup would be the suggestion, you know, if you
15 put an unknown latent print and a known print in, you know,
16 and say I request that you do an analysis of these, the
17 implication is pretty clear that somebody thinks the known
18 print is the source of the unknown print.

19 So why not throw it into a lineup? Why not give
20 them 10 known prints like we do with eye witnesses so that
21 it's not so clear which one is from the person you think
22 might be the donor of that print.

23 Q. By the way, that's a suggestion that is even being
24 raised in the judicial opinions, correct? Judge Gertner in
25 her decision in U.S. versus Green raises that point, does

1 she not? Not in relation to fingerprints, but comparable
2 field of firearm comparisons?

3 A. I do not have such strong recall of that opinion to
4 remember that, no.

5 Q. Okay. One of your articles here in your binder is an
6 article by Judge Gertner?

7 A. Yes.

8 Q. And does that relate to her involvement in the Pena
9 case which is cited in the government's brief?

10 A. Yes.

11 Q. What's the point she's making there?

12 A. That's an article by Judge Gertner who was, I believe,
13 the trial judge in the United States versus Pena case which
14 had latent print evidence in it.

15 And what she writes about in that article is that
16 she asked the defense attorney if he wanted to mount an
17 admissibility challenge to the latent print evidence. And
18 the defense attorney said, no. And she said, are you sure?
19 And he still didn't. And she said, okay, it's admissible,
20 feeling she had no choice. Although, in fact, unbeknownst
21 to the defense attorney she would have been interested to
22 hear an admissibility challenge.

23 Her point is that then the circuit court wrote an
24 opinion in Pena saying, you know, after a thorough analysis
25 by the district court latent print evidence has been found

1 admissible. And her point is there wasn't a thorough
2 analysis at all and that the defense had not done its job.

3 Q. Okay. Is there any dispute in the -- is anybody in the
4 scientific community, at this point, saying, we need more
5 research because bias is actually -- could be in a
6 conservative direction, there was this reference to this
7 Ladenburg paper? Is that the position that the National
8 Commission is at in terms of saying, well, we need to find
9 out whether providing things like confessions to people is
10 actually going to help the situation and we should be
11 encouraging that?

12 A. Well, I guess there are lots of people saying we still
13 want more research, that this bias thing is real, but I
14 think it's fair to say that at -- that in serious
15 discussions of forensic reform there's very little dispute
16 about bias any more. And there's general consensus that we
17 should implement the tools that are available to us to
18 minimize bias. The arguments are about the details, the
19 devils of the details about what to do and how to do it.

20 Q. But is there any dispute that it is a failure to follow
21 proper methodology to bring to the attention of the examiner
22 things that everybody would agree is context irrelevant or
23 should be irrelevant to the task?

24 A. Well, I think that would be in violation of this
25 document, for example.

1 Q. In this case you didn't -- you weren't aware when you
2 wrote your declaration that there was this issue of the
3 examiner seeing these detailed reports of Mr. Fell's
4 confession, correct?

5 A. I was not aware of that till this week.

6 Q. And when you heard that, does that give rise to a
7 separate contextual bias issue in this case that you weren't
8 aware of before?

9 A. Yeah, that's a, as Miss Gische agreed, that's a, that's
10 some task irrelevant information in there that, that if this
11 document is implemented will not be provided.

12 Q. I want to just briefly talk to you about standards.
13 You've written about the presence or absence of standards in
14 the field, correct?

15 A. Yes.

16 Q. And when we're talking about standards in the
17 fingerprint field, is the focus on standards for the
18 identification decision or on other types of standards? For
19 instance, is the standards requirement satisfied by saying,
20 well, we have a standard for education or we have a standard
21 for how many continuing hours of education we must meet, but
22 we don't have a standard telling an examiner how to make
23 these comparisons or what criteria to use.

24 Which, what are we talking about when we're
25 talking about standards?

1 A. I think it includes all of those things. I think that
2 the, the kind of massive effort that's being undertaken by
3 NIST, the National Institute of Standards and Technology,
4 under the auspices of this Organization for Scientific Area
5 Committees, which has, you know, more than a dozen
6 committees and subcommittees. And it's like several hundred
7 people populating those committees. That effort is to
8 develop all kinds of standards for all of these disciplines.

9 So I would think that would include standards for
10 how to make an identification decision. It would also
11 include education standards. It would also include
12 standards for developing prints and so on.

13 Q. The very fact that that undertaking, that that
14 undertaking is in progress means that we're not there yet in
15 terms of having the kind of standards in place that we need
16 in this field?

17 A. Well, it means that NIST recognizes there's a serious
18 need for standards in, in the forensic discipline. I think
19 some people in latent prints would say that SWGFAST has done
20 some work towards standards, although, as noted, they are
21 guidelines and not standards.

22 Q. They are guidelines and not enforceable?

23 A. That's correct.

24 Q. Okay. So there may come a time when these standards
25 are published and adopted by the Commission where we have

1 specific standards in place for identification criteria and
2 how to express the opinion, things of that nature, correct?

3 A. Yes. I think OSAC will produce things that it will
4 call standards. It's, it's adhering to a sort of very
5 bureaucratic process of how you write a standard that was
6 not true of the SWG's.

7 How and whether that will be enforceable I think
8 is another question. I'm not, I don't quite know how NIST
9 is going to enforce the standard.

10 Q. But the point is today we're not there yet, correct?

11 A. That's correct.

12 MR. BURT: That's all I have. Thank you, doctor.
13 I would move in, Your Honor, D1 through 10 --

14 MS. JIMENEZ: The only objection I had on the
15 exhibits was to Exhibit 7, because it appears to be, and
16 maybe it's just in my copy, but it appears to be an
17 incomplete document. It's three pages, but it seems that it
18 continues on.

19 MR. BURT: I don't believe so. It's a very brief
20 comment about Judge Gertner. And it was part of a
21 symposium. But I think we have the complete article. We'll
22 double check on that and if not we'll substitute it in.

23 THE COURT: Just append a document at the end of
24 my copy.

25 MS. JIMENEZ: Yeah, I just couldn't tell.

1 THE COURT: Okay. So why don't you guys check
2 later. And if there's more to it we'll expand the exhibit,
3 okay.

4 MR. BURT: Yeah, she may be right that there's a
5 footnote -- oh, I have page four. She doesn't. She's
6 right. It's just one page. This page.

7 MS. JIMENEZ: Okay. Then that's fine, no
8 objection then, Your Honor.

9 THE COURT: So 1 through 10 are admitted.

10 MR. BURT: Thank you.

11 THE COURT: Do I have page four, Pam? Can you
12 tell?

13 MR. BURT: Yes, it's Exhibit, Tab seven and there
14 should be a page four of that.

15 THE CLERK: Yes.

16 THE COURT: We're there.

17 THE CLERK: There's two page fours.

18 THE COURT: We have the government's that's what's
19 happened.

20 MR. BURT: Thank you.

21 THE WITNESS: Thank you.

22 CROSS EXAMINATION BY MR. JIMENEZ:

23 Q. Dr. Cole, I'd like to pick up right where you left off
24 which is talking about standards.

25 Are you familiar with what's been admitted as

1 Government's Exhibit 5, which is the Standard Operating
2 Procedure for Examination of Friction Ridge Prints from the
3 FBI Lab?

4 A. Yes.

5 Q. Have you reviewed that document before?

6 A. Yes.

7 Q. And you're familiar with this as being, let's see, it
8 looks like a 17 page document that goes through the
9 standards that an FBI examiner -- the operating procedures
10 in order to make a comparison, an analysis and comparison of
11 fingerprints, correct?

12 A. Yes.

13 Q. In this document there are definitions of what level
14 one detail is, level two detail, level three detail,
15 correct?

16 A. Yes.

17 Q. You're familiar with that?

18 There's also a discussion of analysis procedure,
19 records, how recordings should be made on photographs,
20 correct?

21 A. Yes.

22 Q. There's specific information regarding what happens
23 when there's a change in analysis, analysis information to
24 support conclusions, comparison, and then there's detailed
25 information about the comparison procedure to be used,

1 correct?

2 A. Yes.

3 Q. With several subparts to each of those areas or to that
4 area, 8.2.1 comparison procedure, correct?

5 A. Yes.

6 Q. There is information on, we saw evaluations, exclusion,
7 inconclusive, verification and blind verification, ACE
8 checks and supervisor review, correct?

9 A. Yes.

10 Q. There's detailed information in that document about the
11 steps that the examiner should take when conducting their
12 examination?

13 A. Yes.

14 Q. You talked a little bit also about bias. You don't
15 know whether or not Kira Glass looked at the document that
16 was referenced this week and that you were just asked
17 questions about, correct?

18 A. No, I do not.

19 Q. You can't testify as to whether or not Kira Glass'
20 conclusions regarding the latent prints in this case are in
21 error can you?

22 A. No.

23 Q. And if they are in error you can't attribute that to
24 whether or not she was influenced by any bias in this case,
25 correct?

1 A. Correct.

2 Q. You would agree, you've sat here through testimony, you
3 know how it goes in court, there's direct examination and
4 cross examination, correct?

5 A. Yes.

6 Q. You would agree that bias is an area that can be
7 inquired into on cross examination, correct?

8 A. Yes.

9 Q. You would --

10 A. Bias is supposed to be an unconscious psychological
11 process. So you can't just ask someone were you biased.
12 The claim about bias is that it would be an unconscious
13 process that led you to make a conclusion.

14 Q. Questions can be asked about the information that the
15 examiner had at the time they were conducting their
16 analysis?

17 A. Yes.

18 Q. The examiner can be asked if they've had similar
19 information in the past and made exclusions, correct?

20 A. Yes.

21 Q. In fact, you are probably familiar that there are often
22 times when the FBI Laboratory receives information from
23 perhaps just one suspect to do a comparison and they make an
24 exclusion, correct?

25 A. Yes.

1 Q. There are instances where perhaps they may have
2 information about how a crime occurred or a confession and
3 exclusion has been made, correct?

4 A. Yes.

5 Q. There have been instances where they have known about a
6 previous examiner's conclusions and still come to a
7 different conclusion, correct?

8 A. Yes.

9 Q. In fact, Kira Glass came to the conclusion that two
10 prints in this particular case were of no value when there
11 was a different conclusion from the previous examiner
12 Michael Smith, correct?

13 A. Yes.

14 Q. You would agree that in terms of the legal decision
15 that the Court has to be made -- that the Court has to make
16 there may be some issues that you've discussed here today
17 that may relate to the weight of the evidence as opposed to
18 its admissibility?

19 A. Yes.

20 Q. And I think you've testified that you are not offering
21 an opinion today on either the validity of fingerprint
22 science or the ultimate question of its admissibility, do I
23 understand that correctly?

24 A. Yes.

25 Q. Let's talk a little bit about error rates. You

1 indicated -- I guess error rates and validation studies. I
2 would like to discuss those together. A lot of your prior
3 publications have dealt with the fact that there hadn't been
4 a validation study as it relates to latent fingerprints,
5 correct?

6 A. Yes.

7 Q. And you have agreed and testified today that at a
8 minimum the 2011 study by Ulery, that that counts as a
9 validation study under your definition, correct?

10 A. Yes.

11 Q. Would you agree with the statement that there has been
12 significant additional research since the 2009 NAS Study was
13 published in the area of fingerprint comparison and
14 analysis?

15 A. Yes.

16 Q. That many of the calls for research that have been made
17 have been addressed or in the process of being addressed?

18 A. Yeah, I would say in the process of being addressed.

19 Q. Is it fair to say that there's probably never going to
20 be an end to the suggestions of different types of studies
21 that can be done in this particular area?

22 A. Yes. You can always do more scientific research on new
23 questions.

24 Q. Would you, let's see, let me put in front of you three
25 exhibits. These are going to be Government's proposed

1 Exhibits 17, 18 and 19. Defense has a copy.

2 Looking there at Government's Proposed Exhibit 17,
3 the first couple of pages, those are the DOJ Proposed
4 Uniform Language that you've already testified about and are
5 a defense exhibit. But included with those documents is the
6 supporting documentation from the Department of Justice.

7 Are you familiar with those documents?

8 A. Yes.

9 MS. JIMENEZ: Your Honor, I'd move for the
10 admission of Government's Proposed 17.

11 MR. BURT: No objection.

12 THE COURT: Admitted.

13 Q. And in the supporting documentation it provides
14 information, some historical information and comments about
15 fingerprint, latent fingerprint examination, the latent
16 print discipline, correct?

17 A. Correct.

18 MR. BURT: This document is already in evidence.

19 THE COURT: Sure.

20 THE WITNESS: I believe just the first two pages
21 were. If the rest was I'm mistaken.

22 THE COURT: No, no. That's fine. Seventeen is
23 in.

24 MS. JIMENEZ: I don't think it matters.

25 Q. So turning to page 10 of that document there is a

1 section that gives some examples of published research
2 post-NAS Report, correct?

3 A. Yes.

4 Q. You're familiar with the first report that is
5 referenced there, the Ladenburg 2009 study? Are you
6 familiar with that study?

7 A. Yes.

8 Q. And would you consider that study a validation study?

9 A. Um, I would consider it as having the form of a
10 validation study. But, no, I would not consider it a
11 validation study.

12 Q. What concerns do you have that make you not consider it
13 a validation study?

14 A. The number of examiners is very small, they all work, I
15 believe, at the same laboratory, at Ladenburg's laboratory.

16 Q. So it's more about the quality of the information due
17 to the small size of the study, would that be fair to say?

18 A. Yes.

19 Q. The 2011 Ulery Study, you've indicated that is a
20 validation study, correct?

21 A. Yes.

22 Q. Now, there was an implication at some point that the
23 reason that Miss Gische or the FBI Lab or latent print
24 examiners don't wish to acknowledge an error rate, there was
25 this implication or impression that that was because they

1 are resistant to the idea of an error rate and there's
2 perhaps being concern that that error is going to be
3 negative for them.

4 Would you agree that in that 2009 Ladenburg Study
5 that the results that he received in that study were very
6 favorable to latent print examination?

7 A. Yes.

8 Q. Would you agree that in the 2011 Ulery Study that that
9 also was very favor error rates for latent print
10 examination?

11 A. Yes. Well, they are what they are in some sense. I
12 mean, I don't know what's favorable or not in some --

13 Q. Well, you don't have an opinion as to whether a 99.8
14 accuracy rate is favorable?

15 A. Right. I think that's a policy decision as --

16 Q. Okay.

17 A. -- to whether that's an error. You know, if you think
18 that's good or you think it should be better.

19 Q. Okay.

20 A. I think it is what it is.

21 Q. Okay. And I guess the point that I'm trying to make is
22 that, would it be fair to say that when the latent print
23 examiners who are saying, I'm not comfortable giving a
24 number for an error rate, they are being conservative when
25 they are making those statements, correct?

1 A. I don't know.

2 Q. You don't have an opinion -- you don't agree or
3 disagree whether that's conservative to say, look, while
4 there's validation studies, we want more validation studies
5 before we come up with one single number?

6 A. That's right. I don't know if it's because they think
7 that this -- that the true error -- yeah, I don't know if
8 it's because they are being conservative.

9 Q. Would you agree that it may not be possible to come up
10 with one number as an error rate that applies to the
11 discipline as a whole?

12 A. I agree that an error rate, eventually a properly
13 constructed error rate is not going to be a single number.

14 As Miss Gische noted, first of all, you have two
15 numbers. You have a false positive rate and you have a
16 false negative rate. And those numbers are related to one
17 another.

18 Second, of course, eventually we're going to find
19 out that the error rate varies according to the quality of
20 the latent print. So you are going to have something like a
21 curve, an error rate curve depending on the quality of the
22 latent print, which I think was one of the points that she
23 was making.

24 So I agree a properly constructed error rate is
25 not going to be a simple one number thing. If I -- I don't

1 agree that you can't measure error across different
2 laboratories because my laboratory doesn't apply to your
3 laboratory, that point that she made.

4 As the Judge noted, we construct error rates like
5 that all the time across air travel or car travel or drugs.
6 And we don't say we can't know the success rate of an
7 operation because my hospital might not apply to your
8 hospital.

9 Q. Is it your testimony today that these studies, such as
10 the 2009 Langenburg Study, and the 2011 Ulery Study, that
11 they have no value to the Court in making its decision about
12 the admissibility of latent fingerprint evidence?

13 A. Your question was whether I'm saying they have no value
14 to the Court? No, I'm not saying that.

15 Q. You would agree with me, as from what you know from
16 your research, that there's no requirement in Daubert that a
17 particular field have a validation study before it's
18 admitted to evidence, correct?

19 A. No, I don't agree with that interpretation of Daubert.
20 Daubert asks for testability. And to me that means doing a
21 validation study.

22 Q. So your understanding of Daubert, and when it talks
23 about testability, that that means that there has to be a
24 validation study?

25 A. That means you have to have tested your ability to do

1 what it is you claim you can do.

2 Q. And in your opinion that's a validation study?

3 A. Yes.

4 Q. And you're aware that there have been several
5 disciplines that have been admitted that don't have
6 validation studies, that have been admitted under the
7 Daubert standards?

8 A. That's probably true, yes.

9 Q. You would agree that the Daubert standards are not a
10 bright line rule as discussed in Daubert itself, correct?

11 A. Correct.

12 Q. And that they are factors to be considered, and the
13 relevance of those factors depends on the particular subject
14 matter at issue, would you agree with that?

15 A. Yes.

16 Q. In fact, there's also no disqualification in Daubert or
17 the Daubert line of cases that would prevent an area of
18 science that or an area of, a subject matter that has
19 subjectivity as part of it, there's no preclusion to such a
20 subject matter being admissible under the Daubert standards,
21 correct?

22 A. I agree.

23 Q. Additionally, going back to Government's Exhibit 17, --

24 THE COURT: I just want to make sure that I'm,
25 that I understand what you're asking about. So you are

1 suggesting, say, psychological or psychiatric opinion
2 evidence, that would be, that's what would be an example of
3 highly subjective non-testable routinely admitted expert
4 testimony?

5 MS. JIMENEZ: Yes, that could very well be.
6 There's also been areas, such as engineering, which might be
7 considered more traditionally science based, but yet there's
8 subjectivity to it. Engineering experts who have been
9 admitted. There is a case that we cited to in our
10 opposition in The Second Circuit, I think it's Guantanamo,
11 that talked about it's coin grading.

12 THE COURT: It's what?

13 MS. JIMENEZ: Coin grading like grading I guess
14 the value of historical coins.

15 THE COURT: Fine, super fine, all those things,
16 yeah.

17 MS. JIMENEZ: Correct. So those are -- yes,
18 that's what I was referring to, Your Honor.

19 THE COURT: Got it. Thank you.

20 Q. Now, there are a couple of the other studies that are
21 referenced in the DOJ supplemental documentation is a 2011
22 study from Tangden, correct?

23 A. Yes.

24 Q. And you're familiar with that study as well?

25 A. I am.

1 Q. Now, that's not a validation study based on how you've
2 defined it today, correct?

3 A. Correct.

4 Q. Again, does that mean that that is a study that you
5 would say has no bearing on validity? While it may not be
6 determinative of validity, are you saying that it has no
7 bearing on the question of validity?

8 A. No, I wouldn't say it has no bearing.

9 Q. And same with the 2012 Ulery Study, that's the one that
10 looked at repeatability and reproducibility. I believe you
11 said that that's something that related to perhaps the
12 reliability, that that was looking at reliability, correct?

13 A. That's right.

14 Q. And, again, while not determinative of validity, are
15 you saying that it has no relation or no, nothing to add to
16 the determination of validity?

17 A. No, I'm not saying that.

18 Q. There are additionally, at the bottom of page 11 of
19 that report, there are references to the portion that I have
20 underlined there, population studies that have assessed the
21 frequency of features. And there's a footnote 38 references
22 a study. And is that study what's Government's proposed 18
23 in front of you?

24 A. Yes.

25 Q. And that's a study entitled Biological Variability of

1 the Minutiae in the Fingerprints of Samples of the Spanish
2 Population, correct?

3 A. Yes.

4 Q. Are you familiar with that study?

5 A. I have not read that study.

6 Q. Okay. You haven't had a chance to review that?

7 A. Right.

8 Q. Are you aware of other studies that have looked at the
9 frequency or the rate of various minutiae in populations?

10 A. Yes.

11 Q. Those exist and you're familiar with that general area,
12 although you aren't familiar with this specific study; fair
13 to say?

14 A. Yes.

15 Q. Okay. And turning to page 12 -- actually, let's start
16 at the bottom of page 11. There's also a reference to
17 statistical models which have demonstrated that as more
18 reliable features are found, found in agreement it becomes
19 less likely to find that same arrangement of features in a
20 print, whoops, sorry, in a print from another source.

21 And, again, there's a footnote to 39. And the
22 study in footnote 39 has been marked as Government's
23 Proposed Exhibit 19. Are you familiar with that study?

24 A. Yes.

25 Q. Okay. Can you explain what that study is about?

1 A. Yes. So that study is, I think of it as a different
2 line of research from the validation study research. It's a
3 different approach to the problem that consists of saying
4 let's measure the rarity of the, of the features that we're
5 looking at in the population.

6 And the best analogy is probably with DNA. It's
7 like a random match probability for DNA. So, so this line
8 of research says I'm not so much interested in testing the
9 examiners with right and wrong answers. What I want to do
10 is try to figure out the rarity of the feature, of some set
11 of features in the population. So how often will this set
12 of features appear in, in some population.

13 And it turns out that that's a more difficult
14 problem for fingerprints than it is for DNA mathematically.
15 So that's what this line of research is trying to do.

16 Q. And would you agree with what Miss Gische testified to
17 that the statistical models are not yet ready for
18 percentages to be made in probability statements in latent
19 fingerprint examinations?

20 A. It -- yes, it appears so. I'm not a statistician and
21 so I'm not in the sense qualified to say when they are
22 ready. But nobody, including their author, seems to think
23 they are ready. So I think I can testify that they don't
24 seem to be ready.

25 Q. So when you testified about identification statements

1 and that in your opinion there should be probabilistic
2 statements associated with them, with identification
3 statements, are you referring to percentages that would be
4 deprived from statistical models?

