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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 ON DAUBERT MOTIONS)

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Proceedings before the HONORABLE RICHARD P. MATSCH, Judge, United States District Court for the District of Colorado, commencing at 1:40 p.m., on the 20th day of February, 1977, in Courtroom C-204, United States Courthouse, Denver, Colorado.

Proceeding Recorded by Mechanical Stenography, Transcription Produced via Computer by Paul Zuckerman, 1929 Stout Street, P.O. Box 3563, Denver, Colorado, 80294, (303) 629-9285

APPEARANCES

JOSEPH H. HARTZLER, SEAN CONNELLY, LARRY A. MACKEY, BETH WILKINSON, SCOTT MENDELOFF, JAMIE ORENSTEIN and AITAN D. GOELMAN, Special Attorneys to the U.S. Attorney General, 1961 Stout Street, Suite 1200, Denver, Colorado, 80294, appearing for the plaintiff.

ROBERT WYATT, ROBERT NIGH, and AMBER McLAUGHLIN, 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

(Reconvened at 1:40 p.m.)

THE COURT: Be seated please. We're resumed.

I note that Mr. Nichols is present as requested.

MR. TIGAR: Yes, your Honor. He is present.

I had a matter I wanted to bring to the Court's attention. I'm sure that Government counsel was pleased with having the motion denied this morning. However, a member of our staff was chagrined to hear Government counsel say in a press conference outside the courthouse, in substance, the Court has heard witnesses for decades and found these witnesses that we put on to be reliable.

Allowing for the fact that we can only hear the substance, not the words, we respectfully ask the Court to admonish the parties again, particularly with respect to this commenting on the credibility of the witnesses. It's particularly concerning to us, of course, since we're going to get the second trial.

THE COURT: I don't know what was said, but of course I did not make any finding as to the credibility of these witnesses and carefully mentioned that that's for the jury to decide. So now --

MR. ORENSTEIN: Before we get started, just as to the parameters of the hearing, I think there are some housekeeping, just a couple of housekeeping things about what's been resolved

and what hasn't. As I understand, there have been some discussions about one of the experts, Mr. Bodziak. The dispute has been largely about discovery more than substantive objections to his testimony. I believe we're at a stage where we're attempting to work that out, and there's no Daubert issue that needs to be addressed today.

THE COURT: There are two questions that have been raised. One is second-pronged Daubert, what does it mean, and what kind of a hearing should be scheduled. Another is there is a motion with respect to several witnesses, for excluding their testimony because inadequate discovery was provided. That's a separate item.

Mr. Tritico, are you going to address this?

MR. TRITICO: Well, if I may address the Agent Bodziak issue for a moment, I think I can resolve that.

THE COURT: Come on up.

MR. ORENSTEIN: It's really just a matter of there is some discovery they've asked for and we've agreed to provide and we've provided some and I think we're going to attempt to resolve to remaining differences.

MR. TRITICO: Your Honor, I have had some conversations with the Government about the discovery dispute with respect to Agent Bodziak. They have agreed to give me what I have asked for and agreed to allow me, after we've had a chance to have your expert look at the information that we get

from the Government, to bring up an objection if we have one. I don't know that we will. But we will do this in the short term, and I think that we can resolve that issue shortly.

THE COURT: Okay, good.

MR. TRITICO: Thank you.

MR. ORENSTEIN: Along the same lines, last time we convened to talk about the Daubert issues, you asked the Government its position on Agent Fram. We said, you know, we're obviously still considering but we'd go ahead and argue it. We continue to think about it, but at this point we think we're at a position where we can say there's no need to discuss it in terms of Daubert. We're not going to offer that at Mr. McVeigh's trial. So that's revolved.

THE COURT: That's what I understood from the response filed.

MR. ORENSTEIN: And with Mr. Stafford, there was an objection, and that's also -- we're not going to offer his testimony. And I think there's some fingerprint and medical examiner witnesses as to whom there are no Daubert issues.

THE COURT: All right. Mr. Nigh, are you going to argue the second prong, as we've called it, Daubert, for Mr. McVeigh?

MR. NIGH: Yes, your Honor.

THE COURT: All right. Where does that leave us on this, the motion insofar as it relates to inadequate discovery?

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MR. NIGH: Your Honor, there is still the six experts that we've identified in the motion to exclude, which we believe we've been granted insufficient information to make a determination about whether or not a second-prong challenge exists, and those six experts still remain.

THE COURT: And Bodziak --

MR. ORENSTEIN: Bodziak was not one of them but Stafford was, and he is not at issue any more.

MR. NIGH: That reduces it to five, your Honor.

THE COURT: Well, where do you want to start?

MR. NIGH: What I would like to do, your Honor, if I could, is to discuss the legal implications in the second prong of Daubert.

THE COURT: All right.

MR. NIGH: And the case law concerning it. I would like to tie that, if I may, to the testimony or the proffered testimony of Agent Burmeister and Linda Jones because I think it helps to put it into a context in terms of this case and the scientific evidence being offered by the Government.

And then after that, your Honor, I would like to accept the Government's suggestion of taking the experts one at a time so that we can explain to the Court what our specific challenges are to those additional experts and why the information we have received is insufficient in reference to them.

THE COURT: Yes. Now, you have joined in the motion filed from Mr. Nichols as to the supplemental with respect to Agent Burmeister?

MR. NIGH: That's correct, your Honor.

THE COURT: Okay.

MR. NIGH: Turning to the Daubert argument, in the second-prong Daubert argument, I would submit to the Court that it places us on the threshold of another one of those decisions about whether evidence should be excluded or can be admitted with the jury being left to the task of sorting out whether or not it's credible or reliable. I say the threshold because I don't think we're there yet. It's my understanding of this particular hearing that what the Court is going to decide as to whether or not to hear evidence with reference to these issues and my argument is designed to point out for the Court why we think evidence is absolutely mandated before an admissibility determination can be made.

THE COURT: Okay.

MR. NIGH: Our first-prong Daubert challenges that we filed, your Honor, were addressed to exclude testimony of experts whose methods and whose procedures could not be considered science under the best of circumstances in the abstract. Our second-prong challenges are designed to exclude

the testimony of experts who base their opinions upon what could be considered science in the abstract under the best of

conditions but as applied in this case and the methods utilized by the witnesses proffered in this case should be excluded because they are fatally flawed in the way that they were applied or because the methods that were utilized were not appropriate for a determination that was made. In other words, the tests utilized by the experts are not appropriate for making the finding that the Government hopes to introduce.

In other words, the tests might be reliable and scientific for one purpose, but they are not suited and they are not reliable that they were used by the FBI in connection with this case.

In light of the Government's response to our second-prong challenges, I think it's also very important to

point out what we are not doing, your Honor, and that is to challenge the conclusions themselves that these experts have made. In the event that the Court decides that the evidence is admissible, then of course we will be prepared at trial to present evidence that the conclusions are simply wrong. What our challenges are at this point are the methods and the procedures utilized to generate the conclusions.

The reason that I want to address the legal argument in the context of Agent Burmeister's proffered testimony and the proffered testimony from Linda Jones is because arguably it is the most important, quote, forensic, end quote, evidence proffered by the Government in terms of the potential for

misleading and prejudicing the jury against Mr. McVeigh.

I hope the Court will recall from the evidentiary hearing on the motion for change of venue that one of

the most

4 important exhibits we thought was The Daily Oklahoman article

5 which appeared very shortly after McVeigh's arrest with the

6 banner headline across the very top of the newspaper which said

7 in 2-inch script, Chemical Tests Point to McVeigh. We thought

8 that that was disinformation of the highest order and some of

9 the most prejudicial in terms of affecting the potential jury

10 pool in Oklahoma. And it is that kind of potential to mislead

11 that's attendant to the proffered testimony of the Agent

12 Burmeister and Linda Jones. For that reason, we ask the Court

13 to exercise the gatekeeping function in keeping out this

14 evidence and keeping the jury from hearing it unless the court

15 can satisfy -- unless the Government can satisfy the Court at

16 an evidentiary hearing that the reliability requirements of

17 Daubert for this kind of evidence have been met.

18 That brings me, your Honor, to the beginning point in

19 terms of admissibility determination and the burden of proof.

20 I think that the law announced by Daubert by both the

Supreme
Court and the Ninth Circuit is that the proponent of the
scientific expert testimony bears the burden of proof by a
preponderance of the evidence, that the testimony proffered is
scientific and reliable, and I would ask the Court to hold the
Government to that burden in this case of this evidence.

Turning to the theoretical underpinnings of Daubert
itself and the decision, the court recognized the overpowering
potential of what is called scientific evidence and its
potential to mislead the jury. And in analyzing it in that
context, the Supreme Court established the factors approach in
determining admissibility. And I would submit, your Honor,
that each of these factors applies with great force to the
proffered testimony from Agent Burmeister and Ms. Jones.
The first factor is whether or not the scientific

hypothesis has been tested to see if it can be falsified. The second factor is whether the theory or technique has been subjected to peer review or publication. The third factor is consideration of the known or potential rate of error. And the fourth and final factor is consideration of the general acceptance of the methodology within the scientific community.

As the District Court in New Mexico explained in the case of Galbreth, the Supreme Court's factor approach in Daubert is in the conjunctive, that is to say that the testability and the rate of error inquiries go together. What those factors establish is the purely empirical character is what -- of what is to be taken as scientific evidence. And the Court outlined that the Court should consider the known or potential rate of error for the procedure and the standards controlling the techniques operation.

It becomes, your Honor, a test of whether a, quote,

scientific technique, end quote, is both empirical and sound.

If a technique -- a particular technique used for generating a conclusion has a high rate of error, it does not satisfy the reliability requirement of Daubert. And if it has an unknown rate of error, then it is impossible for the Court to evaluate.

The adherence to protocols for a particular test go to the rate of error and whether or not they can be determined empirically. If protocols are not in place and followed, then the rate of error for a particular test for identifying a substance or determining that something found is consistent with a particular substance doesn't only go up, it becomes unknown. And the Court is incapable of considering that critical factor under the Daubert analysis.

The point here, your Honor, is that rigorous controls against contamination and written protocols religiously followed, careful maintenance of instruments, and the precautions necessary to guarantee the validity of the scientific testing are all necessary for reliability

determination. If the Government cannot guarantee or prove to the Court by a preponderance of the evidence through testimony that these safeguards have been followed, then the evidence should not be admitted.

Tied specifically to the facts of this case, your Honor, the Government has used supposedly scientific testing to identify traces of explosives residue and other substances at

various place and on various pieces of evidence. What the Government should be required to do is to prove to the Court that their methods for making these determinations are reliable, and they should prove to the Court using these methods for identifying these substances what the rate of error is, how many times a false positive occurs, what procedures are taken to make sure that the results are reliable. And until they meet that threshold burden, the evidence shouldn't be --

THE COURT: Now, there are certain tests that you wouldn't quarrel with as being appropriate tests for this. We're talking about trace evidence of the explosive material; right?

MR. NIGH: Yes, your Honor.

THE COURT: So we have -- I don't know everything that was issued, but we've got spectrometry, we've not chromatography, we have maybe several different kinds of spectrometry. But these are tests that in and of themselves are scientific tests. You don't quarrel with that, do you?

MR. NIGH: No, your Honor, I don't. Under the first prong of Daubert, I do not.

THE COURT: All right. Now, where do we start with the quarrel? As I understand it, where the testing procedures involve the use of standards, you have a concern about whether that was done here.

MR. NIGH: That's correct, your Honor.

THE COURT: What are we talking about specifically?

MR. NIGH: What we're talking about specifically, your Honor, is good laboratory practice and establishing rules before you set out to make a determination.

THE COURT: Well, that's a generalization. And I understand there's a concern that overall the laboratory did not follow -- did not have adequate protocols in the opinion of some of the people you've retained.

MR. NIGH: Sure.

THE COURT: But when it gets down to a specific test done by specific people, what is your position here? I don't mean to jump ahead to the individual witnesses, but Burmeister and Jones go together in that Jones relies in part on Burmeister; and I want to get to what is the problem here because I think -- I want to set aside contamination for the moment because I think that's still a separate -- a separate problem.

But is it the contention here that these

machines

aren't working?

MR. NIGH: Yes, your Honor. Sometimes.

THE COURT: Well, what do you -- what do you think the

Government has to do, come in here and show in detail how each

test was done?

MR. NIGH: Under the circumstances of this case, your

Honor, I would say yes. And let me tell you that there are six

specific challenges that I can articulate for the Court right

now about what was wrong with what Burmeister did.

THE COURT: Okay.

MR. NIGH: In conducting a test to determine -- and

I'll start with No. 1. In conducting a test to determine

whether or not a substance can be identified as explosives

residue using gas chromatography in connection with something

else. And some of the names of the tests escape me, you know,

momentarily.

But in using those kinds of tests, before a laboratory should undertake to identify substances in that manner, they ought to define the rules about what is it going to be that I'm going to call an identification, what does the reading on the graph have to look like or what numbers are going to allow me to say this is an identification. It's not a question of moving the goalpost, your Honor. It's a question of not having a goalpost at all. And sound laboratory practice would mandate before that was done by Burmeister, that those procedures should have been in effect; that the rules should have been in effect.

And the evidence that we've been able to obtain from the FBI lab says that there were no rules, of that nature.

THE COURT: Well, but the fact that the laboratory as a whole doesn't have adequate rules in somebody's opinion doesn't preclude Burmeister from doing an appropriate testing

procedure because he knows what to do.

MR. NIGH: If he's established the rules in advance and at our --

THE COURT: Well, you know, we've got all this problem in appellate opinions of what's a protocol, what's a methodology; and it's easy when we're talking about DNA, which is where a lot of these cases come up, because there are at least now two by courts of appeals accepted methodologies for determining DNA which involves the scientific principle that there is a coding here which is unique to individuals.

MR. NIGH: Sure.

THE COURT: And here, too, we've got cases that say, well, if there is that methodology, one of those two at any rate that's being followed, you're past Daubert; and the fact that there could be other factors influencing the conclusion is a credibility or a weight issue. Right?

MR. NIGH: That's right, your Honor.

THE COURT: Now, here we're talking about at

least two
19 and I guess three types of testing, which really amount to a
20 chemist's qualitative analysis-type tests; right?
21 MR. NIGH: That's right.
22 THE COURT: What is the substance.
23 MR. NIGH: That's correct.
24 THE COURT: And of course we've had testing like this
25 done in chemical laboratories for years. We see it more in

1 drugs than we do in what's involved here, but it's the same
2 kind of testing.
3 MR. NIGH: That's correct, your Honor.
4 THE COURT: And so you have machines where you
5 calibrate the machine and you run samples in and use standards
6 so that you can measure the printouts here vs. the standard and
7 say, Okay, they match. Isn't that the basic testing procedure?
8 MR. NIGH: It is, your Honor. And that gets us to
9 precisely the problem that exists here in terms of the testing

used by the FBI laboratory for explosive residue, including Burmeister's testing the known standard, that the Court referred to in reference to drug testing. Before that test is done and before the chemist says, I'm going to identify this substance as cocaine base, the standard has been identified. It is known what the graph has to look like before the expert's going to make that call. That wasn't done here in reference to the FBI laboratory explosive residue testing. There was no chromatographic window which had to be established before you can say this is an identification of an explosive residue substance. And that's only the first problem, your Honor.

I think I can go immediately to the second one which may be more clear. In reference to explosive testing by the FBI laboratory, they use tests and Burmeister used tests that were inappropriate for identifying substances, explosive residue. What they used were screening tests which should be

used as a preliminary test perhaps to say that --

THE COURT: It's like a presumptive.

