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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

UNITED STATES OF AMERICA, .
 . Docket Nos. 2:02-CR-038,
Plaintiff, . 2:03-CR-052
 .
 . Gainesville, Georgia
v. . November 18th, 2003
 . 10:00 o'clock a.m.
WILLIAM EMMETT LECROY, JR., .
 .
Defendant .
.

VOLUME I

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SUSAN S. COLE,
UNITED STATES MAGISTRATE.

APPEARANCES:

For the Government: OFFICE OF THE UNITED STATES ATTORNEY
RUSSELL G. VINEYARD, AUSA
JOEY BURBY, AUSA

For the Defendant: FEDERAL DEFENDER PROGRAM
STEPHANIE KEARNS,
CHIEF FEDERAL PUBLIC DEFENDER
PAUL KISH,
ASSISTANT FEDERAL PUBLIC DEFENDER
BRIAN MENDELSON,
ASSISTANT PUBLIC DEFENDER

Court Reporter: Donna C. Keeble, RMR, CRR
1959 U.S. Courthouse
Atlanta, Georgia 30303-3361
(404) 215-1383

Proceedings reported by machine shorthand, transcript produced
by computer-aided transcription

1 (Following proceedings were had in open court on November
2 18th, 2003.)

3 (Defendant LeCroy present.)

4 THE COURT: Good morning, please be seated.

5 MR. VINEYARD: Good morning, Your Honor.

6 THE COURT: We're starting with United States versus
7 William Emmett LeCroy, number 2:03-CR-038. There is an issue
8 that needs to be discussed; we will then move on to the
9 pretrial conference in number 2:03-052, which is also the
10 United States versus William Emmett LeCroy, and then, we will
11 take up some further matters in number 2:03-CR-038.

12 So let me first ask counsel to identify themselves
13 for the record.

14 MR. VINEYARD: Russell Vineyard on behalf of the
15 United States, Your Honor, and Mr. Burby will be joining me
16 shortly.

17 THE COURT: All right.

18 MR. KISH: Judge, Paul Kish and Stephanie Kearns and
19 Brian Mendelsohn on behalf of Mr. LeCroy. We're hoping that
20 Mr. Summer will be able to show up later this morning.

21 THE COURT: Good morning. And let the record reflect

22 that Mr. LeCroy is seated next to his counsel.

23 All right. I understand that in connection with the
24 Daubert hearings that we are going to begin today in case
25 number 2:02-CR-038 that there is a question that has arisen

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1 about one of the government's witnesses and, if you would,
2 explain what the question is, Mr. Vineyard.

3 MR. VINEYARD: Yes, Your Honor, thank you.

4 Your Honor, the government intends to call three
5 witnesses for the Daubert hearings that we begin today. The
6 first would be Mr. Art Anthony with the GBI. He is the
7 forensic document examiner who actually examined the notes that
8 are in question in this case and he is here to testify
9 beginning this morning, Your Honor.

10 We had also planned and we still do plan to call
11 Dr. Moshe Kam on Friday. He is a statistician who has done
12 some research in this area and he is planning to be here
13 Friday.

14 We had also planned to call Robert Muleberger as a
15 third witness. Mr. Muleberger is the head of the U.S. Postal
16 Inspection Service forensic document lab.

17 Mr. Muleberger called me on Friday afternoon to let
18 me know that he has a conflict that has arisen; the only day
19 that he was available this week was today, and we have made

20 tentative arrangements, if necessary, to interrupt
21 Mr. Anthony's testimony to put Mr. Muleberger on this afternoon
22 so that he could get back to other matters in Washington.

23 On Friday afternoon, he informed me that his services
24 were required in another investigation and he had proposed
25 having another forensic document examiner in his office, in his

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1 lab, I should say, that is Ms. Singer Jackson, a subordinate of
2 his in his lab, to be available to testify in his stead.

3 Now, Mr. Muleberger did not examine the documents in
4 this case; he is simply an expert in the field of forensic
5 document examination. He actually testified in the Kirby case,
6 which was a case we brought to the Court's attention in a
7 similar situation, and that's why we selected Mr. Muleberger in
8 the first place.

9 Yesterday, I notified Mr. Kish and provided him a
10 copy of the CV and I've provided the Court a copy of Ms.
11 Jackson's CV, showing her qualifications. And, Your Honor, we
12 would propose to have Ms. Jackson testify instead of
13 Mr. Muleberger; she is available to fly down from Washington
14 today, and the reason I asked to bring this matter up the first
15 thing this morning is whatever the Court's decision is on this
16 matter, we will convey that to Ms. Jackson and either she will

17 fly down and be available either later this afternoon and/or
18 first thing in the morning.

19 You know, I would propose perhaps taking her direct
20 testimony this afternoon if we complete Mr. Anthony's and that
21 would allow the defense to have until tomorrow to prepare for
22 cross-examination.

23 THE COURT: Is Mr. Muleberger still available this
24 afternoon?

25 MR. VINEYARD: He is not, Your Honor.

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1 THE COURT: He is completely unavailable?

2 MR. VINEYARD: Unavailable this afternoon, so the
3 other alternative -- and he is unavailable for the rest of the
4 week -- so the only alternative would be to have to reschedule
5 something with him at a later date.

6 And there is nothing unique, as I said, about Mr.
7 Muleberger's testimony; he is simply an expert, a forensic
8 document examiner, and one who can testify about and can
9 address some of the Daubert issues, and I believe after
10 speaking with Ms. Jackson, that she is also competent to do
11 that.

12 And this is not a situation -- I guess I could see
13 there being more of an objection if we were trying to

14 substitute Mr. Muleberger for Ms. Jackson. Mr. Muleberger, as
15 the head of the lab, has a number of more publications than Ms.
16 Jackson does. Ms. Jackson's CV represents that she has one
17 published article that really doesn't relate to the issue that
18 she would be testifying about here, it relates to -- ink
19 deposit pattern is her article.

20 And I say that because if we were trying to
21 substitute Mr. Muleberger, who has a number of other articles,
22 I think there could be an argument, well, we can't prepare to
23 cross-examine Mr. Muleberger because we haven't had time to
24 review all of his articles, and that's just not the case with
25 Ms. Jackson.

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1 And I would ask the Court to allow us to call Ms.
2 Jackson, given the time constraints that we have in this
3 matter. As a matter of courtesy, I have told the defense who
4 our witnesses are; I don't think that we're necessarily
5 required to do that, but I certainly did so, and up until
6 Friday afternoon, we had planned to present Mr. Muleberger
7 today. And so I would ask the Court to allow us to substitute
8 Ms. Jackson, unless there is some showing of real extreme
9 prejudice to the defendant and that other arrangements might
10 have to be made.

11 THE COURT: All right. Mr. Kish?

12 MR. KISH: Yes, ma'am, thank you.

13 Just as Mr. Vineyard shared his witnesses with us, we
14 shared our witnesses with the government many months ago on
15 this issue, and we are still prepared to call those same
16 witnesses.

17 The government did inform us a while ago, indeed, as
18 Mr. Vineyard just mentioned, that Mr. Muleberger would be one
19 of the three witnesses upon whom they would rely, and then
20 about 26 hours ago -- and again, I understand that schedules
21 change -- that's when Mr. Vineyard had the opportunity the
22 first time to let us know that they would be calling a
23 different witness.

24 We object, but not for the same reasons I think that
25 Mr. Vineyard mentioned. I think his point was, well, it would

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1 be different if they were trying to sneak Muleberger in after
2 we prepared for this other person who has less of a history.
3 Well, it's a little bit -- it reminds me of some of the
4 jockeying for position that sometimes happens when a person is
5 nominated for the United States Supreme Court and some other
6 high positions: There is a look at the paper trail of that
7 person.

8 And that's what we have done; we were prepared to
9 cross-examine Mr. Muleberger. He has testified previously; we
10 put a lot of work into looking into his background and the
11 things that he has published before, the areas that he has
12 spoken about and the areas that he has shown an interest and
13 expertise in in this field. But we're not prepared to do
14 anything regarding this new witness, and that's why we think
15 it's not appropriate at this time.

16 Again, I don't at all fault the government for making
17 this attempt, because, I mean, schedules change and I
18 understand that, but I just think under the circumstances here,
19 it would not be appropriate to allow them to substitute this
20 witness at the last stage, so we do object, although we do
21 understand the circumstances.

22 THE COURT: Does either side have any authority
23 either way, other than just arguments of fairness?

24 MR. VINEYARD: Your Honor, I don't have any authority
25 other than the point that we were not required to disclose who

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1 our witnesses are, and if we had elected just not to call
2 Mr. Muleberger at all, the defense would be in the same
3 position.

4 There is no requirement, I don't think, that we

5 notify them in advance of who our witnesses will be; we did so
6 out of courtesy to the defense, and we have accommodated one of
7 their witnesses, Dr. Kam -- I'm sorry, Dr. Saks, who's not
8 available to come here to testify, and we have made
9 arrangements, I believe, to take his testimony, I believe, on
10 December 5th.

11 THE COURT: And that will be done by tele --

12 MR. VINEYARD: Video teleconferencing.

13 THE COURT: Video-teleconference?

14 Okay. That's on December 5th?

15 MR. VINEYARD: Yes, Your Honor, that's what we've
16 agreed to, subject to -- Mr. Kish, correct me, December 5th?

17 MR. KISH: December 5th is what we have tentatively
18 arranged. But as Ms. Kearns reminds me, the Court had
19 previously ordered both sides pursuant not only to Rule 16 but
20 also pursuant to Rule 704 to exchange identities of, the
21 backgrounds for and the bases of the opinions by any experts
22 that would be called in these cases.

23 So again, although we have been sharing them, I don't
24 think it's quite accurate to say that we were not obligated to
25 do so, because I believe you've told both sides to do that

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2 MR. VINEYARD: I don't believe that's correct with
3 regard to these proceedings. I think it's certainly correct
4 with regard to the trial of this matter, which Rule 16 applies
5 to.

6 THE COURT: Is Dr. Muleberger available at a later
7 point, for example, through tele-videoconference?

8 MR. VINEYARD: I suspect we could probably schedule
9 another date with Mr. Muleberger, but as the Court knows, we
10 have set aside these three days to do that and it's our desire
11 to move forward with these hearings. That's why we have
12 proposed having Ms. Jackson, but I would suspect that between
13 now and December 5th, we could probably find a date that
14 Mr. Muleberger would be available, perhaps, even to travel
15 here, if necessary.

16 But I think we'd lose some of the time that Ms.
17 Jackson could fill and is willing to fill over the next couple
18 of days.

19 THE COURT: All right. Well, I'm going to allow you
20 to, allow the government to call Ms. Jackson.

21 And let's move on to -- and let me just mention one
22 thing with respect to that December 5th video conference, I
23 think that my courtroom deputy had indicated that I was going
24 to be present at that and I do not expect to be present at
25 that, so I just wanted to give both sides a heads up on that.

1 MR. VINEYARD: Your Honor, on that same issue, I
2 think we ought to put on the record whether Mr. LeCroy would
3 waive his presence for that.

4 I have had some discussion with Mr. Kish about that
5 matter.

6 MR. KISH: And, Judge, to that effect, we have even
7 executed a written waiver by Mr. LeCroy here this morning and
8 which I will obviously present to the government within a
9 moment, but I would ask that it be filed as part of his written
10 waiver.

11 We can state as officers of the Court that he
12 executed that this morning along with the rest of us here.

13 THE COURT: All right. And that's his waiver to be
14 present at the December 5th teleconference?

15 MR. KISH: Yes.

16 MS. KEARNS: I'm sorry, Judge, I didn't hear; did you
17 say you were or you were not going to allow Ms. Jackson to
18 testify?

19 THE COURT: I will allow Ms. Jackson to testify.

20 The next thing that we need to take up is the
21 pretrial conference in criminal action 2:03-CR-052. And I
22 think the first -- well, before we go through the defense
23 motions, is there anything that you want to address before
24 going into your motions, Mr. Kish?

25 MR. KISH: Ms. Kearns will be handling the pretrial

1 motions on that case, Judge.

2 THE COURT: All right. Anything from you, Ms.
3 Kearns, before we go through the motions?

4 MS. KEARNS: No, Your Honor.

5 THE COURT: All right. The first motion is the
6 motion to strike surplusage -- that's docket number 10 -- and
7 what is the government's position on that?

8 MR. VINEYARD: Your Honor, the defendant I believe in
9 the motion has proposed a stipulation and the stipulation, as I
10 recall, is to stipulate that he was under an indictment for a
11 felony offense. And the government would suggest that the more
12 accurate stipulation would be a capital felony offense.

13 And the government is familiar with the Old Chief
14 case, and I believe that we can agree to a redacting of the
15 indictment along with a stipulation, but I want to add to that,
16 though, the government strongly believes that the evidence that
17 Mr. LeCroy was under indictment and in custody and awaiting
18 trial on a capital case is admissible in the trial of the
19 escape case, because it is probative of his motive for
20 escaping, and there is Eleventh Circuit case law available to
21 that.

22 That doesn't necessarily address this motion, but I
23 wanted the record to be clear, that by agreeing to strike the

24 surplusage upon a stipulation that we're not agreeing that we
25 will not offer evidence at the trial that he was incarcerated

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1 awaiting trial on a capital offense for which he could face the
2 death penalty, if convicted.

3 THE COURT: Ms. Kearns, is the defense willing to
4 stipulate to that version?

5 MS. KEARNS: No, Your Honor. Old Chief stands for
6 the proposition that the fact of the felony conviction that is
7 the element of the offense is what is relevant and that you can
8 avoid the prejudicial aspect of the nature of the underlying
9 felony and the possession of the firearm by a convicted felon.
10 This is no different; it's his status of being in custody for a
11 felony that is an element that they have to prove. It doesn't
12 go to motive. Old Chief deals with the fact that you're
13 allowed to remove the prejudicial aspect of the other offense
14 from the consideration of the jury.

15 And the purpose of the stipulation is to avoid the
16 jury from finding out this information and I'm not sure -- the
17 government appears to be agreeing that they will strike the
18 surplusage from the indictment, that that satisfies Old Chief,
19 but then they can then put up evidence of what the underlying
20 offense was, that's not what Old Chief says.

21 THE COURT: Well, I think what the government was
22 saying is they would stipulate to striking surplusage except
23 that they would say that it was a capital offense.

24 MS. KEARNS: I understood them to be saying two
25 things: One -- and I disagree with that -- that it's a capital

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1 felony, the surplusage.

2 THE COURT: I thought you would.

3 MS. KEARNS: But secondly -- maybe I misunderstood
4 what Mr. Vineyard said -- I thought that even if they agreed,
5 even if we entered into the stipulation that it was the
6 government's intent to offer evidence at trial that he was in
7 custody pending a capital prosecution, again, the purpose of
8 Old Chief is to remove the evidence from the jury, not just the
9 words from the indictment but to remove that evidence from the
10 consideration of the jury, so I submit that their agreement to
11 take this out of the indictment is meaningless.

12 THE COURT: Well, the defense will not stipulate, is
13 what I'm hearing.

14 MS. KEARNS: No. We will stipulate to Mr. LeCroy
15 having been in custody on a felony, and we take the position
16 that under Old Chief, that's all we're required to stipulate
17 to.

18 THE COURT: I understand, but the government is not
19 offering that stipulation, as I understand the government's
20 position.

21 MR. VINEYARD: Your Honor, our position is that we
22 would stipulate to a capital felony offense --

23 THE COURT: I understand.

24 MR. VINEYARD: -- and even if we were to agree to the
25 stipulation that the defendant had proposed, which is simply a

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1 felony offense, we would still take the position that we could
2 offer evidence that he was incarcerated on a capital
3 offense --

4 THE COURT: All right. Well --

5 MR. VINEYARD: -- based on Eleventh Circuit
6 authority.

7 THE COURT: All right. Well, there is not a meeting
8 of the minds here, so does the government want to brief the
9 motion?

10 MR. VINEYARD: Your Honor, if you think it would be
11 helpful for the government to do so, we will be glad to do
12 that.

13 THE COURT: Well, I'm going to take it under
14 advisement, in any case, and if you want to brief it, then, you

15 can do so within ten days.

16 MR. VINEYARD: Ten days, thank you, Your Honor.

17 MS. KEARNS: May we have five days to reply, Your
18 Honor?

19 THE COURT: Yes.

20 MS. KEARNS: Your Honor, and just one other thing I
21 want to make clear, perhaps I haven't read Old Chief correctly,
22 but Old Chief does not say that the parties have to agree there
23 is a stipulation. If the defendant wants a stipulation, then
24 the Court has to accept the stipulation, and that's the premise
25 we're working under.

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1 THE COURT: I haven't read Old Chief yet, so --

2 MS. KEARNS: Okay. Well, we will take five days to
3 reply, then, Your Honor.

4 THE COURT: All right. The next motion is docket
5 number 11, the motion for bill of particulars.

6 And, again, Mr. Vineyard, what is the government's
7 position?

8 MR. VINEYARD: Yes, Your Honor, the government
9 opposes a motion for a bill of particulars. The defendant has
10 been provided substantial discovery in this case from which he
11 can detail the particulars that he is looking for.

12 The motion references coconspirators; no
13 coconspirators are charged in the offense, he is the single
14 defendant charged in this case.

15 I believe from a review of the evidence that has been
16 provided to the defense that they can obtain the particulars
17 that they seek in this motion.

18 THE COURT: Well, what about the portion of the jail
19 from which he is alleged to have attempted to escape?

20 MR. VINEYARD: Again, Your Honor, in the discovery,
21 it shows Mr. LeCroy was in an isolation cell at the time that
22 he put a hole in the wall and attempted to escape from the
23 jail, so that's what the discovery shows.

24 THE COURT: All right. Ms. Kearns?

25 MS. KEARNS: Your Honor, that is part of what we're

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1 asking for. You know, Mr. LeCroy was in the Lumpkin County
2 detention facility for a period of time. The discovery
3 includes information about an extended period of time and
4 statements from witnesses that deal with the times that are
5 totally distinct from when Mr. LeCroy was in the isolation
6 cell.

7 Precisely what we want to know from the government is
8 is their focus and is what we're charged with attempting to

9 escape from the isolation cell where the hole in the wall was
10 found? And if that's the case, then, at least, Your Honor, I
11 submit that they should put that in writing in response to the
12 bill of particulars. That's what we're seeking, so that we
13 know that that is, in fact, what we're focused on.

14 THE COURT: All right. I'll take that under
15 advisement. I'm going to jump to number 20; that's docket
16 number 20, which was the motion for expedited trial.

17 This, I'm going to defer to the trial court judge. I
18 will tell you, though, that he has given me every indication
19 that this case is going to trial -- that number 38 is going to
20 trial beginning February the 16th.

21 Now, of course, he will have to decide this motion,
22 but I do want to let you know that I'm under the assumption and
23 operating as if the case number 38 is going to go first.

24 MS. KEARNS: And, Your Honor, we want to make it
25 clear that we're prepared to try this case prior to the capital

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1 trial. This motion for expedited trial contemplates that we
2 would have to try it before February -- well, the 16th is a
3 holiday, so I'm assuming it's really February the 17th.

4 And Mr. Mendelsohn and I are handling the attempted
5 escape case, and we will be available anytime between now and

6 February the 17th to try it.

7 THE COURT: All right. Well, but I will defer that
8 to Judge Story, since it's his calendar that is affected,
9 primarily.

10 All right. This next motion was filed in both docket
11 number 2:02-CR-038 and 2:03-CR-052. It's the motion to
12 suppress because of unconstitutional destruction of exculpatory
13 evidence, docket number 13 in case number 52, and it's docket
14 number 197 in case number 38.

15 The defense is asking for a hearing; it looks to me
16 as if a hearing will be necessary in this case in connection
17 with this motion.

