

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 POST-HEARING MEMORANDUM
IN RESPONSE TO DEFENDANT'S MEMORANDUM OF LAW
AND IN OPPOSITION TO THE DEFENDANT'S MOTIONS FOR A NEW TRIAL¹

INTRODUCTION

Pending before the Court are motions filed by the defendant for a new trial based on newly discovered evidence and an alleged *Brady* violation. The defendant has not met his burden and the evidence conclusively shows he is not entitled to relief. This memorandum will respond to various statements/arguments made by the defendant in his post-hearing memorandum. However, it will not directly respond to every averment/argument made by the defendant in his memorandum.²

¹Although the defendant's memorandum only speaks about one motion, government counsel has been told by defense counsel that the defense has not abandoned the Motion for New Trial Based on Newly Discovered Evidence.

²Government counsel has been chastised by the defense in the past for confusing argument with averments of fact. Government counsel will not make the same mistake with respect to the defendant's memorandum, inasmuch as the memorandum does little to differentiate between facts and argument. It is sufficient to state that the government disagrees with almost every sentence of facts/argument made in the defendant's memorandum (hereinafter "memo") or the characterization of the evidence that is referenced.

The government's memorandum contains: a Statement of the Facts, summarizing the evidence and inferences, and including a pointed response to some, although not all, of the averments/argument of the defendant; the Law and Argument; and a Conclusion.

STATEMENT OF THE FACTS

In his quest for a new trial, Mitchell called several witnesses. A summary of those witnesses' testimony appears here.

A. RICHARD M. RAU (1/3/01)

Dr. Rau is a Senior Program Manager who has been with NIJ for 30 years, but has only been managing grant programs in the forensic field for 10 years. "[W]e manage program grants. We give research and development at the state and local level." N.T. 1/3 at 20.³ Rau identified a "time line" that he said at first he had prepared in the spring of 2000.⁴ *Id.* at 22. Rau discussed the formation of the Fingerprint Research Advisory Panel (FRAP) and the persons that he selected for that Panel. *Id.* at 24-27. Rau explained that the FRAP met for approximately five hours and that "there's a format that we use for our solicitations.... All we did was sat down and took an existing solicitation that I had on it on the computer, brought it up and let them see what it is, and then asked them to work on it. And they did." *Id.* at 27-29.⁵ Much of the rest of Rau's testimony painstakingly went through his ministerial duties in finalizing the Forensic Friction Ridge (Fingerprint) Examination Validation Studies Solicitation.

³Citations to the record are N.T. (Date) at (page).

⁴Rau acknowledged that he prepared the time line in June or July of 2000. Some entries were made years after the events recorded on the time line, and with respect to the September 1999, some 10 months after those events took place. N.T. 1/3 at 107.

⁵It is was a copy of the previously issued Questioned Documents Solicitation.

Rau's direct-examination did not in any way help the defendant establish materiality of the Solicitation, notwithstanding of the defendant's repeated attempts to have the witness opine on matters on which he held no expertise. The defendant had Rau opine on *Daubert* and *Kumho* (N.T. 1/3 at 42); offer hearsay as to "at least the legal people, raised the same issues that were raised. They talked about *Kumho* and the issue of reliability" (*id.* at 42-43); and the status of the research that had already been done in the fingerprint area. *Id.* at 44-45. Rau's direct-examination was eye opening in one area, namely, it identified the group of people that had met in 1997 and drafted what eventually became the publication Forensic Science: Review of Status and Needs. (Gov. Exh. NIJ-1)

"As you know, I'm not an expert in fingerprint analysis and matching. So what I'm going to say is based on my opinion only. The feeling was that when the people that wrote **status and needs** met to discuss about the needs for research in the forensic field, that **they pulled out the documents, the weapons and fingerprints**, among others, and the issue of the need to do more research in those fields to show the reliability of the procedures."

Id. at 43, Ln. 18-24 (emphasis added).⁶ The defense had Rau opine that fingerprint examination was nearly an untouched research field. *Id.* at 46, Ln. 16-21. Rau went on to say that his opinion on that issue did not come from members at the FRAP but from reading David Stoney's work. *Id.* at 48. Rau also established in his direct-examination his apparent belief that NIJ was something more than an agency that awards and administers research grants. At one time he referred to the NIJ as a "research organization." *Id.* at 70. However, the testimony during the

⁶During cross-examination, Rau acknowledged that none of the 44 "scientists" who attended the meeting in 1997 were experts in latent print examinations. N.T. 1/3 at 104. There was no review of research literature performed by "the 44." See, Government's Supplemental Response to Motion for New Trial based on Newly Discovered Evidence and Appendix thereto, incorporated by reference herein.

hearings conclusively establishes that the NIJ is a Congressionally mandated agency that administered funds designated by Congress for research and that NIJ performed no research. The cross-examination of Rau produced some revelations about how David Stoney became a member of the FRAP. Stoney was recommended by Jan Bashinski, a colleague of Stoney's from California.⁷ N.T. 1/3 at 81. The Court will recall that during the *Daubert* hearings Stoney had done some statistical modeling as part of his thesis which was supervised by John Thornton, the same person who replaced Stoney on the FRAP and who participated in the Fingerprint Research Solicitation Advisory Panel, the group that rejected the proposals submitted in response to the issuance of the Solicitation. *Id.* at 58 and 115-116.

Rau agreed that much of the language that appeared in the Questioned Documents Solicitation also appeared in the friction ridge Solicitation⁸ and that the process he followed was routine. *Id.* at 84-90. The government suggests that the testimony of the members of the FRAP, as well as Rau's testimony, shows the perfunctory manner in which the fingerprint research Solicitation was issued.

⁷Carl Selavka, one the non-fingerprint experts that attended the 1997 meeting which generated the publication Forensic Science: Review of Status and Needs (Gov. Exh. NIJ-1), and the person responsible for authoring the latent print section in that publication, where David Stoney's work was referenced, received Stoney as a recommendation from Jan Bashinski. *See*, Government's Supplemental Response to the Defendant's Motion for a New Trial- Appendix, affidavits of Jan Bashinski and Carl Selavka. So we have David Stoney establishing for non-experts a research need, then Bashinski recommending Stoney's membership in the FRAP, and after the meeting of the FRAP, Stoney leaving the FRAP because he wanted to get research funds from NIJ to do the research he said was needed.

⁸The two versions of the Solicitation appear as attachments to the Government's Response to the Defendant's Motion for a New Trial Based on Newly Discovered Evidence. The yellow highlighted portion contain most of the common language between the two documents. *See*, German's testimony, *infra*.

Rau, during his cross-examination, acknowledged that it was he, not the members of the FRAP, that controlled the ultimate wording of the Solicitation. N.T. 1/3 at 90-101. Rau admitted that the issuance of the fingerprint Solicitation was a very routine matter within NIJ. *Id.* at 101. Rau again admitted his information about fingerprints came from reading Stoney's work and the Status and Needs (Gov. Exh. NIJ-1) that had been authored by non-experts with the assistance of non-experts. *Id.* at 103-104. Rau also admitted that the statements that he used in the internal memo and papers accompanying the Solicitation as part of the approval process were pro forma documents used to justify the issuance of the Solicitation. He said that puffery was allowed in such documents and that he exaggerated the importance of the Solicitation. *Id.* at 105 and 119-120. Rau acknowledged that at the May 1999 meeting of the FRAP, Steve Meagher said that reliability already existed and that the research was already done. *Id.* at 106.

Rau admitted that the September 17, 1999 meeting with the FBI concerned DNA. Rau acknowledged that there were various stages of the implementation of the DNA Solicitations and that the meeting concerned laboratory funding under the DNA Solicitation. Rau said Bruce Budowle brought up the research done by the FBI (50K study) and that the FBI wanted NIJ funding to continue research. *Id.* at 110-111 and 108.

Rau said he knew that John Thornton was David Stoney's advisor on Stoney's Ph.D. *Id.* at 115-116. Rau said he thought Stoney terminated his relationship with the FRAP in January of 2000, only a couple of months before the ultimate issuance of the Solicitation, and that the members of the FRAP were free to discuss the FRAP and its work product with anyone. *Id.* at 116-117.

What follows are comments on some of the defendant's statements about Dr. Rau.

The defendant states Rau's testimony establishes the materiality of the Solicitation. Memo at 10 and fn 7. The defendant is wrong. Rau could not testify, nor did he testify that the members of the FRAP "unanimously reached the conclusion that the fingerprint field is in need of basic validation studies." Rau acknowledged that NIJ, namely Rau, was the final decision maker on the wording of the Solicitation. N.T. 1/3 at 90-101. Rather than testifying that "there was unanimous agreement among the FRAP members to go forward with the Solicitation" as the defendant stated (Memo at 11, fn 9), Rau testified

Q. Did there come a point during that meeting when you asked the participants whether there was a consensus that a solicitation for fingerprint validation studies should be issued?

A. I don't think I put the word issued. I said should we put together a solicitation.

Q. What was the response?

A. Well, there was -- as far as I recall, everybody agreed.

Q. You don't recall anyone saying that --

A. I didn't take a vote.

Q. You don't recall anyone objecting to releasing a solicitation?

A. Not releasing.

Q. Putting it together?

A. Putting it together.

Q. Okay.

Id. at 27-28.

The defendant notes that Rau testified the first time he heard anything about the Solicitation being delayed was at the September 17, 1999 DNA meeting with the FBI and that the FBI asked to delay the solicitation until after the *Mitchell* trial.

Q. What do you recall Dr. Kerr saying in this regard?

A. To the best of my recollection, when we were through with the DNA part of the meeting, Dr. Kerr turned to Dr. Boyd and simply indicated to him that the judge had ruled -- Your Honor had ruled that the fingerprint evidence was admissible, and then suggested to David and asked him if he would consider holding the solicitation until after the trial, and David said yes.

Q. Do you recall anything else being said during the meeting regarding the delay of the solicitation?

A. Not to the delay. There was a lot of discussion about who can do DNA -- who can do research and fingerprints, who should be doing it and so forth like that. That came up after that.

Q. But as to the delay, you didn't hear anything else?

A. No, not that I recall. I mean this was enough for me.

Q. Prior to the September 17th meeting, had you heard any discussions about the possible delay of the solicitation?

A. No.

Q. So this meeting was the first you heard about delaying it?

A. Yes.

Q. Dr. Rau, is there any reason as to why this September 17th meeting is particularly memorable to you?

A. As I told you before, **if we had the money** to fund the solicitation at that time and when we released the solicitation, last March, the money had been used for something else. So we're still looking for money to pay for the solicitation. That is something

that you do remember your program manager as trying to get things funded.

Q. Is it fair to say that you weren't particularly happy when you heard the solicitation was being delayed until after the trial?

A. I think I just said to you why, because I just knew the money would disappear. That was what upset me.

Q. Now, the solicitation -- strike that. Dr. Rau, as of September 17th, the fingerprint solicitation was ready to be released, correct?

A. Yes.

Q. There was no other impediment that you knew of to it being released besides this case, correct?

A. Right.

Q. Now, the solicitation was ultimately published in March, right?

A. Yes.

Q. And you know that was shortly after Mr. Mitchell's conviction, correct?

A. Sometime after. We didn't even consider releasing it until we heard that the case had been determined.

Q. So basically after the September 17th meeting, you were just waiting to hear that Mr. Mitchell's trial had been concluded?

