OIG REPLIES TO THE RESPONSES TO THE DRAFT REPORT

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Our replies to the responses made by the FBI, the U.S. Attorneys' Offices, and other responders are set forth below. We did not attempt to reply to every comment made by these individuals or offices. Rather, we address the responses that concern the most significant issues, we indicate where we made changes to the Report, and we discuss our reasons for declining to make the changes requested by responders.

I. REPLIES TO GENERAL RESPONSE MADE BY FBI IN THE EXECUTIVE SUMMARY OF ITS RESPONSE

FBI Response

The FBI states that by commenting about how particular cases illustrate ways in which Laboratory practices could be improved, the OIG gives the incorrect impression that various issues have not been considered by the FBI. The FBI recommends that discussions about the need to improve Laboratory practices that appear other than in Parts Six and Seven of the OIG Report should be omitted. FBI Response at 5-6.

OIG Reply

The Executive Summary and Part Six of the final Report acknowledge that the FBI has indicated that it accepts virtually all of the recommendations contained in Part Six and has taken, or is taking, steps to implement them. Part Two of the Report notes that practices in the Laboratory have evolved over time. The OIG determined not to remove the discussions about the need to improve the Laboratory that appear in parts of the Report other than Parts Six and Seven because it is useful to present these conclusions not only in terms of general recommendations but also in the context of the matters from which they are drawn.

FBI Response

The FBI contends that the OIG, in finding that certain examiners testified outside the scope of their expertise, fails to appreciate the role of the expert in the criminal process and that the OIG's discussion improperly suggests that because the FBI has not had codified standards for expert testimony, "requiring accurate testimony would be new to the FBI." FBI Response at 7.

OIG Reply

The general observation that the OIG does not appreciate the role of the expert in the criminal process is unfounded. The Report notes in various places that experts may testify not

only based on scientific knowledge, but also based on technical knowledge or experience. Where the OIG criticizes individuals for straying beyond their expertise, it is usually because they either proffered an opinion that they suggested had a scientific basis when it did not, or they ventured into an area in which they were not qualified by education, training, or experience. In the final Report, the OIG also notes in Part Six that the importance of presenting opinions in a clear, objective manner within the bounds of one's expertise, and other issues noted in our recommendations, may have been addressed in the past as part of the moot courts or other training of FBI examiners. Yet, despite whatever guidance the FBI previously gave its examiners concerning testimony, some examiners identified in the Report did not testify accurately, objectively, or within their expertise.

For reasons noted in the Report, we think it is important that the Laboratory adopt a common core curriculum for new examiners to address the identified issues, as well as written guidelines for examiner testimony. We also note that the FBI, in response to the general recommendations in Part Six of the OIG Report, states that it concurs in the OIG recommendations concerning examiner training and testimony.

FBI Response

The FBI objects to suggestions that one or more examiners may have biased their conclusions to favor the prosecution, citing the Rudolph, Oklahoma City, and Avianca matters. The FBI observes that to charge that the Laboratory acted with other than "complete objectivity" is an "extremely serious allegation, and one that lacks support." FBI Response at 8.

OIG Reply

We address the FBI's complaint in the specific sections that include similar type language, such as the Rudolph matter, the Oklahoma City bombing, and the Avianca bombing.

FBI Response

The FBI requests that we delete expressions of our "serious concern" or being "deeply troubled" with regard to particular findings. The FBI states that the "fact-finding objective of the OIG is compromised by such `subjective opinion.'" FBI Response at 8.

OIG Reply

In general, the OIG concluded that the Report should not be revised in response to this request, because it is noteworthy that the OIG's investigative team, including the panel of five experienced scientists, did in fact find certain conduct and practices to be deeply troubling or of serious concern. In certain instances, however, we did delete these conclusions from the body of

a particular section where we thought the substitution of a different way of stating the point clarified our meaning. These opinions were then moved to the Conclusion portion of the section so that our concerns remain in the Report.

FBI Response

The FBI states that it is not inclined to transfer the investigative and crime scene management functions of the Explosives Unit out of the Scientific Analysis Section. The FBI notes that bomb scene investigations are unique and that it is necessary for explosives examiners to be involved at the scene. FBI Response at 9.

OIG Reply

The FBI appears to have misunderstood our recommendations in this regard. The OIG did not intend to suggest that EU examiners should be excluded from crime scenes, and we noted in the draft Report that "examiners in the EU should continue to advise and assist in the gathering of evidence at bombing scenes." We do think, however, that the investigative and crime-scene management functions now performed by examiners in the EU do not justify having non-scientist agents serve as examiners in that unit. Moreover, while scientifically qualified EU examiners can appropriately provide input for investigations, we do not think they should direct the overall investigation, because of the resulting tension between the roles of a forensic scientist and the criminal investigator. Based on the FBI's response, in the final Report we have clarified our recommendation concerning the EU to state, "Examiners in the EU should continue to advise and assist in gathering evidence at bombing scenes, but primary responsibility for conducting investigations and directing crime-scene management should rest with components of the FBI outside the Scientific Analysis Section."

II. REPLIES TO RESPONSES MADE TO SPECIFIC SECTIONS OF THE DRAFT REPORT

EXECUTIVE SUMMARY

This section was not submitted to the FBI, the U.S. Attorneys' Offices, or others for comment.

PART ONE: ORGANIZATION OF THIS REPORT

The FBI, U.S. Attorneys' Offices, and other responders did not make any comments on this section.