18 Mr. Vineyard?

19 MR. VINEYARD: Your Honor, we would ask for the
20 opportunity to brief this one before deciding whether a hearing
21 is necessary. It's our position that the defendant has a
22 burden to show at least three things, that they cannot show
23 and, number one, have not shown before any hearing would be
24 necessary and, number two, we believe the evidence will show
25 they cannot show, the argument will show they cannot show,

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1 number one, they have to show that the note, the portion of the
2 note that they believe was not recorded is exculpatory, that it

3 has exculpatory value.

4 Now, they have proposed in their motion to do that
5 ex parte with the Court. My inquiry would be if this is
6 exculpatory information, then why does it need to be ex parte?
7 If this is evidence that he contends will exculpate him from
8 the offense of attempting to escape, then that ought to be
9 evidence that he is ready to share with everyone in open court
10 on that matter.

11 But they haven't made that showing, number one,
12 whether, ultimately, it's ex parte or not; number two, they
13 have to show that there is no other comparable evidence
14 available for the portion of the note that was not captured on
15 the digital photograph.

16 And, Your Honor, in the discovery that has been
17 provided, there is testimony from one of the local deputies
18 about what the portion of the note read that was not
19 photographed, so it is available through the testimony of that
20 deputy.

21 I would propose that it is probably available by
22 stipulation. I suspect the parties can stipulate as to what
23 the portion of that note that is not captured on the digital
24 image is.

25 And then, finally, it is the defendant's burden to

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1 show bad faith on the part of the government, not the
2 government's burden to show good faith, and I have a couple of
3 cases from the Eleventh Circuit that address that, one, United
4 States versus Brown, which is 9 F3d, 907; another case, Redmond
5 versus Duger, 866 F2d, 387.

6 So, Your Honor, we strongly contend that, number one,
7 the defendant has not made a showing as required by the
8 Eleventh Circuit case law. We would request an opportunity to
9 file a written response to this, Your Honor, laying out in
10 detail our position before jumping to the necessity of having
11 hearings.

12 THE COURT: Ms. Kearns?

13 MS. KEARNS: We would just like the opportunity to
14 reply to whatever they submit in writing.

15 THE COURT: All right. You don't want to respond at
16 this point?

17 MS. KEARNS: No, Your Honor.

18 THE COURT: All right. The government will have ten
19 days, and the defense will have ten days after that.

20 MS. KEARNS: Thank you, Your Honor.

21 THE COURT: The next motion is a motion for
22 disclosure of particular Brady and Giglio information relating
23 to jailhouse snitch, and it is docket number 14 in case number
24 2:03-CR052, and it is docket number 198 in case number
25 2:02-CR-038.

1 Mr. Vineyard, what's the government's position?

2 MR. VINEYARD: Your Honor, there is a standing order,
3 of course, from the Court regarding Brady and Giglio material;
4 we certainly intend to comply with that.

5 We have provided to the defense any material -- I'm
6 noticing their motion to exclude snitch testimony on page 3,
7 paragraph 5, they make reference to some evidence that they
8 already have about, quote, "deals."

9 There are not any deals, Your Honor, with any of
10 these individuals; there are requests by some of these
11 individuals for consideration. Perhaps that's what they are
12 referring to. They have that information. We certainly
13 understand our obligations and intend to comply with our
14 obligations under Brady and Giglio, so, Your Honor, I guess we
15 do not oppose the motion, provided it's within those
16 constraints.

17 THE COURT: All right. Anything further, Ms.
18 Kearns?

19 MS. KEARNS: Yes, specifically with some of the
20 things that we did request, of course, we do know from the
21 discovery that has been provided that some of these folks have
22 asked for consideration and there is always the possibility
23 that before they testify, that there may be some deals that are
24 entered into, so that is an ongoing request, not only for just
25 what we already obtained.

1 Also to the extent that we have an expectation that
2 we're going to get something because of representations made by
3 the agents that interviewed them, I'm going to submit that is
4 also Giglio and Brady that we would be entitled to.

5 Also specifically with reference to paragraph 4-G, it
6 is our understanding that some folks were given polygraphs, and
7 if so, we would like the results, assuming the government
8 doesn't disagree we're entitled to that information.

9 MR. VINEYARD: Your Honor, I've told them I intend to
10 give them the polygraph information.

11 THE COURT: All right. This motion, then, will be
12 granted in accordance with Brady and Giglio.

13 The next motion is docket number 15 in case number
14 2:02-CR-052 and it is docket 199 in 2:02-CR-038, motion in
15 limine to exclude jailhouse snitch testimony.

16 Does the government want to brief that?

17 MR. VINEYARD: Your Honor, Mr. Burby will address
18 this motion.

19 MR. BURBY: Good morning, Your Honor.

20 THE COURT: Good morning.

21 MR. BURBY: The government is happy to brief it if
22 the Court would find that helpful but, quite honestly, we feel

23 like oral argument right now could handle it. There is not
24 really any authority on this point, none is cited in the
25 defendant's motion; what they cite is studies or research that

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1 this type of testimony may be unreliable but there is no
2 judicial authority that the government is aware of or that the
3 defense has cited for the Court to exclude this testimony.

4 I would be happy to address the motion right now for
5 the Court and don't really feel that I have much more to add in
6 a written brief, but of course, if the Court would like that,
7 we can do that.

8 THE COURT: Well, I'm going to defer it to Judge
9 Story, I think it's really his call.

10 MR. BURBY: Okay.

11 THE COURT: But --

12 MR. BURBY: Well, then we will save our arguments for
13 him then, I guess, Judge.

14 THE COURT: Right. I wanted to give you a chance to
15 make your showing.

16 MR. BURBY: We will then take the opportunity to file
17 something, if we could have ten days to file that.

18 THE COURT: All right. And the defense will have ten
19 days to respond.

20 MS. KEARNS: Your Honor, and I would like to point
21 out that I think there is a distinction to be made, because it
22 appears that they provided us this evidence for both cases and
23 in one, the traditional attempted escape trial, the standards
24 that apply may be different than -- not may be, I suggest are
25 different than the reliability of evidence that's admissible in

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1 the penalty phase.

2 And I don't know, I'm assuming that it has been
3 provided to us in case number 38 as penalty phase discovery,
4 where, again, the Court I do believe has the responsibility --

5 MR. BURBY: It seems that Judge Story will deal with
6 it either way, Your Honor.

7 THE COURT: Right, I think that will be his call.

8 The next motion is docket number 17 in case number
9 52, and it's docket number 202 in case number 38; it's the
10 motion for information regarding the Lumpkin County detention
11 center, and Mr. Vineyard or Mr. Burby, what is the government's
12 position about that?

13 MR. VINEYARD: Your Honor, of course, to the extent
14 there is any Brady or Giglio material within such reports, we
15 understand our obligation to provide that; however, under Rule
16 16(a)(2), investigative reports are excepted from discovery

17 otherwise. So our position would be, Your Honor, to the extent
18 there is any Brady or Giglio materials, we certainly understand
19 our obligations to provide those.

20 I think we have had some mention, perhaps, of the
21 polygraph may be an example of one in which if a polygraph was
22 administered in the course of the investigation, we have
23 already said we would intend to provide that to the defense and
24 will provide that to the defense. But otherwise, to discover
25 the entire investigative file particularly when investigations

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1 are ongoing, to the extent they are ongoing, would be improper
2 and prohibited by Rule 16(a)(2).

3 THE COURT: Do you want to speak to that, Ms.
4 Kearns?

5 MS. KEARNS: Yes, Your Honor. I'm not sure that I
6 follow that distinction. The government is saying to the
7 extent it's Brady or Giglio but published in an investigative
8 file, even though it might be Brady or Giglio, we're not
9 entitled to it?

10 Okay. I misunderstood.

11 I understand from reliable sources that there have
12 been other escapes from the Lumpkin County Detention Center and
13 the details surrounding those escapes, I believe, are Brady and

14 Giglio. And maybe not Giglio; it depends on whether or not
15 those witnesses are testifying. But it certainly would be
16 Brady that we're entitled to, and whether or not it is part of
17 a current investigation, the information, the underlying
18 information about how the escape occurred, what portion, what
19 parts of the facility, how the inmates were able to accomplish
20 it, who was involved in that is something that we contend is
21 Brady that we're entitled to.

22 THE COURT: Well, I'm going to grant the motion in
23 accordance with Brady and Giglio.

24 MS. KEARNS: Your Honor, I think our dilemma is that
25 we don't agree on what that requires.

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1 THE COURT: Well, I saw Mr. Vineyard shaking his head
2 as if he did agree that anything that's Brady or Giglio, even
3 if it's included in an investigative report, you're entitled
4 to.

5 MS. KEARNS: Okay. And may we ask when we're going
6 to receive this?

7 THE COURT: Yes, you may.

8 MR. VINEYARD: Your Honor, I will review those files;
9 I would say within ten days, we can provide that, Your Honor.

10 THE COURT: All right.

11 MR. VINEYARD: And, again, I think the case law is
12 clear that the government makes the initial call whether it's
13 Brady or not, and we will be making that decision, Your Honor.

14 THE COURT: All right. I believe that covers the
15 motions that are joint motions in case number 52 and case
16 number 38.

17 There are two motions that were filed yesterday in
18 connection with case number 2:02-CR-038, and the first one is a
19 motion for reconsideration of order granting government's
20 motion for a mental examination of defendant; that's docket
21 number 219.

22 And my first question is does the government or has
23 the government received a copy of it?

24 MR. BURBY: We have received a copy, Your Honor. We
25 just received these yesterday. I was actually out of the

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1 office yesterday, and so we're just beginning to kind of review
2 these.

3 We do have, I guess, responses, particularly to the
4 motion for reconsideration, so if we could have some additional
5 time to --

6 THE COURT: Let me ask you, in the motion, the
7 defense states that the government was searching for an expert

8 to do a mental health examination of the defendant in the
9 Atlanta area, somebody local, and is that so? Is it possible
10 to have Mr. LeCroy examined locally?

11 MR. BURBY: I do think there is confusion, Judge. We
12 have not sought out a local mental health expert to examine the
13 defendant, so I'm not sure where the source of that information
14 is, but that's not accurate.

15 THE COURT: All right.

16 MR. VINEYARD: Your Honor, if I could add, I think we
17 would like to know the source of that information. I mean, it
18 has been put forth in a pleading; if they would share it with
19 us in court, perhaps we could dispel any confusion about that.

20 THE COURT: Is it possible to have the evaluation
21 done locally as opposed to at Butner?

22 MR. VINEYARD: I'm sorry, Your Honor. I've dealt
23 with that side of it, Your Honor.

24 THE COURT: Okay.

25 MR. VINEYARD: Mr. LeCroy's circumstances,

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1 particularly his security issues, are going to pose difficulty
2 with conducting any kind of thorough examination of him. I
3 think that's what's contemplated, unless we move him to Butner
4 or to another facility.

5 I have not specifically asked our expert about that.
6 The expert who we have discussed is in Butner and that's where
7 it is contemplated that's where these examinations occur
8 routinely in these cases, so I can tell the Court I've not
9 specifically inquired of that but it's my understanding and our
10 experience is that it would not be feasible to do that, and
11 particularly given, I think, Mr. LeCroy's security issues after
12 the attempted escape.

13 THE COURT: Well, I assume that in the superior
14 court, these kinds of evaluations occur frequently and they
15 don't use Butner, and I wonder if the facilities that are used
16 in the state court system could be available?

17 MR. VINEYARD: I could certainly inquire about that,
18 Your Honor. I think Mr. LeCroy was in a state facility, of
19 course, when he attempted to escape, placed there by the
20 marshals under contract, and I think there are some real
21 concerns about placing Mr. LeCroy in any state facility unless
22 he is secured.

23 I'm sure during the course of the trial, he may have
24 to be housed here locally in Hall County. But, Your Honor, I
25 think that we would be best to leave it as the order has been

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2 evaluation. That's what was done in the last death penalty
3 case in this district, the defendant in that case was sent to
4 Butner for evaluation, and we would ask the Court to follow
5 that precedent in this case.

6 THE COURT: Well, I would like the government to file
7 a response, and I'll give you ten days to respond to the motion
8 for reconsideration.

9 MR. MENDELSON: Your Honor --

10 THE COURT: Yes?

11 MR. MENDELSON: -- I'm sorry, if I could just
12 address two points about that?

13 THE COURT: Certainly, yes.

14 MR. MENDELSON: First of all, Your Honor, I'm a
15 little confused by the government's response that security
16 makes it impossible for them to get a local evaluation. If
17 that were the case, the defendant would never be able to have
18 its own evaluation.

19 On a regular basis, in every case that involves
20 mental health in this district, we send private doctors into
21 the jail. The jails and the prisons in this district have
22 spaces available to do evaluations and do conduct these
23 evaluations on a regular basis. So the idea that for some
24 reason, an evaluation can't be done locally for security
25 reasons is really -- it just doesn't hold any water, because,

1 otherwise, the defense counsel never could get an evaluation.

2 As to the issue of whether or not the government has
3 been looking locally for an expert, I got a phone call from an
4 expert that we had had contact with about this case, who
5 informed me that Mr. Burby had spoken to her about working on
6 the case and also asked for references for other local doctors
7 who could do an evaluation.

8 The expert called me, after saying she was concerned
9 about whether or not she had a conflict of interest in the case
10 and whether or not she could work on it, and it's my
11 understanding told Mr. Burby that she was going to call me to
12 check out her conflict of interest.

13 So the idea that there has been no -- that's the
14 basis for the statements in our motion, so just for a
15 clarification.

16 THE COURT: All right.

17 MR. BURBY: Judge, if I could just respond briefly to
18 clarify the record, we have contacted local mental health
19 experts for purposes of assisting us in this case in a
20 consulting capacity but not for the purpose of examining the
21 defendant, and the person we've spoken about -- I don't know
22 why we don't use her name, Dr. Julie Rand -- we did meet with
23 but we never discussed with her the possibility of her actually
24 examining the defendant. It was solely for her to serve in a
25 consulting capacity with us.

1 And after she raised concern that the defense had
2 called her about her examining Mr. LeCroy, we agreed that if
3 there was a conflict, if she felt there was a potential
4 conflict, that we would not use her, and any references we
5 asked for were for other people that could serve in a
6 consulting capacity to assist us in preparing for the penalty
7 phase. Again, never was it discussed of her or any other
8 person she referred us to actually examining the defendant, and
9 that's completely inaccurate.

10 THE COURT: All right. Well, I think the record is
11 clear on that point, then, and what I think would be useful
12 would be if the government would, as part of its response,
13 check to see whether there might be some local facility where
14 such an evaluation could be done.

15 So I will take this docket number 219 under
16 advisement pending receipt of the government's response.

17 And then the last motion also received yesterday in
18 case number 2:02-CR-038 is the motion for stay of government's
19 mental examination, and I assume that the government would like
20 a chance to brief that as well?

21 MR. BURBY: Judge, I don't know that we see the need
22 to brief that. We view that motion as somewhat moot. The
23 Court's order was clear and I believe that our original motion

24 was clear that it was all subject to the District Court
25 agreeing with Your Honor's ruling on the application of Rule

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1 12.2, and I think the Court's order specifically says,
2 "Assuming that the District Court does agree." And that
3 really seems to be the main point of the stay, is that nothing
4 happens until that is resolved, so I don't see that we need to
5 respond to that. And quite frankly, I would ask the Court to
6 deny it as moot. The Court's order addresses the specific
7 issue that's raised here.

8 THE COURT: Mr. Mendelsohn?

9 MR. MENDELSON: Well, Your Honor, the motion is --
10 as things stand now, Mr. LeCroy could be whisked away to Butner
11 Friday afternoon, and as I understand the Court's order on the
12 motion for reconsideration, the government would have ten days
13 to brief the issue.

14 The motion for reconsideration and any possible
15 subsequent appeal to the District Court of this order becomes
16 moot if Mr. LeCroy is whisked away to North Carolina for an
17 evaluation on Friday, so what we're asking for is that the
18 Court stay the implementation of the evaluation order pending
19 resolution of all these legal challenges to the order for

20 evaluation. So it's far from moot; it's extremely urgent that
21 it be heard.

22 THE COURT: All right. I'll take it under
23 advisement.

24 And I believe that covers all of the pending motions
25 in either case; is that your understanding, Mr. Vineyard?

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1 MR. VINEYARD: Yes, Your Honor. There was one other
2 unopposed motion for access to the alleged crime scene, and I
3 just wanted to put on the record that we did make the
4 arrangements, as directed by the Court, for the defense
5 attorneys to visit the crime scene, and I believe they have
6 done so.

7 MS. KEARNS: That's correct.

8 MR. VINEYARD: We would just like to put that on the
9 record.

10 THE COURT: That was in case number 52?

11 MR. VINEYARD: Actually, I believe this was for both
12 cases 38 and 52.

13 THE COURT: All right. But the crime scene being the
14 Lumpkin County jail?

15 MR. VINEYARD: Correct, Your Honor.

16 THE COURT: All right.

17 MS. KEARNS: Your Honor, just for clarification, on
18 the very first motion we got, docket number 10, I had asked for
19 five days to reply, but you gave me ten days in all of the
20 other motions. May I have ten days?

21 THE COURT: Yes. Yes, you may.

22 All right. Before we take up the Daubert hearing,
23 I've got some loose ends I want to tie up in case number 38,
24 and let me ask counsel for both sides, first, apart from the
25 motions that were discussed today -- well, this isn't quite the

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1 way to say it, because I know there are several motions that
2 are pending.

3 What I want to know is what issues, if any, have not
4 yet been addressed by the Court as far as counsel are
5 concerned?

6 And excluding today, today's motions, what I'm aware
7 of would be the motion -- it's docket number 101, and you all
8 may not be able to answer it this way, but the motion by the
9 defendant to bar consideration and imposition of the death
10 penalty due to the improper restriction on the right to weigh
11 the sufficiency of aggravating circumstances, that's docket
12 number 101; the motion to declare the federal death penalty
13 unconstitutional under Ring; the motion to declare the federal

14 death penalty unconstitutional, that's docket number 104, and I
15 think that's what we refer to as your big motion, it's the one
16 with the 80-page brief; docket 105, motion to declare the
17 federal death penalty unconstitutional due to infrequent use;
18 106, motion to strike the constitutionally-invalid aggravating
19 factors from the notice of intent; 111, motion to require the
20 government to provide a more specific notice of intent to seek
21 death penalty; and then the motions relating to the expert
22 witnesses, I'm not sure you all are going to be able to tell me
23 whether there are other motions or issues outstanding in
24 addition to these.

25 But to the extent that you can, if you would, answer

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1 that question. Maybe you can't.

2 MR. KISH: I don't think -- we were just conferring.
3 We think that all of the search motions have been handled.

4 THE COURT: All right.

5 MR. KISH: Obviously, we agree that the motions that
6 you've just enumerated have not yet been ruled upon.

7 THE COURT: Right.

8 MR. KISH: And we are pondering and Mr. Mendelsohn
9 and Ms. Kearns are currently speaking one with the other

10 whether there is anything else, but I don't see them saying
11 anything.

12 MS. KEARNS: I think there were a few, like the
13 victim impact.

14 THE COURT: Which were deferred?

15 MS. KEARNS: Which were deferred, right. So I think
16 the other motions that haven't been ruled on were deferred.

17 THE COURT: All right. And you're not going to waive
18 anything by not saying today that something is still pending.
19 I'm really just trying to get a sense of if there is something
20 that I have overlooked?

21 MR. MENDELSON: Not on that. I don't know of any
22 others that you have overlooked.

23 I do have one thing that I need to bring up with the
24 Court about the timing of the lethal injection proffer.

25 THE COURT: Yes. Well, this is as good a time,

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1 today.

