IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 96-CR-68

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TIMOTHY JAMES McVEIGH and TERRY LYNN NICHOLS,

Defendants.

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REPORTER'S TRANSCRIPT
(Hearing: Daubert Issues and Statewide Jury Pool)

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Proceedings before the HONORABLE RICHARD P. MATSCH, Judge, United States District Court for the District of Colorado, commencing at 9:00 a.m., on the 5th day of February, 1997, in Courtroom C-204, United States Courthouse, Denver, Colorado.

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P.O. Box 3563, Denver, Colorado, 80294, (303) 629-9285

APPEARANCES

PATRICK M. RYAN, United States Attorney for the District of Oklahoma, 210 West Park Avenue, Suite 400, Oklahoma City, Oklahoma, 73102, appearing for the plaintiff.

SEAN CONNELLY, LARRY A. MACKEY, BETH WILKINSON, SCOTT MENDELOFF, and JAMIE ORENSTEIN, Special Attorneys to the U.S. Attorney General, 210 West Park Avenue, Suite 400, Oklahoma City, Oklahoma, 73102, appearing for the plaintiff.

STEPHEN JONES and ROBERT NIGH, JR., Attorneys at Law, Jones, Wyatt & Roberts, 114 East Broadway, Suite 100, Post Office Box 472, Enid, Oklahoma, 73702-0472; JERALYN MERRITT, 303 East 17th Avenue, Suite 400, Denver, Colorado, 80203; CHERYL A. RAMSEY, Attorney at Law, Szlichta and Ramsey, 8 Main Place, Post Office Box 1206, Stillwater, Oklahoma, 74076; and CHRISTOPHER L. TRITICO, Attorney at Law, Essmyer, Tritico & Clary, 4300 Scotland, Houston, Texas, 77007, appearing for Defendant McVeigh.

MICHAEL E. TIGAR, RONALD G. WOODS, ADAM THURSCHWELL, REID NEUREITER, and JANE TIGAR, Attorneys at Law, 1120 Lincoln Street, Suite 1308, Denver, Colorado, 80203, appearing for Defendant Nichols.

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PROCEEDINGS

(In open court at 9:00 a.m.)

THE COURT: Be seated, please.

This is 96-CR-68, United States against Timothy James McVeigh and Terry Lynn Nichols. We're here for oral argument on motions that have been filed that relate to opinion

witnesses; and the issue, as I've defined it previously, is what is the meaning of Daubert vs. Dow Merrell, the Supreme Court opinion, and how does it apply to the expected testimony from witnesses in this case.

So for the Government.

MR. MACKEY: Good morning, your Honor. Larry Mackey on behalf of the United States. With me is Pat Ryan, who will present argument concerning the statewide jury pool; Sean Connelly; Jamie Orenstein, who will argue on behalf of the United States concerning the Daubert pleadings; Scott Mendeloff and Beth Wilkinson.

THE COURT: Thank you. And for Mr. McVeigh, Mr. Jones?

MR. JONES: Good morning, your Honor. Stephen Jones on behalf of Mr. McVeigh, who is present in court. To my right, Jeri Merritt, who will argue the motion with respect to Daubert. I will address our motion with respect to the statewide jury pool; and on Ms. Merritt's right, Mr. Rob Nigh; and on his right, I'm pleased to present on the Court two new

members of the defense trial team that the Court has authorized, Cheryl Ramsey, a former Assistant Attorney General of Oklahoma and judge of the district court, and Mr. Chris Tritico of Houston, Texas.

THE COURT: And Mr. McVeigh is present.

MR. JONES: He is.

THE COURT: Mr. Tigar.

MR. TIGAR: Michael Tigar on behalf of Terry Lynn Nichols. Mr. Nichols is present in court. With me are Ronald Woods, Reid Neureiter, Adam Thurschwell and Jane Tigar.

THE COURT: Thank you.

MR. TIGAR: Your Honor, pursuant to a prior order of the Court, our case agent, Mr. Killam, is in court today. I wonder if the Court would also permit attendance by a prospective expert; that is, a person who is not a fact expert, who we have asked to observe the Daubert argument in connection with potentially helping us on these issues; that is to say, he's not a fact witness, and I do not think he falls within your Honor's 615 order. But I thought in light of all that's gone on, I should ask.

THE COURT: And what is his name?

MR. TIGAR: I would prefer not to reveal his name at this time, your Honor, because we haven't endorsed him as yet. He will have one of our passes when he arrives, if that's acceptable to the Court.

THE COURT: No, it isn't. Either reveal his name so it's recorded of record that he's been present, or exclude him.

MR. TIGAR: All right. His name is Dr. James S. Gordon.

THE COURT: Thank you. Any objection to Dr. Gordon being here?

MR. MACKEY: None, your Honor.

THE COURT: All right. Now -- and Counsel have correctly noted I did not announce, in announcing the hearing, that we will also hear the motion by Mr. McVeigh's counsel for the use of a state-wide jury pool for the selection of the jury for his trial.

In reviewing the papers that have been filed with respect to this Daubert issue, I noted that in the beginning

there were some differences between counsel for Mr. McVeigh and for Mr. Nichols as to what was being contested; and then the Government's response indicated that the issues with respect to hair and fiber comparisons may be moot because maybe those -- such testimony was not going to be offered in Mr. McVeigh's trial; so I think we ought to find out what the Government's position is on that so we know whether that type of issue is an issue.

MR. ORENSTEIN: Judge, consistent with what we said in our earlier pleading, the witness may be called to testify; and if the Court is unwilling to reserve that part of the issue

until trial, until such time as he's called or not, then we should go ahead and discuss it today. We're not prepared at this point to say he will definitely not be called as a witness.

THE COURT: Well, one of them is hair and one of them is fiber, and it's the same witness.

MR. ORENSTEIN: Yes. Agent Fram will testify about both hair and fiber.

THE COURT: So we'll discuss that. And here, Mr. Jones, I wasn't -- well, Ms. Merritt, I wasn't too clear as to whether that's being challenged.

MS. MERRITT: Your Honor, we're challenging the hair and fiber; but the hair we're challenging under the first prong of Daubert, saying it's not a science, and the fiber we're challenging under the second prong as to how the methodologies and procedures were utilized in this case; and we joined in Mr. Tigar's objections as well.

THE COURT: So are you saying that there is a scientific basis for making fiber comparisons but not for hair?

MS. MERRITT: Yes. There can be. If it's done properly, fiber testing -- microscopic fiber testing is scientific. We're not challenging it on that basis, just how it was done in this particular case.

THE COURT: Well, we're limiting this this morning to the question of the scope of Daubert and its applicability to

these particular methodologies, tests, and results.

MS. MERRITT: Right; and I wasn't planning on addressing the fiber today for that reason.

THE COURT: And, Mr. Tigar, you have objected to that on the Daubert grounds; but I don't think we need to hear it, then, since we're preparing for Mr. McVeigh's trial.

MR. TIGAR: All right, your Honor. We have -- we've made our position clear on our papers, and I will not address it when we argue to the Court.

THE COURT: All right.

Well, we'll begin with Mr. McVeigh's counsel, Ms. Merritt.

DEFENDANT MCVEIGH'S ARGUMENT RE HANDWRITING AND HAIR EVIDENCE

MS. MERRITT: Good morning, your Honor.

THE COURT: Good morning.

MS. MERRITT: Your Honor, I think that it's clear that Rule 702 contemplates some degree of regulation of the subjects and theories about which an expert can testify. Rule 702 says that if it is scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue, an expert can testify to it. Clearly, the first requirement for expert testimony under Daubert is that the subject matter of the testimony

constitute knowledge. If the subject matter or theory about which the expert wants to testify is not knowledge, it doesn't

matter whether it's specialized or technical, and it doesn't matter whether it would have assisted the trier of fact. If it's not knowledge, then it is not admissible under Rule 702.

THE COURT: Well, I don't agree with that. I don't think that's what Daubert says.

MS. MERRITT: Well --

THE COURT: Daubert talks about scientific knowledge. The Rule includes things other than scientific knowledge.

MS. MERRITT: Correct.

THE COURT: Including skills.

MS. MERRITT: Correct.

THE COURT: Including experience.

MS. MERRITT: Correct.

THE COURT: And that's where I think the problem lies: that Daubert has been exaggerated way beyond anything that was intended by it to make some kind of scientific verification necessary before anybody expresses an opinion.

Now, I think that there is much to be said for this opinion -- and I pronounce it Starzeckpyzel.

MS. MERRITT: Starzeckpyzel.

THE COURT: All right -- from the Southern District of New York; and you like the first part of it.

MS. MERRITT: That's right.

THE COURT: Yeah. But you part company when the judge makes this very same distinction that I'm suggesting.

MS. MERRITT: Sort of. I am not disagreeing with the Court. I agree that if it is specialized or technical knowledge, it can come in. I am not saying that handwriting, if it were specialized or technical knowledge, could not come in. What I'm saying is a little bit of a nuance on that, and I'll explain it further in a minute. But what I'm saying is that it is not knowledge as "knowledge" is defined commonly. And because it is not knowledge, it doesn't -- "knowledge," when we get into the definitions, we'll see that all of the dictionaries define "knowledge" essentially as something that is factual, truthful, or capable of verification. In fact, Daubert even defines "knowledge."

THE COURT: Well, doesn't it all depend on what the opinion is and how it's expressed? I mean there is a great difference between a witness who has the requisite training and skill saying, "Look, I've compared this handwriting on this exhibit with this exemplar and I've used the techniques of microscoping and, you know, all of those things that are often involved in that kind of a comparison, and these are the things I find, and I see these similarities and these dissimilarities and so forth" but does not go on to reach any sort of ultimate conclusion that this was written by the same person or expresses some probability or degree of confidence.

The problem with -- and the literature is full of it, and you've cited it -- the problem with handwriting is that

there is no testing of the -- no verification-type testing of these opinion results; and in addition, there has never been within the discipline of people who practice this skill -- there has never been any agreement on how to express the

Therefore, it seems to me that we should draw the distinction between somebody getting on the stand and saying, Yeah, written by the same person, or no, not written by the same person, vs. these are the similarities or these are the dissimilarities; and the jury can decide.

MS. MERRITT: I understand what the Court is saying,

expert to do that; whether or not the jury isn't fully capable of doing that on their own looking --

THE COURT: Well, we're not going to pass on the microscopes to the jury and do all of the kinds of things that these folks do routinely; that is, the handwriting comparison people.

there is no problem with that, of course; that the jury can make its own comparisons, both in the jury room and, for that matter, initially in the courtroom. But it is quite a different thing to look at it with the same eye, magnification, sometimes chemical tests of what kind of ink and all that kind of stuff that we hear about.

MS. MERRITT: That's true; and the court draws another distinction between what kind of identification or handwriting analysis is being performed; and in this case we're talking about handwriting identification analysis, we're talk --

THE COURT: I don't like the word "analysis," you know. I've heard that used by these people who try to determine somebody's personality and character from handwriting, and that's a different --

MS. MERRITT: Right. That's graphology.

THE COURT: Yeah. Different thing.

MS. MERRITT: I won't use that word. I'm trying not

to use the word "experts," because I don't like to call them experts.

THE COURT: I don't either. It's opinion testimony, and opinion testimony is what 702 is all about. And to begin with, in determining the admissibility of the opinions under 702, it seems to me you start with what is the opinion being offered and work back from that.

MS. MERRITT: I believe the opinions being offered in this case relate to handwriting identification; that is, the authorship of certain documents, so that the testing of dyes or imprints and the things for which you use scientific equipment probably will not be at issue. It will be a question of an expert testifying that he reviewed what are called known documents; and after that, he reviewed what were called the

questioned documents and he looked for the similarities within the known document and then he looked at the questioned documents; and then he compared them to see if there were a sufficient number of similar characteristics to make a conclusion and seeing whether or not there was a significant difference between the documents.

THE COURT: All right. Now, if that testimony stops short of the conclusion, do you object to it?

MS. MERRITT: Yes.

THE COURT: Why?

MS. MERRITT: I object to it because it is too subjective. If you will -- and when we question these handwriting experts on the stand, you will see that they cannot answer basic questions that they should be able to answer, such as how many differences does it take before you will say that this is an irreconcilable, significant difference. How --

THE COURT: That's the point I made earlier; that there are no standards.

MS. MERRITT: And because there are no standards, it's not verifiable and it's not testable and it's not fact and it's not knowledge.

THE COURT: Well, the similarities and the dissimilarities are different from that. That's my point. I don't see anything wrong with a witness who has the necessary equipment and skill saying, These are the similarities and the

dissimilarities.

The ultimate inference of what that means is an issue for the jury; and I don't think that's the proper subject of opinion.

MS. MERRITT: True, but then you also get into -- if you take that attitude, then you get into the aspect of Rule 403: If the Government's FBI agent comes up and testifies as to the similarities and the characteristics and how many there are, is the jury going to place too much weight on that even though he has not been -- he hasn't given the conclusion? And that's --

THE COURT: Not with an adequate cautionary -- you know, that's exactly what the judge talked about here in New York: A cautionary instruction, limiting the jury's consideration of it so they don't think that we're talking about some scientific knowledge.