5 A. I am referring to numbers that would be deprived from
6 statistical models. The statistical models like this one,
7 the Neumann. He would report it not as a percentage, but as
8 a likelihood ratio, which is a fraction.

9 Q. And would you agree that if the general consensus is
10 that the science isn't quite there to make those
11 probabilistic statements that it would be a problem to
12 include those in an identification statement if the science
13 is not there to support making those statements?

14 A. Yes.

15 Q. What about, looking back at Exhibit 17, what about the
16 last line of paragraph one there, or the last sentence or
17 phrase, I should say, that makes the comment that studies
18 have shown that as more reliable features are found in
19 agreement it becomes less likely to find that same
20 arrangement of features in a print from another source.

21 And let me start by asking, do you agree with that
22 statement?

23 A. Yes.

24 Q. In fact, the, I think you pronounced it Neumann Study,
25 is an example of a study that would support that statement,

1 correct?

2 A. Correct.

3 Q. And so while you have some concerns about the, this
4 identification language, you don't necessarily agree with
5 the underlying point there in that last phrase that we just
6 discussed, correct?

7 A. You meant to say disagree, right?

8 Q. I may have, yes. You don't disagree with that
9 statement?

10 A. I do not disagree with it. That's right.

11 Q. Thank you. And you indicated, however, that you had
12 concerns about probabilistic statements being made without
13 statistics, am I representing that accurately?

14 A. No. I believe Mr. Burt asked me what is the criticism
15 of that. And I said what the criticism of it was. I wasn't
16 saying it was my criticism.

17 MS. JIMENEZ: If I can have the Court's indulgence
18 for a moment? Too much paperwork, Your Honor. I apologize.

19 THE COURT: No, take your time. No rush. We've
20 got all morning.

21 Q. Well, let me ask it this way. Do you recall the
22 paperwork that was shown you from the Department of Army
23 with the Department of Army's proposed identification
24 language statement?

25 A. Yes.

1 Q. And that included probabilistic statements that did not
2 include actually numbers, would you agree with that?

3 A. Yes.

4 Q. And you said that the, you stated a criticism of that
5 language, it's not necessarily your criticism?

6 A. That's correct.

7 Q. Do you have an opinion on whether or not such language
8 would be appropriate?

9 A. Yes.

10 Q. And what is that?

11 A. I think, I think that the Army's statement is
12 preferable to this statement that you have on the screen,
13 but I do not claim to represent a consensus in that I
14 understand there's people who disagree. And I think I
15 understand why.

16 Q. I think what this reminds me of sort of, when we're
17 talking about coming to agreement on this language, well,
18 first of all, it reminds me of lawyers because we like to
19 disagree about language, but it also reminds me of the
20 statement about, you know, you don't want to watch sausages
21 or laws being made and I'm starting if we should throw in
22 identification statements in the forensic science fields and
23 in with that common phrase.

24 So there's some disagreements about exactly how
25 those should be worded, but you think that that's better

1 than how the identification statement is currently written,
2 correct?

3 A. Yes.

4 Q. And while it's phrased slightly differently, would you
5 agree that the phrase here that we've talked about that the
6 more reliable features that are found in agreement the less
7 likely it is to find the same arrangement of features in a
8 print from another source, while worded differently, that is
9 in essence a similar type of probabilistic statement?

10 A. It, it's similar, but this statement here is making a
11 sort of very simple point that as you get more features it
12 gets rarer.

13 The statistical models are trying to do a much
14 harder problem, which is given some number of features how
15 rare is that.

16 So in a way -- as I said, I don't disagree with
17 that statement, but it just doesn't tell us very much. And
18 I don't know what it's doing there because it's sort of a
19 point that we already know and that is sort of common sense,
20 that more features is more discriminating.

21 Q. Well, one clarification. They say more reliable
22 features, correct?

23 A. Well, if I wanted to write more than nine pages of
24 critique of this I would say I don't know what they mean by
25 a reliable feature.

1 Q. Well, you've heard testimony that talks about the
2 reason that the latent print examination area has moved away
3 from a strict point count is that there's a qualitative
4 determination to points or minutiae in addition -- that it's
5 just not simply a numbers game, correct?

6 A. Yeah. Is that what they mean by reliable features? I
7 didn't know that. I mean --

8 Q. That wasn't my question. My question was, if you would
9 agree that that's why they moved away from a simple point
10 count, correct?

11 A. I'm sorry. Yes, they did move away from a simple point
12 count.

13 Q. Okay. And so a reasonable interpretation of reliable
14 feature would reference that the feature is reliable or
15 reference a qualitative decision about the feature, correct?

16 A. It, that's why I made that answer to your last
17 question. That may be a reasonable interpretation of it.
18 It didn't even occur to me that that's what it meant.

19 Q. And you, would you agree that when we're talking about
20 identification language that is contained in a report, when
21 it comes to admitting this evidence and information into
22 court, the examiner doesn't just sit on the stand and read
23 the report and that's the end of it, correct?

24 A. I actually believe that this effort towards developing
25 standards and the National Research Council, its

1 recommendation number two I believe was for standardized
2 terminology in the forensic disciplines, I actually believe
3 that they do want boiler plate language that is just used
4 the same every time because, because as this discussion
5 illustrates so much mischief can be made by small
6 differences in words.

7 So I actually think this national effort by the
8 National Commission on Forensic Science and the Organization
9 of Scientific Area Committees is pushing towards actual
10 uniform language.

11 Q. Would you agree though that the whole courtroom
12 adversarial process is all about questioning a witness to
13 make sure that there is an understanding of the language
14 that they are using on the stand?

15 A. I, I agree that that happens, but I do believe that
16 this -- first of all, on direct, you can control what you
17 say. And I do believe that, that part of this effort is
18 that standardized language would be desirable.

19 Q. I guess my point is that the confrontation clause might
20 have a problem with a witness coming in and only being
21 allowed to make one sentence and not being able to be
22 questioned about that. Would you agree with that?

23 A. Yes, I don't think I was saying the person couldn't be
24 questioned. But I was saying the initial statement would
25 probably be uniform.

1 Q. And that's fair. And I guess more what I was going to
2 is that the witness is going to be able to be questioned
3 about the basis for making that identification, correct?

4 A. Yes.

5 Q. They are going to be able to be questioned about the
6 minutiae that are involved, the quality of that minutiae,
7 whether or not they would say this is an incidence where
8 there is a high number of reliable features found in
9 agreement or whether they would characterize it as medium or
10 low-level of reliable features found in common, and that's
11 what we do in a courtroom. I realize you are not a lawyer,
12 but you've been in court often enough, correct?

13 A. They can be questioned about all those things if, as
14 long as the examiners can answer them.

15 Q. And you would agree that under the FBI policy there
16 isn't going to be an examiner whose going to come into this
17 courtroom and testify that an identification was made to the
18 exclusion of all others, correct?

19 A. I do understand that, yes.

20 Q. And you understand that per the FBI policies there's
21 not an examiner whose going to come into court and testify
22 that there is a zero error rate in latent print, in the area
23 of latent print identification?

24 A. I do understand that.

25 Q. And in terms of sort of just from a historical

1 perspective, when we talked about the fact that latent print
2 examiners used to allege that there was a zero error rate,
3 when latent print examiners were making that allegation they
4 were basically making a division between human error rate
5 and what they were asserting was methodological error rate,
6 meaning they weren't denying that there could be a human
7 error rate, but they were coming in and saying, well, look,
8 under the methodology, because fingerprints are unique,
9 there isn't an error rate associated with the methodology,
10 correct? Am I stating that accurately?

11 A. That's what they are saying. And I published
12 criticisms of it. And the document you have on the screen
13 now says to do that division is inappropriate.

14 Q. I didn't suggest that it wasn't inappropriate. I just
15 was clarifying that historically I wanted to explain that
16 that is what was being stated about a zero error rate,
17 correct?

18 A. I think that's what they were thinking when they made
19 those statements.

20 Q. And I think you've discussed that. And I think I
21 probably got that from one of your papers, that explanation.
22 Does that sound familiar to you as an area you discussed?

23 A. Yes. Yes.

24 Q. But nonetheless, as you pointed out, that is no longer
25 the testimony that is going to be made in this case because

1 we have an FBI examiner and the FBI protocol prohibits it,
2 correct?

3 A. Correct.

4 Q. In terms of the recommended language as included in
5 Defense Exhibit, I believe we're in C5. One of the
6 commentaries that was submitted is from the IAI. Are you
7 familiar with that?

8 A. Yes.

9 Q. And that's one of these public comments on the DOJ
10 Uniform Language Document we've been looking at; fair to
11 say?

12 A. Yes.

13 Q. And in this particular comment the IAI makes this
14 statement, beginning here. These guidelines reiterate
15 previous standards and are already believed to be the state
16 of the practice among forensic examiners, correct?

17 A. Correct that it says that? Yes.

18 Q. Yeah. Correct that it says that. I'm not asking that
19 you agree with that. In fact, you disagree with that,
20 correct?

21 A. I believe I do.

22 Q. Okay. And, excuse me, the very last sentence of the
23 IAI comment indicates that, it has been demonstrated through
24 research that the overall quality of latent print work is
25 high and error rates are relatively low. And we believe

1 this has been accomplished through the thoughtful
2 application of appropriate standards and guidelines.

3 Do you agree or disagree with that statement?

4 A. Um, I don't agree or disagree. I, I think that I
5 object to the verbal characterization of accuracy rates and
6 error rates without them making explicit what the numbers
7 are behind those verbal characterizations, if that's clear.

8 Q. Okay. No, that makes sense.

9 And the comments that were included in the
10 exhibits that you looked at, that's not every single comment
11 that was made on this document, correct?

12 A. That's correct.

13 Q. And these are a standard that's open for public
14 comment? Anybody from the public can comment on these
15 standards, correct?

16 A. Yes.

17 Q. You also discussed the documentation that was done in
18 this case. And primarily your declaration referred to
19 Michael Smith's examination. Would you agree with that?

20 A. Yes.

21 Q. The one additional item that you testified to today
22 related to the SWGFAST standards about documenting
23 information on the known print, correct?

24 A. Yes.

25 Q. And I wanted to clarify what your testimony was. And

1 you indicated that -- well, I guess let me ask you, were you
2 indicating that Miss Gische testified that the FBI Lab did
3 not comply with the SWGFAST standards on the identification
4 or the, excuse me, the documentation on known prints or were
5 you saying that her testimony was that she disagreed that
6 that's what the standards called for or were requiring?

7 A. I think she was testifying to the latter.

8 Q. Okay. And the phrase that you're relying on in
9 speaking about the documentation is, this is Defense Exhibit
10 39C or A39C. And would it be fair that the statement that
11 you are relying on there is in 3.1, documentation that
12 records the information relied upon during comparison shall
13 be made for each comparison. Documentation of the
14 comparison relies on both the latent print and known print.
15 That's the language that you are referring to, correct?

16 A. Yes.

17 Q. And that's on page four of 14 of that document. And if
18 you go to page five of 14 there's a box that says,
19 Discussion. That's before moving on to subsection 3
20 apparently; fair to say?

21 A. Right.

22 Q. And the first bullet point in the box about discussion
23 says, documentation of known prints used for comparison
24 could be accomplished by maintaining a legible copy of the
25 known prints in the case record, correct?

1 A. Yes.

2 Q. Would you agree it's important, when talking about how
3 to document these examinations, that the purpose of that
4 documents is that so somebody else can come back and look at
5 the examination and see what was done on the basis of the
6 conclusions, correct?

7 A. Yes.

8 Q. And in order to be able to do that this other person,
9 the second person needs to be able to see, of course, the
10 latent print as well as the known print, correct?

11 A. Yes.

12 Q. And it's important to see not just the known print but
13 the exact replication of the known print that the examiner
14 was working off of, correct?

15 A. Yes.

16 Q. The statement here that says, documentation of known
17 prints used for comparison can be accomplished by a legible
18 copy of the known print. It doesn't say a legible copy of
19 the known print with markings documenting the minutia does
20 it?

21 A. It does not say that.

22 Q. Would it be fair to say that as lay examiners, if you
23 are comfortable with my referring to both yourself and
24 myself, I don't think either of us is purporting to be a
25 latent examiner, that for people like us or people like the

1 jury it may very well be helpful to have those side by side
2 documents that we saw where the minutia on the latent print
3 are documented and then the corresponding minutia on the
4 known print are documented, correct?

5 A. Yes.

6 Q. Would you agree that somebody who is a latent print
7 examiner, who has training in documenting minutia, that they
8 are going to be able to take that copy of the known print
9 that the examiner used, and the copy of the latent print,
10 and they are going to be able to look at the minutia that
11 were documented on the latent print and decide whether or
12 not they agree that those minutia correspond on the known
13 print, correct?

14 A. Yes. But they are not going to know whether the
15 original examiner -- what features the original examiner saw
16 in the known print. That seems to be the issue.

17 Q. Okay. Would you agree that somebody who is doing a
18 second examination that they would want to look past what
19 the examiner looked at and identified as minutia in coming
20 to their own conclusion? They would want to determine
21 whether there was, for example, minutia that the latent
22 print examiner missed?

23 A. You're talking about a -- so a second examiner might,
24 for example, in a blind verification, just get clean
25 photographs. That's my understanding, right. And then

1 they'd find the features themselves.

2 Q. I guess my --

3 A. We're talking about documenting so that somebody else
4 can look in order to see what was your reasoning, the first
5 examiner's reasoning process was.

6 Q. Right. But I'm not necessarily talking about
7 verification.

8 A. Okay.

9 Q. I'm talking about this idea of transparency, which if
10 it's helpful we can put it in the context of a criminal
11 case, where say a defense expert is going to be asked to
12 look at the government's or the FBI latent print examiner
13 and come to a conclusion about whether or not their opinion
14 was correctly rendered?

15 A. Okay.

16 Q. So that's the circumstance I'm discussing.

17 A. Okay.

18 Q. And so I guess my question is that they are going to be
19 able to look at the latent print and look at the minutia
20 that were documented, they are going to be able to determine
21 whether they agree or disagree that those minutia are
22 present on the known print, and then also going to be able
23 to look and see if there's other minutia that either they
24 identified or they believe should be identified that might
25 have affected that opinion?

1 A. Yes. And that appears to be the thrust of what the FBI
2 is doing. But the issue is they don't know what features on
3 the known print were relied upon. They don't have the
4 examiner's sort of statement, as it were, by poking them or
5 labeling them, I relied on this.

6 Q. And it's your position then that such an examination
7 by, whether it's a defense expert, that that can't be done
8 without that information?

9 A. We weren't talking about that. Well, we were talking
10 about transparency. They can review the material, but they
11 would not know what features on the known the original
12 examiner relied upon.

13 Q. Let me ask you this, now that we've looked at that
14 language in the discussion box, are you still of the opinion
15 that this SWGFAST document requires documentation of the
16 known print?

17 A. Well, I'm certainly of the opinion that the SWGFAST
18 document is not a model of clarity, but it seems to me that,
19 that item 3.1 that we mentioned seems to me to refer to
20 marking the known.

21 Again, Miss Gische was chair of SWGFAST. And, you
22 know, she's interpreting her own document. But I say as a
23 reader of it that 3.1 seems to talk about documenting the
24 known.

25 Q. Okay. Your reading that sentence in the discussion box

1 make you question that opinion a little bit?

2 A. I understand why you can read that sentence to be
3 contradictory to sentence 3.1, but it -- 3.1 is still there.

4 Q. You would also agree that there are some areas of,
5 whether it's technical knowledge or scientific knowledge or
6 other expertise that rely on personal knowledge or
7 experience, that subjective component that we've talked
8 about, correct?

9 A. Yes.

10 Q. And you would agree that Daubert, Kuhmo Tire, the line
11 of cases under Daubert, don't prohibit the admission of that
12 testimony that does rely on that personal experience,
13 correct?

14 A. I would agree with that, yes.

15 Q. And you recall the testimony, I apologize I'm blanking
16 right now on the name of the study, but you're familiar with
17 the study that was done that showed that trained latent
18 print examiners who are experts in the field were, had a, I
19 believe, less affected by bias and made more accurate
20 determinations than somebody who was a novice? Do you
21 recall the study I'm referring to?

22 A. You're referring to the Langenburg?

23 THE COURT: No, it was the third one down. I can
24 see it.

25 THE WITNESS: Then you're referring to the third

1 Ulery --

2 MS. JIMENEZ: The Tangen Study. Thank you, Your
3 Honor. You're more on top of it than I am.

4 MR. DARROW: Oh, the Tangen Study.

5 Q. I'm sorry, I've got it back up on the screen. I'm sure
6 that identifies it better than I just did in my question.

7 A. Yeah. So what's the question?

8 Q. The question is, you're familiar with that study that
9 the results of which show that somebody who is an expert
10 latent print examiner, meaning that they've been trained,
11 they have experience in making identifications, that they
12 are more accurate than a novice person who does not have
13 training and experience?

14 A. That's what that study found, yes.

15 MS. JIMENEZ: The Court's indulgence? I have
16 nothing further.

17 FURTHER EXAMINATION BY MR. BURT:

18 Q. So you were asked some questions on why, why do we
19 focus on language and inconsistencies in language. And you
20 alluded to the fact that there seem to be some consensus
21 emerging that it was important to get the language
22 consistent and clear, correct?

23 A. Yes.

24 Q. And were you referring specifically to A53, which is
25 the position paper issued under the auspices of the

1 Department of Justice, the same department of the employer
2 of the lawyer who was just asking you questions that says,
3 it is the view of the National Commission on Forensic
4 Science that the forensic science community should endeavor
5 to make terminology more consistent within a particular
6 discipline and across disciplines? Is that what you
7 referenced?

8 A. I was not thinking of this document. I was thinking of
9 recommendation two of the NRC Report. But this document is
10 another good example of that sentiment.

11 Q. And in terms of the NRC Report, this Department of
12 Justice National Commission on Forensic Science states,
13 quotes the National Research Council Report page 21. And
14 the quote is, inconsistency or ambiguity in terminology can
15 and does have a profound effect on how the trier of fact in
16 a criminal or civil case perceives and evaluates scientific
17 evidence, right?

18 A. Right.

19 Q. And is that what you were referencing?

20 A. Yes.

21 Q. And in terms of this Department of Justice National
22 Commission statement, they go on to explain why the use of
23 inconsistent or unclear terminology is problematic, correct?

24 A. Yes.

25 Q. They state, do they not, one of the problems with the

1 use of similar or identical terms to define different values
2 in different disciplines is a confusion these definitions
3 can cause in the courtroom. If consistent with or match
4 means one thing in one discipline and has a totally
5 different value ascribed to it in another a lawyer, judge or
6 juror is left to not only try to understand the nuance of a
7 particular discipline but also to sort out the confusion in
8 different terminology.

9 In the minds of most jurors words such as match
10 mean that the compared items come from the same source and
11 none other. You see that?

12 A. Yes.

13 Q. Would that same logic apply to language which tells the
14 juror, I am identifying this print, as opposed to the
15 language which just takes out the words, I'm identifying
16 this print to the exclusion of everyone else in the world?

17 I mean --

18 A. Yes, I think that it would. I think you could
19 substitute the word identification for the word match in
20 that sentence. And I've written an article making that very
21 argument, that the word identification is sort of vague and
22 ambiguous and used in different ways by different people and
23 even by different disciplines.

24 Some mean it to mean an absolutely certain
25 identification. Some mean it to mean a much weaker thing

1 like I identified this as cocaine, just as a type of a
2 thing. So, but it, it does have these connotations of
3 certainty.

4 Q. Now, the other questions you were asked were
5 suggesting, well, why don't we just leave this all to the
6 jury to figure out whether statistical -- whether validation
7 studies have been done and what they mean and this whole
8 scientific debate can just be put in front of the jury in
9 the context of the adversary system, right? That was the
10 thrust of the questioning?

11 A. So these are the questions about that things can go to
12 weight as well as admissibility?

13 Q. Well, I think there were questions about why can't we
14 just have lawyers, you know, asking questions -- put in the
15 terms in sort of whatever way you want and then let the
16 lawyers sort of work through trying to parse out that
17 language in front of the jury?

18 A. Okay. That question. Yes.

19 Q. Yes. And in that regard, this Department of Justice
20 document that I put up here, has a heading called Confusion
21 as to Meaning and Misapplication as to Result. And they
22 say, this challenge is often tied to the temptation to
23 overstate or redefine a term and, therefore, exaggerate its
24 meaning. However, this problem is directly related to the
25 failure of the user of the terminology to fully understand

1 the meaning.

2 One of the challenges that is in some ways unique
3 to forensic science is the fact that the end users and some
4 analysts often do not have scientific backgrounds and do not
5 regularly use the language of science. Law enforcement,
6 lawyers and judges need to learn the language. Inconsistent
7 terminology within and across disciplines further compounds
8 this challenge. When lawyers misconstrue terms, they may
9 unintentionally mislead others.

10 And then they go on to point out a federal case,
11 do they not, in which they say, in Williamson, for instance,
12 the prosecutor argued in closing to the jury in respect to
13 the hair evidence there's a match. This statement
14 completely misrepresented the expert testimony and ignored
15 the limitations of the technique.

16 Given that the term match is also commonly used,
17 understood as a kind of match popularly associated with
18 fingerprints or DNA profiles the statement becomes even more
19 damaging.

20 And then they go on and say, again, would having
21 had a clear and concise definition originally for the value
22 of this evidence avoided these problems? It is very hard to
23 say, but it would be a step forward to have a clearly
24 defined, uniform term that is properly articulated.

25 And then they state, there are more than one set

1 of challenges that lead to an example such as this. One
2 study suggested that presentation of the limitations of
3 forensic science during trial through cross examination or
4 jury instructions might do very little to cure the problems
5 surrounding overstatement in the courtroom. But having
6 terminology that is clearly defined in a written,
7 standardized format might assist those charged with these
8 responsibilities into imposing limits on how terms are used.

9 Doesn't that accurately state the entire thrust of
10 this whole endeavor to get this language right before you
11 put it in front of a jury?