2 MR. MENDELSON: Your Honor, yesterday, we received
3 from Mr. Vineyard a 60-page document that is the first of the
4 2,000 to 3,000 pages to be provided.

5 All that was was a protocol manual used by the Bureau
6 of Prisons. Unfortunately, it has none of the relevant
7 information in it. Information that we're really looking for

8 involves protocols relating to the types of chemicals and the
9 timing and the manner that they are used, that they use at the
10 federal system. None of that's in there.

11 As a result, we have nothing to give to our experts
12 to evaluate; we have nothing from that to proffer to the
13 Court. We are now, by my count, 13 days from the date that our
14 proffer was due and we have a Thanksgiving Holiday in the
15 middle of that and are looking at least 2,000 documents still
16 to come, 2,000 pages of documents still to come.

17 So as things stand now, I don't believe that it's
18 realistic for us to make a proffer on December 1st, as the
19 Court has ordered. So I would want to request another week or
20 two to make that proffer.

21 As the Court saw from our Innocence Project, it's a
22 substantial document that we're trying to prepare, and given
23 2,000 pages still to come, I just don't think it's possible to
24 do that by December the 1st.

25 THE COURT: Mr. Vineyard, can you speak to that?

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1 MR. VINEYARD: Yes, Your Honor. We have provided, as
2 we said we would, the documents that are in the public domain.
3 The other documents referred to as 2,000 to 3,000, some of

4 those are going to be, I suspect, documents that are subject to
5 privilege from production. So I don't think we're going to be
6 producing 2,000 to 3,000, the full amount of that.

7 THE COURT: Well, what about the protocol?

8 MR. VINEYARD: I believe we have provided that, Your
9 Honor, as part of the public documents. I think that was the
10 first thing that we provided.

11 THE COURT: But apparently, it's not what they need.

12 MR. MENDELSON: Correct. It makes no mention of the
13 chemicals used.

14 MR. VINEYARD: It's my understanding it did, Your
15 Honor. I'll review it again to see.

16 I've also conveyed the Court's order about a rolling
17 production of information to the BOP and they are going to do
18 that. They started in earnest on Monday, yesterday with the
19 review of the privileged documents. They have been gathering
20 them. I shouldn't say it has just started; they have been
21 gathering them. But they are in the process of reviewing them
22 for privilege, and we will produce those as they go through
23 them.

24 So another point I would make is that part of the
25 timing issue here is of the defendant's making. I mean, he

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1 could have sought this at a very much earlier date. We have

2 been involved in this case now for a year and a half, and it
3 was only recently that this request was made. And it was made
4 in a 17(c) subpoena that was not served on us. And that sort
5 of maneuvering prevents us from responding promptly to the
6 request.

7 This is a request that could have been made months
8 ago, and so I don't think that the fact that the defendant has
9 delayed in requesting this information ought to, you know, put
10 the government now to the task of promptly trying to meet his
11 deadline.

12 I would ask the Court to hold him to that deadline or
13 close to that deadline with regard to this.

14 THE COURT: Mr. Mendelsohn, are there any provisions
15 in the protocol that you received other than the lack of
16 reference of records to the chemicals?

17 MR. MENDELSON: Well --

18 THE COURT: I don't have a clear understanding of
19 what's -- of what's missing.

20 MR. MENDELSON: Yes, what this document is is a
21 manual used by the Bureau of Prisons, a checklist of things to
22 do in the month or so leading up to an execution.

23 And it would say, you know, the security team has to
24 do these four things and the media team has to do these four
25 things and the administrative people have to do these things.

1 What it doesn't have in it is the types of chemicals
2 that are used, all the real details of the actual execution
3 itself.

4 THE COURT: Well, what else is missing that you're
5 looking for?

6 MR. MENDELSON: Well, that's what we're looking for,
7 Your Honor, and that's just not in there, Your Honor.

8 THE COURT: Well, you know I would think that the
9 government could -- could provide that and should provide it.

10 MR. MENDELSON: Right. And I would also note that
11 our subpoena for this was filed on, I believe it was, October
12 the 8th, so we're close to six weeks that we have been waiting
13 for this material.

14 THE COURT: Mr. Vineyard, can you promptly supply the
15 information about the chemicals?

16 MR. VINEYARD: Your Honor, given the fact that I'm
17 going to be in court this week, I suspect Thursday I can
18 contact my -- contact the BOP and inquire.

19 It was my understanding, Your Honor -- I would have
20 to look through the materials again and see that that
21 information was contained in there. If it wasn't, it may be an
22 oversight, but I will check that and see.

23 MR. MENDELSON: And there are substantial parts that
24 have been blacked out under the Freedom of Information Act
25 that, I guess, they assumed for privilege reasons or others

1 that we're not entitled to, and so it may be that the parts
2 that contain that information have been blacked out.

3 THE COURT: All right. I do think that they are
4 entitled to that information, Mr. Vineyard. I am going to hold
5 you to the deadline of December 1, and if that needs to be
6 revisited as well, then, we will revisit it, but at this point,
7 I'm expecting the proffer to be complete by December 1.

8 MR. VINEYARD: Your Honor, may I raise just one
9 question about the timing on the motion for reconsideration,
10 since we are approaching the end of the month?

11 I think our intention is to file something by the end
12 of this week, our response to their motion for
13 reconsideration. I think the Court has given them ten days to
14 file a response to that.

15 Could we have a more expedited reply time, if we, in
16 fact, are able to file our response by Friday, so that we're
17 not up against the deadline and still waiting for a response
18 from the defense?

19 THE COURT: Yes, since it is a motion for
20 reconsideration, I'll give them a five-day period.

21 I have a question for the defense about the proffer
22 on this innocence proffer. And it's really -- I noticed the
23 way it was docketed, the docketing indicated that it was
24 addressed to several motions, and I didn't understand why it

25 was docketed that way.

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1 Did counsel suggest to the clerk that it be docketed
2 a certain way, or was that something that she took it upon
3 herself to do?

4 MR. MENDELSON: I believe that was done in the
5 clerk's office. We simply presented the --

6 THE COURT: Okay. All right. It just didn't quite
7 make sense to me the way it was docketed.

8 MR. MENDELSON: No, no. It just goes to the big
9 motion, is the one that --

10 THE COURT: Yes. Right. Right. All right.

11 I also have a question, and this really goes to have
12 I overlooked something, in the defendant's motion to bar
13 consideration and imposition of the death penalty due to
14 improper restriction on right to weigh sufficiency of
15 aggravating circumstances, which is, docket number 101, the
16 defense states in another motion, "Defendant challenged the
17 statute insofar as it required a defendant prove the existence
18 of mitigating circumstances by a preponderance of the
19 evidence," and that's on page one of the motion.

20 The docket number of whatever motion that is is not
21 referred to and we have not found such a motion in the

22 remaining motions.

23 MS. KEARNS: Judge, we will have to get back to you
24 on that, and we will have to look at it. I think that actually
25 it is not the title of the other motion but the argument is

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1 made in the weighing. It's definitely not the title of another
2 motion, but I think it is an argument that is embodied within
3 another motion that was filed, and we have to look at it to
4 identify what it is. We will call your office and get right
5 back to you.

6 THE COURT: Please, yes. Yes, I don't want to
7 overlook that, but frankly, we haven't found it.

8 Okay. I think that's all I had before we begin the
9 Daubert hearing. Is there anything from either side before we
10 start the Daubert hearing? Mr. Vineyard?

11 MR. VINEYARD: If I could just have maybe five
12 minutes to meet, we have some charts, and get them set up and
13 ready to go? I think it will expedite the proceedings, Your
14 Honor.

15 THE COURT: All right. Mr. Kish?

16 MR. KISH: The only thing we would like to do is
17 invoke the Rule of Sequestration, but based upon what

18 Mr. Vineyard said earlier, the only people would be Mr. Anthony
19 and this lady who would be flying down from D.C., so that
20 should not be an issue.

21 MR. VINEYARD: An that would follow for the defense
22 experts?

23 MR. KISH: Yes. They're not here today.

24 MR. VINEYARD: Your Honor, my point is if Ms.
25 Jackson's testimony rolls over until tomorrow morning, their

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1 expert would also be excluded from the courtroom for their
2 testimony.

3 MR. KISH: That's fine.

4 THE COURT: All right. The rule is invoked.

5 MR. KISH: Thank you.

6 THE COURT: All right. We will take a 15-minute
7 recess.

8 (A recess was had, after which the following proceedings
9 were continued in open court.)

10 (Defendant LeCroy present.)

11 THE COURT: Let me address a couple of things before
12 we begin,. I understand that the people, the spectators, were
13 having a hard time hearing and, in some cases, the court
14 reporter was also having trouble hearing the lawyers. So if

15 the lawyers will speak at the lectern, please, that will help.

16 Let me ask you, Mr. Vineyard, what you anticipate the
17 schedule to be today, so that we can make a schedule, including
18 a lunch break.

19 MR. VINEYARD: Yes, Your Honor. I expect that
20 Mr. Anthony's direct testimony may take 45 minutes, should be
21 no more than an hour. Ms. Jackson, I'm told, is trying to get
22 her flight to arrive here, but it looks like it would be later
23 this afternoon before she could reach Gainesville, as in
24 probably 4:00 o'clock.

25 I discussed with Mr. Kish the prospect of having Ms.

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1 Jackson testify first tomorrow morning and that would still
2 allow time for his expert, Mr. Denbeaux, to testify, so it
3 might be wise, unless I'm told over the lunch hour of a change
4 of Ms. Jackson's flight arrangements, to just take
5 Mr. Anthony's testimony today.

6 Mr. Kish indicated his cross would be longer than one
7 hour.

8 MR. KISH: That's true, Judge.

9 THE COURT: All right.

10 MR. VINEYARD: And if by chance, she can get here
11 earlier and we can start her testimony this afternoon,
12 certainly, that would be fine.

13 THE COURT: I do want the defense to have some time
14 to prepare their cross-examination, obviously. So tomorrow
15 is Denbeaux?

16 MR. KISH: Yes, Judge.

17 THE COURT: And how long do you think his testimony
18 will take?

19 MR. KISH: I would guess it would be about two hours.

20 THE COURT: All right. And do you have any idea how
21 long your cross would take?

22 MR. VINEYARD: I would think no more than 45 minutes,
23 Your Honor, to an hour.

24 THE COURT: All right. And so we have set aside the
25 entire day tomorrow.

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1 All right. Well, it may be that we will take a
2 substantial break following her testimony, if it turns out that
3 she testifies in the morning, meaning Ms. Jackson.

4 All right. And one other thing I wanted to ask
5 Mr. Vineyard about the protocol. It seems to me that someone
6 in your office, even though you're here and Mr. Burby is here,
7 ought to be able to get the information about the chemicals
8 promptly to the defense and by the end of the day, or by

9 tomorrow.

10 Isn't there some way that you can arrange for that to
11 happen?

12 MR. VINEYARD: Well, we will certainly -- I don't
13 have the numbers with me, Your Honor, but I presume we can find
14 the numbers for the BOP person and over the lunch hour,
15 perhaps, try to make contact with them and report back to you
16 after the lunch hour --

17 THE COURT: All right.

18 MR. VINEYARD: -- what we have learned.

19 THE COURT: All right. What we will do is we will, I
20 think, just have you do the direct examination today of --
21 before lunch of Mr. Anthony, and then do his cross-examination
22 after lunch, if that's agreeable?

23 MR. KISH: That's fine, Judge.

24 THE COURT: All right.

25 MR. VINEYARD: That's fine, Your Honor.

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1 THE COURT: You may proceed, then, Mr. Vineyard.

2 MR. VINEYARD: Your Honor, the government calls Art
3 Anthony to the stand, if Mr. Anthony could be administered the
4 oath, please.

5 THE DEPUTY CLERK: Please stand and raise your right

6 hand.

7 ARTHUR G. ANTHONY, GOVERNMENT WITNESS, SWORN

8 THE DEPUTY CLERK: Please be seated, and state your
9 full name for the record.

10 THE WITNESS: Arthur G. Anthony.

11 DIRECT EXAMINATION

12 BY MR. VINEYARD:

13 Q. How are you employed, Mr. Anthony?

14 A. I'm a forensic document examiner with the Georgia Bureau
15 of Investigation's Division of Forensic Sciences, which is more
16 commonly referred to as the Georgia State Crime Lab.

17 Q. And, sir, what is your position at the GBI crime lab?

18 A. I'm the supervisor of the questioned documents and the
19 forensic photography section.

20 Q. And how long have you held that position, sir?

21 A. For about six or seven years, now.

22 Q. Were you employed by the GBI prior to holding your current
23 position?

24 A. Yes. I've been employed by the GBI since 1981.

25 Q. And in what capacity were you employed before becoming the

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1 head of your section?

2 A. As a forensic document examiner, or handwriting expert.

3 Q. Sir, how long have you been in the field of forensic
4 document examination?

5 A. I've been working in this field for approximately 27 years
6 now.

7 Q. And, sir, how did you get into the field of forensic
8 document examination?

9 A. Well, I was employed by the Federal Bureau of
10 Investigation in Washington, D.C., and I applied to transfer
11 from the computer division to the laboratory division. And in
12 1976, after a testing process, I was accepted as a physical
13 science technician in the questioned document section of the
14 FBI laboratory.

15 Q. And what testing process did you go through to be accepted
16 into that program?

17 A. There were several types of examinations and also a form
18 blindness test, which tested my aptitude for working in this
19 field.

20 Q. And were you accepted into that program after this
21 testing?

22 A. Yes.

23 Q. And, sir, what kind of training did you receive at the
24 FBI?

25 A. As a physical science technician, my training program was

1 a part-time program, where I attended lectures and classes in
2 the identification of writing, the detection of forgery, as
3 well as other aspects of the work. And then, I worked in the
4 FBI's questioned documents section for approximately three
5 years.

6 Q. Okay. And what sort of training did you receive, what
7 specifically sort of things did you do while you were with the
8 FBI?

9 A. Well, I assisted forensic document experts in the
10 preparation of cases; I did comparisons and file searches such
11 as the bank robbery note file, making comparisons to see if you
12 could associate individuals with having prepared bank robbery
13 notes. There is various types of files that were searched. I
14 prepared preliminary reports to the document examiners, who
15 then did a full-blown analysis and reported.

16 Q. And how long did you work at the FBI, sir?

17 A. For a total of five years but for approximately three
18 years in the laboratory division.

19 Q. Okay. And where did you go, what was your employment
20 after leaving the FBI?

21 A. Well, after I left the FBI, I accepted a position with the
22 Illinois State Crime Laboratory, because I wanted to become a
23 forensic document examiner, and I apprenticed under the chief
24 forensic document examiner for the Illinois state police crime
25 laboratory for a little under a year and was then released to

1 perform independent casework in a regional laboratory in a
2 southern part of the state.

3 Q. Okay. And who did you apprentice under at Illinois?

4 A. Stephen McKasson.

5 Q. And could you just briefly relate to the Court Mr.
6 McKasson's credentials?

7 A. Yes. Your Honor, Mr. McKasson was a former postal
8 inspector, a document examiner who worked in the Chicago
9 laboratory, and Illinois started a document program and he
10 became the chief examiner for the state and hired other
11 individuals to work under him. And he is an author of a book
12 and is currently in private practice.

13 Q. Is he recognized as an expert in the field of forensic
14 document examination?

15 MR. KISH: Judge, I'm going to object to that,
16 recognized as an expert. I think we have seen a number of
17 reports that have had different points of view.

18 I don't think that's quite -- we have to be careful,
19 I guess my point is, on how we use the term "expert" and
20 "accepted as an expert." So I will object to the form of the
21 question.

22 THE COURT: Can you clarify your question?

23 MR. VINEYARD: Yes, Your Honor.

24 BY MR. VINEYARD:

25 Q. Is Mr. McKasson, to your knowledge, Mr. Anthony, been

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1 qualified in court as a forensic document examiner to give
2 expert testimony?

3 A. Yes, he has, on numerous occasions.

4 Q. And has he been recognized in the field for his expertise?

5 A. Yes, he has. In fact, he has lectured all over the world
6 and was hired by the Chinese government to instruct their
7 document experts for approximately over a year's period.

8 Q. And, sir, how long did you apprentice under Mr. McKasson?

9 A. It was just slightly under one year.

10 Q. And can you describe in general what that apprenticeship
11 entailed?

12 A. It entailed attending lectures and classes and also taking
13 examinations in various aspects of the work.

14 Q. And you said "taking examinations"; what sort of
15 examinations were you taking?

16 A. Competency-type tests, where the answer to problems are
17 known and given to you to examine and to come up with
18 conclusions.

19 Q. Were you required to pass those competency tests to
20 continue in your apprenticeship and your employment at the
21 Illinois crime lab?

22 A. Yes.

23 Q. And did you successfully complete those competency
24 examinations?

25 A. Yes, I did.

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1 Q. And after you said a period of approximately a year, you
2 then began working as a forensic document examiner on your own?

3 A. Yes.

4 Q. At the Illinois crime lab?

5 A. Yes, with cases being peer-reviewed, though.

6 Q. Okay. Now, and that led you then, ultimately, to the GBI;
7 was that your next employment after leaving the Illinois crime
8 lab?

9 A. Yes, it was. I accepted an opening and started employment
10 with the GBI's crime lab in November of 1981.

11 Q. And just so we're clear, you were at the Illinois crime
12 lab from 1978 through 1981?

13 A. Yes.

14 Q. Now, sir, have you continued to attend conferences and
15 seminars in the field of forensic document examination during
16 your career?

17 A. Yes, I have.

18 Q. And do you also present and publish papers in your field?

19 A. Yes, I do.

20 Q. And have you had occasion to train other forensic document
21 examiners?

22 A. I have.

23 Q. Now, sir, you've mentioned also that in your current
24 position, you are head of the forensic laboratory as well as
25 the photography department; is that correct?

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1 A. Forensic photography. It's a dual section, Your Honor;
2 it's questioned documents and forensic photography.

3 Q. And what are the other disciplines within questioned
4 documents? We're here talking about handwriting examination,
5 but what other expertise do you have in that field of forensic
6 science?

7 A. The examination of inks non-destructively through infrared
8 inspection, also the examination of manipulated documents, the
9 processing of documents non-destructively for indented
10 handwriting impressions. In general, when a question arises as
11 to the authenticity of a document or who prepared it or how it
12 was prepared, many times, it's submitted to the laboratory for
13 analysis.

14 Q. Mr. Anthony, how many forensic document examiners work
15 under your supervision currently at the GBI?

16 A. Two.

17 Q. And in the past, have there been more forensic document
18 examiners under your supervision at the GBI?
19 A. No. Just two.
20 Q. Okay. And, sir, are you a member of any professional
21 associations?
22 A. Yes, I am.
23 Q. And could you summarize for the Court those associations
24 that you're a member of?
25 A. I'm a fellow of the American Academy of Forensic Sciences,

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1 Your Honor, which is a national organization comprised of
2 individuals practicing in the various fields of forensic work.
3 I'm also a regular member of the American Society of Questioned
4 Document Examiners, which is an organization comprising of
5 forensic document experts throughout the United States and some
6 foreign countries. I'm certified by the American Board of
7 Forensic Document Examiners, and I'm also a member of the
8 Southeastern Association of Forensic Document Examiners, which
9 is a regional organization comprising of people in my field
10 from the southeastern states.
11 Q. Sir, you mentioned that you were certified by the American
12 Board of Forensic Document Examiners; is that referred to as
13 ABFDE?