MS. MERRITT: I understand. That is what the judge in Starzeckpyzel did, but he also made another observation that I don't think is valid; and if I can go to Starzeckpyzel for a minute, what he decided in that case was that handwriting

opinion testimony is not scientific evidence under Daubert; and as the Court noted earlier, I completely agree with that.

THE COURT: Scientific knowledge.

MS. MERRITT: Correct. But then he went on to say that he believed it constituted either technical or other

specialized knowledge and therefore it could come in under Rule 702 and because the Daubert factors did not apply. And in doing so, he gave an example; and one of the examples he gave was that of the harbor pilot.

THE COURT: Yeah. I don't think it's a very good example.

MS. MERRITT: Neither do I.

THE COURT: Except, I guess, if the guy made 100 trips and didn't run into another boat, that's significant.

MS. MERRITT: True, but the difference is that if the harbor pilot makes a mistake, he's going to either crash into the side of his docking slip or he's not going to come home; and we know he made a mistake. With handwriting experts, we don't know ever if they made a mistake. The handwriting expert will get up there and say, This is so-and-so's handwriting. The case is over, the person may go to jail, but we never have a way of finding out if that is true or not. With the harbor pilot, at least we know if they crash or don't come home, they made a mistake; so at least the harbor pilot is more verifiable than handwriting. With handwriting, the problem is that it is not verifiable and there is no way to test it.

THE COURT: The conclusion that it came from the person is not verifiable. Whether these similarities or dissimilarities -- they're right there; and the jury can say, Yeah, I agree with that, or, No, I don't agree with it.

MS. MERRITT: But there is no way for the handwriting -- how is the jury then supposed to know how many similarities or how many dissimilarities?

THE COURT: It's up to the jury to decide that.

MS. MERRITT: Well, then why can't the jury have a magnifying glass -- you don't need a microscope -- and make the same visual observation, subjective visual observation that the handwriting expert does?

THE COURT: For the same reason we don't have a jury go out to an accident scene and do measurements and all those kinds of things. That's the subject of testimony.

MS. MERRITT: Let me give you another analogy, then. Let's take photographs. You usually don't have an expert witness on the stand to look at two photographs and decide whether or not the people look like each other or not, or whether or not it's the same person. You would let the jury look at the photographs to decide if it was the same person.

THE COURT: We let a person who knows them get on the witness stand, and a lay opinion can come in on that.

MS. MERRITT: If there is somebody who knows them, right. My point is you don't need an expert; and my argument is that I believe it's the same for handwriting. And I think one of the things we're asking for in connection with this motion is to allow our expert, Professor Dembaux, to testify because he has been qualified as an expert in the analysis --

the limits of handwriting identification testimony.

THE COURT: I've read his stuff.

MS. MERRITT: And the Court in Velasquez in the Third Circuit case actually reversed a continuing criminal enterprise conviction --

THE COURT: I know.

MS. MERRITT: -- because the trial court didn't allow him to testify.

THE COURT: I don't think anybody is suggesting that he can't testify with respect to the limits, but it depends upon what the first testimony is; and if the first testimony does not give the ultimate conclusion about this is or isn't the same author, you have a much different question.

MS. MERRITT: But when the handwriting expert or the handwriting identification person, opinion witness, gets up and says that these characteristics in Document A are similar to Document B, that's exactly what the court in the Williamson vs. Reynolds case, the Oklahoma hair case, said is impermissible because of Rule 403: that the probative value would be outweighed by the prejudice because the jury would get confused.

THE COURT: Well, let's remember that was a habeas case, and it was done in retrospect; and it was not -- there is not a very good record before the court as to how the opinion witness testified. I don't mean that it is inaccurate. I mean

that the foundation was not very well laid.

MS. MERRITT: But the point I think that I'm using this case for is the point that the court said: when you have an expert up there or you have an opinion witness and he's testifying to the jury that -- there are certain similar characteristics, the jury may confuse that with "that's a

match." And I hear what the Court is saying: that because the handwriting witness is not going to give his opinion that it's a match, it's okay.

And I'm just pointing out that under Rule 403, you still have problems because the jury may not understand the distinction; it may think when the handwriting witness testifies that there are similarities between these two documents, they may take that to mean it's a match.

THE COURT: Well, it's my job to make sure the jury understands the limited purpose for which the testimony has been received.

MS. MERRITT: Can I move on back to Daubert now, or --

THE COURT: It's your argument.

MS. MERRITT: Okay. First, I think when we start with Daubert, Daubert speaks only to scientific knowledge; and in a footnote it makes it pretty clear that it isn't even going to address the technical or other specialized knowledge prong of Rule 702. And the courts around the country have in various ways addressed that and said, Well, you know, what happens when

we have specialized or technical knowledge? Do the Daubert factors apply, or do they not apply?

And I think that in this circuit, at least, the answer is pretty clear because of the Compton vs. Subaru case; and Compton vs. Subaru basically says that if it's going to be scientific knowledge, then all of the Daubert factors apply and the court has to make the inquiry as those four factors: Has it been subject to peer review, has it been published, is there a known error rate, and can it be empirically tested?

Then the Court in Compton says if it is not scientific

knowledge, it still must pass the general test of Rule 702 for reliability and relevancy. It just doesn't have those added Daubert factors to go through.

And in reviewing the Government's response to our motions, I don't think it's clear whether or not they're conceding that handwriting identification testimony is not science. They certainly haven't made that concession. If they're going to argue, as -- that handwriting identification testimony has a methodology, then I think that the Daubert factors have to apply to it and the Court has to use those factors.

If they are going to say that it is -- that that first prong of the Daubert factors don't apply and that only -- it only has to be shown reliable and relevant under Rule 702, then I think the Government has to concede that it's not scientific

evidence. And I don't think the Government has done that yet. It sort of wants to use the second prong test, but it hasn't really admitted that it's not science yet; so I think that's something that the Government is going to have to address.

But, you know, I've pointed out in our papers that I believe the Starzeckpyzel court is correct that it's not science; and it's not science because it cannot be empirically tested, it hasn't been empirically tested, and it isn't subject to peer review or publication, and there is no known error rate. And in fact, there is no -- there is really a dearth of studies.

Now, I noticed that the Government in its reply mentions this new study by Moshe Kam that has never even been released yet. In fact, my understanding is that he's going to be releasing it February 20, at the annual meeting of the

American Academy of Forensic Sciences in New York. That's the first time it's going to be made public. It was testified to in a hearing, the same kind of hearing as this, in Atlanta twice in the last month. But it hasn't been made public.

And the Government asserts in that study that all of a sudden now we have a study that shows handwriting identification testimony is reliable, and I would take great issue with that finding, because having consulted with our experts and reviewing that study, what it shows is the opposite. It shows that 87 percent of lay people can determine

correctly who wrote a document. I think it's 86.5 percent -- I think it's a half percent higher -- that lay people got the stuff right than the handwriting experts.

The difference came in what's called "false positives," where who -- who didn't guess one way or the other more.

And the reason for that, which the Government doesn't point out in its brief, is that there was a financial incentive system in that study. In that study -- and --

THE COURT: I don't want to talk about the study.

MS. MERRITT: Okay. That's -- then there is no -- if you're not going to talk about the study then there still --

THE COURT: I'm not talking about your studies, either.

MS. MERRITT: I'm saying there are none. Government raises --

THE COURT: Well, there are some studies that go the other way; and you cited them.

MS. MERRITT: There was one study, which was Moshe

Kam's first study; but that had its critics, also, because it used a very small database and because of the incentive problem. On the one hand you had handwriting experts who were looking out for their livelihood and had a great incentive to be very careful. And on the other hand, you had a small group of college students who really had no incentive to do it

correctly. And both studies were funded by the FBI, which is another issue that I don't think the Government raises and I think is a consideration.

And if you take away those two studies, there really isn't anything that shows that handwriting experts or handwriting identification witnesses will more correctly identify handwriting than lay people.

And that's the second prong of Daubert, is that it has to be -- it has to assist the trier of fact. And if it's not going to assist the trier of fact, the witness shouldn't be allowed to testify to it. And it's our position that lay people are just as capable of looking at two pieces of writing and deciding whether the same person wrote them or comparing one person's -- a writing written by one person with another to see if that same person wrote both as is an expert; and therefore, we don't need opinion witness testimony on it.

I'd also point out that the Government, as the proponent of this evidence, has the burden of establishing its admissibility; whereas it's the Court, of course, who acts as the gatekeeper in deciding the admissibility under Rule 104.

I think one other point: The Tenth Circuit again has

made that distinction with what factors apply, whether it's scientific knowledge or whether it is specialized or technical knowledge in the Muldrow case. There were two experts that were called upon to testify in that case. One was a police

officer who was going to testify as to specialized knowledge about drug trafficking, and the other was a chemist who was going to testify to the chemistry of the drugs.

For the chemist who was going to testify about the drugs, the Daubert factors applied; but for the police officer who was going to testify as to the specialized knowledge about drug trafficking, only the Rule 702 factors of reliability and relevancy applied.

And what we're asking is that the Court schedule a pretrial -- an evidentiary pretrial hearing on this issue at which Professor Dembaux can testify that handwriting as an alleged expertise has never been validated as credible, scientific, technical, or other specialized knowledge. It doesn't comport with the requirements of evidentiary reliability that the Supreme Court set forth in Daubert, and it doesn't have a foundation in cognizable objective methodology.

And I now understand that the court in Velasquez very well as questions found that handwriting did pass all three, but I would submit that those findings are wrong. The only thing the court in Velasquez, in my opinion, decided right is that Professor Dembaux should have been allowed to testify.

There are still some other reasons, I think, that handwriting is too subjective for the Court to consider reliable or helpful to the trier of fact; and that would involve going into how handwriting analysis is done, and I'm

not certain the Court wants to go into that today. If the Court wants to just stick to the Daubert factors --

THE COURT: That's my plan.

MS. MERRITT: So what we would request is that the Court allow us to present expert witness testimony on the issue of the reliability or nonreliability of scientific handwriting testimony so that we can demonstrate to the Court that it is not reliable and that it will not assist the trier fact, because jurors are just as capable of looking at handwriting and identifying it as is the Government's expert. And the prejudicial value of having an FBI agent up there, wearing the badge of the Government, testify as to his finding of similarities is going to outweigh any probative value for the jury; and it's going to be way too prejudicial.

Does the Court want me to go on to --

THE COURT: Stay with handwriting. Do these one at a time.

Mr. Tigar, you're on this as well.

MR. TIGAR: I would ask the Court's guidance: Does the Court want me to make the portion of our argument that deals with the meaning of Daubert and the scope of its application and then turn to the handwriting issue, or --

THE COURT: Yes. I think they really, you know -- you can address the handwriting by the use of your analysis of

Daubert.

DEFENDANT NICHOLS' ARGUMENT RE HANDWRITING AND HAIR EVIDENCE

MR. TIGAR: Yes, your Honor.

Let me begin by saying that in our view, Daubert imposes a burden of proof on the Government to establish certain foundational facts with respect to certain kinds of evidence. And that's why we had thought that the Government ought to come forward and present some indication of what that foundational showing would be.

Second, we do take issue with what I understand to be a part of the Court's position -- and I hope the Court will hear me out. In Compton vs. Subaru, this court did address the scope of Daubert, as opposed to what isn't within it. And contrary to the Government's assertion, what the court there said was in Judge Porfilio's opinion was that Daubert would apply when there was a methodology that can be subject to Daubert analysis, and it would not apply when there is not a methodology that could be subject to Daubert analysis.

I also, at the risk of rearguing a position that the Court seems to reject, point out that the Supreme Court in Daubert --

THE COURT: I haven't ruled, Mr. Tigar. I've only offered these suggestions to focus the argument.

MR. TIGAR: I understand, your Honor; and I wasn't suggesting the contrary.

The Supreme Court did say in footnote 8 that the

discussion was limited to the scientific context; but that footnote is in a paragraph that deals with the word "scientific" and the word "knowledge." And as the First Circuit held in the Bogosian case that we found on Westlaw and cited yesterday, the Daubert approach -- that is to say, the foundational things that must be shown -- applies equally well outside the narrow compass of scientific cases. After all, knowledge applies to any body of known facts or any body of ideas inferred from such facts or accepted as truth on good grounds.

So even if the evidence is not scientific, the knowledge prong of Daubert, the knowledge part of the Daubert analysis does apply.

And I take also the suggestion -- we endorse it -- made by Ms. Merritt: Expert witnesses are not tethered to the personal knowledge requirement. Because they are not tethered to the personal knowledge requirement, there is this risk that the jurors will attach too much importance to their testimony.