12 A. I think it does. I think that's a very cogent and
13 sensible summary of the situation.

14 Q. And the study they cite for the point that presentation
15 of the limitations of forensic science during trial through
16 cross examination or jury instructions might do very little
17 to cure the problems surrounding overstatement, they cite an
18 article by Michael Saks called the Testimony of Forensic
19 Identification Science: What Expert Witnesses Say and what
20 Fact Finders Hear.

21 And they quote from that study, these results
22 should give pause to anyone who believes that the
23 traditional tools of the adversary process, for example,
24 cross examination, opposing experts, instruction will
25 readily undo the effects of misleading expert testimony.

1 So even by this Commission, which was created by
2 the Department of Justice, isn't there a consensus at this
3 point that we can't simply put in front of the jury
4 misleading and inaccurate or ill defined terms and expect
5 that a jury is going to sort it out even when you have tools
6 like cross examination and defense experts?

7 A. Yes, I think so.

8 Q. And the Mayfield case where a defense expert was hired,
9 in your own study, your Zero Error Rate, No More Than Zero
10 Error Rate, explores the issue of whether the presence of
11 defense experts to review, review the work that has been
12 done is a, necessarily a cure-all for problems in this
13 field? Don't they illustrate that it's not?

14 A. Yes. So some of those 22 cases, including the Mayfield
15 case, the erroneous identification or consensus erroneous
16 identification was corroborated by a defense expert.

17 So that refuted the claim that was common at the
18 time that even if there was an erroneous identification you
19 could always hire a defense expert and they would always
20 catch the erroneous identification. It isn't always true.

21 Q. It isn't true, always true?

22 A. It's sometimes true. Some have been caught by defense
23 examiners.

24 Q. The then, lastly, you were asked questions about this
25 DOJ document, which we also have marked I believe. And

1 specifically this quote, population studies have assessed
2 the frequency of features.

3 It's not just a question of whether studies have
4 been done, it's also what the studies say; isn't that true?
5 In other words, don't you actually have to look and see,
6 well, what are these studies saying?

7 A. Yes. I don't think you can just say these studies have
8 been done therefore the latent print identification is
9 reliable. What these studies are proposing to do is have a
10 model that would help you report your conclusions in the
11 form of a scientifically defensible likelihood ratio.
12 That's what they are trying to do.

13 Q. So when you read that sentence, population studies have
14 assessed the frequency of features, and then you say, okay,
15 well, what does that study say? And you go to it, this is
16 Exhibit 18, and in the introduction of it one of the things
17 they say is, from an identification point of view the
18 minimum number of minutia needed to establish the identity
19 of an individual numerical standard varies considerably
20 between the criminal laboratories of different countries.

21 This variability is due to the fact that the
22 minimum number of minutia needed to prove identity has not
23 yet been rigorously established.

24 So that's one thing this study says, right?

25 A. Yes.

1 Q. And then if you look at the next page, the same authors
2 say, unfortunately due to the absence of systematic studies
3 of their distribution and variability on the dermal ridges,
4 our present knowledge of these dermal papillae
5 characteristics is insufficient. And so important aspects
6 of their biology and genetic makeup are unknown.

7 And then they say, one of the problems with
8 approaching the study of these peculiarities is a different
9 classification for them that exist. Although, the different
10 attempts that have been made to classify the minutia agree
11 about the principal types, they have not obtained the
12 necessary agreement within the scientific community which
13 would allow for the systemization of the study, a situation
14 that must change so that the samples and results of the
15 different populations can be compared.

16 And then go on to do their study, which they are
17 implying here that this work has not been done and we need
18 to do it, right?

19 A. That's right, yes.

20 Q. And so, and then in their conclusion they say, it would
21 be of grave interest if the criteria for classification
22 within the scientific community and criminal databases were
23 standardized making it possible to progress in the study and
24 comparison of these features of the different human
25 populations, right?

1 Again, sort of pointing out the difficulty of the
2 issue?

3 A. Yes.

4 Q. And then in the conclusion, there are very few studies
5 of the variability of minutia in fingerprints?

6 A. Yes.

7 Q. And, finally, when tackling any calculation of probable
8 identity, we feel it necessary to take into account, and so,
9 no, the frequency with which different types of minutia
10 occur within the different populations, as well as their
11 relation to gender, fingerprint pattern, and the area of the
12 finger, this would permit the use of more specific
13 probability models in accordance with the different known
14 aspects of each identity set.

15 In the particular case of Spanish police, the
16 frequencies obtained for the different characteristics point
17 in this study could be used in their investigative reports
18 to quantify the degree of rareness of the points used when
19 fingerprints of this finger are evaluated.

20 So if this study ended the debate on this why
21 wouldn't the FBI be using Spanish population figures to
22 estimate probability statistics? And why would Miss Gische
23 be saying, we're not yet there to be able to do statistical
24 models?

25 A. Well, it didn't end the debate. And I think that's why

1 it was used to support that very weak point that more
2 features are rarer.

3 Q. Right. More features are rarer, but that doesn't
4 address the issues raised in this study does it, in terms of
5 the lack of research and we need to start looking at this?

6 A. Right. But I, yup. I think the DOJ document is using
7 this study simply to support the very small point that more
8 features are rarer. It's not saying that the work of
9 devising a statistical model is complete.

10 Q. And then they say, the sentence that was read to you,
11 while an identification to the absolute exclusion of others
12 is not supported by research, an identification conclusion
13 is supported by the biological premise that friction ridge
14 skin is persistent and unique.

15 And we've already talked that that is what you
16 described as the fingerprint examiner fallacy, right?
17 Focusing on persistence and uniqueness and not on accuracy?

18 A. Right. So this is -- yeah, so this is a little odd,
19 right. This is the supporting documentation part of this
20 document. And now we have the same statement. And it's
21 like got a little more in it.

22 But, no, I don't agree that you can support an
23 identification conclusion on, merely on, one, persistence,
24 two, uniqueness and, three, rarer features are more
25 discriminating.

1 Q. Right. And then they say --

2 A. I don't think that's --

3 Q. -- population models have demonstrated that as more
4 reliable features are found in agreement it becomes less
5 likely to find that some arrangement and features in a print
6 from another source. And the cite for that, the sole cite
7 for that is this Quantitating the Weight of Evidence, a New
8 Paradigm Article which has been admitted as 19, correct?

9 A. Yes.

10 Q. Okay. Then, again, if you go and actually read this
11 study, one of the things they say is, the current culture
12 within fingerprint communities worldwide demands the
13 fingerprint identification should be presented in court as
14 categorical opinions. A fingerprint examiner will tell the
15 Court that on the basis of a careful and detailed comparison
16 he or she is absolutely certain that a particular mark was
17 made by the person who provided the control print to the
18 exclusion of all other individuals on earth. Citing Saks
19 and Koehler and your article, 2009.

20 They continue, the achievement of that state of
21 certainty, as Saks, Koehler and Cole allude, is a question
22 of epistemology. It cannot be rationalized scientifically
23 except in trivial situations and leads to an overstatement
24 of the evidence when presented in court. The last decade
25 has seen a growing body of literature that question this

1 paradigm. They state that, right?

2 A. Yes.

3 Q. And then at the bottom he says, we agree with the
4 views, with views expressed in the literature, citing
5 Zabell, Office of the Inspector General, Saks and Koehler,
6 the National Research Council, that the evaluation of the
7 weight of evidence associated with any particular
8 fingerprint comparison lacks both a scientific foundation
9 and transparency.

10 So when you read statements like that in this
11 report how do you then turn around and say, well, that paper
12 ends the debate on the scientific validity of whether we
13 should be allowing jurors, allowing experts to state
14 identification, either to absolute terms or something close
15 to it, when they themselves are saying we don't have the
16 science to back this up?

17 A. Well, I would not say it ends the debate.

18 Q. You what?

19 A. I would not say it ends the debate.

20 Q. And does this statement in the article that the
21 government has now introduced accurately describe the state
22 of scientific knowledge, that is, the evaluation of the
23 weight of evidence associated with any particular
24 fingerprint comparison lacks both a scientific foundation
25 and transparency?

1 A. I would agree with that characterization, yes.

2 Q. Now, lastly you were asked, well, you know, the
3 documentation point here, look at, look at the SWGFAST
4 standard for documentation. It's true though, is it not,
5 that putting aside even the SWGDAM documentation standard
6 that there are other standards to be considered, right,
7 including what courts have to say about this?

8 A. Yes.

9 Q. And you, in your declaration, quote a number of
10 decisions that have been decided beginning in about 1995 in
11 which courts have demanded that points of identity be
12 identified just as part of the discovery process?

13 A. Yes. So legal opinions is another authority for the
14 importance of documentation. And there have been a number
15 of cases that have found latent print evidence, it's usually
16 not, it's not in an admissibility hearing. They've, you
17 know, reversed, reversed a conviction because of failure to
18 document. Because, because the failure to document the
19 reasons behind the conclusion, I mean, usually the reasoning
20 is that the failure to document the reasons behind the
21 conclusion deprives the defendant of his right to cross
22 examination.

23 THE COURT: This is, I'm guessing, people that
24 don't document either the known or the unknown? Just people
25 that say I looked at it and I could tell?

1 THE WITNESS: Right. Right.

2 THE COURT: Right. Not the more narrow debate
3 we've had about whether the known print also has to have the
4 same documentation?

5 THE WITNESS: That's correct.

6 THE COURT: Okay.

7 Q. And those cases you're referencing are on page nine,
8 footnote five of your declaration, including isn't it true,
9 the Robinson case where the same argument that was just
10 suggested to you was considered and rejected which is, well,
11 the defense expert can get a copy of the prints and figure
12 out for himself or herself whether the identification was
13 valid, and the Court says, no, under the standards of legal
14 perfection, specifically Rule 16, because the government
15 failed to provide the points of similarity between the known
16 and the unknown, failed to mark them, that the Court
17 excluded the fingerprint evidence, right?

18 A. Yeah. That's right. That's the opinion in this case.
19 I'm not a legal expert on Rule 16 nor did I even know --

20 Q. Sure. But the point is, there are standards other than
21 just SWGFAST standards?

22 THE COURT: There's a higher standard?

23 MR. BURT: A higher standard?

24 THE COURT: At least in that court.

25 MR. BURT: Correct. That's right.

1 Q. And you've also become familiar, since you filed this
2 declaration, that there's been a more recent affirmation of
3 that same principal in the Sanders case out of the 7th
4 Circuit?

5 A. Yes. I saw the Saunders case I think it is,
6 S-A-U-N-D-E-R-S, that's a similar case, finding it violated
7 Rule 16 to not allow -- the fact that it was not properly
8 documented.

9 THE COURT: So I can find it all in your report?

10 MR. BURT: Yes. The Saunders case actually came
11 out just in the last month. And so that's cited in our
12 reply brief. But it's not in his declaration because he
13 filed it before.

14 THE COURT: All right.

15 Q. But, again, there are standards out there, legal
16 standards, that have to be accounted for as well, right, not
17 just whether it fits within SWGFAST?

18 A. Yeah. I call them legal authorities I guess or the
19 higher standard, if you would.

20 THE COURT: Right. Different standard?

21 THE WITNESS: Yes.

22 MR. BURT: Thank you. That's all I have.

23 MS. JIMENEZ: I just have a few additional things
24 to ask, Your Honor.

25 THE COURT: Of course. I think I mostly

1 understand the points of difference and similarity.

2 FURTHER EXAMINATION BY MS. JIMENEZ:

3 Q. Just the 2007 article that counsel was asking about,
4 I'm pretty sure that's the one you said you weren't familiar
5 with, correct?

6 A. Right.

7 Q. You just agreed to a bunch of statements that were read
8 from it that that's what they said, correct?

9 A. Correct.

10 Q. And this is an article that's published, at least
11 according to the article, in 2007, correct?

12 A. I'm sorry? This is the, this is that same article?

13 Q. Yes.

14 A. Okay.

15 Q. This is Government's Proposed 18. Actually it hasn't
16 been moved in.

17 A. Okay. And what was your question?

18 Q. If it was published in 2007?

19 A. Yes.

20 Q. So the statement that there's very little research out
21 there is a little bit outdated, correct?

22 A. Correct.

23 Q. And then they ultimately conclude in the article that
24 based on their study they believe that, at least in terms of
25 this Spanish Scientific Police, they can use the frequencies

1 for the different characteristic points when they are
2 evaluating fingerprint conclusions, correct?

3 A. I'm just taking a look at it if it's all right.

4 Q. Yeah. Sure. Go ahead.

5 A. So, you know, I didn't read the article until the bits
6 that are being shown today, but this -- the use of the word
7 could may be forward looking. So they may be talking about
8 some day we could use this to assess the degree of rareness.
9 I don't quite know whether they are saying that or they are
10 saying they could use it tomorrow.

11 MS. JIMENEZ: Thank you. I'll go ahead and move
12 for the admission of Government's Proposed 18.

13 MR. BURT: No objection.

14 THE COURT: Are 17, 18, 19 all offered?

15 THE WITNESS: Yes.

16 THE COURT: Any objection to any of them?

17 MR. BURT: No.

18 THE COURT: All admitted.

19 Q. You were also asked about, in Government's 19, you were
20 read a portion that talked about an agreement that the
21 evaluation of the weight of the evidence associated with any
22 particular fingerprint comparison lacks both a scientific
23 foundation and transparency. Do you recall that?

24 A. Yes.

25 Q. And, actually, if you go up a little bit and put that

1 in context, when they are having this discussion they talk
2 about the fact that the current culture within fingerprint
3 communities worldwide demands that fingerprint
4 identifications should be presented at court as categorical
5 opinions. A fingerprint examiner will tell the Court that
6 on the basis of a careful and detailed comparison he or she
7 is absolutely certain that a particular mark was made by the
8 person who provided the control print to the exclusion of
9 all other individuals on earth, correct?

10 A. Correct.

11 Q. That's the context of this discussion, correct?

12 A. Yes.

13 Q. And would it be fair to say that between yourself and
14 Miss Gische both of you agree that categorical statements of
15 absolute to the exclusion of all others should not be used
16 and won't be used in this particular case?

17 A. Yes.

18 Q. And then dropping down to the sentence that was read by
19 defense in the beginning of that paragraph in this study
20 they indicate, we do not challenge the overall reliability
21 of the conclusions of the immense majority of fingerprint
22 comparisons performed over the past century, nor do we
23 intend to minimize their contribution to the criminal
24 justice system?

25 A. Yes.

1 Q. And last area, I think perhaps my intentions were
2 misstated, but when we discussed the purpose of cross
3 examination or the availability of cross examination --
4 maybe it's best to ask it this way, you've purported that
5 what you would like to see in these latent fingerprint
6 reports are probabilistic statements based on a statistical
7 analysis that inserts a number into the conclusion, correct?

8 A. Yes.

9 Q. And because that -- I think you referenced, that's how
10 it's done in the DNA world right now, correct?

11 A. To some extent, yes.

12 Q. And given that, so that's kind of, that's the standard
13 we're looking for, we'd like to get latent prints to that
14 point, according to your testimony, about the community that
15 they can have those statistical models, and yet even in the
16 context of the DNA world, where they provide a statistic,
17 the meaning of that statistical information is still
18 questioned and cross examined by defense counsel and there's
19 questions and testimony about it in front of the jury in an
20 attempt to establish what that means for each side for the
21 jury, correct?

22 A. Yes.

23 MS. JIMENEZ: Nothing further.

24 THE COURT: All right. I think we're done?

25 MR. BURT: Yes.

1 THE COURT: Thank you. Safe trip home. I very
2 much appreciate your coming.

3 THE WITNESS: Thank you.

4 THE COURT: I know you got to get on the road. I
5 just, I had a couple of thoughts. One is, can I get, I want
6 to return to where we started with the government and make
7 sure I understand the proffer for the four, the four prints
8 that you propose to offer, right. How I understand it, and
9 make sure that I've got it right, that prints from Mr. Lee
10 and Mr. Fell were found in the, in the interior of the car
11 on the driver's side and also on the passenger's side.

12 MS. JIMENEZ: No. There's prints on the inside
13 windshield of the driver's side belonging to both Mr. Fell
14 and Mr. Lee.

15 THE COURT: That's why I wanted to have this
16 discussion, make sure I got it. Tell me again.

17 MS. JIMENEZ: There's prints on the inside
18 driver's window --

19 THE COURT: Yup.

20 MS. JIMENEZ: -- that were identified to Mr. Lee
21 and Mr. Fell.

22 THE COURT: Okay.

23 MS. JIMENEZ: And additionally there were prints
24 from the license plate of the vehicle as well as a Dunkin
25 Donuts bag.

1 THE COURT: Okay. And the license plate is the
2 license plate that originated from the car in Pennsylvania,
3 right?

4 MS. JIMENEZ: That's correct.

5 THE COURT: Yeah. Okay. I mean, I knew it had to
6 be that way, but I just wanted to make sure. And those are
7 Lee or Fell or both?

8 MS. JIMENEZ: Those were identified to Mr. Fell.

9 THE COURT: To Fell. Okay. And then the bag?

10 MS. JIMENEZ: I'm sorry, excuse me. To Mr. Lee.
11 I mis-spoke. I was thinking Lee, but I said Fell.

12 THE COURT: Okay.

13 MS. JIMENEZ: Correct. And then there was also
14 the letter of Mr. Fell's that was separately examined.

15 THE COURT: There was what?

16 MS. JIMENEZ: The letter written by Mr. Fell that
17 was separately examined where an exclusion was made. That
18 was also discussed.

19 THE COURT: Oh, I must -- oh, okay. What's the
20 relevance of that?

21 MS. JIMENEZ: Well, we may or may not present it,
22 Your Honor. But if the latent print evidence as a whole was
23 challenged, so we wanted to be sure that we presented
24 testimony as to every single analysis that was done. So we
25 haven't gotten to the point of strategically making that

1 decision, but we wanted to make sure we covered it because
2 the purpose of the hearing is whether or not our latent
3 print examiner would testify, would potentially at least be
4 part of her testimony.

5 THE COURT: All right. So there was a letter
6 written, from your perspective, what's the scoop?

7 MS. JIMENEZ: It's a letter that was written to
8 our, to a -- Court's indulgence?

9 MR. BURT: I think it's a jailhouse letter that
10 they intercepted that contains communications by Mr. Fell
11 written to somebody else.

12 MS. JIMENEZ: Yeah, I just don't want to identify
13 the other person on the record.

14 THE COURT: So this was obviously a year, two
15 years after the crime?

16 MS. JIMENEZ: This was in relation to the 2012
17 stabbing of Mr. Roan.

18 THE COURT: Got it. Okay. And then tell me about
19 the offer on the Dunkin Donuts bag?

20 MR. DARROW: Your Honor, if memory serves, at the
21 first trial there was testimony that the third homicide
22 victim, Mrs. King, short minutes before she was abducted
23 from out in front of the Price Chopper she stopped at the
24 Dunkin Donuts south of U.S. 7, bought doughnuts for her
25 co-workers.

1 THE COURT: Right.

2 MR. DARROW: She's abducted before she can get
3 into the store. And the doughnut bag goes with Fell and Lee
4 and Mrs. King on route to New York. In Fell's confession he
5 says that she offered them doughnuts.

6 THE COURT: Right.

7 MR. DARROW: Fell says that after they killed her
8 they got back in the car and then stopped at Burger King for
9 breakfast.

10 THE COURT: Right.

11 MR. DARROW: Mrs. King's pocketbook, with the
12 Dunkin Donuts bag inside it, was recovered at Burger King.

13 THE COURT: And whose fingerprints are on the
14 Dunkin Donut bag?

15 MS. JIMENEZ: Mr. Lee.

16 THE COURT: Mr. Lee. And Mrs. King's are or not
17 that we know?

18 MS. JIMENEZ: He's not --

19 MR. DARROW: I don't think the examiners looked
20 for Mrs. King', s prints on the bag.

21 THE COURT: Yeah, okay. I had just wanted to
22 understand the scope of the offer. So it's Mr. Lee whose on
23 that fourth item, the Dunkin Donut bag. All right. That's
24 very helpful. I just wanted to be oriented.

25 The other thing, Mr. Burt, I think we're going to

1 lose you for a while. I wanted to thank you for all your
2 work this summer and your patience in coming for so many
3 weeks. When will we see you back?

4 MR. BURT: Well, Your Honor, that was one issue
5 that we were hoping the Court would have some time sometime
6 relatively soon to maybe hold a status conference and we can
7 discuss scheduling issues and my schedule.

8 THE COURT: Right.

9 MR. BURT: We have some concerns about being
10 prepared for the September DNA hearing without my
11 assistance. And I wanted to see if I could work with Judge
12 Sorokin in Boston to see if there was a time period where I
13 could be freed up to be able to complete that hearing. And
14 so we wanted to discuss that with the Court --

15 THE COURT: Okay.

16 MR. BURT: -- at the Court's convenience. We
17 could make arrangements through your staff for a telephone
18 conference, sooner rather than later, in terms of
19 scheduling.

20 THE COURT: So do you want to talk to Judge
21 Sorokin first about what's going to be available, right?

22 MR. BURT: Yes. I think so. And I'll know that
23 the first week, we're starting on the 7th of September with
24 an in limine and jury related motions. And then we're
25 selecting the jury on the 14th.

1 So I, I would like to get back to the Court after
2 the 7th, perhaps the 8th, around there, so that I can let
3 the Court know what my availability is going to be because I
4 do feel I need to be involved in this DNA hearing since I
5 was the one that prepared it and arranged for the experts
6 and have been tasked with the responsibility of putting it
7 in.

8 So I will discuss with Judge Sorokin the need to
9 do that and to make arrangements to be here, but with the
10 Court's permission I would like to have that discussion with
11 him and then --

12 THE COURT: That's fine.

13 MR. BURT: -- get back to you.

14 THE COURT: And he talks to me a little bit about
15 scheduling stuff as well. He's very cooperative.

16 MR. BURT: Great. Excellent.

17 And then there was one additional issue that I
18 wanted to take up with the Court, because I am not going to
19 be here this afternoon, regarding the need for a hearing on
20 Mr. Gilkerson, who is the footwear expert.