14 A. Yes, it is.

15 Q. And, sir, when did you become certified by ABFDE?

16 A. In 1984.

17 Q. And can you explain to the Court the process required to
18 obtain certification by the ABFDE?

19 A. Yes. It's several stages of testing. The initial aspect
20 or phase is a written examination, and if you pass that, then,
21 you go on to a practical examination phase, examining five
22 different types of forensic problems, forensic document
23 problems, and then there is an oral board, where you prepare
24 each of those cases as if you were going to testify to them in
25 court and the Board selects three out of the five and questions

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1 you on your opinions.

2 Q. Mr. Anthony, did you have the opportunity to be
3 grandfathered into the certification program of the ABFDE?

4 A. Yes. I was eligible to grandfather into the certification
5 board; however, because of my background as a physical science
6 technician, I felt that I would be better served to take the
7 examination process to demonstrate my capabilities in the
8 field.

9 Q. And you successfully completed those examinations to
10 obtain your certification in 1984?

11 A. That's correct.

12 Q. Is there any further testing or recertification for the
13 ABFDE?

14 A. Yes, there is.

15 Q. And explain to the Court what that involves, please.

16 A. You must obtain points similar to education points over a
17 five-year period, the minimum being 50, and it shows,
18 demonstrates that you are keeping current in the field, such as
19 presenting papers, publishing papers, attending meetings and
20 workshops and seminars.

21 Q. Mr. Anthony, I'm going to show you what's marked for
22 identification as Government's Exhibit 1 and ask you to
23 identify this for us, please, sir.

24 A. (Witness reviews document.)

25 (Pause in the proceedings.)

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1 THE WITNESS: It's a copy of my resume or curriculum
2 vitae.

3 BY MR. VINEYARD:

4 Q. And does that accurately depict your experience and your
5 education, as well as certain publications that you have made?

6 A. Yes, with the exception that there is an additional
7 publication that should be added to it.

8 MR. VINEYARD: Your Honor, I offer Government's
9 Exhibit 1 at this time.

10 MR. KISH: I have no objection, Judge.

11 THE COURT: It's admitted.

12 BY MR. VINEYARD:

13 Q. Mr. Anthony, I failed to ask you, if you would, to
14 summarize your educational background for us.

15 A. Well, I have a bachelor of science degree which was
16 awarded at Central Missouri State University, and I received
17 the bachelor of science in 1972.

18 Q. Mr. Anthony, I'm turning to page 3 of your CV and I notice
19 there is a list of publications and papers, and among those are
20 papers that are published in the Journal of Forensic Sciences.

21 What is the Journal of Forensic Sciences, Mr. Anthony?

22 A. It's a peer review journal, and it's the official
23 publication of the American Academy of Forensic Sciences.

24 THE COURT: And when you say it's a peer review
25 journal, what do you mean by that?

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1 A. That articles that are submitted are reviewed by peers in
2 the particular discipline that you work in before it's accepted
3 for publication.

4 Q. Now, in addition to publishing in peer-review journals

5 like the Journal of Forensic Science, do you also present
6 papers at seminars and conferences with other forensic document
7 examiners?

8 A. Yes. At both the meetings of the American Academy of
9 Forensic Sciences, the American Society of Questioned Document
10 Examiners, and also the Southeastern Association of Forensic
11 Document Examiners, I've presented papers at all of those
12 meetings.

13 Q. And those are to your peers?

14 A. Yes.

15 Q. Sir, approximately how many times have you been qualified
16 to testify in court as an expert in forensic document
17 examination?

18 A. I've testified at trials, hearings and depositions in
19 excess of 250 times. I've probably testified at trial probably
20 175 times.

21 Q. Okay. And when it wasn't in trial, it was in some other
22 setting such as a hearing or a deposition?

23 A. Such as like today, yes.

24 Q. In fact, sir, have you been qualified as an expert in the
25 field of forensic document examination in the Northern District

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1 of Georgia, in the federal district courts?

2 A. On a number of occasions, yes.

3 Q. And, sir, have you had occasion to go through a Daubert
4 hearing before today?

5 A. Yes.

6 Q. And did you, in fact, go through a Daubert hearing in a
7 case prosecuted in this district, the United States versus
8 Kirby?

9 A. Yes, that was the case.

10 Q. Sir, do you recall anything about that case?

11 A. About the hearing or the case?

12 Q. About the case or the hearing, either one.

13 A. Yes. It was a handwriting problem that was submitted by
14 the Federal Bureau of Investigation to our laboratory for
15 analysis.

16 It consisted of several threatening communications,
17 Your Honor, written by Terry Kirby to the director and other
18 officials of the Federal Bureau of Prisons.

19 Q. Sir, do you remember those particular writings and whether
20 they were cursive or printing?

21 A. They were both. They were hand-printed letters and the
22 signature was cursive on the documents.

23 Q. And, sir, you went through a Daubert hearing in the Kirby
24 case; were you found to be qualified to give testimony as a
25 forensic document examiner in that case?

1 A. It's my understanding that Judge Baverman did recommend
2 that I be permitted to testify at trial.

3 Q. In fact, did that case go to trial, to your knowledge?

4 A. It did; however, my testimony was stipulated to.

5 Q. Sir, are there occasions in which you conduct analysis of
6 questioned documents in which you don't actually testify in any
7 court proceeding or hearing?

8 A. On many occasions.

9 Q. And what sort of circumstances -- strike that.

10 Approximately how many times do you think that has
11 occurred, where you have actually conducted an analysis but it
12 didn't result in you actually going to court in addition to the
13 more than 250 times that you have been into a courtroom or
14 other hearing?

15 A. Well, I would have to say many thousands.

16 Q. Is there any way for you to estimate the total number of
17 exams you have conducted in your more than 20-year career?

18 A. No.

19 Q. In addition to conducting examinations for your own cases,
20 do you do peer review for other forensic document examiners in
21 your lab?

22 A. Yes, I do.

23 Q. And have you done peer review at the Illinois, for
24 example?

25 A. Yes, from time to time, I did.

1 Q. Okay. And certainly, in your lab, the GBI lab, you
2 conduct peer review for the other examiners; is that correct?

3 A. In our laboratory, Your Honor, peer review is 100 percent
4 of cases submitted.

5 Q. Okay. I want to talk to you a few minutes about the GBI
6 crime lab; does it hold any accreditation, sir?

7 A. It does.

8 Q. And what are those?

9 A. It holds two accreditations, one from approximately 19 --
10 excuse me, 2000, we were accredited by the international
11 standards organization, which is referred to as ISO, and we
12 have been recertified by them or re-accredited by them last
13 month. And we're also accredited by the American Society of
14 Crime Laboratory Directors.

15 Q. I want to talk to you for a few minutes about the ISO
16 accreditation. Are all crime labs accredited, to your
17 knowledge, by ISO in the United States?

18 A. No. Up until just recently, we were the only laboratory
19 that held that certification. There are some toxicology
20 laboratories, I believe one in Florida, that is involved in the
21 racing industry that is ISO certified as well, but we're the
22 only forensic lab to my knowledge currently accredited by the

23 International Standards Organization.

24 Q. And what did your lab and the GBI crime lab do to obtain
25 that accreditation by the international standards organization?

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1 A. We developed protocols and procedures on how to examine
2 physical evidence and also came up with a standardization
3 process so that toxicologists, for instance, in the Atlanta
4 laboratory are doing the same type of analysis as those in our
5 Savannah laboratory. It's a standardization process.

6 Q. And --

7 A. -- to ensure that the quality of our work is of the
8 highest caliber.

9 Q. Does your ISO accreditation require any auditing?

10 A. Yes, there are internal audits done by our own staff, and
11 then there are external audits from experts from outside our
12 department that come periodically and inspect various aspects
13 of the laboratory.

14 As I mentioned, last month, we did a total inspection
15 of all disciplines and all laboratories by the National
16 Forensic Center Technology Center, which is our accrediting
17 body currently.

18 Q. You also mentioned that your lab is accredited by the

19 American Society of Crime Lab Directors; is that correct?

20 A. Yes.

21 Q. And what did the Georgia crime lab process -- what did it
22 go through to obtain that certification?

23 A. Pretty much the same as the ISO inspection. ASCLD is a
24 certifying board in the United States that certifies crime
25 laboratories, but we felt that we wanted to do the

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1 international standard, since ASCLD will more than likely adopt
2 those at some point in time.

3 Q. And what sort of quality control measures are in place
4 within your lab as required either by these certifications or
5 by your own procedures?

6 A. Well, there is procedures that we follow. There is a
7 standardized work sheet that must be completed during the
8 analysis of evidence. Also portions are documented digitally
9 into the case record for a peer reviewer to reevaluate, if you
10 will, that the opinions reached or expressed are correct.

11 Q. Is your own work subject to peer review within your lab?

12 A. Yes.

13 Q. And could you identify for us who the other forensic
14 document examiners are and just generally what their experience
15 is?

16 A. Betty Gayton conducts probably the majority of my peer
17 review work. She works for me and has been with the lab, I
18 believe, about 15 years and in the section for probably going
19 on eight to ten years now.

20 Brian McVicker just joined our staff several years
21 ago, and he is just currently out of training the last several
22 months.

23 Q. Mr. Anthony, you've mentioned that you follow certain
24 procedures in conducting your analysis; could you describe for
25 the Court what those procedures are?

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1 A. Well, I refer to them as comparison, examination, excuse
2 me, comparison, evaluation and verification. There is no set
3 way in which I begin examining a case; however, typically, I
4 would assess the questioned document which was submitted to see
5 if the writing is sufficient in length, also whether it's
6 clear, is it an original or a photocopy, and then, I assess the
7 writing features in that questioned document.

8 I exam then the known standards which are submitted
9 as the writings of a particular individual to determine, number
10 one, were they all authored in my opinion by one individual,
11 and then I assess the characteristics in that sample of

12 writing. And then I do comparisons of both, evaluating the
13 handwriting features in the questioned and the known document.
14 And if there are sufficient individual idiosyncracies or habit
15 patterns preset in the questioned and the known, then an
16 opinion can be rendered on the positive side of the scale, if
17 you will.

18 Conversely, if there are significant differences
19 between the two sets of the writing, then an elimination
20 opinion would be expressed.

21 Q. Now, Mr. Anthony, these procedures you have described, are
22 they followed by other forensic document examiners or are these
23 unique to yourself?

24 A. No. They are pretty much standard throughout the
25 discipline.

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1 Q. And are there any guidelines that have been published?

2 A. Currently, there is a scientific working group in
3 questioned documents that I -- I'm not positive if any
4 guidelines have been ultimately published; however, they are
5 working on specific guidelines currently in the comparison of
6 writing.

7 Q. Okay. And does your process substantially comport with
8 those procedures or guidelines?

9 A. From what I've seen, yes.

10 Q. Now, sir, you briefly explained or touched on the process
11 that you go through; does it result in a range or could it
12 result in a range of opinions?

13 A. Yes.

14 Q. And could you explain to the Court what those range of
15 opinions could be?

16 A. There are guidelines for reporting questioned document
17 opinions published by the American Society of Testing
18 Materials, which has a nine-scale reporting scale from positive
19 identification to highly probable to probable indications, no
20 conclusion, and then on their negative side would be
21 indications that someone did not, someone probably did not,
22 highly probably did not or did not.

23 Our laboratory has modified that to a seven scale,
24 eliminating the highly probable on either end, just reporting
25 out either no conclusions, indications did or did not, probably

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1 did or did not, and then, a positive identification and a
2 positive elimination.

3 Q. And, sir, can you describe what sort of things you look
4 for as an expert when you examine handwriting, what are the

5 types of things you're looking for to make your opinion?

6 A. I'm looking for not only general handwriting features,
7 features that are shared by many people that are common, common
8 types of forms, letter forms of designs, but I'm also looking
9 for those nuances, those idiosyncracies that we all impart into
10 our writing, because we are individuals, and these
11 idiosyncracies or nuances are what is important in making an
12 identification or an elimination.

13 Q. Okay. And you've mentioned a couple of times now
14 identification or elimination; are those both parts of your
15 examination determination?

16 A. Yes.

17 Q. Okay. Now, sir, do you use any equipment in conducting
18 your examination of questioned documents?

19 A. Yes, I do.

20 Q. What types of equipment do you use, sir?

21 A. Hand magnifiers, stereo microscopes, infrared inspection
22 equipment, ultraviolet light sources, an instrument that
23 processes documents electrostatically for indented handwriting
24 impressions.

25 Q. And do you also work in conjunction with the photography

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2 testify?

3 A. Yes.

4 Q. And what sort of equipment are y'all using in the Georgia
5 crime lab, photography equipment?

6 A. We have gone totally digital since 2001. We use digital
7 cameras, scanners and digital printers for all of our work
8 currently.

9 Q. And, sir, when you complete your review of questioned
10 documents, do you prepare your written report?

11 A. Yes, I do.

12 Q. And do you also prepare what's called a work sheet?

13 A. Yes.

14 Q. And does a work sheet reflect what you've done in
15 connection with that examination?

16 A. Yes.

17 Q. Or let me ask you, what does it reflect?

18 A. It assesses what types of documents were examined; it also
19 looks at what type of features such as are they originals
20 versus copies, photographs, the size of the writing, is it, you
21 know, contemporary, the height relationships, letter designs.
22 It's somewhat of a checklist to verify that you are looking at
23 the document in detail and not doing just a cursory
24 examination.

25 Q. Sir, are you familiar with the tenets underlying document

1 examination?

2 A. Yes.

3 Q. And what is the chief tenet of the field?

4 A. Basically, it states that no two people write exactly
5 alike.

6 That is a variation or version of what I would refer
7 to as the theory of uniqueness, Your Honor, that is, that
8 everything is unique and we, as individuals, are unique;
9 therefore, the factors which go into our writing, such as
10 eye/hand coordination abilities, our motor skills, our neural
11 system are all individually unique to us and, therefore, we
12 impart little idiosyncracies in our writing, those telltale
13 signs that identify us as the writer of a particular signature
14 or writing.

15 Q. And is that tenet or principle accepted within the field
16 of forensic document examination?

17 A. Yes.

18 Q. Sir, are you aware of any studies that have been done that
19 support that tenet?

20 A. There have been many studies that have tried to prove the
21 individuality of handwriting; however, the most current one and
22 the one that I believe is probably the most serious piece of
23 research into that field is titled "Individuality of
24 Handwriting," which was published in the Journal of Forensic
25 Sciences by Dr. Srihari and his colleagues at the University

1 System of New York at Buffalo. And I understand that either
2 Dr. Srihari or an affidavit of his is going to be submitted
3 explaining his work.

4 Q. Are you familiar with any other studies other than
5 Dr. Srihari's that have been done, perhaps, that preceded Dr.
6 Srihari's work?

7 A. As I mentioned, there are several. I can't recall --
8 concerning the individuality of writing?

9 Q. Yes, sir.

10 A. I can't recall the titles, offhand.

11 Q. Have there been, for example, studies of twins?

12 A. Yes, there have been several. The first, to my knowledge,
13 was done by Ms. Mary Beacon, who is the first forensic document
14 examiner for the Georgia Bureau of Investigation's crime
15 laboratory back in 1960 where she examined the writing of twins
16 and came to the conclusion that twins' writing could be
17 differentiated from one another.

18 Q. And, likewise, let me back up to Dr. Srihari stated that
19 it did, in fact, support the finding of uniqueness among
20 individuals in writing?

21 A. Yes. His work states that -- it is with machine
22 examination of writing, Your Honor, and, evidently, machines

23 can come up with currently a 98 percent greater success, if you
24 will.

25 But Dr. Srihari also notes that forensic specialists

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1 in my field would more than likely have a higher success rate,
2 since machines cannot perceive those telltale nuances that I
3 was referring to earlier, at least, they can't currently.

4 Q. Sir, are you aware of any studies supporting the concept
5 that forensic document examiners are better at examining
6 questioned documents than are laypersons?

7 A. Yes, I am.

8 Q. And what sort of studies have been done in that area?

9 A. Dr. Moshe Kam of Drexel University, he is the professor in
10 the data fusion laboratory -- he is an engineer, basically, and
11 computer scientist -- tested individuals working in my field
12 because of criticism by critics to see if professionals were
13 better at examining writing than lay individuals, and his
14 testing in our field has demonstrated that we are better than a
15 lay individual or a nonprofessional in identifying writing.

16 In fact, his one work shows that there is a
17 discipline error rate of approximately six percent in
18 mis-identifications, and the lay public or the nonprofessional

19 had a mis-identification rate of approximately 38 percent.

20 Q. And Dr. Kam has published several papers on his research;
21 is that correct?

22 A. Yes, he has.

23 Q. Are you familiar with whether he has published any papers
24 addressing the issue of hand printing and the ability of
25 professionals to render opinions on hand-printed documents?

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1 A. He has. He had data as far back, I believe he says, from
2 1996 or '97, and because of criticism by individuals concerning
3 our -- "our" being the experts -- ability to compare hand
4 printing, published an article in the current Journal of
5 Forensic Sciences which came out this month addressing that
6 issue.

7 Q. Now, Mr. Anthony, have you been asked to examine certain
8 documents in this case?

9 A. Yes, I have.

10 Q. Okay. I'm going to show you what's marked for
11 identification as Government Exhibits 2 through 6. I tender to
12 you these exhibits.

13 MR. VINEYARD: Photocopies, Your Honor, have been
14 offered as exhibits --

15 THE COURT: All right.

16 MR. VINEYARD: -- rather than the originals.

17 THE WITNESS: (Reviews documents.)

18 (Pause in the proceedings.)

19 THE WITNESS: Yes, these are copies of the documents
20 that I examined.

21 MR. VINEYARD: Your Honor, I would offer for
22 admission Government Exhibits 2 through 6 at this time.

23 MR. KISH: Judge, Government's Exhibits 2, 3, 4 and 5
24 are things to which we have no objection for purposes of this
25 hearing.

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1 Government's Exhibit Number 6 is this digital
2 photocopy of a note, ostensibly, a photograph taken many months
3 ago at the Lumpkin County jail, to which we have our other
4 objections that we discussed earlier concerning the destruction
5 of the original note.

6 I simply want to make sure that we don't waive any
7 such objection by allowing testimony concerning Mr. Anthony's
8 examination of that photograph. But with that caveat, we have
9 no objection to that.

10 THE COURT: The exhibits, then, 2 through 6 are
11 admitted for purposes of this hearing.

12 BY MR. VINEYARD:

13 Q. Mr. Anthony, did you follow the same procedures in
14 examining these documents, that is, Government Exhibits 2
15 through 6, that you have testified about here today?

16 A. Yes, I did.

17 Q. And those are procedures that are followed within the
18 field of forensic document examination?

19 A. Yes.

20 Q. Sir, were you in conducting your analysis provided known
21 writing samples to compare to the questioned documents?

22 A. Yes, I was.

23 Q. I'm going to show you what's marked for identification as
24 Government's Exhibits 13 and 14 and ask if you recognize these
25 exhibits, sir.

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1 A. (Reviews exhibits.)

2 (Pause in the proceedings.)

3 THE WITNESS: Yes. These are copies of documents
4 that were submitted to me for comparison purposes.

5 MR. VINEYARD: Your Honor, I tender Government
6 Exhibits 13 and 14 at this time.

7 MR. KISH: Judge, can I voir dire on these two
8 exhibits before I state my position on their admissibility?

9 THE COURT: Yes.

10 MR. KISH: Thank you.

11 CROSS-EXAMINATION

12 BY MR. KISH:

13 Q. Mr. Anthony, the one that has been --

14 MR. KISH: Oh, great. Thank you, Russell.

15 BY MR. KISH:

16 Q. Do you have copies in front of you or not?

17 A. I have copies, yes.

18 Q. Let me show you the originals, if I could. I just want to
19 make sure I have our numbering system straight here.

20 The one that Mr. Vineyard has marked as Government's
21 Exhibit Number 13 also has a yellow sticky on it that has the
22 numbers 21-D and then a parenthesis and a K. The one that has
23 been marked as Government's Exhibit Number 14 has a yellow
24 sticky on it with the markings of the letters of 26 and then
25 the parenthesis of K.