One of the ways that we analyze hearsay questions is, of course, to look at the words of the hearsay rule. But often at the end of the day, we ask ourselves, Does this pose the hearsay dangers? And if it poses the hearsay dangers, then we're on alert and we might say, Gee, we'll exclude that evidence; we're not sure what section of 803 we're talking about, but it raises the dangers.

And so here, because as the Daubert court pointed out -- and there is no disagreement; all the justices agreed with that -- these experts are not tethered in that way, there is this need for a foundational showing.

Handwriting analysis is an example. Certainly, your

Honor, no one -- well, I won't say no one. We would not quarrel with a witness getting up and saying, I have a microscope and under my microscope I took pictures of down-strokes of "g"s written on two occasions, and here are my pictures.

When the witness sees fit, either directly or by inference, to add more to that and say there really is science back of this, there really is a methodology back of this, then it seems to us that Daubert analysis applies; that is to say, there is a need for some foundational showing if that person wants to go any further than that.

THE COURT: Well, this is where -- yeah. This is where I'm suggesting the difference. If opinion is -- if a person's opinion on the witness stand is "This, I am confident, was written by the same person," now, then, using the techniques that were used to come to that opinion, the foundation upon which such an opinion has to be based, it seems to me, is the notion that it is scientifically valid; that there is scientific knowledge; that the way in which a person writes is so consistent that you can say that these identifying

characteristics identify that person.

And I don't think there is any such scientific knowledge. And that's why I don't think that, you know, these people can express such opinions.

And I'm in agreement with that so far, having not yet heard from the Government; but it's sort of like -- and we're jumping ahead. But let's take hair samples and the hair comparison. There is quite a difference between saying that, you know, my microscopic tests and my determinations of width

and fiber and all of that sort of analysis of these hair samples leads me to conclude that this hair came from this head.

Now, that's one, and that's subject to a lot of criticism, because where is the scientific knowledge for that?

However, if the person did a DNA analysis and used a proper protocol and all of those things that would make the evidence admissible and says yes, the DNA here matches, we've got a much different question, because there is scientific validity to at least two types of DNA tests.

MR. TIGAR: Although your Honor, absent a decision like the one the Eight Circuit just rendered, there would still have to be a Daubert hearing to establish that for purposes of the case.

THE COURT: I understand. But that's the kind of thing it seems to me to be the difference. Here you've got

scientific knowledge that at least properly done, DNA analysis can identify uniquely an individual in any part of the body that contains DNA, which I guess is everything. Not being an expert in DNA, I'm a little careful with that. But --

MR. TIGAR: Nor I, your Honor.

THE COURT: But it's a lot different when you say, This hair came from this head because I've done these comparisons.

MR. TIGAR: Yes, your Honor. And I think that we're moving towards -- I'm moving towards understanding your Honor's position about this. The problem comes when the Government wants to do what the Daubert court condemns under the guise of opinion testimony. There certainly is no problem with someone saying I, have a microscope, I know how to use it, I take

pictures through it, these are my pictures.

THE COURT: Yes.

MR. TIGAR: And a person who gets on the stand and says, Been at the FBI laboratory 30 years; never met Fred Whitehurst, so you don't have any problem on that score; been looking at handwriting exemplars all these times, done quite a lot of handwriting myself, Palmer method, used pencils, and so on; and by golly, I can tell you when I see this that -- that these things are similar. And that's the reason I picked them out, as a matter of fact. The reason I picked these out is that I'm real good at that.

Well, the problem is that handwriting analysis, like hair analysis, is one of those fields invented by a small group of people. It's like the story of the self-made man who was inordinately fond of his creator. These people did not have any outside folks that are criticizing their work, and there is this danger of the oversell. Thus to the extent that all the person wants to do is show pictures, no, we certainly don't have any problem.

I'm not going to talk about hair, unless your Honor wants me to move into that --

THE COURT: We'll do these one at a time was my plan, but I think there is a -- I think there is quite a similarity in the approach when we're talking hair and handwriting.

MR. TIGAR: Yes, your Honor. And I think also that in looking at your Honor's difficult job, where we come down -- what we come down to is this: These cases have got to be tried. They've got to be tried in the near term. The purpose of all of us is not to waste the jury's time. The Government

has the burden of coming before your Honor and saying, This is the evidence we intend to introduce under Rule 702, this is why we can untether these witnesses from the personal knowledge requirement, and this is our foundation.

The Tenth Circuit in the case cited as a matter of fact by the Government, the Robinson case in 16 F.3d, once again reaffirmed this gatekeeping function; and they did that

in the context, your Honor, of an accidentologist. Now, granted, the accidentologist, as the court said, relies on underlying valid scientific ideas such as physics, and so on. But when it is sought to stand upon the little perch provided by the little bit of scientific knowledge and leap to conclusions, then, of course, the gatekeeping function becomes very important.

That's our approach to Daubert. It is, it seems to us, a very practical one. We've got to have these hearings. We ought to do them before trial and out of the presence of the jury, as suggested in Robinson.

With respect to handwriting, no, we don't have any objection if a witness who doesn't oversell comes and says, These are my pictures, assuming the defense can say, Well, here is some other pictures as well; but when the next step is sought to be taken, that, we do say, is Daubert; and we say it under the Compton case.

THE COURT: All right. Thank you.

We're anxiously awaiting what the Government is going to offer in testimony.

PLAINTIFF'S ARGUMENT RE HANDWRITING AND HAIR EVIDENCE

MR. ORENSTEIN: Your Honor, our position on handwriting evidence is that it is as Judge McKenna described

in the Starzeckpyzel case. It's an area where someone who has been for many years looking at samples of handwriting has

gained a certain adeptness at noticing minute similarities and dissimilarities, in Judge McKenna's term, and aids the jury in being able to guide them to what they might otherwise miss. And I think that is the position that your Honor is agreeing with.

THE COURT: Yes, up to, you know, whether you're looking for a final conclusion.

MR. ORENSTEIN: Right. Now, on the point of the final conclusion -- and I -- beyond -- up to the point of can an expert get on the stand and point out the similarities and dissimilarities, I'm not going to address any further, because I think your Honor agrees that that's something that's perfectly appropriate; and frankly, I don't see why that would need a factual hearing along the lines Ms. Merritt suggests to point out that experts can do that.

Where I guess we part company is on the issue of can an expert render a conclusion on the ultimate issue: Is X person the author of this writing?

THE COURT: Right.

MR. ORENSTEIN: I think there are a number of reasons why your Honor should allow such testimony and --

THE COURT: What do you intend to offer? Let's get to it.

MR. ORENSTEIN: Okay. There are a number of documents that we --

THE COURT: I don't mean each document, but I mean the question that you're going to ask these opinion witnesses.

MR. ORENSTEIN: In short, the question would be -- the series of questions --

THE COURT: After going through the comparison and all that stuff.

MR. ORENSTEIN: Well, I think there is an issue of whether you would do it with the comparison first and the conclusion last, or the other way around.

THE COURT: Well, you do it the former, because I can control that; and that's the way I do it.

MR. ORENSTEIN: Fine. The testimony would be, Have you compared this questioned document with one or more known documents, nonsamples of the -- in this case, the defendant's handwriting, which have been authenticated through some other means? And based on that comparison, do you have an opinion as to whether or not this person is the author of that questioned document? And depending on the particular document involved, the expert would say, Yes, I have an opinion that he wrote it, or, No, I don't have an opinion that he wrote it; but I have an opinion that he probably wrote it, and here's the reason why I have less confidence in it.

THE COURT: Have you got anybody who would say yes, without any qualification?

MR. ORENSTEIN: Oh, yes. It's just there are

different documents. Some of the documents, the expert will say, Yes, in my opinion, Timothy McVeigh wrote this document; in my opinion, Terry Nichols wrote that document.

THE COURT: Well, I'll tell you right now if you're

going to do that and persist in it, we will have to have such a hearing, because I don't think that there is any basis in science for that kind of an opinion; and as has been pointed out repeatedly, there are no agreed standards for the terminology. There is no confidence level that's been agreed upon. It's not like the old way in fingerprints, where you had to have 12 points of identification. Now I guess you don't have those anymore, although maybe that's something that has to be argued about, too. But, you know, there are no standards.

MR. ORENSTEIN: Judge, right; and we're not offering it as a scientific standard.

THE COURT: Well, but there has to be, because take my DNA analysis --

MR. ORENSTEIN: Uh-huh.

THE COURT: -- and for hair or any body tissue. You know, that's lacking. We do not have any body of scientific knowledge of which I am aware that says that there are such identifying characteristics every time a person puts pencil or pen to paper that you can say that's who it is.

MR. ORENSTEIN: Agreed, Judge. But I think that's not the standard that's needed and particularly in the handwriting

area, and I'll explain why.

What a handwriting expert does is say, I've become adept at recognizing handwriting. And an eyewitness --

THE COURT: And they do it by experience. There is no academy of training for these people. They just say, I've done enough of that that now I'm a self-declared expert at it.

MR. ORENSTEIN: That's to some extent true; and if you have a hearing, obviously there will be testimony about the

extent to which there is training and proficiency testing.

But someone who says, I recognize Judge Matsch because I've seen him before, isn't able to say the eyebrows are the same, the nose has the exact same measurements as the person I measured before. That would be the analogy to DNA testing. But he can say, I've seen enough people so I have a sense of being able to say when I recognize something; and it's that kind of experience -- it's a specialized experience that someone brings to the arena with handwriting.

Agent Williams can say, I have looked at many, many examples of handwriting over the years, and I have never seen the letter Q constructed in this particular way. He can't say for a certainty that nobody else could possibly construct the letter Q in this way; but he can say, In my experience, I've never seen someone do it like that.

THE COURT: Or that this same person constructs the letter Q every time the same way. That's the problem with it.

MR. ORENSTEIN: He can't say that; but what he can say is, Every example that I've seen in both the questioned and the known document has a similar construction for that letter. And it can be attacked by an impeaching expert, Professor Dembaux, if you will, who can say, Well, you're not taking into account the fact that there is a Q in one word of the known document that isn't constructed that way or in one instance in the questioned document.

I think that's the sort of thing that an expert can get up and say, I have experience, and this is my opinion based on that experience. And that is subject to attack by --

THE COURT: How do we determine when his experience

showed him to be wrong, like the point Ms. Merritt makes?

MR. ORENSTEIN: I disagree with the point Ms. Merritt makes, actually. If someone, for example, confesses that the questioned document was written by me rather than the person that the expert says it was written by, that can be the subject of a motion for a new trial based on new evidence. It can happen.

THE COURT: Well, sure, it can happen.

MR. ORENSTEIN: It can happen and --

THE COURT: There is no verification of how many times this guy was wrong.

MR. ORENSTEIN: No, but there is testing, and that's -- that's what the Kam study shows, I think; that you

can subject these experts to testing.

THE COURT: Well, then you've got to hold a hearing on the testing and the validity of the testing, which itself is scientific, in that the statistical methodologies involved have to be evaluated in detail.

MR. ORENSTEIN: Sure. You can --

THE COURT: I don't intend to do that. I think you ought to think twice about whether you're going to offer these conclusory opinions.

MR. ORENSTEIN: Certainly, Judge, we'll take guidance from the Court.

There is one other argument I'd ask you to consider before deciding the matter, which is accepting your arguments -- your point that there is a difference between DNA profiling, where you can point to specific characteristics that are never going to change --

THE COURT: Right.

MR. ORENSTEIN: -- and handwriting, where you're basing your opinion -- and it's not saying with certainty, but you're saying, My opinion is I recognize this as being the same as the known sample. That's an argument that I think can certainly apply to hair comparisons, and I know we'll get into that in a few moments. Let me just add one thing, though: We're not ever going to say or have an expert say, This hair came from this head. It's only a matter of this hair is

consistent with that hair.

THE COURT: Right.

MR. ORENSTEIN: But the rules of evidence have two provisions that I think it's worth bringing to the Court's attention on this issue, on the issue of handwriting. First, generally it does -- the Rule 704 does allow an expert to attest to an ultimate opinion, an opinion of ultimate issue; but I think more specifically to this issue, Rule 901(b)(3) specifically allows the handwriting expert to authenticate a document based on a comparison with a known exemplar.

Whatever the merits, that can be debated, about the wisdom of that. Congress has enacted these rules, the Supreme Court has enacted them with Congress' approval, and these rules specifically allow the kind of testimony that we're proposing to elicit.

I think if the -- if the rule is to be --

THE COURT: Which rule are you talking about?

MR. ORENSTEIN: 901(b)(3)?

THE COURT: "For identification." It doesn't say that -- well, let's look at it.

Generally, my understanding of this rule and the way

in which I have confronted it in the past is that a witness on the stand can say that because I'm familiar with this person's signature, it's on this document, and that authenticates the document for purposes of admissibility of the document.

MR. ORENSTEIN: That's one of the ways you could do it, by someone who is familiar with it.

THE COURT: What case do you have that says this supports this type of conclusion/opinion that you're suggesting in this case?