MR. NIGH: Exactly. You go on and do a confirmatory test that is more specific and can generate the result that you're looking for. They didn't do that here. What Burmeister did in this case, your Honor, is use two screening tests in conjunction with each other, which were dependent upon each other. And our experts tell us that's not the way you go about it --

THE COURT: Well, suppose it isn't, though. If his testimony is not based on the screening test but is based on a proper methodology, what's wrong with it?

MR. NIGH: If it's based on a proper methodology, then there's nothing wrong with it, your Honor. But we submit that the evidence that we have and our examination of it is that it wasn't a proper methodology and that the tests that were utilized are not appropriate for making this kind of a

determination.

THE COURT: Well, I have trouble understanding why the use of a presumptive test, as you call a screening test, precludes the follow-up by a valid technology and test.

MR. NIGH: I don't submit that it does preclude it, your Honor. I just submit that they haven't done it in this case. I submit that the conclusions that the Government proffers from Burmeister are based upon two screening tests and

that no follow-up test has been done. And if the Government were to present evidence that that had been done, then perhaps the Court could make a reliability determination. But the evidence that we have and the information that we have is that that's not what was done, that there were two screening tests used and not the follow-up test that the Court refers to and that in the context of this case, that's not sound science and

it undermines the reliability of the process.

And it brings me to the third point, if I may, your Honor, concerning the Daubert factors and the specific problems in reference to the testing that was done by the FBI laboratory. These screening tests, if the Government is going to utilize them, then the Government should be required to prove the rate of error for screening tests in identifying explosive residue. They should come forward with evidence to prove to the Court that when these screening tests are utilized to find explosives residue or identify explosives residue, there are negligible false positives, and I submit, your Honor, they can't do it. Because for these screening tests, the false positive rate is high. And it goes to the Daubert factor determining the reliability of a particular test in issue.

The potential error rate is tied to that, and that would be the fourth factor that I would list. And I would say that the potential error rate for these particular tests that were utilized by the Government, by Mr. Burmeister, is

unknown.

We don't know how many false positives you get for determining the presence of PETN if you use the testing procedures that the Government used in this case. They can't tell you how many false positives there are or what the rate of error is.

The fifth error, the fifth area, your Honor, relates to sound laboratory practice in terms of preventing contamination and testing for contamination. I think that the Court perceives that to be different, a different issue than the Daubert --

THE COURT: Yes.

MR. NIGH: -- reliability factors.

THE COURT: So have the cases that have come down.

MR. NIGH: They can be read that way, your Honor. But I would also submit that the specific language of the cases was in those cases, the contamination issues that existed were not sufficient to undermine the reliability of the process.

THE COURT: Yeah, and the jury decides that.

MR. NIGH: I think that the Court can decide it preliminarily if the contamination issues are significant enough to call into question the reliability of the procedures. I think that a threshold determination could be made by the Court that there is such a potential for contamination, that the whole process is flawed. And I would submit that the evidence and the information that we have about the FBI laboratory indicates that the Court could make such a finding.

THE COURT: Well, but we have a known number of samples -- not samples, but pieces of evidence that are identified here with their Q numbers.

MR. NIGH: That's correct.

THE COURT: And one of them is this Q507 which, you know, we have as a specific item. And there's going to be obviously chain of custody to show that this is where it came

from and it is what the Government says it is for purposes of making the test results relevant. But then the fact that there may have been some contamination between the time of its recovery and the time that the test results are printed out, I don't think that's a Daubert issue. I think that's a question of is the test result to be accepted in view of the possibility of that contamination. But then evidence about contamination can come in in the course of the trial.

MR. NIGH: I understand that that's one way to look at it, your Honor. I would submit that --

THE COURT: That's the good, old-fashioned way to look at it, isn't it?

MR. NIGH: My new-fashioned way of looking at it, your Honor, is that if the FBI laboratory and Burmeister working in the FBI laboratory did not follow sound scientific laboratory procedures to prevent contamination, including contamination of the work areas, contamination of the clothing worn by the individuals working there, and the instruments that

were being

used to test these substances -- if those safeguards were not in place, the Court can conclude that the contamination potential undermines the reliability of the process. And I would submit that particularly in light of the fact that we can prove that contamination did exist in the FBI lab. And I think that there is, the Government made much in their response brief about the fact that --

THE COURT: The different part of the lab.

MR. NIGH: Different part of the lab. But we've tried to unlock the door to the FBI lab and get inside as much as we can. And our understanding and our good-faith understanding of what happened with Burmeister is that the change in his position was administrative only, that he got assigned from one unit to another unit only on paper and that his work area stayed the same.

Also, the potential for contamination because

of the

nature of these substances existed in almost every part of that

lab, particularly the testing areas. Sound laboratory practice

calls for testing each of these areas periodically,

systematically, to make sure that there's not background noise,

contamination in the machines, contamination on the laboratory

personnel. And we also know, your Honor, that bomb data center

people, people who go to explosive ranges and test explosives,

were in the same building. Now, precisely where in the same

building we can't prove every instance of, but we can prove

that they were in one area where evidence in this case was

stored at one point in time. The Government has eliminated

that evidence from explosive residue testing it, but the point

is it undermines the system that was in place to prevent that

contamination from happening.

And I would submit that the Court could

conclude after

the evidentiary hearing that the potential for contamination

was so great that the procedures were --

THE COURT: Potential. Wouldn't the Court have to

find that actual contamination destroyed the test results?

MR. NIGH: I don't think so, your Honor.

THE COURT: Why not? Because that's like saying the

methodology is no longer appropriate scientifically because you

had contamination. Let's take contamination of the machine,

not the possibility that the machine could be contaminated, and

therefore before you can get the evidence in, you have to show

pristine machine, but it seems to me that you have to say,

Well, because this machine had explosive residue in it from the

last thing that ran through it, your methodology is flawed and

your results are inadmissible. That I can follow.

But to say, Look, they didn't have proper protections

against contamination as a general proposition, that that

destroys admissibility, there I have trouble following you.

MR. NIGH: I look at it in the reverse, your Honor.

The way that I look at it is that in order for this to be

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scientific and reliable and supportable, good labs, accredited labs would say, For this process to generate conclusions, we have to have these safeguards in place. And if we don't have these safeguards in place, we cannot guarantee the reliability of our results because the results that we're generating can be caused not by what we're trying to analyze but by our environment. And it's not sound scientific practice for us to say that it came from a piece of clothing. It is not sound scientific practice for us to operate in that way. And, your Honor, I think that our experts are prepared to testify that good science requires that kind of a systematic approach.

THE COURT: I don't know that the issue is good science vs. sloppy science. The issue is admissible evidence,

which may be subject to credibility evaluations by jurors when they hear the whole story vs. this is so far off base that it can't come into a courtroom. And that's what I think we're struggling with, the off base.

MR. NIGH: I think that is what we're struggling with, your Honor. And my view of -- and my interpretation of Daubert and its progeny is that the overwhelming potential for expert witness testimony to mislead the jury --

THE COURT: It has to be looked at, really, in terms of what the Supreme Court was doing in Daubert which was saying, Look, get rid of Frye, 702 has been brought in here and is supposed to make modern science more useful to trials and to

the search for the truth and all that good stuff. But it's supposed to liberalize, not restrict, and doesn't really destroy the role that I was talking about this morning, the

difference between what a judge does and what a jury does with evidence; and that is judge the credibility of it, the jury's function, vs. the admissibility of it, the judge's function.

Now, I grant you that the law is that if the scientific methodology purportedly followed was so badly misapplied that it skews the results in such a way that it is no longer acceptable methodology, that's Daubert. And that can be kept out because that's no longer a scientific test. The problem is who has to show what and whose burden it is before trial to determine this admissibility issue. And you're saying, as I understand you, that before the -- before this Court can admit this evidence, the Government has to come in here and show the purity of its protocols and procedures.

MR. NIGH: That's what I'm asking the Court to do is consider evidence on the question, because I would submit, your Honor, that the limited information that we've been able to obtain suggests that the methodologies were so skewed that it

shouldn't be presented to the jury. And it's impossible to make that showing to the Court based upon the pleadings and the papers. And I would submit that evidence is required to analyze that proposition, evidence presented to the Court outside the presence of the jury, and that the Government

should be required to make that showing.

Going back to Daubert and what the Supreme Court did for just a moment, I think that part of what they did is very relevant to the issue facing the Court here in terms of the scientific evidence in question there. Recalculation of epidemiological studies and animal studies were proffered to support the proposition that Bendectin causes birth defects.

THE COURT: Right.

MR. NIGH: What I submit to the Court, your Honor, is that the same kind of inappropriate tests are being proffered

here to indicate that explosive residue was found.

THE COURT: Well, I know, but it's quite different, the problem of causation is, with toxics or hazardous chemicals is a lot different from what is essentially causative analysis, which is what is this, what is the substance that I've got here in front of me. Now, you know, folks have been doing tests like that ever since they had test tubes, but they used to use a lot different methodologies, including the whole color tests and that kind of stuff, to see what deposits out. And now we've got these machines that tell us what's in there, and that's where we get to the spectrometry and chromatography and so forth.

But the basic science, it's not any novel science; right?

MR. NIGH: It's not --

THE COURT: We're not talking about some new

revelation in scientific theory that associates or goes from a negotiation to causation in medical effects. We're talking about just the basic thing of what does the -- what do these laboratory tests tell us about what this substance is and what are the elemental components of it.

MR. NIGH: That's right, your Honor. These are not, I would submit, brand-new machines or --

THE COURT: No, they've been around --

MR. NIGH: -- or brand-new ways to try to identify substances. I would submit that the FBI lab is using inappropriate machines to make these identifications and that even though it's not brand-new, I submit, your Honor, it's subject to question. Just because -- I would submit that simply because we perhaps have blindly relied on what's been going on in the past, it doesn't justify us doing it now, and particularly when this type of evidence is so potentially prejudicial. And once it's done before the jury, we're going to have to strive mightily to undo it. That's why I would ask

the Court to look at the evidence before making a decision about admissibility. In the context of the, the tests of DNA which were new at the time that the appeals courts --

THE COURT: Yes.

MR. NIGH: -- consider them, evidence was taken in all of those cases and testimony was heard from the experts about

why the tests were empirically sound, what the rate of error was, and issues of contamination were also considered in terms of whether or not they undermined the process. And I submit that each of those things is appropriate in this case, to look at whether contamination undermined the process and where the tests utilized were appropriate for what was being done, to make the conclusions that the Government wants to offer into evidence.

Your Honor, I don't think that I'll tax the Court's

attention any more with my analysis of Daubert and its progeny.

I will simply ask the Court to consider granting us an evidentiary hearing so that these questions can be determined based upon evidence presented from the people involved.

THE COURT: So what you're saying, have an evidentiary hearing, Government trot out Mr. Burmeister and everybody else that did this test and tell us exactly what you did and how you did it and how you documented it?

MR. NIGH: Yes, your Honor.

THE COURT: Now --

MR. NIGH: And, primarily, your Honor, for purposes of them also telling you that this is how I know that this is an appropriate test to identify this substance, this is the procedure that we follow to make sure that the reading that we are getting is not a contaminant but indeed is the substance that came from the questioned piece of evidence, so that the

witnesses can establish for you that these methods and procedures are grounded in sound science and also for the Court to hear from our experts, explaining to the Court why an accredited laboratory doesn't do business this way and why these particular machines are not appropriate for making the determinations that were being made and why the rate of error can't be calculated. That's what I would ask for, your Honor, is the opportunity for the Court to test the evidence in terms of admissibility and not credibility.

THE COURT: Well, you want to come back to individual witnesses after we hear --

MR. NIGH: I think that would be the best way to proceed.

THE COURT: All right.

Mr. Tigar, are you going to argue on what Daubert means in this case?

MR. TIGAR: May it please the Court, we accept the Government's concession that Linda Jones and Mr. Rydlund and Mr. Stokes should be heard at a pretrial hearing. I want

briefly now to give the Court an overview of how we see Daubert in the context of this case and then to use Q507 as illustrative of the kind of hearing that we believe is required. And I do that because that's something that everybody knows about and it's a good thing to discuss.

In this conversation, in this argument, I will not

refer to the thing that I am not supposed to refer to. We do have a great deal of information that came to us, and I'll obey the Court's order with respect to revealing it.

I think that I do agree with Mr. Nigh, after all, to treatise reports, that one-quarter of the jurors, citizens in trials with scientific evidence said that had evidence not been there, they would have changed their vote from guilty to not guilty.

The Supreme Court of the United States, in Daubert, quoting Judge Weinstein, who has a lot of experience with

this -- he doesn't always turn out to be right according to the appellate courts but a lot of experience -- pointed out that expert testimony is different from lay testimony.

And there's where I wanted to disagree with what I understood your Honor to be suggesting might be the case; that is, we trust jurors. This is a case in which we've already seen, your Honor, that there's a limit to the extent to which we can trust jurors to decide things. We have not trusted an Oklahoma jury, nor indeed any Oklahoma judge, to decide anything in this case. We have not trusted jurors to decide the guilt or innocence of the defendants jointly even with all the instructions we could deploy, and that's because, as Judge Weinstein said, this scientific evidence comes with a kind of imprimatur, a kind of image of reliability that is different I suggest in these days of machines where from the days of the

test tubes.

All of us who took high school chemistry could -- as a matter of fact, it was in Crime Stoppers textbook, your Honor, if we put iodine on a potato, it turns it gunmetal blue, and that's how Fly Face broke out of prison. It was because the inter-reaction of the iodine with the starch meant he could carve a gun out of a potato and show it to the guards. Well, we knew that, but mass spectrometry and these graphs and all these things these scientists are talking about have this air of technology.

Now, I want to take issue with the Government's construction of Daubert. The methodology your Honor has decided in certain instances is sound. That's Daubert Prong 1. We've disagreed with some of those holdings, that's what the Court has held. We say Prong 2 is what was the sound methodology reliably applied in this case. The Government suggests that once they prove an expert is qualified, that that's all there is to the second prong. But that's not it.

If I can use an analogy not from the area of science.

My wife is an author of a best selling cookbook. The other evening I made something and brought it into the dining room.

She said, What is this?

I said, It's Golubtsi.

And she said, No, it's not. Where did you get that?

I said, Out of your cookbook.

She said, Well, the methodology is unquestionably sound. I have the reviews. But the execution of the methodology in this case falls far, far short of what a reasonable person would expect.

That is the question, what has Mr. Burmeister and Ms. Jones been cooking up in the laboratory. Given that all of the machines they have and all of the techniques they have are reliable, what is it that they have been doing there?

Now, the Government -- the Court is free, I want to acknowledge that, to divide this inquiry however the

Court wishes. The Court can say, I'll postpone this question till the time of trial, I'll hear this pretrial or whatever. But at the end of the day, we have no doubt that the Government must establish certain things. Again, here is where we part company.

The Government cites a series of cases in which they say courts have held that challenges to the admissibility of evidence go to weight and not to admissibility. However, none of those cases in fact stand for that proposition. All of those cases do talk about weight vs. admissibility, but in every single one of them, there was a hearing out of the sight and hearing of the jury to establish the fundamentals. Only when the Government had met a certain threshold did the weight vs. admissibility point come in.

In Cardenas, the Court acknowledged that there had to

be exclusion of some reasonable possibility of contamination.

Chain of custody did have to be proved as a necessary element

in the Washington case in the Tenth Circuit. In the Cyphers

case in the Seventh Circuit, once the Government establishes a

proper chain of custody, then everything else does go to

weight. In the Lopez case in the Eleventh Circuit, there had

to be proof of chain of custody. In the Jakobetz case in the

Second Circuit, the Government had adhered to a protocol, yes.

Now, it's true, we can talk about the Davis case in

the Tenth Circuit, the Martinez and Beasley cases in the Eighth

talk about protocol. Here I want to be clear that we don't say

that there must be a protocol in every case. The Government

seizes on the fact that some courts have said that a minor

departure from a protocol is okay or that maybe there doesn't

need to be a protocol as long as there is some other valid

methodology in place.