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1 Those numbers on those yellow stickies, do those
2 numbers associate with something that happened in your lab?

3 A. Yes. They are laboratory exhibit numbers.

4 Q. Okay. It's my understanding that you rendered two
5 separate opinions during your examination of the writings

6 involving my client; is that right?

7 A. At least two.

8 Q. Okay. There is more than two opinions? I mean, I say
9 "opinions"; two reports that you have authored, would that be
10 right?

11 A. There is a total of three, possibly more.

12 Q. Okay. The one that has the yellow sticky with the letters
13 21-D, is that the first set of documents that you examined or
14 was the one with the yellow sticky of 26 the first set of
15 documents, known documents, that you examined?

16 A. Government's Exhibit 13, which is my exhibit 21-D, was the
17 first set of known documents I examined.

18 Q. Okay. That's what I needed.

19 MR. KISH: With that, those questions, Judge, thank
20 you, I have no objection. Thank you.

21 THE COURT: All right.

22 DIRECT EXAMINATION (RESUMED)

23 BY MR. VINEYARD:

24 Q. Mr. Anthony, you testified that you prepare reports
25 following your examinations. Have you prepared reports in this

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1 case, sir?

2 A. Yes, I have.

3 Q. I'm going to show you what's marked for identification as
4 Government's Exhibits 7, 8 and 9 and, if you would, just
5 identify by date your reports, sir.

6 A. Government's Exhibit Number 7 is dated March the 12th,
7 2002; Government's Exhibit 8 is dated August the 1st, 2002; and
8 Government's Exhibit 9 is dated November 13th, 2003.

9 Q. And those are all reports that you prepared in connection
10 with your examination of the exhibits 2 through 6, or some
11 parts of those?

12 A. Yes.

13 MR. VINEYARD: Your Honor, I tender Government
14 Exhibits 7, 8 and 9 at this time.

15 MR. KISH: No objection, Your Honor.

16 THE COURT: All right. They are admitted.

17 BY MR. VINEYARD:

18 Q. I want to hand you back Government's Exhibit 7 and just
19 for the record, so we're clear, if you would, tell the Court
20 what your opinion was as reflected in Government's Exhibit 7?

21 A. That William LeCroy, designated as item 21-D, prepared the
22 item on item 21-C. LeCroy probably prepared the item 21-A
23 note. A conclusion whether or not LeCroy prepared the writing
24 on 21-B could not be reached.

25 Q. Okay. And for the record, I'm going to go back to

1 Government Exhibits 2, 3, 4 and 5 and just have you, for the
2 record, identify Government Exhibit 2 was assigned what number
3 in your laboratory?

4 A. 21-A.

5 Q. And Government's Exhibit 3 was assigned what number?

6 A. 21-B.

7 Q. And Government's Exhibits 4 and 5 have been separated for
8 purposes of this hearing as separate exhibits, but could you
9 describe the condition of those two notes and what they are
10 designated?

11 A. Your Honor, these two notes on Government's Exhibits 4 and
12 5 were written on a large topographical type map, or a portion
13 of a large topographical type map, and it took two copies to
14 get both notes copies.

15 Q. And they are assigned a single number for that reason,
16 because they are on a single piece of paper?

17 A. That's correct. 21-C is our exhibit number.

18 Q. A conclusion could not be reached by you with regard to
19 21-B, according to your report; is that right, Mr. Anthony?

20 A. Initially, yes.

21 Q. Initially?

22 A. (Nods head affirmatively.)

23 Q. And that is Government Exhibit 3, which is the list that
24 has a heading, "Need to Acquire"?

25 A. That's correct.

1 Q. Did you request additional handwriting samples be obtained
2 for your comparison?

3 A. I requested additional cursive writing for comparison with
4 this document.

5 Q. And did that result in you being provided what has been
6 marked for identification and admitted as Government's Exhibit
7 14?

8 A. Yes.

9 Q. Did you then conduct another review with the additional
10 exemplars?

11 A. I did.

12 Q. And did that result in Government's Exhibit 8, which is
13 your report?

14 A. Yes, it did.

15 Q. And what opinion did you reach upon further examination?

16 A. That William LeCroy, item 26, prepared the questioned
17 writing on item 21-B.

18 Q. Now, sir, more recently, were you provided a digital image
19 that has been admitted as Government's Exhibit 6?

20 A. I received a digital file, Your Honor, from Special Agent
21 Brayon (phonetic) of our Gainesville office through an e-mail
22 of this document.

23 Q. And that is a copy of the document, obviously?
24 A. This is another copy, yes.
25 Q. Okay. And did you use the known handwriting samples that

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1 are Government Exhibits 13 and 14 to conduct your analysis of
2 the document that is Government's Exhibit 6?
3 A. I did.
4 Q. And did that result in the report, which is Government's
5 Exhibit 9?
6 A. Yes.
7 Q. And what report did you -- what was your conclusion in
8 that report?
9 A. That William LeCroy, items 21-D and 26, prepared the
10 writing depicted in item 28-A, which is a version of
11 Government's Exhibit Number 6.
12 Q. Okay. And what was the date that was completed; was it
13 last week, Mr. Anthony?
14 A. November the 13th, yes, last week.
15 Q. Now, Mr. Anthony, in connection with your testimony in
16 this case, were you asked to prepare a summary of your
17 testimony?
18 A. I was.
19 Q. And I want to show you what's marked for identification as
20 Government's Exhibit 10. Can you identify Government's Exhibit

21 10, sir?

22 A. (Reviews exhibit.)

23 (Pause in the proceedings.)

24 THE WITNESS: Yes. It's a copy of a summary and
25 exhibits that I prepared in this case.

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1 MR. VINEYARD: Your Honor, I tender Government's
2 Exhibit Number 10 for purposes of the record.

3 MR. KISH: No objection, Judge.

4 THE COURT: It's admitted. And just for
5 clarification of the record, I don't think I stated whether 13
6 and 14 were admitted, but they are.

7 MR. VINEYARD: Thank you, Your Honor.

8 BY MR. VINEYARD:

9 Q. Mr. Anthony, in connection with your review of these
10 documents, did you have charts prepared and photographs taken
11 of certain of the questioned and known writings?

12 A. Yes, I did.

13 Q. All right. And have you prepared charts for purposes of
14 your testimony here today?

15 A. Yes.

16 Q. Let me show you what's marked for identification as
17 Government Exhibits 11 and 12 and just ask if these are copies

18 of those charts?

19 A. Yes, they are; they are reproductions of the charts that I
20 have enlarged and brought today.

21 MR. VINEYARD: Your Honor, I would ask that Mr.
22 Anthony be allowed to step off the witness stand. I'm going to
23 ask him to go through the charts and explain his opinions, if
24 that's all right.

25 THE COURT: He may.

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1 THE WITNESS: Thank you, Your Honor.

2 MR. VINEYARD: And for the record, Your Honor, while
3 he is doing that, I will tender Government's Exhibit 11 and 12
4 so that they are part of the record.

5 MR. KISH: Let me make sure, these are only some of
6 the ones that are attached already to Government's Exhibit
7 G-10?

8 (Pause in the proceedings.)

9 MR. KISH: I have no objection to those, Judge.

10 THE COURT: They are admitted.

11 THE WITNESS: Your Honor, can you see?

12 THE COURT: Yes.

13 BY MR. VINEYARD:

14 Q. Mr. Anthony, if you would, using what have been marked as
15 Government's Exhibits 11 and 12, explain to the Court your
16 opinions?

17 A. Your Honor --

18 MS. KEARNS: Excuse me, Your Honor. Could we turn
19 the --

20 MR. KISH: Yes, and so Mr. LeCroy can see it as well,
21 Judge?

22 THE COURT: So you can see it, too, if you can tilt
23 it so we can both see it, you may have to move.

24 (Pause in the proceedings.)

25 THE COURT: Can you see?

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1 MR. MENDELSON: Maybe a little more.

2 THE COURT: You can turn it some more, Mr. Anthony?

3 MR. KISH: I think we can see it now, Judge. Thank
4 you.

5 MR. VINEYARD: Your Honor, I can tender to the Court
6 as well the copies.

7 THE COURT: Can you all see?

8 MR. KISH: That's better now, Judge. Thank you.

9 THE WITNESS: Your Honor, first, I would like to
10 explain what is represented on the chart.

11 Under the caption, "Questioned or portions arising
12 from the questioned documents" and on the right-hand side under
13 the caption "Known" are portions of the known writing of
14 William LeCroy, and certain aspects of the writing are
15 obviously more significant than others and I would like to just
16 point out several of the features that led me to my opinions in
17 this case.

18 And initially, I would like you to look at the
19 lowercase P in the word "pistol" on the left-hand side of the
20 caption "Questioned," and you will note that it begins with a
21 downward motion going below the imaginary line of writing and
22 retracing back upward. But more significant than that retraced
23 stroke is the upper portion of the P, which is formed in a
24 triangular movement, if you will (indicating).

25 You see that same pattern repeated over on the

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1 right-hand side, where the stroke, the initial stroke begins
2 with a downward motion, and then the upper part of the P is a
3 triangular form, not an oval or a smooth curve.

4 I would also direct Your Honor's attention to, for
5 instance, the lower case in the word "not," it begins with a
6 downward motion, moving upward to the first arch but being very

7 angular in its formation of the valley in the center, being
8 high but angular and then moving out into the letter O, with
9 another angular upper portion.

10 You see that same habit repeated under the caption
11 "Known" in the word "now," with a slight downward movement,
12 moving up to the first arch, angling down, with an angled upper
13 motion forming a V in the center, just as in the questioned
14 writing, and then moving on into the O, forming that second
15 arch, which is angled and not a smooth curve as P.

16 The lower case R in the word "for" I find to be
17 significant. If you were to isolate it like in number 7 with a
18 slight tic mark as it exits, you will see that habit reflected
19 over on the right-hand side on two occasions there in the word
20 "for."

21 Something as subtle as the curved motion of the
22 downward stroke on the lower case T, I find to be significant,
23 and you will see that same motion beginning with a tic mark
24 curving to the left and then back over to the right into the
25 letter O.

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1 A highly unusual feature that I found is the
2 ampersand, and under the captioned question, you will note that
3 the ampersand is made with an initial movement of a letter or a

4 numeral 3, moving, making the 3, coming off with a drag stroke
5 into the center portion and then moving downward and curving
6 slightly to the right (indicating).

7 This habit is repeated several times in the known
8 writing, and you can see that here under the caption, "Known."
9 The ampersand is made like a letter, a numeral 3, pardon me
10 again, with a drag stroke moving up into the center downward
11 motion and then curving slightly to the right (indicating).

12 The second chart shows other writings from the
13 questioned documents, and I'll point out some of the features
14 that I find to be significant in arriving at my conclusion.

15 If you would, Your Honor, look under the caption
16 "Questioned," the first word, "thanks," if you would look at
17 the letter A, you will note that it begins with a downward
18 movement, curving into the upward movement into the pinnacle of
19 the A coming down. But the significant aspect is that curved
20 initial stroke. Then, you will see that repeated in the word
21 "and" under the caption, "Known," that downward movement,
22 moving up toward the pinnacle of the A down and then the
23 crossbar made from the left to the right, the darker portion to
24 the lighter, indicating movement from left to right
25 (indicating).

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1 The letter E in the word "please," if you would look
2 at that, Your Honor, you will note that it's made initially
3 with a formation similar to the letter C, and the center part
4 is placed and then the upper part is placed completing the
5 letter form. But you note that it sets on top of -- it moves
6 slightly to the left, if you were to put a perpendicular line
7 through the back of the C.

8 You will see that same habit reflected in the word
9 "Emily," or the name "Emily," pardon me, and the initial
10 movement is like in the letter C, with the center stroke moving
11 to the right and the top being placed on the E, but it is
12 slightly to the left of that initial movement in the left
13 formation like a C, if you will (indicating).

14 Something that I have found to be very significant
15 and something which I have tried to recall seeing in past
16 writings and I cannot recall ever having seen this, I know it
17 would be referred to as an ellipsis in grammar, in text, but
18 this is not a true ellipsis, because it's at the end of
19 sentences. The word "hell" is followed by three vertical
20 movements in the form of period marks, periods.

21 You will note that they are vertical and that the
22 last one being heavier in its formation than the first two
23 (indicating).

24 If you look to the right of the chart under the
25 caption "Known," the word "two" is followed by that same series

1 of three vertical movements. That's a habitual feature of the
2 individual that's shared both in the questioned writing and
3 also in the known writing, and that is something that I found
4 to be highly, highly significant (indicating).

5 Subtleties, as I mentioned, in the form of indicia in
6 writing would be the slight tic mark or drag stroke in the T,
7 if you will, in the word "that" on the left-hand side under the
8 caption, "Questioned."

9 If you look to the right of the chart at the word
10 "that" under "Known," there is a slight tic mark also; it's a
11 drag stroke moving into the vertical down stroke of the T.

12 The connecting stroke of the T, the crossbar into the
13 H, is made with an upward curving motion. You will see that
14 habit reflected under the caption "Known" in both renditions of
15 the word "that."

16 Also the last T in the word "that" on the questioned
17 side, with the crossbar being lower than midpoint on that staff
18 or that vertical motion, you will see that same habit reflected
19 in the word "that," the second word "that" under the caption,
20 "Known."

21 And it's these features, Your Honor, these subtle
22 idiosyncracies and nuances in the writing, which led me to my
23 ultimate opinions in this case.

24 BY MR. VINEYARD:

25 Q. And, Mr. Anthony, the charts that you've been going over,

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1 those represent some of your findings, are just illustrative of
2 some of the findings that you have made?

3 A. Yes.

4 Q. Okay. And the Government's Exhibit 6, which is the
5 digital photograph of a note, did you find some of these
6 similar habit qualities in that writing as you found in the
7 others?

8 A. Yes, I did, including the ellipsis or the three periods
9 following two of the words on Government's Exhibit 6.

10 Q. Now, Mr. Anthony, was your work in this case peer
11 reviewed?

12 A. Yes, it was.

13 Q. And was it peer reviewed by someone in your laboratory?

14 A. Yes, by Ms. Gayton of my staff.

15 Q. And, sir, have the questioned and known documents been
16 made available to the defense, to your knowledge?

17 A. I believe they have.

18 Q. And has any forensic document examiner on behalf of the
19 defense contacted you to review these documents?

20 A. No.

21 Q. Sir, are there private practitioners of forensic document

22 examination?

23 A. Yes. There is a number of them.

24 Q. Mr. McKasson is one that you referred to?

25 A. Yes, earlier.

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1 Q. And do they on occasion appear in litigation to render
2 alternative opinions?

3 MR. KISH: Judge, I'm going to object to this line of
4 questioning. It seems to me that what Mr. Vineyard is
5 suggesting here is that, somehow, there is more validity to the
6 opinion rendered by Mr. Anthony by virtue of the fact that
7 there was not a request for an independent defense examination
8 of the original documents when, in fact, the entire purpose of
9 this hearing is an attempt for the Court to determine whether
10 or not this entire field has sufficient validity so that it can
11 be proffered to a jury under the expert witness rule, so I
12 would object to this line of questioning.

13 MR. VINEYARD: Your Honor, my line of questioning is
14 intended to go to the issue of peer review, which is a point
15 under the Daubert analysis.

16 THE COURT: I'll overrule the objection.

17 BY MR. VINEYARD:

18 Q. Mr. Anthony, I may have failed to ask you this: In
19 addition to testifying as an expert in federal court, have you
20 also testified as an expert in state court?

21 A. Yes.

22 Q. Do you have any estimate of the number of times you've
23 testified as an expert forensic document examiner in state
24 court during your career?

25 A. Not the exact number, but many more times than in federal

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1 district courts.

2 MR. VINEYARD: If I could have just one moment, Your
3 Honor?

4 THE COURT: Yes.

5 (Pause in the proceedings.)

6 MR. VINEYARD: Your Honor, I just want to make clear
7 that 11 and 12 have been admitted by the Court, which are
8 smaller versions of the charts that Mr. Anthony has used in his
9 testimony.

10 THE COURT: Okay. The defense did not object,
11 correct?

12 MR. KISH: No, we did not object, Judge.

13 THE COURT: They are admitted.

14 MR. VINEYARD: I believe that's all the questions we

15 have for Mr. Anthony at this time.

16 THE COURT: All right. We will take a one-hour
17 recess and, then, we will resume and the defense may
18 cross-examine.

19 (A recess was had, after which the following proceedings
20 continued in open court.)

21 THE COURT: Please be seated.

22 All right. Mr. Kish?

23 MR. KISH: Thank you, Judge.

24 CROSS-EXAMINATION

25 BY MR. KISH:

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1 Q. Mr. Anthony, I don't believe we have ever met before, but
2 my name is Paul Kish. You've seen me here, sitting in court
3 this morning, haven't you?

4 A. We met earlier this year also.

5 Q. Okay. Oh, down at the lab?

6 A. Yes.

7 Q. Okay. And you've seen me here in court, like the rest of
8 the lawyers, writing on my pad here, right?

9 A. I haven't paid much attention.

10 Q. Okay. You've seen how in courtrooms, lawyers often hold

11 pens and pads?

12 A. Yes.

13 Q. All right. And you've seen, sometimes, the pad and pen
14 touching one another, right?

15 A. Yes.

16 Q. And you've assumed, obviously, that that's some form of
17 writing; would that be true?

18 A. Yes.

19 Q. Okay. But you wouldn't be sure that it was writing, would
20 you?

21 A. No.

22 Q. You would want to test that hypothesis by looking at it,
23 wouldn't you?

24 A. If asked to do so.

25 Q. Well, would you be willing to, for example, wager your

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1 career on whether or not what's on my pad here is writing?

2 A. Absolutely not.

3 Q. You would want to test it first, before you made any sort
4 of determination one way or another?

5 A. If it were requested, yes.

6 Q. Okay. What you do for a living is to look at lines on
7 pieces of paper to determine if you can render an opinion as to

8 whether one line was created by the same person that created
9 another line; would you agree or disagree with that statement?
10 A. Could you define "line" for me?
11 Q. A marking made upon -- and I'm going to use the paper
12 here. I recognize that handwriting identification can be done
13 in many different ways, but a line is a marking placed upon a
14 piece of paper by some sort of instrument, under my definition;
15 would you agree or would you disagree with what I said?
16 A. That that's what I do for a living?
17 Q. Yes.
18 A. That's the bulk of what I do for a living, yes.
19 Q. Okay. You would also agree with me, I'm sure, that the
20 thing we call writing in the English language is something that
21 is a learned trait?
22 A. Absolutely.
23 Q. All right. And you would also agree with me, I bet, that
24 most of the writing that you have examined has been in the
25 English language; would that be right?

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1 A. Yes, the majority --
2 Q. Okay.
3 A. -- in English.

4 Q. And the vast majority of the writing that you have
5 examined involved pen or pencil placing marks upon some form of
6 paper; you would agree with that, wouldn't you?

7 A. Yes.

8 Q. Okay. You would also agree with me, wouldn't you, that
9 there are two main categories of writing, one being cursive and
10 the other being printing, or sometimes called block printing?
11 Would you agree or disagree?

12 A. Yes, those would be the two major categories of writing.

13 Q. Okay. You would also agree with me, wouldn't you, that
14 there are different styles of writing both in the printing and
15 in the cursive categories?

16 A. Yes.

17 Q. Okay. Printing, let's start with that: Have you ever
18 been a schoolteacher?

19 A. No.

20 Q. Have you ever taught printing or cursive writing to
21 initial writers?

22 When I say "initial writers," I mean either children
23 or some adult person learning to write for the first time; have
24 you ever taught it?

