

examinations, the words of which formed the basis of the March 2000 NIJ solicitation.¹ That Dr. Stoney decided to discuss the pending Solicitation with Dr. Bruce Budowle, a non-member of the NIJ Fingerprint Research Advisory Panel (a possible violation of his contract as outlined in his affidavit) and not with counsel that hired him, although possibly affecting Dr. Stoney's credibility, is not critical to the issues before the Court.

3. The defendant did not exercise due diligence when he failed to pursue the pending research issue during the cross-examination of Special Agent German.

4. Whatever defense counsel's level of knowledge of the pending Solicitation, in light of Special Agent German's cross-examination, the possibility of future research was before the court. Counsel's decision to limit the cross-examination of Mr. German on that point does not impact upon the court's prior rulings.

5. The March 2000 NIJ Solicitation is cumulative evidence and, as demonstrated by the cross-examination of Special Agent German, and the government's Supplemental Response, is of very limited impeachment value. Had the document existed at the time of trial, its use would have been limited to impeachment of the government's experts since the document is hearsay.

6. The March 2000 NIJ Solicitation is not material. 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

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. *See*, Gov. Response..., Attachment "A".

Department of Justice in the instant litigation, nor was it a party to this litigation. Moreover, NIJ cannot and does not have the authority to concede any factual or legal position on behalf of the government. The government's Supplemental Response demonstrates that criticisms and opinions questioning the scientific validity of latent print examinations were fully developed at the *Daubert* hearing. Defense witness David A. Stoney's papers, which are cited in the NIJ publication Forensic Science: Review of Status and Needs, were available to the defense at the time of the *Daubert* hearing and were part of that record. The court rejects the defendant's position that the NIJ publications, either alone or in combination, state that the Department of Justice, or the NIJ for that matter, has conceded that evidence of latent print examinations cannot satisfy the requirements of *Daubert* and by inference, *Kumho*.

7. The relevant government experts' opinions at the *Daubert* hearing and at the trial, after consideration of the NIJ publications and the results of the government's contacts with the participants of the March 1997 and May 1999 NIJ meetings, remain unchanged. *See*, Affidavit of Stephen B. Meagher.

8. 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*, would not have changed the outcome of the trial. Even assuming the Solicitation had been published and available for use during the cross-examination of the government experts at trial, such use would not have 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 SUPPLEMENTAL RESPONSE TO DEFENDANT’S MOTION FOR
A NEW TRIAL AND TO DEFENDANT’S REPLY MEMORANDUM IN SUPPORT OF THE
MOTION FOR A NEW TRIAL- THE NIJ FORENSIC FRICTION RIDGE (FINGERPRINT)
EXAMINATION VALIDATION STUDIES, MARCH 2000 SOLICITATION

Before the Court is the defendant’s Motion for a New Trial Based on Newly
Discovered Evidence, namely, the March 2000 Solicitation from the National Institute of Justice
(NIJ) concerning research in the fingerprint field. The government responded¹ to that motion and
in reply the defendant filed a Memorandum in Support of his motion. In essence, the defendant
states that some group of distinguished scientists from the Department of Justice or, by inference,
other scientists, and headed by the National Institute of Justice, had concluded that the existing

¹The government made the statement that NIJ had left out its disclaimer in the Forensic
Science: Review of Status and Needs and the March 2000 Solicitation. That statement was
incorrect. The government has been informed by Dr. Richard Rau of NIJ and NIJ counsel at the
Office of Justice Programs (OJP) that only work product by NIJ contractors or grantees carried a
disclaimer. However, OJP counsel has stated because of the way in which NIJ documents have
been used by the defendant in the instant case, government counsel is authorized to state that all
future NIJ publications and Solicitations will carry a detailed disclaimer appropriate to the
publication at issue.

state of fingerprint science did not meet the requirements of *Daubert*.²

The government has read the NIJ publication Forensic Science: Review of Status and Needs and the NIJ March 2000 Solicitation many times and questions the candor of the defendant's statements. The defendant states the following:

1. "The Department of Justice effectively concedes in the solicitation that when it comes to fingerprint evidence the government cannot satisfy the essential criteria of *Daubert* . . ." Motion for a New Trial at ¶ 3.

2. "The Department's solicitation thus makes abundantly clear that the admissions criteria of Daubert were not in fact satisfied in this case . . ." *Id.* at ¶ 8.

3. "Second, the solicitation is plainly material in that it makes abundantly clear that the admissions criteria of Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579 (1993) was not satisfied in this case." Defense Reply Memorandum at 1.

4. "DOJ has issued a solicitation calling for fingerprint validation studies to be done and essentially admitted that until those studies are conducted latent fingerprint examiners cannot satisfy the admission criteria of Daubert." *Id.* at 5-6.

5. "While the government was representing to the Court at the Daubert hearing that such testing is completely unnecessary, it is now apparent that the leading forensic science experts within the DOJ have reached a contrary conclusion." *Id.* at 6.

6. "In sum, the DOJ Solicitation makes it clear that the admissions criteria of

²Although the Fingerprint Research Advisory Panel (FRAP) met in May of 1999 and the Solicitation itself was not published until March of 2000, there is no mention in the Solicitation of *Kumho Tire Company, Ltd. v. Patrick Carmichael*, 119 S. Ct. 1167 (1999), which was decided in March 1999.

Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579 (1993) was not satisfied in this case . . .”

Id.