PART TWO: BACKGROUND TO THE OIG INVESTIGATION

The FBI, U.S. Attorneys' Offices, and other responders did not make any comments on this section, other than to point out certain factual corrections (such as the date a trial began) in the World Trade Center case.

PART THREE: ANALYSIS OF PARTICULAR MATTERS

SECTION A: ALLEGATIONS CONCERNING TERRY RUDOLPH

FBI Response

The FBI notes that the draft Report is incorrect in stating that FBI OPR advised Rudolph that its inquiry had not developed facts warranting administrative action. Also, the FBI maintains that FBI OPR exercised proper investigative discretion in deciding not to pursue further the allegations that Rudolph had perjured himself in a case in the Southwest. FBI Response at 35.

OIG Reply

The OIG has revised the Report to state, as was noted elsewhere in the draft Report, that as a result of the FBI OPR investigation, the FBI Administrative Services Division, not FBI OPR,

advised Rudolph that the facts did not warrant administrative action. Regarding the perjury allegations, the OIG considered the FBI's response but did not change the Report's conclusion that FBI OPR should at least have reviewed FBI records to determine if Rudolph had ever testified in a case in the Southwest, which could have led to further investigation. As explained in the Report, we do not think that Rudolph's denying that he had ever perjured himself should have ended FBI OPR's inquiry in the matter.

SECTION B: VANPAC CASE

FBI/Rothstein Response

The OIG received separate responses from both the FBI and Stanley Rothstein, an attorney in the Terrorism and Violent Crime Section of the Criminal Division of the Department of Justice, urging the OIG to delete its conclusion that CTU examiner Roger Martz was unnecessarily ambiguous when he testified at trial that he was not able to "successfully compare" certain smokeless powders. Both the FBI and Rothstein maintain that Martz truthfully answered the questions he was asked and that his answers, when viewed in the context of the questions, were not ambiguous. FBI Response at 28-29; Rothstein Response at 1-2.

OIG Reply

Based on these responses, the OIG decided to reproduce the testimony in question in the final version of the Report. As noted in the Report, the OIG concluded that Martz was ambiguous in stating on direct examination that he had been unable to "successfully compare" the powders. Only further questioning on cross-examination brought out that he could not determine from his comparisons if powders had come from the same lot. His testimony also left unclear whether he had compared samples from all the devices. Martz compared a sample from one of the four devices, a sample from a four-pound can of powder, and some known samples from the Laboratory. He should have stated more directly that he found differences and similarities when he compared certain samples, but could not determine from the data if the powders came from the same batch.

FBI Response

The FBI also urges in its response that the OIG consider whether its conclusions regarding former examiner Robert Webb are overly critical and inaccurate. The OIG found in the draft Report that Webb had stated his conclusions about the common origin of certain tape, paint, sealant, and glue more strongly than was justified by the results of his examinations and the background data. As noted in the Report, the methods Webb employed would allow an examiner

to conclude that samples could have come from the same source or manufacturer, but not to opine that they necessarily did. FBI Response at 29.

The FBI makes four points: (1) Webb used "polarized light microscopy" to examine the items; (2) the tests identified in the draft Report would be sufficient to allow an examiner to determine if two items came from the same manufacturer; (3) the draft Report reflects a misunderstanding of the nature and use of FBI data bases insofar as the draft Report notes that when Webb did the work neither he nor the FBI had a data base to confirm that the materials in question did in fact differ among manufacturers in terms of their chemical and physical characteristics; and (4) it is inappropriate to find deficiencies in Webb's analysis when certain documents were missing from the case file. FBI Response at 29-30.

OIG Reply

The OIG considered the FBI's comments and determined not to revise its conclusions regarding Webb's work in VANPAC. The FBI does not identify any validation study conducted by it or any other laboratory showing that either polarized light microscopy or the other tests performed by Webb would successfully determine if samples came from the same source (or, with regard to the tape and RTV, the same batch or lot). The FBI's response also appears to misapprehend the significance of the OIG's comments concerning the absence of a data base. Without data confirming that samples of the questioned materials -- for example, black latex paint -- do in fact differ chemically or physically among manufacturers, we question the validity of Webb's working proposition that the examinations would have revealed some differences if the materials had come from different manufacturers (or batch or lot). This point is not adequately answered by the FBI's observation that "[t]he ultimate comparison and determination whether the two samples are from the same source is made by the examiner, based on all of the information available, including such factors as the color and texture of the item." Finally, as noted in the Report, we find that Webb's conclusions also seem overstated in light of differences in the results from certain analyses that Webb performed. This conclusion was based on results that do appear in the case file.

SECTION C: WORLD TRADE CENTER CASE

FBI Response

The FBI contends that Williams accurately testified that urea nitrate was made pursuant to Arabic formulas from bomb-making books linked to the defendants because two bomb technicians recalled that the chemists told Williams that the formula they were using was "the same" as that in the Arabic Formula. FBI Response at 10.

OIG Reply

This section of the Report was modified in light of the statements of the bomb technicians.

FBI Response

The FBI makes several points regarding Williams' role in the manufacture of urea nitrate. First, the FBI disagrees with our assessment that Williams was wrong to consider himself a supervisor of the Eglin "project." The FBI points out that Williams was in charge of logistics, recruiting the bomb technicians, and other tasks. FBI Response at 11.

OIG Reply

In the testimony at issue, however, Williams asserted that he was the supervisor not of the "project" but of the "mixing process." The Report already notes that Williams was in charge of certain administrative matters. Accordingly, Williams erred in his testimony that "I" made the urea nitrate and "supervised" the "mixing process."