25 A. No, I have not.

1 Q. Have you ever read any studies about how to teach
2 printing?

3 A. Yes. I've read books on penmanship.

4 Q. No, that's not what I asked you. Have you ever read any
5 studies on how printing is taught to first-time writers?

6 A. Yes. I've read books on penmanship.

7 Q. Okay. How many styles of printing are there?

8 A. Formal styles that are taught?

9 Q. Right.

10 A. I'm not certain.

11 Q. Tell me again the organizations you're a member of.

12 A. The American Academy of Forensic Sciences, the American
13 Society of Questioned Document Examiners, the American Board of
14 Forensic Document Examiners.

15 Q. Do you get their publications?

16 A. Yes.

17 Q. You sometimes submit papers to those publications, don't
18 you?

19 A. Yes, I do.

20 Q. Are you not aware that your own American Society of
21 Questioned Document Examiners has set out class characteristics
22 of hand printing involving 38 different styles of hand
23 printing?

24 A. No, I'm not aware of that.

25 Q. Would you disagree with me if I told you that's what it

1 says?

2 A. No.

3 Q. All right. Now, in the books and the things that you have
4 read about how printing and cursive writing is taught, you've
5 also learned, I would assume, therefore, that the early process
6 of teaching these skills involves standardization, right?

7 A. Yes.

8 Q. You know that each teacher -- and you probably remember
9 from when you were a kid -- is teaching each student to make
10 the same letters in exactly the same way, right?

11 A. They are attempting to do that, yes.

12 Q. Okay. The effort is to make all of the letters look the
13 same, in an attempt, as you said, right?

14 A. That is the goal.

15 Q. Okay. But at some point, according to the theories
16 underlying your field, some differences come in in between the
17 point when the teacher first teaches standardized letters and
18 when the pen hits the paper that you later see, right?

19 A. I'm sorry, could you repeat that?

20 Q. I'll be glad to. At some point, a difference, according
21 to the theory of your field, differences or distinctions come
22 in between the way people form letters in between the time when
23 those people first learn their standardized writing and later,
24 when you are examining some writing; would you agree with that?

25 A. Absolutely.

1 Your Honor, that's the whole basis of the
2 individualization of writing. If writing weren't
3 individualized, all of our writing would look like that
4 copy-book style we are taught in school, and it does not.

5 BY MR. KISH:

6 Q. How do you know?

7 A. Just from observation.

8 Q. Have you ever tested it?

9 A. On a daily basis.

10 Q. Do you know what it means to test a hypothesis?

11 A. Absolutely.

12 Q. Okay. Tell us what you mean when you say you are testing
13 the hypothesis on a daily basis?

14 A. Well, if I look at the Zancerian (phonetic) style of
15 writing or the Zaner-Blouser style of writing and then I look
16 at the many, many thousands of samples that I have examined
17 over the years, I do not find any that come close to that
18 standard style of writing.

19 Q. Okay.

20 A. In fact, the most current form of penmanship taught in

21 schools today, Your Honor, is called D'Nelian, and it was
22 developed by a schoolteacher who recognized the fact that it
23 was useless to spend inordinate amounts of time to train
24 children to do an ideal alphabet because he realized that they
25 individualize their writing, so he began by teaching an italic

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1 form of writing, which could transition more quickly to cursive
2 writing.

3 And even Harcourt-Brace, who publishes his system,
4 states in their books that because people individualize their
5 writing, it's a waste of time to teach those ideal letter
6 forms, because children are not going to replicate them
7 identically; as long as the writing is legible, then, it's
8 acceptable.

9 Q. You wrote an article about D'Nelian writing at one point
10 in your career, didn't you?

11 A. Yes, I did.

12 Q. That was 20 years ago, wasn't it?

13 A. I can't recall the date; it was in the 1980s, yes.

14 Q. You've never published an article on hand printing
15 characteristics other than that ever, have you?

16 A. Not specifically, no.

17 Q. Okay. Now, let's talk for a second about the differences
18 between what you've called cursive and what I've called

19 printing, or what I've called cursive and printing.

20 You would agree with me, wouldn't you, that printing
21 is far less unique than cursive writing?

22 A. No, I would not.

23 Q. You told us earlier, I think, in answer to some of
24 Mr. Vineyard's questions that you remembered testifying in
25 front of Magistrate Judge Alan Baverman in the case of the

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1 United States versus Terry Kirby; do you remember that?

2 A. Yes, I do.

3 Q. And do you remember that in testifying in that case
4 involving Mr. Kirby, you were in a different courtroom but one
5 similar to this, right?

6 A. Yes.

7 Q. At the beginning of the proceedings, you sat in the
8 witness chair, just like the one you're sitting in now? You
9 did that, didn't you?

10 A. Yes.

11 Q. At the beginning of the proceeding, at least, your
12 involvement with it, you put your right hand up and you took an
13 oath to tell the truth, the whole truth and nothing but the
14 truth, right?

15 A. Yes.

16 Q. And then, you were asked a number of questions by an
17 assistant United States attorney on two different days, right?

18 A. Yes.

19 Q. A defense lawyer asked you some questions also, right?

20 A. Yes.

21 Q. Do you recall being asked these questions and giving these
22 answers on page 176?

23 MR. VINEYARD: Thank you.

24 BY MR. KISH:

25 Q. Well, it's numbered serially, it's on page 176, at line

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1 16: Question: "And in the courses that you took, what did
2 they teach you that distinguished between hand printing and
3 cursive?"

4 Answer: "Well, I recall that it was pointed out that
5 cursive writing might be more distinctive than handwriting of
6 an individual, might be."

7 Do you remember giving that answer to that question
8 on an earlier occasion while you were under oath?

9 A. I don't recall specifically, no.

10 Q. Do you also recall at page 178 being asked the following
11 question and giving the following answer: Question: "Okay.

12 I've got it right. How about do signatures compare?"

13 Answer: "Well, every case has to be taken on a
14 case-by-case basis. In some instances, if the hand printing is
15 very limited in its quantity, if you will, that would place
16 restrictions on any comparisons. However, if it's lengthy, as
17 in this case, it really wouldn't make any difference whether
18 it's hand printed or cursive."

19 Question: "How do signatures compare?"

20 Answer: "Signatures are probably the most highly
21 individual form of writing that we do, and when you say how do
22 they compare, how do they compare with what?"

23 Do you remember giving those answers to those
24 questions on an earlier occasion?

25 A. I don't remember specifically, but you're reading from the

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1 transcript, so I must have.

2 Q. Well, do you doubt that you previously told Magistrate
3 Judge Baverman that hand printing is less unique than cursive?

4 A. I don't believe I said that; I said that it might be.

5 Q. Oh, it might be?

6 A. That's what you've said.

7 Q. Okay.

8 THE WITNESS: Each case, Your Honor, must be assessed
9 on a case-by-case basis, and in some instances, hand printing
10 may be very limited and void of any real individual
11 characteristics, but speaking in hypotheticals, I would have to
12 see an actual case in order to make an accurate assessment.

13 BY MR. KISH:

14 Q. Would you be surprised to know that other examiners in
15 your field specifically say that printing is far less unique
16 than cursive writing?

17 A. I have heard individuals make statements such as that,
18 yes.

19 Q. Do you remember who those individuals were?

20 A. No.

21 Q. So at least there is some dissention within your field as
22 to whether or not printing is more or less unique than cursive
23 writing; would you at least agree with that?

24 A. Well, there is debate, I would say; I don't know about
25 dissention.

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1 Q. Okay. Now, another thing that you do after you take
2 standardized writing that has, as you pointed out earlier,
3 turned into differences because of the way people are different
4 is you then compare a known sample to a questioned document to

5 see if you can decide or make an opinion as to whether the
6 writer of the known item had anything to do with the
7 preparation of the questioned document; is that right?

8 A. Or not, conversely.

9 Q. Or not?

10 A. Or not.

11 Q. That's right. You mentioned to us earlier in some of your
12 testimony that from your point of view, there are certain
13 unique characteristics that each person has in his or her style
14 of either writing or printing; is that right?

15 A. Yes.

16 Q. Okay. You are assuming that those unique characteristics
17 are repeated by that writer; is that right?

18 A. No. It has to be demonstrated to me that that is the
19 case.

20 Q. Well, okay. If you see a unique characteristic in a
21 person's known document, are you going to assume that they will
22 always make that unique characteristic if you don't see it
23 again?

24 A. It would depend, but I would want to see it repeated more
25 than one, one repetition.

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1 Q. Okay. What you're really doing when you're talking about

2 unique characteristics is -- again, we're coming back to some
3 of our initial definitions -- you're comparing one line on a
4 piece of paper with a different line on a different piece of
5 paper to see if they are, in your terminology, a unique
6 characteristic; is that right?

7 A. Well, I don't know that I would term it that way. I'm
8 looking for repeated characteristics in the unknown with the
9 known or repeated differences.

10 Q. Okay. I want to talk to you about, then, how any of us
11 would get to the point to where a person could sit in your
12 chair and make such a comparison.

13 You went to elementary school where?

14 A. In New York City.

15 Q. Nothing in your elementary school education in New York
16 City taught you anything about examining documents, did it?

17 A. No.

18 Q. All right. And then you went to college where?

19 A. Central Missouri State University.

20 Q. And you took no courses at Central Missouri State
21 University having anything to do with forensic document
22 examination, did you?

23 A. No.

24 Q. You then went into the United States Army; am I right?

25 A. Yes.

1 Q. And you had nothing to do with forensic document
2 examination while you were a member of the United States Army,
3 did you?

4 A. That's correct.

5 Q. Okay. And then after you came out of the Army, you
6 started working at the FBI, you told us?

7 A. Yes.

8 Q. And you took what you called a proficiency test to see if
9 you could start along this track of document examining, right?

10 A. In the form blindness test.

11 Q. Form blindness meaning a test to determine whether or not
12 you had any problems with your eyesight that would
13 prevent you --

14 A. No, no.

15 Q. No?

16 A. No. Certain people cannot perceive differences, subtle
17 differences in shapes, circles, arcs or angles, and there's a
18 test that has been designed to assess whether you are form
19 blind.

20 Q. All right. Now, and then you started learning first from
21 some document examiners that worked for the FBI and then,
22 later, from Mr. McKasson, who worked for the Illinois crime
23 lab; would that be right?

24 A. Yes.

25 Q. Okay. They taught you their theories, which are the same

1 theories that you have told us about here today, the theory of
2 uniqueness, right?

3 A. Well, I would credit Mr. McKasson as informing me of
4 looking at it in that regard.

5 Q. Okay. Mr. McKasson did not point you out in the 1970's
6 when you were under his tutelage about any studies that showed
7 whether or not the principle of uniqueness was true or not
8 true, right?

9 A. I don't follow you; I don't understand.

10 Q. When you were first learning about being a document
11 examiner, Mr. McKasson didn't tell you whether or not anyone
12 had ever studied the principle of uniqueness to see if it was
13 true or whether it was not true, right?

14 A. It's something that's probably unprovable.

15 Q. The principle of uniqueness is unprovable, you will
16 concede that?

17 A. Well, as it relates to handwriting, it would be
18 unprovable, because you could not compare everyone's writing
19 that has preceded us, everyone's writing today and everyone's
20 writing that will follow us. You have to make certain
21 assumptions in the theory of uniqueness that you are logically
22 thinking has to be true; everything is unique.

23 Q. The theory of uniqueness is an assumption, correct?

24 A. Yes, yes.

25 Q. Okay. And it is based upon that assumption that your

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1 entire field is predicated, right?

2 A. And experience and training.

3 Q. Okay. When you then have gone through your training and
4 you are then performing your task of comparing a known to a
5 questioned item, you're looking, among other things, for either
6 differences between the two documents or similarities; would
7 you agree with that or not agree?

8 A. Yes.

9 Q. Okay. Would you agree with me that one difference can
10 outweigh numerous similarities?

11 A. It may very well.

12 Q. Okay. When, then, the document examiner is making this
13 comparison between the known and a questioned item and is
14 looking either for similarities or differences, there is no
15 standard for how many either differences or similarities are
16 required before an opinion can be rendered; is that true or not
17 true?

18 A. That's true.

19 Q. In other words, too, what you would consider to be highly
20 qualified, capable, competent forensic document examiners can

21 have completely different criteria for purposes of deciding if
22 they are going to render an opinion, right?

23 A. It would be based on their individual training and
24 experience, yes.

25 Q. For example, as we have just established a moment ago, one

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1 difference can outweigh numerous similarities; two different
2 document examiners very well may come up with a different
3 point, a different opinion, as to whether there is such a
4 difference in a case in which there are, otherwise,
5 similarities?

6 A. It may happen.

7 Q. Okay. You also cannot quantify how many differences are
8 required before you can eliminate a person as a certain writer;
9 would you agree with that?

10 A. Well, we just mentioned that one fundamental difference
11 might exclude a writer such as skill, Your Honor.

12 If writing is of a very low skill level in the
13 questioned material but the writer whose known writing is
14 submitted is a very highly skilled writer, that might be
15 sufficient to exclude based on skill alone, because an
16 individual who is a poorly skilled writer cannot all of a

17 sudden change into a very adept writer or an adept pen person,
18 penman.

19 Q. How do you know that?

20 A. With experience and training.

21 Q. Have you ever tested that? Have you ever tested that
22 proposition?

23 A. Not personally, but I've known --

24 Q. Are there any published reports on testing that
25 proposition?

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1 A. I'm not certain.

2 Q. Has this opinion you've just given to us ever been
3 reviewed by your peers.

4 A. It's a tenet in our field that you cannot exceed your
5 level of skill.

6 Q. I'm sorry, was the answer to my question that it has or it
7 has not been reviewed by your peers, this opinion that you've
8 just given to us?

9 MR. VINEYARD: Your Honor, I believe he was
10 responsive to the question in that he said it was a tentative
11 field that's written, subject to peer review.

12 THE WITNESS: It is written about in texts that are
13 specific to this field.

14 BY MR. KISH:

15 Q. I think you told us that the principle of uniqueness is at
16 least the assumption that no two people will write precisely
17 the same way; would that be right?

18 A. Yes.

19 Q. A bit of a corollary to that principle, I'm assuming, is
20 that each person, when they do write over and over during the
21 course of their lives, they don't write identically each time?

22 A. That's correct, but I would also like to state that the
23 writing has to be sufficient in order to make those comparisons
24 accurately.

25 Q. I understand. I'm just talking about in general, when

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1 I've been writing here all day, it's not going to be identical
2 each time I form the same letter; would you agree with that?

3 A. Absolutely not; we're not machines, we don't replicate our
4 writing identically every time.

5 Q. Now, because of that corollary to that main principle, I'm
6 assuming that there is a distinction in your mind between
7 something that is what you termed earlier a substantial
8 difference which can eliminate a person as being the possible
9 source of a questioned document and something that is simply a

10 variation among the writing of the same person over and over,
11 right?

12 A. Right. You're referring to what I referred to as normal
13 and natural handwriting variation; we're not machines, so we
14 cannot replicate all writing identically, but we do reintroduce
15 certain additional features from time to time, and those are
16 the features that are used to make an identification or,
17 conversely, make an elimination, if there are specific
18 differences repeated.

19 Q. So using the term that we're talking about here right now,
20 a difference, a substantial difference, means two different
21 writings are authored by different people, whereas a variation
22 means that it's simply that the known writer has changed his or
23 her letter formation or writing in some small or minor way;
24 would that be right?

25 A. Yes.

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1 Q. Okay. There are no standards, there are no criteria in
2 your field for distinguishing between a substantial difference
3 and a variation; is that true or not true?

4 A. There is no standard, no.

5 Q. Right. There is no set of guidelines that are currently

6 published, right?

7 A. That's correct.

8 Q. There are no numerical quantifiers applied to that process
9 of distinguishing between a substantial difference and a
10 variation, right?

11 A. That is correct.

12 Q. What you're doing is in looking at questioned and known
13 documents and trying to decide if a difference is a substantial
14 difference or a variation, you're using a subjective standard,
15 right?

16 A. Yes, based on experience and training.

17 Q. But it is your, Arthur Anthony's, subjective standard,
18 right?

19 A. Yes. But I might add that it is subjected to peer review
20 from another qualified individual.

21 Q. I do understand that, sir. The thing that you are looking
22 at when making your subjective judgment in determining between
23 a variation and a substantial difference, that thing you're
24 looking at is something that any layperson could see, right?

25 A. Possibly.

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1 Q. Well, let's assume that the layperson has the same visual
2 ability you have. Okay?

3 A. Yes?

4 Q. Shall we?

5 A. Yes.

6 Q. Okay. And let's also assume that it's something that you
7 observed only through a magnifying glass or a microscope, that
8 the layperson had access to those tools, right?

9 A. And if they knew what they were looking for, yes.

10 Q. They can see exactly what you see; would you agree or
11 disagree?

12 A. Yes.

13 Q. Okay. And it is what you see that is assisting you in
14 making your subjective judgment, right?

15 A. It's the observations that I make, yes.

16 Q. Okay. Now, you mentioned that in your job, you work for
17 the Georgia Bureau of Investigation's crime lab, right?

18 A. Yes.

19 Q. As a matter of fact, you are the head of one of the
20 sections in that lab, and have been for several years now,
21 right?

22 A. Yes.

23 Q. You're the head of the section that involves forensic
24 document examination --

25 A. Yes.

1 Q. -- as well as it has a photography component to your
2 section, right?

3 A. Yes, it does.

4 Q. Okay. You mentioned to us also, and I sort of sensed some
5 pride there, that your lab is maybe the only one that has been
6 certified by this international group; is that right?

7 A. Currently, yes, in the United States --

8 Q. And --

9 A. -- other than the toxicology lab that I mentioned.

10 Q. Okay. And you also mentioned to us that your lab went
11 through the certification process of the American Society of
12 Criminal --

13 A. Crime Laboratories.

14 Q. American Society of Crime Laboratories, right?

15 A. (Nods head affirmatively.)

16 Q. And to do those processes, in other words, to get
17 certified, you and the other directors of the various sections
18 had to make sure that you kept up with certain processes,
19 right?

20 A. Yes.

21 Q. Certain standards?

22 A. Yes.

23 Q. Unlike what we just talked about, where there are no
24 standards that govern document examination itself, there are
25 specific written objective and quantifiable standards that are

1 used in determining whether a lab gets certified, right?

2 A. Yes.

3 Q. Now, do you do periodic case reports in your section?

4 A. On a daily basis.

5 Q. Are those kept in any specific place?

6 A. They are kept on a computer system.

7 Q. Okay. Are they reviewed?

8 A. I don't know what you mean by "reviewed."

9 Q. Are they reviewed by a person other than the person that
10 writes them?

11 A. By a peer reviewer, yes.

12 Q. Okay. Is that review done on an internal basis; is that
13 what your peer review is?

14 A. Yes. And there are internal audits, and there are also
15 external audits, where random reports are examined.

16 Q. Okay. Now, does your section of your lab do proficiency
17 testing?

18 A. Yes.

19 Q. Does that proficiency testing involve blind samples?

20 A. Not that I'm aware of; currently, we do not do blind
21 testing.

22 Q. Then how is it if that's a requirement of the American
23 Society of Crime Lab Directors that your section is qualified
24 if you don't do that?

25 A. I don't know.

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1 Q. Do you keep records of this proficiency testing?

2 A. Yes.

3 MR. KISH: I had asked for that stuff.

4 (Pause in the proceedings.)

5 BY MR. KISH:

6 Q. Did Mr. Vineyard ask you to bring that stuff with

7 you --

8 A. No.

9 Q. -- your proficiency testing?

10 A. No, he did not.

11 Q. How difficult would it be to get that?

12 A. Not very.

13 Q. Are you the person that keeps those?

14 A. They are kept in a database, yes.

15 Q. Okay. And give us a rough idea of what your proficiency

16 testing consists of.