A. Yes.

Id. At 51-53 (emphasis added).⁹

⁹The government suggests that Rau does not appear to know whether or not the funds were available on September 17, 1999. Of course, Dr. Forman confirmed no such funds existed. N.T. 1/3 at 137-138. The defendant represented differently to the Court. Memo at 21, fn. 17.

However, immediately thereafter, Rau testified NIJ was waiting for the Court's written decision on the *Daubert* issue, the reference he made in his September 28, 1999 e-mail to Edward German.

Q. And you state there, "Ed, as you know, the judge in the trial in Philadelphia has made a positive decision on the admissibility of the fingerprint evidence. Since we had not put the solicitation out, we decided to first get a copy of the decision, call the advisors back to look at the solicitation and make any changes it decides. I would appreciate your advice on this. This information was presented to us by Dr. Kerr at a meeting on DNA at which this decision to hold the solicitation was made." I'm going to stop there. Now, this meeting that you referred to in this E-mail with Dr. Kerr, in which the decision to hold the solicitation was made, I take it you were referring there in the September 28th E-mail to the September 17th meeting that you had just attended, correct?

A. Yes.

Q. Your September 28th E-mail to Mr. German then continues, and you ask him if he has any suggestions or modifications and have a copy of the decision. "I would appreciate your sending it to us. At this time NIJ does not believe that the decision negates what was planned in the solicitation. It does feel that mention of the results needs to be included, and reference should be made by anyone offering an application." Then you conclude by saying, "Hopefully we can get the modifications made quickly so as to get this work up and running." When you say at the end of the E-mail, "Hopefully we can get the modifications made quickly so as to get the work up and running," what do you mean by that?

A. I tried to indicate to Ed and anybody else who I talked with that we are holding the solicitation because we told them that it was going to go out on a tear when we had it originally planned. **But since we had something else that came along that pertained to that solicitation, I wanted them to give me any input they felt that should go in there. The reason I was hoping we could get the modifications made quickly was it takes a long time to get modifications made. If it has to be made very drastic, then the process has to start all over again to go back through the director, to get his approval. And if we had time and we had**

modifications that were recommended, it would have to go out to the other members of the panel to get their approval after they were recommended. So that would take quite a period of time. That's why I said what I did.

Q. So when you were writing this, it was still your understanding, was it not, that the solicitation was not going to be released until after this trial was concluded?

A. That's what I said.

Q. And so, basically, you were just -- since the solicitation was going to be held off until the end of Mr. Mitchell's trial, you thought you might as well see if the advisory panel wanted to make any modifications in light of the Court's rulings, right?

A. Right. And I also thought there was going to be something from the Court that I could reference.

N.T. at 53-56 (emphasis added).

The government suggests the bolded portion cited above explains why Rau did not want a delay and why he did not want any changes in wording of the Solicitation after the late August 1999 sign off by the Director of NIJ, namely, in spite of the perfunctory manner in which solicitations are created, he would have to redo the approval process. The government suggests Rau is just mistaken about the events which took place at the September 17, 1999 meeting and that Rau was unhappy about Dr. Boyd's decision to hold up the Solicitation after Dr. Budowle discussed direct tasking of the FBI for additional research and this Court's September 13, 1999 decision on the *Daubert* issue. That inference is consistent with Rau's statement that "[t]his information [a reference to this Court's *Daubert* decision and getting a copy of that decision] was presented to us by Dr. Kerr at a meeting on DNA at which this decision to hold the solicitation was made." *Id.* At 53-54. Only in Rau's time line, created 10 months after the meeting, does he state "during the

meeting, Don Kerr asked and David Boyd agreed to withhold... until after the Philadelphia trial had ended.” Also, strangely out of place in Rau’s time line, is the reference that at the September 17 meeting no suggestions were made about changing the Solicitation’s text. Gov. Exh. 1. What would non-members of the FRAP have to say at that time about the wording? The FBI expected to review the version submitted for publication.

The government suggests that Rau’s contemporaneous e-mails support the inference that no request for delay “until after the *Mithcell* trial” was made by anyone outside of NIJ.

The defendant states there is some significance to the fact that no one at NIJ made changes to Rau’s time line. Hardly. It was Rau’s time line. Boyd testified he did not see the time line until after it had been created. N.T. 3/20 at 57. See *infra*. Julie Samuels, Acting NIJ Director, testified that Rau’s entry was not necessarily the prevailing view at NIJ. See *infra*. Samuels obviously would not have had any way to know that Rau’s time line was wrong.

The fact that Rau testified he was not contacted by anyone at the FBI and that Boyd testified Rau had mentioned an FBI request, does not take on sinister motives as suggested by the defendant. Memo at 24-25. Both Rau and Boyd were present when Budowle questioned the need for the Solicitation and Budowle’s request to get NIJ funds for continuing fingerprint research. See *infra*. The government suggests, assuming Rau and Boyd are inconsistent in some of their testimony, that it is entirely consistent with recollection triggered some 9 months after a meeting. That is so, in spite of the defendant’s hyperbole of Boyd’s potential professional suicide. Memo at 24-25.

Unlike the defendant (Memo at 25-26), the government does not believe anyone has intentionally fabricated (by any other name, committing perjury at the hearing) their testimony.

B. LISA FORMAN (1/3/01)

Lisa Forman, a PH.D. in population genetics, with undergraduate degrees in anthropology, was called by the defendant. Forman described her position as very low on the NIJ hierarchy. She had been with NIJ since September of 1997 and was a program manager up until January of 2000, when she became the acting director of one of the subdivisions in the Office of Science and Technology at NIJ. N.T. 1/3 at 124-125. Her area of competence is population genetics and DNA. *Id.* at 126.

The totality of Lisa Forman's testimony lends nothing to the defendant's argument that the Solicitation was material or that the FBI requested the Solicitation not be issued until "after the Mitchell trial had concluded in Philadelphia." Indeed, Lisa Forman's testimony again established that the purpose of the September 17, 1999 meeting held in Dr. Kerr's conference room was not fingerprints, but DNA. *Id.* at 133. Rau's time line and the other indisputable evidence in this case confirm it was a meeting on DNA. But Lisa Forman's direct examination did shed some light on what she believed were the reasons for the NIJ Solicitation being delayed. One of those reasons, consistent with other witnesses, was that NIJ was waiting for appropriate funding and that there were time restraints. In sum, her belief was that regardless of the *Mitchell* case, the Solicitation would not have been released. *Id.* at 137-138 and Gov. Exh. NIJ, 3/14/01 letter on funding. Of course, Lisa Forman was neither the project manager nor Rau's superior at the time that the Solicitation was being assembled in 1999. One could reasonably describe Lisa

Forman's testimony as a composite of hearsay remarks not specifically recalled, spoken by speakers not specifically recalled. *Id.* at 128-137.

What follows are comments on some of the defendant's statements about Dr. Forman. The defendant notes that Dr. Forman "recalled 'with clarity' Kerr thanking Boyd for agreeing to withhold the Solicitation." Memo at 20. The government suggests a more valid and probable inference relates to the purpose of the DNA meeting, namely, to stop grants until the DNA issue could be resolved.

The defendant stated "there was a conversation between the two men 'about not wanting . . . to interfere with an ongoing trial.'" Memo at 20. However, what Forman described was a statement about "not wanting to seem to interfere with an ongoing trial" mentioned by one, either Dr. Kerr or Dr. Boyd, not a conversation on that topic. *Id.* at 134. Budowle's testimony, *infra*, would make it more probable than not that if said, Boyd would have been the speaker.

Dr. Forman's uncertainty as to who said what and when is demonstrated by the following discourse.

A. When I think back on that time, as I say, it was ancillary to what we were really discussing. All I really remember was him bringing up the solicitation and the publication date of the solicitation. Not the date necessarily, but the publication of the solicitation.

Q. Do you recall how long -- was there any discussion about how long the publication of that solicitation might be held off for?

A. The only thing that I remember accurately, or as accurately as I can remember it, I should say, when I recall, is that he talked about the solicitation, and he talked about an ongoing trial. He mentioned those things. But, again, this was not the primary topic of conversation.

Q. Do you recall Director Travis stating to you, stating to Mr. Boyd, that Donald Kerr of the FBI had called him and stated that it would be difficult to have a fingerprint solicitation coming out during a trial, words to that effect?

A. I remember that Dr. Kerr called Mr. Travis, and that Mr. Travis told us that Dr. Kerr called him. I remember that there was a conversation about the fingerprint solicitation. I don't recall any exact words that were said.

Q. I'm not asking about exact words. I'm asking you if you recall words to the effect of, that it would be difficult to have a fingerprint solicitation coming out during the trial.

A. I'll just repeat that it was -- this was not the primary focus of this conversation, so I'm not able to accurately recall that well.

Q. Do you recall that on November 15th, I came to meet with you in your office at the NIJ to interview you?

A. I do.

* * *

Q. And you recognize that was an important meeting, obviously?

A. Yes, I do.

Q. And you also remember that there was somebody from the government taking notes, correct?

A. That's correct.

Q. And certainly while you weren't under oath, you were trying as hard as you could to tell me everything that you could recall in regard to the questions that I was asking you?

A. That's correct.

Q. Do you not recall on November 15th telling us that Director Travis stated that Donald Kerr had called him and stated that it would be difficult to have the fingerprint solicitation coming out during the trial?

A. I may have said that, but when I sit and think, try really hard to think about that conversation, I can't remember those words being said in that particular conversation. I remember all of those things being said at some point in time, but if I really tried to pinpoint it to that conversation, I really cannot.

Q. You say you recall those words being said at some point in time?

A. But not by Director Travis.

Q. Who might have said that to you?

A. I may have heard that from Dr. Rau. I can't tell you exactly who I heard that from, but that was the sentiment that I recalled at that November 15th meeting. As I sat and really thought about who said what, **what I'm confident to say under oath** is that I know that the fingerprint solicitation was mentioned. I know an ongoing trial was mentioned. But it was not the primary focus of that conversation.

Q. Do you recall Director Travis saying to Mr. Boyd, this is going to be something for you to handle?

A. Well, yes, but not in that context. The context was, Dr. Kerr called Jeremy Travis especially about this . . . [DNA] matter. The fingerprint solicitation was mentioned, and I recall with great clarity that Mr. Travis told Dr. Boyd that he should handle it directly with Don Kerr.

Q. Now, do you remember saying anything at that meeting in regards to the delay of the solicitation?

A. At the meeting with Director Travis?

Q. Yes, and Dr. Boyd. Do you recall, as you put it, putting your two cents in that matter?

A. Not off the top of my head at this moment.

Q. You don't recall saying that the FBI would not be happy no matter when that solicitation came down?

A. That sounds like me.

Q. So that sounds --

A. I wouldn't be surprised if I said that.

Id. at 129-133 (emphasis added).

The defendant states that the government did not dispute the defendant's non-substantive evidence pertaining to Dr. Forman's testimony. Actually, the defendant asked for and the government supplied extensive information pertaining to the Solicitation funding. The March 14, 2001 letter to defense counsel confirms Forman and Boyd's statement that the funds were gone by the time of the September 17, 1999 meeting, a fact the defendant has ignored.

C. ANJALI SWIENTON (1/3/01)

Swienton's testimony is devoid of anything supporting the defendant's position on materiality or the FBI's making a request for a delay because of the *Mitchell* trial.