FBI Response

Second, we stated in the draft report: "The reference in [Williams'] trial testimony to the other FBI personnel at Eglin as 'my workers' ... manifests an intent to downplay the role of the others and to aggrandize his own." The FBI argues that the trial testimony about "my workers" was reasonable and objects to "the OIG's speculation as to Williams' intent." FBI Response at 11.

OIG Reply

This sentence was revised for the sake of precision to indicate that Williams' testimony "could be interpreted to manifest an intent...."

FBI Response

Third, the FBI objects to our assertion that Williams' misstatement as to his role in the mixing process made him "appear to be an expert in the manufacture of urea nitrate," contending that the jury was not misled as to Williams' role or expertise. FBI Response at 11.

OIG Reply

We believe the statement in the Report is accurate, and therefore we did not amend it. We made no judgments as to what the jury concluded.

FBI Response

At the end of this section of the draft Report, we stated, "We are deeply troubled by Williams' testimony about the FBI's manufacture of urea nitrate." The FBI objects to our including the phrase "deeply troubled." FBI Response at 8.

OIG Reply

As previously noted, we deleted characterizations such as "we are deeply troubled" from the body of certain sections of the Report to address the claim that such characterizations appear overly subjective. The Conclusion in this section of the final Report begins: "We are profoundly disturbed by Williams' testimony in the Salameh trial." Report at 145. Thus, our strong disapproval of Williams' testimony is still expressed in the Report.

FBI Response

Regarding Williams' testimony about the defendants' capacity to make urea nitrate, the FBI generally does not disagree with our analysis, but the FBI does object to the sentence, "We are troubled that Williams' erroneous calculations conveniently produced the exact amount of urea nitrate -- 1200 pounds -- that he later testified ... was used in the Trade Center bombing." The FBI contends that since Williams' erroneous calculations produced a range (1200 to 1800 pounds), they did not produce the "exact amount" allegedly used in the bombing. FBI Response at 12.

OIG Reply

For the sake of precision, we have inserted the phrase "a range that included" after "produced." (The correctly calculated range would not have included 1200 pounds). Report at 101.

FBI Response

The FBI objects to the conclusion in the Report that Williams' testimony about a "non-laboratory yield" may have been "tailored" to reach the desired result (the amount of explosives used in the bombing). FBI Response at 12.

OIG Reply

For the reasons stated in the Report, the language is appropriate. Report at 102-104.

FBI Response

The FBI objects to our discussion of Williams' testimony about the VOD of urea nitrate. FBI Response at 12-13. The section of the draft Report on this subject included the following paragraph:

> *We are deeply troubled by Williams' testimony in Salameh that the VOD of urea nitrate is 14,000-15,500 feet per second. At best, the testimony was incomplete. At worst, it was intentionally false. We do not understand why Williams failed to tell the court that a standard text in the field of explosives (the Encyclopedia)--a text Williams was aware of when he testified--indicated that urea nitrate has a VOD of about 11,155 to 15,420 feet per second.*

Williams told us that he obtained the VOD orally from different persons. The FBI contends that while the persons Williams named "did not recall" discussing the VOD with Williams, "none of them stated categorically that it did not happen." Therefore, according to the FBI, there is no evidence to support the assertion that Williams' testimony may have been "intentionally false." FBI Response at 12-13. The FBI acknowledges that "[t]he recognized VOD of urea nitrate is . . . 11,155 to 15,420 fps." FBI Response at 12.

The FBI also objects to our conclusion that we have "grave doubts" about the veracity of Williams' claim that his testimony about the 14,000-15,5000 feet per second VOD of urea nitrate was based on oral statements from persons outside the FBI. FBI Response at 13.

OIG Reply

The three witnesses we contacted following Williams' interview told us more than that they just did not recall talking to Williams about the VOD. Two said that they did not recall such a conversation but that if they had been asked about the VOD of urea nitrate they would have consulted the Encyclopedia. The third witness said that he was "pretty sure" he did not have the conversation and that he would have had to perform research or make calculations to determine the VOD of urea nitrate (which would have made it more likely he would have remembered the conversation; moreover, any research would have inevitably led to the VOD range in the Encyclopedia). Moreover, there were no casenotes reflecting a VOD range of 14,000 to 15,500 feet per second, but in Williams' casenotes was the page of the Encyclopedia containing the range of 11,155 to 15,420 feet per second. Further, Williams told us he reviewed the Encyclopedia regarding the VOD of urea nitrate before he testified at the trial. It should also be noted that the 14,000-15,500 range was the exact range Williams estimated for the VOD of the explosive in the bombing. Accordingly, Williams' testimony may very well have been "intentionally false," and we believe our language referring to "grave doubts about the veracity" of Williams' claim is appropriate. Nevertheless, we have changed the phrase "intentionally false" to "knowingly incorrect" for the sake of precision and have rewritten the paragraph.

FBI Response

With respect to the discussion of Williams' opinion regarding the VOD of the main charge, the FBI "agrees with the OIG that a broader range should have been given. We disagree, however, with the OIG's criticism of Williams' methodology," on the ground that the methodology of inferring a VOD from observations at the scene is permissible as long as the estimated range is broad enough. FBI Response at 13-14.

OIG Reply

We were careful in the Report, however, to criticize Williams' "application of the methodology" not simply the methodology. Accordingly, the FBI's point lacks merit.