In short, protocol is not talismanic, we agree with

that; but your Honor, the fact that protocol is not talismanic does not mean that the absence of a procedure by which results are validated and accepted is unnecessary to be shown. The Government makes it disappear entirely, they say in their brief, as I said before, once they prove qualification, that's all they have to prove. That's not what the cases say. When cases have permitted routine departures from protocols or small departures from protocols, it's only been in the context that

there are other assurances of the methodology, the valid methodology being reliably applied in the particular case.

In that examination, for example, that we say must be made, your Honor, of course 702 will be relevant. But also 703. That is to say, when an expert makes a conclusion, is what the expert is opining on, if it's based on what others

have done, is that of the kind of evidence ordinarily relied upon by experts in the field.

If your Honor wants to postpone chain of custody until the time of trial, very well. And for the purposes of the rest of my argument, I will exclude all chain of custody arguments with respect to 507. But chain of custody must nonetheless be proved. That is to say, it doesn't just go away. Rule 901 says the Court's got to make a preliminary finding. And of course I would expect the Court would postpone until later the 403 determination. That is, the Government doesn't have to prove everything with every piece of evidence, but some of this may be cumulative or some of the relevance of it may be so marginal that the Court would want to exclude it.

THE COURT: Well, that's one of the problems here, of course, because there is the interplay of 403 and also 703 as well as 702 when you're dealing with opinion testimony.

MR. TIGAR: Exactly, your Honor.

THE COURT: The basis upon which the witness forms the

opinion under 703, and it is very difficult to say, well, this

is 702, this is 703, and even this is 403.

MR. TIGAR: Well, your Honor, let me just focus on 702, 703. Because here's another problem with the Government's brief. They want to ignore, with all respect, the fact that the most devastating thorough-going criticism of the FBI ever in its history has now been made. And that is the laboratory. Depending upon the gender of the observer, that laboratory report is the ghost of the dinner or the spot that simply won't wash out. And I respectfully suggest, to keep the metaphor within the same tragedy, that the Government's brief palters in a double sense and keeps that word a promise to our hope because it says we get a Daubert hearing and then says it only goes to qualifications..

Let me illustrate. Linda Jones. Linda Jones is a

classic expert, your Honor, and I'm glad she's going to be here. Because Linda Jones comes to a conclusion that is in most instances not based upon any original work she has done. She apparently has done very little scientific work. Thus her impressive list of qualifications doesn't seem to bear upon the conclusions she is drawing. The hearing will tell us for sure. But what's striking about the Jones report is, your Honor, that it appears to be the ghost of the discredited David Williams report sitting grounded upon the grave thereof. That is to say, by some amazing coincidence Ms. Jones comes to the same conclusion as to the provenance, amount, velocity of detonation

and so on of this explosive device, the same conclusion as Mr. Williams came to.

Now, we know the Mr. Williams' conclusion was based upon a cowboy theory of -- with no disrespect meant to cowboys,

if the Court please -- but it certainly was not based on science. The criticism of that has been thorough going. So we need to explore the extent to which Miss Jones permissibly or impermissibly relied upon the work of others. If it turns out she just disregarded the invalid Williams thing, well, fine, but at some point the Government is going to have to show that.

Now, the second point about Miss Jones, getting past the 703 to the 702 point. What combination of methodologies did they employ and were they reliably done for her to reach the conclusion, and now we get down to Mr. Burmeister. Mr. Burmeister is the one upon whom she's going to say she rested. And we filed an additional motion about Mr. Burmeister. Let me trace that, your Honor, to show what I think a hearing ought to deal with.

There's no question that all of Mr. Burmeister's machines are good machines. He's doing good science there. The machines are capable of it. But what we're getting here, your Honor, falls so far short of what a jury ought to

hear

based on the present state of proof, we say a hearing is

necessary.

Let's look at what happens. In April of 1995,

Mr. Burmeister looks at Q507 and finds crystals. He -- the

crystals he says are consistent with the presence of ammonium

nitrate. A report is then generated. That report is signed by

Mr. David Williams, not Burmeister, and forwarded to

Mr. Kennedy in the FBI saying this is what we found on Q507.

Now, I don't have a great deal of quarrel with that.

Although . . . turn the light on here.

THE COURT: I don't know this technology.

MR. TIGAR: Yes, your Honor. If it doesn't work, I'll

quit trying to mess with it. There it is. Maybe we can have a

video. No. There it is, your Honor.

He finds a, he analyzes the Q507 crystal, and he finds

something called A L, something called S I, that's silicon, and

then he finds some S in there, which I assume is sulfur. But you notice, your Honor, that the peaks for aluminum and silicon are way down there to where they're not even, they're not even as high as some of the other peaks that aren't labeled.

Now, the significance of that, your Honor, is that Mr. Whitehurst has told us that these machines have a labeling problem; that is to say, there were instances in a prior case in which somebody found a peak of something and labeled it and the machine printed that out every time. The point is that these other peaks have some significance. And in order to make sure that this man, Mr. Burmeister, is telling us reliably, they need to know about this.

Well, the matter rests here for more than a year, your Honor, with these peaks and this material. In the fall of 1996, ICI gets busy. And ICI conducts some tests. Now, we

argued about that last time. The Government's answer, is well, yes, ICI conducted them, but Mr. Burmeister was there. As I pointed out last time, we don't have any evidence as to what ICI's machines are like. We don't have any evidence as to how they calibrated them, we don't have any evidence as to whether they cleaned the stub. We don't have any evidence as to what techniques they used. But it is interesting what they found.

If your Honor will indulge me a moment, I'm trying to find the scan here.

MS. WILKINSON: Mr. Tigar.

MR. TIGAR: Government counsel is offering to help me here, your Honor. I seem to have messed up my papers.

THE COURT: I suggest you accept it.

MR. TIGAR: I shall your Honor, yes.

Now, your Honor, here is a prill taken from Mr. Nichols' house; okay? This is an ammonium nitrate prill. You notice the presence of aluminum, sulfur, and silicon. Now, Mr. Burmeister then opines based upon this information that the ammonium nitrate that was found on Q507 is the same as

ammonium

nitrate that came from a commercial fertilizer, ammonium

nitrate fertilizer that is sold with a coating to prevent it

from absorbing water.

Now, so far, so good, except for the fact, your Honor,

that these folks are unable to explain to us why it is that

that peak, Nichols' peak, Q507 peak -- why those peaks are so

different and why the relative shape of the pyramid is as

different as it is. Is that because the machine is dirty? Is

that because the sample is not clean? Is that because there's

some sort of contaminant? In short, before the jury sees that,

we respectfully suggest that there's got to be some kind of a

hearing.

Now, in addition to the Nichols' house fertilizer and

the Q507, the ICI people also looked at a single crystal.

That's all it's listed as in their report, a single

crystal.

Now, the only crystals we know about are the ones that are on Q507.

Your Honor, I don't know if the Court can see that; but here is a peak all the way up here for silicon. And then I'm going to move this up. We get a peak for aluminum, we get a peak for sulfur; and lo and behold, we get a peak for K. That's potassium, your Honor. Ammonium nitrate fertilizer is 34 ought ought; that's to say, 34 nitrogen, zero phosphorous, zero potash, potassium being an ingredient of potash.

13, 13, 13, which is another recognized kind of fertilizer or 10, 10, 10 or 5, 5, 5 all do contain come phosphorous, the ammonium nitrate doesn't contain any. Thus, without an explanation of how they get a K peak, which is

something completely unrelated to this case and completely unrelated to anything ever associated with Mr. Nichols, this

application of the accepted methodology simply fails, your Honor, to be helpful to the jury.

Your Honor, I could go through the cases one at a time; but I know that the hour is late and the Court has read those cases and can read them as well as we can; but your Honor, this is not like drugs. In a drug case, I think the Court could say, Look, are you going to prove up the chain of custody?

Yes, we are.

Okay, we'll do that at trial. If there's a serious question about it, we'll handle it in the morning.

And you all have a machine down there that tells you it's cocaine?

Yes, I do. I have a machine that tells me that.

Here, the instruments are supposed to tell us, your Honor, about the presence of microscopic elements, not just one, but many. And there is a proven history of mislabeling and mistakes; and the printouts that we've seen show stuff that

is peaks that are down in the noise. And thus there is that serious risk that the admittedly valid methodology, a mass spectrometer, or whatever, has not been validly applied in this particular situation. Those, your Honor, are the reasons that we think that a pretrial hearing addressed to these things is

the appropriate way to go.

I had -- your Honor, I can go through these cases, I can talk about it; but I think I've made the point about what I think is helpful to the Court. I want to be clear about this, because I've got to make my record.

We object to every single piece of evidence, every single piece of expert evidence that has been tendered by the Government to which we've made objection orally, in our papers, or in the papers of Mr. McVeigh we've adopted. We recognize the Court has considerable discretion as to when to hear thses

challenges, but what we've suggested is that there is a time-saving to be achieved here by having the kinds of things I've identified here heard before trial, and I have no doubt that it's the Government's burden of proof to do that. They may have an explanation today, but that's no substitute.

THE COURT: There is also always the risk that the thing you started out with here this afternoon happens, and that is that a court's ruling is misunderstood. If I were to have a pretrial hearing before we ever had a jury selected and made a determination adverse to these motions and said that this is admissible and it's up to the jury to determine credibility, then that be misunderstood as saying that I've found all of this evidence to be valid, reliable, and credible.

MR. TIGAR: I have two answers to that.

THE COURT: That's a problem with a pretrial hearing.

MR. TIGAR: Of course it is, your Honor. And

I don't think that any of your Honor's rulings is susceptible to misunderstanding by any reasonable person. My objection was to the spin doctors. And the spin doctors lie within your Honor's writ.

The second suggestion that I would respectfully make to the Court is that it may be possible to have these hearings and for your Honor to place the admissibility ruling under some kind of protective order, or to only make it after the jurors have begun to be under the Court's control, which is going to be very, very soon now, so that we don't have that kind of overlap. As I say, these judicial administration concerns, you know, your Honor sits in the only place in the courtroom in which those are properly addressed. All we could say is that we have these challenges, we do believe them to be valid, and we respectfully submit that having some kind of a pretrial hearing would be of assistance.

THE COURT: All right. Thank you.

Ms. Wilkinson, you're going to deal with Prong 1 of Prong 2, I guess is what we're dealing with here.

MR. TIGAR: Ms. Wilkinson wants her chart back, and I promise to give it as soon as I can find it.

PLAINTIFF'S ARGUMENT

MS. WILKINSON: I promise not to use it, your Honor. I just want it back.

Your Honor, in preparation for the argument this afternoon, Mr. Orenstein and I divided up the experts and decided that I would argue the explosive and explosive-related experts, he, being the more scholarly, would argue the law on Daubert and the remaining experts. But we think it would be better to go right to Mr. Burmeister and Ms. Jones, since those seems to be the issues --

THE COURT: I think they illustrate the problem, probably, as a general problem.

MS. WILKINSON: I think what we need to do,

your

Honor, is get to the facts. I notice that you were probing

Mr. Nigh on what his actual challenges were and on the tests

that were used in this case. So I think I would like to give

you a little background on Mr. Burmeister and what he did in

this case just to focus in on your questions about what tests

or methodologies were used.

Mr. Burmeister is a renowned explosive expert; and I

believe the defense has acknowledged in their reply brief that

they are not questioning his qualifications. He is the acting

chief of the chemistry toxicology unit. And I mention that

because there seems to be some misunderstanding on the part of

the defense about the location and the difference between the

chemistry toxicology unit and the explosive unit.

If I might, the explosive unit is where Dave Williams

and others work; and they are the folks that go out to the

crime scene and manage the explosive cases. They do testing and examinations to determine blast damage. They do not do any test as to residue analysis.

Mr. Burmeister and his colleagues do that in the chemistry toxicology unit, which is in a separate portion of the laboratory. It used to be called the materials analysis unit; and yes, we agree that it was never moved, but the point of the defense's challenge is that we have informed you in our brief in the contamination studies that were conducted at the laboratory there was never any finding that the chemistry toxicology unit or the materials analysis unit were contaminated in any way. And the defense seems to claim that somehow there was some finding of contamination, and there was not. And those are the areas in which Mr. Burmeister and Mr. Kelly, his assistant, who is also a chemist and an examiner, conducted the tests in this case.

Mr. Burmeister was trained under Dr. Whitehurst; and in the deposition that Dr. Whitehurst gave in this case

to the defense, Dr. Whitehurst himself said that Agent Burmeister's examination of Q507 was brilliant. He said he had no concerns whatsoever about Agent Burmeister's handling of Q507, and that Burmeister is one of the top ten residue explosives chemists in the world. We cite that to your Honor just to say there is very little question even from those critical of the laboratory that Agent Burmeister's work in this case was superior. And

the reason his work is superior, your Honor is because he's known for his meticulous attention to detail and his conservative interpretations of the data.

In this case he's only going to discuss with regard to residue analysis five or six items: Clothes that Mr. McVeigh was wearing at the time of his arrest, two shirts, a pair of pants, and items he had on him at the time of his arrest, a pair of earplugs. The only other item that has

explosives
material on it is the one your Honor is familiar with, and
that's Q507. And that's not residue, that's the actual crystals that were identified.
So it's only these items, your Honor, that are really relevant in terms of what tests were conducted, whether there was any potential for contamination, and what methodologies were used to come to the conclusions that Agent Burmeister did.
Agent Burmeister used qualified and well-known methodologies to conduct his tests, your Honor. In terms of the clothing, he used a variety of methodologies that are accepted, as I believe Mr. Tigar has acknowledged, everything from FTIR, which is four-year transform infrared spectrometry and different types of spectrometry that your Honor is familiar with, mass spectrometry, he used ion chromatography and gas chromatography, all tests that I believe are accepted by scientific experts and especially experts in the explosive analysis community to determine whether there are residues

remaining on certain items of evidence. The only test or methodology I'm aware that the defense is actually questioning is IMS, ion mobility spectrometry; and that is the test that they are claiming or at least claim in their brief has some false positives or problem with false positives, they say.

I believe that's incorrect. Agent Burmeister has informed us that when he and Agent Whitehurst were working on the World Trade Center, there were problems with using that machine with certain amounts of nitroglycerine. He was familiar with that problem, as he and Agent Whitehurst discovered it, themselves, and interpret the data accordingly. But there was no instances in this case where there was that large level of nitroglycerine that might go basically off the charts, so to speak, when reading this machine.

But other than that, your Honor, Agent Burmeister did not use any of these one tests to come to his

conclusions. He

17 relied in some cases on up to eight different tests. For

18 example, on one of the shirts that Mr. McVeigh was wearing, he

19 used eight different tests that all confirmed the presence of

20 PETN. And with Q507, he conducted the the same type of an

21 x-ray defraction with a Gandolfi camera which as I understand

22 it, is the fancy technology that the Smithsonian uses where

23 they take photos of this crystal going all the way around and

24 it becomes a fingerprint. So they can say without a doubt this

25 this crystal was ammonium nitrate. Agent Burmeister employed

1 that test as well as seven others to determine that those

2 crystals present on Q507 and embedded into that piece of

3 evidence were in fact ammonium nitrate.