MR. ORENSTEIN: I don't have any case that directly says that, and I think there are two reasons for that. One is this hasn't been subject to challenge, and courts have traditionally allowed in the kind of testimony that we're proposing to elicit, so it hasn't been the subject of much litigation.

But the other case that I would point out is the Starzeckpyzel decision, which addressed 901(b)(3). I'm doing by sort of negative inference here. In Starzeckpyzel the issue was is this writing a forgery. And the Government there sought to rely on Rule 901(b)(3) as an alternate basis for admitting the testimony. And Judge McKenna there said, It doesn't apply here because although you can use it to authenticate a writing,

So I think the reasoning by Judge McKenna in that case -- though of course he didn't have to decide it and therefore didn't decide it -- supports the idea that where we're seeking to authenticate a document as saying Mr. McVeigh actually wrote this document and that's why it should be in front of the jury, I think it's appropriate to rely on

901(b)(3) to say, to have a comparison by an expert witness

which have been authenticated. I think that's within the plain language of the rule, and I think it's consistent with what we're trying to do. And that's -- and I think that allows something more than just saying, The letter A is written similarly on these two documents.

THE COURT: Well, of course, the rule begs the

MR. ORENSTEIN: I'm not sure I understand.

THE COURT: It says, "The comparison by the trier of fact --" we don't have any problem with that "-- or by expert witness. Now, the question here is, is this the subject of

MR. ORENSTEIN: I think the rule doesn't beg the question.

THE COURT: Well, it does. Congress doesn't define who is an expert witness -- yet.

MR. ORENSTEIN: No, it doesn't define who is an expert, but it does clearly say here that an expert -- someone

existence of this rule presupposes that there are some people who can be qualified as experts in this area. Some expert can say, Even though I am not previously familiar with this person's writing, based on my comparison of the questioned

writing with the known, I can authenticate this document as having been written by that person.

Now, if that rule is to be changed, if such opinions

done by an interpretation of Daubert. I think it must be done by Congress in amending the rules.

So I think -- I think that the Court's point is well taken for areas of expertise which are based on comparison

generally; and I think that I wouldn't have this argument obviously for a hair expert, saying, I identified this hair --

THE COURT: Why do you make the distinction between hair comparisons and the handwriting comparisons?

MR. ORENSTEIN: Well, I make the distinction for this point only because there is a specific rule that I read --

THE COURT: Well, forget the rule for a moment.

MR. ORENSTEIN: I agree with you --

THE COURT: You say, as I understand it, that you're not going to offer this conclusory-type opinion from somebody who has examined and compared hair samples.

MR. ORENSTEIN: I'm sorry. I didn't --

THE COURT: But with respect to handwriting, you are.

MR. ORENSTEIN: Yes.

THE COURT: Now, why?

MR. ORENSTEIN: Because -- well, there are two reasons I think; and one, I will freely admit, is my own speculation,

because I haven't asked the different experts about this. But handwriting has so much possibilities for variation that it also has so many more possibilities for individualization. And I think it's harder to say that about a piece of hair.

So that there is more opportunity for a person's handwriting to exhibit unique characteristics that make it more and more possible through additional comparisons to, say -- to narrow down the class of people who could have done this piece of writing and to say that yes, it's that person's writing.

THE COURT: Now, are you always able to identify your own handwriting?

MR. ORENSTEIN: Am I?

THE COURT: Yes.

MR. ORENSTEIN: My handwriting is particularly bad, Judge, so I'm not the best example. But no, I think there are times when people fail to recognize handwriting that they're familiar with. And I don't think --

THE COURT: Or including your own.

MR. ORENSTEIN: Including my own, correct.

THE COURT: I mean I have that experience. It seems to me everybody does.

MR. ORENSTEIN: My handwriting has previously been criticized by judges, so I can usually recognize it. But the point is well taken: A person can fail to recognize his own handwriting, but I think that's where we're trenching on what

Daubert says should not be done. The conclusion itself should not be the basis of admissibility. It's the -- it's the technique or the method or the specialized skill that's being used.

So handwriting, I submit, has greater opportunities for being individualized, being recognized, that a hair does not.

But the other reason is that frankly, hair analysis may one day get to the point where the practitioners of hair comparison are confident enough in what they do to say, Yes, I can identify this hair. And at that point there will be testing of them, and the tests will show that they're right or wrong.

Handwriting has progressed to that point and the study by Professor Kam -- and I know your Honor doesn't want to get into it here, so I'll reserve my responses to the criticisms of it, but I think that a fair consideration of that study will show that handwriting experts do one thing that a lay person does not do, which is when he makes an identification, when he is confident enough in the characteristics, similarities, to say, These two documents were written by the same person, he is much more likely to be right than is a lay person.

There has been testing of that; and the testing has shown to a statistically significant degree that handwriting experts are able to do what they claim to do; and I think

that's one other reason for the distinction that I'm drawing between the ability of the handwriting comparison expert to make this kind of identification and a hair comparison expert to say only these two are consistent.

THE COURT: Okay.

Ms. Merritt?

DEFENDANT MCVEIGH'S REBUTTAL ARGUMENT
RE HANDWRITING AND HAIR EVIDENCE

MS. MERRITT: Your Honor, I don't have much more to say about handwriting other than that we still take the position that the Government's witness should not be allowed to testify as to similarities and differences in handwriting that it views. And before the Court allows that to happen, we would request a hearing at which we can demonstrate to the Court why that is not appropriate.

And again without going into the details of Professor Kam's study, I would say that my information is opposite from

that of Mr. Orenstein; so if that is going to be an issue, we should have a hearing on that, also, particularly as to the financial remuneration that went to one category of persons involved in the study and didn't go to the other. But the evidence was that both -- in that study was that lay people identified it as correctly as the experts. It was just with the area of false positives, but that was because it cost them money if they guessed a wrong false positive.

In any event, that's our position on it; and we would ask the Court who hold an evidentiary hearing, if it's going to do anything more than what Mr. Tigar said, which is say these are the pictures I took, this is the handwriting; but once it gets into "I find that these similarities exist between these two," I think that's what is objectionable.

THE COURT: Yeah, but I thought you were objecting earlier to even that much, because you're saying that the jury doesn't need that, it's not helpful and therefore is excludable under that area of the rule.

MS. MERRITT: I am still objecting to that.

THE COURT: Yeah. All right. Well, I don't agree with you on that.

MS. MERRITT: I knew that.

THE COURT: So your position then, I take it now converges with Mr. Tigar beyond that objection, which is there for the record and I've overruled it; that you have no problem up till you get to this "Yes, it's the same person," or "probably so," or whatever. Do you have the same objection to "It couldn't possibly be the same person"?

MS. MERRITT: Yes.

THE COURT: Okay. And it's rooted in the same thing,

then, I take it: that this is not verifiable science.

MS. MERRITT: Correct. And it's also one other thing: It's not subject really even to cross-examination or

impeachment. I think somebody -- Mr. Orenstein made the point, Well, you can always cross-examine the expert.

THE COURT: Yeah, because you can't say, How many times have you been wrong?

MS. MERRITT: Right. You can't say that. You also can't say, Well, you see these similarities; how many similarities does it take to say that this is consistent with somebody's writing; that this is probably written by the person, this is absolutely written by the person? How many dissimilarities? You know, how do you decide whether a dissimilarity is significant or not significant? You can't answer it.

THE COURT: Like the old fingerprint that you had to have 12 points of similarity.

MS. MERRITT: Right.

THE COURT: Not similarity. You have to have 12 points that you can show are the same. Well used to say that. I'm not sure we have to do that anymore, but -- well, you've heard Mr. Orenstein talk about the hair; that they don't intend to offer such opinions with respect to the hair comparisons.

So aren't we as far as the hair then -- we don't have a problem, do we? Because we're just -- I mean, sure, you're

still objecting, well, you don't need the trier of fact, then, to show pictures of the pieces of hair and under microscopes, and so forth.

MS. MERRITT: In a sense, that's true. But I would also point out that hair is -- the problem with hair is that if the expert gets up there and talks about that he examined these hairs under a microscope and he found similarities that -- or that he found a match between certain characteristics that the jury is going to confuse that match with the experts' saying that this hair matched the person, matched the hair from that person.

THE COURT: Well, again, that's a matter of cautionary instruction.

MS. MERRITT: And as the Court pointed out, there is now this new hair testing that can be done, for example, through DNA. And also I think now they can test for cocaine metabolites in the hair. They can do a test on hair that will show if the person whose head it came from had used cocaine or not through scientific analysis. And that's far different than what we're talking about here, which is just identifying a class of persons that the hair might have come from and saying that; so I don't think I even have that much more to say about hair, other than we would have to have a hearing if the Government was going to try and introduce that kind of evidence as well.

THE COURT: What's your view of the, or counter to the argument made about that this is admissible under 901(b)(3)?

MS. MERRITT: Well, your Honor, I think I addressed

that Rule 901 in my original brief; and I think that pertains basically to lay witnesses saying -- being asked on the stand, Are you familiar with the handwriting of this person?

Yes, I am.

And I hand you now . . . What is this? Can you look at this and identify the handwriting?

Yes, it's theirs.

THE COURT: Yes, but the rule says expert witness.

MS. MERRITT: We don't need them.

THE COURT: Okay, Congress, take that. All right. Thank you.

Mr. Tigar?

DEFENDANT NICHOLS' REBUTTAL ARGUMENT
RE HANDWRITING AND HAIR EVIDENCE

MR. TIGAR: I would answer the 901(b)(3) question by pointing out that matters of fact can never be the subject of legislation, nor of judicial precedent; that is to say, what is and is not an expert always has to be the subject of some ~~FACTUAL INQUIRY. AND INDEED, THAT'S REFLECTED IN 28 U.S.C.~~ Section 1731, which says that the admitted or proved handwriting of any person shall be admissible. It has to be proved, and that statute is cited in the advisory committee notes to 901(b)(3).

That's a springboard, your Honor, for what we were going to say about hair analysis. The Federal Judicial Center

reference manual on scientific evidence notes that over the ~~YEARS, A NUMBER OF FORENSIC TECHNIQUES THAT INITIALLY FOUND~~

their way into the courtroom have subsequently fallen into disfavor; that is, the Frye test, by talking about acceptance in the field, encouraged the formation of these coteries of self-styled experts; and the manual notes that such things as voice print identification and parafin tests have fallen out of use? Why? Because we know more now.

~~How does that relate, then, to hair? I hope that I~~ heard the Government make a concession, but perhaps not.

THE COURT: Well, what I heard -- and I don't think -- is they're not going to offer this type of opinion that this hair came from that head.

up, I think I know the source of the confusion here.

THE COURT: Yeah, but that's what you said; right?

MR. ORENSTEIN: In one of our summaries we made an allusion to the fact that there would be testimony of identification, and the summary itself was a mistake. The report by the expert spoke only in terms of consistency. And

MR. TIGAR: So the Government is withdrawing Conclusions 3 and 5 in Special Agent Fram's report that was furnished to us on the 3rd of August and is attached to our motion.

THE COURT: Is that right.

MR. ORENSTEIN: We're amending it to say it's consistent with, rather than an identification; and the testimony that we'll be offering.

THE COURT: All right.

MR. TIGAR: Then, your Honor, we still have an objection, because "consistent with" represents an expression of opinion.

Now, hair evidence is different from handwriting; that

is to say, we all look at handwriting. We look at our signatures, we recognize or don't recognize what we wrote before. The hair person is going to get up here and say that there are certain shaft thickness, cortical fusi. He is going to use a lot of words and concepts that are beyond the ken of lay people who haven't done this study. Thus, the patina of expertise is there.

And even the conclusion "consistent with," your Honor, rests upon no valid scientific basis; that is to say, our conclusion is that this is junk science. To say other than by using DNA -- that is, pulling out by the roots and using DNA, which is not what was done here, is to look for consistencies that have -- that are meaningless in the sense that they have no scientific basis that gives them any meaning whatever.

And it -- even the terminology and the technique used

gives this false aura of science to matters. It's like -- well, I use an analogy, your Honor: The Romans and the Etruscans, in order to decide whether to build a building, had

and they had scientists called "haruspex." And there was extensive literature about it; and they could prove that the livers of animals sacrificed at good buildings matched the liver of the animal sacrificed for the building they proposed to build; and so therefore, the liver of these two chickens that were killed at different times were consistent with each

Now, did we not understand what Daubert teaches us -- that is to say, that these are matters of knowledge and not precedent -- we would still be locating buildings based on these kinds of sacrifices.

The point is that Agent Fram isn't testifying about

anything that has the slightest validity. And I go beyond

suppose we amend the conclusion: Hair on blanket found in McVeigh's Noble County Jail cell is consistent with a hair from Terry Nichols. Now, we know that Terry Nichols wasn't ever in the Noble County Jail cell. We know that Terry Nichols --

THE COURT: Well, let me just interrupt you for a moment. I think "consistent with" is still something different from "these are the comparisons that I made and they show --

you know, these are the consistent comparisons."

MR. TIGAR: Yes, your Honor.