FBI Response

The FBI contends that the OIG is "overreaching" when we stated in the Report:

> *Williams' testimony about the "very limited" "type" of explosives that fit in the 14,000-15,500 feet per second bracket was literally correct, because the many commercial products within that range fall into certain categories or types--namely, dynamites, water gels, emulsions and fertilizer (e.g., ANFO) products. We are concerned, however, that the court may not have understood that within each "type" there are numerous commercial products meeting the 14,000-15,500 feet per second range.*

According to the FBI, "[t]here is nothing in the record to suggest that the court was unclear on this matter." FBI Response at 14.

OIG Reply

For the reasons stated in the Report, the language is appropriate. Report at 124.

FBI Response

On cross-examination Williams testified that in his opinion the explosive used in the Trade Center bomb was urea nitrate. He told us that he rendered this opinion based on the chemicals possessed and purchased by the defendants. We concluded that in the context of the examination "it was unprofessional and misleading for Williams, without explanation, to base such an incriminating opinion on a factor (the auxiliary searches) so different from the factors previously relied on (VOD and damage at the scene)." The FBI objects to this conclusion because "[t]he questions posed by defense counsel were admittedly unclear and opened the door to Williams' opinion" -- the questions "provided Williams with an opening to consider the results of the

searches." The FBI also states that it is "fundamentally unfair" to say that defense counsel "clearly meant" to limit his questions to an analysis of the crime scene. FBI Response at 14.

OIG Reply

We have revised this section of the Report. The revision changes the phrase "counsel clearly meant" to "the question, reasonably interpreted, meant." Our criticism of Williams for using the auxiliary searches to form his conclusion is appropriate and was not changed. The FBI's general point that defense counsel "opened the door" to Williams' opinion is specifically addressed in the Report at 131, note 76.

FBI Response

In Part Five regarding Williams we state:

> *Most egregiously, Williams gave a scientifically unsupportable opinion in stating that the main charge was urea nitrate. That opinion was improperly based on information linking the defendants to urea nitrate that was not related to any scientific analyses of the bomb scene.*

The FBI considers this conclusion "unfair" because Williams' opinion "was elicited by unartful questioning by defense counsel"--"an open-ended question on cross-examination which allowed [Williams] to consider more than the 'scientific analyses of the bomb scene.'" FBI Response at 39. The FBI does not address our conclusion that the opinion was "scientifically unsupportable."

OIG Reply

We reject the FBI's argument for the reasons stated in the Report at 131, especially note 76.

FBI Response

Regarding Williams' testimony about attempting to modify Whitehurst's dictation, we concluded that Williams' testimony was, "at a minimum, misleading." The FBI agrees that Williams' testimony was "incorrect" but complains that we held him "accountable" for interpreting imprecise questions. FBI Response at 15.

OIG Reply

For the reasons stated in the Report, the language in the Report is appropriate. Report at 134-137.

U.S. Attorney Response

The U.S. Attorney points out several factual inaccuracies related to the dates of events, and other matters. U.S. Atty. Response at 2-3.

OIG Reply

These inaccuracies have been corrected.

U.S. Attorney Response

The draft stated that the blue manuals were "circumstantially linked to the defendants." The U.S. Attorney thinks the evidence linking the defendants to the manuals -- the manuals were found in one defendant's luggage and his and another defendant's fingerprints were on pages of the manuals -- was stronger than circumstantial evidence. U.S. Atty. Response at 2-3.

OIG Reply

To avoid a debate as to the correct definition of "circumstantial evidence," we dropped the word "circumstantially" from the text of the Report.

U.S. Attorney Response

As a preliminary matter in support of Williams' testimony, the U.S. Attorney asserts that Williams testified as a "summary witness" and notes that "[t]he Government obtained permission from the Court for Williams to read the entire trial transcript before his testimony and to base his testimony in part on this record." U.S. Atty. Response at 3.

OIG Reply

We requested documentary support for this assertion, and the U.S. Attorney sent us a page of the trial transcript that included the following:

> [PROSECUTOR]: And then, secondly, recognizing that your Honor has excluded witnesses under [Fed. R. Evid.] 615. At some point, we are going to get to an expert

OIG Reply

As noted in the Report, we offer no opinion as to what constituted the main explosive in the Trade Center bomb.

U.S. Attorney Response

The U.S. Attorney contends that the urea nitrate formula in GX 2783 (the blue manuals) was workable. According to the U.S. Attorney, Burmeister said, when recently contacted by the United States Attorney's Office, that one of the Arabic formulas (GX 2783) was "workable" and "close to the methodology that was used at Eglin." U.S. Atty. Response at 7.

OIG Reply

We disagree with the U.S. Attorney's contention that the formula was workable. Report at 91 and note 41.

U.S. Attorney Response

The U.S. Attorney makes several points regarding Williams' identification of urea nitrate as the main charge in the Trade Center bomb. The Report states that because there was no residue available from which to identify the explosive, "Williams' purported identification of the explosive filled" a "void." The U.S. Attorney argues that this assertion is "unfounded" because "[t]here simply was no such 'void' to fill." U.S. Atty. Response at 10. The U.S. Attorney then summarizes the "overwhelming" evidence of the defendants' guilt. U.S. Atty. Response at 10-12.