Even the most strained reading of the NIJ publication Forensic Science: Review of Status and Needs and the NIJ March Solicitation on fingerprints, cannot support the defendant’s statements and conclusions. Does stating the same claim so many times in his pleadings demonstrate the importance of those statements to the defendant? Or are they being repeated so many times in an effort to convince the casual reader that they are true?³ The facts are fatal to the defendant’s motion.

I. NIJ IS NOT THE DEPARTMENT OF JUSTICE

The fact is that NIJ does not speak⁴ for the Department of Justice in this case or in any other case and certainly was not a party to this litigation. Attached is a June 20, 2000 letter, signed by Julie Samuels, Acting Director of NIJ. The letter makes clear NIJ’s limited authority and the fact that the Attorney General has not delegated policy authority to NIJ. It states:

In the context of a solicitation and a report issued by the National Institute of Justice (NIJ), a question has been asked about the authority of NIJ to set policy for the United States Department of Justice. It should be noted that **NIJ is one of many components of the Department of Justice and its primary function is research and evaluation.** 42 U.S.C. § 3722(b), 42 U.S.C. § 3766. **NIJ does not set policy for the Department of Justice, has never asserted that it has this authority, and has not attempted to exercise this authority.**

The Attorney General of the United States is “the head of the Department of Justice.” 28 U.S.C. § 503. Further, “[a]ll

³That pattern is not new. Since the first trial, the defendant has repeatedly misstated Duane Johnson’s expert testimony at the first trial.

⁴ The defendant’s position is analogous to someone saying the Probation Department is part of the Court so the Court is bound by Probation’s positions.

functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General....” 28 U.S.C. § 509. Therefore, absent a delegation by the Attorney General, only the Attorney General may establish an official policy for the Department of Justice. The Attorney General has not delegated the authority to determine policy for the Department of Justice to NIJ.

NIJ is a component agency of the Office of Justice Programs (OJP) within the Department of Justice. However, NIJ, as a research agency, has been vested with certain independence from OJP. 42 U.S.C. § 3722(h); *see* S. REP. NO. 96-142, at 51 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2471-2521-2522. Also as noted in the Senate Report accompanying the Fiscal Year 1999 appropriations act, when the general grant-making authority for several component agencies of OJP was transferred to the Assistant Attorney General for OJP, the Director of NIJ retained grant-making authority for NIJ, in order to maintain the independence that is desirable for research and evaluation activities. § 112, Pub. L. 105-277, 112 Stat. 2681-67, S. REP. NO. 105-235 at 68 (1998). Thus, the NIJ Director maintains independence in NIJ’s grant-making and publications.

Most recently, this issue of NIJ’s authority to make policy has arisen in relation to fingerprinting. Accordingly, NIJ wishes to clarify its *Forensic Friction Ridge (Fingerprint) Examination Validation Studies*, a solicitation issued in March 2000, and *Forensic Sciences: Review of Status and Needs*, a research report issued in February 1999. **What underlies this solicitation is a desire for more research to further confirm the already existing basis that permits fingerprints to be used as a means to individualize. NIJ wishes to note that it is accepted that fingerprints are unique to the individual. NIJ has no basis to believe that this is not the case.** Further, NIJ notes that, even given the success of the current procedures, such procedures should be periodically examined and research conducted to enhance their empirical foundation. The products and findings from the research funded under NIJ’s March 2000 solicitation should result not only in improvements in fingerprinting but in further research studies that will expand the utility of fingerprint identification.

(emphasis added).

II. THE QUESTIONS

But could the defendant's statements be correct? Was the defendant's reliance upon the Solicitation based on an investigation of the facts behind the Solicitation? Could the defendant be right when he says the Solicitation is substantive evidence?⁵ In order to determine if the defendant's statements concerning NIJ's activities were true, and to make a record, the government has contacted each and every one of the listed attendees at the NIJ conference which was held in Gaithersburg, Maryland on March 5 and 6, 1997. As the Court will recall, that meeting resulted in the NIJ publication Forensic Sciences: Review of Status and Needs, which was published in February of 1999. The government has also contacted 10 of the 11 individuals present when the NIJ Fingerprint Research Advisory Panel (FRAP) met on May 18, 1999.⁶ Of course, the Solicitation is derivative of the March NIJ meeting and the FRAP meeting.

III. THE NIJ MARCH 5-6, 1997 MEETING

The NIJ publication Forensic Sciences: Review of Status and Needs, lists 44 participants at the two-day NIJ meeting. *See* attached pages 63-64. The meeting was held at the National Institute of Standards and Technology (NIST), a Department of Commerce component.

⁵ Of course the document itself is rank hearsay. Therefore, the defendant must have some witness(es) he will rely upon to put forth such substantive evidence. But who are the possible witnesses? Only those that attended the March 1997 meeting and the May 18, 1999 FRAP meeting, as is more fully discussed herein.

⁶The affidavits from 52 individuals will be filed in an Appendix to this Supplemental Response. The government has not spoken to David A. Stoney, inasmuch as he appears to continue to be a defense witness in this case and in others. It is the government's understanding that he recently testified for the Federal Defenders in a hearing in the Southern District of Florida. The court admitted the fingerprint evidence after that hearing.

