

possession another NIJ solicitation, the words of which formed the basis of the March 2000 NIJ solicitation.¹

3. Notwithstanding defense counsels' level of knowledge of the pending solicitation, in light of Special Agent German's cross-examination and Dr. David A. Stoney's knowledge of the pending solicitation, the court cannot find the necessary due diligence on the part of the defendant.

4. The March 2000 solicitation is cumulative evidence and, as demonstrated by the cross-examination of Special Agent German, only has impeachment value. Having now considered the March 2000 NIJ solicitation, the court's *Daubert* hearing rulings remain unchanged.

5. The March 2000 NIJ solicitation is not material in the sense advanced in the defendant's motion. The National Institute of Justice is not part of the litigating components of the Department of Justice but an entity under the Office of Justice Programs. NIJ cannot and does not represent the government or the Department of Justice in the instant litigation or in any litigation. Therefore, NIJ cannot and does not have the authority to concede any factual or legal position on behalf of the government. Had NIJ's normal disclaimer ("Opinions or points of view expressed in this document do not necessarily reflect the official position of the U.S. Department of Justice.") been published as part of the March 2000 solicitation, it would not be a document

¹ Exhibits 1 and 2 of Special Agent German's affidavit visually demonstrate the perfunctory manner in which the March 2000 NIJ solicitation was issued. That is not an uncommon occurrence in a world where computers and forms are used to generate similar repetitive publications.

that could be relied upon to form the basis of a new trial motion under Rule 33 of the Federal Rules of Criminal Procedure.

6. The March 2000 solicitation, if introduced at the time of the hearing, would not have changed the court's rulings after the Daubert hearing and, a fortiori, could not have possibly changed the outcome of the trial.

BY THE COURT:

HON. J. CURTIS JOYNER
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
v. : CRIMINAL NO. 96-00407
BYRON C. MITCHELL :

GOVERNMENT'S RESPONSE TO
DEFENDANT'S MOTION FOR A NEW TRIAL
ON THE BASIS OF NEWLY DISCOVERED EVIDENCE

The United States of America, by its attorneys, Michael R. Stiles, United States Attorney for the Eastern District of Pennsylvania, and Paul A. Sarmousakis, Assistant United States Attorney, responds to the defendant's motion as follows:

1. Admitted. However, sentencing has been continued until August, 2000.
2. Denied. However, it is admitted that "the solicitation" is annexed to the defendant's motion as Exhibit A.
3. Denied.
4. Denied. By way of further response, "the solicitation" is a written document which speaks for itself. The defendant's characterizations are denied.
5. Denied. By way of further response, "the solicitation" is a document which speaks for itself. The defendant's characterizations are denied.
6. Denied. By way of further response, the record of the *Daubert* hearing is a written document which speaks for itself. The defendant's characterizations are denied.

7. Denied. By way of further response, the record of the *Daubert* hearing is a written document which speaks for itself. The defendant's characterizations are denied.

8. Denied.

WHEREFORE, for all of the foregoing reasons and for the reasons as stated in the accompanying Memorandum of Law, the government respectfully requests that the defendant's Motion for a New Trial on the Basis of Newly Discovered Evidence be denied.

Respectfully submitted,

MICHAEL R. STILES
United States Attorney

/s/ Paul A. Sarmousakis
PAUL A. SARMOUSAKIS
Assistant United States Attorney

Our case law makes clear that five requirements must be met before a trial court may grant a new trial on the basis of newly discovered evidence: *4 (a) the evidence must be in fact newly discovered, i.e. discovered since trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal. *Lima*, 774 F.2d at 1250 (quoting *United States v. Ianelli*, 528 F.2d 1290, 1292 (3d Cir.1976)). The movant has a "heavy burden" in meeting these requirements. *United States v. Ashfield*, 735 F.2d 101, 112 (3d Cir.1984).

United States v. Saada, 2000 WL 583430, at *3 and *4 (3rd Cir. 5/15/00 (N.J.)); see also *United States v. DiSalvo*, 34 F.3d 1204, 1215 (3d Cir. 1994); and *United States v. Lima*, 774 F.2d 1245, 1250 (3d Cir. 1985).

FACTS OF THIS CASE

For the reasons stated below, the defendant cannot establish even one of the five requirements which must be met before this Court can consider granting a new trial.