21 THE COURT: You said Mr. Gilkerson. And is he
22 here? I thought so, yeah.

23 MR. GILKERSON: Yes, I'm here.

24 MR. BURT: So, Your Honor, when we first filed
25 this Daubert Motion we had been informed through the Rule 16

1 disclosures that Mr. Gilkerson was going to take the place
2 of another examiner whose reports we were provided. And
3 those reports purported to find various associations between
4 footwear found at the crime scene or other places and
5 footwear received from Mr. Lee and Mr. Fell.

6 After the motion was filed, or right around the
7 time, but not in time to be incorporated into the motion, we
8 were provided with a new report by Mr. Gilkerson.

9 And in that report came to, in our view,
10 substantially different conclusions than what an earlier
11 examination had revealed.

12 And so much of the Daubert Motions focused on
13 opinions, which I don't believe are any longer in play. And
14 Mr. Gilkerson concluded in his report that the relevant
15 portion of the report, for our purposes, that the footwear
16 impressions labeled 20 and A share similar design features
17 and orient with the item number one left boot, which is the
18 boot of one of the suspects.

19 However, due to the limited detail retained in
20 these impressions it could not be determined whether the
21 item number one boot is the source of these impressions.

22 And he has listed in his report what it means to
23 conclude that something could not be determined. And he
24 says --

25 THE COURT: Well, let me interrupt you. I can't

1 kind of go back ways into the guts of the thing and
2 understand it. Is it a problem that's he's the wrong
3 witness?

4 MR. BURT: No. No. Not a problem that he's a
5 wrong witness, but it would be our position that given that
6 he reached an in -- a, what's characterized as an
7 inconclusive, that separate and apart from Daubert
8 considerations there is a relevancy objection to the
9 testimony about inconclusive results.

10 THE COURT: All right.

11 MR. BURT: And the government and I have had some
12 discussions about this. I provided the government with an
13 order from the New Mexico case that has been alluded to here
14 in which, in which Judge Guerra wrote in an order, and I can
15 provide this to the Court, quote, and this had to do with a
16 inconclusive firearms comparison.

17 THE COURT: Right.

18 MR. BURT: She writes, quote, finally, the Court
19 agrees with Mr. McCluskey that Babcock may not testify as to
20 inconclusive results such as her statement in her report
21 that neither fired casing could be identified or eliminated
22 as having been fired in the pistol.

23 To be admissible is relevant evidence under the
24 Federal Rules of Evidence. Evidence, expert or otherwise,
25 must make a fact that is of consequence to the determination

1 of the action more or less probable than it would be without
2 the evidence, citing Rule 401.

3 Then she goes on to write, because such
4 inconclusive testimony findings do not make a fact more or
5 less probable than it would be without them, they are not
6 relevant and may not be admitted into evidence.

7 And I also cited to the government a case by the
8 high court in Massachusetts, Commonwealth versus Cabot, 460
9 Massachusetts 617 which states, quote, testimony regarding
10 inconclusive DNA results is not relevant evidence because it
11 does not have a tendency to prove any particular fact that
12 would be material to the issue in the case, end quote.

13 THE COURT: So I hear what you're saying. It's
14 sort of, it's very similar to the government's point that
15 they didn't think some of these, Dr. Morrow's probably in
16 particular, his testimony required a hearing.

17 It's a lot easier for me to hear the evidence from
18 the, from the witness and then square it up against the
19 legal standard than it is to argue about the legal standard
20 and then read a report and try to decide if it meets it or
21 not.

22 MR. BURT: That's fine.

23 THE COURT: So we'll just proceed with Mr.
24 Gilkerson, and I'll hear from you Miss Jimenez, but I
25 propose to proceed with him if the testimony's offered and

1 do as we've done with the other people.

2 It just is a lot easier to understand what the
3 argument is if we start with what the, what the opinion is.

4 MR. BURT: I kind of thought that's where the
5 Court would be going, but since I had been the one
6 researching this I thought I'd put that argument in front of
7 the Court so that the Court was aware that that was going to
8 be our position. Thank you.

9 MS. JIMENEZ: I just wanted to add in reference to
10 the first comment on the schedule for the DNA, I just wanted
11 to bring to the Court's attention that, because it might
12 affect scheduling, is we had also made an argument in our
13 DNA opposition to the first argument that a hearing isn't
14 necessary at all as to the Daubert issue of DNA or -- we
15 also cited to cases where a court had decided to severely
16 limit the subject matter at issue in this case. I would
17 think it would be LCN, no copy number testimony that the
18 Court would limit it to.

19 And I just wanted to point that out because since
20 that hearing has been -- if the Court decides to take a look
21 at that that may affect the scheduling in Sampson, etcetera.

22 THE COURT: Okay. No. And for that one I've got
23 plenty of time to look at it and not be sort of boxed in.

24 MS. JIMENEZ: Of course. Of course. Thank you.

25 THE COURT: All right. So it sounds likely that

1 I'll see you in September at some point if you can, if you
2 can get away. I just hate to give up that week because the
3 month is full and we've sort of had that and you've made
4 your plans with your experts.

5 MR. BURT: We have other issues that we were going
6 to propose. If for some reason we can't work the scheduling
7 out we have plenty of other issues that we could use that
8 time with the Court if the Court's available to.

9 THE COURT: I can imagine.

10 MR. BURT: Yes.

11 THE COURT: All right. Anything else? So this
12 afternoon, we'll take an hour off then we'll turn to the
13 footwear question, right?

14 MR. DARROW: Yes.

15 THE COURT: Good enough.

16 MR. DARROW: Thank you, Your Honor.

17 THE COURT: See you all then.

18 (The Court recessed at 12:10 p.m. and resumed at
19 1:15 p.m.)

20 THE COURT: We're all set. Thanks, appreciate it.

21 MR. DARROW: Your Honor, the government calls Eric
22 Gilkerson.

23 E R I C G I L K E R S O N, The Witness, after
24 being duly sworn, was examined and testified as follows:

25 MR. PHILIPSBORN: Your Honor, as Mr. Gilkerson is

1 taking the witness stand, the Court's already heard and
2 addressed the objection made by Mr. Burt right before the
3 lunch hour. And I know the Court will be considering that
4 when it's reiterated in pleadings. That was the relevance
5 objection.

6 THE COURT: Got it. Okay.

7 MR. PHILIPSBORN: Thank you.

8 THE COURT: Good afternoon. Thanks for making the
9 trip. I appreciate your coming up. When did you get here,
10 last night?

11 THE WITNESS: No, I got here Tuesday.

12 THE COURT: Tuesday?

13 THE WITNESS: Yes.

14 THE COURT: Have you got around the state a little
15 bit?

16 THE WITNESS: No, I was pretty much staying around
17 my hotel and around the area getting ready for what I'm
18 going to testify.

19 THE COURT: Here you are.

20 THE WITNESS: Here I am.

21 MR. DARROW: You got a good look at the Holiday
22 Inn area of Route 7.

23 THE WITNESS: Yes.

24 THE COURT: It gets better you know.

25 THE WITNESS: It was a nice drive down here from

1 Burlington.

2 DIRECT EXAMINATION BY MR. DARROW:

3 Q. In any event, good afternoon, Mr. Gilkerson.

4 A. Yes.

5 Q. I want to show you a document that has been marked for
6 identification as Government's 21. Can you take a look at
7 that, please?

8 A. Yes, it is a copy of my CV.

9 Q. Does that have your CV on the front?

10 A. Yes, it does, on the front.

11 Q. Followed by your Rule 16 submission dated August, 2016?

12 A. Yes.

13 Q. Followed by your -- well, a lab report with your name
14 on it dated May 26, 2016?

15 A. Yes, this is lab report I wrote. Yes.

16 Q. And after that a power point?

17 A. Yes, that's correct.

18 Q. Okay. Let's start with introducing yourself to the
19 Court. Can you tell the Court your full name and where you
20 work, please?

21 A. Yes. My name is Eric spelled E-R-I-C. Last name
22 Gilkerson, G-I-L-K-E-R-S-O-N. And I work in the Questioned
23 Documents Unit doing footwear and tire comparisons in the
24 FBI Laboratory in Quantico, Virginia.

25 Q. How long have you done that?

1 A. For almost 20 years.

2 Q. When did you join the FBI?

3 A. 1997.

4 Q. Can you give the Court a summary of what you were doing
5 prior to 1997 by way of preparation or education?

6 A. Prior to that I worked in a couple different jobs as a
7 chemist. And in terms of education, I have a Bachelor of
8 Science Degree in Biochemistry from the University of
9 Maryland.

10 Q. Now, when you joined the FIB how did you start out
11 there?

12 A. I started out initially doing what I would call
13 technician level type work for a few months. Then I
14 transitioned into the examiner training program. And that
15 lasted about a year and a half or so. And in February of
16 1999 I began working cases as a qualified examiner in the
17 FBI Lab related to footwear and tire tread evidence.

18 Q. What was your training at the FBI in order to become,
19 in order to examine footwear?

20 A. We take manufacturing tours, we would work on casting
21 and lifting and chemical enhancement exercises that related
22 to the analysis of footwear.

23 We would go to professional meetings, reading some
24 literature related to the topic and work cases and study
25 under another certified examiner within the laboratory.

1 Q. Who was the certified examiner you worked under?

2 A. I worked under two. I worked under Sandy Wiersema and
3 Michael Smith.

4 Q. Now, you mentioned that those examiners are certified.

5 A. They were qualified by the FBI Lab. That's the term
6 we're using, yes.

7 Q. Okay. Are you qualified?

8 A. Yes.

9 Q. What does it take to become qualified?

10 A. You have to pass the training program as well as an
11 oral board and moot courts.

12 Q. Any continuing education or qualification you undergo
13 during the course of a career there?

14 A. Yeah. We undergo annual proficiency testing. And we
15 do undergo some annual training, attending meetings, reading
16 articles, things like that.

17 Q. What do you do during an annual proficiency training?

18 A. We receive a proficiency test from Collaborative
19 Testing Services. And we do the analysis and then send that
20 in and, to make sure that we're proficient in the
21 examination.

22 Q. Are we talking about footwear examinations now?

23 A. Yes, specifically for footwear.

24 Q. Tell us about any professional affiliations you may
25 have?

1 A. I'm a member of the International Association For
2 Identification or the IAI.

3 Q. And do you serve on any committees related to that
4 professional organization?

5 A. Yes. In the past I belonged to the Certification Board
6 For Footwear, along with the Footwear and Tire Track
7 subcommittee. Both of those are under the IAI. And then I
8 was also a member of SWGTREAD for several years. SWGTREAD.
9 It's an acronym and it's spelled S-W-G-T-R-E-A-D.

10 Q. Now, we've asked you to come up today to address both
11 the, what the lawyers call the Daubert part of footwear
12 forensics.

13 Do you understand what Daubert is?

14 A. Yes.

15 Q. Have you, in fact, testified at prior Daubert Hearings
16 on footwear?

17 A. Yes, I have.

18 Q. And were you the FBI expert that testified in the case
19 which resulted in the United States v Ford decision out of
20 the Third Circuit cited in the government's papers?

21 A. Yes.

22 Q. And in addition to that, have you testified as an
23 expert in the area of footwear forensics in a variety of
24 state and federal courts?

25 A. Yes, I have.

1 Q. Okay. When -- the second reason why we asked you to
2 come up is you actually are the FBI examiner that, this
3 year, examined the footwear evidence in the Fell case,
4 correct?

5 A. Yes, that's correct.

6 Q. And now, who did the original examination?

7 A. Sandra Wiersema.

8 Q. And that was some 15 years ago?

9 A. Yes, that's correct.

10 Q. And she's left the FBI and you were asked to fill in
11 for her and you did a new examination; is that right?

12 A. Yes, that's correct.

13 Q. Did you prepare for us a power point on footwear
14 impressions for purposes of Daubert review?

15 A. Yes, I did.

16 Q. Okay. If we could have the power point up. I think I
17 have your -- there we are. Is that your power point?

18 A. Yes, it is.

19 Q. Great. Can you start by telling us a little bit about
20 the basic theory that underlies footwear forensics?

21 A. Yes. This is slide number two. And basically the shoe
22 picks up debris as it comes across, as you walk, take normal
23 walking motions. It picks up debris and redeposits that in
24 the form of an impression. And that's on a hard surface.

25 There are other impressions where you walk and

1 step into soil or snow. And that causes a deformation in
2 the surface. And, again, it also can be the form of a
3 footwear impression.

4 And these two and three dimensional footwear
5 impressions, as we call them, can be compared directly to
6 items of footwear.

7 Q. Okay. And what's the methodology you use while
8 examining footwear evidence?

9 A. This is slide number three. It's a physical
10 comparison. It involves the use of side by side comparisons
11 and superimposition. And superimposition is taking a test
12 impression and superimposing it, putting it on top of a
13 crime scene impression to assess how well the features
14 align.

15 And a test impression is made by putting
16 fingerprint powder on the bottom of the shoe, putting the
17 shoe on your foot and stepping and walking on the ground.
18 And you're left with a record copy of what the shoe would
19 look like. And the examination is essentially a four step
20 process.

21 In the first process here we -- what I did, and
22 this is -- this methodology is what I followed in this case.
23 I looked at the shoe impressions to determine if there's
24 sufficient clarity, can I see the gross design features, is
25 there enough there for me to do a comparison. In other

1 words, can I see the geometric shapes that make up the
2 outsole design. They might be squares or triangles or
3 circles or things like that. And if there's insufficient
4 clarity then there is no comparison conducted and the
5 examination essentially ends.

6 On slide five, this is just an example of two
7 impressions that we got in different cases. And you can see
8 the geometric shapes. They come in a wide variety. Some
9 are lines, some are herringbones, there's zigzag lines. You
10 can see triangles and things like that. So there's a wide
11 variety of geometric shapes that are found on the bottom of
12 shoes. And the bottom on the shoe is what's called an
13 outsole design.

14 Q. The last thing you said, the bottom of the shoe is the
15 outsole?

16 A. Yes. The bottom of the sole is referred to as the
17 outsole. And those geometric shapes make up what's called
18 the outsole design.

19 Q. And the two photographs on this slide, those are crime
20 scene prints or of your -- you described how you would put
21 something like fingerprint powder on the bottom on the
22 outsole?

23 A. No. These are actually impressions that were made at
24 two different crime scenes. These are not from this case.
25 They are just here for illustrative examples to show the

1 types of impressions we can get in case work.

2 Q. All right. So that's step one. What comes next?

3 A. If there's sufficient detail then you can go on with
4 the comparison. You can make test impressions that I just
5 said. And I can explain that a little bit further.

6 So you need enough clarity and detail in the crime
7 scene impression to continue on with the analysis.

8 Q. So far it sounds a little bit like some of the things
9 we heard about in fingerprinting?

10 A. Yes.

11 Q. More on step two?

12 A. And these are why we make test impressions. They are a
13 record copy of what the shoe looks like when it comes into
14 contact with the surface. As I described earlier, we put
15 fingerprint powder on, step into what's called like a clear
16 piece of acetate, and I'll show you in a subsequent slide.
17 And they are a tool and aid that I can use in the
18 examination process. And the average person would not have,
19 would not have that to use in an analysis. So that's a tool
20 that the examiner in the lab has another lay person would
21 not have. And we use this to compare the class
22 characteristics and what I'm calling randomly acquired
23 characteristics. And in the past we would refer to those as
24 identifying characteristics. And a test impression can also
25 be used to orient the impression with either the left or the

1 right boot.

2 Q. Randomly acquired characteristic, is that something
3 like if the person wearing the shoes had stepped on a
4 thumbtack and it was still in the bottom of the boot?

5 A. Yes, it could be that.

6 Q. So you could see an impression of it later?

7 A. Yes, it could be that. It could be a scratch, things
8 like that that damage that's caused to the bottom of the
9 shoe through normal wear and tear and use.

10 Q. And on this next slide what do we see there? What are
11 those two prints?

12 A. These are -- this is an example of a test impression
13 that was made. And it's, put the shoe on my foot, put
14 fingerprint powder on it, stepped onto it. And this is an
15 example of a test impression from a pair of shoes that we
16 got in a case. Not in this case, but this is just an
17 example of that.

18 Q. Okay. Continuing with the methodology?

19 A. So in doing the methodology using side by side
20 comparison. Again, side by side comparison, I'm looking at
21 a feature in the crime scene impression and comparing it to
22 a feature I might see on the outsole of a known shoe. And
23 using superimposition, where I have the test impression, I
24 can superimpose over that impression.

25 These are the four areas that we look at. They're

1 outsole design. And, again, that's the pattern that's on
2 the bottom of the shoe. The physical size. That's the
3 physical size and spacing of the geometric shapes that make
4 up the outsole design. The third thing is wear. As you
5 wear the shoe the outsole can become deteriorated over time.
6 And the final thing are randomly acquired characteristics.
7 And they are also referred to as identifying
8 characteristics.

9 Q. Did you make a slide with some example of outsoles?

10 A. Yes. This slide here, there's literally tens of
11 thousands of outsole designs in existence. And there's a
12 wide array of geometric shapes that make up these outsole
13 designs.

14 Q. The one on the far left looks a little familiar, but
15 it's not from this case is it?

16 A. No. That's what we call a general lug sole design.
17 It's made by many different manufactures and comes in a wide
18 variety of stars; one, two, three stars in the heel.
19 Possibly five, six, seven stars in the toe area.

20 Q. Okay. And is this next slide an example of the size
21 issue?

22 A. This is showing the example of the physical size. You
23 can see some zigzag lines in the middle. This is slide
24 number 11. What we call a herringbone pattern. They are
25 very small or close together. And on the same outsole

1 design you can see more of those zigzag lines. They are
2 larger and spaced further apart.

3 You can see squares that are evenly spaced on the
4 left-hand side of that shoe. And on the right-hand shoe are
5 circles that also have spacing difference.

6 So this is just to show the wide variety of
7 physical size of the geometric shape. Some of them are
8 small. Some of them like those circles are somewhat large.
9 And then also to show the proportional spacing between them.
10 Some it's far, a larger amount of proportional spacing, and
11 some has a smaller amount of proportional spacing.

12 Q. Okay. And the third characteristic, if memory serves,
13 is wear?

14 A. These are what we call wear characteristics. As you
15 continue to wear the shoe through normal use the outsole
16 design with the geometric shapes on there begin to erode or
17 wear away.

18 And these are examples of them. They are commonly
19 found in the toe and the heel areas of the shoes and
20 sometimes in the ball of the shoe that's sort of the center
21 of the toe area there. Oftentimes you'll find wear in there
22 as you continue to use the shoe over time.

23 Q. And then you have some examples of randomly acquired
24 characteristics?

25 A. Yes. Below are examples of randomly acquired

1 characteristics. As you walk across a surface, use the
2 shoe, it picks up defects. They might be scratches or cuts.
3 They could be a hole, for example, on the right-hand side.
4 In the middle what's called a stone hold, a rock that's
5 embedded in that shoe.

6 Q. Okay. And does that -- that's step two?

7 A. Yes, that's correct.

8 Q. And what happens next?

9 A. Once we evaluate these characteristics we formulate an
10 opinion. We do an evaluation of those four areas using our
11 test impressions and superimposition and side by side
12 comparison. And we use these things to evaluate the
13 correspondence between the impression and the known shoe.
14 And we use that to formulate an opinion.

15 Q. And these, the slide 15 is the different opinions you
16 can get to?

17 A. Yes. This is currently what we're using. There are
18 seven levels we're currently using. The first one is
19 identification. The second level is probably made. The
20 third level is could have made. The fourth level is could
21 not be determined. In other words, I don't know if the shoe
22 is the source of the impression.

23 Indications, did not make, meaning that there are
24 indications there that this is not the right shoe that made
25 the impression, but I can't outright exclude it.

1 There are elimination opinion, it's clearly not
2 the right shoe for different reasons. I can eliminate it as
3 a source. And then the final one is unsuitable. There's
4 not enough detail there where I don't see any footwear
5 impressions in the images or things like that and I can't do
6 any type of meaningful comparison.

7 Q. Are these seven categories that the FBI is using now?

8 A. Yes, they are.

9 Q. Have they evolved over the years?

10 A. Yes, they have. And they partly evolved, we've tried
11 to take technical information and put it in terms like these
12 words that a lay person, a non-expert can understand. We've
13 tried to avoid over the years of using technical terms that
14 are difficult for a non-expert to understand. And in my
15 opinion these types of terms are easy for a lay person or a
16 non-expert to understand.

17 Q. Okay. Slide 16 continues with methodology?

18 A. Yes. And these are the criteria that I've set out here
19 that we include for each level in the methodology.

20 So an identification is the highest degree of
21 association between the questioned impression and known
22 shoe. It has to have a class of characteristics that
23 correspond. And we would also have to have one or more
24 randomly acquired characteristics.

25 There is no set number of randomly acquired

1 characteristics that we have set to make an identification.
2 It could be with as few as one. And we would not expect to
3 find the same combination of those, those randomly acquired
4 characteristics on another shoe with the same class
5 characteristics.

6 In other words, if I had a shoe and it had these
7 racks on it, I would not expect to find another shoe with
8 those same set of racks with that same outsole design, that
9 same wear and same spacing.

10 However, we haven't examined every shoe in the
11 world. And so that's why we're using the term, would not
12 expect to find. And we're not saying that this is an
13 identification to the exclusion of all others.

14 What we're saying is based on the evidence at hand
15 in a particular case, and based on the features that we see
16 in the randomly acquired characteristics, it's our opinion
17 that the shoe is the source of the impression.

18 And this can never be empirically proven. It's
19 not possible to look at all shoes in the world to determine
20 if there's another one out there that has the same exact set
21 of characteristics, but we would not expect to find another
22 one.

23 Q. All right. What's next category down from that?

24 A. The next category is probably made. It's unlikely that
25 there's another shoe, there may be one randomly acquired

1 characteristic, there may be a high degree of wear and
2 things like that that agree, but there's not enough clarity
3 in the impression to make an identification.

4 So generally the impression has a lack of some
5 clarity in detail for us to get to the identification
6 opinion level.

7 Q. All right. And continuing on the next category is the
8 could have made conclusion?

9 A. Yes. Slide 17.

10 Q. I apologize.

11 A. The could have made. It means that the known shoe is a
12 possible source of the impression. And other shoes with
13 those same class characteristics are also included in the
14 population of possible sources.