Kathleen M. Higgins, Director of the Office of Law Enforcement Standards of NIST described the meeting:

NIST hosted the March 5-6, 1997 NIJ meeting on forensic science. I was assigned to the Training working group which met during the afternoon of day one and into the morning of day two of the two day NIJ meeting. However, as host of the meeting, the majority of my time was spent floating between the working groups. The NIJ meeting was designed to be a general look at the current status, the projected needs, and what future research might be beneficial to the forensic sciences. An important part of the two day meeting was the presence of Department of Energy (DOE) scientists as observers. The purpose was to inform DOE personnel about the forensic fields and for DOE to determine what present or future DOE technologies could assist to law enforcement.

At the end of the meeting, the working group leaders, including Dr. Carl Selavka, chair of the [Methods] Research, Development, Test[ing] and Evaluation working group, turned over their work product to editors from Aspen Systems Corporation hired by NIST. The editors' produced both the April 29, 1997 and January 26, 1998 drafts of the NIJ publication "Forensic Sciences: Review of Status and Needs." The working group leaders were responsible for editing both drafts into a proposed final version....

I neither participated in nor heard any opinions, criticisms, comments or discussions by the working groups which suggested in any way that latent print examinations were scientifically invalid, were otherwise unreliable or were inadmissible as evidence in courts. Likewise, I never heard any opinions, criticisms, comments or discussions from any of the more than 40 participants in the two days meeting that questioned the scientific validity of latent print examinations, the reliability of latent print examinations or the legal admissibility of latent print evidence. I would have remembered any such opinions, criticisms, comments or discussions since they would have been directly opposite to my own views ... that friction ridge skin and arrangements are unique and permanent, that positive identifications can be made by latent print examiners, and that fingerprint evidence is admissible in court. To my knowledge, there was no review by the working groups of any of the research or research references for latent print examinations or any of the other forensic fields addressed in the Methods Research, Development, Testing, and Evaluation section of the NIJ publication "Forensic Sciences Review of Status and Needs"....

Affidavit at 1-2.

Richard M. Rau, a Program Manager in the Office of Science and Technology, National Institute of Justice (NIJ) and co-host of the NIJ meeting, states:

The National Institute of Justice falls within the Office of Justice Programs in the Department of Justice. NIJ by statute enjoys considerable independence from the Department of Justice. My education is in mathematics/operation research analysis. While I have a Ph.D. in the area of mathematics and have been trained in the scientific method, I serve a management function at NIJ. As a Program Manager, one of my main duties has been to coordinate groups of experts in various fields to identify areas in need of further scientific research. I have and claim no expertise in the latent print examination field. Further, I have and claim no expert knowledge of the research which has been done concerning how human friction ridge skin develops, the latent print examination process or the permanency and uniqueness of friction ridge skin.

On March 5-6, 1997, NIJ held a meeting, at the request of the American Society of Crime Laboratory Directors (ASCLD), which was designed as a general overview of the status and needs of forensic sciences going into the year 2000. Kathleen M. Higgins of the National Institute of Standards and Technology (NIST) and I co-managed the March 5-6, 1997, NIJ meeting. NIST was tasked with the preparation of "Forensic Sciences: Review of Status and Needs" while NIJ was tasked with publishing. Several Department of Energy (DOE) scientists were also present at this meeting as observers. One purpose of the meeting was to inform DOE personnel about the forensic fields and for DOE to determine what present or future DOE technologies could assist law enforcement....

I have no recollection of any opinions, criticisms, comments or discussions that pertained to fingerprints from any of the more than 40 participants at the two-day NIJ meeting on March 5-6, 1997.

Affidavit at 1,3.

So how many of those 44 participants were "leading forensic science experts within the DOJ"? Does the defendant mean leading forensic science experts within the relevant community of latent print experts? Does he mean something else? It turns out it does not matter what the defendant means. No one attending the meeting in March 1997 can recall participating in or hearing any opinions, criticisms, comments or discussions which suggested that latent print examinations were scientifically invalid, were otherwise unreliable or were inadmissible as

evidence in courts. *See* Affidavits in Appendix.

Who were the participants at the March 1997 NIJ meeting? Fifteen of the “participants” were Department of Energy (DOE) representatives and scientists attending the meeting as observers. Their purpose was to listen and observe with an eye toward determining what present or future DOE technologies could assist law enforcement in the forensic science fields. None of the DOE personnel claim any expertise in the latent print examination field and none claim any expert knowledge of the research which has been done concerning how human friction ridge skin develops, the latent print examination process, or the permanency and uniqueness of friction ridge skin. **None of them heard any opinions, criticisms, comments or discussions by anyone at the meeting which suggested in any way that latent print examinations were scientifically invalid, were otherwise unreliable or were inadmissible as evidence in Court.** Most of them stated that they would have remembered such opinions, criticisms, comments or discussions. *See* Affidavits of James Barnett, Vivian Baylor, Albert Boni, David Dye, Selma El-Safwany, Gary Gresham, Jack Guerrier, David Hendren, Richard Larsen, Steve Martin, Paul Persiani, Robert Scarlett, Steve Schubert, Gregory Thomas, and Peter Vanier.