A. The Evidence Was Known Before the *Daubert* Hearing

Exhibit A to the defendant's motion is a photocopy of the solicitation issued by the National Institute of Justice (NIJ) in March of 2000 titled "Forensic Friction Ridge (Fingerprints) Examination Validation Studies." The *Daubert* hearing took place in July 1999. Over a month before the *Daubert* hearing, the defendant's expert, Dr. David A. Stoney, was aware of the pending solicitation. Stoney was part of the NIJ Fingerprint Research Advisory Panel (FRAP) which met on May 18, 1999 in Arlington, Virginia. The purpose of the FRAP meeting was to discuss the issuance of the very solicitation the defendant now claims is newly discovered. Stoney had a copy of the basic wording of the solicitation when he left the May 18, 1999 meeting. In

fact, Stoney discussed the solicitation at the *Daubert* hearing with Stephen Meagher and Bruce Budowle, two of the government's experts, during a court recess. Stoney had withdrawn from the FRAP only after decisions on the solicitation were made at the May 18, 1999 meeting and told Meagher and Budowle he withdrew because he wanted to apply for the NIJ grants offered in the solicitation. Any conflict of interest surrounding Stoney's participation in the FRAP is not material to the motion before the Court. *See* Attachment "A", Affidavit of Special Agent Edward R. German, Chief Warrant Officer Five, United States Army (hereinafter referred to as "German").

That Stoney actually knew of the solicitation prior to the *Daubert* hearing pales in comparison to the fact that defense counsel knew of the pending solicitation. During the cross-examination of government expert Edward R. German, the following exchange took place:

Q. And would you agree with me that there's an insufficient amount of studies that exist addressing the probability of this occurring?

MR. SARMOUSAKIS: Objection.

THE COURT: Overruled. If you know.

THE WITNESS: No, I would not agree with that, because I believe that in the last 100 years, that examinations have been performed and comparisons have been performed between persons. And looking at fingerprint identifications, that these are not meaningless comparisons. That if you have a study – and you say, okay, we're going to compare the fingerprints and we're going to take a latent fingerprint and we're going to compare it against 50,000 people versus the fact that a crime laboratory has done the same thing last week, that the crime laboratory's comparisons mean nothing and that what you did this week because you said we're now going to do this now as a study, that the other details mean nothing.

It's not that there there's not--that there's not a great amount of information that has been reported and recorded in the last 100 years concerning these comparisons concerning studies, if you want to call them studies.

Q. Have you not, sir, recently called upon more studies – called upon for more studies in the area of whether or not a scientific basis exists for a fingerprint examiner to make an identification?

A. Are you talking about me personally?

Q. Yes, you personally.

A. No, I personally have not recently called for more studies to be done.

Q. You haven't communicated with anyone on that issue?

A. Oh, yes, I have communicated with people about the National Institute of Justice initiative for studying fingerprint validation and fingerprint training, things that are very closely related to what we have done with SWGFAST.

Q. Can you explain, sir, what you men (sic) by fingerprint validation?

A. Yes. By fingerprint validation, I mean in essence, I think what is the exact question of this hearing, of this Daubert hearing, are fingerprints individualized between two people. Can you take a sufficient quantity and quality of information of ridge details and one impression and individualize that impression and indeed state that it was made by another person to the exclusion of everyone else in the world?

Q. And you've called for more studies in that area. That's all I'm asking.

A. Well, again, you asked me if I personally had. No, I was not. I was asked by the National Institute of Justice to serve on a fingerprint advisory board concerning this topic. And I do serve on that board.

It is clear that defense counsel knew that German was a member of the FRAP which met on May 18, 1999, almost two months before the *Daubert* hearing. Based on conversations with defense counsel, government counsel knows that the defense was in possession of a February 1999 NIJ publication titled “Forensic Science: Review of Status and Needs”, a copy of selected pages appearing as Attachment “B”. That document was the basis for subsequent solicitations, including the one at issue before this Court and had more information pertaining to latent prints than the solicitation. *See* Attachment “B”, pages 28 to 31; and the March 2000 solicitation at page 3, exhibited as Exhibit “A” in the Defendant’s Motion.

Since the evidence was in fact known by the defense prior to the *Daubert* hearing, the defendant cannot prevail.

B. The Facts Establish That Due Diligence on the Part of the Movant Does not Exist.

The defendant has not acted with due diligence. Assuming for an instant that defense counsel did not know of NIJ’s intent to issue a solicitation on fingerprint research, counsel had to do no more than ask their own expert, Dr. Stoney, or follow up Edward R. German’s answers on cross-examination. Clearly, the defendant has not used due diligence or even alleged sufficient facts from which the Court may infer due diligence.