4 So to go to your Honor's point about what

5 methodologies were used and whether they were reliable, one, we

6 would say all the methodologies Agent Burmeister were

reliable,
but he didn't rely on just one. He used multiple types of
tests.
THE COURT: Now, Mr. Nigh's telling me that he used --
he, Mr. Burmeister -- used a couple of screening tests which I
guess presumptive tests as I said, and then didn't do the
follow-up on the definitive test. Now, what's that about?
MS. WILKINSON: I'm not sure, your Honor. I was
waiting to hear the details, myself. I understand from my
instruction from Agent Burmeister and others that there are two
tests that can be used as screening. One is the IMS, and one
is what they commonly refer to as EGIS, but that's the gas
chromatography with a certain type of detector. But those
tests, when entwined with others, your Honor, are not
considered screening tests. In fact, for example, at airports
sometimes, you'll see these screening machines, the EGIS
machine, where they can, you know, take a little vacuum type
device that's attached to the machine and sniff or, you know,

vacuum the clothing.

In fact, that test was used at Mr. Nichols' residence

by Agent Burmeister. That itself, by itself without a detector is just a screening test; but with a detector and with the additional test that Agent Burmeister used, he was able to identify the residues and not just determine that there was the likelihood or the probability, like a screening test would, that those items were present. So in none of these tests did he rely purely on screening mechanisms to determine or to come to his final conclusions.

Now, unless Mr. Nigh has other evidence that I'm not aware of -- if he could give specific examples as to these items where Agent Burmeister is going to rely, he believes is just to go to rely on some kind of screening device, we'd be happy to address that; but I didn't hear anything today about

the specificity of the claim that he's making.

THE COURT: Well, we do have these machines that require the use of standards or comparison models or whatever you want to say; right?

MS. WILKINSON: Yes.

THE COURT: Now, the defense is challenging here the way in which that was done and saying that the standards that were used here had deteriorated or whatever.

MS. WILKINSON: Two things.

THE COURT: How do I know about that?

MS. WILKINSON: Right. Well, I'm not sure, unless they give you the detailed information, your Honor. And we

have provided 5,000 pages of notes from Agent Burmeister which show the chromatograms and other things that are the printouts of the standards, the blanks, and the identified samples.

But I can tell you how the process works generally. A

sample is extracted from a piece of evidence, perhaps from the shirt of Mr. McVeigh. A portion of that sample is taken out and placed into a machine. But before it's placed into a machine, the technician runs a blank to make sure that the machine is not contaminated.

THE COURT: Okay.

MS. WILKINSON: These print out that chromatogram and show it, and then they put the sample in. If it comes out positive, for example, for PETN, another blank is run and then another sample is run again to make sure there is nothing left in the machine for the next time. When the series of tests are completed and only when they're completed, they run a standard.

I point that out because Mr. Nigh seems to suggest that the standard should be established beforehand. The reason they don't do that is it could potentially contaminate the machine. So they try and run a blank first, run all the tests, and then if they hit a positive for PETN or RDX, they then put the standard in at the end so they have how the machine

is

23 reading that day and they can compare the known standard from

24 the chromatogram to the sample and make sure through the

25 examiner's interpretation that they can in fact identify that

1 substance.

2 Now, I understand from the examination of Agent

3 Whitehurst during the deposition that they believe certain

4 chromatograms show some kind of breakdown of the standard. I'm

5 not sure exactly what they mean, and they haven't provided any

6 details of that, even though they had the chromatograms and

7 they were trying to cross-examine Agent Whitehurst with those

8 during the deposition. So I would submit if there is some

9 detailed challenge to that, that they present it and we can

10 reply to it.

11 But otherwise, speaking with Agent Burmeister, he

12 views it obviously as his job as the expert and not as

the

technician to interpret the data. It isn't a matter of just

putting it into the machine, getting the read-out and saying,

Okay, I find HMX, I find PETN. You have to understand how the

machines work. You have to understand the things that

Mr. Tigar was trying to suggest to you create some doubt like

why the charts have different peaks. One of the most obvious

reasons is they're on a different scale. So sometimes if you

don't understand that, the chart is going to read differently

to you. So it takes the expert who understands all the data

and the scientific principles underneath it to interpret the

data. Agent Burmeister knows the machines that he used in his

laboratory, he knows how the standards read. He put all those

chromatograms and read-outs in his notes, and we provided them

the defense.

So if they want to challenge that, your Honor,

again I believe it still goes to, ultimately to the credibility of the finding, can you really call that peak PETN. Even if the standard has some kind of breakdown, the point is can you identify this sample as PETN or whatever the residue is on that substance.

But I don't think it's a matter of a Daubert challenge, your Honor. As you were pointing out to Mr. Nigh, that goes to the general methodologies that were employed. And again, I haven't heard a challenge to the actual methodologies that were used by Agent Burmeister. The challenges sound to me like did he actually apply the test and follow the procedures that they believe should be followed, the protocols, the way that they believe they should. And I think I should address that.

And it really goes more to the contamination issue, your Honor. The defense has had unprecedented discovery in this case with regard to the lab for the reasons that the Court

has talked about earlier. We've provided all the notes. We've provided them with the underlying allegations in the Inspector General's investigation. They've retained, we just found out today, seven different explosives and explosive residue experts, and yet they have still not been able to mount a challenge that the evidence in this case was actually

contaminated or some failure to follow a protocol actually affected the results. And that's because, your Honor, that didn't occur in this case.

Now, there's always a chance for possible contamination in any kind of forensic science, and I think that the Ninth case, the Hicks case recognized that, that that is the nature of forensic science; and so to suggest that the Government has some kind of burden to come in here and prove to you that there is no potential for error would make it be basically a matter of judicial notice. We would have to prove

that there's absolutely nothing wrong with this test, it says absolutely what the expert says, and by then the Court could take judicial notice. That's clearly not the standard under Daubert. Scientists do make errors, and that's fodder for cross-examination; and, you know, we're ready for the defense to attack our proof at trial, and we're ready to persuade a jury that this evidence is very compelling. But it's not a matter for the Court to determine pretrial that the jury can't hear this evidence because there may be some question about how the test was actually carried out in this case.

THE COURT: Well, you intend at trial to go through the step-by-step procedures followed?

MS. WILKINSON: Your Honor, in my judgment that would not be the most persuasive way to present it to a jury. But if we're challenged by the defense, we can do that. There's a lot

of different tactical ways to present this evidence.

THE COURT: And some of them are under the control of the Court.

MS. WILKINSON: Correct.

THE COURT: As to whether the witness has to identify the bases under 703 before he or she can give the opinions under 702.

MS. WILKINSON: Well, I believe because these findings are so powerful, it would be in our interest to provide the bases to the jury, so they can understand, within reason, without boring them to death with some of the minutia of the science, so they can understand why Agent Burmeister can say what he's saying to them. So we will prepare him to provide those bases, and of course he is so knowledgeable in this area that it won't be a problem for him to answer questions on cross-examination explaining to the defense if they have questions about the methodologies he used or the actual way he carried out some of these tests. But I believe the Court is

concerned, or at least wants to address, or wants us to address the issue of contamination. And that relates to how did he conduct the tests in this case.

Your Honor, the defense has not alleged any actual contamination. They titled the section of their brief "possible contamination," and that's because that's all it is, a possibility. But I would like to give the Court ten reasons

why in this case it is very unlikely, and indeed, the most unlikely scenario, for why these items were not contaminated and in fact are consistent with the Government's theory that Mr. McVeigh handled bomb-making components shortly before his arrest.

First, there is no systemic contamination in the FBI laboratory. The defense concedes this in their reply brief, Agent Whitehurst has said it, and there's absolutely no evidence of systemic contamination. If there were, you

would

see item after item coming up positive. And in this case, we've had over 400 tests for high explosives residue; and as I said, we only have five or six that came up positive. So there's absolutely no evidence of systemic contamination.

The second are the proactive measures that Agent Burmeister and his technicians took in testing these actual pieces of items. What they did, your Honor, was ensure that the material, before they took it out of their plastic bags -- ensure that their area was clean by using a bleach and acetone substance to clean their table, they put on gloves, they laid down disposable butcher paper, Agent Whitehurst -- Agent Burmeister puts on a second pair of gloves, to actually take the item out, he leaves the item out only long enough to extract the sample, puts the item back into the bag, seals it, takes off that second pair of gloves, and works with the sample, keeping the sample covered, obviously, at all times,

minimizing the chance, your Honor, for any kind of contamination. And then when he actually conducts the test, he does what I stated earlier: He runs blanks on the machine. After every positive hit, there's a blank every other time. He runs these tests on a variety of machines to make sure that he can ensure that his results are correct.

So all of these different measures that he used and that the FBI laboratory has used in the explosives, in the chemistry toxicology unit for some time, minimize the chance for any contamination.

Third, your Honor, on some of the substances or some of the items, there are multiple residues. For example, on the earplugs, there's PETN, EGDN and nitroglycerine. Just your common sense tells you that three residues didn't just jump onto those earplugs and magically contaminate them. I mean Scientists will tell you that, that it's less likely

that more

than one residue would just randomly be contaminated on a

substance. But here in one instance we have three. In other

cases we have two. Now there's arguments on both sides, but

the point is that the more residues that find on one substance,

the less likely it is that all those substances were around, I

assume the defense is contending somewhere in the area.

Now, Agent Burmeister --

THE COURT: Well, except a person can have earplugs

because he's a target shooter and can be using those earplugs

out firing firearms, which would give some nitroglycerine and

some other residue on those plugs; right?

MS. WILKINSON: You're right, most respectfully, in

part, your Honor. It would give nitroglycerine, but that leads

me to my next point of why it's less likely, or very unlikely

that there's contamination, and that's the type of residues we

find. You would find nitroglycerine from a firearm. You would not find PETN and EGDN Those are found in explosives components. EGDN is found in dynamite, and PETN is found in blasting caps and in detonation cord. So that is not the kind of thing that you would find out, you know, in the general public or even out in a firing range. You might find it out at a explosives range, but you're not going to find it, for example, you know, out in public or in public areas.

And a recent study conducted by the British lab supports this fact. They did a study last year showing the unlikely nature of contamination, in England, of course, but in public areas, in police vehicles, and in police stations.

THE COURT: They have different firearms laws there, too.

MS. WILKINSON: That's true.

The next point, your Honor, on why it's unlikely there was any contamination in this case was the types of residues and their properties. For example, PETN that was found on

25 Mr. McVeigh's clothing and on the earplugs does not vaporize,

1 it doesn't magically -- you know, it doesn't have that
2 vaporizing property like nitroglycerine does or EGDN so it
3 wouldn't seep up in the air as some have suggested and then
4 somehow land on these pieces.
5 Dr. Whitehurst said in his deposition it's hard like a
6 rock; in fact that's why it's hard to detect, it doesn't move,
7 it's more like a sticky substance, so it's not going to
8 penetrate a paper bag and a box and a plastic bag that this
9 evidence was maintained in. So then, again, it's very unlikely
10 that these residues which were found on Mr. McVeigh's clothes
11 got there through contamination.
12 The fifth area, your Honor, is the one that I
13 mentioned earlier which is the that the areas that these items
14 were tested have never tested positive for contamination. We
15 have provided to the defense the contamination study that Agent

Whitehurst conducted in June of 1995. And in that study he specifically says that he tested Agent Burmeister's area and Mr. Kelly's area and there were no residues detected in that area.

THE COURT: What was the date of that?

MS. WILKINSON: June 1995. Now, there's an argument over how persuasive that is, of course, because the testing in this case for these items was conducted before that. These items came in early. But if you follow the point that PETN may stay in a place for a while because it's sticky, you could

argue that if they found it in June 1995, it could have been there for a while. That's possible, but my point is at the time they tested, which was shortly after these tests were conducted, Agent Burmeister's area was clean.

The sixth reason, your Honor, why contamination is

unlikely is the nature of the crystals found on Q507. Those crystals were found embedded into a portion of the truck which was blown apart. The portion the Morgan box that makes up the Ryder truck is made out of a reenforced plywood, fiberglass plywood; that was blown almost in half, this piece was, and then the crystals were embedded in it.

So despite Mr. Tigar's theory that perhaps these crystals washed up somehow because they were in the rain which ensued on the evening of the 19th and reformed, that's virtually impossible because of how they were embedded and Agent Burmeister tells me because of the structure of the actual crystal, that if crystals somehow were to reform, which he believes would be virtually impossible under the circumstances of the bombing and the rain and the lack of those crystals found on any other items at the crime scene, you would have seen a different structure to the crystal than he saw.

The seventh reason, your Honor, is that the residues were found where you would expect a bomber to have residues.

24 Again, going back to your common sense, if there's this claim
25 of random contamination that's very hard to detect which the

1 defense states in their brief, you would assume that it would
2 just be on one piece here, one piece there, and not occur on a
3 regular basis. Obviously the definition of random.
4 All of the residues were found on Mr. McVeigh's
5 clothes, on both of his shirts, on his pants, in his pants
6 pockets, on his knife. All the places where you would expect
7 someone who had been handling explosive materials to have them.
8 And they weren't found where you wouldn't expect them. They
9 weren't found on his boots, they weren't found on his blanket,
10 they weren't found on those areas where we would think it to be
11 less likely for him to have residues. So if there was some
12 kind of random contamination, it was pretty effective, because
13 it all jumped on the right places where we would expect

Mr. McVeigh to have his residues.

The ninth reason, your Honor, is that the clothes and the earplugs that were tested in this case were tested at totally separate times, so if there, again, were this random contamination, we find all these residues on the clothes which were tested separately but within a, but within the same day day or two. and then the earplugs are tested at a totally separate time, handled by different people, and we find two explosive res -- or three, as I said, explosive residues on those earplugs.

The final reason, your Honor, is that although the FBI does not do quantitative analysis for explosive residue -- and

there's lots of reasons for that -- different items that had residue on them showed different intensities of the residues. And if there were contamination, it would be more likely that

there would be similar intensities and relatively small amounts on all the items.

The defense's own expert Dr. Lloyd has relied on this premise in his analysis of evidence in Great Britain. And we've reviewed some of his reports and he relies on this in sometimes determining whether there was contamination or whether there wasn't.

So for all of these reasons, your Honor, and many more that I'm sure Agent Burmeister will be much better at explaining than I have, it is the most unlikely scenario in this case that these residues were deposited based on contamination. Nevertheless we understand that the defense has every right to challenge these in front of a jury and argue basically the issues your Honor cited this morning about whether this evidence is to be believed and whether there's alternative explanations for the data.

But there's no evidence that there was any massive contamination in the FBI laboratory, there's no evidence that

this evidence -- there's no evidence that these items themselves were contaminated; and based on the lack of any of that affirmative proof, your Honor, it is unnecessary to have any kind of pretrial hearing, because the Court couldn't come

to any final ruling. It would be impossible for you to determine as a matter of law that these items were so contaminated or possibly contaminated which is all that Mr. Nigh is claiming, or as Mr. Tigar has claimed, that somehow the interpretation that Agent Burmeister makes is somehow so different from the one his expert would make or that he would make, that clearly falls right in the province of the jury, for them to determine -- Mr. Tigar can call his experts and they can try and interpret the chromatograms and charts that Agent Burmeister interpreted and try to persuade the jury that there are alternative explanations.

THE COURT: Are you going to address this matter of

the supplemental testing done to determine whether these were prills?

MS. WILKINSON: I will briefly, your Honor.

THE COURT: All right.

MS. WILKINSON: As Mr. Tigar related to you, when Agent Burmeister did his initial testing of Q507, he determined there were crystals present, and he found those three elements, the aluminum, the sulfur, and the silicon. At that time he did not know the significance of those materials. And indeed I think that makes it even more powerful because he reports it in his notes and identifies those quantities but can't come to any conclusions.

He then learns that the ICI corporation that

manufactures some of the low-density prills that Mr. Nichols had at his house using an additive package in their coating that's identifiable. So he goes to ICI in October and November and participates in testing with them. There's an

exchange of information because the scientists at ICI know what's in their prills and Agent Burmeister knows what he's seen on Q507 and his other charts. They test the prills from Mr. Nichols' house and they test the known ICI prills and he determines that the elements in those coatings are consistent with those three elements that he found, what, a year and a half before that.