The only participants from the Federal Bureau of Investigation were Dwight Adams, Steve Allen, Randall Murch and Robert Sibert. **None of the FBI personnel claim any expertise in the latent print examination field and none claim any expert knowledge of the research which has been done concerning how human friction ridge skin develops, the latent print examination process, or the permanency and uniqueness of friction ridge skin. They all state they would have remembered opinions, criticisms, comments or discussions which suggested that latent print examinations were scientifically invalid, were unreliable**

or were inadmissible as evidence in court. Dwight Adams is the Deputy Assistant Director of the FBI Laboratory and he has expertise in the field of DNA. Steve Allen, now retired from the FBI, has an expertise in organic chemistry. Randy Murch, then a Section Chief of the Scientific Analysis Section of the FBI Lab has a Ph.D. in plant pathology and a background in Forensic and Life sciences. Robert Sibert is a qualified expert in firearms and tool marks. Bob Sibert was one of the FBI members assigned to the Methods Research, Development, Testing, and Evaluation working group at the March 1997 meeting. Carl Selavka, the drafter⁷ of the Methods Research, Development, Testing, and Evaluation Section for the NIJ publication Forensic Sciences: Review of Status and Needs , forwarded a copy of the draft to Bob Sibert. A quote from Mr. Sibert's affidavit is enlightening:

I was one of the seven (7) persons assigned to the Methods Research, Development, Testing, and Evaluation working group which met during the afternoon of day one and into the morning of day two of the two day NIJ meeting.

I understood the NIJ meeting to be a broad brush look at forensic sciences into the next century. The only participant at the NIJ meeting I believe possessed any expertise in the Latent Print field was Dr. Antonio A. Cantu from the United States Secret Service, a member of my working group. His expertise is in the chemical composition of latent prints and techniques used to visualize latent prints....

Sometime after the March 1997 meeting, I received from Dr. Selavka the April 29, 1997 draft of the Methods Research, Development, Testing, and Evaluation section proposed for insertion into the NIJ publication.... I circulated that draft through the appropriate sections within the FBI Laboratory Division. After receiving back comments from experts within the FBI, I authored a letter dated May 29, 1997, to Dr. Selavka summarizing the objections noted by the experts within the FBI. See Attachment "B." My statement that "the latent fingerprint examiners were rather defensive and apparently felt that the statements in the report were incorrect and indicative of an absence of a representation of their expertise in our workgroup" was my attempt to be diplomatic with

⁷ NIST engaged the services of editors from the Aspen Group to produce an April 29, 1997 draft. The working group leaders' work product and observations made during the meeting were the sources of the materials used by the editors to produce that draft.

Dr. Selavka, who I thought had worked diligently during the two-day meeting. **The strength of latent print examiners' criticism of the draft is demonstrated by Gene Mulholland's Memo to me dated May 29, 1997.** Gene Mulholland is a qualified latent print examiner with 32 years of experience, who at the time held Stephen B. Meagher's position. Unit Chief Stephen B. Meagher was a witness at the Philadelphia Daubert hearing.

Dr. Selavka never contacted me or other members of the FBI to address the opposition to the wording contained in the draft. The final version of the Latent Print Examination section of the NIJ report was not circulated to me or the FBI before it was published in 1999. Likewise, I have no knowledge of whether or not Dr. Selavka shared the FBI criticisms with anyone else within NIJ.

Affidavit at 1-3.

Gene Muholland's memo to Sibert read as follows:

I have read the attached draft report. First of all I do not agree with it in principle and I'm not going to try to respond to each issue of difference.

I also have concerns as to how this ever came about. Who made the assessment of the fingerprint science and determined its needs? Who was the FBI's representative for latent prints?

The fingerprint science has already established its credibility over the last hundred or so years and there is virtually no reason to have to reestablish it. It proves itself everyday. Anyone who isn't aware of its reliability or doesn't accept it by this time is probably an alien from outer space (or spaced out)⁸. There certainly can be more important things to do than to do "more extensive studies and examinations"... "To show that no two people have fingerprints that are exactly alike."

The question of specific number of points that examiners need to make a match is also an issue that has been discussed for years by the fingerprint community and rejected. Even England who has had a "sixteen point rule" since eternity is in the process of eliminating it.

I don't know exactly what is meant by reason of relative importance of print features, but if this is meant that greater weight be given to one type of ridge characteristic than another, then this is another area of disagreement.

Concerning cyanoacrylate processing – we do understand how this process works and to my knowledge no identifications effected of cyanoacrylate prints

⁸ This opinion is reminiscent of Professor Andre A. Moenssens saying "[w]ith the data that is available today, however, it would be rather **ludicrous to argue that the premises underlying fingerprint identification have not been scientifically validated** in the face of the accumulated experience of the millions of fingerprints that have been scrutinized by experts." 7/8/99 *Daubert* transcript at 184 (emphasis added).

have ever failed to “stand up in court.”

Concerning fabricated prints – what is meant by “copied?” We have been able to detect “forged” prints; however, it turns out the prints are not “forged,” but the source of the print was misrepresented.

AFIS – there are more than just the two AFIS systems mentioned in the draft. Also, transmission standards for the exchange of fingerprint information have already been adopted.

Sibert Affidavit, Attachment “B” (footnote and emphasis added).

Jan S. Bashinski, Chief of the Bureau of Forensic Services of the California Department of Justice described the March 1997 NIJ meeting as follows:

At the time of my participation in the March 5-6, 1997 NIJ meeting...[,] [l]atent print examinations [fell] under my supervision. My educational background is in chemistry and forensic science. I did bench work and was court qualified in drug analysis, serology, DNA and some latent print development and comparison before I became an administrator. I do not claim to be an expert in the discipline of latent print comparison.

I was assigned to the Training working group which met during the afternoon of day one and into the morning of day two of the two day NIJ meeting. I understood the NIJ meeting to be a general look at forensic sciences and to suggest where research might be directed in the future. There was no discussion at the meeting that would cast doubt on the validity of any of the forensic sciences. The only participant at the NIJ meeting that I am aware possessed in depth expertise in the Latent Print field was Dr. Antonio A. Cantu from the United States Secret Service. His expertise is in the chemical composition of latent prints and techniques used to visualize latent prints.