THE COURT: And he can testify about that. That's different from saying it's the same person.

MR. TIGAR: It is different, your Honor; but our objection is still a Daubert objection.

Let me use as an example an explosive residue. There, you read a machine. The machine says that the peak I got from this is consistent with the presence of ammonium nitrate. We can't say "identified as." After all, there could be other things that do it that are -- that could cause the same kind of a peak. But your Honor, that process is still science. There has to be a methodology that tells us that every time a machine registers a certain kind of peak, it gives us something that is consistent with any one of a given number of chemical compounds.

And if we found, as we will get to when we talk about Agent Burmeister, that in fact the silicone peak on the machine is way down in the noise, then we might have a scientific objection.

But my point is just as the "consistent with," which the Government is going to rely on in the explosive residue

area, represents a form of science, "consistent with" here represents a claim by a man who says, "I can say that because I'm a scientist. I can say 'consistent with.' I'm better at

that than the average person who just pulls a couple of hairs from people's heads and looks at them under a microscope."

So with all respect, your Honor, even with the Government's retreat, the underlying question, is this kind of hair comparison junk science or not -- that inquiry in our respectful submission still has to be made, because here is a witness testifying not on the basis of personal knowledge but on the basis of characteristics that he says are sufficiently common or individual. That's the two sides of the coin, to make it possible to say "consistent with." Otherwise, your Honor, all hair would be the same.

So in our respectful submission, that still would require a foundational showing. And there is a methodology there; and because there is a methodology, that foundational showing must be consistent with Daubert.

THE COURT: All right.

MR. TIGAR: One more thing, your Honor. This is one of these "Why do you need it?" These two people know each other. They know each other for a long time. There is plenty of evidence as to what sorts of contacts they have. The Noble County Jail cell blanket evidence seems to me to be such a stretch under any circumstances as to wonder, you know, why are we doing this?

And I would add just one thing: Even the method of collection, your Honor -- that is, they take a vacuum cleaner

and vacuum the blanket, with no evidence that that procedure has any validity whatever. I mean, maybe their vacuum cleaner looks different from my vacuum cleaner, your Honor, in terms of having a filter cleaned each time and there not being other hairs left, and so on; but that, too, leads to this fundamental question, why are we doing this here? It seems such a stretch.

MR. ORENSTEIN: Judge, may I respond to a couple things that came up?

THE COURT: You may.

PLAINTIFF'S SURREBUTTAL ARGUMENT

RE HANDWRITING AND HAIR EVIDENCE

MR. ORENSTEIN: And I guess let me start by responding to the last point we heard. Why do we need it? Because we don't get to ask the jury, When have you heard enough evidence to vote guilty? We have to prove our case beyond a reasonable doubt; and we should be given the latitude consistent with the rules of evidence, of course, to prove it in the way that we think best.

And I don't think that's anything more than a rhetorical point that's being made, you know, as to why we need it.

But a couple things that Ms. Merritt and Mr. Tigar said that I think are worth responding to. It's twice now that Ms. Merritt has, I think, made a fundamental misreading of the Kam study; and it's something that may be the source of a

hearing or not, depending on what you decide. I think it's, for purposes of clarity of the record -- it's worth addressing.

The incentive and penalty structure that Professor Kam

and his colleagues put together simply did not encourage guessing. There was a penalty of $25 -- the test subjects, the nonprofessionals, would get 25 --

THE COURT: I don't want to deal with that study unless I have to. I guess I have to, if you're going to proffer or expect to offer at trial the opinion that the same person wrote two documents, so . . .

MR. ORENSTEIN: Without rehashing it, that's not necessarily true, if you accept our arguments about 901(b)(3).

THE COURT: I don't.

MR. ORENSTEIN: And the point I'd like to respond to -- Mr. Tigar's point is with respect to Section 1731, handwriting must be proved. Of course it must. And this is one way of proving it authorized by Congress.

But again, the point of -- that this has to satisfy the Daubert standards because it employs a methodology I think is once again getting into the area where your Honor has noted before that Daubert is being used loosely. Daubert said where there is a science being used, a scientific basis of knowledge, then there are some factors that we use; otherwise it's the traditional reliability standards that Compton talks about. And Compton said the district court should not use its

discretion to restrict viable theories of a party. So I think there is some blurring of the terms here; but beyond that, I think your Honor has our position.

MS. MERRITT: Your Honor, can I add one thing?

THE COURT: Yes.

DEFENDANT MCVEIGH'S FURTHER ARGUMENT
RE HANDWRITING AND HAIR EVIDENCE

MS. MERRITT: This has to do with the language "consistent with," which was brought up by Mr. Tigar and by the Court and as to what would be allowed to be testified. And I just wanted to point out that the -- there have been some standards formulated called Terminology for Expressing Conclusions of Forensic Document Examiners by the ASTM. They have not yet been approved but --

THE COURT: What's the ASTM?

MS. MERRITT: I believe I believe it's the American Society of Technological -- I forget what the M is. It's one of these -- it's one of the organizations that tries to make standards for these disciplines, and it's the most national one.

Anyway, I just wanted to point out that what they said --

THE COURT: Well, what are you saying about them; that they can have standards?

MS. MERRITT: I'm saying that they are proposing

standards.

THE COURT: Well, you know, why worry me with that?

MS. MERRITT: Because I want to point out what it says about "consistent with"; and what they do is they divide terminology into recommended -- terms that are recommended to be used and terms that are not. And they have moved "consistent with" from the recommended column to the column that says "deprecated and discouraged expression," because it says that, "To say that the known writing is consistent with the questioned writing has no intelligible meaning." And I just wanted to point that out.

THE COURT: Okay.

Well, we'll take a recess before we go to these other issues; but I'll tell you that my view of it is that you can have, you know, a witness who has done measurements and has supplied technology to make comparisons to testify about those comparisons, whether this is handwriting samples vs. documents, or whether it's hair. But to express the opinion that this

scientific knowledge that will authorize them to make that kind of an opinion, and you're going to have to prove that to me at another hearing; so that's my view of it: that there is a difference between, you know, scientific knowledge and technical skills and tools, the use of laboratory tools and so forth. And therein lies the difference.

So I think the Government has to tell us whether

do with respect to the handwriting but not to hair. Reconsider that. If you still want to do that, then we'll have to have such a hearing on handwriting.

20 minutes. Recess.

(Recess at 10:17 a.m.)

(Reconvened at 10:37 a.m.)

All right. Our next -- our next issue is, what, the explosive residue?

MR. JONES: Your Honor, before we do that, just so the record is complete, if I may, we have adopted Mr. Tigar's briefs and the position with respect to the tool marks and Linda Jones.

THE COURT: All right. Well, the tool marks is much the same thing, I would think; that is to say, there's a difference between, again, as with ballistics in showing enlargements from the microscope pictures or prints of the

microscope pictures of the striations and all of those things versus this was one and the same tool.

DEFENDANT NICHOLS' ARGUMENT
RE TOOL MARK AND EXPLOSIVES EVIDENCE

MR. TIGAR: Yes, Your Honor, we -- certainly we will not have an objection to the Government showing microscopic or

other photographic evidence of the interior of the lock and of the drill bit with which the comparison was made. That doesn't seem to us to involve anything other than taking pictures and magnifying things.

THE COURT: Right.

MR. TIGAR: The Government's conclusion with respect to tool marks is a tool mark on a drill lock from Marion, Kansas, identified as a mark produced by a drill bit; that is, they propose to have the expert come to a conclusion of identity. Now, ballistics does have a -- there's a recognized body of scientific knowledge out there. The problem with tool mark identifications, as our brief points out, is that there isn't any. And indeed, in our Prong 2 brief, we quote from the protocol that we later received that was Bates stamped and it's in the record. And what the tool mark examiner is told to do is look through the microscope, make sure that your equipment is clean, and then draw your own conclusions.

Well, that's rather like a manual on how to drive a car: Get in car, turn on ignition, start car, don't run into anything. There simply is no body of scientific knowledge that supports the drawing of the conclusion. Now, the Government tries to avoid this by what we respectfully suggest is a three shells and no pea linguistic game; that is, the Government says we escape from Daubert because it isn't scientific.

Well, as I said earlier -- and the Court can accept,

obviously, or reject that idea -- under Compton, there is a methodology there. If there is a methodology there that leads the expert to this conclusion, then the Daubert-type analysis, as pointed out in these other cases that we cited, is applicable; that is to say, there is a foundational question here: Can this person be untethered from the personal knowledge requirement so as to opine on this particular identity as opposed to just showing us a bunch of pictures?

It's particularly troublesome here, Your Honor, because the other scientific evidence produced by the government, albeit belatedly, contradicts the evidence of this expert. Now, ordinarily, we'd say, Gee, isn't that for the jury to look at? But where the other evidence shows that the tool mark identification person might not have it right, we are doubly driven, it seems to us, to require some foundational showing. And the evidence to which I refer is the Oakridge Laboratory which shows that the brass shavings in the chuck of the drill do not match the brass from the lock. So under those circumstances, we think that qualification is required. That's our position, your Honor.

It's, again, this question of what do you have to show by way of foundation to permit someone to testify under Rule 702 once you get beyond this basic notion of now I'm going to show you some pictures. So that is our position on tool mark evidence.

Would your Honor like me to address the explosive residue question?

THE COURT: Yes, go ahead.

MR. TIGAR: Explosive residue is addressed by the McVeigh trial team more as a Prong 2 issue than as a Prong 1. We have taken it on Prongs 1 and 2. And I want to focus here on two bits of evidence that it seems to us make this a Prong 1 inquiry. The first is the report of Linda Jones, that she is a British person. She says she's been in a lot of places where things have been blown up. The Government has not assured us that she was not present or will not rely on the New Mexico blast. That is a matter that is going to have to be addressed by the Government.

But Linda Jones does not claim to be a person who examined the physical evidence, herself, microscopically or scientifically. Rather she got reports from Mr. Burmeister. Those are the reports on which Mr. David Williams was principal examiner. In addition to that, she examined videotapes and examined pieces of evidence, came to Denver, looked at them. She is in the position, your Honor, of a accidentologist. That is a person who sits astride a body of knowledge which is indisputably scientific and wants to draw an overall conclusion about how this event came to be.

Well, accidentologist-type evidence, like reconstruction-type evidence, as the Tenth Circuit pointed out

in Robinson, does have a methodology. And because the accidentologist is at so many steps removed from the primary gathering of evidence, there are special dangers about such testimony. Miss Jones wants to say that this device was, in her opinion, a relatively simple ammonium nitrate, fuel oil

device of several tons.

Now, the problem with that is that she doesn't tell us by what methodology she excludes other conclusions. That is, she doesn't tell us how it -- what it is that she studied, what books she read, what peer review there is that permits a person to give such an opinion. That's particularly troublesome because she couches her opinion in an apparent effort to avoid those methodological problems by saying that the explosion is consistent with, for example, such a device.

Well, there comes a point, your Honor, at which her attempt to retreat from her methodological insufficiency makes her testimony so unreliable as to be excluded as simply mere speculation and not at all helpful to the jury. So she's caught between those two poles. What I respectfully suggest we need is if we're going to have this kind of accidentologist overview, there's got to be some showing that it's reliable.

Second part --

THE COURT: What would that be? I'm struggling to see what evidence would support an opinion within your view of what's required.

MR. TIGAR: We would ask Ms. Jones, for example, Have you ever studied a scene, a bomb scene that is equivalent to this in any material respect? She's done a lot of car bombs and she's looked at them, but she's remarkably unspecific about that. Is there literature, Miss Jones, about the study of these scenes?

THE COURT: You're looking for identifying characteristics of a particular device?

MR. TIGAR: Yes, your Honor, identifying

characteristics and to the exclusion of other kinds of devices. Remember, your Honor, unless the Government can prove to the satisfaction of this jury that this device was made with things to which these defendants had access and were known to deal, then the Government's case is seriously weakened. So, yes, we've got to inquire whether she's in a position to draw the sorts of conclusions that she draws from this, you know, position of reviewing the evidence. And I think it's particularly important, your Honor, that methodology is all.

She claims to be a forensics chemist with a great deal of experience, but she doesn't focus on what skills, what scientific principles underlie the conclusions that she wants to give you. The British forensic people in bombing cases don't come to the court with a clean record. The people who brought you the Gilford 4 are on the march again. And I think there is this need to look at the evidence. Let me take it out

of this context.

THE COURT: Why is that a Daubert one, first prong instead of second prong?

MR. TIGAR: Because, your Honor, in Robinson, which is the grade crossing case, there the Court dealt with two sets of issues. One was the video re-creation, and there is a great deal of discussion about that. And I know it was Judge Bright sitting by designation, your Honor, but he was a Tenth Circuit judge for a day, so I think we have to pay attention.

THE COURT: Also was a distinguished Eighth Circuit judge.

MR. TIGAR: Yes, your Honor, and he cited his own treatise apparently in support of his conclusion which adds additional weight to what he was to tell.