He then --

THE COURT: So he's in the hands-on testing down there at the manufacturer?

MS. WILKINSON: Yes, he went to ICI's laboratory, which is I believe in Montreal.

THE COURT: And what kind of machine was that done with, do you know?

MS. WILKINSON: I don't recall. I don't have the report. But I do differ with Mr. Tigar that the report, it did set forth the types of tests that were used. And obviously we relied on Agent Burmeister to determine whether those were methodologies that he would rely on. But the general

methodology was the SCM, the chart, chromatogram he shows you, that scanning electron microscope is accepted technology. As you say, it's been around for years.

THE COURT: I don't have that report, do I?

MS. WILKINSON: You don't. You don't. But that's why they were able to compare those chromatograms or those charts because they used that same test, the scanning electron microscope, which identifies the element by atomic wave. So it's the same type of test that was conducted at the FBI. The same, at least that test. And on the same type of machine. My understanding is I think the machine at ICI is more sophisticated and it can identify elements below 11, the weight of 11 and the one at the FBI laboratory can't. But that was irrelevant for the purpose of identifying these coatings.

THE COURT: Well, now, you've mentioned in response here that there should be a hearing with respect to

qualifications of three of the witnesses.

MS. WILKINSON: Well, your Honor, we have agreed to a hearing. I think I should make that clear.

THE COURT: Yeah, I'm not clear what that hearing would be.

MS. WILKINSON: Well, our understanding is that the defense is challenging Miss Jones, Mr. Rydlund, and Mr. Stokes, claiming they're not even qualified to give the opinions that we have told them we expect to elicit from them. In other words, let's use Mr. Rydlund who is the ammonium nitrate and fuel oil expert from Eldorado which is a chemical corporation. We have advised the defense that he will testify about a

variety of matters, including the manufacturing of ammonium nitrate and fuel oil, the detonation, boosters that are necessary, and they claim he doesn't -- residues that may be left when ammonium nitrate fuel is detonated. They

claim he
doesn't have the expertise to do that. We assert that he
does..
THE COURT: His mining experience.
MS. WILKINSON: Right, he's a mining engineer. He has
conducted studies, mostly for environmental impact, to
determine what residues are left. We could give a proffer to
you right now on his credentials that I believe would be
sufficient to show that he's qualified to give those opinions.
But because the defense has made the challenge that he's not
even qualified, we were willing to have a limited hearing on
those issues.
THE COURT: What about --
MS. WILKINSON: How about Miss Jones?
THE COURT: Yeah.
MS. WILKINSON: I believe, and I hope I don't misstate
their objections, and I'm sure they'll correct me if I do. I
believe they think that Miss Jones is not qualified to opine on
the location of the device and the type of device; and their
objection, I believe, was that it wasn't in her report,

which,

one, is wrong, but two, obviously from her credentials, she's

qualified to do that.

They also claim she is not qualified to discuss the

ease or difficulty of purchasing, acquiring, or manufacturing

explosives and explosives components. We, again, would argue

that Miss Jones started her career in explosives factory where

she did quality assurance for the manufacturing of explosives,

she studied polymers and how they interact with explosives and

she just has an incredibility background and knowledge base.

THE COURT: I think there's also an issue, as I

understand it, about her ability to opine regarding the size of

the device based on effects. Is that --

MS. WILKINSON: I don't recall that, but Mr. Nigh will

have to correct me on that. I don't believe so.

THE COURT: You know, we had some argument about

there's no comparable size in there, her experience.

MS. WILKINSON: That's incorrect. Mr. Tigar made some disparaging remarks about her being, having a knowledge of a few car bombs. Unfortunately, because of her position in Great Britain, there are quite a few large explosives devices. She's been present at, I think after the fact of an explosive device that was as big as 10,000 pounds in trucks. In fact, these are the type of devices are somewhat similar to the devices the IRA uses in Great Britain. She's also been on the scene when devices were neutralized or rendered safe that were large truck bombs. So that information that was provided to you was incorrect. She has testified in over 30 cases about explosive

residue. As far as we know, she is the most qualified expert on ammonium nitrate-based explosives in the world. She's been in more bombing crime scenes than anyone we've been

able to find. On ammonium nitrate-based explosives. So I don't believe there's any basis to challenge her, you know, as Mr. Tigar suggested during the first argument.

THE COURT: Who is the third one?

MS. WILKINSON: Mr. Stokes, who is the FBI's expert on the videotapes. And the defense makes an unusual challenge, shall we say, that because he's an expert in photography, he can't be an expert, he has no expertise in videotapes. And I believe that Mr. Orenstein can address that for you. He's more prepared on that than I am, but I know that Mr. Stokes has expertise in videos and has been analyzing videos for quite sometime.

So we don't believe that a hearing is necessary, your Honor, we believe we can do this through a proffer; but if the defense decides that based on the actual qualifications they wanted a hearing, we could do that. I think it would be better if we just answered their questions or provided additional

information if that what was necessary other than bringing these people into court for this limited purpose.

THE COURT: Okay.

MS. WILKINSON: As to Miss Jones, only briefly, your Honor, I believe that Mr. Tigar has argued somehow that she's

relying on Agent Burmeister and therefore her opinions aren't valid. She's relying on Agent Burmeister only with regard to his chemical analysis of Q507. Miss Jones is a chemist herself, she has reviewed Agent Burmeister's work, she has discussed it and can of course under Rule 703 reasonably rely

With regard to the remainder of her opinion, I believe Mr. Tigar has challenged it claiming that Miss Jones hasn't used any proper methodologies to determine the blast damage and the blast effects. And I'm not sure exactly what he's saying there, but Miss Jones has viewed the evidence in this case -- I guess he's saying she's relying somehow on other people

in the

12 FBI, which is not true. She has come to the United States and

13 examined the evidence, herself. She has not read Agent

14 Williams' reports in this case, so she has not relied on any of

15 his work. She's come to her own conclusions, and her

16 conclusions while they're consistent with Agent Williams' are

17 not the same as Agent Williams'. So I think that is an

18 misrepresentation of the opinions that we're going to elicit

19 from her in court.

20 THE COURT: Okay.

21 Mr. Nigh.

22 MR. NIGH: Thank you, your Honor. I'd like to respond

23 to Ms. Wilkinson's arguments in reference to Agent Burmeister's

24 testimony first before we go to the other experts, if I may.

25 I would submit, your Honor, that what we have had just

1 had was an evidentiary hearing concerning the reliability of

2 Agent Burmeister's findings as testified to my Ms. Wilkinson,

and I would submit that what we have had is a detailed account of Ms. Wilkinson's testimony concerning her determinations of the reliability of the FBI laboratory. And I submit, your Honor, that it was inappropriate and the way to resolve that question is for the witnesses themselves to come into the courtroom and offer testimony to the Court concerning what tests they performed, whether their methods were reliable, instead of having Ms. Wilkinson testify about it.

It seems to me, your Honor, that --

THE COURT: Well, are you saying every time there is to be opinion based on laboratory testing, that there has to be a pretrial hearing.

MR. NIGH: No, your Honor, not at all.

THE COURT: Well, where do you draw the line as to when you hold a pretrial hearing and when you don't?

MR. NIGH: I draw the line on those circumstances where there is reason to question the methodologies used by the proffered expert and those occasions a pretrial hearing should

be held and the proponent of the evidence should be required to prove the reliability of the methodology. And your Honor, we have --

THE COURT: So there's some, the opponent of the evidence has to show something preliminarily to warrant a

hearing?

MR. NIGH: I think there has to be a good-faith reason to question the process that's being offered. I think if it's a well established process that's generally accepted and has gained acceptance in the appeals courts, then it's difficult to justify an evidentiary hearing. But I submit that's not what we're dealing with here.

THE COURT: But, again, though, the methodology is not subject to quarrel here. As applied that's being questioned, isn't it?

MR. NIGH: I think --

THE COURT: How the methodology is applied, including the, I guess, particular machines that were used.

MR. NIGH: I think that that's one way to articulate it, your Honor. And we have received 5,000 pages of notes from Agent Burmeister.

THE COURT: Yeah.

MR. NIGH: And our experts tell us, based upon their review of their notes, not eight tests were used in reference to these findings in reference to Mr. McVeigh's clothing, but that two screening tests were used. That's based upon the best information that they have. And they also tell us that those screening tests are not the appropriate tests to utilize in making an explosive residue determination.

I can testify about that based upon what my experts

tell me in reference to it, but I submit that the way to resolve it is for the Court to hear the testimony from Agent

Burmeister concerning what tests that he performed, what rate of error those testing devices had when used in the way that he used them.

THE COURT: And then hear from your experts, too?

MR. NIGH: Yes, your Honor. I would submit that that's the appropriate way to do it because of the overpowering nature and the potential prejudicial effect of that testimony if the Court determines that it's unreliable. After it's already gone to the jury. I think that that's the way to resolve the issue. And if the Court determines that it's admissible, we'll live with those results and we'll challenge the conclusions through our own experts at trial. But because of the nature of the testimony, we think that a pretrial determination is appropriate.

THE COURT: Well, you know, I'm not very persuaded by some of these things in the materials here where they're saying good lab, bad lab, good science, bad science, that isn't very

persuasive to me. Seems to me, they have to be a bit more specific than they say every lab ought to have a certain amount of protocols.

MR. NIGH: We tried to be as specific as we can based on the information that we have, your Honor. We submit specifically that the testing that was performed on

Mr. McVeigh's clothing was not done properly.

THE COURT: And why specifically wasn't it?

MR. NIGH: The first reason that it wasn't done properly is because the wrong instruments, wrong testing instruments were used in order to make identifications or consistency determinations.

THE COURT: Like what?

MR. NIGH: I think that IMS and EGIS are the two tests involved there.

THE COURT: And those are not appropriate tests?

MR. NIGH: Not for making identifications which is

what the FBI lab, the use that the FBI lab has put them to.

And that's what our experts tell us based upon their review of

Agent Burmeister's notes. That's the first way. Their review

of --

THE COURT: Well, if Burmeister says it is, and they

say it isn't, let the jury decide, isn't that how we do it?

MR. NIGH: I think if the Court determines that Agent

Burmeister is right about it, that that's the way that it ought

to be done --

THE COURT: I'm not supposed to decide whether he's

right about it. I'm supposed to decide whether his conclusions

are based on accepted scientific methodology.

MR. NIGH: Certainly, your Honor. And if the Court

conclusion based upon the testimony from both experts that his

conclusions are based upon valid scientific methodology, then

the evidence should be admitted.

I submit that the Government bears the burden of proving through Burmeister's testimony or other witnesses that it was a scientific methodology. That support the conclusions that he reaches. And I submit that there are based upon the record before the Court very serious questions about that based upon all the information that we've been able to gather.

THE COURT: What do you need to talk about with respect to specific witnesses here, other than Burmeister?

MR. NIGH: What I would propose to do, your Honor, is go through the them alphabetically in the order that they're in the Government's brief. Primarily the first objection to the rest of the experts is based upon a failure in discovery which permits us from --

THE COURT: Well, let's take a recess before we go through that process. We'll recess, 20 minutes.

(Recess at 3:24 p.m.)

(Reconvened at 3:45 p.m.)

THE COURT: Be seated, please.

Mr. Nigh, before we talk about the individual witnesses and the discovery issues, what is your position regarding the qualifications of Linda Jones?

MR. NIGH: Your Honor, we do believe that the Government has proffered Ms. Jones' testimony for areas that

are beyond her area of expertise, including the availability and accessibility of explosives and things of that nature. And the nature of our objection there is primarily in reference to availability in the United States, which would seem to be a relevant area of inquiry.

And our understanding of Ms. Jones' qualifications relate to Great Britain, and we think that she should be required to establish her qualifications in that regard before being allowed to admit testimony.

THE COURT: That's a relatively minor thing. I mean, that could be done at a pre-jury hearing before trial -- in

trial.

MR. NIGH: That aspect of it could, your Honor.

There is an additional problem with Ms. Jones that I failed to mention previously, although it's in the -- one of the motions before the Court, and that is the fact that Ms. Jones observed the explosives tests in Socorro, New Mexico.

THE COURT: Well, but I understood that would not be a part -- that would not be one of the bases upon which she would give opinions.

MR. NIGH: Well, in light of the fact, your Honor, that she proposes to testify about the size and nature of this device, and the tests at issue in Socorro, New Mexico, were supposed to be 5,000 pounds of ammonium nitrate and fuel oil, I think she should be required to explain to the Court how she's

going to discount her observation and studies in connection with those tests in offering that kind of opinion,

particularly

because to my knowledge there is nothing that exists that

approaches that in the previous testing that was done or within

her experience.

THE COURT: Well --

MR. NIGH: And I think the agreement on that point was

clear that --

THE COURT: I've already ruled with respect to the

inadmissibility, either directly or in support of opinions, of

the tests where there was not compliance with the agreement.

Now, am I right, Ms. Wilkinson, that she is -- she,

Linda Jones, is not using that as a basis for her opinion?

MS. WILKINSON: You're right, your Honor. Ms. Jones

did participate in the earlier Socorro tests which you have not

suppressed; and so if she were asked about her ability to make

a determination, she may refer to those earlier tests; but she

is not going to refer to the 1996 tests and in fact has not

become familiar with the actual results of the tests based on

the Court's order, and neither has Agent Burmeister.

So the only thing they did was actually observe; and as scientists, I think they would tell you that they would not make conclusions based upon purely those observations. They would want to study the data that was obtained during those tests; and they have not done that. So they won't -- they

won't rely on it at all for their testimony.

THE COURT: Well --

MR. NIGH: Your Honor, our position for the record is that they should be required to explain how they're going to separate that out. That's the reason -- one of the reasons that we think that Ms. Jones should be required to appear at a pretrial hearing.

THE COURT: And with respect to -- let's see -- William Stokes, what are -- are you still saying he's not qualified to deal with video because he's a still photographer

or something?

MR. NIGH: Yes, your Honor. Ms. McLaughlin is prepared to explain to the Court why the qualifications for one do not mean the qualifications for another.

But if I could, your Honor, Mr. Tigar asked for the opportunity to respond to the Government's argument in reference to Mr. Burmeister and Ms. Jones prior to the time the Court does that.

THE COURT: All right. Mr. Tigar?

MR. TIGAR: I wanted to answer your Honor's general question about what kind of a pretrial hearing.

THE COURT: Yes.

MR. TIGAR: Federal Rule of Evidence 104(c) confers discretion on your Honor as to what hearings will be held out of the sight and hearing of the jury.

In United States vs. Davis, the Court held that there had been the functional equivalent of a preliminary hearing and

noted that defense counsel did not object to having the matter heard before the jury.

That's a strong suggestion that it ought to be held out of the sight and hearing --

THE COURT: Well, of course, court of appeals judges like to have that done so it keeps things cleaner for them. I mean, we get that kind of suggestion every now and then like in James hearings, saying, Well, do it all ahead of time so it's all nice and clean for us.

MR. TIGAR: Yes, your Honor.

THE COURT: They don't face the same problems we do.

MR. TIGAR: I understand that, your Honor; and your Honor's relations with the Tenth Circuit and how the Court feels about it is your Honor's. I would suggest that these Daubert issues come up -- Daubert itself is a summary judgment case, the Duffee case is a summary judgment case; that is, courts use this threshold determination. And I think the thrust of Daubert is that it's a gatekeeper function. And the

gatekeeper is not like the watchman that the Prophet Isaiah referred to. The gatekeeper is -- it's a function a little more stringent than that, and that's what we suggest.