15 So this whole process is deductive. We're
16 starting with very large but getting narrower, narrower and
17 narrower. And so identification is the most narrow. Now
18 we're a little bit broader in terms of, could have made.

19 Q. And how about, could not be determined?

20 A. There might be similarities or differences in the crime
21 scene impression that we can't account for or can't explain.
22 And for those reasons we would come to the opinion that it
23 can't be determined whether or not it's the source.

24 It would be considered a straight up, I don't
25 know, or some people would characterize that as an

1 inconclusive.

2 Q. All right. And, finally, for, identifications did not
3 make?

4 A. These indications did not make, there's some features
5 there that are dissimilar from the known shoe. There might
6 be some difference or part of it that's unexplained. Not
7 enough there to make an elimination. However, there are
8 clearly things that are different. So we would say,
9 identifications did not make. And this level of opinion is
10 very rare in case work, very rare.

11 Q. Very what?

12 A. Very rare in case work for, in my personal experience.

13 Q. And then, lastly, elimination, is that what we've been
14 talking about using the word exclusion with fingerprints?

15 A. Yes. It means the same thing. The known shoe can be
16 excluded or eliminated as the source of the impression
17 because of some unexplainable difference.

18 Q. Is unsuitable, you were unable to -- essentially the
19 sample print was too poor to allow you to draw any
20 conclusions?

21 A. Yes, that's correct.

22 Q. All right. Slide 19 refers to a step four in your
23 methodology. Tell us about that.

24 A. In step four someone else does an independent technical
25 review of the case. They have my notes. They have my

1 report. They do a quasi re-examination. They see if the
2 notes support the conclusion. And that's how we do a tech.
3 review in our lab with footwear and tire impression
4 evidence.

5 Q. What's a quasi re-examination?

6 A. They re-examine, they have the test impressions, they
7 have the cast and they have all the original evidence and
8 photographs that I had, they have the original evidence, the
9 original cast, the original lifts, original photographs,
10 original test impressions and they redo the analysis.

11 Q. Okay. Now, moving on, does that conclude your sort of
12 overview of the methodology?

13 A. Yes. And I wanted to point out too, they don't take
14 their own set of bench notes like I do. They look at my
15 notes to see that my notes support the conclusions that I've
16 arrived at in a case.

17 Q. They ever disagree with you?

18 A. Yes, on occasion they disagree. And we discuss it and
19 go from there. If I need to re-examine something I do that.
20 And that happens -- that happens from time to time. There
21 might be some disagreement or a question about a result that
22 you came up with. That I would consider normal in examining
23 evidence in the laboratory.

24 Q. Okay.

25 THE COURT: Do they usually have more or less

1 experience than the initial examiner?

2 THE WITNESS: It depends. They could have -- it
3 could be both. They could have more or less. In my
4 particular case my tech. reviewer at this point has fewer
5 years of experience than I do. So I've seen it in both
6 cases. I've had tech. reviewers that have had more
7 experience.

8 Q. You've got 20 years in, you'd be hard pressed maybe to
9 find someone with significantly more experience?

10 A. Maybe so. Yes, I've been doing this for a long time.
11 For about 17, 17 and a half years.

12 THE COURT: It must wear on you.

13 THE WITNESS: It can after time, yes. That's
14 correct.

15 THE COURT: Terrible. I'm sorry.

16 Q. Technical term. So in preparing for your talk today,
17 and the Daubert issue, have you looked at the extent to
18 which the methodology that you've described can be testified
19 or has been tested?

20 A. Yes. Yes, I have.

21 Q. Tell us about that? Tell us about it?

22 A. For one thing, has it been tested. It has been tested
23 in terms of we use proficiency tests and other tests like
24 that where there is a ground truth answer.

25 We, there's an answer known. If I apply my

1 methodology I can arrive at the ground truth answer. That's
2 what we use. That shows that the theory's been tested. So,
3 in other words, we have a shoe, we know what the answer is,
4 we make, someone makes a crime scene impression or mock
5 crime scene impression. I do my analysis. I can come up
6 with a correct result. That's one way.

7 And the other way there's been lots of research
8 done through the years for a long period of time. There's
9 hundreds of different journal articles discussing footwear
10 and tire evidence and things related to that type of
11 evidence.

12 Q. Have you cited a couple of them here on slide 20?

13 A. Yes, these are some examples of articles that have been
14 done. Most of them recently. And there are a few that I
15 had just put here for historical purposes.

16 THE COURT: What does ground truth mean?

17 THE WITNESS: Ground truth means that we know that
18 the shoe made the impression. So we know that. So they are
19 going to use a known shoe and make up a test. And so then I
20 can apply the methodology and come up with it or not.

21 They might make another -- they may use another
22 shoe to give me to make a test impression, let's say, with
23 elimination. But in either case they know what the answer
24 is.

25 Q. Now, is this slide 20 actually the first of five slides

1 in which you've given examples of studies that have reported
2 on this area?

3 A. Yes.

4 Q. More of them on 21?

5 A. Yes. That's correct.

6 Q. And 22?

7 A. Yes.

8 Q. Twenty-three?

9 A. Yes.

10 Q. And 24?

11 A. Yes.

12 Q. Okay. Now, let's turn to another Daubert
13 consideration. And that is the extent to which there are
14 standards that apply or controls and how the methodology's
15 applied. Can you talk about that, please?

16 A. Yes. There are groups and organizations that do have
17 procedures and protocols and guidelines relating to the
18 examination of this type of evidence. There's the SWGTREAD,
19 which is known as the Scientific Working Group for Shoe
20 Prints and Tire Tread Evidence. I was a member of that
21 group for several years.

22 That group is, has been absorbed into the
23 Organization of Scientific Area Committees or OSAC. And
24 there is a footwear subcommittee that's part of OSAC.

25 The website has not yet been transitioned into

1 OSAC, but at some point in the future it will.

2 Q. Is it correct you prepared three slides and listed the
3 various entities --

4 A. Yes. These are different. ASCLD/LAB --

5 Q. I'm sorry. You prepared three slides listing various
6 entities that have articulated or distributed standards,
7 applicable standards to footwear forensics?

8 A. Yes.

9 Q. And we're looking at 25. And there's 26. If you want
10 to add anything to this, otherwise I'll just move it along.

11 A. It's the International Association for Identification.
12 I've mentioned this before. I was a member of the two
13 committees they have that relate to footwear. One is for
14 the evidence itself. And the other one is for certifying
15 examiners. And I was a member of both of those at one time.

16 Q. Okay. And various other entities on 27?

17 A. Yes. We have Collaborative Testing Services there, the
18 agency or the group that creates and administers proficiency
19 testing. And they do it for a variety of different,
20 different forensic disciplines. There's also our Quality
21 Assurance Unit in the FBI Lab.

22 Q. Is that, is CTS the outfit you talked about earlier
23 coming in to check out the FBI Lab?

24 A. No. That's as ASCLD/LAB. They do certification.

25 Q. Okay. And you prepared a slide on peer review and

1 publication. This sounds related to the controlling
2 standard slides, but are these some of the leading
3 publications?

4 A. These are the books that are most commonly in use for
5 footwear impression evidence. They are not all of them, but
6 they are the ones that have been used most often through the
7 years.

8 Q. And it looks like you've got more examples on the next
9 couple slides?

10 A. These are books that also include footwear impression
11 evidence. They are not, the other books were exclusively
12 for that type of evidence. These books include discussions
13 about footwear impression evidence.

14 Q. 1953, looks like people have been working in this area
15 for a while?

16 A. Yes. The FBI Laboratory has been examining shoe and
17 tire impression evidence since the 1930's. So we've been
18 doing it for a very long time.

19 Q. And looks like another slide there in 30 with more
20 publications listed?

21 A. Yes. These are examples of journals where articles
22 have been published concerning footwear impression evidence
23 or topics related to that.

24 Q. And more on slide 31?

25 A. These are professional meetings and organizations that

1 have had workshops and lectures and things like that related
2 to footwear impression evidence.

3 Q. All right. More of the same here on 32?

4 A. Yes. The same thing. These are more regional type
5 meetings. Sometimes we have a symposium. We've had a
6 couple of those I've attended in the past.

7 Q. Were you here for our discussion of error rate earlier
8 today?

9 A. I was here in the morning, yes.

10 Q. Okay. Let's talk about or ask you to talk about how
11 that concept might apply to footwear forensics?

12 A. Sure. In footwear exams the exam itself, it's a
13 physical comparison using, again, as I had mentioned
14 earlier, side by side comparison and superimposition.

15 Footwear analysis is not quantitative analysis.
16 We're not measuring anything. We're not generating any
17 number. And so for those reasons, and other reasons I've
18 listed here, it's difficult to develop an error rate that
19 you could apply either to the examiner or the methodology
20 that you could use in casework or relate that to casework.

21 And these are some of the variabilities we
22 encounter quite often in footwear cases. There are a large
23 number of outsole designs in existence. It's in the,
24 literally in the tens of thousands.

25 We don't really know where they are distributed.

1 We don't know the exact number of shoes that are made in
2 each of these different patterns and each of these different
3 sizes. That's related to the items of footwear.

4 Then we come to the impression part of it. We
5 could have partial impressions. Sometimes we have full
6 impressions. We have impressions on different types of
7 surfaces. And the composition of the impressions can be
8 quite difficult. They are in dust, they are in blood, they
9 can be in mud. So there's lots of variability in this type
10 of analysis.

11 And at this point there is no, there is no working
12 mathematical model of error rate that we can apply in
13 casework.

14 Q. All right. And I wanted to make sure you had a full
15 opportunity to address error rate?

16 A. Yes. However, errors can occur. It's possible. And
17 it has happened in the past. Examiners do make errors in
18 casework.

19 We have a quality assurance system and a tech.
20 review system in process to try to prevent that. All of our
21 cases in the lab are technically reviewed before they are
22 issued.

23 And so that's the mechanism that we have in place
24 to deal with that. It may not be perfect, but we
25 acknowledge that there is no such thing as zero error rate.

1 Errors can occur in casework. And they are typically found
2 with people that aren't trained very well, they didn't apply
3 the methodology, and things like that.

4 Q. Now, if you've been doing this down at the bureau since
5 the 30's I gather it's accepted down at the FBI, but what
6 about general acceptance elsewhere?

7 A. It's, it's examined in lots of other states. It's
8 examined in other countries of the world. As I mentioned,
9 we have been analyzing this evidence since the 1930's. It's
10 generally collected and generally examined in the same
11 manner.

12 Q. Would you describe this as a fairly, a well established
13 and routine area of forensic inquiry?

14 A. Yes.

15 Q. Okay. You've cited some court decisions here on slide
16 36?

17 A. I included this just to give an example. The one
18 Daubert Hearing I testified in, I know that there's other
19 hearings, and footwear evidence has not only been examined
20 in the labs in the U.S. for a long time, but footwear
21 evidence has appeared in court cases since, at least in the
22 U.S., since the 1800's.

23 Q. That Ford decision you have there cited out of the
24 Third Circuit, that's the case that you testified in?

25 A. Yes. That's correct.

1 Q. That was the Daubert Hearing?

2 A. Yes.

3 Q. You managed to persuade that Court that you had a
4 reliable methodology?

5 A. Yes.

6 Q. Now, I'm going to turn to the examination you conducted
7 in this case. Okay?

8 A. Yes.

9 Q. All right. If I understand correctly your predecessor,
10 one of your trainers, did the original footwear examination
11 back in, is it 2001-2002?

12 A. Yes. That sounds right.

13 Q. And in a subsequent 15 years or so she's left the
14 bureau, is no longer available?

15 A. That's right. She retired in 2007. And she does not
16 do any private casework or anything like that. She is
17 retired retired.

18 THE COURT: Yeah, right.

19 Q. Did she make that clear when you called her up and told
20 her we needed her?

21 A. No. I haven't talked to her in a very long time. But
22 before she retired or was leaving she made it clear to me
23 she had done this a very long time and was moving on to
24 another phase in her life.

25 THE COURT: More power to her.

1 THE WITNESS: Yes.

2 Q. And so were you asked to take a look at the footwear
3 examination, footwear evidence and do a new, do a new
4 examination?

5 A. Yes, I was.

6 Q. All right. Is it, is it your general understanding
7 that the footwear evidence in this case was, well, it came
8 from two places; one in a gravelly surface in up-state New
9 York between Route 22 and the crime scene, this being some
10 three or 400 feet?

11 A. It's my understanding they were soil impressions. And
12 they led to and from a body that was recovered.

13 Q. Okay. And did the evidence that you looked at consist
14 of, from that crime scene consist of two types of footwear
15 evidence, one, photographs of these bootprints in that area?

16 A. Yes.

17 Q. And, two, some plaster casts, I don't know if plaster
18 cast is the right word, but some medium was used which was
19 poured into those impressions which, and then hardened and
20 sent down to the FBI?

21 A. Yes. It was a material called Dental Stone. Dentists
22 used to use it, they may still, to make impressions of your
23 teeth. And it's a powder. You mix it with the appropriate
24 amount of water and mix it up until it gets to about pancake
25 type batter consistency. And you pour it into the

1 impression and after it hardens it's a life-size
2 representation of that impression. And that was done in
3 this case.

4 Q. So what do you call those?

5 A. We call them castings.

6 Q. All right. So did you, did your evidence include a set
7 of castings and a set of photographs of footwear evidence
8 from the New York crime scene?

9 A. They included castings, they included negatives of
10 photos. So I took the negatives and scanned them in. I had
11 electronic copies. And there was also one, there was also
12 one lift of a footwear impression as well. I believe it
13 came from a vehicle.

14 Q. I apologize.

15 THE COURT: What did you say?

16 THE WITNESS: There was a lift. It may have been
17 a gel lift. I'm not sure of what type of lift. But it was
18 physically used to lift an impression from some part of a
19 vehicle. So they laid the lift over the top of the
20 impression and physically transferred it.

21 Q. So the first two types --

22 A. Similar to a fingerprint lift.

23 THE COURT: Okay.

24 Q. So the first two types of evidence you had are the
25 photographs and the castings with the addition of a lift?

1 A. Yes. I had the -- well, I, they weren't really
2 photographs. They were negatives. And the castings, the
3 one lift, and then I had two pairs of boots.

4 Q. Okay. And that's what I was going to ask you about
5 next. You were given two pair of boots. And were you
6 basically comparing the, is it outsole?

7 A. Yes. I was comparing the outsole.

8 Q. The outsole of the boots with the footprint evidence?

9 A. Yes. The footwear impressions. Correct.

10 Q. Now, let me show you, by way of an example, something,
11 a photograph marked as, for identification as Government's
12 Exhibit 22. Can we go to the Elmo, please?

13 Do you recognize that, on the lower part of this
14 photograph, is that one of the castings?

15 A. Yes. That's correct. It's one of the castings that I
16 examined.

17 Q. All right. And on the upper side of the same
18 photograph, what's that?

19 A. That's the same impression prior to the casting. So
20 that's what the impression looked like in the soil.

21 Q. All right. And that's photograph number 20?

22 A. Yes, that's correct. I've inverted the photograph. It
23 looks backwards and I've inverted the photograph so it's in
24 the same direction as the casting.

25 So if I step onto the ground, Your Honor, with my

1 left shoe, and I made a casting and turn that over, it would
2 look like a right shoe. So it would be reversed
3 orientation.

4 And so in this photograph I've taken the image and
5 reversed it so both things are in the same orientation.

6 THE COURT: Okay.

7 Q. All right. And you mentioned boots. Is this one of
8 the pair of boots that you had?

9 A. Yes, it is.

10 Q. I should be more precise. I've got a photograph of the
11 outsoles of one of the pair of the boots?

12 A. Yes, it is.

13 Q. Now that we have an idea of what evidence you were
14 working with, can you tell us what you did with this
15 evidence in making your examination?

16 A. Well, I followed the methodology that I've just talked
17 about here; making the test impressions, assessing if
18 there's enough gross design features. I carried out the
19 analysis as I normally would. And I formulated an opinion.
20 I took notes of things that I observed.

21 And at the end of that I wrote a laboratory report
22 that summarized my findings. And in the laboratory report
23 it also included a list of the categories of conclusions
24 that we can reach and the criteria for each of the
25 categories to make it clear to the reader how we arrived at

1 the opinions in the report.

2 Q. All right. I appreciate that. But I'm going to ask
3 you to walk through it a little more slowly, okay?

4 A. Sure.

5 Q. And you mentioned, back when you were going over your
6 methodology, that there were various steps that you went
7 through?

8 A. Yes.

9 Q. Do you have those steps in mind?

10 A. Yes.

11 Q. Did you follow those steps you said?

12 A. Yes, I did.

13 Q. Okay. Can you just go through it a little more slowly
14 the various steps and starting with step one and what you
15 did?

16 A. Sure. I first looked at the impressions to assess if
17 there was enough gross design features. In other words, can
18 I see what geometric shapes make up these outsole designs.
19 And for those impressions that I could not do that on the
20 examination essentially ended and I said they lacked
21 sufficient detail for meaningful comparison with footwear.

22 Q. Now, the things you're examining now in step one are
23 the castings and the photographs?

24 A. The castings and the photographs, correct.

25 Q. Go ahead.

1 A. And in other cases where I could see some geometric
2 shapes then I continued on in the analysis. And in those
3 instances I made a test impression of the shoes and used
4 those test impressions and superimposed them over the
5 casting or life-size prints of the photographs. And that's
6 how I did my analysis.

7 Q. Okay. Referring again to Government's 22 for
8 identification, can you tell us what this shows?

9 A. This is a test impression of the pair of boots that you
10 just previously showed to me. And so this is a record copy
11 of what the shoe would look like when it steps onto the
12 ground.

13 Q. So that's the test impression you made from those
14 boots?

15 A. Yes. That's correct.

16 Q. So you made that test impression. And then you did, if
17 memory serves, the side by side comparison of that
18 impression with the photographs and castings from the crime
19 scene?

20 A. Yeah, as well as superimposition. So I took those test
21 impressions and physically superimposed them over the
22 castings. The castings were a life-size representation of
23 the impression at the crime scene.

24 Q. Now, --

25 A. And the casting is at the bottom of the image you're

1 showing. So I physically took that test impression and
2 superimposed it over there to see how well the features
3 align.

4 Q. All right. Now, were you working with -- well, can you
5 tell us roughly how many castings and photographs you had to
6 work with?

7 A. There were approximately 11 castings. And there were
8 approximately 29 impressions.

9 Q. And I may be missing my terminology here. There are
10 impression photographs?

11 A. There were a total of 29 impressions photographed.

12 Q. Oh, photographed.

13 A. And they were labeled 1 through 20, A through H, or
14 some letter like that, and then there was one that was
15 unnumbered. And then of those 29 impressions that were
16 photographed 11 of them, there were castings made from
17 those.

18 Q. Okay.

19 A. And so initially I took those photographs and cast to
20 figure out which cast goes with which impression. And that
21 was the initial part of organizing the case at the
22 beginning.

23 Q. All right. Now, the photograph that we're looking at
24 now on the Elmo --

25 A. Yes.

1 Q. -- is that, do you recall if that was one of the better
2 impressions you had to work with?

3 A. Yes, it was.

4 Q. All right. And how about the pair of boots and the,
5 what do you call the print you make of the outsole of the
6 boot?

7 A. The test impression.

8 Q. The test impression and the boots, were those
9 photographs showing the outsoles of the boots, the test
10 impressions, were those the things that you used to focus
11 closely in on these, this Exhibit Number 20 photograph and
12 the associated casting?

13 A. Yes, that's correct.

14 Q. Can you just walk us through a little bit what
15 observations you made when you were comparing them?

16 A. Sure. The first thing I noticed in this particular
17 impression, particularly from the casting, is there are
18 geometric shapes around the border. We call those lugs.
19 And they are in a pair.

20 And then there appears to be maybe one star on the
21 heel. There are some stars in the toe area, but I can't
22 tell the number of stars in the toe area because of the
23 level of the detail and the clarity in the impression.

24 Q. Thanks. Interrupt just for a moment for a question?

25 Do you know, does this technology allow the witness to make

1 marks so he can point to what he's showing at? You may be
2 able to put your finger on your screen.

3 A. Okay. I can do that. So these were examples of
4 perimeter lugs that were in pairs that I observed. There
5 appear to be perhaps a star here in the heel.

6 And there were also stars -- and the castings
7 appear a bit better in person than on the scene here. But
8 there appear to be some stars in the toe area. Toe area, I
9 don't know the number because of the detail. And, again, I
10 can see the, the lugs that are in pairs here.

11 Q. And you're comparing those with these impressions that
12 you made?

13 A. The test impressions, yes. And the actual boot itself.

14 Q. And can you show us here where you were talking about?

15 A. These are stars that are in the heel and these are
16 stars that are in the toe. And these are perimeter lugs.

17 Q. So you've got double perimeter lugs and stars in the
18 heel and the toe?

19 A. Yes. And this is -- that pattern, if you could put,
20 this is what we call a general lug sole shoe. In other
21 words, this general pattern is made by lots of manufacturers
22 and different companies. And there's a variety of
23 variations of the overall pattern.

24 In you can go back to that I can point that out
25 real quick.

1 MR. PHILIPSBORN: Your Honor, I don't know if any
2 of this is going to be significant at trial, but just for
3 our record, this is a four page exhibit. And I believe that
4 the pattern or one of the references that the witness is
5 making is to the second page of the exhibit. And then we
6 have the photographs we're dealing with, I believe, are
7 labeled at the top of the page impression number 20. Since
8 the exhibit has two different sets of photographs of cast
9 positives essentially and casts it might be helpful if we
10 ever need this in the future.

11 MR. DARROW: I'm sorry, you're saying that we
12 should refer to each page as we go along?

13 MR. PHILIPSBORN: Just --

14 THE COURT: Sure. That's a good idea.

15 MR. DARROW: Okay.

16 Q. Yeah. I was trying to use language to make it clear,
17 but let's think about that when you're talking and
18 articulate which image we're talking about.