But the second part of the Robinson analysis was this person was an accidentologist who wanted to tell us, based on a review of all the physical evidence at the scene, how the train hit the car. And the railroad had one, too, because there is a real dispute about whether the person in the vehicle that got hit had violated the rules about the grade crossing barriers.

Accidentologist testimony, with which I trust the Court is familiar in these cases, comes under particular Daubert scrutiny because of the risk that from so small a percentage of scientific inquiry, the accidentologist wishes to make so great a leap to conclusions about how the thing must

have happened. So I can't argue it any more eloquently than Judge Bright, and I would be a temerarious man to try it. But I think the Court of Appeals says in Robinson, Wherever you have somebody who looks like an accidentologist, Daubert controls.

Now, there's a second part of this: The Government, in evidence that we have moved to exclude on the ground that it came late and of suspicious provenance at that, has now got Mr. Burmeister testifying about ammonium nitrate residue on the very same piece of physical evidence that Linda Jones bases her conclusion on. That's this Q507. It's a piece of the Ryder truck body.

And what Mr. Burmeister does is after having in May 9, 1995, concluded there is ammonium nitrate on this piece, Q507, he then goes back and looks at it again in the fall of '96 because ICI, a manufacturer of ammonium nitrate, gave him certain information. And Mr. Burmeister goes back to certain -- to his original conclusions. And what the

Government wants to do is have him say that the ammonium nitrate on this board is ammonium nitrate that originated in prills, not in some other forms, because as the Government must concede ammonium nitrate is present in literally hundreds, the undisputed evidence shows, of explosive compounds.

The question, therefore, is: By what methodology can Mr. Burmeister, who now -- who supports Ms. Jones as well --

she's essential, he's essential to her conclusions -- by what methodology does Mr. Burmeister come to this conclusion? And it turns out, your Honor, that the methodology is fatally flawed. First, of course, all ammonium nitrate prill manufacturers use some combination of chemicals to coat the ammonium nitrate because its too hydroscopic, it puddles, it absorbs water. 90 percent of the ammonium nitrate is going to have traces of aluminum, sulfur and silicon.

But when you look at Burmeister's lab reports dating back to May '95 -- on which, by the way, David Williams is principal examiner; Burmeister and Williams' names are both on there -- you find that the traces of these chemicals to which the Government now attaches such enormous significance in this belated production, the traces of these chemicals hardly rise above the background noise of the instrument. And we say that those conclusions have got to be subject to a Daubert analysis. We don't have any problem with the ammonium nitrate peak. The ammonium nitrate peak on the machine, that's routinely within the realm of what can be detected in a laboratory. But Mr. Burmeister is going way out on a limb by testifying about the significance of relatively small peaks on the machine that are consistent with background noise.

Now, that would also relate to Prong 2 because this

kind of relatively small peak could result from the machine having been improperly calibrated or the little stub or card

that's put in to do the read not having been properly inserted or prepared. What we therefore have, your Honor, is that the Government has built an enormous edifice of speculation upon a small piece of plastic-covered plywood recovered at the scene by someone who cannot say that it was deposited there by the blast, how long it laid there, what water washed over it to cause whatever was on it to dissolve and recrystallize. This edifice of speculation is built by two people: Linda Jones, who is an accidentologist with a British accent and some experience in car bombs, and by Steven Burmeister, whose work comes out of the laboratory itself discredited for reasons I need not go into here, but who is making his conclusions based upon what our supplemental submission shows is invalid science. For that reason, we think that the Court's time would be well served by having a hearing at which the Government would have to establish foundation for the submission of this evidence.

THE COURT: All right.

Mr. Orenstein.

PLAINTIFF'S ARGUMENT RE TOOL MARK AND EXPLOSIVES EVIDENCE

MR. ORENSTEIN: Thank you, Judge. I'll address each of the, I guess three areas now, tool marks, explosives, and to the extent Agent Burmeister's findings are now in issue. And I guess, if you don't mind, it will easier for me to start with Agent Burmeister because that's the freshest in my mind.

THE COURT: All right.

MR. ORENSTEIN: What strikes me first of all is I'm not sure if the attack on Agent Burmeister makes a lot of sense. They're claiming there are problems with the lab; but after a tremendous amount of discovery, there has been no claim that what Agent Burmeister is doing is bad science or he's in any way disqualified. Quite the opposite.

But to the extent that they're saying -- Mr. Tigar is saying, rather -- that his methodology is fatally flawed because the peaks that he's reading are barely above background noise, that strikes me as a classic jury argument, the sort of thing that the Daubert court said should be left to the adversarial process. And if you'll excuse me for a moment while I get some notes.

The Daubert court specifically addressed this when they said, you know, there's some concern that in abandoning the Frye general acceptance test, that we're going to have a free-for-all of speculation and unsupported pseudoscientific assertions. And they said, no, that vigorous cross-examination, presentation of contrary evidence and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky by admissible evidence. And it seems to me that the court in talking about reliability -- and Compton did the same thing -- said that these are areas that should be challenged by the adversarial process in front of the jury and that a court should not use

its discretion in this way to keep evidence from the jury.

One more thing about Burmeister, just to clarify what it is that we're talking about here. It's possible to get the misimpression -- I'm sure it wasn't intentional -- that Agent

Burmeister went back to do new findings after learning about the coating on the prill that's used in ammonium nitrate. What he did was he had found back in 1995 that, in addition to finding ammonium nitrate indicated in his readings, there were some certain elements, and he didn't know what significance to attribute to that.

Later he found out that those elements are used by an ammonium nitrate prill manufacturer in the coating of their prills. So that's the conclusion that he drew, that those trace elements were consistent with having been in a prill but not consistent with ammonium nitrate in dynamite, for example, because those elements wouldn't be there.

But this seems to me --

THE COURT: Did he run more tests, then, or was that just in explanation of the tests previously run and the existence of these elements that he couldn't account for before?

MR. ORENSTEIN: Well, the existence for the elements was something that he already had.

THE COURT: Yeah, that's what I'm saying. And he didn't know where they came from.

MR. ORENSTEIN: Right. And I think after he learned that those elements are used by the -- company's name is ICI. ICI manufactures ammonium nitrate prills, and they have in their coating these particular elements. And Miss Wilkinson can help me with the facts of what he did at that point.

MS. WILKINSON: He went to ICI, your Honor, did additional testing with ICI to determine the contents of those elements in their prills and in some other prills that are

found at Mr. Nichols' house and compared those with the elements he already knew existed on the crystals on Q507 and was able to determine that therefore it's more likely these crystals came from a prill instead of from -- in their pure crystalline structure, which you would have found in a dynamite or in an emulsion or some other type of explosive. But it's based on his scientific testing of the materials.

MR. ORENSTEIN: I think in answer to your question, though, it's not that there's additional testing of Q507.

THE COURT: No, no, I didn't mean that.

MR. ORENSTEIN: And I guess the only other basis that they're asserting for excluding this is not so much Daubert first prong challenge but that it's belatedly turned over. I think that's an ill-founded objection from someone who is not going to trial for several months. But that's the subject of a separate motion, and I'm sure the Court will give us an opportunity to respond to their brief.

Let me turn, proceeding backwards, I guess, to Linda Jones. And I think it's -- it's an unfortunate analogy to say she's an accidentologist with a British accent, and I'm not sure what the British accent part of it tells the Court. But she's not an accidentologist; and I think if there's a comparison to be made, it's most like the fire chief whose testimony was approved in the Muldrow case. A fire chief and an explosives analyst do very similar things. They have a background that's both scientific and experiential. They know the chemical and physical properties of certain physical substances. The fire chief knows about accelerants. The explosives analyst knows about ammonium nitrate, other explosives. They both have experience in seeing what the

effects of the use of those substances are. And based on their experience and their knowledge of physical properties, they can examine the evidence left by a fire or an explosion and tell you things about what happened.

And the Court in Muldrow approved the use, said it was not erroneous to admit this kind of testimony. So -- and it's also in some ways like what the Court said in Compton with respect to the engineer. It's not something that you have to have done before, exactly like you're doing it now. If you have general training in this area, it's appropriate to let the jury hear this evidence and to let the two parties fight it out as to its significance.

As to Ms. Jones' qualifications to do this, first it's not a first prong type of challenge. But Ms. Jones is the leading British expert in explosive analysis. She's been doing this in one form or another for over 23 years. She's been a forensic examiner since 1985. She's a fellow in the Royal Society of Chemistry. She's a member of the Institute of Explosive Engineers for several years. She's authoring, I believe, a chapter in a textbook about forensic aspects of explosions. This is a qualified expert. And obviously if they want to challenge her qualifications, we can address that either in voir dire, at a pretrial hearing, but it's certainly not the sort of thing that is a first prong objection which is can this ever properly be the subject of expert testimony at a trial.

With respect to tool marks, I guess a couple of factual things need to be corrected. The metallurgical examination, as I understand it, showed that there was a --

THE COURT: Let me just back up a second. Is her ultimate conclusion expected to be that after looking at all of these things, my view is that this explosion and the consequences of it are consistent with an ammonium nitrate, fuel oil device?

MR. ORENSTEIN: She will not say ammonium nitrate, fuel oil, is my understanding. Certainly, she will -- Miss Wilkinson will correct me if I'm misstating it.

THE COURT: What's she going to say?

MS. WILKINSON: She's going to say it was one device placed in the truck that is consistent with a ammonium nitrate-based explosive.

THE COURT: Okay.

MR. ORENSTEIN: The difference being not the fuel oil part of it is not her conclusion.

THE COURT: It's not?

MS. WILKINSON: She is not going to ultimately say it was an ANFO bomb based on her scientific analysis and based on her experience.

MR. ORENSTEIN: Your Honor, unless the Court has additional questions about Miss Jones, I'm going to proceed backwards to tool mark.

THE COURT: Go ahead.

MR. ORENSTEIN: She will not say ammonium nitrate, fuel oil, is my understanding. Certainly she -- and Miss Wilkinson will correct me if I'm misstating it.

Or do you just want to state it directly?

THE COURT: What's she going to say?

MS. WILKINSON: She's going to say, your Honor, that it was one device placed in the truck that is consistent with

an ammonium nitrate-based explosive.

THE COURT: Okay.

MR. ORENSTEIN: The difference between -- not -- the

fuel oil part of it is not part of her conclusion.

THE COURT: It's not?

MS. WILKINSON: She is not going to ultimately say it was an ANFO bomb based on her scientific analysis and her experience.

MR. ORENSTEIN: Unless the Court has additional questions about Miss Jones, I'd like to proceed --

THE COURT: Go ahead.

MR. ORENSTEIN: -- backwards to tool mark.

There is an objection that, first of all, we should be very careful about letting this in because it's wrong. Again, that violates I think the basic precept of Daubert and Compton, which is we don't focus on conclusions at this juncture, we focus on the methodology. But to the extent that there is an assertion that metal -- independent metallurgical examination shows that they're inconsistent, that's not the case, well --

THE COURT: Well, but here's the thing, too. Again getting back to my method of analysis, which is what's the opinion we're talking about; and there's a difference in my mind between saying, well, as a result of my comparisons here and analysis, this drill made this mark versus these marks with this type of drill is consistent with this type of drill.

MR. ORENSTEIN: Well, our -- the conclusion that we're offering is that this drill made this mark.

THE COURT: All right. You're doing it like a

ballistics test, that this slug came from this gun.

MR. ORENSTEIN: It's the same type of principle in that the drill leaves behind individual characteristics that you can compare and contrast to other drills. And the marks allow the examiner to say, you know, This drill made this mark. So that's what we're offering. And I guess the response that I have to Mr. Tigar is that --

THE COURT: Every electric drill, every Black & Decker drill, every Makita drill or something leaves unique characteristic marks?

MR. ORENSTEIN: I don't personally claim to be an expert in this obviously, but my understanding of it is that, you know, any kind of metal --

THE COURT: I guess we're talking about bits, actually.

MR. ORENSTEIN: The drill bit -- is going to have some -- some tiny imperfections or differences from one drill bit to the next and you can compare them and say, Look, this is the -- the imperfections that we see on this bit --

THE COURT: And can't be found in any other drill?

MR. ORENSTEIN: Well, again, this is an area where --

THE COURT: Where's the science of that? That's the question here.

MR. ORENSTEIN: And my position, your Honor, would be that this is not -- it's not the case that every opinion has to

be backed up by science. It can --

THE COURT: It depends on what the opinion is.

MR. ORENSTEIN: Right, but even --

THE COURT: But the opinion here has to be rooted in the notion that there are individual characteristics of a drill bit.

MR. ORENSTEIN: Right, and that can be based on one of two things. And I think that depending on which it's based on, you have different arguments about its weight. If it's based on science -- in other words, there's a scientific law that no two drill bits can be alike --

THE COURT: Exactly.

MR. ORENSTEIN: -- that's one thing. And that would certainly --

THE COURT: Which you're not suggesting is the case.