I neither participated in nor heard any opinions, criticisms, comments or discussions by any working group which suggested in any way that latent print examinations were scientifically invalid, were otherwise unreliable or were inadmissible as evidence in courts. Likewise, I never heard any opinions, criticisms, comments or discussions from any of the more than 40 participants in the two days meeting that questioned the scientific validity of latent print examinations, the reliability of latent print examinations or the legal admissibility of latent print evidence. I would have remembered any such opinions, criticisms, comments or discussions since they would have been directly opposite to my own informed views that friction ridge skin and arrangements are unique and permanent, that positive identifications can be made by latent print examiners, and that fingerprint evidence is admissible in court. I know of no review by the working groups of any of the research or research references for latent print examinations or any of the other forensic fields

addressed in the Methods Research, Development, Testing, and Evaluation section of the NIJ publication “Forensic Sciences: Review of Status and Needs,” which was published in February 1999.

The Method Research, Development, Testing, and Evaluation working group was headed by Dr. Carl Selavka, then Director of Forensic Services for the New York State Division of Criminal Justice Services.

Sometime after the March 1997 meeting, I received the April 29, 1997 draft of the Methods Research, Development, Testing, and Evaluation section proposed for insertion into the NIJ publication “Forensic Sciences: Review of Status and Needs.” I marked up the draft and sent it back to Dr. Selavka. **I was concerned that the draft seemed to imply that scientific research on latent prints had not been done, an implication that I believed to be incorrect.** Through my association with colleagues in the forensic science group at U.C. Berkeley, **I was aware of David A. Stoney’s work on statistical modeling and I made marginal notes in the Latent Print Examination Section of the draft referring to that work.**

Affidavit at 1-2 (emphasis added).

Carl Selavka was the Director of Forensic Services with the Office of Forensic Services of the New York State Division of Criminal Services at the time of the March 1997 NIJ meeting. He is presently the Director of the Massachusetts State Crime Laboratory. His expertise is in forensic analytical chemistry, in particular arson, bombs, and toxicology. Like all the other participants in the March 1997 NIJ meeting, he claims no expertise in the latent print examination field and further claims no expert knowledge of the research which has been done concerning how friction ridge skin develops, the latent print examination process, or the permanency and uniqueness of friction ridge skin. Dr. Selavka makes it clear in his affidavit that any suggestion that what he wrote stands for the proposition that the latent print examination field does not meet the *Daubert* standards is incorrect. His affidavit explains:

I have not been trained and do not claim competence in the examination and comparison of latent prints. Further, I have not developed sufficient expertise in how human friction ridge skin develops, the latent print examination process or the permanency and uniqueness of friction ridge skin to the extent that would be

necessary to present such information to a court.

With the exceptions noted below, I neither participated in nor do I recall hearing any opinions, criticisms, comments or discussions by our working group or from any of the more than 40 participants in the two-day meeting which suggested in any way that latent print examinations were scientifically invalid, were otherwise unreliable or were inadmissible as evidence in courts. I would have remembered any such opinions, criticisms, comments or discussions since they would have been directly opposite to my own informed views that friction ridge skin and arrangements are unique and permanent, that positive identifications can be made by latent print examiners, and that fingerprint evidence is admissible in court. There was no review prior to or during the meeting by my working group of any of the research or research references for latent print examinations or any of the other forensic fields addressed in the Methods Research, Development, Testing, and Evaluation section of the NIJ publication “Forensic Sciences: Review of Status and Needs” which was published in February 1999. **The exceptions are: 1) I heard the comment that “it was not science” made by someone outside of our working group. I do not now recall that person’s identity; 2) I recall a DOE observer saying he had heard that fingerprints have trouble in the legal world and that there were bad proficiency testing results. He did not name the source of that hearsay.**

At the conclusion of the meeting, I delivered a preliminary draft of the Methods Research, Development, Testing, and Evaluation section proposed for insertion into the NIJ publication “Forensic Sciences: Review of Status and Needs” to the editors from the Aspen Group. A working draft was produced by the Aspen Group and was dated April 29, 1997. I circulated that draft through the members of my working group and received feedback on the subject of latent print examinations from several member, including Jan S. Bashinski, Chief of the Bureau of Forensic Services of the California Department of Justice, and Bob Sibert, Deputy Chief of the Scientific Analysis Section of the FBI Laboratory Division.

In the FBI comments, it was clear that the FBI’s latent print experts strongly disagreed with some of the wording and some of the positions stated in the draft. Jan Bashinski’s comments included a reference to researchers named Kingston and Stoney concerning statistical work that had been done. I spoke to Jan about that and decided to call David A. Stoney. I called David Stoney and had a short conversation. He gave me the reference to the two articles cited on page 30 of “Forensic Sciences: Review of Status and Needs”. I read these works and changed the Determination of the relative importance of print features paragraph in part to reflect Stoney’s articles. I completed the revisions and submitted a draft that mirrors the final version as published. I believe that the published version reflects the consensus of the working group. However, I am fully aware that some experts disagree with some of the wording

and content. **I am also aware that some of the language is being used in a federal criminal case in Philadelphia to suggest that fingerprint evidence does not meet the requirements of *Daubert*. As the working group leader and the person responsible to oversee the production of the Methods Research, Development, Testing, and Evaluation Section, I reject those interpretations and state that no such meaning is conveyed by the wording.**

I have been asked by Assistant U.S. Attorney Paul A. Sarmousakis to comment on the following portions of the text that appears on pages 28 through 31 of the NIJ publication “Forensic Sciences: Review of Status and Needs”:

Nonetheless, two efforts are now underway to increase the understanding of fingerprint features and content. There is a modest effort to better comprehend the genetic basis and relative importance of specific print features.... Page 28

COMMENT: I do not remember who among the working group gave me this input. I was not familiar with the identity of persons who were doing this work.