OIG Reply

The evidence summarized by the U.S. Attorney only tends to show that (1) the defendants manufactured a urea nitrate bomb and (2) the defendants were involved in the Trade Center bombing. The U.S. Attorney's summary includes no scientific evidence that the Trade Center bomb in fact used urea nitrate. The "void" referred to in the Report -- a void that was never validly filled -- is the absence of scientific evidence and is therefore a correct characterization. Further, Williams' own trial testimony indicates that he thought one of the purposes of his testimony was to supply opinions in areas in which the government "may need some assistance" and "to tie this case up in a nice package," which in a sense is an attempt to fill a void. Accordingly, the word "void" is appropriate. Report at 96, note 45.

U.S. Attorney Response

The U.S. Attorney asserts that the absence of chemical evidence identifying urea nitrate, and Williams testimony that urea nitrate "likely served as the main charge," were not "significant" or "critical" to the case, in light of the overwhelming evidence of guilt.

OIG Reply

This point goes to the ultimate effect of the evidence on the outcome of the trial and is a matter beyond the scope of this Report.

U.S. Attorney Response

Regarding Williams' direct examination about the category of explosives that could have caused the explosives damage, the Report states: "In light of Williams' OIG testimony, we are deeply troubled that his trial testimony may have misled the court." The U.S. Attorney states that "it is not correct that the court or jury was 'misled' by Williams." U.S. Atty. Response at 12.

OIG Reply

We did not conclude that the court or the jury in fact were misled, and given the serious differences between Williams' OIG and trial testimony, the Report wording is warranted. For clarity, however, the phrase "his trial testimony" was changed to "his testimony on direct examination."

U.S. Attorney Response

On cross-examination Williams at one point stated that "the bulk of the explosive was, in my opinion, urea nitrate." Williams told us he based this opinion on the searches of defendants' storage facility and bomb factory, which showed that the defendants had the capacity to make a urea nitrate bomb. The draft report criticized Williams' opinion on two grounds: (1) the questions put to Williams called for an opinion based on the damage at the crime scene and therefore Williams should have limited his opinion to that basis, and (2) it was improper for a scientific examiner to base an opinion on evidence collateral to his Laboratory examinations. The U.S. Attorney objects to the first ground of our criticism, but makes no comment on the second. U.S. Atty. Response at 15-18. In analyzing the pertinent cross-examination, the U.S. Attorney seizes on the phrase "based on everything you know" in one of the questions and asserts that the defense counsel "did not limit his questioning to Williams' conclusions based on physical data and scientific analysis." U.S. Atty. Response at 15.

OIG Reply

In the context of the examination, however, the phrase "everything you know" appears to have referred to the scientific information available to Williams and everything Williams knew about the damage at the crime scene. Moreover, even if the questioning was inept, Williams had an obligation to restrict his opinions to his scientific knowledge and resist the temptation to speculate about what the explosive must have been based on the defendants' capacity to manufacture such an explosive. Accordingly, the U.S. Attorney's point lacks merit and is addressed in the Report at 131, note 76.

Nevertheless, in order to strengthen the Report, we rewrote a portion of this section to accomplish the following: (1) put the second ground of our criticism first, since this is our main point, (2) change some language in the first ground, and (3) add some introductory language stating that Williams' error consisted of basing an opinion on speculation beyond his scientific expertise.

U.S. Attorney Response

The U.S. Attorney states that Williams "corrected" any misimpression when, in response to questions by the court, he acknowledged that ANFO could have caused the damage at the crime scene. U.S. Atty. Response at 18.

OIG Reply

This point is fully addressed in the Report at 130, note 75.

U.S. Attorney Response

The U.S. Attorney argues that, when Williams told us the main charge "could have been anything," Williams was not basing that on his damage assessment but only on the negative chemical analysis. U.S. Atty. Response at 20.

OIG Reply

Given the question that elicited Williams' answer, we disagree. Report at 126, and note 70.

U.S. Attorney Response

The U.S. Attorney also contends that the statement that the explosive "could have been

anything" should not be taken literally because "Williams was professionally able to narrow the range of possible explosives used in the bomb (to those with VOD's roughly between 10,000 and 20,000 feet per second)." U.S. Atty. Response at 22.

OIG Reply

This is addressed in the Report at 126-27, note 70.

U.S. Attorney Response

The U.S. Attorney states that the Report "should indicate that it concerns the investigation of Whitehurst's allegations and is not meant to be a legal analysis or fact-finding concerning the effect of any of the allegations on the verdicts in the trials discussed therein." U.S. Atty. Response at 23.

OIG Reply

We agree with this point, and it is addressed in the Executive Summary and other places in the Report.

U.S. Attorney Response

The U.S. Attorney also asks us to "state, wherever relevant (as in the WTC case), that Whitehurst's allegations do not concern any tampering with or destruction of evidence." U.S. Atty. Response at 23.

OIG Reply

We do not think this is necessary.

SECTION D: THE BUSH ASSASSINATION ATTEMPT

FBI Response

In this section, the FBI contends that we are unfairly critical of Jordan's failure to include Whitehurst's dictation verbatim in his laboratory report in the Bush matter. The FBI contends that: (1) there were unique circumstances that permitted Jordan to paraphrase and only partially incorporate Whitehurst's dictation; (2) "It seems inevitable that there will be some circumstances that will require that dictation be summarized and a blanket rule requiring that dictation be

included verbatim [is] . . . unnecessarily inflexible [and] inappropriate"; and (3) we are ignoring the fact that the document in question was not a laboratory report.