17 A. Well, currently, we take tests supplied by the

18 Collaborative Testing Organization in McClain, Virginia; it's a

19 requirement of ASCLD, and they send out two tests per year, one

20 concerning handwriting, some type of handwriting problem, and

21 then another questioned document type problem.

22 Q. And since there is three people in your section, I would
23 assume that these tests come to you?

24 A. No. They come to a quality manager, who disseminates
25 them.

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1 Q. When you say "disseminates them," do you mean hands them
2 out?

3 A. Yes.

4 Q. Okay. And one is handed out to you?

5 A. Yes.

6 Q. When was the last time you did a proficiency test, Mr.
7 Anthony?

8 A. Several months ago.

9 Q. Okay. And then are you told of the results of the
10 proficiency test?

11 A. Yes. They are published.

12 Q. Okay. When you say "published," are they published to you
13 or in the public realm?

14 A. Collaborative Testing publishes the results and submits an
15 answer sheet to our quality manager.

16 Q. Okay. Now, you also talked to us earlier about this
17 process that you have called peer review. And that's p-e-e-r

18 review, right?

19 A. Yes.

20 Q. All right. Now, to you, peer review is something that's
21 done internally in your lab; is that what I'm understanding?

22 A. Yes, it is.

23 Q. Okay. Now, your lab consists of yourself, another
24 document examiner, and a young fellow who has just started in
25 this field; is that right?

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1 A. Yes. He has finished training, but he is doing
2 independent casework.

3 Q. And then after, for example, the lady you told us about
4 does her work, she submits it to you for you to be her peer and
5 for you to then review her work, right?

6 A. Yes.

7 Q. When you, her boss, do your own examination, you submit it
8 to your subordinate for her to give you her opinion about your
9 work, right?

10 A. No. To review the data that's compiled.

11 Q. Your subordinates have never once disagreed with your
12 opinion, have they?

13 A. No, that's not true. Ms. Gayton has not disagreed but has

14 questioned me further about a specific opinion that I have
15 rendered from time to time.

16 Q. Give us the specifics about that, if you would, please.

17 A. Ms. Gayton has asked for further information or
18 clarification of what I'm reporting based on images.

19 Peer review is not a total re-analysis of every
20 document possibly in the case; it is a review of the data that
21 is put or is an attachment to a case file, electronic images of
22 writing with notations, arrows, annotations and so forth and
23 work sheets.

24 But there have been times when Ms. Gayton has
25 questioned whether my opinion was correct and asked to see more

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1 information, more documentation.

2 Q. She has never disagreed with you, has she?

3 A. No.

4 Q. Now --

5 A. Possibly only in degree.

6 Q. -- I'm going to show you Government's Exhibits 8 and 9, 7,
7 8 and 9 again, and those are your official reports of the three
8 examinations that you told us about earlier that you had
9 performed as it relates to this case, right?

10 A. Yes.

11 Q. Attached to those reports are some things you mentioned to
12 us earlier, which I think you had called work sheets, right?

13 A. Yes.

14 Q. These work sheets are a format, I think to paraphrase what
15 you said before, that each examiner is supposed to follow, I
16 think you said, to make sure that you're doing more than just a
17 cursory review of the document, right?

18 A. Yes.

19 Q. And for Government's Exhibits 7 and 8, there is a work
20 sheet attached to it, right?

21 A. Yes, there is.

22 Q. Those are the examinations that you performed back in the
23 year 2002 as it relates to this case, right?

24 A. Yes.

25 Q. But Government's Exhibit Number 9, the most recent

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1 examination you performed on this digital photograph, has no
2 work sheet, does it?

3 A. There is no work sheet attached to this.

4 Q. Did you do a work sheet?

5 A. Yes.

6 Q. Okay. Coming back to Government's Exhibits 7 and 8, there

7 is a section on each one of those that's called, "Technical
8 Review," right?

9 A. Yes.

10 Q. And it has got a set of boxes underneath the word,
11 "Scientist," doesn't it?

12 A. Yes.

13 Q. And those boxes are all X'ed in on Government's Exhibits 7
14 and 8; that's true, isn't it?

15 A. Yes.

16 Q. And what that X'ing in of those boxes under the word
17 "Scientist" indicates is that you, the person who did those
18 reports, fulfilled all the requirements for that particular
19 test, right?

20 A. Yes.

21 Q. Then there is a similar set of boxes under the word "Peer
22 Reviewer," right?

23 A. Yes, there is.

24 Q. Not one of those boxes is checked under either one of
25 those documents; isn't that true, Mr. Anthony?

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1 A. That's correct.

2 Q. There is also a place for initials under "Admin. Review"
3 and "Supplemental Review" on each one of those boxes, right?

4 A. Yes.

5 Q. There is no date under either of those nor any initials
6 placed on those documents, right?

7 A. Right.

8 Your Honor, this is a computer-generated form, and we
9 have changed our procedures. The laboratory information
10 management system, as it's called, keeps track of peer review
11 or notations and will not release a report unless these are
12 checked.

13 This is an old version of our form, when we were hand
14 writing them. We have since replaced that peer review column
15 with an electronic version that is checked off by
16 Ms. Gayton. It has a PIN number assigned to her, and the
17 report will not be released until that has been accomplished.
18 So this, it has been peer-reviewed.

19 Q. How do you know?

20 A. Well, because the computer will not release it unless Ms.
21 Gayton has released it on the computer. And there is
22 documentation that can be printed out to support what I'm
23 saying.

24 Q. See, because I had asked earlier for all documentation
25 relating to this, so you're now telling me there is something

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1 in the database that we haven't yet seen; is that what I'm
2 hearing?

3 A. Well, yeah, it's in the database; it's not usually printed
4 out as part of the case report. I can print it out, though;
5 it's not a problem.

6 Q. Okay. I understand. Will that show what date this peer
7 review took place?

8 A. Yes.

9 Q. Okay. And I'm assuming from what you're saying that it
10 won't be a terribly difficult thing, then, to get something
11 that shows that a peer review was done around the time that the
12 computer database is going to show?

13 A. I'm assuring you, Your Honor, that the report will not be
14 released without peer review authorization.

15 Q. Who makes that decision as to whether or not a report can
16 be released?

17 A. The manager of the computer system. It was designed to do
18 that, so that I cannot generate a report without having it
19 peer-reviewed.

20 THE WITNESS: We do not mail reports, Your Honor;
21 it's on our web server and it's downloaded by agencies that are
22 authorized to get a copy of it, so it has to be released
23 electronically, and before it will be released, Ms. Gayton has
24 to push the right buttons, if you will, including her bar-coded
25 employee ID and her PIN number.

1 BY MR. KISH:

2 Q. Okay. So let's assume that -- and, again, you're assuming
3 obviously because this is the way your system is set up that
4 there was some method by which your subordinate
5 reviewed --

6 A. I'm not assuming; it is a fact, a fact.

7 Q. This one is not an assumption?

8 A. No, it's not an assumption.

9 Q. Okay. All right. And do you think that Ms. Gayton will
10 have an individual recollection of this particular test to
11 where if there is no record, she could still say that she did
12 the peer review?

13 A. Yes.

14 Q. About how many such peer reviews does she perform per
15 year?

16 A. Oh, it's hard to say; I don't know.

17 Q. You are her manager?

18 A. I probably work several hundred cases a year.

19 Q. And the only person she is peer reviewing is you, until
20 the last couple of months, right?

21 A. Yes.

22 Q. All right. So it would be a pretty simple calculation
23 that the number of cases you do is the number of cases that she
24 peer reviews, right --

25 A. Yes.

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1 Q. -- assuming that, obviously, she is supposed to do every
2 one, right?

3 A. She is required to do every one assigned.

4 Q. In this calendar year, in which we are in the month of
5 November, how many cases have you have worked on that she would
6 have peer reviewed?

7 A. I can't say, offhand.

8 Q. You cannot hazard any guess?

9 A. Maybe a hundred.

10 Q. Okay.

11 A. It could be less.

12 Q. Is there a database that shows us the answer to this
13 inquiry?

14 A. Yes.

15 Q. All right. And do you control that database?

16 A. I have access to those statistics, yes.

17 Q. Okay. Does that same database also give us the answer to
18 the question of what sort of opinions are being rendered by
19 you?

20 A. I do not believe that it's that sophisticated, no.

21 Q. Okay. What is blind testing?

22 A. It's when the individual in forensic work is not aware
23 that a case is actually contrived, if you will, to test the
24 individual as to -- it's where the answer is known on a
25 specific case --

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1 Q. Okay.

2 A. -- but the participant is not aware that it is a test.

3 Q. Would you also agree with me that blind testing also
4 encompasses the idea that there should be no suggestion as to
5 what the answer should be to the inquiry? Would you agree with
6 that?

7 A. I'm not an expert in testing, but that sounds reasonable
8 to me.

9 Q. Okay. And would you also agree with me that the two
10 organizations that have given certification to your lab also
11 suggest blind testing, which has no suggestion of the answer
12 when proficiency tests are administered?

13 A. I'm not aware that that is suggested by them; it may very
14 well be.

15 Q. All right. But in the information that was given to you
16 in this case, looking at Government's Exhibits 6 and 7, it was
17 already suggested to you that Mr. LeCroy had committed a

18 murder, right?

19 A. No, I don't believe I was aware of any of the particulars
20 of the case.

21 Q. Do you disagree with me when I tell you that the reports
22 on the evidence submission form show that they already told you
23 that this was a death case involving homicide and sexual
24 assault?

25 A. If it's on the case report, it's on the case report; I

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1 don't recall that initially I knew any of the particulars of
2 the case.

3 Q. Okay. Now, when you are in your lab and you're having to
4 do one of these 100 or so cases you've already done this year,
5 you mentioned to us that you're looking at some things you call
6 general characteristics, right?

7 A. Yes.

8 Q. And I think you told us earlier that general
9 characteristics are things or features -- I use the word
10 "things," that's fairly indefinite -- that are features that
11 most people have in their style and form of writing?

12 A. Their class characteristics, yes.

13 Q. All right. Class characteristics, is that what we're
14 talking about here when I say "general"?

15 A. Common, common to a group --

16 Q. Okay.

17 A. -- rather than an individual.

18 Q. Okay. So all of us in this room, from your point of view,

19 are going to have these class characteristics?

20 A. We may.

21 Q. Well, if they are common to the group, why may we not,

22 then?

23 A. Because some of you may individualize letter forms that

24 I'm thinking about that would not make them class.

25 Q. So if --

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1 A. I would have to see it.

2 Q. I understand. If the judge and I write the letter R in

3 the same way, to you, that's a class characteristic?

4 A. Possibly, yes. If it's very similar, yes.

5 Q. But if we write the letter R differently, then, it's a

6 what?

7 A. It would be an individual characteristic.

8 Q. Okay. How can you tell if the judge's R is more like

9 everyone else in the room than my R?

10 A. Well, experience, looking at thousands and thousands of
11 letter forms and deciding what is a class characteristic as
12 opposed to what is an individual characteristic; it's
13 experience.

14 Q. How many writers of the English language exist on Planet
15 Earth today, do you know?

16 A. I wouldn't have a clue.

17 Q. You really don't have a clue as to what is the usual way
18 the letter R is formed by people who write in the English
19 language, do you?

20 A. I haven't examined every R that is in existence today, no,
21 I have not.

22 Q. This is another assumption you're making, right?

23 A. What assumption?

24 Q. The assumption that you have in your mind of a class
25 characteristic for a specific letter.

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1 A. Yes, that I've seen before.

2 Q. Oh, okay.

3 THE WITNESS: An example would be a lower case E in a
4 cursive script, Your Honor; how many ways would there be to
5 individualize that movement? Not very many.

6 BY MR. KISH:

7 Q. I can't remember if you agreed with me or disagreed with

8 me before that there are 34 known styles of the hand printing
9 that are taught? Would you agree or disagree?

10 A. I don't know that that's the case. I doubt that there is
11 that many being taught today. I believe that D'Nelian is
12 probably the most prolific style of writing taught at schools
13 in the United States.

14 Q. And when did the D'Nelian style of printing begin to be
15 taught; does your research show you that?

16 A. I believe it was in the mid-1970's when it was developed
17 and first published.

18 Q. It was actually developed and first published in
19 California, wasn't it?

20 A. I believe so.

21 Q. And it didn't move east until about 15 years ago; would
22 you agree with that or disagree with that?

23 A. I'm not sure. But I know it's very widespread in the
24 educational system in the United States. My children even
25 learned it.

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1 Q. Sure. Do you know what Mr. LeCroy learned?

2 A. No.

3 Q. Could you tell from looking at the known writings whether
4 he learned D'Nelian or a different form of block printing?

5 A. I cannot.

6 Q. It didn't jump out at you, did it?

7 A. Well, it's irrelevant, as far as I'm concerned.

8 Q. So if the questioned document had Zaner-Blouser printing,
9 it wouldn't matter to you what the known writer had learned as
10 a style of printing?

11 A. But it doesn't.

12 Q. How do you know?

13 A. Because I know what Zaner-Blouser looks like.

14 Q. So what style of printing did the writer of the questioned
15 document learn?

16 A. I can't say. I mentioned earlier, we abandon all
17 reasonable forms of that system that we're taught; that's why
18 our writing all looks different. We don't follow that model
19 exactly; if we did, we would be able to superimpose everyone's
20 writing on top of one another.

21 Q. You mentioned to us the concept of skill level when you've
22 answered a couple of questions earlier; do you remember saying
23 that?

24 A. Yes, I do.

25 Q. All right. Skill level is, again, a subjective

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1 determination by any particular forensic document examiner,
2 right?

3 A. Yes, it is subjective, to some extent.

4 Q. Well, how is it, then, objective?

5 A. Well, you can see a poorly skilled writer's writing and
6 assess that that's a poorly skilled writer as opposed to a
7 highly skilled writer, who is very fluent in writing.

8 Q. But "objective" means it's quantifiable. Is there a way
9 to quantify the distinction between a skilled and an unskilled
10 writer?

11 A. Well, I don't think you can put numbers to it; it's an
12 observation that can be clearly made.

13 Q. Rhythm and speed are other features that you look at when
14 doing some of your initial examinations during a comparison;
15 would you agree with that?

16 A. Yes, I would.

17 Q. There is no way to quantify or objectify the rhythm or
18 speed that a writer uses in preparing a certain document;
19 that's true, isn't it?

20 A. Not to quantify, but it can be assessed.

21 Q. Right. Another feature that you and other document
22 examiners look at is the height relationship of various letters
23 and even of words; that's true, isn't it?

24 A. Yes.

25 Q. That can be quantified, can't it?

1 A. It could be, but we do not measure height relationships.

2 Q. All right. One thing that you can quantify, you don't,
3 right?

4 A. Putting numbers to it, I don't know. Because of natural
5 variation, I don't know that putting actual rulers to writing
6 would be of any benefit at this point in time.

7 Q. Well, if rulers would be of no benefit, would you then
8 agree that height relationships would be of no benefit?

9 A. No. Height relationships are, and I pointed that out to
10 Your Honor earlier in the word, "that."

11 Q. Okay. How about the spacing between letters and words,
12 that can be quantified, can't it?

13 A. It could be, yes.

14 Q. But you don't do that, do you?

15 A. Currently, no.

16 Q. Although you do use the concept of subjective ideas of
17 spacing to make a comparison?

18 A. Yes.

19 Q. Okay. The placement of letters or marks or words in
20 relationship to a line on a paper is another feature that you
21 sometimes look at, right?

22 A. Yes.

23 Q. Again, that can be quantified, right?

24 A. It might be quantified.

25 THE WITNESS: We don't measure, Your Honor, with

1 rulers to see -- to put numerical values to height
2 relationships, spacing, whatever; it's just not done in the
3 field.

4 BY MR. KISH:

5 Q. You just make your choice after the years of experience
6 that you have learned, right?

7 A. Yes.

8 Q. Okay. Letter design or construction, that's another
9 feature you look at when making your comparison?

10 A. Yes.

11 Q. Unlike the previous three ones we have just talked about,
12 that letter design or construction cannot be quantified; that's
13 right, isn't it?

14 A. There are some computer systems that do look at writing in
15 that manner, but the normal day-to-day practitioner does not
16 utilize those tools.

17 Q. Okay. A subset of what I just said, I think, is
18 connecting strokes, in other words, the way that particular
19 letters are either connected or not connected to adjacent
20 letters, that's another feature you look at?

21 A. Yes.

22 Q. Okay. Stroke direction is something you often look at by

23 using your magnifying tools; would you agree with that?

24 A. Yes.

25 Q. And what that determines, sometimes, is that if a

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1 particular form is masking the direction of the stroke by
2 sometimes going over once or more, you can make determinations
3 by a microscopic examination?

4 Am I making sense with what I'm saying?

5 A. Yes, you can make those assessments microscopically or
6 under magnification.

7 Q. Okay. The questioned documents in this case, what
8 instrument was used to write with them {sic}, to write on those
9 documents?

10 A. I believe the majority are written with ball-point pens.

11 Q. Okay. When you say "the majority," there is only four
12 questioned documents, right?

13 A. I believe they were all written with a ball-point.

14 Q. Are you sure about that?

15 A. Not 100 percent, but I know that at least two are
16 ball-points.

17 Q. Okay. Are there certain instruments that make it more or
18 less difficult to determine stroke direction?

19 A. Yes.

20 Q. What are the writing instruments that make it more
21 difficult to determine stroke direction?

22 A. I would say sometimes possible a fiber tip or felt tip
23 marker, possibly, a liquid or a fluid ink pen, it might be
24 difficult to assess direction, at times.

25 Q. I'm going to read off another list and try to speed this

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1 up. Do the paper and the writing instrument, the slant of the
2 writing, the pen pressure and the pen direction, either
3 clockwise or counterclockwise for letter formation, are those
4 also features that you look at?

5 A. Those are all features that are considered, yes.

6 Q. Okay. Now, you told us also about when you finally have
7 gone through your comparison after looking at these features
8 and using whatever tools are at your disposal, you yield an
9 opinion of one form or another, right? And I'm including the
10 inconclusive as being an opinion.

11 A. Yes.

12 Q. Okay. And it's a spectrum from being able to make the
13 strongest association between the known and the questioned on
14 the one end of the spectrum to the strongest disassociation
15 between the known and the questioned on the other end of the

16 spectrum; would you agree with that?

17 A. Yes.

18 Q. And there are different words for where you might be on
19 the spectrum, right?

20 A. Yes.

21 Q. You mentioned to us this international organization has
22 nine places on the spectrum?

23 A. The American Society of Testing Materials has a nine-scale
24 opinion.

25 Q. Right. Right, but your lab uses seven places roughly

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1 similar?

2 A. Yes.

3 Q. Okay. You and every other forensic document examiner make
4 a subjective decision as to where to place your opinion on that
5 spectrum, right?

6 A. Yes.

7 Q. There is no standardization whatsoever to guide a document
8 examiner as to where on that spectrum his or her opinion comes
9 out?

10 A. It's based solely on experience and training.

11 Q. It's a judgment call, right?

12 A. It is a judgment call, yes.

13 Q. There has been no testing that you are aware of, there is
14 nothing in the literature as to whether or not all forensic
15 document examiners are using the same subjective measurement
16 when they decide where on that spectrum they are coming out?

17 A. No.

18 Q. Now, you mentioned to us earlier that you had heard of
19 some studies that you thought might have something to do with
20 the principle of uniqueness, right?