But to make our point clear, I offer to prove to the Court that Mr. Burmeister's conclusions, insofar as they -- as

we have challenged them represent -- and I'll use the words -- application of a reasoning or methodology that cannot properly be applied to the facts in issue, based in part upon the dissimilarity of the peaks, scale having nothing to do with it; based in part upon ICI's invention of a technique for this particular purpose; based in part upon the unexplained presence of something with which Mr. Nichols has never been known to be associated; based in part upon what I challenge from Ms. Wilkinson's statement -- and I won't go through 40 minutes of it, your Honor, because it's not testimony, even though it

might sound like it. I think what she said isn't true and that Mr. Burmeister won't say it.

One of the things he won't say is true is that something found in Mr. Nichols' house is uniquely associated with an ICI product.

I offer to prove, your Honor, as a matter of challenge in a pretrial hearing or a hearing out of the presence of the jury under Rule 104 every single thing in our papers with respect to a challenge of these particular experts. The timing of -- of my chance to do that is for your Honor.

And yes, in answer to your question to Mr. Nigh, if I show up with an expert and say that as a part of my essentially voir dire, I want to put this expert on, your Honor could well require me to make a proffer of what the expert would say because your Honor might say, Hey, even if you prove that, it

wouldn't make any difference, I'm going to let it in.

But within that and recognizing fully that the timing is fully within your Honor's control, subject to what the Tenth Circuit says, I wish it to be understood that what we have said is our offer to prove something and not my testimony from this place in the courtroom, which is, in our view, an inappropriate place for people to be testifying from.

THE COURT: And what is your -- I don't remember, frankly, from the papers filed where you are on the qualifications of the witness Linda Jones -- her qualifications to opine in the areas in which she's expected to do so.

MR. TIGAR: Linda Jones' qualifications represented here today involve allegedly that she worked with large devices. Our information is that the large devices in issue were not examined in the laboratory where she worked and thus she did not possess that degree of qualification to give an opinion on those issues.

While she is a chemist, she is going to express an opinion about essentially the effect of an explosive of a certain size having a certain velocity of detonation.

Now, that is so far outside the expertise of a chemist, your Honor, and not contained within the four corners of what we have seen that as to that, we also suggest there would have to be some inquiry out of the sight and hearing of the jury before she was able to toss that into the jury box.

Again, it's not --

THE COURT: Well, as I understand it, her background of experience is what's going to be relied on for her ability to give opinions about size and effect.

MR. TIGAR: I understand that, too, your Honor. The trouble is that my understanding and Ms. Wilkinson's understanding and therefore with all respect your Honor's understanding falls short of what has to be proved by the proponent of evidence.

We say that what they've shown does not establish her qualification to express so cosmic a conclusion, particularly

given this odd similarity between these two reports, the Williams reports and hers.

THE COURT: Do you have a position on William Stokes, the photography expert?

MR. TIGAR: No, your Honor, we haven't expressed any opinion on that. That doesn't -- that doesn't concern us, as the Court may well recognize. We haven't challenged it. That's a videotape taken at a time when Mr. Nichols was home with his family.

THE COURT: Okay. All right.

Mr. Nigh?

MR. NIGH: Thank you, your Honor.

Primarily our challenge as to the remaining experts relate to a lack of information provided by the Government

concerning what the testimony of those experts will be based upon. There are a few other specific challenges that I would

suggest that we address alphabetically as they've been set forth in the Government's response brief.

THE COURT: All right.

MR. NIGH: But in order to give the matter some context, your Honor, I would like to begin with referring back to the Court's Scheduling Order No. 2, which was filed on July 19 of 1996 at Docket Entry 1753.

In that order, the Court directed that by August 2 of 1996, the Government would file a list of expert witnesses that would provide defendants' counsel with copies of the reports of such witnesses as they became available.

Your Honor, many of them have still not become available, and we're less than two months before the trial date.

Back in August still, August 30 of 1996, Mr. McVeigh filed his objection to the Government's proffered expert witness testimony and cited in that objection specifically the provisions of Rule 16 and cited the examples of the lack of information that we've been provided by the Government in

reference -- in reference to its proffered expert witness testimony.

We ask that the Court direct that the Government provide us with meaningful reports from all of its experts so

that we could determine what they base their opinions on, essentially is what we were looking for.

And, your Honor, unfortunately, the information that we have received since then has been negligible. We have received a bulk of information and we have weeded through it. In many instances, the ones we've identified, we still can't tell why it is that the expert reaches the conclusion.

THE COURT: So do you want to go through them one at a time and --

MR. NIGH: Yes. If you do it alphabetically, you start with, after Burmeister -- you get to Mr. Cadigan; and essentially, your Honor, we've adopted Mr. Nichols'

motion in reference to Mr. Cadigan, who wrote the first- and second-prong Daubert challenges; and I don't intend to address that more in oral argument.

If we go truly alphabetically, then -- and Mr. Tigar wants to address it. Perhaps that's where we should begin.

THE COURT: I can't remember what his area is.

MR. NIGH: He's tool marks, your Honor, in reference to the drill bit and the drill block and the --

THE COURT: Oh, yes.

All right, Mr. Tigar.

MR. TIGAR: You will recall, your Honor, that at the last hearing Ms. Wilkinson represented that Mr. Cadigan had found some unique characteristic, her word, with respect to

that drill bit.

The uniqueness does not appear in Mr. Cadigan's report; and thus in order to determine whether his science is

reliably applied here, I think that out of the sight and hearing of the jury there would have to be evidence, as opposed to counsel's representation, because, after all, we were talking about a spinning tool.

I won't repeat what's in our brief about the methodology. Assuming there is a methodology of tool mark identification, the manuals with which we have been provided upon which Mr. Cadigan relies are essentially look at the tool and see what you think; so we don't have an evidentiary basis upon which to establish whether his expertise should go to the jury.

Moreover, Mr. Cadigan's report includes a section called metallurgy. And since that report was done, that metallurgy has been contradicted by the Oak Ridge National Laboratory. Thus, to the extent that Mr. Cadigan relied upon the synergy between his tool mark identification and pieces of brass found in the chuck of the drill, that second prop is out from under, because the brass found in the drill

doesn't match

the lock. It was a brass lock, but Mr. Nichols' drill, or one

found in his house, had different brass in it, didn't come from

that lock.

So for all of those reasons, it may very well be that

Mr. Cadigan simply washes out as a witness because he doesn't

have anything useful to tell us.

I'm the first to concede that if he comes up and says,

Yes, I used a reliable procedure, this is what it was, this is

the particular unique mark, here you can see it, and metallurgy

or no metallurgy, that's my story and I'm sticking to it, then

the jury gets to hear it.

But before they get to hear it, it seems to us that

those are the sorts of questions that ought properly to be

asked.

THE COURT: All right.

Well, let's talk about that. My memory is

that I gave

13 the question before of whether there was something distinctive

14 about the tool, as there would be in a crowbar or a chisel or a

15 pry bar with a little tooth out or something.

16 MR. TIGAR: Yes, your Honor, I believe that was the --

17 THE COURT: I thought that the Government was saying,

18 Yes, that's what we are relying on.

19 So tell us about it, Mr. Goelman.

20 MR. TIGAR: This is Mr. Orenstein.

21 MR. ORENSTEIN: I'm proud to be Mr. Goelman, your

22 Honor.

23 THE COURT: I'm sorry. Apologize.

24 MR. ORENSTEIN: None needed, your Honor.

25 Yes, your Honor. Yes, it is a unique characteristic.

1 I think it's somewhat more involved than simply the shape of a

2 chisel in a door. I think it's more persuasive than that, and

3 I --

4 THE COURT: Well, what is it? Tell us what

his

testimony is.

MR. ORENSTEIN: Well, it is unique characteristics.

I'm saying it's somewhat more involved than just the chisel has a V shape and there is a V-shape notch in the door. It's like that, only more complex.

I think that example or an analogy that Agent Cadigan might use, or as he could explain it, would be if you have a worn windshield washer -- windshield wiper on your car, as it goes across your windshield it's going to leave a trail of lines of rain that it hasn't wiped away, thinner or thicker lines. And if you could take a picture of the trail left by that wiper on the windshield and then take the suspected windshield wiper and take another picture using that wiper, you could match up the lines, the pattern of lines left by the questioned wiper and the known wiper and you'd see that the lines would just continue from one right into the other if you lined the pictures up.

That's along the lines of what he does, and I think that's why it's not in the report that --

THE COURT: Well, has he got some pictures that he used?

MR. ORENSTEIN: Yes. That's what I was about to say. It's not in the report. It's in the picture. What he's taken is a side-by-side picture of the mark left on the lock from the Martin Marietta burglary and a picture of a mark left by the drill bit found in Mr. Nichols' home, took that drill bit, used it to make a mark, lines the two pictures up, and you can see that the lines left by the minute imperfections in the drill bit line up, you know, very closely; and that's the basis on which he makes his identification.

So it -- you're not fitting a chisel into a notch, you're using the chisel to make another notch and showing --

THE COURT: So the drilling -- I take it for

the

13 comparable, there is a test drilling of this bit.

14 MR. ORENSTEIN: Exactly. You take the questioned bit.

15 THE COURT: In the same type of metal?

16 MR. ORENSTEIN: I don't know if it's necessarily used

17 in the same type of metal. It may well be. I just don't know

18 the answer to that, but it leaves an impression and you compare

19 those two impressions.

20 THE COURT: Now, is he also going to testify about

21 material found in the chuck of the drill?

22 MR. ORENSTEIN: No.

23 THE COURT: So it's only the bit.

24 MR. ORENSTEIN: Yes. And the -- to complete the

25 record, the two are not tied together as far as I know. But

1 also, I think Mr. Tigar is misinformed about whether it was

2 different metal or just a failure to confirm the same metal;

3 but again it's not tied to --

THE COURT: So his testimony -- let me -- this is my understanding of what you said. His testimony is going to include showing us enlargements of some microscopic examination of the markings left by the -- a particular bit which would be identified as having come from a particular source.

MR. ORENSTEIN: Yes.

THE COURT: And show the marks on this lock and the marks on the test drill metal.

MR. ORENSTEIN: Correct.

THE COURT: And that's it?

MR. ORENSTEIN: That's it.

THE COURT: Okay.

Now, back to you, Mr. Tigar.

MR. TIGAR: A windshield wiper doesn't spin. And so we're still -- we can use all the analogies we want. We're still not at a place where we have a showing that this man Cadigan has a reliable method to identify a mark made by a spinning tool as it goes in and out of a particular lock. And without that foundation, the testimony shouldn't be admitted.

Now, the second point is suggested by a case

that

Mr. Orenstein cites in his brief, Jones vs. Otis Elevator. In Jones vs. Otis Elevator, there was a test of the elevator by

the plaintiff's expert; and the court there did affirm, but they insisted that it be shown that the elevator control mechanism that the expert inspected was the same or would expected -- to be expected to be the same at the time he performed his test as at the time of the accident being sued on.

Here, the alleged burglary takes place in the fall of 1994. This drill bit is concededly in use for other things because nonidentifiable brass chips and rocks and stuff are found in the chuck. It isn't tested until April or May of 1995.

So there is -- there is that gap that has to do with the reliability and admissibility of the evidence.

So for those reasons, that foundational showing would have to be made.

And, your Honor, I've --

THE COURT: Is this testimony going to be offered at Mr. McVeigh's trial?

MR. ORENSTEIN: Yes, sir.

THE COURT: All right.

MR. TIGAR: Your Honor, I've looked at the pictures. I'm sorry. I don't see it. If I could see it in the pictures, I'd sit down and I wouldn't waste your Honor's time.

THE COURT: And where is Mr. McVeigh's counsel on this issue?

MR. NIGH: We join in Mr. Nichols' motion.

THE COURT: Okay. Well, I'm not going to hold a hearing on it. We'll see what the evidence is.

Now, Mr. Nigh.

MR. NIGH: Thank you, your Honor.

Next, alphabetically would be Charles C. Edwards in

reference to keys and locks. There were two items of information that we indicated we didn't have in reference to Mr. Edwards. The Government proffers Mr. Edwards to testify that a key fit in and functioned in a lock that he had manufactured.

THE COURT: An ignition key.

MR. NIGH: Exactly. Exactly. The Government tells us -- we challenge that on two grounds. We couldn't figure out how he found or determined the vehicle identification number with which to manufacture the ignition.

THE COURT: I think that's been answered here.

MR. NIGH: It has been.

THE COURT: This was a partial number, and these other numbers are not really definitive, they have other purposes.

MR. NIGH: That's right.

THE COURT: That's the answer in the papers.

MR. ORENSTEIN: That's correct, Judge.

MR. NIGH: We'll accept that answer, your Honor.

THE COURT: All right.

MR. NIGH: The next question is how the lock itself was built once the determination was made of the vehicle identification number. We don't challenge that you can tell if a key fits a lock. It would be silly for us to do so; and this might be a relatively simple matter in terms of how the lock was constructed; but fact of the matter is that the Government hasn't told us why, and we simply have asked for that information since August. And we don't know why it wouldn't be forthcoming.

THE COURT: All right. Will you address that, Mr. Orenstein?

MR. ORENSTEIN: Yes, Judge. Let me just take a moment to find the particular page here.

I think as we've informed the defense, Mr. Edwards obtained the specifications for a particular lock and he built it.

THE COURT: Specifications being from the manufacturer of the --

MR. ORENSTEIN: Yes. This is for the Ryder truck that was rented by Mr. Kling. Built that lock based on those specifications, takes a key found at the crime scene, sticks it in the lock and turns it and it works, so --

THE COURT: And have the specifications been provided?

MR. ORENSTEIN: The specifications have been provided. So I'm not sure --

THE COURT: It doesn't sound like it's a very fancy science.

MR. ORENSTEIN: It ain't rocket science.

And that's why we're sort of stymied by what the problem is. We've given them the information that there is; and the way I understand -- I understood the papers from the defense, the second-prong objection was that Mr. McVeigh has not been provided sufficient information to challenge testimony that Edwards built a lock that a certain key -- and

that a certain key fits that lock. I'm quoting from my brief. I intended to find the exact words from Mr. McVeigh's brief, but --

THE COURT: Yeah, well, I think the bigger problem was the identification number and what a VIN number means and how specific it is; and you've responded to that and answered it, so I don't see any problem here. We won't hold a hearing on Edwards. We'll rely, of course, on him being able to testify as to how he did it.

MR. ORENSTEIN: Of course.

MR. NIGH: The next one alphabetically, your Honor, would be Robert Fram; but I understand that the Government is not going to offer hair and fiber evidence at Mr. McVeigh's trial.

MR. ORENSTEIN: That's correct.

THE COURT: That's what you said.

MR. NIGH: At all, is my understanding.

MR. ORENSTEIN: That's what we said.

THE COURT: At all. Okay.

MR. NIGH: The record being clear on that point, Linda Jones would be next -- I'm sorry.

MR. TIGAR: I'm sorry to appear again like the ghost at the banquet, your Honor.

If they do decide to offer it at Mr. Nichols' trial, we maintain our objection.

THE COURT: Oh, yes.

MR. TIGAR: I'm sorry. I wanted to make the record.

THE COURT: I understand.

MR. TIGAR: I apologize.

MR. NIGH: Next, your Honor, alphabetically would be Linda Jones; and I feel like we've already done that, so the next would be John Osteraas, and Mr. Tritico is prepared to address our challenges to Mr. Osteraas's testimony.

THE COURT: All right.

MR. TRITICO: Good afternoon.

THE COURT: Mr. Tritico.

MR. TRITICO: Your Honor, our challenges to

Mr. Osteraas's testimony deal primarily with the failure of the Government to provide sufficient discovery in this matter. As Mr. --

THE COURT: Now, he's a structural engineer.