OIG Reply: The FBI's objections are not persuasive:

(1) There were no unique circumstances that justified Jordan's actions. Unit Chief James Ronay and Counter Intelligence Section Chief Neil Gallegher told us that they did not ask Jordan to prepare this report in any particular manner. Additionally, there were no apparent space or time limitations that made it difficult to include Whitehurst's dictation verbatim. In fact, Jordan probably spent more time and effort editing Whitehurst's dictation than he would have spent by simply incorporating the dictation verbatim. Thus, we think the circumstances did not justify Jordan's failure to report Whitehurst's dictation verbatim.

(2) The so-called "blanket rule" merely requires that Jordan obtain Whitehurst's authorization before changing his dictation. Such a rule is not inappropriate. Moreover, this rule is in place for important reasons: As we have seen several times in this investigation, when a principal examiner without expertise in a particular area attempts to summarize the expert opinion and findings of an auxiliary examiner, it is far too easy for the principal examiner to inadvertently misstate the auxiliary examiner's findings or subtly change the auxiliary examiner's conclusions. As a result, the auxiliary examiner later may be unable to defend the conclusions stated in the Laboratory report. For these reasons, Laboratory policy clearly required verbatim inclusion of auxiliary examiner dictation at the time of Jordan's report, unless the auxiliary examiner agreed to the change, which did not occur here.

The FBI fails to appreciate the importance of the verbatim rule. Indeed, although the FBI generally purports to recognize the importance of this rule in other parts of its response, its response in this particular case -- that a blanket rule requiring that dictation appear verbatim is "inflexible" and "inappropriate" -- conflicts with that position. Notably, such mixed signals were precisely the problem that existed in the Explosives Unit. The Explosives Unit's lax adherence to the verbatim rule fostered a permissive attitude about altering dictation that led to the unauthorized changes described in the Thurman and Higgins Sections of our report.

(3) Contrary to the FBI's assertion, the document in question was a laboratory report.

(4) Examiner Alan Jordan also requested that his name be deleted from this chapter because of concerns for his safety. After careful consideration, we decided not to delete Jordan's name for several reasons. First, the FBI said that it was unaware of any threat that specifically targets Jordan or any FBI employee based on their role in the investigation of the Bush assassination attempt, and the FBI declined to take a formal position with respect to deleting Jordan's name. Second, if we deleted his name, we would be treating him differently from numerous other FBI examiners whose work is discussed in our Report and

who, if given the option, would request that they not be identified by name in the Report. We have determined that because of the high level of legitimate public interest in the contents of this report, the names of the individual Laboratory examiners should be included. In this respect, Jordan is no different than the other FBI Laboratory employees whose names are contained in the Report. Finally, we believe that omitting his name would unduly highlight this section of the Report and inevitably lead to questions about the identity of the examiner whose conduct was at issue. In other words, we believe that deleting Jordan's name would have the opposite effect of what he intends and result in concerted efforts to identify Jordan by the media and defense counsel.

SECTION E: AVIANCA CASE

FBI Response

The FBI contests our conclusion that Hahn "slightly overstated his experience" regarding his activities in the Pan Am 103 and World Trade Center cases. The FBI states that the Report "mischaracterizes Hahn's claim of 'assessing' evidence as 'analyzing' evidence -- two very different processes." FBI Response at 20, note 38.

OIG Reply

Hahn did not testify that he "assess[ed]" "evidence." He testified he was involved in assessing the "causes of [the] explos[ions]" -- which, for the reasons set forth in the Report, was inaccurate.

FBI Response

The FBI contests our conclusion that Hahn's testimony about the structure of the aircraft "appears to require expertise that Hahn lacked." The FBI argues that we ignored the fact "that Hahn testified from official Boeing diagrams and with the knowledge base of other investigative team members." FBI Response at 20, note 38.

OIG Reply

The diagrams and the opinions of the other team members did not make Hahn an expert in aircraft structure.

FBI Response

The FBI requests that we "delete any suggestion that Hahn formed his conclusions to support the prosecution's theory of the case." FBI Response at 21.

OIG Reply

This presumably is a reference to a statement in the Conclusion that we omitted from the final Report as explained in note 141 of the Report at 201.

FBI Response

The FBI objects to portions of our discussion of Hahn's testimony that correlated pitting and cratering with a high velocity explosive. FBI Response at 21-23.

(1) The FBI first asserts that Hahn's testimony "has been taken out of context by the OIG." The FBI contends that the purpose of Hahn's testimony was to give "the approximate VOD that could have caused the observable damage, including the pitting and cratering." FBI Response at 21.

(2) The FBI repeats the position taken by Hahn in his OIG interviews that his testimony should not be "taken literally." FBI Response at 21.

(3) The FBI objects to "criticism that Hahn's opinion . . . was offered in an attempt to help the prosecution's case." FBI Response at 22. See also FBI Response at 23 ("that Hahn's testimony 'was intended to buttress the prosecution's case'").

(4) The FBI also cites a Colombian Laboratory Report that states that certain damage (not the pitting and cratering) was "characteristic of high explosives traveling at a velocity of 20,000 to 23,000 feet per second" as corroboration for Hahn's conclusions. FBI Response at 23.

(5) The FBI states: "While we agree that Hahn's opinion may have lacked adequate supporting scientific data, Hahn did in fact have sufficient experience to offer that opinion at that time." The FBI then summarizes Hahn's experience. FBI Response at 23.

(6) The FBI asserts that the Report "is unfairly critical" of Hahn's failure to make inquiries about the validity of his jetting theory because "that aspect of his testimony was neither material to a finding of guilt nor susceptible, at that time, to ready validation." FBI Response at 23.

