

posting on the NIJ web site on March 30, 1999, long before the *Daubert* hearing and trial in this case. Exhibit A, Affidavit of Joyce Hutchinson. The language in that document would put any reader on notice that NIJ was exploring possible research in several disciplines, including document examination and latent print examination.

II. BRADY MOTION

The defendant will argue that the FBI improperly held up the issuance of the solicitation. The government incorporates its response (doc. 163) and has established that NIJ is an independent entity within the Department of Justice and while exercising that independence delayed the issuance of the solicitation until March of 2000. The government expects the following testimony:

(a) Dr. David G. Boyd, Director of the Office of Science and Technology of the NIJ will testify to the facts and circumstances leading to the decision to delay the issuance of the solicitation concerning fingerprint research. Boyd will relate his conversations that he had with Dr. Bruce Budowle of the FBI about the FBI's fingerprint research, sharing of resources to conduct research, the desire to obtain the trial court's written decision in the *Mitchell* case and various scheduling and fiscal matters that influenced his decision to withhold the issuance of the solicitation.

(b) Dr. Donald Kerr, Assistant Director of the Federal Bureau of Investigation and head of the Laboratory Division of the FBI, will testify that he started the process of NIJ's consideration of the issuance of the solicitation when he had a telephone conversation with

Jeremy Travis,¹ then the director of NIJ. The telephone call took place a short time before the September 17, 1999 DNA meeting held in Dr. Kerr's office. Dr. Kerr will testify that the purpose of his phone call was to discuss matters relating to DNA procedures in labs that received government funds. Dr. Kerr will testify that during that phone call he brought up the issue of the fingerprint solicitation, including his staff's opinion of the wording of the draft. Dr. Kerr will testify that Jeremy Travis told Kerr that any issue with respect to the solicitation would have to be directed to Dr. David Boyd of the NIJ staff. Dr. Kerr knows that at the conclusion of a September 17, 1999 meeting concerning DNA, Dr. Bruce Budowle of the FBI had a conversation with Dr. David Boyd of NIJ concerning fingerprint research.²

III. PARTY ADMISSION—FED. R. EVID. 801(d)(2)(D)

The defendant is plainly mistaken when he states that the draft of a solicitation or the solicitation itself if it existed at the time of the *Daubert* hearing or the trial would have qualified as a party admission under the Rules. Mitchell relies on *United States v. Van Griffin*, 874 F.2d 634 (9th Cir. 1989).

¹Jeremy Travis told government counsel he recalled the phone call and that DNA was an issue. He does not recall whether or not the fingerprint solicitation was mentioned. However, if it was raised, he would have told Dr. Kerr to talk to Dr. David Boyd.

²The government believes that Mitchell will call Dr. Richard Rau, a program manager at NIJ who is Dr. David Boyd's subordinate. Rau holds the view that the conversation at the end of the DNA meeting on September 17, 1999 included Dr. Kerr. However, in addition to Drs. Kerr, Boyd and Budowle, the government will produce Steve Niezgoda, a former member of the FBI who will establish that Dr. Kerr was not part of the conversation. Dr. Rau, in previous conversations with the government and during conversations with defense counsel and government counsel has on numerous occasions had a failure of recollection concerning events. Dr. Rau's recollections of events that took place almost a year before he authored a time line will be explored. The time line was prepared in the summer of 2000 and covered events that took place over several years.

In *Van Griffin*, a Department of Transportation manual concerning Sobriety Testing was at issue. The court held that the manual was a party admission by the United States under Fed. R. Evid. 801(d)(2)(D), reasoning that “the government department charged with the development of rules for highway safety was the relevant and competent section of the government” that produced the testing manual. *Id.* at 638. It is clear in *Van Griffin* that the pamphlet was issued after research on the issue of sobriety testing.

Neither the draft solicitation nor the final fingerprint Solicitation share the characteristics of the pamphlet in *Van Griffin*. First, the defendant cannot establish that NIJ is the agency responsible for setting the standards used by latent print examiners because those issues are dealt with on a continuing basis by the International Association for Identification. Second, the draft solicitation and the final Fingerprint Solicitation only call for proposals to conduct research. Unlike the document in *Van Griffin*, the solicitation here does not report findings gleaned from research.

United States v. American Telephone and Telegraph Company, 498 F. Supp. 353 (D.D.C. 1980) does not help the defendant. In that marathon complex anti-trust civil litigation, Judge Harold H. Greene held that certain statements made by officials of Executive Branch Departments before the FCC were admissible under the party-opponent exception to the hearsay rule. The issues there were discovery rules under a prior discovery order of the court during the pre-trial skirmishing in that case. *Id.* at 356-58. The FCC was the agency responsible for investigating AT&T. Judge Greene exempted “independent commissions.” *Id.* at 358. But more importantly, the statements were made by people who could be examined at trial and were not solicitations for research.

NIJ is more appropriately aligned with the independent commissions mentioned by Judge Greene.