MR. TRITICO: Yes, your Honor. As Mr. Nigh addressed, Scheduling Order No. 2 was filed by the Court Docket Entry No. 1753 on July 19, 196 -- 1996. I'd like to discuss and back up a few weeks, or a few days, actually, preceding July 19 and discuss specifically what happened with respect to Mr. Osteraas. In a chambers conference, pretrial conference that resulted in Scheduling Order No. 2, Mr. Osteraas and Failure Analysis was specifically discussed by the Government and the defense. I propose to read in a relevant paragraph from that transcript, your Honor; however it's sealed, and I wanted to request permission to do that, or I have copies to provide the Court.

MS. WILKINSON: Your Honor, could I just review the paragraph before he reads it in? I'm sure I don't have an objection.

THE COURT: All right.

MS. WILKINSON: I have no objection.

THE COURT: All right. Go ahead and read it because it will be the easiest way to approach it.

MR. TRITICO: Yes, sir. This is a comment by Ms. Wilkinson on page 11, line 9 -- I'm sorry, beginning on line 19.

"For example, we have hired an organization called Failure Analysis Associates, who were actually present after the bombing at the site to ensure the structural integrity of

the building for the safety of the rescuers. They had come to the conclusion before we hired them that the building collapsed due to a bomb and due to a bomb that was placed outside the

building. We are obviously going to want -- we have hired them to explain that to the jury and show as an outside expert that that's their conclusion, so that they already came to the conclusion before the Government hired them. But it's a matter of them writing up their formal report, which we believe Mr. Jones and Mr. Tigar will be entitled to. And they have not completed that report for us."

As a result of this conference where other matters were discussed, of course, Scheduling Order No. 2 was entered by the Court requiring the Government to file a list of witnesses and -- pardon me -- a list of witnesses and copies of reports of such witnesses -- expert witnesses and copies of their reports as they became available.

I think a liberal reading of the Court's ruling could be that if the Government never asked or requires their expert to produce a report, then it never becomes available. I do not think that was the subject of the Court's order or the intent of the Court's order. I think the intent of the Court's order

was that the experts in due course would prepare their reports and they would be transferred -- transported immediately to the defense.

We filed our objection pursuant to the Court's order

on August 30, 1996, wherein we specifically pointed out that we had not received reports from Mr. Osteraas or Failure Analysis Associates. In January of this year, we again filed our second-prong Daubert objections coupled with a motion to suppress certain expert testimony, Mr. Osteraas being one of them, for the failure of the Government to provide us with a report.

In the Government's response to our motion to suppress and our second-prong Daubert objections, the Government opines that Mr. Osteraas is not going to prepare a report unless this court orders him to do so.

This court has ordered him to do that. The Government has wholly failed to comply with its obligations pursuant to Scheduling Order No. 2.

It is true, as the Government alleges in their response, that they have provided the defense with some -- pardon me -- 610 pages of documentation. I have reviewed this documentation, your Honor, and I'd like to address it -- address that documentation.

The first 13 pages are titled on-site notes. They appear to be a diary that goes through and details Failure Analysis Associates' attempts to hold up the building while the rescue attempt was going on and then go through the implosion process. Nowhere in the on-site notes am I able to discern what Failure Analysis Associates did or what John Osteraas did

individually to come to the conclusions that the Government is proposing that he testify to, specifically the bomb and

the

other aspects.

14 through 72 -- pages 14 through 72 of the notes that they gave us are calculations that don't appear to tie to any of the handwritten notes.

Pages 73 through 173 are reference documents, largely seismographic information obtained from the Federal Government; and pages 174 through 610 are photographs.

Now, those photographs do tell me that Mr. Osteraas owns a camera. They do not tell me what methodologies he used to come to the conclusions that the Government proposes that he testify about.

Your Honor, at some point, there is a line drawn between discovery abuse and a violation of Mr. McVeigh's right and ability to confront and cross-examine the evidence against him and a violation of his Sixth Amendment right to effective assistance of counsel. If this were a civil case, I have no doubt that we would be standing here today getting Mr. Osteraas stricken as an expert witness in a civil case.

THE COURT: Well, there is -- in the Government's response as to him, there is a reference to the conference of January 29 of this year and an offer to provide a written report from him.

MR. TRITICO: Yes, your Honor, there is. I'm glad you

brought that up. I'd like to address that, if I may. That again was a sealed conference. I'd like to read that paragraph into the record. I'll show it to Ms. Wilkinson.

THE COURT: Is it right?

MR. TRITICO: No, it isn't right.

THE COURT: I don't remember the specific --

MR. TRITICO: It is not right, your Honor. What was discussed at that conference, Ms. Wilkinson did say that she would have some experts type up the same summary conclusions that the Government has already provided to us and that Mr. Jones had refused that. I have no doubt that he refused

that. There is no need for their experts to type up the same summaries that they've already provided us. What we're asking for is a report written and drafted by the expert to tell us what they did. We have no idea what this person has done to reach the conclusions that he proposes to testify about.

THE COURT: Okay. Let me hear from the other side and see what this problem is.

Also, I was a little surprised in reading the response in the summary of subject matter -- and I know this is a sealed response because it deals with discovery; but the location of the device in the response -- is that what he intends to say? Bottom of page 45.

MS. WILKINSON: I only have page 46 with me, your Honor.

THE COURT: Well, get 45.

MS. WILKINSON: Indulge me.

Yes, your Honor. I believe this is no secret for folks about where the crater was located. It was in the rear of the building. I know it looks like from the photographs from the media that that is the front of the building where the explosion occurred.

THE COURT: I thought that's what Ms. Jones says, too.

MS. WILKINSON: What, that it's in the rear of the building?

THE COURT: That's right.

MS. WILKINSON: No, she does not. There are different references, and I think a lot of people have called it the front of the building because that's where the explosion occurred; but my understanding in speaking to the folks from Oklahoma and to Dr. Osteraas, who has reviewed the building plans, that is actually the rear of the building that's on 5th Street, not the front of the building.

THE COURT: Okay.

MS. WILKINSON: But it's where the crater was.

THE COURT: All right.

MS. WILKINSON: As Mr. Orenstein would say, it's not rocket science. There was a big hole there, and that's where the device was.

THE COURT: Why don't we have a report from him?

MS. WILKINSON: We never asked him to prepare a report, your Honor. As I said in that hearing, he had already come to his conclusions. We thought we would ask him for a report, and we were really thinking -- at that point thinking of Dr. Eve Hinman who works with him and has some specific expertise on explosives and the impact of explosives on buildings.

After further consultation with them, we decided that wasn't necessary; that this was an issue that we thought was only controversial because the defense has still claimed in public proceedings that they may allege that there was -- there were two bombs and perhaps a bomb inside the building.

We don't think this testimony is really necessary, to be candid with the Court. There is really no question that one device caused this explosion and caused the failure of the building; but we have maintained Dr. Osteraas on our list in case the defense continues to pursue this claim.

THE COURT: Is he a rebuttal witness?

MS. WILKINSON: No. We believe that it would be appropriate during our case in chief if this is -- if all of our other witnesses are going to be challenged based on this premise that there was another explosive device inside the building.

We have received information from the defense yesterday that one of their experts is General Partin, who is a

retired Air Force general who has made some comments about his opinions about a second device or numerous devices that were inside the building; so we anticipate that this will be

an
issue at trial.
THE COURT: Well, let's do this: If he's going to
testify the way the summary reads on the bottom of page 45,
have him do a report.
MS. WILKINSON: Well, your Honor, could I explain one
thing? When I made those comments in chambers about asking
Mr. Jones if he would like a report, it wasn't that day and it
wasn't based on this summary. It was we could have him write a
report, but his report would be the conclusions that we've
summarized.
THE COURT: Have him write a report. Let's get past
it.
MS. WILKINSON: Yes, your Honor.
THE COURT: All right. And get it done quickly,
please.
MS. WILKINSON: Can we give him two weeks, your Honor?
THE COURT: Well, he ought to be able to write it in
one week, I would think.
MS. WILKINSON: That's fine.

THE COURT: All right. We don't have a lot of weeks here.

MR. NIGH: Thank you, your Honor.

If I might suggest, the Government provided reports from Tony Tikuisis, which was a very clear two-page report about what testing he did, what instruments he used, and how he came about his conclusions and what they were based upon.

And that's the kind of report the Government ought to give us; and when they do --

THE COURT: Well, different opinions are based on different things, but --

MR. NIGH: Sure.

THE COURT: -- but we'll have him write a report.

MR. NIGH: Thank you, your Honor.

THE COURT: That's it. Let's don't go back over old ground.

MR. NIGH: I didn't mean to, your Honor. I

was

suggesting that as a guide.

THE COURT: Next witness.

MR. NIGH: Edward Paddock is the next one; and this one, your Honor, does not involve rocket science, either. It's simply a matter of identification of truck parts.

And right now, your Honor, under the state of discovery that exists, we don't know what truck parts Mr. Paddock is going to identify. I'm assuming if you put two truck parts together and look at one and look at the other, you might be able to make a determination that this is a part from a Ryder truck. But we don't know what parts we're talking

about and we don't know what comparisons he made. That's the reason for the motion.

MS. WILKINSON: Your Honor, Mr. Nigh has received 302's which indicate the items of evidence, the item number, and the description which show the parts that Mr. Paddock has

identified as being consistent with Ford F-700 series truck.

There is one, two, three, four, five -- five reports that set out the evidence numbers and the descriptions that have been provided to the defense over a year ago which set forth the items that he's identified. It is highly unlikely, of course, that we would introduce each of these items, but they have all that information.

THE COURT: That plus the VIN number.

MS. WILKINSON: Plus the VIN number. That's correct.

THE COURT: All right. Is that it?

MR. NIGH: That's it, your Honor.

THE COURT: Solved. Next.

MR. NIGH: Your Honor, the next one is Mr. Rydlund, and Mr. Tritico will address that issue.

THE COURT: All right, Mr. Tritico.

MR. TRITICO: Your Honor, my arguments with respect to Mr. Rydlund are largely the same as they were with respect to Mr. Osteraas, except he wasn't specifically addressed in the chambers conference. Mr. Rydlund has worked in the mining

industry for a number of years, and I concede that.

THE COURT: Okay.

MR. TRITICO: However, the Government proposes that he testify about some matters that appear from his rÇsumÇ in the two pages of what has been loosely determined as "notes" appear to be outside his area of expertise. We're asking the Court to order that he produce a report to inform us what he -- testing he did to determine such things as the possibility of residues remaining after an explosion, blast pressures, and velocities of detonations of ammonium nitrate and fuel oil, the uses of ammonium nitrate in a homemade explosive. There is nothing in his rÇsumÇ to indicate that.

We have been provided by the Government with the two pages that they claim to be his notes. On those two pages are what is -- what I can only determine to be the headings for the

bases of his conclusions that he's offered with no other information. By looking at it, I can't tell by the cryptic information that's provided on these two notes that he's done anything to make these conclusions that he's offering.

I'm only requesting that we get a report. If we don't get a report, I request that the Court suppress this testimony.

THE COURT: Okay. Now, my understanding from the response is he's being offered as a person who has experience with explosive devices of the same components.

MR. TRITICO: From looking at his rÇsumÇ, he has worked in the mining industry and has sold ammonium nitrate

explosives to the mining industry. My information tells me that those explosives are sold already mixed and already ready to explode. That doesn't mean he has any information or any knowledge about mixing ammonium nitrate or using it for the use

of a homemade explosive.

THE COURT: Okay. All right.

Ms. Wilkinson, are you going to address Mr. Rydlund?

MS. WILKINSON: Yes.

MR. TRITICO: Your Honor, one more thing: I will accept their offer for the pretrial hearing with respect to Mr. Rydlund.

THE COURT: I haven't accepted it. We'll see if it's necessary.

MS. WILKINSON: I understand that counsel is new to this case, and perhaps he did not review the bases of opinion from Mr. Rydlund that we provided; but in that we cite his experience, his --

THE COURT: This is something you gave in discovery?

MS. WILKINSON: Yes, back in August; that he conducted research for the presentation of several papers relating to ANFO, the explosive energy release, the selection of blasting agents; that he studied various written materials; that he's been to manufacturing facilities, he's witnessed numerous tests

of various types of explosives including ANFO.

THE COURT: Now, is all this in connection with his 35

years in the mining industry?

MS. WILKINSON: Absolutely, your Honor.

THE COURT: As opposed to preparing for his testimony here?

MS. WILKINSON: Correct. He has done no specific testing or examination. He is offered as a general expert about ammonium nitrate fuel oil, its explosive capabilities, how you detonate it; and counsel is incorrect in stating that ANFO is all premixed. That's incorrect. Mr. Rydlund says often because of the cost of transporting fuel oil, they mix it on site. So he has specific expertise in testifying about the ease in mixing ammonium nitrate and fuel oil, but all this comes from his years and years in the industry and his research. He is an engineer, he's not just a marketing expert,

and he has the ability to testify to all of these issues.

THE COURT: Based on experience?

MS. WILKINSON: Correct.

THE COURT: Well, I'll hear from you further, Mr. Tritico, but it's the kind of thing that's not unusual testimony. I don't mean the explosives, but I mean somebody getting on and saying I've been a brakeman for years and this is how we set the brakes on a railroad car.

MR. TRITICO: I agree with that, your Honor, except I want to take issue with one point -- is his ability to testify about the possibility of residue left after the explosion of an

ANFO bomb.

Now, the biggest thing I ever blew up was my GI Joe with a firecracker, but --

THE COURT: How old were you then?

MR. TRITICO: Just a year ago.

But the explosions that I have seen on television

create an enormous amount of dust. That doesn't mean that there is residue left from the explosion. Without some testing, I don't think he's qualified to testify to that.

THE COURT: Well, I think we can deal with that one at trial --

MR. TRITICO: Thank you.

THE COURT: -- if he's asked; so he'll either be able to able to answer that question, or he won't. I don't think we need a pretrial hearing on that.

Okay. Next one.

MR. NIGH: Your Honor, next would be James Schmidt, who is a chemist from DuPont. And our only challenge to Mr. Schmidt's proffered testimony is that it's dependent upon work performed by the FBI laboratory; and the same objections that we've previously made in the oral arguments and in the briefs we make to his reliance upon that testing. And that's the only objection to Mr. Schmidt, your Honor.

He has provided us -- the Government has provided us with a report which is clear; and we have no further

other than his opinion being based upon what we say cannot reasonably be relied upon by experts in the field.

THE COURT: All right. Well, I don't know that we need to talk about that, then. If there is no problem with admissibility of the former, then the derivative testimony is admissible.

MR. NIGH: The next one, your Honor, is Brian Stafford, and I understand the Government won't offer him.

So that will bring us to William Stokes, and that's the photography issue that Ms. McLaughlin is prepared to address.

THE COURT: Good afternoon.

MS. MCLAUGHLIN: Good afternoon. According to Lab Report No. 447, Special Agent William Stokes, FBI Special Photographic Unit, and Supervisory Special Agent David Williams performed two tests on the Regency Towers videotape

which came

from a surveillance camera from the Regency Tower Apartments in Oklahoma City. This videotape captured images of a moving truck the morning of April 19, 1995.

The first test they performed was designed to determine a number of facts, including the time a moving truck entered the frame of the camera's field of view, the exact time an external signal loss occurred, and whether or not there were any missing images between the time the vehicle appeared in the camera's view and when the signal loss occurred.

THE COURT: Did the camera have a timing device in it?

MS. MCLAUGHLIN: Yes, your Honor, and the time was noted on the camera or on the film.

THE COURT: Yeah.

MS. MCLAUGHLIN: Yes.

THE COURT: All right. I don't know -- I read the papers here and I didn't understand the problem.

MS. MCLAUGHLIN: Right. If I may proceed, your Honor.

THE COURT: Yes.

MS. MCLAUGHLIN: The lab report states that these tests were conducted by the FBI laboratory --

THE COURT: What I'm getting to, is he going to give an opinion that the time is different from the one that is shown on the film?