C. The Evidence Relied on Is Merely Cumulative and at Best Is Impeaching.

The solicitation can only be viewed as cumulative and impeaching. As discussed below, the defense has misled the Court as to the value of the evidence in question since opinions and points of view expressed in NIJ documents do not represent the official legal or policy positions of the litigating components of the Department of Justice. A fair reading of the solicitation discloses positions and suggested areas of research which were addressed by the

experts testifying at the *Daubert* hearing. As was demonstrated during Edward R. German's cross-examination, the evidence has only impeachment value.

D. The Evidence Is Not Material to the Issues Involved.

The National Institute of Justice is not one of the litigating components of the Department of Justice but is an entity under the Office of Justice Programs. See Attachment "C," Organizational Chart. NIJ was established by statute and for defined purposes.

Statement of purpose

It is the purpose of this subchapter to establish a National Institute of Justice, which shall provide for and encourage research and demonstration efforts for the purpose of—

- (1) improving Federal, State, and local criminal justice systems and related aspects of the civil justice system;
- (2) preventing and reducing crimes;
- (3) insuring citizen access to appropriate dispute-resolution forums; and
- (4) identifying programs of proven effectiveness, programs having a record of proven success, or programs which offer a high probability of improving the functioning of the criminal justice system.

The Institute shall have authority to engage in and encourage research and development to improve and strengthen the criminal justice system and related aspects of the civil justice system and to disseminate the results of such efforts to Federal, State, and local governments, to evaluate the effectiveness of programs funded under this chapter, to develop and demonstrate new or improved approaches and techniques, to improve and strengthen the administration of justice, and to identify programs or projects carried out under this chapter which have demonstrated success in improving the quality of justice systems and which offer the likelihood of success if continued or repeated. In carrying out the provisions of this subchapter, the Institute shall give primary emphasis to the problems of State and local justice systems and shall insure that there is a balance between basic and applied research.

42 U.S.C.A. § 3721.

The defendant's motion purposely or mistakenly fails to inform the Court of the purpose of the NIJ and indeed erroneously and misleadingly substitutes the words "Department of Justice" and "Department" for the NIJ. It is beyond dispute that references to the "Department of Justice," the "Department" and the "government" in litigation, particularly criminal litigation in federal courts, is understood by the courts and counsel to refer to the litigating components of the Department of Justice, namely, the United States Attorneys' Offices, or other litigating components within the Department of Justice. Counsel knows full well that NIJ is not a litigating component. NIJ has program functions, including distributing grant money for research.

Although carelessly missing from the solicitations and Attachment "B," NIJ documents routinely carry a disclaimer which reads in most instances, "Opinions or points of view expressed in this document do not necessarily reflect the official position of the U.S. Department of Justice." *See* Attachment "D." That reality is demonstrated by this response and an official DOJ Memorandum dated May 15, 2000, from the Executive Office for the United States Attorney concerning an unapproved survey from the NIJ directed to United States Attorneys. "After a review of the survey questions, the EOUSA has determined that United States Attorneys should not respond at this time. Although we believe..., we do not agree with the substance of several of the survey questions." *See* Attachment "E."

The immateriality of the evidence relied upon by the defendant is more evident when you examine the perfunctory manner in which the solicitation was issued. Special Agent German establishes that the March 2000 solicitation used wording from a prior solicitation issued by NIJ. Attached as Exhibits 1 and 2 to German's affidavit are the two solicitations. Yellow highlight boxes appear where the two solicitations use the same words. Most of the quotes used

by the defendant in his motion appear in both solicitations. It is apparent that NIJ did not believe the March 2000 solicitation required “reinventing the wheel.” *See* Attachment “A,” German at ¶¶ 4 and 7.

E. The Newly Discovered Evidence Is Not Such, or of Such Nature, as That, on a New Trial, Would Probably Produce an Acquittal.

The defendant cannot seriously contend the March 2000 solicitation is of such a nature that at a new trial, an acquittal would probably result. Indeed, the government is at a loss to say more on this factor.

CONCLUSION

The defendant cannot meet any of the five requirements necessary for this Court to grant a new trial.

WHEREFORE, for all of the foregoing reasons, the government respectfully requests that the defendant’s motion be denied.

Respectfully submitted,

MICHAEL R. STILES
United States Attorney

/s/ Paul A. Sarmousakis
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