A. Function of the National Institute of Justice

The National Institute of Justice (NIJ) is one of many components of the Office of Justice Programs (OJP), an agency of the United States Department of Justice (DOJ). Its primary functions are research and evaluation. 42 U.S.C. §3722(c), §3766.

NIJ was created by the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. §3711 *et seq.*). In this authorizing legislation, NIJ was given authority to enter into grants, cooperative agreements and contracts with public agencies, institutions of higher education, private organizations, or individuals, to conduct research and demonstrations, and to provide technical assistance. 42 U.S.C. §3722(b).

B. Authority of the National Institute of Justice

The Director of NIJ reports to the Attorney General of the United States through the Assistant Attorney General for OJP. 42 U.S.C. §3722(b). The Attorney General is the statutory “head of the Department of Justice.” 28 U.S.C. §503. Further, “[a]ll 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.

While NIJ is a component agency of OJP, it retains a certain independence over grants, contracts, and cooperative agreements. 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. However, it is clearly “a part of

the Department of Justice” *Id.* at 2522. Also, as noted in the Senate Report accompanying the Fiscal Year 1999 appropriations act, which transferred the general grant-making authority for several component agencies of OJP directly to the Assistant Attorney General for OJP, the Director of NIJ retained grant-making authority for NIJ, in order to maintain the independence which is desirable for research and evaluation activities. §112, Pub. L. 105-277, 112 Stat. 2681-67, S. Rep. No. 105-235 at 68 (1998).³

Despite this independence, the NIJ Director remains under the authority of the Attorney General. As the Attorney General has not delegated any policy-making authority to the Director of NIJ, the Director has no authority to set policy for the Department or for the United States Government.

C. NIJ Publications

The defendant has not brought to the Court’s attention any cases involving the use of NIJ publications, particularly solicitations for research, in litigation. There are several cases, some of which are summarized here.

In *Utah v. Tuttle*, 780 P.2d 1203 (Utah 1989), the court accepted information in an NIJ publication on hypnotically refreshed testimony as being relevant to the scientific basis of that technique. As the court noted, “[a]t the present time, the inherent unreliability of such testimony is well established by the cases and articles cited [in the court’s opinion] and by a comprehensive 1985 study commissioned by the United States Department of Justice.” *Id.* at 1210.

³A similar provision in the Fiscal Year 2000 appropriations act continued this transfer of authority for the OJP component agencies, except NIJ. §108(a), Pub. L. 106-113, 113 Stat. 1501A-20 (1999).

In *United States v. Neill*, 166 F.3d 943 (9th Cir. 1999), the court held the lower court did not err in disregarding an NIJ report stating that pepper (OC) spray did not cause serious injuries, when the United States offered testimony clearly demonstrating that in the case at bar pepper spray had caused serious injuries.

In *Kansas v. Allen*, 917 P.2d 848 (Kan. 1996), the court used an NIJ document on computer crime to help analyze an ambiguous state statute, but did not reach the value of the NIJ document itself.

In *United States v. Crumby*, 895 F. Supp. 1354 (D. Ariz. 1995), the court allowed into evidence information contained in an NIJ publication about the accuracy of lie-detector tests. The court noted that the United States did not present any persuasive evidence disputing either the NIJ publication or other scholarly documents.

In *Stephenson v. Davenport Community School District*, 110 F.3d 1303 (8th Cir. 1997), the court employed standards detailed in an NIJ report to invalidate a school district's definition of what constituted a "gang symbol." The NIJ report noted that the key to determining what is a gang symbols lies in establishing "a set of restrictive definitions." The school district had no such restrictions on its definition of gang symbol, and was therefore, based on this and other standards, found to be in error.

In *United States v. Medina*, 749 F. Supp. 59 (E.D.N.Y. 1990), the court listed an NIJ publication in a list of "scientific writings on RIA hair analysis [which] establishes both its reliability and its acceptance in the field of forensic toxicology"

The cases summarized above suggest that courts give some credence to the authority of NIJ on scientific and criminal justice matters. However, it should be noted, that in all

of the cases mentioned above, **the NIJ document or information being relied upon is from a study or a report, not from a solicitation. The purpose of a solicitation is not to make conclusions or to declare facts; it is to begin a fact-finding process that will, ideally, end in a report to the public.** The government is unaware of any federal case where the defendant has attempted to use a solicitation for research to imply the subject of the research is invalid.

CONCLUSION

The fact is that the government established **with evidence** at the *Daubert* hearing the validity of latent print evidence and the defendant's arguments (sometimes interpreted by the government as factual averments) do not distract from the evidence. Similar to his remarks which were entered into evidence at the *Daubert* hearing, Professor Andre Moenssens recently stated "[latent print evidence] meets the *Daubert-Kumho* standard in every way." ABA Journal/December 2000 at 20, (attached as Exhibit B).

The difference here is simple. The government submits that wording in a research solicitation is not material since the solicitation calls for proposals for research only. The defendant would have the Court find that the solicitation is equal to a report issued after research has been conducted. The defendant is simply wrong.

Respectfully submitted,

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