Swienton corroborated the fact that when the FRAP met a copy of the document Solicitation was up on the screen for review and that she made changes to the Solicitation during the meeting. *Id.* at 152-153. Swienton also believed that she had been told that the Solicitation had been delayed waiting for a ruling in the *Mitchell* case. *Id.* at 157-158. Although Swienton did not understand what the term "ruling" meant, it is obvious that she was referring to what Rau had suggested in his e-mails were rulings from the court on the *Daubert* issue. She also mentioned that she had heard that part of the reason for holding up the issuance of the Solicitation was because NIJ did not want to interfere with how that ruling would be decided. *Id.* at 159.

D. JULIE SAMUELS

Julie Samuels was called by the defendant and at the time of her testimony she was the Acting Director of NIJ. *Id.* at 160. The examination of Samuels neither established any materiality of the Solicitation nor any information concerning why the Solicitation was delayed. She did recall that she had conversations with other staff people at NIJ that suggested to her that Rau's time line, in particular the September 17, 1999 meeting notation, was not necessarily the prevailing view¹⁰ with respect to the meeting. *Id.* at 164.

E. CHRISTY UNGER

Ms. Unger's testimony does not establish the materiality of the Solicitation. Her testimony is not substantive evidence of the existence of any request from the FBI to delay the Solicitation until after the *Mitchell* case. Unger took selected information from her notes and wrote what appeared in D-42, non-substantive evidence under the Federal Rules of Evidence. It is neither statement of the witness, Lisa Forman, nor was it adopted by her. Indeed, Unger testified that defense counsel never show D-42 to Forman. It is apparent that defense counsel never established the proper foundation for Unger's testimony. Is the defendant stating that Lisa Forman committed perjury? The totality of her testimony, along with Unger's testimony, shows that Forman refused to say under oath things which she may have speculated upon during an interview with defense counsel. See, Forman, *supra*.

¹⁰The defendant would have the Court believe that there is a grand government conspiracy to suppress the existence of the FRAP and its work product. The government suggests the existence of the different versions of the September 17, 1999 DNA meeting is inconsistent with a grand conspiracy and entirely consistent with several people experiencing an unremarkable event and asked to recount that event 10 months and more later.

F. JAMES E. STARRS (3-15-01)

Professor Starrs was examined by way of video deposition which took place on March 15, 2001, in Philadelphia, Pennsylvania. The defendant called Starrs, apparently in an effort to yet again expand Starrs' areas of expertise beyond those that were attempted to be established at the *Daubert* hearing. The sum and substance of Professor Starrs' direct testimony was that he was called to opine as to the materiality of the Solicitation. The government submits that his direct examination does not qualify him to opine as to the definition of materiality under *Brady* and its progeny and to do so is inappropriate. That issue is for this Court. Defense counsel, during the deposition, stated, with respect to the rank hearsay that was part of the Freedom of Information Act production by NIJ, "we believe they would have been properly made a part of the trial had they been disclosed to us. It would have been something we would have provided to this expert witness had he been permitted to testify and it certainly would have been something he would have been entitled to rely upon¹¹ in forming his opinions." N.T. 3/15 at 11-12. However, as the Court will recall, Starrs' expertise was drastically narrowed by the defendant to opining as to "whether latent fingerprint examination meets the criteria of science." *Daubert* hearing N.T. 7/12/99 at 135-136.

Starrs at deposition opined: "the Solicitation itself to be a dynamite package"¹² and stated that the Solicitation "was a further verification of my view that something needed to be done and, indeed, it seemed to be further emphasis of further credibility given to the fact that this

¹¹For Starrs to have relied on a mere solicitation for research as the basis for his alleged expert opinion(s) is truly astonishing.

¹²The banner bandied about by the defendant during the hearing.

was in fact a very significant – as I described it, dynamite Solicitation, in terms of the revolution it would create both in this case and in other cases on fingerprint analysis.” *Id.* at 12-13. Even so, on cross-examination, Starrs admitted that he did not call Mr. Epstein after Starrs received the Solicitation to explain to Epstein that he got a “dynamite” document on fingerprints. *Id.* at 15-16.¹³ Starrs acknowledged that his testimony was based on his interpretation of the Solicitation. *Id.* at 16. Starrs on direct examination stated he believed part of the Solicitation to be flawed. *Id.* at 9, 17-18. Yet, on cross-examination he resisted that notion. *Id.* at 17-18. Starrs never talked to any FRAP members, even the defendant’s own witness, Stoney. Starrs also admitted that his answers on direct examination with respect to the importance of the documents at trial would also have been his responses if defense counsel had asked him the same questions during the *Daubert* hearing. *Id.* at 23. Starrs testified that the Solicitation would have been supportive of his opinions voiced at the *Daubert* hearing. *Id.* at 24. With respect to the Forensic Science: Review of Status and Needs publication, and whether or not his opinion would be altered if he knew that none of the people involved in the creation of that document were latent print experts, Starrs conceded “if people that don’t know anything about a subject put out a document in which they make recommendations, I would give them a failing grade in anyone of my courses.” *Id.* at 37-38. When asked whether or not his opinion would be changed if he knew that none of the members of the FRAP agreed with the language that Starrs used as a basis for his opinion that the

¹³Apparently following the example of David A. Stoney. The government suggests Stoney and Starrs viewed the draft Solicitation and the published Solicitation, respectively, as merely what they were, an invitation for research. The defendant never called Stoney to ask him how the Solicitation would have impacted on his testimony. The government suggests that Stoney, who is no stranger to receiving grant monies from NIJ, would have testified consistent with all other witnesses, that a solicitation is nothing more than an invitation to submit a proposal for research.

Solicitation bolsters the positions he took at the *Daubert* hearing and “that they don’t agree with it and never did” Starrs responded “Oh, oh, oh. Well, I certainly would have to investigate much further as to how that document came into existence. If the people in the FRAP are—who were presumably behind the document—I have to investigate exactly what’s going on.”¹⁴ *Id.* at 39-41. Upon further examination Starrs dug in and regardless of how the Solicitation came about, opined that the Solicitation bolstered his opinions expressed at the *Daubert* hearing. *Id.* at 38-59. When asked whether or not part of the January 20, 2000 letter signed by the NIJ Director would change his opinion that the Solicitation bolstered his *Daubert* hearing opinion, Starrs then opined on behavioral patterns, called “it weaseling out of it . . . , and admitted it was not his expert opinion but his interpretation.” *Id.* at 67-71.

On redirect, Starrs again suggested that his opinion would not change unless he had a satisfactory explanation from a member of the FRAP as to why he would not agree with the wording of the Solicitation. *Id.* at 73-78.

James E. Starrs was offered at the *Daubert* hearing to opine as to his definition of scientific as it related to latent fingerprint examination, part of what the Court ultimately had to decide. His opinion as to the materiality of the Solicitation, again an issue the Court must decide, is outside of his proffered expertise. The government suggests that Starrs’ opinion on materiality is worthless, especially since he never consulted any of the FRAP members, including the defendant’s own witness, David Stoney.¹⁵ James E. Starrs was the defendant’s last witness.

¹⁴Starrs seemed oblivious to the fact that the hearings were being conducted by this Court to see “exactly what’s going on.”

¹⁵The government suggests Starrs has in the past held himself out as quite the investigator, e.g. the investigation of Jesse James remains, yet he failed to use that touted trait concerning the Solicitation and how it was created..

Thereafter, the government called its witnesses.

G. DONALD M. KERR (3/19/01)

Kerr's testimony was taken by way of video deposition on March 19, 2001, in Philadelphia, Pennsylvania. Kerr has a Master's and Ph.D. in plasma physics and microwave electronics with an undergraduate degree in electrical engineering. He is the Assistant Director of the Federal Bureau of Investigation in charge of the Laboratory Division of the FBI. The Laboratory consists of three branches, including the Forensics Analysis branch, wherein the Latent Print Examination Units reside. He took over as Director of the Lab in October of 1997. He previously was the Director of the Los Alamos National Laboratory, and for three years prior to that his assignment was with the Department of Energy. He was also at Los Alamos as a scientist and a manager. When he was doing bench work his area was Ionospheric Physics, studying the behavior of the atmosphere at very high levels and worked on nuclear detection satellite installation and high altitude weapons effects. Kerr testified that prior to the September 17, 1999 DNA meeting held in his office, he had a conversation with Jeremy Travis, then the Director of NIJ. The subject of the conversation was the FBI's concern that grant monies could be issued to laboratories for DNA purposes without the laboratory complying with the statutory requirements that the DNA be searchable in a CODIS data base. N.T. 3/19 at 6-11. Kerr stated that the only purpose of the conversation was the DNA protocol and grants for DNA improvement. *Id.* at 12. Kerr related a meeting of his staff that took place before people from NIJ arrived for the September 17 DNA meeting. Kerr stated that Bruce Budowle had asked if Kerr would have any objection to Budowle raising with David Boyd the possibility of the FBI getting support from the NIJ for further work on fingerprint identification, namely, the work that had been done at the

Clarksville, West Virginia facility by Lockheed Martin, commonly referred to as the 50K vs. 50K study. Kerr stated that he had no objection to Budowle raising the issue with Boyd. *Id.* at 13-15. When asked whether or not he had thanked David Boyd for delaying the fingerprint Solicitation, Kerr related that he did not recall anything like that being said, that the purpose of the meeting was about the DNA program, and that he had no memory of deviating at all from that subject from the start of the meeting. Kerr testified that the purpose of the meeting was to hold up NIJ funding to those laboratories that were not complying with the CODIS requirements.¹⁶ *Id.* at 17. Kerr explained that the FBI's DNA scientists usually help review the grant applications for NIJ since NIJ does not have an independent scientific staff. Kerr also stated that there was no conversation about fingerprints during the DNA meeting that he overheard. *Id.* at 17-18. Kerr acknowledged that he never overheard any of Bruce Budowle's conversation with David Boyd concerning the FBI obtaining NIJ funds. *Id.* at 18-19. Kerr testified that at a later point Budowle had informed him that Budowle had indeed talked to David Boyd about the FBI doing fingerprint research with NIJ money. *Id.* at 20.

Kerr testified that he never had any substantive conversations about fingerprints with Rau, David Boyd or Lisa Forman. *Id.* at 20-23. Kerr denied at any time ever having a conversation concerning a decision to hold up the fingerprint Solicitation. *Id.* at 24-25. With respect to Richard Rau's time line on the meeting of September 17, 1999, Kerr testified that he never asked Boyd to change his schedule for a Solicitation and that the statement was incorrect. He further denied ever telling anyone to delay the issuance of the fingerprint Solicitation. He

¹⁶The government suggests that there is a very reasonable explanation for Rau's and others' misinterpretation of the beginning of the meeting. Kerr actually thanked Boyd for holding up the funding of the DNA laboratories until the FBI had its meeting on that topic.

testified that he never told anyone that the issuance of a Solicitation would be a problem for the FBI or for the *Mitchell* case then pending in Philadelphia, and with respect to whether or not he ever thought that a fingerprint Solicitation could be a problem for any case including the *Mitchell* case, Kerr stated “I don’t think a solicitation would be a problem in any case, it is simply an advertisement for people to apply for grant money. It does not represent a record of research done nor a peer reviewed published article of the sort you see in a scientific journal.” *Id.* at 26-27. Kerr testified that he did have a meeting with Julie Samuels after she was made Acting Director of NIJ in April or May of 2000 and after the fingerprint Solicitation had been issued. Kerr stated that one of the issues brought up with the Acting Director of NIJ was that the fingerprint Solicitation wording and the Solicitation had been issued without the FBI being given an opportunity to review what was going to be proposed as the final version of the Solicitation. *Id.* at 28-30. As to solicitations in general, with which Kerr testified he had familiarity, he stated “solicitations are, in fact, an invitation for people to seek grant support. The accuracy of what they say about the science may or may not be correct, and in fact, it is the work that results from the grant that would be peer reviewed and published that would, in fact, add to the scientific literature, not the solicitation.” *Id.* at 31-32. During Kerr’s cross-examination, Kerr again confirmed that he did not ask NIJ to withhold the fingerprint Solicitation. *Id.* at 42-43. Kerr emphasized that the FBI was perturbed because the final Solicitation language had not been reviewed by them. *Id.* at 65-70. Kerr confirmed that he never requested the fingerprint

Solicitation to be delayed. *Id.* at 73. Like Bruce Budowle, *infra*, Kerr thought it illogical to request a delay since Bruce Budowle was asking for funds.¹⁷ *Id.* at 73-74.