However, minimum criteria and reporting standardization based on empirical studies and a consensus process among qualified examiners would significantly enhance the reliability of findings. Page 29

COMMENT: That sentence is related to data gathering to enhance training and to determine the competency of examiners.

The quality of the comparison relies as much on spatial relationships between, and the specific types of, minutiae (and the frequency of occurrence of these minutiae in the “population” of Prints.... Page 29

COMMENT: This data could be produced by AFIS and would be helpful for training. It would be machine generated and not impact directly on the actual examination process.

How can examiners prove that each individual has unique fingerprints? There are certainly statistical models that support this contention. Friction ridge print evidence has historically been “understood” to hold individuality based on empirical studies of

millions of prints. However, the theoretical basis for this individuality has had limited study and needs a great deal more work to demonstrate that physiological/developmental coding occurs for friction ridge detail, or that this detail is purely an accidental process of fetal development. Studies to date suggest more than an accidental basis for the development of print detail, but more work is needed. Page 29

COMMENT: This general statement calls for additional research. It does not question the fact that friction ridge skin and arrangements are unique.

Affidavit at 1-4 (emphasis added).

Dr. Carl Selavka's final input into the NIJ publication Forensic Science: A Review of Status and Needs represents what he believes to be a consensus of the working group that more research should be done. He also explained he revised the draft and incorporated David Stoney's opinions.

Stephen B. Meagher describes the government's contacts with the participants at the March 1997 NIJ meeting. Not one of those persons supports the statements the defendant asserts in his Motion for a New Trial or in his Reply Memorandum in Support thereof. *See infra* Part V.

The NIJ publication Forensic Sciences: Review of Status and Needs", as is apparent, contains an overview of the forensic sciences which were generally discussed at the March 1997 NIJ meeting. Although it may be a document that Congress or NIJ may rely upon to justify research in the forensic sciences, it is not a document that an expert in latent print examinations or any of the forensic sciences for that matter would rely upon for their expert opinions and it is not authoritative in the fingerprint field or in any other forensic field.

IV. THE MAY 18, 1999 FINGERPRINT RESEARCH ADVISORY PANEL (FRAP)

The FRAP meeting was formed to follow up on the NIJ publication Forensic

Science: A Review of Status and Needs. As Dr. Rau explained:

I was also the manager of the Fingerprint Research Advisory Panel (FRAP) which met on May 18, 1999. The attendees at the FRAP were Allyson Simons and Stephen Meagher of the FBI; Antonio Cantu, Coy Burns and Robert Ramotowski of the U.S. Secret Service; Edward R. German of the U.S. Army Criminal Investigation Laboratory; David L. Grieve of the Illinois State Police; David A. Stoney of the McCrone Research Institute; and Robert Kaminski and Anjali Swienton of NIJ.

In April of 1999, I attended an NIJ “Science and the Law” meeting. This meeting included presentations by various U.S. District Court judges. I remember in particular that the Judge from the *Starzecpyzel* case spoke. At that meeting, the *Daubert* and *Kumho* cases were discussed in connection with possible scientific challenges. On May 18, 1999, the FRAP met to determine whether there was a need for a Solicitation concerning fingerprint research. A decision was made by the FRAP members to produce a Solicitation. At the FRAP meeting, copies of the Solicitation for the Forensic Document Examination Validation Studies were distributed to those present and the fingerprint Solicitation followed the same format.

The background section appearing on page 3 of the Solicitation for Forensic Friction Ridge (Fingerprint) Examination Validation Studies was originally drafted by Edward German. Mr. German’s draft paragraphs were reordered to maintain chronological order, and a few minor editorial changes were made. Specifically, I added two additional paragraphs to the final version of the background section of the Solicitation – one paragraph concerning the Status and Needs publication, and one paragraph concerning the Forensic Document Examination Validation Studies Solicitation. The Fingerprint Solicitation was issued in March 2000. The general purpose of the Solicitation appears in the Introduction Section on page 3 and states ‘**to provide greater scientific foundation for forensic friction ridge (fingerprint) identification....**’

I do not recall that anyone attending the FRAP, with the possible exception of Dr. David A. Stoney, said that latent fingerprint examinations were scientifically invalid, unreliable, or legally inadmissible. I do acknowledge and understand that Dr. Stoney had written about his concerns about the scientific status of the latent print examination process. I also understand that Dr. Stoney testified at *Daubert* hearings held in Philadelphia and Florida Federal Courts and that this affidavit will be furnished to the Philadelphia Court.

Affidavit at 2-3.

David Grieve, Stephen Meagher, as well as the other members of the FRAP, confirmed that a previously issued Solicitation on question documents was handed out at the FRAP meeting and was to be used as the model⁹ for the fingerprint Solicitation. Edward German was tasked with writing the Background Section of the Solicitation. The Court will recall that Special Agent German from the Army CID Laboratory was a witness at the *Daubert* hearing.