21 A. "The Individuality of Writing."

22 Q. Okay. You prefer calling it the individuality of
23 writing?

24 THE WITNESS: That's the title of the paper, Your
25 Honor, by Dr. Srihari.

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1 BY MR. KISH:

2 Q. Okay. Have you read the paper?

3 A. Yes.

4 Q. I thought you told us earlier that you're not an expert in
5 testing?

6 A. I'm not.

7 Q. Okay. So all you know is what you've read, real frankly;
8 that's not your field?

9 A. Correct.

10 Q. Okay. You also mentioned to us a Dr. Moshe Kam, which you
11 thought had done some work on whether or not forensic document
12 examiners do a better or a worse job than lay people when
13 looking at these lines and making comparisons, right?

14 THE WITNESS: I didn't think that, Your Honor; I
15 stated that he did do studies.

16 BY MR. KISH:

17 Q. And I wrote down that you said that your recollection of
18 Dr. Kam's work is that Dr. Kam said that forensic document
19 examiners make far less errors than do lay people, right?

20 A. Yes. But Dr. Kam, I understand, will be here to address
21 his research, better than I could articulate it.

22 Q. I know, but you've brought that up, so I would like to
23 talk about your understanding of it. I think you used the
24 words "error rate"; do you remember saying that?

25 A. Yes.

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1 Q. And I think you used the term that the forensic document
2 examiners, under Dr. Kam's report, had an error rate of 6
3 percent and the lay people in the 38 or 39 percent range?

4 A. That's correct.

5 Q. All right. Did you also know that in that exact, same

6 report, Dr. Kam had a different test for how well lay people
7 and forensic document examiners do when they are correct, in
8 other words, not when they make a mistake but when they are
9 right? Did you read that in his report?

10 A. Yes.

11 Q. And did you notice that when it comes to doing the exact
12 thing you've done in this case, which is making a match between
13 a questioned and a known, Dr. Kam said that you and the lay
14 people both are successful 87 percent of the time? Did you
15 notice that?

16 A. Yes.

17 Q. Now, I assume that you have also kept up on the fact that
18 the federal courts have been a little more stringent in your
19 field within the last 15 years? Would you agree, or have you
20 kept up on your reading on that?

21 A. When you say "stringent" --

22 Q. Well, you mentioned to Mr. Vineyard earlier that you
23 actually testified in a Daubert hearing on an earlier occasion,
24 right?

25 A. Yes.

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1 Q. And you know, now, that Daubert is the name of a case that

2 requires federal judges to assess expert witness testimony in
3 some situations before it can be presented to a jury, right?

4 A. Yes.

5 Q. Up until the Kirby case, you had never had to do that
6 before, had you?

7 A. No.

8 Q. As a matter of fact, the Kirby case is the only time any
9 lawyers have ever challenged whether you can testify as an
10 expert pretrial in federal court, right?

11 A. Well, they have protested my testifying but not in a
12 Daubert hearing.

13 Q. Okay. Have you kept up with reading about how many
14 federal judges have decided that your field is not an
15 expertise?

16 A. Very few. The majority are in favor of allowing testimony
17 in, is my understanding.

18 Q. And where are you getting your understanding from?

19 A. From the Internet, from colleagues, from reports, reading
20 court decisions.

21 Q. I see. Okay. Obviously, you're not a lawyer?

22 A. Oh, of course not.

23 Q. Okay. I'm going to hand to you what's already been
24 admitted as Government's Exhibit Number 10 and Government's
25 Exhibit 14 here. Government Exhibit Number 10 is the summary

1 that you helped the government prepare, and Government's
2 Exhibit Number 14 is a group of some of the questions or the
3 known writings that were submitted to you.

4 All right. Now, you've seen all those items before,
5 haven't you?

6 A. Yes.

7 Q. Now, if you turn over to the summary, at the very back,
8 you had prepared a number or you had helped the government put
9 together a number of pages that were copies of photographs that
10 included enlargements from what you thought were relevant
11 portions of both the questioned and the known documents, right?

12 A. When you say prepared for the government, you mean the
13 demonstrative charts?

14 Q. Yes, sir, that's what I mean.

15 A. Yes, I prepared those.

16 Q. In other words, there is more of those attached to that
17 beyond what you showed us on this large stand-up easel this
18 morning?

19 A. Yes.

20 Q. Okay. I want you to turn over to in Government's Exhibit
21 10 the very first of those -- I guess we will call them
22 charts.

23 A. (Witness complies with request of counsel.)

24 Q. Okay. And what that first chart has is eight different
25 sections of writing that have been extracted by you from either

1 the known writing of William LeCroy, Jr., or from the
2 questioned documents in this case, right?

3 THE COURT: Mr. Kish, would you mind just putting the
4 exhibit on the board, so I could follow it as well?

5 MR. KISH: I would, except this one, we don't have a
6 chart.

7 THE COURT: Oh.

8 MR. KISH: What I could do, Judge, is hand up --

9 (Pause in the proceedings.)

10 MR. KISH: I'm going to hand to your law clerk,
11 Judge, this document.

12 THE COURT: Thank you.

13 MR. KISH: Yes, I apologize.

14 BY MR. KISH:

15 Q. It has these eight different extractions from either the
16 known or the questioned document, right?

17 A. Yes.

18 Q. And you did some of these extractions, because I think, as
19 you told us this morning, they were significant to your
20 opinion, right?

21 A. They were done for the purposes of peer review, Your
22 Honor, not for demonstrative purposes at trial; they are
23 attachments to my case notes.

24 Q. Well, were they not significant, then, to your opinion?

25 A. Yes.

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1 Q. Oh, okay. The first one on the upper left-hand side has
2 the word T-h-a-n-k-s, I believe, in hand-printed form and it
3 comes from one of the questioned documents, which within your
4 lab was given number 21-Q. That's right, isn't it?

5 A. 21-C.

6 Q. 21-C, you're right.

7 A. (Nods head affirmatively.)

8 Q. And then you focused with two little arrows on the bottom
9 portion of the letter N and the bottom left portion of the
10 letter A within that word "Thanks"; that's right, isn't it?

11 A. Yes.

12 Q. You did the same thing directly below that with a section
13 of something that came out of one of the known writings, right?

14 A. Yes.

15 Q. Again, you focused on the letter A in the word A-l-l; you
16 put a little arrow towards the bottom left-hand side of that
17 letter; that's true, isn't it?

18 A. Yes, it is.

19 Q. And directly below that, you did the same thing with the

20 letter N, as extracted from one of the known writings, right?

21 A. Yes.

22 Q. Now, let's turn through the exhibit of known writings that

23 I have just handed to you and turn over to a letter that's

24 dated 12/18/94. It should be one, two, three, four, five, six

25 pages in.

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1 A. (Witness complies with request of counsel.)

2 Q. The third paragraph, the 9th line of the third paragraph,

3 second line, left-hand side of the line, the word A-n-d in this

4 known writing, do you see that A?

5 A. Yes.

6 Q. Take that and compare that to the A in your questioned

7 document that you have got right there.

8 A. Okay.

9 Q. They're different, aren't they?

10 A. There is a variation, yes.

11 Q. So to elaborate on what we said earlier, if it matches

12 your opinion, it's a similarity; if it's different, it's a

13 variation?

14 A. It's a semantical thing, but yes.

15 Q. Have you ever heard the expression, "Heads, I win; tails,

16 you lose"?

17 A. Yes.

18 Q. Now, let's turn over, then, to two more pages, a letter
19 that has about 15 lines of text and ends with the salutation
20 "Love, Big Brother"; the third line down from the top, the
21 right-hand side of that line, the word "As," capital A, small
22 S.

23 A. I'm sorry, I'm lost. Which document are you talking
24 about, this letter?

25 Q. Well, as I said, it's the letter dated 2/22/94 and it's

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1 the second page of that letter.

2 A. (Reviews exhibit.)

3 (Pause in the proceedings.)

4 THE WITNESS: Okay.

5 BY MR. KISH:

6 Q. Third line down, right-hand side of the line, the word is
7 capital A, small S. Take a look at that capital A and compare
8 it to your questioned capital A?

9 A. We're talking about the first page on 2/22/94?

10 Q. The second page sir, I apologize. The third line down
11 from the top.

12 A. I see it.

13 Q. That capital A versus the capital A in your questioned

14 document, this time, they're even more different, aren't they?

15 A. There is a cursive A, as compared to the printed A.

16 Q. But the entire rest of this letter is all in printing,
17 isn't it?

18 A. Not all of it, there are some script letters in it.

19 Q. Okay. But, again, this would be something that is
20 different than what you've found in the questioned document,
21 right?

22 A. I consider it to be a normal and natural variation of the
23 individual, not indications of another writer. There is
24 sufficient individuality between the questioned material and
25 the known material, based on my experience and training, for me

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1 to make the opinion that I have made. And I am assessing these
2 other characteristics that you're pointing out and calling
3 differences as normal and natural variation.

4 Q. Let's turn over to the letter dated August 7th, 2001.

5 THE COURT: Mr. Kish, again, I don't have these
6 letters, do you have copies or --

7 MR. KISH: I do, Judge, and I can give you another
8 set. Yes, I can give you a set right here.

9 I want to make sure I have them in the correct order
10 so that you can follow along.

11 (Pause in the proceedings.)

12 MR. KISH: Judge, I had some little markings on this
13 one that I'm going to remove so that there won't be any
14 potential prejudice, and I will hand these to your clerk.

15 THE COURT: And we will give them back.

16 MR. KISH: And I can never find my markings again.

17 (Pause in the proceedings.)

18 BY MR. KISH:

19 Q. What we are on now, sir, is the letter dated August 7th,
20 2001, and I want you to look at the letter A in the word
21 "August." Do you see that?

22 A. Yes.

23 Q. And then look back to the letter A on the upper left-hand
24 side of your questioned or your chart here on the questioned
25 document. Again, this is different in that it doesn't have the

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1 little tail that you found so significant on the lower
2 left-hand side of the letter, right?

3 A. Yes, it does not.

4 Q. Let's follow down that page, one, two, three, four --
5 about twenty-two lines, and this is the word, "Anyway," with a
6 capital A, again, with no little left hand lower side marking
7 that was so significant to you when you decided it was

8 significant.

9 A. Yes.

10 Q. The next page of the same letter, the top line, the word
11 As, A-s, no little left hand side marking you found so
12 significant there, is there?

13 A. That's correct.

14 Q. The bottom of the page, one, two, three, four lines from
15 the bottom, the word "And," no little left hand lower side mark
16 you found so significant on that capital A, is there?

17 A. No.

18 Q. The next page, July 1st, 2001, twelve lines down, the word
19 is capital A, small L-L, the same thing I just said previously
20 is true, isn't it, no little mark on the left-hand side of the
21 A, right?

22 A. Correct.

23 Q. All right. Five more lines down, the left-hand side, the
24 word is capital A, small R-E, no little mark on the left-hand
25 side of the capital A there, is there?

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1 A. No.

2 Q. Let's then go over to it's like about four more pages to a
3 letter that has no date but which starts with the salutation,
4 "Kristie," K-r-i-s-t-i-e, and after that salutation, on the

5 second line is the word "Aunt," A-u-n-t. That capital A
6 doesn't look like the A in your questioned document, does it,
7 because it doesn't have the little mark on the left side,
8 right?

9 A. Right.

10 Q. The line below that where in parentheses, there is "A" and
11 then "Mother," that capital A doesn't look like the questioned
12 one, does it?

13 A. Not exactly, no.

14 Q. Well, it doesn't have the little mark that you found so
15 significant, does it?

16 A. No.

17 Q. There's the first paragraph and then there is the second
18 paragraph, and the last line of that second paragraph is the
19 words "And Julie, too." That capital A doesn't have the mark
20 you found so significant in the questioned document, does it?

21 A. I don't see where you're talking about.

22 Q. There is two paragraphs, the first two paragraphs after
23 the salutation "Kristie," do you see that?

24 A. Yes.

25 Q. At the very end of that second of those first two

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1 paragraphs is a short phrase, "And Julie, too."

2 A. Yes, I see that.

3 Q. That capital A doesn't have the distinctive mark you found
4 in the questioned document, does it?

5 A. No, it does not.

6 Q. Turning over to a letter dated 7/1/94 and the second of
7 those two pages on that letter, three lines up from the bottom
8 on the left-hand side is the phrase, "And you are required."
9 That capital A doesn't have the little mark you found so
10 significant on the questioned one, does it?

11 A. No.

12 Q. Let's go over to the letter dated 3/27/94, the last line
13 on the first page, the word is A-r-e. That capital A doesn't
14 have the marking that you found so significant, does it?

15 A. No.

16 Q. Now, you also on this one word "Thanks" that you found so
17 significant for the As, you also found the letter N to be of
18 some import to your opinion, didn't you?

19 A. Yes.

20 Q. And as a matter of fact, you've made a little marking on
21 your chart for the lower left-hand side of the capital letter N
22 that had that same sort of little tail on it, and you found a
23 place in the questioned documents -- the known documents, I'm
24 sorry, that had the same little tail, and to you, that was
25 significant, wasn't it?

1 A. Yes.

2 Q. Let's go back to the front of our group of known documents
3 here, back to 12/18/94, the very bottom line, under "Happy New
4 Year," the capital N.

5 A. Mr. Kish, I have to catch up with you. 12/18/94?

6 Q. Right, we just turn our documents back over to where we
7 start. "Happy New Year" at the bottom, the N doesn't have the
8 little tail, does it?

9 A. No, it does not.

10 Q. Turn over to the letter dated February 22, '94, and this
11 time, we're going three lines from the top, and the word is
12 "Not," capital N, N-o-t, and that N doesn't have the little
13 telltale tail, so-to-speak, does it?

14 A. No, but the word "Nanny" almost to the bottom of the page,
15 let's see, 1, 2, 3, 4, 5, 7 lines from the bottom, does.

16 Q. So when it matches, your opinion, it's important; when it
17 doesn't, you just discard it?

18 A. No.

19 THE WITNESS: As I explained to Your Honor earlier,
20 variation is normal, it's natural, it's expected. The
21 individual nuances, the idiosyncracies are not there at each
22 and every letter form, but when they are present, they are
23 significant. And these features are significant and they are
24 present, but not in every letter.

25 BY MR. KISH:

1 Q. But a document examiner, just like yourself --

2 A. And they are not taken --

3 Q. I'm sorry, I didn't mean to interrupt you. Go ahead.

4 A. And they are not taken by themselves, it's additive.
5 The ellipsis that I referred to earlier is throughout the
6 documents; that is highly significant and probably more
7 significant than the upturn on the N.

8 Q. Good. I want to talk to you about that ellipsis for a
9 second. What is an ellipsis?

10 A. Well, in grammar, it's a bridge between two thoughts or
11 phrases in a sentence where words are left out, but in this
12 case, as I said earlier, I don't think it's really a true
13 ellipsis, it's just an emphasis at the end of a sentence.

14 Q. This is not handwriting; a ellipsis is punctuation or
15 grammar.

16 A. Absolutely.

17 Q. Are there any studies that you're aware of that you can
18 identify a writer by virtue of grammar or punctuation?

19 A. Yes, there is.

20 Q. And what are those, and are you qualified in that field?

21 A. Absolutely not. These are written markings at the end of
22 a sentence.

23 Q. Wait a minute. You just told us a second ago that this
24 was highly significant --
25 A. Absolutely.

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1 Q. -- but you're not qualified in this field of making
2 determinations based on grammar and punctuation?
3 A. Absolutely I am, in punctuation, handwritten punctuation
4 as significant as that is.
5 Q. Well, that's what I'm getting at, is --
6 A. It's highly significant.
7 Q. -- up until now, you've told us you've been looking at
8 letter forms and, now, you're telling us about the content of a
9 writing.
10 A. Absolutely not. I'm looking at the punctuation at the
11 end; it's handwritten at the end of words.
12 Q. And what training did you receive in determining whether
13 punctuation can assist you in making one of the determinations
14 that you make in your job?
15 A. It's a known --
16 Q. And let me finish. In your job as a forensic document
17 examiner.
18 A. Look at punctuation constantly, on a daily basis.

19 Sometimes, punctuation is significant; sometimes, it's not. In
20 this particular case, it's highly significant.

21 Q. How do you determine whether it's significant or not
22 significant?

23 A. Based on experience and training.

24 Q. I would assume that there is no published testing on this
25 thesis; would I be right about that?

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1 A. Not that I'm aware of.

2 Q. I could go on for a little longer, but I would assume you
3 can probably agree with me I can find a lot more times when the
4 feature you found important on the questioned document is not
5 found on the known documents, and I'm assuming your answer
6 would be it's a variation, a normal variation?

7 A. Yes.

8 Q. Okay. So to save a lot of time, would you agree with me
9 that I could find probably a lot more examples of what we have
10 just gone through?

11 A. Certainly.

12 Q. Okay. You mentioned to us when you were talking about
13 some of the associations of which you're a member that one of
14 them, the American Board of Forensic Document Examiners,
15 actually certifies practitioners by administering some testing?

16 A. Yes. I guess you could call it certification. I mean, it
17 is certification, yes.

18 Q. You kind of rolled your eyes. I mean, is there
19 something --

20 A. I didn't roll my eyes. Yes, it is certification of the
21 competency of an individual that they meet the standards as set
22 by the Board.

23 Q. When did you take those certification tests?

24 A. In 1984.

25 Q. Do you have --

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1 A. Well, prior to 1984.

2 Q. Okay. Do you have any recollection of whether or not the
3 five tests you took to be Board-certified had anything to do
4 with printing?

5 A. I don't recall.

6 Q. Okay.

7 MR. KISH: Okay. If I could just have one moment,
8 Judge?

9 (Pause in the proceedings.)

10 MR. KISH: Judge, I think that's it. Thank you very
11 much.

12 THE COURT: All right. Mr. Vineyard, any redirect?
13 Mr. Kish, she will hand you the other exhibits, the
14 other documents.

15 MR. KISH: Yes, ma'am.

16 REDIRECT EXAMINATION

17 BY MR. VINEYARD:

18 Q. Mr. Anthony, you testified about an assumption; do you
19 recall that on cross-examination?

20 A. Yes.

21 Q. And were you referring to the impossibility of testing
22 every individual's handwriting?

23 A. Yes.

24 Q. You are familiar that some testing has been done?

25 A. Yes, I'm aware of that.

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1 Q. And you've already testified about that?

2 A. Yes.

3 Q. Sir, were there any other questions asked of you on
4 cross-examination for which you did not get to fully answer or
5 correct anything?

6 A. I don't believe so.

7 Q. And the various examples that Mr. Kish went over with you
8 in terms of variations in letter formations between the A and

9 the N, those were things that you noted and considered in
10 reaching your opinion; is that right?

11 A. Absolutely.

12 Q. And had you found sufficient numbers of differences, you
13 would have not reached your opinion that Mr. LeCroy was the
14 author of the documents?

15 MR. KISH: Judge, I would like to object to the
16 leading form of the question in redirect examination, Your
17 Honor.

18 MR. VINEYARD: I'll rephrase it, Your Honor.

19 THE COURT: Yes.

20 BY MR. VINEYARD:

21 Q. Sir, had your opinions been different, would you have
22 concluded that the variations pointed out to you were
23 significant?

24 A. Yes.

25 THE COURT: Any recross?

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1 MR. KISH: No more questions.

2 THE COURT: All right. Mr. Anthony, you may step
3 down.

4 MR. VINEYARD: May he be excused, Your Honor?

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THE COURT: Yes.
Does that conclude the evidence for today?
MR. VINEYARD: Yes.
THE COURT: 10:00 o'clock tomorrow?
MR. VINEYARD: That's fine, Your Honor.
MR. KISH: Fine, Judge.

(Proceedings adjourned, to recommence as ordered by the Court.)

* * * * *

CERTIFICATE

I, DONNA C. KEEBLE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

Donna C. Keeble, RMR, CRR

DONNA C. KEEBLE, Official Court Reporter

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