OIG Reply

(1) Hahn did not testify that an explosive with a VOD of 20,000 feet per second "could have caused" the pitting and cratering, but rather that such an explosive "did that damage." The testimony was not taken out of context.

(2) The FBI's contention that Hahn's testimony should not be "taken literally" is addressed in the Report, which discusses the validity of Hahn's opinion if it is not taken literally. Report at 168-71.

(3) As we stated in the Report, Hahn himself noted in his OIG testimony that he was "certain" that the testimony was offered to contradict the Confessor's story should it be introduced.

(4) Hahn never said he relied on the Colombian Laboratory report in rendering his opinion on pitting and cratering, and he has criticized the competence of the Colombian Laboratory. Further, the velocity range in the Colombian Laboratory Report is below the velocity of Semtex, which Hahn and the prosecution thought may have been used in the bombing. Additionally, the Colombian Report does not render a categorical conclusion, as Hahn did, that the explosive definitely had a VOD of 20,000 feet per second or more. Accordingly, the FBI's point lacks merit.

(5) In the Report we set forth the basis for our conclusion that Hahn's experience was inadequate. Report at 166-71.

(6) The jetting theory was material to Hahn's analysis of the pitting and cratering. If Hahn's theory was not "susceptible, at that time, to ready validation," then he should not have used it to reach his conclusions.

FBI Response

The FBI objects to portions of our discussion criticizing Hahn for testifying incorrectly and outside his expertise about a fuel-air explosion. FBI Response at 24-25.

(1) The FBI complains about "the OIG's suggestion that [Hahn] attempted to mislead the jury." FBI Response at 24.

(2) In support of Hahn's testimony about a fuel-air explosion, the FBI cites the report of Walter Korsgaard, the FAA representative who investigated the Avianca crash. FBI Response at 24, note 52.

(3) The FBI states that Hahn's role at trial was, in part, "to summarize the conclusions of other witnesses. That summary witness role was apparently what led to some of Hahn's

difficulty and we believe the OIG is unnecessarily critical of Hahn in this regard." FBI Response at 24.

OIG Reply

(1) The FBI does not cite to a page of the Report in support of this assertion, and the assertion is incorrect. We specifically concluded that Hahn did not intend to mislead the court. Report at 200.

(2) Korsgaard's report is addressed in the Report at 181-82.

(3) This point is addressed in the Report. The FBI's claim (FBI Response at 24-25 and note 52) that Hahn used the word "we" to indicate that the opinion being rendered was the product of a "joint effort" with the other experts is a mischaracterization of the record as it applies to Hahn's testimony in the second trial concerning a fuel-air explosion. The use of the word "we" cited in note 52 only applied to the discussion of the voice data recorder.

FBI Response

Regarding Hahn's testimony that certain injuries to the passengers (hard, burnt skin and skulls that had been cracked open) supported his theory of a fuel-air explosion, the FBI states: "Hahn has informed us that he was used as a summary witness in this regard as well and that he simply discussed the findings of the medical examiner about which he was aware." FBI Response at 25.

The FBI also argues that Hahn's testimony is supported by the report of the Colombian agency that investigated the Avianca crash. The Colombian report stated: (1) "Generalized explosion of head, apparently produced during the explosion"; (2) "the lesions and the burns observed on the bodies were caused by an explosion inside the airplane while it was still in flight and subsequently was aggravated by the detonation of some type of gas (oxygen, cumbustible vapors, or some other element)." Response at 26.

OIG Reply

The summary witness point is addressed in the Report at 186, note 124.

In his testimony, Hahn did not purport to summarize the Colombian report. Moreover, Hahn's testimony was different from the quoted passages in the Colombian report. The Colombian report, for example, suggests that the explosion of the heads occurred from the initial, not the secondary, explosion. The second passage in the Colombian report does not specifically discuss the hard, burnt skin and indicates that "the burns" were caused by the initial explosion and only "aggravated" by the secondary explosion; moreover, the secondary explosion is not

specifically described as a fuel-air explosion or flash fire. Hahn, on the other hand, did not discuss the "burns" generally but only a particular type of burn, and he said this type of burn was specifically caused by the secondary explosion, which he characterized as a fuel-air explosion or flash fire.

FBI Response

The FBI contests our discussion of Hahn's incomplete testimony about Whitehurst's scientific results. Without addressing the analysis in the Report, the FBI asserts that "Hahn's testimony at trial was responsive to the questions asked," notes that Bender not Whitehurst conducted the instrumental examinations, and asserts that Hahn could ignore the Whitehurst Memorandum since he received no guidance from his supervisors. FBI Response at 27.

OIG Reply

For the reasons stated in the Report, these contentions lack merit. Report at 177-79.

U.S. Attorney Response

In the Conclusion to the Avianca Section, the draft Report stated regarding Hahn:

> *We conclude that in the Munoz trials Hahn did not commit perjury, fabricate evidence, or intend to mislead the court. We also conclude that he committed several errors[, which are listed.] . . . All of these errors tended to help the prosecution's case or rebut a defense.*

The U.S. Attorney objects to the final sentence in the above paragraph, arguing that Hahn's testimony about the explosive used on the aircraft did not "tend[] to help the prosecution's case or rebut a defense." U.S. Atty. Response at 2.

OIG Reply

For the reasons given in the Report at 200, note 140, the sentence was deleted. Furthermore, we agree with the U.S. Attorney's point regarding the use of the word "rebut." Although we state explicitly in the Report that the Confessor defense was not interposed in either trial, we think the word "rebut" could engender confusion. Accordingly, throughout the section, references to "rebutting a defense" are changed to "contradicting a potential defense."