German describes the process as follows:

During the FRAP meeting Dr. Rau mentioned that he had heard some federal judges were calling for additional research in the latent print field because of expected *Daubert* challenges. During the FRAP meeting, I neither participated in nor heard any opinions, criticisms, comments or discussions which suggested in any way that latent print examinations were scientifically invalid, were otherwise unreliable or were inadmissible as evidence in courts. I would have remembered any such opinions, criticisms, comments or discussions since they would have been directly opposite to my own expert opinions that friction ridge skin and arrangements are unique and permanent, that positive identifications can be made by latent print examiners, and that fingerprint evidence is admissible in court.

As I stated in my earlier affidavit, I had the responsibility of preparing the Background portion of the Solicitation. I believe I had been tasked to use the same wording as was used in the Questioned Document Solicitation but with some fingerprint language. I have attached hereto a copy of my e-mail to Dr. Rau with my suggested draft. Dr. Rau told me that my draft would be modified with a NIJ flavor. I do note that many of the Scientific Working Group on Friction Ridge Analysis, Study and Technology (SWGFAST) objectives were[*sic*] omitted from the final version of the Solicitation.

Although I do not agree with some of the wording in the Solicitation, I was not particularly concerned because I believe the document is adequate for the purpose for which it was created, namely, to justify research and to generate proposals for research from the field.

Affidavit at 1 (emphasis added).

David Grieve an expert with 35 years experience made the following statements,

⁹The common wording between the two documents is striking and shows that, with the exception of some fingerprint substitutions language, the documents are essentially the same. *See*, Government's Response to Defendant's Motion for New Trial, Attachment "A".

among others, in his affidavit:

During the FRAP meeting Dr. Rau mentioned that calls were being made for additional research in the latent print field because of expected *Daubert* challenges. **I neither participated in nor heard any opinions, criticisms, comments or discussions which suggested in any way that latent print examinations were scientifically invalid, were otherwise unreliable or were inadmissible as evidence in courts. I would have remembered any such opinions, criticisms, comments or discussions since they would have been directly opposite to my own expert opinions that friction ridge skin and arrangements are unique and permanent, that positive identifications can be made by latent print examiners, and that fingerprint evidence is admissible in court. However, I do recall David A. Stoney being critical of the existing statistical models in the field, including his own work, and calling for more statistical research.**

The panel consensus at the end of the 18 May 2000 meeting was to use the wording from an earlier issued Solicitation for document examination research grant money as the model for the Forensic Friction Ridge (Fingerprint) Examination Validation Studies Solicitation. Dr. Rau suggested that there was no reason to reinvent the wheel and stated that the Solicitation format had been successful for document examination research. The other consensus was to do more research if money was available.

Ed German had the responsibility of preparing the Background portion of the Solicitation. He was tasked to use the same wording as was used in the Questioned Document Solicitation but with some fingerprint language. I did not read the final version of the Background section.

Although I do not agree with some of the wording in the Solicitation and would make changes to that wording, I believe the document is adequate for the purpose for which it was created, namely, to justify research and to generate proposals for research from the field.

Affidavit at 2-3 (emphasis added).

Stephen B. Meagher as part of his affidavit described his participation in the FRAP meeting:

I participated in the Fingerprint Research Advisory Panel meeting at the Doubletree Hotel in Arlington, Virginia on 18 May 1999. I was called to the meeting by my supervisor, Allyson Simons, who was already at the meeting. I arrived within an hour of the time the FRAP meeting started. Dr. Richard Rau chaired the meeting.... The other latent print experts at the meeting were Coy Burns, David Grieve, and Edward German. Tony Cantu and Robert Ramotowski

are experts in the chemical compositions of latent prints and detection and visualization techniques. David Stoney (McCrone Research Institute), a defense witness at Mitchell's *Daubert* hearing, was also present.

I have been told that before I arrived, Dr. Rau mentioned that others were calling for additional research in the latent print field because of expected *Daubert* challenges. **I neither participated in nor heard any opinions, criticisms, comments or discussions which suggested in any way that latent print examinations were scientifically invalid, were otherwise unreliable or were inadmissible as evidence in courts. I would have remembered any such opinions, criticisms, comments or discussions since they would have been directly opposite to my own expert opinions that friction ridge skin and arrangements are unique and permanent, that positive identifications can be made by latent print examiners, and that fingerprint evidence is admissible in court. However, I do recall David A. Stoney being critical of the existing statistical models in the field, including his own work, and calling for more statistical research.**

The panel consensus at the end of the May 18, 2000 meeting was to use the wording from an earlier issued Solicitation for document examination research grant money as the model for the Forensic Friction Ridge (Fingerprint) Examination Validation Studies Solicitation. Dr. Rau suggested that there was no reason to reinvent the wheel. The other consensus was to do more research if money was available.

Ed German had the responsibility of preparing the Background portion of the Solicitation. He was tasked to use the same wording as was used in the Questioned Document Solicitation but with some fingerprint language. I did not read the final version of the Background section.

Although I do not agree with some of the wording and content in the Solicitation and would make changes to that wording, I believe the document is adequate for the purpose for which it was created, namely, to justify research and to generate proposals for research.

Affidavit at 1-2 (emphasis added).