H. STEPHEN JOHN NIEZGODA, JR.

Niezgoda testified that prior to the start of the September 17, 1999 meeting, he was present in Don Kerr's office. Niezgoda said that the purpose of the meeting with NIJ was a disagreement on funding for DNA research. Niezgoda confirmed that prior to the NIJ people arriving, Bruce Budowle mentioned to Don Kerr that fingerprint research that had been done had been accepted by the court in Philadelphia. Niezgoda thought that an NIJ Solicitation was scheduled to be released and Budowle wanted the Solicitation to be delayed or postponed so that the money could be used by the FBI to continue the research that had already been done. Niezgoda testified that he never heard Budowle or Kerr say or suggest that the Solicitation should be delayed because of the *Mitchell* case in Philadelphia. *Id.* at 12-14. Niezgoda said when the DNA meeting was concluded, Bruce Budowle brought up the Solicitation and Budowle wanted to direct the research funds or have the funds go to the FBI to further the research that had been done on fingerprints. *Id.* at 14-15. Niezgoda recalled David Boyd asking the status of the Solicitation and someone saying that it was to be posted that day on the internet.¹⁸ Niezgoda said Boyd commented that the Solicitation should be pulled off the internet to decide whether NIJ would spend the money elsewhere, remarking that NIJ had enough on its plate right now and that

¹⁷Jeremy Travis told the government and the defense that he did not recall whether or not the fingerprint Solicitation was mentioned by Don Kerr and that if it was raised, Travis would have told Don Kerr to talk to David Boyd. N.T. 3/20 at 8. Of course, Boyd was obviously the point person from NIJ on the DNA issue.

¹⁸Whether that was true or an offhand comment by a NIJ staffer is unknown.

maybe it should wait and see if it could be better spent. *Id.* at 14-15. Niezgoda testified that he did not hear anyone say or make any linkage, between the delay of the Solicitation and the research that Budowle wanted to continue, and the *Mitchell* trial in Philadelphia. Niezgoda knew through personal participation in solicitations, that solicitations are not scientific reports or documents and that he never had anyone represent to him or did he ever represent to anyone else that solicitations were scientific reports and that peer reviews are not part of that process. *Id.* at 16-17. On cross-examination Niezgoda again testified to Budowle's interest in receiving research money.

Q. Please tell me what you recall of what Dr. Budowle said to David Boyd regarding the fingerprint solicitation.

A. He said -- I don't recall specific words. It was to the effect of whatever research he had been doing in fingerprints was accepted by the Court. He felt that that money could be better spent elsewhere at this point in time.

Q. Better spent on what else?

A. I believe on fingerprints. Like the research was redundant at this point.

Q. What do you recall David Boyd saying at that time?

A. Something to the effect that if that's the case, that's fine. They have plenty on their plate without taking on another solicitation at that point.

Id. at 23-24.

Niezgoda characterized the relations between NIJ and FBI as having inherent conflicts and disagreements. He acknowledged that NIJ would sometimes accept the FBI's

position on issues and sometimes reject those positions. He believed the relationship had inherent conflicts and resembled sibling rivalry. *Id.* at 25-31.

I. DAVID GERALD BOYD (3/20/01)

Boyd has a Ph.D. in decision sciences and is a Deputy Director of the National Institute of Justice and the Director of the Office of Science and Technology in the NIJ. Other than the Director of the NIJ he is responsible for directing research monies for NIJ and the physical sciences.

Boyd testified that no one within the Department of Justice can override the Director of NIJ's decision with respect to grant monies that have been authorized by Congress. *Id.* at 32-33. Boyd explained that statutory law makes the Director the final authority on selection of awards for grant monies from NIJ. *Id.* at 33. Boyd had been with NIJ since 1992 and for 23 years before that was with the U.S. Army with the last assignment as the Deputy Director of Science and Engineering for the U.S. Army Operational, Testing and Evaluation Branch. *Id.* at 33-34. Boyd testified that he had learned from Jeremy Travis that the FBI had expressed concern about DNA grantees receiving funds and not complying with certain conditions. The DNA Solicitations had already been published, applications had been reviewed, and the issue was the awarding funds under the various Solicitations. Boyd testified that he called Don Kerr to set up the DNA meeting of September 17, 1999. *Id.* at 36-37. Boyd explained that NIJ does not do any research, it only directs the funding for research and that NIJ administers the programs and grants. *Id.* at 38.

Boyd testified that as the DNA meeting was breaking up he had a conversation with Bruce Budowle of the FBI where the FBI was interested in collaborative research the FBI

and NIJ could do together, including fingerprints. *Id.* at 38-39. Boyd testified that Bruce Budowle's comments about fingerprint research were that the FBI had a major project underway or had just completed one which was being conducted by Lockheed Martin and that Budowle thought that type of research would be useful. *Id.* at 39. Budowle suggested that the FBI's research could be useful in structuring what kind of research in fingerprints ought to be done and that NIJ could fund research through an interagency agreement tasking the FBI to do the research. Boyd explained that that was done with many agencies, not just the FBI. *Id.* at 40-41. Boyd said that he did recall that after arriving at the meeting Dr. Kerr thanked the NIJ personnel for agreeing to a delay and that he now believed it referred to the DNA funding since that was the sole reason the meeting had been called. Boyd recalled that when Don Kerr called Jeremy Travis, Kerr had asked "that we not make any DNA awards until we had worked these details out," referring to the FBI's DNA concern which had triggered the meeting. Boyd did not remember any discussion about the fingerprint Solicitation during the DNA meeting. *Id.* at 43.

Boyd also explained the way funding works with NIJ and that although they have no-year money, meaning it would not be lost going from one fiscal year to another, he explained that they generally get out the door 99 ½ percent of their funds each year and further explained that as a matter of common sense NIJ does not try to have a large bank account at the end of the year. Boyd explained that if Congress saw a large bank account they may question the need for funding the entire budget as requested by NIJ. They always had more than enough priority projects to fund. Boyd also explained that there are certain earmarked funds which were Congressionally directed monies and that they had no latitude but to spend those monies on the legislated or Congressionally mandated projects. Boyd also explained that only once in the prior

nine years had NIJ's budget ever been approved by the beginning of the fiscal year and that he routinely redirects money towards the end of the fiscal year in order for it to be spent. *Id.* at 44-46.

As to whether or not Boyd asked his staff and received information that the fingerprint Solicitation was scheduled to be put on the internet that day, he stated he could not remember but that it might have happened. *Id.* at 47-48.

Boyd testified that he satisfied himself that the internal flow of the funds for the fingerprint Solicitation was fairly represented in the March 14, 2001 letter (Gov. Exh. NIJ) which was addressed to Mr. Skipper. "I'm going to sweep up money that can't be committing before the end of the fiscal year, and put it on other projects that have been identified as high priority, but we didn't have money for." *Id.* at 48-50.

Boyd said he never received a request from the FBI to delay the Solicitation and never made any link between the fingerprint Solicitation or things he heard, and the *Mitchell* trial or the outcome of the *Mitchell* trial. Boyd said he saw the e-mail from Richard Rau to Ed German dated September 28, 1999, in January of 2001 when he came to Philadelphia for the *Mitchell* hearing. Boyd stated that he was never present in a meeting where Don Kerr said anything about delaying a Solicitation on fingerprinting. The reference in the e-mail to getting a copy of the Court's decision would be a normal thing for NIJ to do since the decision might raise issues which would help focus the research. *Id.* at 51-53.

Boyd testified that generally speaking NIJ would not release research reports (not Solicitations) on controversial issues which were currently being considered by Congress, because of the concern that a single research report might carry undue weight in influencing the ongoing

debate. He did not recall that policy being used nor had he ever heard it being used in connection with ongoing litigation in the forensics area. *Id.* at 53-54.

Q. Do you know whether or not that policy was considered or utilized as part of the decision not to release the fingerprint Solicitation?

A. No, it wasn't. In fact, I frankly would have never considered that, because I naively thought that a solicitation wouldn't have any bearing on any case anywhere.

Id. at 55.

As to Rau's September 17, 1999 time line entry which read in part "during meeting, Don Kerr asked and David Boyd agreed to withhold releasing the fingerprint solicitation until after the Philadelphia trial had ended. No suggestions were made about changing the solicitation's text," Boyd testified that the meeting had nothing to do with the solicitation wording and said "I disagree that Don Kerr asked or that I agreed to withhold any solicitation because Don Kerr didn't raise anything at all about fingerprinting. The topic of the discussion was DNA. Don wasn't present for most of the meeting." *Id.* at 55-56. Boyd could only guess that the reason for Richard Rau's entry being incorrect was the passage of time between the events of the September 17, 1999 DNA meeting and the creation of Rau's time line, sometime in or after June of 2000. *Id.* at 56-57. Boyd further testified that he never saw the time line until after it had been presented to Julie Samuels, the Acting Director. *Id.* at 57. Boyd summed up by stating that he did not take whatever conversations that went on at the September 17 meeting about fingerprint research as extraordinary in any way. *Id.* at 58.

Boyd also established NIJ did not have an authority in the forensic sciences.

Q. Now, let me ask you a little bit more about your Congressional mandate. . . . Does NIJ have any quasi-

regulatory authority or regulatory authority over any forensic science?

A. No.

Q. Does NIJ set policy for any law enforcement, U.S. government, or local or State?

A. No, we don't. We have no authority to do so.

Id. at 58 (emphasis added).

Boyd ended his direct testimony by explaining that only once in the prior nine years has NIJ's budget been authorized by the 1st of October, and that typically that funding would not be signed until the November-January, December-January, and in one particularly bad year April. *Id.* at 60-61.

On cross-examination Boyd acknowledged that he was not clear in his own mind during his prior interview with defense counsel as to what Kerr was referring to when he thanked him for agreeing to withhold the solicitation. He testified that upon reflection, since the meeting was about DNA, he is not sure what solicitation Kerr thanked him about. *Id.* at 64-65. Boyd recalled that the first person to speak to him about the Solicitation's delay was Dr. Rau and that Dr. Rau had given him a reason for the delay that the FBI had pending research which would make a significant difference and that the NIJ ought to consider it. Later, Boyd assumed that was the Lockheed Martin study that Bruce Budowle told Boyd about at the September meeting. Rather than Rau requesting a delay, Rau gave Boyd the impression that the FBI had requested a delay in the Solicitation. *Id.* at 66-67.