MS. MCLAUGHLIN: I don't believe so, your Honor. What our main objection to him testifying to that is he is a photographer, and this test was apparently conducted by the video enhancement unit of the FBI lab.

THE COURT: Well, maybe I ought to find out specifically what they're going to offer him for. I'm having trouble --

MR. ORENSTEIN: Sure.

THE COURT: -- understanding the issue. And then I'll come back to you, Ms. McLaughlin.

What's this witness supposed to be -- what do you

intend for him to say?

MR. ORENSTEIN: Well, it's essentially two things, Judge. There is this videotape that was recovered from the Regency Tower.

THE COURT: I understand that.

MR. ORENSTEIN: And it is time-stamped. As I understand it -- Mr. Mackey will correct me if I'm wrong -- it has four cameras that sort -- it rotates among and you can focus on one camera by looking at the frames devoted to that camera.

Agent Stokes will tell us about the time that --

THE COURT: Each camera has film in it, separate film?

MR. ORENSTEIN: I don't know that each camera has film, but four different cameras are being recorded on one tape; so the view changes periodically from one camera to the other. So if you look at the tape as it plays from beginning to end, you're going to see the four views changing. So what we were going to do is just --

THE COURT: So it's four lenses and one film.

MR. ORENSTEIN: Right, but we're going to focus on the view from one lens; and so --

THE COURT: So where does the opinion come in?

MR. ORENSTEIN: The opinion is that there is no missing frames; that the timing is as it's set forth on the tape; and the other part of his testimony is an opinion about

the truck that appears in the tape. There is a process called photogrammetry. There are different types of photogrammetry; but it's basically a fairly commonsense thing; that if you want to know the size or other specifications of something that appears in a picture, you take another picture of something where you know the size in as close to the same conditions or in differing conditions where you know the difference and you just do comparative measurements. So he's going to testify.

The other part of his opinion besides the time

of the

tape is that the truck that appears in the Regency Tower video

is consistent with the specifications of an F-700 Ford truck

used by Ryder and not with a different kind of Ryder truck

played by GMC.

THE COURT: That's this reference to enhancement

procedures accomplished in the laboratory?

MR. ORENSTEIN: I have to ask Mr. Mackey. I don't

know if enhancement procedures so much . . .

THE COURT: Well, I think that's what was said.

MR. MACKEY: Judge, it's nothing more fancy than

slowing down the film so you can get a good look at what's

captured on the film.

THE COURT: Is this witness going to talk about what

lens rating is and a focal length and that kind of thing?

MR. MACKEY: No, no. He would simply say I got the

videotape from the Regency Tower and I was able to slow it down

in such a way that I could take a still photograph and from that photograph one could see, any of us could see, what would appear to a large truck with the word "Ryder" across the side.

THE COURT: So what's the expertise in this?

MR. MACKEY: It's not much. Not much; but if you stick that same video into that player without making this transition, you can't see it; so that's why we gave notice that one might consider that an expert.

THE COURT: Okay.

Ms. McLaughlin, I hesitate to say it, but I get the picture.

Go ahead.

MS. MCLAUGHLIN: What they failed to disclose to you was that they also want the expert to testify that it was a particular brand of Ryder truck, particularly a Ford Ryder truck which matches the same measurements as the one rented from Elliott's Body Shop. And the reason they were able to determine that it was a Ford Ryder truck was based upon

technique called reverse projection photogrammetry.

And we've got several different objections to that process, the main one being that that process was designed to utilize measurements and crime scene reconstructions. It wasn't utilized to determine the minute distinctions between models of vehicles or the minute distinctions between objects.

It was designed to measure skid marks.

THE COURT: So what's the difference?

MS. MCLAUGHLIN: Well, your Honor --

THE COURT: I mean measurements are measurements, aren't they?

MS. MCLAUGHLIN: Right; but your Honor, these are shapes and different sizes. They're talking about class characteristics of the different vehicles. We haven't been provided with the information that they relied upon to state the differences between the two vehicles.

I don't know what they were relying upon.

THE COURT: Well, you're getting into an area that I didn't understand him to be opining about. I thought he was just doing measurements.

MR. ORENSTEIN: It's essentially measurements. Based on the measurements that you get from the photogrammetric technique, you can say it's a Ford Ryder truck or it's a GMC Ryder truck.

THE COURT: Because they're the same measurements.

MR. ORENSTEIN: Right, because the questioned and the known have the same measurements.

THE COURT: That's what I'm saying. It's just a question of so many feet and inches vs. so many feet and inches; and there has been a predicate showing that that's the size of the bed of the truck or the box of the truck.

MR. ORENSTEIN: That's all I understand it.

MS. MCLAUGHLIN: Well, your Honor, we haven't been provided with any of the tests that he relied upon to determine the measurements of either one of these trucks.

THE COURT: Well, what kind of a test do you need? You need a tape measurement.

MS. MCLAUGHLIN: Well, your Honor, we don't know what measurements they took in --

THE COURT: Well, I don't want to hear anymore.

MS. MCLAUGHLIN: Okay. Our next objection is that according to the FBI protocol this reverse projection photogrammetry is a technique used to --

THE COURT: I'll hear about it at trial. We're not going to suit up for that kind of an issue.

MS. MCLAUGHLIN: Okay. Thank you.

THE COURT: All right.

MR. NIGH: The next one is Theodore Udell, and he is a chemist --

THE COURT: Plastics engineer, we have.

MR. NIGH: Yes, your Honor. The Government proffers to testify that he was able to identify some plastic fragments --

THE COURT: Smurfit, or whatever it is.

MR. NIGH: Smurfit plastic.

Based upon the discovery we have received in reference to Mr. Udell, his methods -- I hate to say it -- are just not

good science; and the reason that we object to his testimony is because it appears that his methods are not methods at all, really.

THE COURT: Now, as I understand it from the Government's response, he's limiting this now to the clear plastic and not the colored plastic.

MR. ORENSTEIN: That's correct. Actually, that's been a misunderstanding we've been trying to clear up for some time. It's always been our position to put it a natural color.

THE COURT: It's clear plastic; and what he's going to testify as to composition?

MR. ORENSTEIN: Well, Mr. Udell knows what the composition of Smurfit plastic is.

THE COURT: You mean factory specification.

MR. ORENSTEIN: Correct. And there is a certain recipe, if you will, for Smurfit plastic. Some of the tests he's done and some the tests by Tony Tikuisis, an expert as to whom they have no objection, if you put it those together, you come up with a --

THE COURT: A match.

MR. ORENSTEIN: A match. Exactly.

MR. NIGH: Yes, your Honor. The information we have been provided in reference to Mr. Udell leads us to seriously question whether or not he is capable of making such a match and based upon his scientific or what are called scientific

practices. We have notes, your Honor, which say that he guessed about the density of a plastic sample because his tube wasn't big enough --

THE COURT: Well, but the response says they're not

relying on density comparison. Isn't that what you said?

MR. ORENSTEIN: Density is part of it, I think; but it's mainly -- the tests done by Mr. Tikuisis show there are some additives present and some that are not. And Mr. Udell knows on his knowledge of Smurfit and based on his knowledge of the rest of the industry that the characteristics --

THE COURT: The recipe for this plastic is different from all others.

MR. ORENSTEIN: I don't want to overstate it. I don't think Tikuisis has shown the exact recipe, and Mr. Udell is matching it up. But there are things that Tikuisis is finding that you would find in Smurfit, things he's not finding that you wouldn't find in Smurfit.

THE COURT: How unique is the formula for the plastic used by Smurfit.

MR. ORENSTEIN: It is unique.

THE COURT: That's the point, isn't it?

MR. ORENSTEIN: Yes.

MR. NIGH: If that was all it was, your Honor, I'd sit

down. But it appears to me that there is a methodology involving density testing that Mr. Udell intends to use to

convey his opinion to the jury; and I don't think that it's supported scientifically. That's the nature of our objection.

THE COURT: All right. So we're down to the density testing procedures?

MR. NIGH: That's what it appears to me.

THE COURT: All right. Who can explain the density testing procedure used here?

MR. ORENSTEIN: I can't explain the procedures used. I know it's part of the testing that Tikuisis did.

THE COURT: Has he explained it?

MR. ORENSTEIN: No, no, no. It's a test done by Mr. Tikuisis, and that's why I'm having trouble understanding the objection. They don't object to the science applied by Mr. Tikuisis.

THE COURT: Well, I don't know. Do you?

MR. NIGH: No, your Honor, we don't. We object to the science applied by Udell. It's unclear to from us the information we've been provided thus far whether Mr. Udell --

THE COURT: -- did any different test.

MR. NIGH: Exactly, and what methodologies he's relying upon to make this conclusion.

MR. ORENSTEIN: Nothing different.

THE COURT: Udell is relying on the man whose name --

MR. ORENSTEIN: Tikuisis, your Honor.

THE COURT: Okay. Doesn't that answer your question?

He doesn't do his own tests. He's relying on this other fella's tests that you don't object to.

MR. ORENSTEIN: There is a redundancy. He does his own tests. It's also a test that is done by Tikuisis.

THE COURT: If he's going to testify to his tests, we ought to know what his test was.

MR. ORENSTEIN: No, what I'm saying is it's the same

test, if I'm getting it right. It's one test that is done by two people. It's a redundant test. So you can do the entire -- you can reach the opinion entirely based on the information provided by Mr. Tikuisis.

THE COURT: Is that what he's going to do?

MR. ORENSTEIN: Yes.

THE COURT: Udell?

MR. ORENSTEIN: Yes. Udell, yes.

THE COURT: Udell is relying on Tikuisis?

MR. ORENSTEIN: Yes.

THE COURT: Okay. Got it?

MR. NIGH: I think so, your Honor.

THE COURT: Okay Mr. Tigar?

MR. TIGAR: I'm sorry, your Honor, to -- I don't want to add to the confusion; but as I understand it, Mr. Udell is going to say yes, Smurfit plastic is unique in the sense of its combination of additives; however, these chemical tests do not show that whatever they've tested was Smurfit plastic. They're

simply going to show that it contained certain things that are in Smurfit plastic and does not contain certain things that are not; and therefore, these samples could well have been manufactured by any one of a number of other manufacturers.

Now, if I'm correct about that -- am I right about that?

MR. ORENSTEIN: I think you may be missing a point. The -- what Mr. Udell can do is take information provided by Mr. Tikuisis and say that provides a unique profile that is based on my knowledge -- Mr. Udell -- based on my knowledge of the components used in the market, it's unique to Smurfit.

So I think that Mr. Tigar may be wrong; that what Udell is doing is something within his expertise based on his knowledge of the market.

THE COURT: Well, how does he know the composition of everybody else in the plastics business?

MR. ORENSTEIN: That's from his knowledge of his rivals in the market.

MR. TIGAR: Your Honor, given the proprietary nature of these compounds, I think we are at a point where we just need more information. I tell the Court why I'm concerned: When Mr. Nichols was held to answer, the FBI agent said, and Judge -- Magistrate Judge Howland concurred, that the incriminating fact about Mr. Nichols was that he had blue plastic in his house and it was blue plastic. And the media

were all over it: Terry Nichols had blue plastic in his house and that's why he should be held to answer.

Now we're getting that it's not blue plastic that is the really important thing. And I think that we ought to have -- and maybe it's time enough to do it when you get to trial, but Mr. Udell ought to be made to pony up just exactly what he's opining to, what the basis of it is, and your Honor's question, which is a good one, how do you know what else is out

there in the industry? How are you doing it? Because the Government did, at a time in our lives when it was critical to Mr. Nichols, rather overstate the matter; and I just want to alert the Court to that concern that we have.

THE COURT: Well, I'm concerned as to how he would know what competitors put in their product.

MR. ORENSTEIN: Information provided by competitors.

THE COURT: You mean these guys go around and tell what their recipes are?

MR. ORENSTEIN: No, in this case, we collate the information for this case so he can say, so that he can get up on the stand and say, Now I know.

THE COURT: Well, that information ought to be shared with the defense --

MR. ORENSTEIN: Fine.

THE COURT: -- as to what it is that he relies upon to say that this is a unique formula.

MR. ORENSTEIN: That's fine. We can do that.

MR. NIGH: Only one more, your Honor, and that's Mr. Williams; and Ms. Merritt is prepared to address that point.

THE COURT: Okay. Well, I didn't think Williams was going to be --

MS. MERRITT: More of a discovery issue. The motion to compel that we filed previously has not been addressed by the Court; and at the last hearing, the Court decided that the Government would not be permitted to put Mr. Williams on to testify as to his conclusions regarding handwriting but that they could put him on to talk about similarities.

THE COURT: Right.

MS. MERRITT: The problem is, as is indicated in the motion to compel, we have no indication of his similarities. He never gave us any statement of bases or reasons that is anything other than a restatement of his training.

So we have no idea what the points of comparison are that he's going to be relying upon for any of these

documents.

And it's in violation of Rule 16, which states that the summary must describe the bases and reasons for his testimony; so if he's going to say that there are similarities between Document A and document B, I mean we should at least know (a) what the similarities are and (b) what are, you know -- what are the reasons he says that they're similar.

I think those are the same thing. I think he can do it just by telling us the similarities. We can figure the rest out, but we haven't even gotten that.

All we have are these lab reports that appear to be nothing more than a rough draft of his final report that say so-and-so wrote this document. Now, we know that isn't allowed; but he never in those reports says why he believes it.

THE COURT: Why the Ts are crossed and the Is are dotted.

MS. MERRITT: I'm not even asking for that degree of specificity; but if he would even say it's the size of the letters, the spacing of the letters, the height of the letters.

THE COURT: I got it. I got it.

What about it?

MR. ORENSTEIN: Judge, I think that it's hard to come up with a definition of what should be provided that wouldn't go -- cross the line from a summary of his testimony to his testimony. It's not going to be --

THE COURT: Get them what he says are similar characteristics.

MR. ORENSTEIN: Well, that's -- the problem I'm trying to address, Judge, is each document has similarities that you can point to.

THE COURT: Yeah. So? That's what he should provide.

MR. ORENSTEIN: Well, I pursue this only so I know how

specific we need to be. He can say letters are

constructed the
same way from one document to another?
THE COURT: What's he going to testify about with
respect to the Ts and the Is and the kinds of stuff that these
people do?
MR. ORENSTEIN: Okay. Like I say, for each document,
there may be different things that he's focusing on.
THE COURT: Well, provide them.
MR. ORENSTEIN: All right.
THE COURT: All right.
MR. NIGH: Your Honor, that completes the list; and
the only other thing that I would ask to do is to complete the
record that I should make, which is if granted an evidentiary
hearing, we would be prepared to present expert testimony
concerning those issues that we raised in our brief. And I'd
also like to adopt Mr. Tigar's oral arguments in reference to
the experts that we both filed objections to.
THE COURT: Yes.
Mr. Tigar?
MR. TIGAR: I had an 848 matter on which I wish to

address the Court this week at your Honor's convenience. I could come in any time, though -- next week -- at all.

THE COURT: All right. We'll invite you back.

MR. TIGAR: Thank you, your Honor.

THE COURT: On the major motion here, Daubert, we'll

take it under advisement. I'm sufficiently confused both as to the law and the facts that I need to reflect upon that; but I believe we've resolved these discovery points.

Whatever, the Williams report ought to be in, in a week, too, on the comparisons.

MR. ORENSTEIN: We'll do that, Judge.

THE COURT: Okay. All right. Court is --

MR. HARTZLER: Your Honor, could we schedule another conference?

THE COURT: You'll hear from me. Court is in recess.

(Recess at 4:50 p.m.)

* * * * *

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 20th day of February, 1997.

_____
Paul Zuckerman

_____
Kara Spitler