MR. ORENSTEIN: I'm not suggesting -- I don't want to speak out of turn, though, because it may be that I'm misperceiving what the expert says. But let's assume for the moment that that's not what we're saying, that it's a matter of experience. I would argue to the Court -- and I think this is consistent with Compton -- where the engineer renders his opinion about what caused the event, not based on science, not based on the idea that there are scientific principles which say this must have happened, but based on his background, his experience as an engineer to say that in my experience this is

likely what caused this event.

THE COURT: Well, that's quite a different thing from saying that in my experience every Black & Decker drill bit is different from every other.

MR. ORENSTEIN: Well, it's not different from saying, In my experience, I haven't seen this characteristic repeated. And it's the difference between saying, The empirical data that

I have is limited but it does support my conclusion, and saying, The empirical data that I have must be generated by scientific truths. I don't think that either Compton or Daubert says that you can only admit the latter kind of testimony.

THE COURT: I think this is a lot like handwriting.

MR. ORENSTEIN: I agree that the principles we're talking about here are the same, that it's a matter of can experience --

THE COURT: Or maybe hair sample is better because you are contending the handwriting has unique individual characteristics.

MR. ORENSTEIN: Right, but I think -- the broader point I think is that to a greater or lesser extent in all of these disciplines, you take an expert who, based on experience in looking at these characteristics over time, can say, In my experience, this is something that's unique or it's not. Now --

THE COURT: But, you know, it really depends. Like you have a chisel that has been used to jimmy a door.

MR. ORENSTEIN: Uh-huh.

THE COURT: And that particular chisel has an imperfection in it because of its prior use and so forth, and you can match that against a mark on the doorjamb and say that chisel went in there.

MR. ORENSTEIN: Uh-huh.

THE COURT: That's quite a bit different from saying that every drill bit has a different, unique characteristics. Now, if there's something wrong with this particular one, I don't know. Is that his testimony, that this one has a piece

of metal missing or something like that?

MS. WILKINSON: Your Honor, that's what he is going to say, that it has unique marks on the drill bit that leave a unique impression in the lock. So the way you phrased perhaps is the way we should phrase our opinion. That's what he's going to say.

THE COURT: Okay.

MR. ORENSTEIN: Yes, and based on that, I think it's like the chisel analogy, the expert is saying --

THE COURT: Yeah, this one can do it because of these unique characteristics of this particular one --

MR. ORENSTEIN: Right.

THE COURT: -- and that's shown by the marks. That's

quite a different thing --

MR. ORENSTEIN: That's what we're offering --

THE COURT: -- by itself to know exactly what the opinion is.

MR. ORENSTEIN: So unless the Court has additional questions on the other areas that we've been discussing?

THE COURT: Okay.

Mr. Tigar.

MS. WILKINSON: Your Honor, could I just clarify one thing that I said to you about the Miss Jones conclusion?

THE COURT: Come on up and clarify it.

MS. WILKINSON: Thank you. When you asked me whether she would be concluding whether it was an ANFO bomb, I said, no, but she's just going to say that it's consistent with an ammonium nitrate-based explosive. That also means that it's consistent with an ANFO bomb. It's just based on her

experience and the science. She can only conclude, when I think the Court is alluding to is proper, that it's consistent with the group of explosives that are ammonium nitrate based of a midrange velocity.

THE COURT: And when you say the midrange velocity, that relates to the quantum of ammonium nitrate involved?

MS. WILKINSON: No, it refers to the supersonic wave of the detonation of the explosive; in other words, the velocity of detonation, how fast the explosive goes out.

THE COURT: Is she going to talk about that, you know, these results show this size of, this explosive device?

MS. WILKINSON: Yes, she opines within a range, within several tons of the explosive, and she's going to say that the damage is consistent with this midrange velocity which shows this pushing and heaving versus a higher explosive which shows shattering, which is more of a brisant-type explosive, a military explosive. She is doing what the Court said, she's eliminating some of the points, but she's not going beyond their expertise to say, I can tell you without a doubt it was an ANFO bomb. And she's just limiting it to that category of explosives based on all these factors that we've discussed plus others.

THE COURT: All right. Mr. Tigar.

DEFENDANT NICHOLS' REBUTTAL ARGUMENT
RE TOOL MARK AND EXPLOXIVES EVIDENCE

MR. TIGAR: I am grateful for the clarification because Miss Jones does speak in her report that's attached to our motion of ammonium nitrate being mixed with a suitable fuel oil and termed ANFO, and here I think is the Prong 1 issue: Is she qualified to tell us that; that is, on the one hand, there

are low-velocity --

THE COURT: I'm going to stay with what Ms. Wilkinson has said in clarification of the opinion to be expected from the witness. So let's deal with that.

MR. TIGAR: Yes. If that is her --

THE COURT: That's why we hold hearings --

MR. TIGAR: Yes.

THE COURT: -- you know, to get these things cleared up.

MR. TIGAR: It is our contention, your Honor, that there is no showing of a scientific methodology that permits her to make this conclusion; that is, to distinguish between, based on the material presented to her, the relative low performance of a gunpowder-type explosive and the relatively high velocity in terms of feet per second out from the blast center of a military-type explosive; that is, she is making a conclusion, but she isn't telling us what methodology permits her to say that this is a midrange explosive, something in the 13,000-foot-per-second range. And that is only one of the conclusions she expresses.

THE COURT: I don't know what you would require of the witness.

MR. TIGAR: Well, one of things we found in the depositions we were able to take, your Honor, is that nobody has any experience in a real-life sense with an explosion of this magnitude. There's nothing to compare it to. Now, that doesn't mean that the Government can't put on its case. Of course it can. But it does mean that absent some prior body of knowledge on the basis of which Ms. Jones can opine, we need to

have a hearing to determine whether or not her qualifications permit her to make this sort of reconstruction based on the evidence that was available to her.

THE COURT: Well, I would assume part of this is simply extrapolation from what is known about other devices with other results.

MR. TIGAR: Well --

THE COURT: I mean, can't you just -- it seems to me that it's simply logic that you can say that if certain quantum can do this, then if you increase the magnitude by three, we may have this result.

MR. TIGAR: That may very well be, your Honor, and I'm prepared to accept that. However, with all respect, neither the Court nor counsel can say whether or not a simple arithmetic progression of that kind exists or whether such generalizations are appropriate. And this obviously comes up in an analogous context in Daubert. We may swear a pediatrician to testify to some conclusion about some small cell cancer. Well, the pediatrician can reason out the sense of the thing, but unless that pediatrician can show us that he or she has some scientific basis for making this conclusion, then the evidence wouldn't come in. All we're saying is that that's a part of the foundational requirement that has to be shown.

Now, the fire chief case that Mr. Orenstein cited, if

you will recall, is a perfect example of the distinction. The fire chief there was permitted to testify that the rekindling

of the blaze in the burned house had to have come from some source other than spontaneity, thus supporting a conclusion of arson, because, as the Court recounted, thousands of gallons of water had been poured on the blaze. And he said, Gee, in my experience, it wouldn't just start up again after we poured all that water on it, unless somebody had put something in there to make it do that.

That sort of a simple conclusion, based on the 28 years of experience of the fire chief there, is a far cry from the complex reports that we have from Miss Jones, and that is what we would say is the distinction.

Now, with respect to Mr. Burmeister, in our supplemental motion, we point out that Mr. Burmeister did not indeed go back to his original analysis of the Q-507, but he did go meet with ICI, and ICI did the analysis that permits him to make his comparison. Here's what they say about their own methodology that Mr. Burmeister adopts: It is not our normal practice to identify unknown ammonium nitrate samples. We normally know from where the sample has originated. The testing methodology was therefore developed as we proceeded. We were also limited by the amount of material available for testing.

Now, that, your Honor, is a voluntary petition in

intellectual bankruptcy with respect to the conclusions that Mr. Burmeister offers.

And finally with respect to tool marks. Of course every drill bit leaves some kind of a mark. Now, Ms. Wilkinson says this expert is going to say there's something unique about this drill bit. Oh, there is? The drill bit was allegedly

used to drill a lock on or about October 1, 1994. The drill bit was thereafter in a box of drill bits with a Makita drill. The drill bit was tested in April or May of 1995 after having been apparently in continuous use. Why do we say apparently in continuous use? Because the chuck of the drill has these metal shavings that don't match the lock, so it's been used to drill other things.

How an expert can six months after the fact come to this conclusion of uniqueness with respect to this tool does, it seems to us, require some foundation. After all, a drill bit is not like a chisel, nor is it like a bullet. A bullet leaves the chamber, goes out the barrel, and spins. And thus by looking at the rifling characteristics and other characteristics, you can come to a conclusion. A drill goes in and out; and if you're like me, your Honor, trying to drill through something thick, it goes in, and then you pull it out to see whether you got it all the way through, and then you put it back in, and then you spit on it or dip it in water and then put it back. It's not exactly the same sort of phenomenon.

So this is one of these things in which I would say, Gee, how did he do that, your Honor, how is he able to offer that conclusion? And once we get beyond photographs, we say that's methodology.

THE COURT: Yes.

MR. ORENSTEIN: With respect to the, with respect to the tool marks, what Mr. Tigar just went through expounding is, A, disputed, it's a factual matter, and I think his conclusions about the shavings or his beliefs about the shavings are incorrect; but that's more importantly, I think, classically the sort of thing that you would argue to a jury after

cross-examination, and I think that's the important point that we have to keep returning to because both Daubert and Compton talk about the fact that this is not a rule to exclude anything that isn't absolutely certain to be what the proponent says it is. It's a rule to make sure that the testimony rises above a certain floor where it's just total speculation or unsupported and then to let the adversarial system allow to jury to come to a conclusion.

The idea that one can't extrapolate from past experience, as you were talking about, I think is an unsupportable rule legally. It would essentially mean that for any particular size of a bomb, you get one free shot at using it before you can have an expert identify, and that can't be the law, and it's not the law under Daubert and Compton.

As to the, the complaint that ICI doesn't generally do this kind of testing, well, Agent Burmeister does, and again this is an area where the results of the test and the experience or not of the person doing it can be tested on cross-examination, but that's not the issue under Daubert.

THE COURT: Okay. Well, you know, in looking at the motions as I structure this argument, the question is whether the opinions and the evidence, the testimony that's described here in motions should be excluded at the threshold because Daubert excludes them. And my view of it is that it does not with respect to the tool marks and it does not with respect to the testimony, as I understand it, from Linda Jones about the explosive device and it does not with respect to the hair. Given my understanding of what's going to be offered. And of course I'm making a threshold ruling. There will be other

rulings made in the course of the trial. It may be that there won't be an adequate foundation and there will be other objections under the rules of evidence. But we're just looking at this as the threshold.

Now, with respect to the handwriting, I don't have any problem with what we've already discussed; that is, the comparisons made, the demonstration of similarity in strokes and all of that sort of thing. When it comes to expressing an opinion of identification with this handwriting, with this person, you'll have to show me more, if that's what you intend

to do, and if we're going to go forward on that, we'll need a hearing about the validity of the science of handwriting comparison to make an identification of the writer.

So, those are my rulings. We'll take up the matter of the jury pool. Mr. Jones.

DEFENDANT MCVEIGH'S ARGUMENT RE STATEWIDE JURY POOL

MR. JONES: May it please the Court, this matter has been the subject of discussions in chambers with the Government and with Mr. Nichols' counsel as we have tried under the Court's guidance to do the necessary planning leading towards the calling, empaneling, and selecting the jury and getting the trial under way. And the Court heard us in chambers, and in addition to that we filed this brief, so the Court is familiar with the contentions that we have made and the discussion that has occurred, and I don't wish to repeat them unnecessarily here. And so therefore I will be brief.

And let me also begin by, with candor to the Court saying that the Sixth Amendment does not require the relief that we are asking. So far as we understand the teachings of the relevant case law. Nor are we at this time making any

challenge to the district of Colorado jury selection plan. So I don't know that there is anything, and in fact, I'll go further than that, I don't think that the Court is required under the existing state of the statute, the plan, and the case law, to grant this motion. It is simply a question that I

believe is within the discretion of the Court and the Court has invited us to give our reasons why we feel that it would be more appropriate, more representative, and more fair to bring in a jury from the entire district rather than the 23 counties which compose the Denver division of the jury wheel.

I think that there are two reasons that we would argue to the Court. And one of those is I think less compelling as time goes on. The first was that frankly, we were concerned that when we came to the district of Colorado, that we would find the same type of massive and indeed unfair and prejudicial publicity here that we had to wrestle with in Oklahoma. Whether that's because Denver has a competitive press in that it has two morning newspapers and a highly competitive media market in this area or other reasons, I'm not qualified to speak. But it does seem to me that in carefully reviewing the material, even some that was submitted to the Court as late as last night, that there has been a balance, a willingness to present both editorially and even, if you will, in headline, an objective and fair balance of the respective views of the both sides as either they may have been shaped by counsel or by the reporters either for the press or for television and radio. As opposed to the situation that we found in Oklahoma in which for whatever reason, the overwhelming share of what was said was so one sided and so negative it was kind of like when I ran for

the United States Senate, you wondered why they even bothered

to count my votes or why we even bothered to have a trial in this case because guilt was so overwhelmingly presumed.