Boyd was asked on cross-examination whether during his interview on November 15, 2000, he recalled mentioning funding as one of the issues with respect to the timing

of the Solicitation's release. Boyd stated "No, I don't recall whether I did or not." *Id.* at 75-76. When asked about the appropriateness of delaying a solicitation, even if the FBI had a concern that the Solicitation might negatively impact on the *Mitchell* case, Boyd stated that it would not be inappropriate but that NIJ would not ordinarily do such a thing. Boyd stated that it was well within the NIJ Director's authority and that it could appropriately be withheld because "a solicitation is not a finding. It's not research finding. It's only a declaration of intent to do research." Boyd further explained that NIJ jealously guards its independence and "we, frankly, would not consider [a trial] an issue that would be relevant to a solicitation." *Id.* at 84-86. Boyd also explained that "Solicitations tend to be shortened, so there tends to be some bald statements about the existing state of the science. They are not findings. They are very truncated kinds of statements." *Id.* at 95.

What follows are comments on some of the defendant's statements about Boyd.

The defendant says that "Boyd was the one person . . . who claimed that the delay of the Solicitation had nothing to do with the instant case." Memo at 22. Not true. Boyd, like others at the September 17, 1999 meeting, related his conversation with Budowle, which was about the *Mitchell* case and further research flowing from the *Mitchell* case. 3/20 at 38-42, 66-68, 70-71, 73, and 74.

Rather than Boyd's testimony being "completely unraveled (Memo at 23-24), Boyd's testimony is consistent. Assuming Boyd said during the November 15, 2000 interview that he did not follow up on receiving the FBI research before that date, his testimony that he followed up later is completely consistent if a person reads more than what the defendant cited. *Id.* at 68-71.

The defendant would have the Court believe that Dr. Boyd had different versions of the reason for the delay. Memo at 22-25. This is just not so. Boyd's testimony, when considered as a whole, disclosed a number of factors which, when combined, resulted in the Solicitation not being published.

The defendant states that Boyd did not raise funding during Boyd's November 15, 2000 interview. Memo at 23 and N.T. 3/20 at 75-76. Special Agent Gallant's chance presence in the courtroom, sunk that boat. N.T. 3/21 at 61-64.

J. BRUCE BUDOWLE

The government called Bruce Budowle, a Senior Scientist with the FBI who was one of the government's experts at the *Daubert* hearing. Budowle testified that on September 17, 1999, while in Don Kerr's office at the FBI and prior to NIJ staff arriving for a meeting relating to DNA, he asked permission to talk to NIJ about fingerprint research. "I understood that there was a potential funding for research in the area of fingerprint analysis from the NIJ. I asked them (sic) at the end of that meeting if it would be appropriate for me to be able to ask for a potential relationship to achieve some—required some funding." Budowle testified that at the end of the DNA meeting he had a conversation with David Boyd. "I had told him that we had done some research on this 50K study on fingerprints and how successful that was in demonstrating the rarity of potential matching fingerprints, which we didn't detect any, and that we'd like to be able to continue on that research by using the computer systems and other prints. We used loops and wanted to look at whorls and arches and other population groups. And that I understood that they had some potential funding. And I wanted to see if there was a mechanism that we could use to acquire some of those funds. He said that it's a little different than the typical grantees,

because we work for the same department. What I could do was put in a proposal, and if it was deemed it was meaningful, they would test (sic) [task] us with carrying out that research.” *Id.* at 101-102.

Q. Do you recall anything being said by you about a fingerprint solicitation at that time?

A. No.

Q. Was the purpose of your conversation with him to delay the fingerprint solicitation?

A. Not in my mind. It would have been the opposite, because I was looking for funds as soon as possible.

Id. at 102.

Budowle testified that he had never had any substantive conversations about fingerprints with Dr. Rau or with Lisa Forman and that prior to the September 1999 meeting had never had any conversations with David Boyd about fingerprints. Budowle testified that he never told anybody nor did he hear anybody ever say that the issuance of Solicitation would be a problem for the *Mitchell* case. *Id.* at 103-104.

Budowle testified that he was familiar with solicitations and attended meetings once a year in the area of DNA concerning the awarding of grants in the DNA area. Budowle stated he never has relied on a solicitation in forming his expert opinions and explained, “Solicitation is just a proposal for research in a whole host of areas. As a scientist, we are always looking at new tools and new ways to look at things and different kinds of aspects. But it doesn’t mean anything about the state-of-the-art at the time.” Budowle testified that up until April 2000 he never thought, believed or envisioned that a Solicitation would be problematic or a problem with for case. *Id.* at 104-105.

Budowle related that in July of 1999 during the *Daubert* hearings, he had a conversation with David Stoney concerning Stoney's desire to do fingerprint research.

A. As I recall, Dr. Stoney told me that - - I think we were talking generally, and it just came up as part of the conversation, that he was on a panel, an advisory panel with NIJ on fingerprints, and was going to recuse himself so that he could apply for a research grant from NIJ.

Q. Now, you weren't a member of that advisory panel, were you?

A. No.

Id. at 105-106.

Budowle ended his direct examination by stating that after reading the fingerprint Solicitation, it did not change in any way his opinions or testimony that he gave at the *Daubert* hearing. *Id.* at 106.

During cross-examination, Budowle made the distinction between his knowledge that NIJ may have had some research monies for fingerprint studies and the Solicitation itself.

Q. Dr. Budowle, when was it that you first learned that the National Institute of Justice was planning a solicitation for fingerprint validation studies?

A. Well, I learned that they were going to have funding during the *Daubert* hearing we had here in July of 1999, through David Stoney. The solicitation, as it's worded and such, I did not learn about that until April of 2000.

* * *

A. No, I'm just -- the wording you used, I didn't know what it meant. I didn't have any discussion on solicitation at all, because it didn't mean anything to me at that point.

Q. When did it come to mean something more to you?

A. I think it came to mean more to me in April of 2000 when it was being raised in the case as some sort of a material that would question the opinion of the government's witnesses.

Q. So between the time that you first learned anything about this from Dr. Stoney at the Daubert hearing and when you went to Don Kerr on September 17th, 1999, you didn't learning more about this?

A. No, it was a nothing issue to me.

Id. at 106-107.

Budowle testified on cross-examination that he had conversations with Steve Meagher concerning the research that the FBI wanted to propose to NIJ.

A. Let me take that back. I did speak with Mr. Meagher about proposed research, but not about the solicitation itself.

* * *

Q. When was this?

A. That was from September 17th, onward. On several occasions we talked about these things.

Q. What did you say to him and what did he say to you?

A. . . . the idea was what would be the description of the research and the different facets that we would undertake, but nothing on the solicitation itself.

Q. Were you thinking that this was something that you were going to submit as a proposal to be awarded the solicitation funds?

A. See, I didn't think of it in the sense of solicitation funds. I just knew there was money for research. The mechanism that we go through had nothing to do with the solicitation. We would put it in a proposal. And if they approved it, they would task us, so it wouldn't be the same as any solicitation. The concept of solicitation didn't enter my mind as meaningful or even being used in this context until April of 2000.

* * *

Q. So you certainly never requested that the NIJ delay the solicitation?

A. No.

Id. at 108-110.

When asked on cross-examination whether or not the Solicitation contradicted

Budowle's testimony at the *Daubert* hearing, Budowle stated,

A. I wouldn't agree with that at all. It's a solicitation. It has nothing to do with science or any studies or foundation to do with anything on fingerprint examinations.

Q. You testified at the Daubert hearing, did you not, that examining error rates in the fingerprint field is the wrong approach, and that calculating error rates is meaningless and misrepresents the state-of-the-art, correct?

* * *

THE WITNESS: That's correct.

Q. Now, are you aware that the fingerprint solicitation states that a need of the fingerprint field is to test procedures for comparing friction ridge impressions statistically, in order to insure that following the stated procedures allows analysts to produce correct results with acceptable error rates?

A. Again, I think you have a problem here in what is meant by error rates.

Q. I'm asking you if you are aware of it, sir?

A. I'm aware of it, but, again, it's not the same issue of error rate as what we're talking about. What we're talking about is --

Q. I didn't ask for an explanation. I'm just asking if you are aware of this solicitation -- that this solicitation provided that?

A. Yes, but, again --

Q. It would be your testimony that that is not inconsistent with the testimony that you provided at the Daubert hearing?

A. I would say it's inconsistent because there's two different issues about error rates. You're using terminology in different ways. Error rate –

Q. I'm not using any terminology. I'm using terminology –

MR. SARMOUSAKIS: Objection.

THE COURT: Counsel, you asked this question. Allow the witness to answer it.

THE WITNESS: I'm saying that error rates of the human error and those issues are what I talked about at the case. That is different than what Daubert has, which is the method. What they are talking about there is statistical errors, for instance, which is different than true error rate. I use the example, I think, during the hearing of a blood stain on the carpet. It's a type of blood. Approximately half the population would match that. They are talking about that being a statistical error rate in the sense of those amount of people that would not be excluded. That's not really an error rate. That's just a bad terminology for what are potential contributors to a sample. I think that's the same thing that they are talking about in that solicitation, which is not a human error, which is also not part of the Daubert criteria.

THE COURT: And it's also a solicitation.

THE WITNESS: Absolutely.

* * *

Q. You would agree with me, would you not, that a Fingerprint Research Advisory Panel that produced this solicitation was comprised of top people in the fingerprint field?

A. I believe so, but I don't remember all of the people that were on it.

Q. Well, Ed German was on it. You would agree that he is a leading fingerprint expert, would you not?

A. Yes.

Q. And David Boyd?¹⁹

A. Yes.

Q. And Mr. Meagher?

A. Yes.

Q. And the three people from the Secret Service who participated were Dr. Cantu, and, Antonio Cantu, Coy Burns and Robert Ramotowski. Are you familiar with any of them?

A. I know Antonio Cantu.²⁰

Q. Do you believe that he is --

MR. SARMOUSAKIS: Your Honor, we'll stipulate that they are the best experts in their fields.

Id. at 113-116.

Budowle was questioned about whether it would have been improper for someone from the FBI to ask for the Solicitation be delayed because of the *Mitchell* case.

THE WITNESS: My opinion is that without more information of what is the reason for asking for something, it's hard to say what's improper or not. If someone just says, Don't publish it until a certain date, whether it had to do with the Mitchell trial or not, I don't know. Because someone thought it had something to do with the disposition of the case, then I would say that's improper, and it would be illogical because no one cared.

Q. So you would agree that it would be improper to ask for the solicitation to be delayed because of a concern of its impact, possible impact on the case?

¹⁹Boyd was not a member or even at the May 18, 1999 meeting of the FRAP.

²⁰Cantu is not a latent print expert. He is a chemist having an expertise in detection and development of latent prints.

A. I really can't answer that way. It's not an issue that's even improper to even put it into concert with each other. No one would have been concerned in the first place to do that. No one asked it. Unless it's for that specific purpose that someone was afraid that there was going to be some disposition in the case, then I would say it's improper.

Id. at 118-119.

On redirect, Budowle made it clear that he only became aware of the Solicitation because of a *Daubert* hearing in Florida that mirrored the challenge in *Mitchell*. *Id.* at 121.

K. EDWARD RAYMOND GERMAN

Edward German, a fingerprint expert from the U.S. Army Crime Lab and a witness at the *Mitchell Daubert* hearing, testified concerning the formation of the Advisory Panel that participated in the creation of the fingerprint Solicitation.

Q. You referred to this group as what? What was the group that Rau asked you to participate in?

A. Dr. Rau called it an advisory board, Fingerprint Advisory Board.

Q. Did it have other names as it began, life and continued life?

A. Yes. At different times Dr. Rau called it a Fingerprint Advisory Board, also a Fingerprint Advisory Group. And eventually I saw it in writing as the fingerprint -- Friction Ridge Advisory Panel, but initially it was a Fingerprint Advisory Board.