19 A. Okay. Sure.

20 Q. You would -- where did we leave this? You had asked to
21 go back to something?

22 A. The test impression you're showing me. I was
23 explaining this. This type of boot is what we call a lug
24 sole shoe. There's lots of variations of it made.

25 THE COURT: Right.

1 THE WITNESS: In other words, you can see two
2 stars here in this particular boot. Some have three stars
3 in the heel. Some have one star in the heel. And in the
4 toe area some boots have five, six or seven or eight stars
5 in the heel. Some of them are paired like you see here.
6 And in other designs the lugs are evenly spaced around the
7 parameter. So there's lots of variations of this, what we
8 call general lug sole design.

9 Q. And when you were doing your examination were you
10 scrutinizing the casting shown on the prior page of the
11 exhibit and the photograph marked, well, it's backwards, but
12 with an evidence tag number 20, looking for those
13 characteristics?

14 A. Yes. And on this page, just to clarify, it wasn't
15 clear, the casting, and it's referred to as item 45 in my
16 report, and item Q138 in the previous report, that casting
17 is the same impression as in the photograph that has the
18 number 20. So we're talking about the same footwear
19 impression.

20 Q. And just to be clear, in your May 26, 2016 lab report,
21 you talk about comparing the footwear impressions labeled 20
22 and A?

23 A. Right. I compared, I looked at a total of 29, 1
24 through 20 and A through H. And then there was an
25 unnumbered. So there were a total of 29 impressions that I

1 was asked to look at.

2 Q. All right. And going now to your, your conclusions,
3 you found shared similar design features and orient with the
4 item one left boot. Is that boot the boot, the outsole
5 which is depicted on the first page of Government 22?

6 A. Yes. It's labeled item one.

7 Q. All right. And what do you mean by, you say similar
8 design features and orient with. Starting with orient, what
9 does that mean?

10 A. Orient means the impression is made by a, I believe, a
11 left shoe as opposed to a right shoe. That's what orient
12 means.

13 Q. And when you said similar design features, are you
14 talking about the sort of things we were talking about with
15 double perimeter lugs and stars and the spaces between them?

16 A. Yes. And to clarify, they are similar outsole design
17 features. So they are the stars and the perimeter lugs,
18 yes.

19 Q. Now, you mentioned, during the Daubert presentation, if
20 memory serves, there were seven different levels of
21 conclusions that one reached from essentially a match or
22 close to it down to an exclusion or insufficient evidence?

23 A. Yes.

24 Q. Where did you come out on this exam?

25 A. This one came out a could not be determined or an

1 inconclusive or a I don't know type of an answer.

2 Q. All right. So fair to say, you couldn't reach a
3 conclusion, you couldn't reach -- well, let me use your
4 language. That's a formal term of art, right?

5 A. I said I couldn't determine whether or not that shoe
6 was the source of that impression.

7 Q. All right.

8 A. Based on the limitations that I've described.

9 MR. DARROW: Can I have a moment, Your Honor?

10 Your Honor, that's it for this witness. Could we
11 please move in Exhibit 21, which is the exhibit with the CV
12 followed up by the Rule 16 paper and the power point and the
13 lab report, and also Exhibit 22, which is the four
14 photographs of the boots and footwear impressions?

15 MR. PHILIPSBORN: No objection, Your Honor.

16 THE COURT: Admitted.

17 MR. DARROW: Thank you.

18 THE COURT: And that's it?

19 MR. DARROW: On direct, yes. Unless you want me
20 to press further somewhere.

21 THE COURT: I just don't understand what the point
22 is if, you wouldn't have come all the way up from D.C. in
23 order to testify that he can't make a connection between the
24 boot and the imprint or am I missing something?

25 MR. DARROW: Well, I'm happy to address that right

1 now if you'd like. I mean, you know, what happened here,
2 similar to what happened in fingerprints, the 15 years or so
3 that have elapsed between the original examination of the
4 evidence and the, and re-trial, we've lost one of our
5 experts.

6 THE COURT: Right.

7 MR. DARROW: And a new expert has come in. You,
8 you heard that the fingerprint evidence, new fingerprint
9 expert only made, I think, seven of the nine matches the
10 original expert made. Similarly here, except even to a
11 greater extent, the original examiner Wiersema.

12 THE WITNESS: Sandy Wiersema. That's correct.

13 MR. DARROW: Sandy Wiersema made more stronger
14 associations between the footwear evidence as to both
15 pairs --

16 THE COURT: Right.

17 MR. DARROW: -- of men's boots. However, like as
18 with the fingerprint things I think the FBI's more cautious
19 today than they were 15 years ago for some of the reasons
20 that we've been hearing about. And the new examiner has
21 come to more limited conclusions, just as to that pair of
22 boots, which are Lee's boots.

23 Now, the reason why we wanted to pursue this is
24 has several components to it. One is, you know, the
25 forensics investigation at the New York crime scene gathered

1 all sorts of evidence. But one of the things they did was
2 they gathered a fair amount of the footprint evidence, some
3 20 odd photographs and a dozen, 11 or so --

4 THE COURT: What we've just heard about?

5 MR. DARROW: Exactly. We think it likely that at
6 trial the jury's going to be aware of that, either because
7 the crime scene people when asked, you know, what did you do
8 that day, I mean, they were gathering evidence up there for
9 a long time, could mention it.

10 Also the photographs of the Dover Plains crime
11 scene have all these little, it was a long line, over a
12 couple hundred feet, of little evidence flags on little
13 metal posts going all the way up through there. And they
14 appear again and again.

15 As you can imagine, that's where they decided to
16 photograph a boot print or pour a casting. So they put
17 little numbers on them associated with these. So all that
18 evidence was gathered. It all went down to the bureau.

19 The finding that there was some similarities,
20 which are apparent I think when you look at the photographs
21 and the castings, we think that has probative value because
22 initially there are some similarities. And the jury can
23 look at it themselves.

24 And Mr. Gilkerson can describe it and be
25 cross-examined on it. The jury can also see. And also, you

1 know, we, we don't want the jury to think that either more
2 forensic evidence was gathered there that wasn't examined or
3 that we're not telling them about. You know, we want to say
4 we gathered all the evidence we could, it's all been
5 examined and here are the results and decide for yourselves
6 what value, if any, you think should go with it.

7 We're more comfortable with that approach than,
8 you know, not putting it on so that they'll never know what
9 all those flags were and whether the government never
10 gathered footprint evidence.

11 And we've had, and we're actually having ongoing
12 discussions with counsel about maybe reaching some kind of
13 stipulation where the two parties could agree that footwear
14 evidence was gathered, the results weak, there were some
15 similarities, but there's no positive finding of a strong
16 association.

17 That was ongoing. And Mr. Burt, we've been
18 talking with him. It was really late yesterday afternoon
19 when it first came up and he had to run off. And rather
20 than try to hammer something out where we didn't have time
21 to do it or not put Mr. Gilkerson on the stand when he was
22 already up here, we decided, particularly after you said no,
23 I'd like to know the facts before --

24 THE COURT: No, I'm glad to hear about it.

25 MR. DARROW: Yeah. So we decided we'll put him on

1 the stand and talk about it.

2 THE COURT: Perfect. I understand.

3 MR. DARROW: This was you'll understand here we
4 are.

5 THE COURT: All right. That's helpful. Thanks.

6 MS. JIMENEZ: Can I have just a moment to confer
7 with Mr. Darrow?

8 THE COURT: Yes, of course.

9 MR. DARROW: Your Honor, may I have another point?
10 And it reminds me a little bit of the issue yesterday
11 afternoon when you asked a rhetorical question, but we think
12 that even the weaker association or the finding of some
13 similar design characteristics has more probative weight
14 when it's taken in the context, the broader context of the
15 case here than it would have in a case if there were, if the
16 print was found on the city sidewalk or at a construction
17 site where maybe you'd have dozens of people wearing boots
18 like that.

19 Here the contextual information is evidence that
20 the jury will have that two men wearing boots, that share a
21 lot of design characteristics with those footprints, walked
22 from the roadside where those tracks began up to the crime
23 scene where Mrs. King's body was found and back.

24 And it's a pretty -- Dover Plains is a tiny little
25 town. It's on the outskirts of towns. It's a pretty remote

1 area. It's an old overgrown gravel pit. And we think that
2 if you put those, the footwear impressions in the, in that
3 context, in other words, they are out in a remote area,
4 rural area in the north country, that that adds to the
5 probative value of the similar outsoles in a way that it
6 would be less so if they were in an area where there were
7 lots of prints and a higher likelihood that guys would be
8 walking around wearing boots like that.

9 THE COURT: All right. So I understand all that.
10 And that really is all testimony that certainly involves
11 expertise but not really an opinion as to anything?

12 MR. DARROW: I don't understand you, Your Honor.

13 THE COURT: In other words, the witness will put
14 all of this in, unless you reach some other understanding or
15 objection sustained or something, put all of this in without
16 really expressing an opinion because his opinion is
17 inconclusive, really he's there as a describer of the
18 physical evidence which has some technical aspects?

19 MR. DARROW: Yes. And that's essentially right.
20 Although, I think it was helpful to have him say, you know,
21 on a scale like that these are the outsoles, they are in
22 dual formation with stars and it sort of focuses on what a
23 lay person, what you're looking for here.

24 And I think, you know, when they hear about how
25 you compare and look for those design details in this cast

1 and that photograph it helps. And he would point out the
2 similarities. But, no, we wouldn't try and extract more
3 from him than what you've heard.

4 THE COURT: Okay. No. That's very helpful.
5 Thank you.

6 MR. DARROW: All right. Thanks.

7 MR. PHILIPSBORN: Your Honor, I wonder, after an
8 overly caffeinated break if we could take a very short break
9 right now.

10 THE COURT: Of course. Yeah. Yeah. Yeah. We'll
11 come back in 10 minutes?

12 MR. PHILIPSBORN: Thank you.

13 (The Court recessed at 2:20 p.m. and resumed at
14 2:30 p.m.)

15 MR. PHILIPSBORN: Your Honor, thank you. I
16 appreciate the Court's indulgence.

17 THE COURT: Sure.

18 CROSS EXAMINATION BY MR. PHILIPSBORN:

19 Q. Good afternoon, sir.

20 A. Good afternoon.

21 Q. Now, just so that we understand a little bit more about
22 the background for your casework here, when were you first
23 asked to take a look at the footwear evidence in this case?

24 A. Sometime after February or March of this year.
25 Somewhere around that time.

1 Q. And were you provided a particular file? Was there a
2 case file that was transferred to the unit or were you
3 directed towards some materials that pertained to the case?

4 A. I had the case file from the examiner who worked it
5 previously.

6 Q. And before you actually began your work on this case
7 did you become familiar with the case file?

8 A. I looked at the examine, the original examiner's bench
9 notes and item numbers that she used. And I wanted to make
10 sure I correlated those with the new item numbers of the
11 same evidence.

12 So, in other words, when the case came in the lab
13 in 2002 it had sub Q or one type of one specimen number.
14 And now it has another item or specimen number.

15 So I wanted to make sure I was correlating and
16 looking at the same thing and all that so that the reader of
17 my report could see what I was talking about in the previous
18 report.

19 Q. You also had in that file her report of examination; is
20 that correct?

21 A. Yes, I did.

22 Q. And you also had in her file other materials that had
23 been made available to her; is that correct?

24 A. Yes. There was a copy of her bench notes in there.

25 Q. You recall there also being actually some kind of a

1 summary, and I'll just indicate the, a summary report that
2 provided some background of the investigation of the case?

3 A. There may have been an electronic communication or
4 request letter that was in there. I don't recall if I read
5 that or not, but there was one in there.

6 Q. And actually a summary that discussed a little bit
7 about the investigative background to the case, the fact
8 that arrests had been made?

9 A. It may have. I received another communication where
10 the case was re-submitted. So I really didn't look a lot at
11 the -- didn't look very much at the old case file other than
12 the bench notes and the photos and things like that that the
13 original examiner had.

14 Q. The point being, you had the original examiner's file?

15 A. Yes, I do have the original examiner's file. Yes.

16 Q. Now, just so we understand what our starting point with
17 respect to whatever opinions you arrived at in this case,
18 notwithstanding the fact that the prior examiner had been
19 one of your mentors, I gather that you were not, in the
20 context of the bench work you were doing, and the casework
21 you were doing here, you were using essentially a somewhat
22 different system, a more modern system of analysis in
23 terminology than she would have used in 2002, correct?

24 A. The principles are the same, but they are more well
25 defined. The categories of opinions have criteria which are

1 more clearly defined than they were in 2002.

2 Q. Okay. And just so it is clear to us, you considered
3 whatever findings she may or may not have had, but your
4 findings are independent findings made on the basis of your
5 examination of the evidence, correct?

6 A. Yes, that's correct.

7 Q. And I think Mr. Darrow very fairly covered this, but in
8 the end you're aware that some of your opinions, at least,
9 are stated differently than hers, correct?

10 A. Yes. Her report contained mostly what I would
11 characterize as observations, approximate size and things
12 like that. So, yeah, they were slightly different than what
13 she had. That's correct.

14 Q. Well, she did make some statements about
15 correspondence, using the word corresponds with, which was a
16 word that was in use or terminology that was in use at the
17 time, correct?

18 A. Yes.

19 Q. Okay. And that's not wording that you were using in
20 the course of your final report, correct?

21 A. I didn't have that opinion in there, but we still use
22 that term, yes.

23 Q. Okay. But, and I think you just covered the salient
24 point, you didn't have that wording in your report, correct?

25 A. Correct.

1 Q. Now, part of what you have explained to us is that at
2 least some of the basic principles in the field are the
3 same, to your knowledge, now as they were in 2002, correct?

4 A. Yes, that's correct.

5 Q. But you're aware that there has been an evolution in
6 the field of forensic science identification in, for
7 example, tool mark identification, footwear and tire mark
8 identification since 2002, correct?

9 A. Yes that's correct.

10 Q. And there also was, and this has been belabored and the
11 Court's well aware of it, the publication of the 2009 NRC
12 Report, correct?

13 A. Yes, that's correct.

14 Q. And the NRC Report actually specifically covered in a,
15 in part of the report tread wear and or tire, I'm sorry,
16 tread examinations, tire tread examinations and footwear
17 examinations, correct?

18 A. They had it labeled under what I believe was called
19 patterned evidence or patterned impressions. I'm not sure
20 of the exact title. And they mentioned in there that the
21 bulk of it dealt with footwear impression evidence. That
22 was the majority of what they encountered. But it also
23 included other things like bite marks maybe or lip prints or
24 things like that. But that was a very small part of that
25 entire section in the NES Report.

1 Q. If you would take a look at that binder that's in front
2 of you that are the defense exhibits that we intended for
3 our use this afternoon. If you look at partition seven. Do
4 you recognize partition seven to contain a copy of the
5 portion of the NRC Report that, among other things, covers
6 what is entitled as Other Pattern Impression Evidence, Shoe
7 Print and Tire Tracks?

8 A. Yes.

9 Q. You recognize that text; is that correct?

10 A. Yes, I do.

11 Q. And you also, if you thumb through that particular
12 exhibit, if you look at the top of the pages thumbing
13 through to pages 149 and 150 of the actual report, or if you
14 look at the bottom of the page, you'll see your name and
15 pages 119 to 120, you see a summary assessment? You see
16 that?

17 A. Yes, I see that.

18 Q. Okay. And you're aware that a number of comments were
19 made about the state of affairs in your field of endeavor in
20 the NRC Report, correct?

21 A. Yes. They were made by this particular group. That's
22 correct.

23 Q. I'm just going to ask you about a few of them and then
24 we'll move on.

25 A. Sure.

1 Q. Just reading from the summary assessment, the first
2 full paragraph about, I'd say halfway through, the sentence,
3 however, there is no consensus regarding the number of
4 individual characteristics needed to make a positive
5 identification, fair statement?

6 A. That's correct. Because we consider it to be as few as
7 one. So there is no standard. That's correct.

8 Q. Okay. And I'm going to read the rest of the sentence
9 and will ask you about part of it. It then picks up after
10 the comma, and the committee is not aware of any data about
11 the variability or, the variability of class or individual
12 characteristics or about the validity or reliability of the
13 method.

14 So, first of all, just the first phrase, are you
15 aware, as you sit here now, of any data about the
16 variability of class or individual characteristics?

17 A. And by, what do you mean exactly by data? Are you
18 talking about numbers?

19 Q. Data I think is, I'm not purporting to translate what's
20 in the report. Data, meaning information. It could be
21 numbers.

22 A. I'm not aware of any specific numbers. There have been
23 studies addressing class characteristics.

24 THE COURT: Can I interrupt just for a second? I
25 don't see that any of this is necessary in the absence of

1 any identifying opinion drawing on -- this is the same
2 testimony that the investigating officer could have offered.

3 Mr. Gilkerson knows more about boots than the
4 officer. But anybody who went to the scene could say, I saw
5 two pairs of boot tracks going to the scene where the victim
6 was found and two pairs coming back and they are of the most
7 commonly sold type of outdoor shoe tread known and that's
8 it.

9 In other words, we don't really have a Daubert
10 problem because we don't really have a Daubert opinion
11 unless I'm missing something.

12 MR. PHILIPSBORN: I understand the Court's point.
13 I think, as I understand the government's proffer to the
14 Court, and I realize all of this remains to be determined,
15 is we may actually be seeing Mr. Gilkerson at some later
16 point in time --

17 THE COURT: Right.

18 MR. PHILIPSBORN: -- dealing with these issues. I
19 can cut further to the chase, Your Honor. And I understand
20 you don't want to belabor it. I wasn't going to belabor it
21 much further, but just in terms of covering a few of the
22 important points, I defer to the Court. I don't want to
23 test the Court's patience.

24 THE COURT: We sort of walked through it with
25 fiber and with fingerprints. But for those two witnesses

1 were different because they were of the opinion that they
2 could form a strong connection or association between the
3 evidence found at the scene and these defendants or this
4 defendant.

5 But Mr. Gilkerson isn't in that situation. He's,
6 well, I don't want to repeat myself. But I just don't hear
7 an opinion yet.

8 MR. PHILIPSBORN: I understand. If I may, one
9 more question for this page --

10 THE COURT: Of course.

11 MR. DARROW: -- and then I'll move on. I
12 understand the Court's point.

13 Q. Let me move on to another place in the page and then,
14 as I said, we'll move on.

15 This has to do with the validity or reliability of
16 the method. The sentence reads, without such population
17 studies it is impossible to assess the number of
18 characteristics that must match in order to have any
19 particular degree of confidence about the source of the
20 impression. You see that?

21 A. Yes. Again, this appears to be referring to an
22 identification opinion.

23 Q. And do you agree that the NRC -- that since the NRC
24 Report there hasn't been anything, any research or
25 publication in your area that addresses the lack of

1 information that the committee was commenting on?

2 A. No. That's not correct. There have been studies that
3 have been conducted since this was issued.

4 Q. That addressed that point?

5 A. Well, again, I'll reiterate what I've said before, we
6 can make an identification with as few as one
7 characteristic. There is an ongoing study now that is
8 looking at these randomly acquired characteristics, a large
9 study. But it's not complete. So there are studies that
10 have been conducted since this was issued.

11 Q. So moving on, as I promised the Court I would do, just
12 addressing a point that you made several times as you were
13 going through your power point, you explained at several
14 points along the way that, that you are subject to
15 proficiency testing, correct?

16 A. Yes, that's correct.

17 Q. And that part of the or at least one element that feeds
18 into the Daubert analysis as it was explained on the slides,
19 was the fact of proficiency testing, correct?

20 A. Yes. We do proficiency testing.

21 Q. You do that through CTS; is that correct?

22 A. Yes, that's correct.

23 Q. The Collaborative Testing Service; is that correct?

24 A. Yes, it is.

25 Q. And you agree with the statement, do you not, that,

1 using CTS proficiency test results to determine an error
2 rate would not reflect the standards of actual casework used
3 in examination?

4 A. That's correct. An error rate or any error or any
5 number associated with those tests would not apply to
6 casework. Part of the reason is nonexperts also take those
7 tests. So not just examiners, but nonexperts can also
8 purchase those tests and take them.

9 THE COURT: Right.

10 Q. Just in, and I'm not going to ask you about specifics,
11 I will ask you if you would to just thumb over to partition
12 10, please?

13 A. Yes.

14 Q. I believe you said you were associated with SWGTREAD,
15 you were a member of it?

16 A. Yes, that's correct.

17 Q. And do you recognize the publication that has the date
18 November 16, 2011, SWGTREAD response to questions, etcetera?

19 A. Yes.

20 Q. And is it correct, again, without getting into the
21 detail that SWGTREAD did respond to questions that were put
22 to it on various topics when it was still in existence?

23 A. We responded overall to the report after it was issued,
24 yes.

25 Q. Now, as the Court mentioned, we've heard about the

1 course that has been followed in other areas of endeavor
2 like fingerprint identification and fiber and to a much
3 lesser extent hair related examinations and identification.

4 Is it a fair statement that SWGTREAD has been
5 transformed into a working group that's now operating or is
6 going to be operating under the umbrella of NIST?

7 A. Yes. Under OSAC, yes. There is already a committee
8 there. So it's been transferred into that.

9 Q. Okay.

10 A. The website has not. That's not been necessarily
11 transferred into NIST. But the members, many of the members
12 of the group are now working for, on the OSAC footwear and
13 tire subcommittee.

14 Q. And a number of the issues that were raised for
15 consideration by SWGTREAD will be considered by this new
16 group, correct?

17 A. Yes, that's correct.

18 Q. Now, moving to the casework here. Mr. Darrow in his
19 questions of you, as he approached the casework, gave a bit
20 of an explanation of the, set the scene for us a bit. Were
21 you ever at that scene?

22 A. At the original crime scene?

23 Q. Yeah.

24 A. No.

25 Q. And do you, just in terms of the collection of evidence

1 at the crime scene, is it a fair statement that you are
2 really in no position to address how that crime scene was
3 processed? In other words, exactly what was done out there
4 to identify a population of the potential tread or
5 footprints?

6 A. Yeah, I wasn't at the crime scene so I wasn't there to
7 evaluate the different number of tracks and the different
8 types of impressions that were there.