V. SUMMARY OF GOVERNMENT'S CONTACTS WITH THE PARTICIPANTS AT THE MARCH 1997 NIJ MEETING AND THE MAY 1999 NIJ FRAP

Stephen B. Meagher as part of his affidavit describes the government's contact and the summary of those conversations:

After Mitchell filed his reply to the government's response to his Motion for a New Trial, AUSA Paul A. Sarmousakis and I contacted all the participants at the NIJ March 5-6, 1997 meeting and all the attendees at the May 18, 1999 FRAP. No person attending the March 1997 NIJ meeting was a qualified Latent

Print Examiner. The only persons having any expertise or experience was Tony Cantu from the U.S. Secret Service and Jan Bashinski, the Chief of the Bureau of Forensic Services for the California Department of Justice. Cantu is a chemist and his expertise is in the chemical composition of latent prints and in the detection and visualization of latent prints. Jan Bashinski, also a chemist and skilled in DNA, did some latent print examinations in the early 1960's.

A fair summary of the conversations with all the participants in the March 1997 NIJ meeting and the May 1999 NIJ FRAP meeting, is that none of those participants participated in, heard or recalled statements that suggested that latent print examinations were scientifically invalid or unreliable or were inadmissible in court. I qualify that statement only to the extent that David Stoney may have had some criticisms, and that Carl Selavka notes in his affidavit two persons, unknown to him, and who, by way of elimination are not experts in the field, were critical of latent print examinations. **In summary, I know of no statements that were made at those two meetings which could support the defendant's statements summarized in the Government's Supplemental Response to the Defendant's Motion for a New Trial and to Defendant's Reply Memorandum in Support of the Motion for a New Trial.**

Affidavit at 2-3 (footnote omitted; emphasis added).

VI. OPINIONS OF THE GOVERNMENT'S EXPERTS

Meagher was tasked to discuss the government's contacts and the NIJ publications with the government's fingerprint experts that testified at Mitchell's *Daubert* hearing and trial. Those experts told Meagher that after considering the contacts with the participants at the NIJ meetings and the NIJ publications, that their opinions remained unchanged.

Nothing I have learned from the conversations with the participants at the March 5-6, 1997 NIJ meeting or the attendees at the May 18, 1999, FRAP or from reading the NIJ publications, including the Solicitation for fingerprint research, changes in any way the opinions I gave during the *Daubert* hearing or at Mitchell's trial. I have also talked with Ed German, Pat Wertheim, Dave Ashbaugh, William Babler and Bruce Budowle, the government's expert witnesses at the *Daubert* hearing, and Duane Johnson, the other government expert at Mitchell's trial. **After discussing the defendant's motion for a new trial, the conversations with the participants at the March 1997 meeting and the attendees at the May 18, 1999 FRAP, and the NIJ publications with them, each of those experts stated that nothing they learned from me about those conversations or from reading or hearing the relevant portions of the NIJ publications, changes in any way the opinions they gave during the *Daubert***

hearing or at Mitchell's trial.

Affidavit at 3-4 (emphasis added).

VII. SELECTED COMMENTS ON THE DEFENDANT'S REPLY MEMORANDUM

The defense maintains it had no knowledge of the FRAP because Stoney did not disclose his participation. However, the record suggests that the defense did know about the issues underlying the FRAP, whether from Stoney or someone else. Interestingly, Stoney does not say he did not tell the defense about Ed German's participation in the FRAP. Indeed, Leigh Skipper brought out on cross-examination German's participation and then never followed up. Memorandum... in Support of the Gov. Response... at 2-5. In addition, Stoney's credibility is called into question by his out of court statements at the *Daubert* hearing when **he discussed the FRAP a non-FRAP member, Dr. Budowle?**. *Id.* at Attachment "A" and *see* Meagher Affidavit at 4.

The defendant's allegation of Brady violations is specious. Reply Memo. at 4-5. The government has already demonstrated that the NIJ materials do not establish what the defendant has stated to this Court. The result of the government's investigation of the NIJ proceedings plainly establishes the defendant's statements are, at best, uninformed. Stoney's criticism of the scientific status of latent print examinations was the only criticism cited by Carl Selavka and the only criticism voiced at the FRAP. However, this Court heard Stoney's opinions at the Daubert hearing and considered those opinions in reaching its original rulings.

VIII. CONCLUSION

The defendant cannot produce one witness, save Dr. Stoney, who can attempt to raise the NIJ publications from rank hearsay to substantive evidence. However, even Stoney will not be able to support the statements made by the defendant to this Court. *Supra* at 2-3. Dr.

Stoney has already testified extensively before this Court. In addition, the defendant's averments concerning the materiality of the NIJ publications are clearly mistaken. The Solicitation is an invitation for research in the fingerprint field, no more or less.

WHEREFORE, for all the foregoing reasons and for all the reasons as stated in the its prior Response, the government respectfully submits that the defendant's Motion for a New Trial... must be denied.

Respectfully submitted,

MICHAEL R. STILES
United States Attorney

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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Government's Supplemental Response to Defendant's Motion for a New Trial and to Defendant's Reply Memorandum in Support of the Motion for a New Trial- the NIJ Forensic Friction Ridge (Fingerprint) Examination Validation Studies, March 2000 Solicitation has been served via hand pick up upon the following counsel on the date set forth below:

Leigh M. Skipper, Esquire
Defender Association of Philadelphia
Suite 800 - Lafayette Building
437 Chestnut Street
Philadelphia, PA 19106-2414

/s/ Paul A. Sarmousakis

PAUL A. SARMOUSAKIS
Assistant United States Attorney

DATE: 7/26/00