So while I address that and I point out to the Court that there is this overwhelming emphasis on newspaper circulation in the Denver division so that 75 percent of both The Denver Post and even higher of the Rocky Mountain News circulation is in this area and that the overwhelming portion of the television audiences in this area, to be frank with the Court, I think that is less important based upon the way things stand today. After all, the teachings of Sheppard vs. Maxwell and Estes and the other cases say that you don't have to empanel a jury that is ignorant, you don't have to empanel a jury that doesn't know anything about the case and you can even call jury people that have an opinion. The question is, are they willing to put aside the opinion and base it upon the evidence that they hear in court. And at least it occurs to us that where there is some type of balance or restraint, that that is a factor that we candidly have to recognize.

However, there is another, and I think more compelling argument, and I want to choose my words carefully here because I don't wish in any way to be offensive to anyone or to cause anyone any pain.

I noticed when I was shown the courtroom the other day that the Court has gone to extraordinary lengths to make this courtroom not just comfortable and solemn, but more

importantly, neutral, antiseptically neutral. Other than the

flag behind your Honor, there are none of the usual appointments, fixtures that we see in federal courtrooms such as the great seal of the United States or other things that indicate that this is a federal government building. And certainly no one can argue about the flag. Now, clearly we are in a federal building. And that's appropriate. I don't suggest that we hold this trial like the Scopes trial under the trees in the spring.

But nevertheless, my point is that that could not have been by accident. The charge against my client for which he stands accused is that because of his political philosophy or motivations, he planned and carried out an attack and killed federal employees in a federal building and specifically chose that federal building and to kill those federal employees because they were employees of the federal government or it was a federal government installation. That's the charge.

Now, if we were to try that case in an environment in which daily the jury was reminded in some inappropriate way that this was the federal government that was putting him on trial and, I say there inappropriate way, it would be of concern and the Court has, I think, legitimately addressed that concern even down to the design of this room.

But, the census data that is most readily available to us, Judge, shows that there are over or almost 50,000 employees

of the federal government that reside in the Denver division of the jury wheel, as opposed to 27,000 that reside in all other three districts, Grand Junction, Pueblo, and Durango, combined. So two-thirds of them are here. And the other third are spread over three districts.

Now, being a federal government employee does not in and of itself perhaps give a challenge for cause. But at least it's been my experience in trying cases for 30 years, and Mr. Ryan, I know, has had similar experience, that we used to find juries that consisted primarily of employees of Tinker Air Force Base and AT&T employees or Southwestern Bell because they encourage the people to serve on juries. And what I'm simply suggesting is that given the facts of this case, we run, it seems to me, a high risk -- the Court will have to determine whether the risk is acceptable or not -- that many of these people that are federal government employees will not want to sit on this case. And so therefore we have to have a sufficiently large pool that we can get people that will offset those that might at first glance not wish to participate.

The other thing is that this census data doesn't address the issue of state employees. And yet we have to remember that the facts of this case will show that not only was the Murrah building destroyed, but also the State of Oklahoma Water Resources Board and some of its employees were killed. Now, they may not correctly be mentioned in the

indictment here, but it will come out.

Well, clearly and while I don't have this precise statistics, since the state capital, the seat of Colorado's government is in the Denver division, then clearly most of the state employees in this state will live in the Denver division of the jury wheel.

We have addressed in our brief the question that we believe that the hardship factors are not relevant here. I know that it is a little more difficult, a little more inconvenient, and a little more expensive to enlarge the pool.

The other thing that I'm concerned about, and my information may be incorrect, and so if it is, I know that the Court will correct me. But I understand that almost no federal jury trials are held in these other three divisions, that it seems to be the preference of lawyers in those divisions to file their cases in the Denver division so that the jury is chosen from here. I do think that might impact upon the question of the representatives of the sample if the history of the plan here is that for all practical purposes, there aren't trials in the Grand Junction, Pueblo, and Durango divisions.

So we would ask the Court, for the reasons stated in our brief and which the Court has heard us graciously in chambers, to move the Court to enlarge the pool here -- well, I shouldn't say enlarge, because you haven't actually called the jury -- but to include the other three districts or at least

one more district -- I'm sorry -- one more division of the district in the pool from which the members of the jury panel will be summoned. All right.

THE COURT: All right. Mr. Ryan.

MR. RYAN: Good morning, your Honor.

THE COURT: Good morning.

PLAINTIFF'S ARGUMENT RE STATEWIDE JURY POOL

MR. RYAN: May it please the Court. Mr. McVeigh's brief cites and quotes from 11 federal cases, the Continental Congress, Andrew (sic) Hamilton's Federalist essays on the making of the Constitution, yet not one word of his brief speaks to any authority or even a compelling reason why this court should depart from the Court's normal practice of selecting jurors from the Denver division. Your Honor, I

intend to speak to five points.

First, Mr. McVeigh asked to be in Denver. To briefly review how we came to be here in this courtroom today, your Honor I know recalls the motion Mr. McVeigh's counsel filed to transfer the venue out of the state of Oklahoma. Counsel for Mr. McVeigh employed an expert consultant by the name of Dr. Penrod. You may remember Dr. Penrod who testified in Oklahoma City. He employed Dr. Penrod to conduct venue surveys and selected the cities of Albuquerque, Lawton, Denver, and Kansas City.

In argument to your Honor after the evidence was

heard, Mr. Jones on behalf of Mr. McVeigh stated, Denver was more fair, less biased than Tulsa or for that matter any city polled inside the Tenth Circuit. Counsel, Mr. Jones, stated that he was willing to accept the designation of Denver; and then Mr. Jones went on to say, to state the following with respect to the transfer to Denver: When you list the advantages of Denver, the fact that it is in the Tenth Circuit, the fact that the Denver division has a very large jury pool, and the fact that Denver has an experience of handling high-profile cases, et cetera, et cetera, et cetera, Mr. Jones, and Mr. McVeigh rather, knew very well what he was asking for, what he was asking this court to do, and now he has it and he's not satisfied.

Second, your Honor, although Mr. Jones has taken the sting out of this a little bit by what he said about the pretrial publicity, I was going to remark that, you know, this morning I was awakened in bed to Mr. Jones's voice on the AM station I was listening to, KOA, which is a 50,000-watt radio channel, the signal is carried all the way, at least in the

evenings from Red Lodge, Montana to Lubbock, Texas. Yesterday I opened Time magazine, and Mr. Jones was saying that his case was in better shape, that Tim, quote, Tim and I feel very good about our case. Last Friday, as I tried to go to sleep, I listened to Mr. Jones on CNN telling the Denver division and the world about the troubles of the case. In fact, your Honor,

in the space of one week, I listened to Mr. Jones's quotes from seven time zones all the way, all the way, your Honor, from newspapers in Idabel, Oklahoma, to a British newspaper, the London Sunday Times. I must confess, your Honor, I don't subscribe to that paper. It was shown to me.

But, your Honor, the reason Mr. McVeigh, of course, has retreated from the publicity angle is because Mr. McVeigh's counsel is the one who's created all the publicity and that is not a valid reason to expand the Court's normal practice outside the Denver division.

Your Honor, I was going to speak to the nature of the publicity, but since Mr. Jones has conceded that it has not been prejudicial, we'll not speak to my Point 3.

Your Honor, even if the publicity was in somehow, some fashion prejudicial, the numbers that Mr. McVeigh's counsel cites do not support their argument. I frankly had a difficult time deciphering the McVeigh brief on this point. It seemed that he misunderstood the fact that the Denver division had 23 counties, although I heard him today acknowledge that that was the case.

To say that the Denver television market extends to 72 percent of the state means nothing because 72 percent of the people in Denver -- excuse me, in Colorado live in the Denver

division. To say that the Denver Post circulation is 75 percent in the Denver division means nothing when 72 percent

of the people of Colorado live in the Denver division.

And similarly, his argument on federal employees absolutely makes no sense to me. The numbers he gave today or in his brief, your Honor, of 45,000 some odd federal employees in the Denver division versus 20 some thousand outside the Denver division shows the opposite of what Mr. McVeigh is arguing. It shows that there is a less, there is a less percentage of federal employees in the Denver division than there is in the state of Colorado. 62 percent of the federal employees in Colorado are in the Denver division. But 72 percent of the people are in the Denver division.

Your Honor, Mr. Jones speaks to, on page 9 of his brief, the McVeigh brief, cites that, quote, potential jurors outside of the Denver division are certain to have experiences with the federal government which differ from those of the Denver division residents and are important to this case. I don't know what that means. I don't know if the McVeigh defense is hoping to find a greater percentage of people outside Denver who hate the government and therefore would be good jurors for the defense. If that is the goal, your Honor, then it is not a goal we should strive to seek. We're, and I know your Honor is, committed to the notion of selecting jurors who can be fair and impartial, and their animus towards the government plays no part in these proceedings.

In short, your Honor, there is no valid reason to

depart from this court's practice of using jurors outside the Denver division. In conclusion, Mr. McVeigh's counsel speaks of the importance of public acceptance of the verdict in this case. To achieve that public acceptance, your Honor, we feel that the Court should not depart from its normal and customary practices. Staying with those time-honored practices is the way for this case to receive public acceptance that we all seek. Thank you, your Honor.

THE COURT: Thank you, Mr. Ryan.

Mr. Jones, do you have any reply?

DEFENDANT MCVEIGH'S REBUTTAL ARGUMENT RE STATEWIDE JURY POOL

MR. JONES: Just briefly, your Honor. Two points. First, I'm sure I'm sorry that Mr. Ryan's sleep was disturbed by me this morning. I assure him that I was not listening to myself on the radio when I awakened, but I'll leave it at that. I'm sorry I don't recognize KLA. I would say that I'll be glad to show Mr. Ryan my scrapbook of clippings from Jamie Gorelick, Weldon Kennedy, Louis Freeh, Scott Mendeloff, Mr. Hartzler, and Leesa Brown. But I don't think that's the issue.

The issue is, as Mr. Ryan and I have framed it, concerning where best the jury would come from. I will, however, say, in all deference, that I commend him for refining my earlier remarks to the Court which seemed to be inconsistent with what I am saying today, and I can only say to the Court that Senator Everett McKinley Dirksen said, Consistency is the

hobgoblin of small minds.

Thank you, your Honor.

THE COURT: I hope he gave attribution to who first said that.

MR. JONES: He did, your Honor.

RULING RE STATEWIDE JURY POOL

THE COURT: All right. I've reviewed the motion, and have also reviewed some information about the Denver division of the court and of course it's a misimpression, and I realize Mr. Jones, that you're aware of it, that the Denver division is Denver or even the six-county metropolitan area of Denver because it does indeed include 23 counties that range from the eastern border of the state to the northern border of the state and that cross the continental divide and include Lake County and Chaffee County and Grand County and as you look at it and looking at the census information you see that, first of all, the ratios that were mentioned by Mr. Ryan are correct, that indeed if you look at federal employees as compared with the population of the other divisions, there are more outside of Denver division than in Denver division in that ratio.

But I, you know, have reflected, we have within the Denver division very small towns, places like Kiowa and Hot Sulfur Springs and Kremmling and then medium -- Fairplay, medium-sized towns, Leadville. It's a, I think, a very diverse population and with a lot of different attitudes and opinions.

We have held court in the other divisions, but we don't do it very much. And there isn't that much call for it.

But I do know from selecting and empaneling a lot of juries, that when we first send notices out to people in Buena Vista and Sterling and Burlington and some of these places, they think we've made some terrible mistake and they come back to us and say, look, I don't live in Denver, why are you summoning me to a Denver court. And of course we have to explain to them that the, it's not a state court and that it is

federal court and that the range here is much broader than the Denver metropolitan area, certainly than the City and County of Denver.

I'm confident that using the Denver jury pool we will find people who can try this case, and particularly using the voir dire techniques that we will be using. So I see no compelling reason to change from the normal practice and therefore deny the motion. We'll select the jury from the Denver panel, Denver pool, according to this court's standing jury plan.

MR. JONES: Your Honor, may I inquire of the Court, did you say there is a city in Colorado called Fairplay, Colorado?

THE COURT: There is.

MR. JONES: Can we just call the jury from there, Judge?

THE COURT: Have you ever been to Fairplay?

All right, we'll -- I believe that concludes the matters that we had scheduled for this morning. I do have some more pretrial conference material to, and matters to deal with counsel under rule, under the rule, including some of the methodology for jury selection. So we will recess and I'll reconvene with counsel and both of the defendants in the conference room at one-thirty.

(Recess 11:43 a.m.)

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REPORTERS' CERTIFICATE

We certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated at Denver, Colorado, this 5th day of February, 1997.

_____
Paul Zuckerman

_____
Kara Spitler