9 Q. And just in terms of evidence that you actually did
10 review with us this afternoon, do you still have the four
11 pages, let me display them, I guess you may not have had
12 them. I'm thumbing to the third page which is entitled at
13 the top of the page, Impression Number 20. Can you see
14 that?

15 A. Yes. What you're referring to here is a few pages from
16 my bench notes.

17 Q. Okay. And actually that helps. So the notation there
18 that appears to read, I'm pointing a pen that I put down on
19 the Elmo on top of the photograph, in handwriting, how many
20 stars question mark in the toe area. That's your
21 handwriting?

22 A. Yes. In other words, I couldn't determine the number
23 of stars that were there.

24 Q. And just looking at the heel of this particular boot,
25 you were explaining to us that, would this have been the

1 left boot?

2 A. I'd have to look at my report, but I believe so.

3 Q. Okay.

4 A. Whatever is in my lab report. I don't have it in front
5 of me.

6 Q. Just looking at that, at the heel area that the pen is
7 currently lying on, I gather that this would be an area
8 that, at least a lay person might say, doesn't, doesn't
9 contain any evidentiary detail, is that a fair description?

10 MR. DARROW: I'll have to object to that, Your
11 Honor. As to whether this witness can testify to what a lay
12 person would conclude looking at this picture.

13 THE COURT: Yeah. I'll sustain that objection.
14 We can ask the question in another way.

15 Q. That area of the heel, there's an area of the heel that
16 has no evidentiary detail just in terms of what you
17 explained to us about the lugs, correct?

18 A. In the, in the heel, yes, that's correct. I can't see
19 the number of perimeter lugs or how they are arranged at the
20 bottom. There's not enough clarity and detail in that part
21 of the impression, in the bottom part of the heel area where
22 your pen is pointing to.

23 Q. Is that one of the elements that you would consider
24 when deciding whether there was actually sufficient quality
25 in the evidence that you were reviewing to be able to make

1 some kind of a positive identification or some gradations of
2 positive identification?

3 A. Yes, that's part of it. Yes.

4 Q. And just, again, in terms of our understanding of your
5 methodology, would, would written notes on a photograph of
6 this kind represent the observations that you are making as
7 you are looking at the evidence that's presented to you?

8 A. Yes.

9 Q. Now, at the bottom of this particular photograph, and
10 I'll just move it up, you have a phrase concerning similar
11 design to items one and two boots.

12 A. Yes.

13 Q. That is referencing the lug pattern?

14 A. Yes, it is. The pairing and the fact that there's
15 stars that are there. And that's similar on what I saw on
16 item one and item two boots.

17 Q. And do you happen to know one way or the other whether
18 the -- let me start again.

19 Is there a database that you use to help you
20 define the design characteristics of the soles of
21 manufactured shoes?

22 A. We have a database that has a lot of outsole designs in
23 there, but that's for a different type of analysis. In
24 other words, there are cases where there may not be a
25 suspect, the crime just occurred and they found, let's say,

1 a bloody shoe print and said, hey, can you tell me what make
2 and model shoe could have left that impression for
3 investigative purposes. And we have a database and that's
4 what it's used for.

5 THE COURT: We saw that in the OJ case.

6 THE WITNESS: Yes.

7 THE COURT: I remember.

8 THE WITNESS: Yes, that's how it was done.

9 THE COURT: Right. Right. Right.

10 Q. And so I appreciate your explaining this to us. So
11 what, what this phrasing, and what this writing means, is it
12 reflects your observation, as a footwear examiner, about the
13 design? In other words, similar design means --

14 A. Yes. As I mentioned earlier, based on my experience
15 and years of doing this analysis, this is a, this type of
16 design is made by a lot of manufacturers in a lot of
17 variations. And as I mentioned earlier some have one, two,
18 maybe three stars in the, in the heel. And some may have
19 five, six, seven, eight stars in the toe. So for me to say
20 it corresponds in like outsole design I would need to count
21 the number of stars so that --

22 THE COURT: Which you weren't able to do?

23 THE WITNESS: I can't do on this impression. And
24 I do that in this case because there's so many -- there's a
25 lot of variations of that pattern sold by different

1 manufacturers.

2 THE COURT: There must be one sold by every
3 Walmart in the country, right?

4 THE WITNESS: There might be and some others.

5 THE COURT: Right. Do you have any idea how many
6 lug soled work-type boots get sold in the United States
7 every year?

8 THE WITNESS: No. We have no way -- that's
9 marketing-type information that we don't necessarily know.

10 THE COURT: Right. Sure.

11 THE WITNESS: Even, some manufacturers couldn't
12 tell you how many shoes they made. It generally follows a
13 bell curve. So the smaller and the larger sizes there's
14 fewer of the shoes made. And, of course, the 9's and 10's
15 and 11's and 12's, and things with a common bell curve,
16 there's more of them made. So it can kind of works that
17 way.

18 Q. And taking a look, even though this is in evidence now,
19 taking a look at the next page, which I believe is four,
20 page four of four, again, there's this notation of similar
21 design?

22 A. Yes.

23 Q. All that's explaining is based on your observations you
24 are arriving at the opinion that it's a similar design to
25 the submitted items one and two, correct?

1 A. Yes. Because of the pairing of the perimeter lugs and
2 the few stars that are visible.

3 Q. And the Court actually cut to the chase much faster
4 than I did of where I was going with all of this, but in
5 terms of giving us a relative frequency of the appearance of
6 those lugs, without actually having more information than
7 you have, it would not be possible for you to give us an
8 estimate of the frequency of that particular pattern on that
9 size boot, correct?

10 A. That's correct. That would not be possible.

11 MR. PHILIPSBORN: Your Honor, if I may ask Mr.
12 Darrow through the Court if, and I'm, I certainly am sure
13 that he was operating in absolute good faith in doing this,
14 but I am relying on the notion that at most we would get an
15 attempt to elicit one opinion, if the Court permitted it,
16 and if we don't arrive at an agreement, I will not belabor
17 this subject matter further.

18 There were some additional observations reflected
19 in his report and some other matters that I would take to be
20 opinions, but it seems as though the government's position
21 is that this was, I gather, the specific opinion it wanted
22 to elicit for the Court for the purposes of this hearing.

23 THE COURT: That's how I remember it too. And I
24 think that's how Mr. Darrow intended it.

25 MR. DARROW: Yeah. I'm not entirely sure what the

1 question is, Judge. But if it's as to why we chose these
2 two pictures that was because we understood these pictures
3 to be the impressions that Mr. Gilkerson drew his strongest
4 conclusions about in the report. And consistent with that,
5 the first, looking at the third and fourth page of this
6 government exhibit, the third page has an impression with a
7 number 20 next to it. And the second page has an A. And I
8 think Mr. Gilkerson's report refers to in his strongest
9 conclusions to 20 and A bearing similar design
10 characteristics.

11 THE COURT: One and two, the shoes one and two are
12 Mr. Lee's and Mr. Fell's shoes, right?

13 MR. DARROW: Your Honor, this pair of shoes on the
14 cover are Mr. Lee's shoes.

15 THE COURT: Okay.

16 MR. DARROW: Right. The government's theory
17 generally is that those two fellows wore them in tandem from
18 the beginning of this episode to their arrest. And if Lee
19 was, if there are two pair of boot prints on the crime scene
20 and one of them can be tied to Lee, that that's probative of
21 in addition to Mr. Fell because they are together all the
22 time.

23 THE COURT: I don't mean to go around in circles,
24 but Mr. Gilkerson can't tie these prints to Mr. Lee or any
25 of the hundred thousand outdoorsmen that wear similar boots,

1 right? He just says, the boots -- the prints look like it
2 could have been made by Mr. Lee's boots, could have been
3 made by many thousands of others?

4 MR. DARROW: I think that's right. I mean, as I
5 understand it, he's saying that these footwear impressions
6 recovered from a crime scene in up-state New York have
7 similar design characteristics to the boots that arresting
8 officer -- well, that Mr. Lee had on when he was arrested.

9 And, yeah, I don't think he's going much beyond
10 that. You know, the government would mention that as, as I
11 indicated earlier, it, we think it means more that when the,
12 when these boot prints are out in the middle of nowhere, as
13 they were, as opposed to being on Church Street in
14 Burlington. But, and one other point, Your Honor, I think
15 it's hard at this point, months before trial, to be able to
16 anticipate what the trial evidence will be and what the
17 defense will be such that a real, sort of a robust 403
18 inquiry is difficult.

19 THE COURT: Okay.

20 MR. DARROW: Though you may be unpersuaded on that
21 one.

22 THE COURT: No. No. I lost my train of thought
23 for a moment. I mean, the, any expert testimony usually
24 involves things that aren't obvious to the rest of us. But
25 if I look at the photo of the bottom of Mr. Lee's boot that

1 was taken off of Mr. Lee, and I look at the print, I can see
2 that they are in a general way similar.

3 MR. DARROW: No, I appreciate that.

4 THE COURT: It's that simple, right?

5 MR. DARROW: I think so.

6 THE COURT: Okay.

7 MR. DARROW: And, in fact, that inquiry was
8 something that we were chatting with a little while ago too.

9 Now I'm not quite sure, I don't have a good sense
10 in my mind how that would play out at trial in terms of
11 evidence, whether the government would, you know, introduce
12 the fact that this material was discovered and then put it
13 in front of the jury and say, look for yourselves. Or
14 whether the jury -- it might benefit the jury to hear some
15 fellow say, you know, these are exterior double lugs and
16 these are stars and you have to count the number of stars.
17 But at the end of the day, you're right, if an expert
18 opinion is something that a lay person can't do then that's
19 what it is.

20 THE COURT: All right. And somebody else
21 presumably will come and lay a foundation or provide eye
22 witness testimony about the layout of the crime scene and
23 the two sets of footprints and how they are discovered and
24 photographed, and all the rest of that?

25 MR. DARROW: Yes. There was a swarm of law

1 enforcement to that scene. And there were various options
2 as to how it could have been laid in. But what we did in
3 2005 was call one of the people who was in charge of one of
4 the two forensic evidence gathering units that responded.
5 And he was tasked at trial with saying, you know, we
6 arrived, this is what we found, these are -- we took these
7 photographs, we put flags on the boot prints, they were
8 photographed. He did all that stuff. And the recovery of
9 the body. And that was the foundation for that stuff.

10 And then in '05 there was a stipulation saying
11 that footwear evidence went to the FBI, was examined and
12 these opinions were reached.

13 THE COURT: All right.

14 MR. PHILIPSBORN: And the reason for my comment,
15 Your Honor, is simply that, at least as I read it, subject
16 to being corrected by Mr. Darrow or Mr. Gilkerson, or both,
17 it seemed as though there were other opinions. I'll give
18 you an example from page five of Mr. Gilkerson's report, the
19 top of the page, second paragraph, the footwear impressions
20 labeled one through 19 and B through H lack sufficient
21 detail for meaningful comparison with known footwear, which
22 is the phrasing that I associated with some of what we were
23 presented today. And there's similar phrasing throughout
24 the report.

25 So it seemed as though, at least as I understood

1 it, Mr. Darrow was using the example he used in a very
2 economical way to give us an illustration of what Mr.
3 Gilkerson would be repeating about a number of other items
4 of evidence. And all I was indicating is that's my
5 understanding, therefore, there's no real purpose in
6 inquiring further.

7 THE COURT: All right. And if Mr. Gilkerson comes
8 and he testifies as he did just now, do you have any
9 particular objection?

10 MR. PHILIPSBORN: I, Your Honor, I can't really
11 speak to that. I would imagine, based on overhearing some
12 discussions, because I think Mr. Burt may have thought this
13 issue through further, and Mr. Darrow and Mr. Burt I believe
14 were talking about this earlier, I'm not sure that we would,
15 frankly, based on what's been testified to. But, again,
16 let's see what --

17 THE COURT: If you think of one in the meantime I
18 won't hold you to it.

19 MR. PHILIPSBORN: No, I understand.

20 THE COURT: But as we talk now one doesn't come to
21 mind?

22 MR. PHILIPSBORN: Correct. Other than the
23 relevance objection that's been made more and then, you
24 know, subject to further discussions.

25 THE COURT: All right. I think we're done. I'm

1 sorry. Anything further?

2 MR. DARROW: I was just going to apologize. I
3 think I misunderstood counsel's question earlier. I wasn't
4 trying to avoid the fact that the other 18 or 19 footwear
5 things were negative. I just, I was just cutting to the
6 chase, Your Honor. May I have a moment, Your Honor?

7 THE COURT: Sure.

8 MR. DARROW: Your Honor, we're good. We're done
9 with this witness. And I think we're done with Daubert. We
10 may have other things to chat with you about.

11 THE COURT: Great Mr. Gilkerson, very nice to meet
12 you and thank you for making the trip.

13 THE WITNESS: Nice to meet you, Your Honor. Thank
14 you.

15 THE COURT: I'm sorry to have kept you so long.

16 THE WITNESS: That's okay. Those things happen.

17 THE COURT: I appreciate it.

18 THE WITNESS: Thank you.

19 THE COURT: I have one thing to take up totally
20 unrelated to what we've been doing. I have, from the
21 defense, the ex-parte motion regarding the Lee legal file,
22 which is quite interesting, but it's not one I'm going to be
23 able to handle in an ex-parte way.

24 So I would propose to set a hearing, get it, make
25 sure that copy gets to the government and also to Mr. Lee's

1 attorney and I suppose his father. And not that I could see
2 a court appointed administrator or representative, but I
3 think we should take it up in a more formal way. I'm not
4 really able to resolve it without hearing from everybody.

5 MR. PHILIPSBORN: Understood, Your Honor.

6 THE COURT: Yeah, I thought you would see it the
7 same way.

8 Anything else that -- the other thing I wanted to
9 get a sense if I can of how long the trial is likely to
10 take. Because it's still a ways off, but I have in mind
11 that Mr. Philipsborn has got obligations in other courts and
12 I want to be in a position to tell judges how long I need
13 him for as best we can tell.

14 MR. DARROW: For the actual retrial?

15 THE COURT: Yeah. Yeah.

16 MR. DARROW: Very difficult to say. I mean, I can
17 tell you that the 2005 trial went a lot faster than any of
18 us thought. I know, I think, I don't want to speak for
19 Judge Sessions, but I think he was under the impression that
20 jury draw was going to take months. And it didn't. And I
21 think if we counted the days of the draw I think it was 15
22 days.

23 The guilt phase went in rapidly in, I think it was
24 two and a half days. But the guilt phase wasn't really
25 contested in 2005. We did it, but we weren't -- counsel now

1 is pressing in all sorts of guilt phase areas that they
2 weren't in '05. So that may not reflect the retrial.

3 The penalty phase was longer. I think there were
4 about 14 defense witnesses, maybe half a dozen government
5 witnesses. I think it wasn't more than five days of trial,
6 maybe seven. But the whole thing, I'm sure you've had this
7 experience before, once it actually got underway it picked
8 up speed and went by very quickly.

9 Notwithstanding, my sense is, although I don't, I
10 haven't worked with these counsel before, certainly the
11 pre-trial motion practice is much more intensive and
12 requiring a lot more work by all of us. I don't know if
13 that would continue through the trial.

14 Also I don't have a sense now of -- I have an idea
15 of what the guilt phase will be, sort of like it was before,
16 essentially a homicide trial. But as to penalty phase, you
17 know, last time it was the dysfunctional child with social
18 workers and teachers and what not from Mr. Fell's childhood.

19 It may, I don't know, it may be all about mental
20 health testimony this time. And one of the things we wanted
21 to talk to you about is the 12.2 notice, the government's,
22 we're blind as to what's coming down the road there. But I
23 suspect everything will be more drawn out this time and you
24 might want to double those numbers.

25 THE COURT: That's kind of what I was doing. How

1 do you see it, Mr. Philipsborn?

2 MR. PHILIPSBORN: Your Honor, the Court may recall
3 that when Mr. Hegyi was on the case we would, we had
4 actually, I'm not sure we paused long enough for this to
5 register, but I know we had talked about it between counsel.
6 We were thinking that it's actually advisable, and, in fact,
7 we were proceeding, at least from the defense table, on the
8 assumption that there's going to be a trifurcation here.

9 THE COURT: Right.

10 MR. PHILIPSBORN: And that there may actually be
11 some reason for yet another short, for another short phase
12 on, on a penalty related issue. And for that reason alone I
13 think doubling the time of the first trial is a good
14 estimate.

15 I can tell you that we, we are, part of the reason
16 for the length of the Daubert Hearings is that we probably
17 are going to belabor some of the guilt trial issues more
18 than did the first defense.

19 THE COURT: Right.

20 MR. PHILIPSBORN: And so I, the Court has a better
21 idea certainly than those of us who are foreigners of what
22 the jury selection length may be. And Mr. Darrow's had that
23 experience. But I would imagine that you can anticipate
24 that there will be some expert testimony, at least at two of
25 the phases, that will lengthen the proceedings.

1 So I think that's a fair estimate. Maybe adding a
2 week or two on top of it for the Court's own calculations
3 now.

4 THE COURT: So I've been sort of scribbling notes.
5 If I were to be, you know, be generous in the estimation and
6 estimate six weeks to draw a jury surely we could get it
7 done in six weeks you think?

8 MR. DARROW: For the draw?

9 THE COURT: For the draw.

10 MR. DARROW: I would think that would be, that
11 would be --

12 THE COURT: Miss Jimenez is going to have a better
13 handle on this than anyone. Around the country, how long
14 has this been taking?

15 MS. JIMENEZ: Yeah, I think if the Court plans on
16 six weeks for the draw I think that's a conservative
17 estimate.

18 THE COURT: Okay. I think that's good. It may be
19 less, but what's the longest your office has seen?

20 MS. JIMENEZ: Well, it can take months sometimes
21 to pick a jury. So that, the longest draw could be a term
22 of months. But I think in a case like this I think that if
23 we're talking about six weeks that's probably a conservative
24 estimate. And we still have to I think to address through
25 motion work probably the manner in which jury selection will

1 even occur which may affect that length as well.

2 THE COURT: Right. I'm thinking individual jury
3 selection, we'll talk to them one at a time, I can't see
4 talking to an entire panel in the traditional way. But
5 we'll hammer out the details together down the road.

6 MS. JIMENEZ: Thank you.

7 THE COURT: I scribbled down two weeks on a guilt
8 phase. You think you would be able to put your evidence in
9 in one week?

10 MR. DARROW: Yes.

11 THE COURT: And I don't want to put any pressure
12 on you to tell me a darn thing, but if I allowed another
13 week would that be reasonable?

14 MR. PHILIPSBORN: I think so, Your Honor. I would
15 say three weeks for the, for the guilt trial would be a --

16 THE COURT: An outside estimate?

17 MR. PHILIPSBORN: Well, I'd say for, at this point
18 it's a reasonable estimate.

19 THE COURT: Okay. And then the one that is hard
20 for me to estimate, because we only do these cases once in a
21 life time, is the penalty phase. I wrote down six weeks,
22 but I don't know if that's short or long or what.

23 MS. JIMENEZ: No, I mean, it's a little bit
24 difficult I think for the parties to estimate. There are
25 still notices due related to penalty phase that we simply

1 haven't gotten yet. So the defense probably is in a
2 position to estimate. And we certainly aren't because we
3 don't know what the defense is intending to present at this
4 point.

5 THE COURT: Yeah, yeah. I hear you.

6 MS. JIMENEZ: Six weeks -- given the information
7 we have now I would say six weeks is a safe estimate, but I
8 wouldn't hold us to it too tightly because we might, you
9 know, estimate either shorter or longer depending on how
10 things progress. I think that's a little harder to predict
11 at this point.

12 THE COURT: Yeah, I'm not trying to hold you guys
13 to anything. I'm trying to defend your time against others.
14 That's my only concern.

15 MS. JIMENEZ: I appreciate that. And I think that
16 the, six weeks is relatively safe unless Mr. Philipsborn has
17 a different opinion.

18 MR. PHILIPSBORN: I think that's a, I think that's
19 a fair estimate, Your Honor.

20 THE COURT: You usually take longer than the
21 government in cases like this on a penalty phase, right?

22 MR. PHILIPSBORN: We, we normally do, Your Honor.
23 The government, in this case, does have -- is likely to be
24 able to prove up some facts in aggravation that will extend
25 the penalty trial longer than it went the first time.

1 So, again, taking all of those things into
2 consideration, I think the estimate you are being given is a
3 fair estimate. And having been through two eligibility
4 trials, which are largely done, at least from the defense
5 viewpoint, through expert testimony, on occasion some lay
6 testimony, I would say two weeks as an outside estimate.

7 THE COURT: For your, your side?

8 MR. PHILIPSBORN: No. For both sides for
9 presentation of, of -- very often the government will have
10 presented much of it's, much of the evidence concerning the
11 circumstances of the crime and the mental states involved
12 and may, and usually has a pretty focused presentation. The
13 defense then presents mental health testimony, which tends
14 to be subject to fairly extensive cross examination.

15 And there's a bleed over into the penalty trial.
16 And that's why or at least that evidence would be used
17 during a penalty trial. And that's why I'm saying in this
18 case a week to two weeks is probably a fair estimate of how
19 long that might take in terms of your staking out, you know,
20 a timeframe for lawyers, etcetera.

21 THE COURT: Two weeks, you mean in the
22 trifurcated --

23 MR. PHILIPSBORN: In the trifurcated.

24 THE COURT: So how about for the final, in the
25 event that there is a final penalty phase another four or

1 what?

2 MR. PHILIPSBORN: No. I thought you were being,
3 again, not really knowing how much longer some of the new
4 evidence available for the government might cause their case
5 to extend, because they were very economical the first time
6 around, maybe you're right, five weeks is a, again,
7 deferring to counsel, to Miss Jimenez and to Mr. Darrow,
8 five weeks probably is a fair outside estimate.

9 THE COURT: All right. So if I booked you all for
10 March, April and May and June surely we would be done,
11 right? That's 16 weeks which is longer than anybody has --

12 MS. JIMENEZ: Yes. Yes, I would think. I mean,
13 barring something unusual happening I think that's an ample
14 amount of time to book for us.

15 THE COURT: Yeah. All right. Thank you. That
16 gives me enough to work with. I just wanted to have the
17 conversation.