Q. Now, when you first talked to Dr. Rau, did you express any opinion one way or another whether research was necessary or required?

A. No, I did not.

Q. Directing your attention to the May 18th, 1999 meeting of the FRAP, the Fingerprint Research Advisory Panel, that meeting took place on that day only; is that correct?

A. That is correct.

* * *

Q. Please describe briefly what happened at that meeting. How was the meeting conducted and what happened?

A. Well, we had a group of fingerprint experts and other individuals present at that meeting. We talked about the solicitation for the expenditure of monies for fingerprint research. Dr. Rau had the questioned document examination solicitation already in a power point format, in a Microsoft Word format on a data screen at the meeting. In essence, the suggestion was made that instead of reinventing the wheel, that we should look at the successful questioned document solicitation and use that as model wording. Indeed, we basically wordsmithed slightly that questioned solicitation slightly, and the consensus was that that would be the wording that would be used for the fingerprint solicitation.

Q. At that meeting, did anyone suggest or imply or state that latent print examinations were unreliable, scientifically invalid or inadmissible in court?

A. No.

Q. Dr. Stoney was at that meeting, correct?

A. Yes, he was.

Q. What, if anything, did he have to offer at that meeting?

A. I recall that he talked a little bit about statistical modeling, and that he had done statistical modeling and felt that perhaps some additional modeling could be done. But he did not make any comments to the effect that fingerprints were unreliable or that fingerprint identifications could not be reliably made.

Q. Did you ever raise with Dr. Rau the issue of whether or not the solicitation was necessary?

A. No.

Q. Did you have any objections to the research being performed?

A. No.

Q. Why?

A. Well, a lot of research money is afforded to the different forensic sciences, and I believe that the latent print examination or the science of friction ridge identification needed their share, their fair share. I believe that research is always welcome.

In addition, because of things, such as this Daubert hearing, I felt that it would be valuable to get out the standard operating procedures and the quality assurance guidelines of SWGFAST, the Scientific Working Group of Friction Ridge Analysis Study and Technology as a national guideline and get wider exposure.

Q. Okay. And up to that point, had you heard of anybody ever dangling around \$500,000 to do fingerprint research?

A. No.

Id. at 124-127.

German testified about government exhibit 3 and government exhibit 3A, German's prior affidavits, and established that a vast majority of the wording that appeared in the fingerprint Solicitation was taken verbatim from the questioned document Solicitation. *Id.* at 127-129. German agreed that Dr. Rau and the members of the FRAP acted in a perfunctory manner in creating the wording of the Solicitation, and that at the conclusion of the May 18 meeting of the FRAP, he intended to insert into the document information concerning SWGFAST. *Id.* at 129-130.

With respect to the work of the FRAP being confidential the following exchange took place.

Q. Now, what, if anything, did Dr. Rau say about the FRAP's work or its work product being confidential at that time, at the meeting?

A. There was nothing that I heard about the work being confidential. Contrary to it being confidential, what we were urged to do was to contact various entities, such as universities or research laboratories that might be good candidates for performing the research. We were invited, in essence, to try to drum up business insofar as research, even before the solicitation was officially to be released.

Q. And you, in fact, did that, didn't you?

A. I did.

Id. at 130.

German identified Gov. Exh. 4 which were e-mails he sent out on June 17, 1999, to possible candidates, enclosing a copy of a draft of the Solicitation. *Id.* at 130-131.

German testified about the 1999 publication Forensic Science: Review of Status and Needs and stated after he had read it he knew it had not been written by fingerprint experts. *Id.* at 131. German went on to relate that he had received an e-mail from Robert Gaensslen, a Professor with the University of Illinois. The e-mail had been sent to various people, including David Stoney, requesting that they join Gaensslen's team for a proposal to NIJ. That e-mail was received shortly after the May 18, 1999 meeting of the FRAP. German explained that Gaensslen ultimately submitted a proposal under the published fingerprint Solicitation and that Gaensslen had listed David Stoney as the principle investigator for his proposal. German added he was a member of the Panel that reviewed the four proposals submitted under the fingerprint Solicitation. John Thornton, David Stoney's Professor and another member of the Panel was responsible for submitting comments back to Gaensslen about why the proposal was unacceptable. *Id.* at 133-134.

German testified that the FRAP was supposed to meet in December of 1999 but that because of conflicting schedules they were not able to meet and that the FRAP never met again. *Id.* at 139.

German never told anyone that the issuance of the Solicitation would be a problem for the *Mitchell* case and he never heard it said. He further testified that until the issue of the Solicitation was raised in the *Mitchell* case he never thought, believed or envisioned that the solicitation could be a problem for any case including the *Mitchell* case. *Id.* at 136. German explained:

A. Well, it was just a solicitation. It was just an invitation for a research into fingerprints, which I think is a very good thing, if we get our share of the pie for research in our forensic science discipline.

* * *

The second part of the solicitation involved qualitative and quantitative friction ridge details, which is the very reason why in this country and the United Kingdom recently and other countries they've abandoned point rules. They've abandoned rules where you say, I have 16 points or 12 points because it all depends upon the quality and the quantity of the ridge detail.

The third part of the solicitation dealt with validation of standard operating procedures. That's -- it gets back to exactly what we are doing with SWGFAST insofar as developing national guidelines for quality assurance, quality control, training standards, standard operating procedures.

Id. at 139-141.

As to the Gaensslen proposal for fingerprint research German explained:

A. The criticism was basically twofold. Firstly, that his proposal included only level two detail, which does not include the actual shapes of the ridges, does not include the individual shape of the edges of the ridges or the location of pores on the ridges or any of

the information that we use as a fingerprint expert to make the identification decision.

His proposal talked about level two detail alone. Level two detail being represented by a skeletonization, being a line drawn by friction print ridges. Fingerprint experts don't make identification only on a type of skeleton, the type of skeleton that a fingerprint computer might generate. The second thing with his was that there were no fingerprint experts listed among his consultants or principal investigators.

My input at the panel was that it would be similar to proposing a validation program for airline pilots, and having people who are experts in aeronautical engineering and aerodynamics concerning structural engineering for aircraft and things of that nature refusing to bring in any certified pilots, because they had no certified legal (sic) [latent] print examiners, no certified experts at all on their research team. That was a fatal flaw, also.

Q. Now, isn't it correct that what Gaensslen was proposing, with level two alone, has been done millions and millions and millions of times by all of the AFIS systems all over this country?

A. Yes. AFIS systems use only level two detail. In essence, they reduce fingerprint ridge detail down to a skeleton, and the computer looks at the location of the ridge endings on that skeleton and locates the XY position and the direction of the ridge, what they call the THETA information, and that's how AFIS works.

Q. And indeed that is similar to what the 50K versus 50K study did, correct?

A. Yes.

Id. at 141-143.

German ended his direct testimony by stating that his involvement in the creation of the fingerprint Solicitation and with knowledge of its contents did not change in any way his testimony or opinions that he gave at the *Mitchell Daubert* hearing. *Id.* at 143.

During cross-examination, when questioned about what the prosecutor knew about the fingerprint research advisory panel, German stated:

A. I believe that he knew it in discussion. I believe that he was aware that Steve Meagher and I and David Stoney were on that Fingerprint Research Advisory Panel, but I don't remember particular discussions about it.

Q. What is the basis of your knowledge that he was aware of that?

A. Well, I remember during the Daubert hearing here in this courtroom, that after one of the recesses I heard from Steve Meagher that he and Bruce Budowle had been talking with David Stoney. David Stoney had related to them that he was no longer going to be on the fingerprint advisory board because he was going to ask for money from that advisory board. I heard the same thing from Dr. Rau, I think about a month earlier.

I believe that Assistant U.S. Attorney Sarmousakis either heard those same comments or was aware of it also. That's why I believed that he knew that there was such a Fingerprint Advisory Board.

Id. at 148-149.

German explained his task was to plug in the SWGFAST information in the background area of the Solicitation. *Id.* at 150. German testified that most of the information that he had provided never wound up in the final Solicitation. *Id.* at 151.

On cross-examination German was asked many questions about the Solicitation and his understanding of certain meaning of words. German's testimony can be summed up by the following testimony.

What I said was, as a latent print examiner reading that sentence, if it was taken out of context, if it was taken -- you know, is this a basic tenet of fingerprint science that we don't know that friction ridges are individual, that they are unique person to person, then I disagree with that wording. However, in the context

of a solicitation for research, you know, I do not have a big problem with it.

Q. When you say in your affidavit that the solicitation was adequate for purposes of justifying research and generating research, what do you mean by "justify research," justify to whom?

A. Justifying to the people who hold the purse strings, the administrators; typically, they are not fingerprint experts; the people who hold the purse strings and award the money higher up. It's -- at my level which is on the Fingerprint Advisory Board or the Friction Ridge Advisory Panel, it's easy to see as the fingerprint expert what looks like to be a value and what would not be a value. But to the administrators who are deciding who gets a half million dollars for research, most of them don't know what a friction ridge is.

Q. Mr. German, you have been an employee of the United States government for the better part of the last 27 years, correct?

A. Yes.

Q. Do you mean to suggest to me that you believe that when attempting to justify research that is going to be paid for by government funds, taxpayer money, that it's acceptable to use language that isn't accurate?

* * *

THE WITNESS: Yes. As I explained, this document, as far as justifying monies is not written specifically for fingerprint experts, but it's an open-ended type of solicitation that is inviting research monies.

Q. Mr. German, the fact is you never expressed to the NIJ your disagreement to that language that you just identified, correct?

A. No, I furnished NIJ a lot of wording that, again, as I stated, in the cutting room floor they dropped out. But still I thought this solicitation for its purpose was good enough.

Id. at 185-187.

The defendant attempted to show that some language appeared in the fingerprint Solicitation that was not plagiarized from the questioned document Solicitation. The implication being that members of the FRAP had worked very diligently to come up with wording. The defendant's fantasy is dashed by the following:

Q. You were asked [on cross-examination] about the common language that you had highlighted in the fingerprint research solicitation and what was not highlighted -- that the panel at FRAP had made up language, correct?

A. Yes.

Q. Particularly on page four, you had read, "However, the theoretical basis for this individuality has had limited study and needs additional work to demonstrate the statistical basis for identification." Top of that page, right-hand side?

A. Yes.

Q. Okay. I want you to show you a document that you've seen before, and is an exhibit in the Daubert Hearing.

MR. SARMOUSAKIS: I apologize to the Court. I don't know what that is, but I represent that it's called, "Forensic Science: Review of Status and Needs."²¹

BY MR. SARMOUSAKIS:

Q. I want you to look at page 29 and the fourth line down, would you read the sentence that appears there? Starting with however.

A. "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."

²¹Introduced at the instant hearing as government exhibit NIJ-1.

Q. Now, that's the document that you have testified to before, that was prepared by people that you knew were not fingerprint specialists, correct?

A. Yes.

Id. at 195-197.

L. STEPHEN B. MEAGHER

Meagher, one of the government's *Daubert* expert witnesses testified next.