18 What else do we need to take up, anything?

19 MS. JIMENEZ: Yes, there is an additional issue
20 that's sort of related to scheduling, but there was due on
21 March 30th the defense's 12.2 notice of mental health
22 evidence as to the guilt phase.

23 They had filed at that point a document giving
24 notice of ongoing consideration. And the government at that
25 point through Mr. Hegyi that was right in that transition

1 phase filed a response essentially objecting to that.

2 We're now several months past that and still
3 haven't heard anything. I don't know if we have an update
4 from defense. Certainly the government obviously is well
5 overdue in the notice that it's entitled to from the
6 defense, but I'm not sure what issues are related to that.
7 If the Court is going to allow that still to be filed we
8 would like a new deadline very quickly. But I wanted also
9 to give a chance for the defense to address that.

10 And I apologize to defense. I didn't have a
11 chance to bring this up beforehand. I wasn't sure if we
12 were meeting in chambers. There had been some discussion of
13 that yesterday. So I wasn't trying to sandbag them.

14 THE COURT: No, no, no. They don't see it that
15 way.

16 MS. JIMENEZ: They may have some response, but I
17 think it's important to discuss it.

18 MR. PHILIPSBORN: That's a fair question, Your
19 Honor. And we have been trying to get that issue addressed.
20 I would say we're still at least four weeks out from making
21 a determination of whether we're going to do it and then
22 providing reports and the like.

23 THE COURT: And this is for an insanity defense in
24 the guilt phase?

25 MR. PHILIPSBORN: If there's a mental condition

1 defense, a Second Circuit diminished capacity or insanity
2 defense.

3 THE COURT: Right.

4 MR. PHILIPSBORN: Correct.

5 THE COURT: So October 1, would that be a fair
6 hard date for disclosure? I mean, we have to get it out at
7 some point because there will be litigation about it.

8 MR. PHILIPSBORN: Agreed.

9 THE COURT: October 1?

10 MS. JIMENEZ: I'm sorry, I thought you were still
11 asking defense counsel. Yes. I mean, obviously our
12 position is it's well overdue. So to the extent I'm not
13 waiving any objection that we have to this evidence, I mean,
14 I think we prefer October 1 over no date.

15 THE COURT: Yeah, right. October 1 it is.

16 And how are we making out on the, on the firewall
17 disclosure deadline for that type of evidence in the, in a
18 potential penalty phase?

19 MR. PHILIPSBORN: Your Honor, that, I don't mean
20 to be bureaucratic about this, I think that's actually
21 moving along better than is the guilt trial --

22 THE COURT: Right.

23 MR. PHILIPSBORN: -- you just addressed. Mr. Burt
24 has been working most closely with those experts. And we
25 can get -- I can consult with him and get back to you in an

1 informed way about that, but I haven't been dealing with
2 that particular issue --

3 THE COURT: Okay.

4 MR. PHILIPSBORN: -- in any detail. The experts
5 have been identified and they've been working steadily. I'm
6 just not sure where we are in terms of production of
7 material.

8 THE COURT: All right. And you have, you have a
9 second, a separate team that's corresponding with Mr. Burt
10 on this at the Justice Department?

11 MR. DARROW: We have a firewall counsel, Your
12 Honor --

13 THE COURT: That's what I mean.

14 MR. DARROW: -- down at the U.S. Attorney's Office
15 in Connecticut. But she hasn't, I don't think she's
16 received anything because we don't even have a 12.2 notice
17 yet. So --

18 THE COURT: So how about, within 10 days can you
19 provide us, everybody with a report on how it's going and
20 how close we are to, I just don't want to get into December
21 and suddenly be in a panic about it.

22 MR. PHILIPSBORN: I understand, Your Honor. And I
23 will, that would be, yes, a 12.2 B and C notice and related
24 status. And I will, I --

25 THE COURT: I understand you don't know yourself,

1 but if you could speak with Mr. Burt and get some kind of a
2 report in to the government, to the Connecticut attorney and
3 to the Court then we would know how close we were.

4 MR. PHILIPSBORN: Will do.

5 THE COURT: Okay. What else do we need to take
6 up?

7 MS. JIMENEZ: Well, I don't know that we can
8 address this today given Mr. Burt's indications about his
9 schedule. I had initially wanted to discuss some deadlines
10 or streamlining of things for the September continuation of
11 the Daubert Hearing because I'm concerned we aren't going to
12 get through all those witnesses.

13 I understand -- what I undertook from Mr. Burt's
14 comments, I don't remember now if it was yesterday or this
15 morning, was that he wanted to check in with Sampson and
16 then set up like a phone status conference. Is that my
17 understanding? Am I correct about that understanding, Your
18 Honor?

19 THE COURT: Yes. That's how I understood it as
20 well.

21 MS. JIMENEZ: Okay. And he thought that might
22 happen around the 7th or 8th of September?

23 THE COURT: By then he will have done those
24 things. I mean, as I thought about it afterwards, it's
25 going to be really hard to move that week. You saved it. I

1 saved it. Some of the younger guys in Mr. Darrow's office
2 have promised me six weeks of a heroin trial in October and
3 November.

4 So I'm going to be out of pocket with that. So
5 it's, that week is kind of golden. I mean, I'm sympathetic
6 to his being pulled in two directions, but I think Mr.
7 Philipsborn may have to play catch up and come in. But
8 that's also the issue you're pretty confident can be
9 resolved on the papers rather than with a hearing, right?

10 MS. JIMENEZ: Well, that's what we're asking for
11 if the Court could resolve at least?

12 THE COURT: And that's on me. I'll do that.

13 MS. JIMENEZ: And if not, to limit it subject
14 matter-wise on the DNA, although we believe it may be that
15 it can be resolved on the papers.

16 I know in McCluskey at some I think running into
17 this problem the parties agreed to some time limits even on
18 direct and cross. And so that may be an option as well that
19 we can discuss with counsel too. But those were just my
20 thoughts on that. And I wanted to touch base on it. I was
21 just concerned about the timing.

22 THE COURT: So we have the DNA question and what
23 else is teed up in September?

24 MS. JIMENEZ: We have one additional medical
25 examiner, Dr. Baden, although he's part of our medical

1 examiner motion we had already proposed. But there is a, my
2 understanding, and I'll let defense speak to it, is there a
3 is, if we do DNA there is a DNA expert that defense would
4 call and one medical examiner expert I think. Obviously
5 they can address that better than me.

6 THE COURT: And I haven't looked at it closely,
7 but Dr. Baden, this is the famous Dr. Baden, right?

8 MR. DARROW: Very famous, Your Honor.

9 THE COURT: Dr. Morrow's opinion was very limited
10 and conservative. Is it Dr. Baden who has a kind of a more
11 psychological view about the nature of the attack or?

12 MS. JIMENEZ: I don't think either of them get
13 into the psychology in that regard.

14 THE COURT: Right.

15 MR. DARROW: I think, Dr. Baden is a little more
16 fulsome than Dr. Morrow, who is very, almost zen-like in his
17 circumspection. But, if memory serves, the main -- one of
18 the things that, for example, that the defense didn't like
19 about Dr. Baden's testimony was he described the killing of
20 Teresca King as a quote kind of overkill I think was the
21 way --

22 THE COURT: That's what I was trying to refer to.

23 MR. DARROW: Exactly. And his reason for that was
24 that he had dual causes of death. In other words, more
25 than, more injuries were, were put on her than was necessary

1 to cause her death than the two that he articulated being
2 that the crushing of her larynx, such that she would be
3 asphyxiated or unable to get oxygen and a hard blow to the
4 bridge of her nose which either one of those things he said
5 would have killed her. And so that's why he said overkill.

6 And then there are collateral queries about which
7 blow came first and if she was killed by the blow in the
8 head then the asphyxiation was essentially superfluous,
9 wouldn't have caused further harm to her. And I think the
10 defense has a medical examiner expert, which they'll call.
11 And that was another reason why we were worried about
12 whether if we do this at the pace we were doing it this week
13 whether we were going to be able to get through this in a
14 week in September.

15 THE COURT: Yeah, we could pick up the pace. I
16 mean, it's --

17 MR. DARROW: That would be great.

18 THE COURT: I was glad to kind of listen to
19 everybody, but I appreciate that it became a bit repetitive.

20 Anything you wanted to contribute on that issue?

21 MR. PHILIPSBORN: Sure. Well, I think, I think
22 the issue on the medical front was fairly addressed by Mr.
23 Darrow. That being said, it is probably a more
24 controversial issue from our viewpoint. And I think we can
25 move through it more quickly now that we've framed some of

1 these issues, but nonetheless, we do anticipate, as
2 indicated, that we would be talking to Dr. Baden and putting
3 our expert on. And part of the reason for that is that at
4 the trial, just so the Court knows our view of the frame,
5 one of the questions -- I think the government's position is
6 going to be there was concurrent action by both people, by
7 both Mr. Fell and Mr. Lee that resulted in the death of
8 Ms. King. And at the first trial there was certain actions
9 that were attributed to Mr. Fell that I think our position
10 is should be spread out a little bit more in terms of the
11 responsibility. And we're going to begin that analysis with
12 the medical examiner.

13 So we, we were approaching the September hearings
14 with a viewpoint that there would be two medical experts.

15 On the DNA front, Your Honor --

16 THE COURT: Before we leave that.

17 MR. PHILIPSBORN: Yes.

18 THE COURT: It's hard for me to understand how
19 that is a Daubert gatekeeping profession-wide issue. In
20 other words, we've all been in trials where you had an
21 overly enthusiastic medical examiner. I remember a
22 marvelous guy but he said, before her death the victim ran
23 here and the victim ran there and then she went there.

24 Well, how would you know that? I mean, you know,
25 we all have that problem. But that's not a Daubert problem.

1 That's a foundational problem or something, you know, an
2 empirical problem unique to the case.

3 How is the sort of separating out the two causes
4 of death and having a guy on your side that disagrees or has
5 a more, puts more blame on both young men, how is that a
6 Daubert issue?

7 MR. PHILIPSBORN: Yeah, I'm sorry. I didn't
8 mean -- I mixed the two and I shouldn't have. We may be the
9 ones who are putting the blame or spreading the blame more.
10 I don't think the medical examiners are in the position to
11 do that.

12 What we're trying to sort out is whether the,
13 whether the notion that there are two concurrent causes of
14 death --

15 THE COURT: Right.

16 MR. PHILIPSBORN: -- is actually a defensible
17 position under the Daubert standard. In other words, given
18 whatever part of those standards are applicable to medical
19 testimony is there a reliable basis to, to explain that
20 whatever injury there may have been to Mrs. King's throat
21 was actually a cause of death.

22 And part of what Dr. Baden is explaining is he
23 finds two areas of injury that each of which could have
24 caused death and both of which operated, as I understand his
25 opinion, to cause death.

1 Our viewpoint is that, in fact, there's only one
2 area of injury that caused death. And that does seem to be
3 in the heartland of Daubert but, again, it can be presented
4 much more economically than we presented the evidence now.
5 That was the point.

6 On the, on the DNA front, Your Honor, all I can
7 tell you is this, the experts have been prepared by the --
8 the evidence has been inquired into by our co-counsel, Mr.
9 Burt. And part of what I'd really like to do, and, again,
10 obviously I serve at the Court's pleasure, as do we all at
11 this table, but there are jury related motions that I wanted
12 to ask the Court about in a moment that are going to be due
13 soon.

14 We're in the process of looking into whether we
15 actually, and I understand the Court may have already
16 established its thinking in this area, but we did indicate
17 that we were making inquiry into venue. And it's something
18 that we need to present.

19 THE COURT: Right.

20 MR. PHILIPSBORN: We have matters, we have other
21 litigation matters, all of which are going to be, are going
22 to be dealt with by the people at this table that we would
23 like to be able to concentrate on the, the DNA issues. As I
24 said, I think some of the -- there's actually an expert who
25 is going to be involved in the Sampson case who is one of

1 the defense experts whose intended to be presented here.

2 And he's available to Mr. Burt. He's not going to
3 be that available to me in the interim. And that's why I'm
4 just forewarning the Court respectfully. I think it's more
5 realistic to see if a negotiation can be undertaken to
6 dispatch Mr. Burt here for a day or two than it is to expect
7 that there's going to be a passing of the baton on that
8 particular issue and in an efficient way.

9 THE COURT: All right. So your dream outcome
10 would be to get Mr. Burt freed up on a Thursday or a Friday
11 in the week that we have already saved?

12 MR. PHILIPSBORN: If it please the Court
13 because --

14 THE COURT: No, I'm happy to talk. I didn't mean
15 to interrupt you. I'll be glad to talk to Judge Sorokin
16 about it.

17 MR. PHILIPSBORN: Yeah, I think that would be
18 helpful because among other things that helps us deal with
19 experts that we want to get information assembled for, you
20 know, examinations concluded dealing with Mr. Fell in
21 another jurisdiction, you know. I mean, defense counsel
22 have to be present for a number of those efforts and have to
23 be able to facilitate them.

24 So all I'm respectfully suggesting is if we can
25 try to free up Mr. Burt the rest of the stuff can get done.

1 THE COURT: All right.

2 MS. JIMENEZ: I'll of course leave it to the Court
3 to work out whatever you may be working out with the judge
4 in the Sampson case. I would just, I'm going to be handling
5 DNA for our side so if the dates that you were able to free
6 Mr. Burt, if that's what ends up happening, if I could --

7 THE COURT: You'll know right away.

8 MS. JIMENEZ: -- I guess put in a vote for earlier
9 in the week as opposed to a Friday. That would be my only
10 request. If that's the only day that works for the Court, I
11 realize there's many balls in the air. I'm not suggesting
12 that it's my schedule that's the important one. If it's
13 possible to avoid the Friday of that week I would appreciate
14 it. If it's not then it's not a problem. So I don't want
15 to leave the Court with the impression that that's a deal
16 breaker, but it would be preferable as I have a wedding to
17 attend that weekend. But, again, it can be worked around.

18 THE COURT: Okay. Do you know when your witnesses
19 are planning to come now?

20 MS. JIMENEZ: They were, they are available for
21 that week. I guess in my head I had anticipated with us
22 starting with DNA on Monday of that week, although I don't,
23 to be honest I didn't have a specific conversation with my
24 expert about that. We had just assured that he was
25 available for the entirety of the week.

1 That was something I had envisioned, but not
2 discussed yet with defense counsel.

3 THE COURT: Okay. Maybe it would be simple if I
4 see it your way and decide on the papers and it's done?

5 MS. JIMENEZ: Very well could be.

6 THE COURT: What do you have planned on the venue
7 issue?

8 MR. PHILIPSBORN: Well, that's, I'll be able to
9 report, I'm happy to file a report on that ASAP. That's
10 part of what we're going to be consulting with the people
11 who are doing the venue surveys during the course of this
12 coming week.

13 THE COURT: Are they close to completion?

14 MR. PHILIPSBORN: And they are being locally done.
15 So the answer is yes.

16 THE COURT: All right. And as I looked at the
17 issue, I was never quite sure what relief you wanted. Did
18 you want us to pick up the whole kit and caboodle, including
19 me, and go to another state or was that to call a judge in
20 Maryland and say, this thing is coming to you? It's people
21 aren't -- it's an awkward thing. What relief were you going
22 to ask for or is it too early?

23 MR. PHILIPSBORN: Your Honor, on one extreme that
24 the shift to Maryland, I suppose might be an argument that
25 the defense could make in a case. I think possibly more in

1 the heartland of what might be requested in a case like this
2 would be whether the Court, notwithstanding that it does sit
3 in Rutland, might, depending on the results of the venue
4 study, look at how it's going to draw the jury from, from
5 the various judicial districts that make up the District of
6 Vermont, from the various divisions that make up the
7 District of Vermont.

8 THE COURT: Oh, it's statewide. That's easy.

9 MR. PHILIPSBORN: No, I understand, Your Honor.
10 I'm just, without arguing it, hypothesizing, let's say the
11 division that covers Rutland happens to have great knowledge
12 or opinion, etcetera.

13 THE COURT: Oh, I see.

14 MR. PHILIPSBORN: And so there may be some remedy
15 that we're requesting that is a much more localized remedy
16 or where the Court actually holds the trial within the
17 District of Vermont. And, again, all of these things are
18 being discussed --

19 THE COURT: Okay.

20 MR. PHILIPSBORN: -- internally, but it may not be
21 a request to move to Honolulu, Your Honor. It may be a more
22 modest request.

23 THE COURT: All right. So do we have a deadline
24 for that motion?

25 MR. PHILIPSBORN: We don't, though the estimation

1 was it was going to be brought to the Court's attention when
2 we were closer to the trial. But we're actually thinking of
3 bringing it, having it on file before the end of the year.

4 THE COURT: Oh, yeah. I mean, if it involves
5 moving things around it's a huge -- you have no idea how
6 hard it is to move courtrooms.

7 MR. PHILIPSBORN: I, I understand, Your Honor.
8 And we do have that in mind. And, again, having, having
9 just drifted out of one judicial district into another all I
10 can tell you is we've been moving ahead with that particular
11 project with the thought in mind that you would be saying
12 just what you said.

13 THE COURT: So would October 1 be an unreasonable
14 deadline?

15 MR. PHILIPSBORN: Can we set that now and if for
16 some reason we can't meet that deadline we may ask to extend
17 it? But that, right now that seems doable. So why don't we
18 aim for that.

19 THE COURT: Yeah, let's make that our goal.

20 MR. PHILIPSBORN: The other thing I wanted to ask
21 the Court is there are a couple of, there's a kind of case
22 management motion that we viewed as jury related. One of
23 the motions we were going to file, this is a September 1
24 deadline on the scheduling order, one of the motions and
25 I'm, I would imagine the government might have an analogue,

1 is simply to suggest to the Court the various steps it might
2 use in selecting a jury. I know the Court was going to
3 determine how it's going to do it.

4 The other thing is for us to determine whether we
5 really have the basis for a jury composition challenge,
6 which is something we're also working on. And I was
7 wondering whether on that particular front you would give us
8 a two week extension where the government would be, would
9 not feel too prejudiced by that because it is something,
10 again, we are working on.

11 We need to decide whether or not there's really a
12 reason for us to move forward. And I'm actually getting
13 some additional information from the Clerk of the Court
14 about that matter. So can we have -- we will file one of
15 the motions on time on September 1st and can we have a two
16 week extension on the other?

17 THE COURT: Any problem?

18 MS. JIMENEZ: I think that's fine, Your Honor.

19 THE COURT: No, it's fine. Totally. Thank you.
20 Appreciate it.

21 MR. PHILIPSBORN: Thank you. Thank you, Miss
22 Jimenez.

23 And the other thing is being the geriatric case in
24 the courtroom, Your Honor, I apologize, but I didn't move
25 some things into evidence. And Mr. Darrow very kindly has

1 given me a bit of indulgence.

2 So with respect to Dr. Morrow's, the Dr. Morrow
3 related defense exhibits I'm moving into evidence Exhibit 7A
4 through C, which are some passages from a book by Spitz and
5 Fisher which we made only very general reference to. And
6 today with Mr. Gilkerson I made reference to him to our
7 Exhibit 7 and 10. And I would move those into evidence.
8 One's a passage from the NRC Report and the other one is
9 from the SWGTREAD Group that he served. Those are the two
10 exhibits.

11 MR. DARROW: May I have just a moment, Your Honor?

12 (Attorneys conferring off the record)

13 MR. DARROW: We don't oppose 7 or 10 on Gilkerson.

14 THE COURT: All right. Those are admitted.

15 MR. DARROW: We don't oppose the Morrow ones
16 either, Your Honor.

17 THE COURT: All right. Admitted as well.

18 MR. PHILIPSBORN: Thank you, Your Honor.

19 THE COURT: Do you want to repeat the Morrow
20 numbers?

21 MR. PHILIPSBORN: Sure. They are 7A, B and C.
22 And we will withdraw the others that were in our binder.

23 MS. JIMENEZ: That reminds me, there was
24 conversation at the end of Dr. Morrow's testimony about how
25 he had counted on the autopsy report the number of stab

1 wounds. And we had provided copies of those to the defense
2 I think yesterday. We did mark that as Government's
3 Exhibit, Proposed Exhibit 20, the copy of that. And we
4 would move that into evidence.

5 THE COURT: Oh, that's with his check marks on the
6 margin?

7 MS. JIMENEZ: Yes.

8 MR. PHILIPSBORN: That's fine, Your Honor.

9 THE COURT: Admitted. All right.

10 This was a long productive week. It was a
11 pleasure to have spent the time together.

12 MR. DARROW: Thank you.

13 THE COURT: Did somebody drive up? I saw there
14 was Virginia plates in the car lot.

15 MR. DARROW: Those might be rental cars from the
16 Burlington International Airport, Your Honor.

17 THE COURT: Oh, okay. You're flying home.

18 MS. JIMENEZ: Yes.

19 MR. DARROW: Thank you, Judge.

20 THE COURT: All right. So we'll be next together
21 for some type of a conference probably on the phone in early
22 September. And then we've got the week saved in the third
23 week in September, whatever it is exactly.

24 MR. DARROW: The 19th.

25 THE COURT: The 19th. Good.

1 MR. PHILIPSBORN: Your Honor, last thing, I can, I
2 gather I can safely represent to Judge Gonzalez-Rogers that
3 I am to be here during that week in September and also is
4 the Court agreeable to my explaining to Judge Rogers that
5 we're estimating the length of our trial at around four
6 months?

7 THE COURT: Four months, yeah.

8 MR. PHILIPSBORN: Thank you.

9 THE COURT: Yes. And I will -- she has been
10 calling me. I thought it was purely sort of to say hi, but
11 I think probably she has also the retrial in mind. So I'll
12 tell her the same thing.

13 MR. PHILIPSBORN: Thank you so much.

14 MR. DARROW: Thanks Judge.

15 MS. JIMENEZ: Thank you.

16 (The Court recessed at 3:50 p.m.)

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C E R T I F I C A T E

I, Anne Marie Henry, Official Court Reporter for the United States District Court, for the District of Vermont, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.



Anne Marie Henry, RPR
Official Court Reporter