Meagher related that he generally agreed with the testimony of Dr. Rau and Ed German as to the things they said about what happened at the FRAP meeting on May 18, 1999. He also testified that he understood that at the end of the FRAP meeting that there was more to be done, that Ed German was going to work on part of the background section, that there was going to be a follow up by NIJ, and that the NIJ was going to disseminate the final version for approval for those who were participants. *Id.* at 197-198. Meagher confirmed that the FRAP itself was an outgrowth of the publication Forensic Science: Review of Status and Needs and introduced documents from the FBI which had criticized the draft language in the latent print section of that publication. *Id.* at 201-204. Meagher testified about a letter that was sent from the FBI to Carl Selavka, a non-fingerprint expert who was tasked as the head of the working group that generated the latent print section of the publication. *Id.* at 205. That letter, including a memo from Jay Mulholland at the FBI Latent Print Section, who stated:

A. "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's virtually no reason to have to reestablish it. It proves itself every day. 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). 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 a "16-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 characteristics than another, then this is another area of disagreement."

Id. at 206-207.

Meagher testified that he agreed with German's characterizations that the work product of the FRAP was not confidential and Rau had essentially asked the members to contact outside individuals to "tweak some interest." *Id.* at 208-209.

Meagher testified that after the September 19, 1999 meeting in Dr. Kerr's office concerning the DNA issue, he had a conversation with Bruce Budowle concerning the future of fingerprint research. Based on the conversation with Budowle, Meagher believed that the FBI would probable receive grant money to continue the research that had been started with Lockheed Martin on the 50K vs. 50K study. He further believed at that point that the Solicitation would never have been released because those monies would have been going to support the Lockheed Martin research. Meagher also testified that acting on Budowle's information he generated Government Exhibit 9, "Strategic Plan For Continuing Research to Establish the Scientific Basis

for Fingerprint Identification.” *Id.* at 210-211. That document is a research proposal which would expand upon the 50K v. 50K study. Meagher also testified that at the time of the *Mitchell* trial in January-February of 2000, that he informed government counsel:

A. I believed at that time that the anticipated solicitation would not be forthcoming, because I, at that time, believed that those monies would be placed towards this research, Strategic Plan, that I had put forward.

Q. I asked you what you told me. Is that what you told me?²²

²²The defendant in his pleadings has suggested that government counsel knew about the draft solicitation and stated that government counsel has not identified his knowledge. German’s and Meagher’s testimony as to government counsel’s knowledge, generally sums up the knowledge of government counsel. Reviewing government counsel’s *Daubert* hearing notes, questions for David Stoney included the following: **“You were a member of the National Institute of Justice, Fingerprint Advisory Board, correct.” “When” – “You are no longer a member because you along with others have applied for grant money correct?” [This demonstrates government counsel’s incomplete knowledge, since the research proposals/ applications were made many months later.] “You want to get money to build new statistical models for fingerprint identification, correct.”**

Government counsel admits that accommodating the defense and letting them call James Starrs between Stoney’s direct examination and the government’s cross-examination was somewhat distracting to government counsel. However, Stoney testified that the government’s premises 1 and 2 (that friction ridges are unique and friction ridge patterns are unique) was correct and that a latent print examiner can make a determination of individuality. Stoney’s opinion was that the determination of how much information is enough to make the call of individuality or positive identification was subjective and not a scientific process. Although the government does not agree with Stoney’s opinion on the issue, when Stoney appeared the next morning to continue his cross-examination it was the government’s judgment was that no further cross was necessary. Therefore, the questions relating to Stoney’s bias, namely, his quest for additional research money from NIJ, were never explored by government counsel. The existence of those questions is directly contrary to an attempt to suppress information. Like the rest of the witnesses, government counsel never gave the potential NIJ research much consideration, except as to the bias and motivation it would demonstrate on the part of David Stoney. Stoney had become part of a self-fulfilling prophecy. Government counsel can state unequivocally that he has no recollection of the existence of a draft solicitation. However, that lack of recollection may be the result of government counsel not attaching any significance to the potential funding other than Stoney’s possible bias.

A. I believe I did tell you that, yes.

Id. at 213.

Meagher again acknowledged that he had told government counsel that what Meagher believed would happen with research and that he subsequently learned that he had misinterpreted Bruce Budowle's statements.

A. Yes, after we pursued this matter, I had begun to understand that I was working with incorrect information, and that my assumption was not correct -- was not proper.

Q. In what sense?

A. Meaning that Bruce clarified for me that there was only the anticipation of getting some of that money, that it was not to preclude the solicitation from going out; but it was a consideration for NIJ to have on their plate for using some of their money to support this type of research.

Q. And this came to light after the defendant filed his motion?

A. Yes.

Q. Certain inquiries were made by me; is that correct?

A. Oh, yes.

Id. at 214-215.

Meagher acknowledged that the Solicitation and its wording did not change in any way his opinions that were given at the *Daubert* hearing or at trial. He also stated that he never told anyone that the issuance of the fingerprint Solicitation would be a problem for the *Mitchell* case, never heard anyone say that, and never thought, believed, or envisioned that a fingerprint research Solicitation would be a problem for any case, including *Mitchell*. Meagher further

testified that he never heard anybody convey any linkage between the issuance of the Solicitation or its wording with the outcome of the *Mitchell* case. *Id.* at 217-218.

Meagher introduced Government Exhibit 10 (holding a different exhibit number in the *Daubert* hearing), which is David Stoney's CV. Meagher testified that the CV came out of the files that were maintained by the government for the *Daubert* hearing. The following exchange took place.

Q. You've seen that document before, haven't you?

A. Yes. Yes, I have.

Q. Is it correct that that document came out of the files that were maintained by the government for the *Daubert* hearing?

A. Yes.

Q. Let me direct your attention to page four. In the middle of the page, right above "Awards/Fellowships," what's the entry there?

A. The entry is under a broader topic called, "Other Professional Service," and the entry is, "**Fingerprint Advisory Board, National Institute of Justice, year 1999.**"

Q. Do you know what that referred to?

A. I certainly believe that that refers to his participation in the Fingerprint Research Advisory Board that was sponsored by the NIJ. That's pretty much the discussion regarding the solicitation.

Q. And those are exactly the words that German used to describe one of the names that Rau had called that panel; is that correct?

A. That is correct.

MR. SARMOUSAKIS: No further questions.

Id. at 219-220 (emphasis added).

Meagher's cross-examination does not help the defendant with materiality or with establishing a plot to suppress evidence.

Q. Do you mean to suggest that -- you believe that when attempting to justify research that's going to be paid for with taxpayer money, it's acceptable to use wording that is not 100 percent accurate?

A. It certainly wouldn't have been the wording that I would have chose to use, and I wasn't the final authority in terms of the wording that was shown.

Q. You just testified, did you not, sir, that you believed it was adequate for purposes of justifying research?

* * *

THE WITNESS: I think there was a significant difference between adequate and my preference, what I would have gone forward with. Counsel, this is simply a solicitation for research. It is not a scientific document that draws conclusions or anything along that line.

It was my perception at the time that the wording was adequate to move forward with getting proposals to do research. There were no conclusions to be drawn, nothing to be inferred from this. They are adequate.

Are they words that I would have chosen to put forward as a solicitation? No.

3/21 at 27-28.

Meagher testified he was never given the opportunity to see a final version of the Solicitation before it was published.

Q. And, again, as I believe you testified on direct, you expected to receive the final version of the solicitation in its final form before it was published, correct?

A. Yes.

Q. And is it your belief that the draft that was sent to you in May or June of 1999, met or was the final version?

A. Certainly not, because it makes reference to, this draft includes. It's still in a draft form.

Q. I'm talking about the one that the NIJ sent out on E-mail.

A. Well, that's the one I'm referring to. It's from Dick Rau. It states right in here, "This draft includes Ed's Ramotowski's and NIJ's input," your comments. So it's still, in my impression, still a draft.

Q. And to be clear, you expected the final version that is here -- this is what we're going to publish?

A. I actually expected more than that. I actually expected when I left the FRAP meeting, that there would be a follow-up meeting where we would all come together and have a final decision process as to what would go forward.

I didn't even envision when I left the FRAP that it would all be done by E-mail or by this type of communication. So I was always expecting as though there would be electronic E-mail communications of drafts going back and forth. But when it came time for the final version that we would all agree to for this to go out, it would be through the process of the meeting. Neither of those occurred, that I'm aware of.²³

Id. at 47-48.

The defendant's limp attack on Meagher's credibility is belied by the record. The defendant has Meagher's **mistaken representation** to government counsel (e.g. Memo at 3) turn to Meagher's **misrepresentation** to government counsel. Memo at 5.

²³Little did Meagher or the FBI know that Rau had cut the FBI out. "Dr. Rau asked Dr. Stoney to excuse himself from the FRAP since he intended to participate in the competition. The FBI was not approached for similar reason. Gov. Exh. 1, Rau time line, pg. 2, January 2000 entry.

Another example of the defendant's incomplete representation of the record is Meagher's testimony about the Solicitation. Rather than say just "that he did not 'give a hoot'" (memo at 15, fn. 13), Meagher gave the following testimony:

Q. I know you never had the opportunity to comment and/or to change the wording like you to wanted it, or how you would have had it.

Other than your concern about someone misinterpreting the words and what they stood for, do you really give a hoot what words were in the solicitation?

A. No. It's a solicitation for research. It's just the up-front document. Once the research is performed, this document is just - - it gets lost in the shuffle.

3/21 at 49-50.

REBUTTAL CASES

The defense in rebuttal called an office employee who stated that David Boyd had not mentioned funding during his previous interview. *Id.* at 57. However, the FBI case agent, Edward J. Gallant, who was present at the interview with Dr. Boyd in Washington and who by chance was present in Court, testified directly opposite to that claim.

Q. You're the case agent in the Mitchell case?

A. Co-case agent, correct.

Q. It's correct that you were present just a moment ago when testimony about the interview of Dr. Boyd took place down in Washington, correct?

A. Yes, fortunately.

Q. And you were there?

A. Yes, sir.

Q. The question was asked whether or not Dr. Boyd ever said anything about funding during that meeting.

A. That's correct, sir.

Q. Did you hear that question?

A. Yes, sir.

Q. Now, I'm going to ask you, did Dr. Boyd ever link anything with funding to the reason for the delay?

A. Yes, sir. My recollection is that he spoke of -- he was aware, maybe through Dr. Rau, that some research was being done by the FBI, and he wanted to wait for this research.

One of the reasons he wanted to wait for this research was to normally see the results of it. But also because in every budget there's limited funds, and if there was a research that caused a study or solicitation, he calls it, not to be necessary, why not wait to see if it's not necessary.

MR. SARMOUSAKIS: Nothing further.

CROSS-EXAMINATION

BY MR. EPSTEIN:

Q. Did you take notes of the meeting?

A. Yes, I did.

Q. Did you take down anything that Mr. Boyd said verbatim?

A. I may have. I don't recall. I'm sure I didn't take everything verbatim. I know there were a lot of things being said.

Q. What you were just referring to, do you have a reference to that in your notes?

A. I have a reference to that discussion, yes.

MR. EPSTEIN: I would ask to see the notes, Your Honor.

THE COURT: Are they present?

MR. SARMOUSAKIS: They are.

THE COURT: Why don't you give them to counsel? Do you want the witness to help point out the area?

MR. EPSTEIN: Yes.

THE COURT: Sure.

THE WITNESS: This is the reference to the study, that they were going to await the results of the study. I don't know if there's a reference – if there's anything written in here about the money or not, but I do remember that following this discussion about awaiting the results of the study.

BY MR. EPSTEIN:

Q. So there's nothing in your notes relating to the money?

A. I did not say that. I said I did not review these 15 pages of notes. I just happened to walk in here and I got called, as you can see. I write poorly, and it may be in here, but I can remember that clearly when he discussed that, that he said that they didn't have an unlimited supply of money and that was certainly -- went part and parcel in awaiting to see if the research was necessary.

Id. at 61-64.

THE LAW AND ARGUMENT

Newly Discovered Evidence

On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require. If trial was by the court without a jury, the court may--on defendant's motion for new trial--vacate the judgment, take additional testimony, and direct the entry of a new judgment. A motion for new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty. But if an appeal is pending, the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds may be made only within 7

days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

Federal Rule of Criminal Procedure 33.

In the Third Circuit,

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: (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, 212 F. 3d 210, 216 (3rd Cir. 2000); 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).

Assuming in the first place that this discussion pertains to an evidentiary hearing under Rule 106 of the Federal Rules of Evidence, after examining the factors in *Saada*, it becomes apparent that the defendant's Motion must be denied. Assuming the defendant did not specifically know about the draft of the fingerprint solicitation, it is still debatable whether "the evidence" was in fact newly discovered, i.e. discovered since the Daubert hearing or the trial, because at the time of the Daubert hearing the solicitation was not published. At the time of the Daubert hearing, it was pure speculation as to the final wording of the solicitation or for that matter whether or not any solicitation would be issued. The Daubert hearing was held in July of 1999, at least a month before the Director of NIJ signed off on the approval for the Solicitation. Whether

it would be issued at all became even more speculative after the September 17, 1999 DNA meeting, given NIJ's knowledge of a fingerprint case, the fact that this Court had ruled favorably, and the FBI's interest in obtain direct tasking to do fingerprint research as a logical follow-up to the 50K v. 50K study presented at the Daubert hearing. However, assuming arguendo that the first prong of the test is met, the evidence conclusively shows that the defendant cannot meet the remaining four tests.

The facts establish that the Court can not infer diligence on the part of the defendant. At the Daubert hearing German testified he was on a NIJ fingerprint advisory board (one of Rau's terms). During the cross-examination 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?

* * *

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.**

7/8/99 Daubert Hearing Transcript at 46-49 (emphasis added).

Of course, defense expert David A. Stoney's own Curriculum Vitae (Gov. Exh. 10 of the instant hearing) listed his participation in the FRAP.

A. The entry is under a broader topic called, "Other Professional Service," and the **entry is, "Fingerprint Advisory Board, National Institute of Justice, year 1999."**

* * *

that refers to his participation in the Fingerprint Research Advisory Board that was sponsored by the NIJ.

Q. And those are exactly the words that German used to describe one of the names that Rau had called that panel; is that correct?

A. That is correct.

N.T. 3/20 at 219-220 (emphasis added).

To uncover the government plot, defense counsel had to do no more than review the CV with his own expert witness, Dr. Stoney. Unlike Stoney's signed affidavit containing his claim of confidentiality, the defendant could not seriously suggest that information listed by Stoney on his CV is somehow confidential. Regardless, defense counsel merely had to follow-up Edward R. German's answers on cross-examination.

The evidence relied on is merely cumulative and impeaching. The defendant's prior position that the draft or the published versions of the Solicitation is a party admission ignores reality. Dr. Boyd testified that NIJ does not have any quasi-regulatory or regulatory function in the forensic sciences and that NIJ has no authority to set policy for state, local, or federal law enforcement. Therefore, the instant case is distinguishable from the legal argument pressed in the defendant's prior pleadings. The government incorporates by reference its prior pleadings on the new trial issues. As the questioning of witnesses at the instant hearing and at the *Daubert* hearing demonstrates, the evidence is cumulative, and at best, only of some limited impeachment value had it been used at the *Daubert* hearing or at trial.

The evidence is not of a nature that, at the *Daubert* hearing or at trial, the newly discovered evidence would probably produce a different ruling from the Court or an acquittal at trial. It is just not material. Each of the witnesses that appeared at the instant hearing, the *Daubert* hearing, or at trial could easily have dispensed with questioning concerning the solicitation. Budowle had encountered the solicitation at a Florida hearing which mirrored Mitchell's motion to exclude. Of course, we know the court there denied defendant's motion. The government suggests that the Court's *Daubert* rulings would have been not be affected by what the defendant claims is qualifying newly discovered evidence and had the Solicitation existed at the time of trial, the outcome of the trial would have remained unchanged.

Alleged *Brady* Violation

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violated due process where the evidence is material either to guilt or punishment. A new trial will be granted for a Brady violation only if the defendant can demonstrate both that the prosecution withheld exculpatory evidence, and that the evidence was material, in that the defendant did not receive a fair trial because of its absence. See *Hollman v. Wilson*, 158 F.3d 177 (3d Cir. 1998); *United States v. Pelullo*, 105 F.3d 117, 122 (3d Cir. 1997). Impeachment evidence can constitute exculpatory evidence under Brady and its progeny. See *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150 (1972). Evidence is not considered material for Brady purposes merely because it "may" have altered the outcome. Rather, evidence is material only where "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. A fair

trial is one deemed worthy of confidence. See *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). The defendant must show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *Id.* at 435. So in addition to showing "Brady material" was known and withheld by the government, the defendant must show actual "prejudice." *Strickler v. Greene*, 527 U.S. at 281-82. No actual prejudice has been demonstrated by the defendant.

The Government Did Not Withhold Exculpatory Evidence.²⁴

The NIJ Solicitation did not exist at the time of the *Daubert* hearing or at time of trial in this case. There is nothing exculpatory about the Solicitation. If it had existed the defendant might have attempted to use it in an unsuccessful effort to impeach the government's experts.²⁵ However, it is the government's position that the Court could properly have excluded the use of the Solicitation at trial.²⁶

²⁴The defendant's argument that the FBI suppressed the existence of the FRAP and its work product, mainly the Solicitation, because of the *Mitchell* case is not supported by the evidence. Indeed, the evidence disproves that allegation.

²⁵Of course, Stoney's testimony about the Solicitation would probably have been problematic for the defendant.

²⁶In his motion to strike, the defendant insists that the Solicitation (if it existed at the time of trial) would have been admissible as an admission against the United States. It was established during the instant hearings that NIJ is not an agency responsible for the regulation of forensic sciences and not a policy maker for any local, state, or federal law enforcement agency, particularly the Department of Justice. The defendant is wrong. The authority cited by the defendant is clearly distinguishable. See also, the government's prior pleadings incorporated by reference herein.

Moreover, the defendant has failed to establish that the FRAP or its work product is material,²⁷ notwithstanding the defendant and Starrs saying so.

But most importantly, the government has no obligation to disclose information that a defendant could obtain from other sources by exercising reasonable diligence. *United States v. Perdomo*, 929 F.2d 967, 970-73 (3d Cir. 1991). Thus, information "is not considered to be suppressed if the defendant either knew or should have known of the essential facts permitting him to take advantage of any exculpatory evidence." *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir. 1984); *United States v. Oliver*, 908 F.2d 260, 262 (8th Cir. 1990). Mitchell must show that he was deprived of information of which he was actually unaware and could not, with reasonable diligence, obtain himself without the government's assistance. See, *United States v. Bey*, 188 F.3d 1, 4, n.2 (1st Cir. 1999) (defendant bears the burden of proving a Brady violation). The evidence at the hearing established just the opposite.

The Facts Establish That Due Diligence on Mitchell's Part Does not Exist

The defendant did not act with due diligence or counsel made a tactical decision concerning the fingerprint research issue. Conceding that defense counsel did not actually know of the possibility of NIJ issuing a solicitation on fingerprint research, counsel had to do no more than 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. Indeed, it may be that the decision not to follow-up during German's cross was a tactical decision. To uncover the government plot, defense counsel had to do no more than

²⁷Assuming, arguendo, that there was a grand conspiracy by the government to hide the evidence, the defendant still cannot show materiality or due diligence.

review the CV with his own expert witness, Dr. Stoney. Unlike Stoney's signed affidavit containing his claim of confidentiality, the defendant could not seriously suggest that information listed by Stoney on his CV is somehow confidential. Regardless, defense counsel merely had to follow-up Edward R. German's answers on cross-examination.

Finally, where a prosecutor has no actual knowledge or cause to know of the existence of Brady material in a file unrelated to the case under prosecution, a defendant, in order to trigger an examination of such unrelated files, must make a specific request for that information. *Joseph*, 996 F.2d at 40-41 (emphasis added). Constructive knowledge cases require only that the government turn over information that it should have known was in existence. The Court should take a restrictive view of constructive knowledge: "[c]onstructive knowledge can only be found where the defense has made a specific request for the information." *United States v. Veksler*, 62 F.3d 544, 549 (3d Cir. 1995) (holding that where defense did not make a specific request for information, the court would not find constructive knowledge), *cert. denied*, 511 U.S. 1075 (1996). No specific request was made here. As the evidence disclosed, at the time of the *Daubert* hearing and at the time of the trial, the NIJ Solicitation did not exist and whether it would ever be issued was a matter of speculation.

The Defendant Received a Fair Trial

When a Brady claim is the basis of the motion for a new trial, the defendant must affirmatively demonstrate that he was deprived of specific impeachment evidence that was "material" to his defense. Evidence is "material" only if there is a reasonable probability that, had

it been disclosed, the result of the proceeding would have been different.²⁸ *Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995); *Buehl v. Vaughn*, 166 F.3d 163, 181 (3d Cir. 1999). This standard is not met by the "mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial." *United States v. Agurs*, 427 U.S. 97, 109-10 (1976). Rather, the item must pertain to a "crucial fact," *United States v. Pelullo*, 14 F.3d 881, 887 (3d Cir. 1994), or "go to the heart of the defendant's guilt or innocence" in light of the "totality of the circumstances," and its absence must "impair the fairness of defendant's trial." *United States v. Hill*, 976 F.2d 132, 134-35 (3d Cir. 1992). The undisclosed information must first be "Brady material" before the Court must determine whether a "Brady violation" has occurred. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Smith v. Holtz*, 210 F.3d 186, 196-97 (3d Cir. 2000). Here it is neither.

The evidence at issue here did not go to the heart of the defendant's guilt or innocence. At most, it provided potential additional impeachment of the government's experts, who were extensively and thoroughly cross-examined by the defense.

CONCLUSION

²⁸The defendant's pleadings have been used by several other defendants across the country to challenge fingerprint evidence. All of those motions to exclude fingerprint evidence or expert opinions have been denied. In at least four cases, the NIJ Solicitation was known to and used by the defendant.

Additionally, in a recent Eastern District of Pennsylvania robbery case, the NIJ Solicitation was used by the defendant while cross-examining the government's latent print expert. The evidence in that case was almost exclusively fingerprint and document examination expert opinions. Unlike the *Mitchell* case, there were no corroborating witnesses to the unlawful planning and execution of the robberies. Like the *Mitchell* case, there were witnesses to the robberies but no eye-witness identification of the defendant. The evidence consisted of latent prints on demand notes used in two of the robberies and writings on one of the two demand notes that were similar to the writings on the demand notes for three other robberies (no fingerprint identification). The jury returned guilty verdicts on all counts.

The defendant cannot meet the requirements necessary for this Court to grant a new trial either on the basis of newly discovered evidence or because of an alleged *Brady* violation. Indeed, the evidence conclusively demonstrates he is not entitled to any relief.

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Government's Post-Hearing Memorandum in Response to Defendant's Memorandum of Law and in Opposition to the Defendant's Motions for a New Trial has been served via hand pick up upon the following counsel on the date set forth below:

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DATE: 5/9/01