U.S. Attorney Response

The U.S. Attorney makes several additional points regarding our criticism of Hahn's testimony about the type of explosive used in the Avianca bombing. First, the U.S. Attorney argues that the type of explosive (and the dispute between Hahn and Whitehurst concerning it) was irrelevant to the trial.

Second, the U.S. Attorney asserts that if dynamite had been used on the aircraft, the prosecution's case would have been strengthened because witnesses linked the defendant to the terrorist use of dynamite; therefore, Hahn's testimony that dynamite was not used cannot be deemed supportive of the prosecution's case. U.S. Atty. at 3-6.

Third, the U.S. Attorney states that Hahn's elimination of the use of dynamite actually helped the defendant because terrorists other than the defendant's group had access to such explosives as Semtex. U.S. Atty. Response at 6.

OIG Reply

Regarding the issue of relevancy, the U.S. Attorney overlooks the fact that the Confessor's statement, if true, would have exonerated the defendant. The Confessor defense, therefore, clearly related to the issue of whether the defendant participated in the bombing. Additionally, we note that the testimony in question was elicited by the prosecution in both trials; in 1994, therefore, the prosecution must have thought the testimony was relevant to something. In any event, Hahn's errors cannot be excused because in retrospect his testimony may be deemed "irrelevant."

The remaining arguments are unpersuasive. The Report does not say that Hahn should have testified that dynamite was used. Rather, the Report says that he erred when he excluded the use of dynamite. Had Hahn testified correctly, he would not have established the use of dynamite. Furthermore, since eliminating dynamite also contradicted the Confessor's story, elimination of that explosive would have also potentially hurt the defendant. Moreover, Hahn told us he believed he was helping the prosecution by contradicting the Confessor's story when he testified concerning the explosive.

U.S. Attorney Response

The U.S. Attorney's final point regarding the usefulness to the prosecution of Hahn's testimony about the type of explosive is that the prosecution had no need to discredit the Confessor because (1) the Confessor did not testify and (2) other evidence rebutted him although Hahn may have been unaware of it. U.S. Atty. Response at 9.

OIG Reply

Regarding the first point, Hahn believed his testimony was elicited in anticipation of a defense based on the Confessor's statement. Whether the defense strategy would have been different had Hahn given different testimony is unknown. The second point relates to whether Hahn's testimony was cumulative. Even if it was, it nevertheless contradicted a potential defense.

U.S. Attorney Response

The U.S. Attorney argues that Hahn's testimony about a fuel-air explosion and the injuries to the passengers was permissible because Hahn testified as a "summary witness." U.S. Atty. Response at 10-14.

OIG Reply

This point is addressed in the Report at 184, 186, notes 121, 124.

U.S. Attorney Response

The U.S. Attorney asserts that we concluded that there was no fuel-air explosion. U.S. Atty. Response at 16.

OIG Reply

The U.S. Attorney's assertion is incorrect, and we address this point in the Report at 181, note 119.

U.S. Attorney Response

In the draft Report we stated that Hahn testified to "a distinct demarcation line" between his duties and those of the FAA and NTSB representatives because he said they were only concerned with the possibility of a mechanical failure of the aircraft. The U.S. Attorney points out that Hahn testified only that they were "primarily" concerned with the issue of a mechanical failure. U.S. Atty. Response at 12.

OIG Reply

The Report was modified accordingly.

U.S. Attorney Response

The U.S. Attorney objects to our criticism of Hahn's testimony about his experience in the World Trade Center and Pan Am 103 cases. U.S. Atty. Response at 13.

OIG Reply

Regarding the statement of Hahn's experience, we did not say, as the U.S. Attorney suggests, that Hahn's experience in those cases was irrelevant, only that he "overstated" that experience.

U.S. Attorney Response

Hahn testified that certain injuries to the passengers (hard, burnt skin and cracked-open skulls) were indicative of a fuel-air explosion. The Report states:

> *In fact, the injuries are not consistent with a flash fire or fuel-air explosion, which are of short duration. Rather, the injuries indicate that the bodies were subjected to substantial heat for a significant period of time. [Footnote and citation omitted.] When we pressed Hahn on this point, he acknowledged that the injuries to the bodies did not justify the opinion that a fuel-air explosion occurred but rather that there was a hot fire burning for a continuous period of time.*

(Underlining added.) The U.S. Attorney complains that the underlined language is inconsistent with the evidence, which indicates that the aircraft was aloft and intact for only a minute or two, at most, after the detonation of the explosive device. U.S. Atty. Response at 15.

OIG Reply

This point is addressed in the Report at 185, note 123.

U.S. Attorney Response

The U.S. Attorney argues that Hahn's testimony regarding the burnt skin, that is, that certain injuries including the passengers' burnt skin was indicative of a fuel-air explosion, is supported by the following passage from the report of the Colombian agency that investigated the Avianca crash: "reported damages to portions of the body relating to sudden burns, including the skin on the legs and hands which were rigid in their normal shape from the onset of the burns, albeit lacking their internal tissue." U.S. Atty. Response at 15.

OIG Reply

Hahn's testimony, however, did not purport to summarize the Colombian report, and it was Hahn who inferred that the "sudden burns" were caused by a fuel-air explosion or flash fire.

U.S. Attorney Response

The U.S. Attorney requests that we state whether we agree with Hahn's "ultimate opinion" that an explosive device functioned on the aircraft, breaking it into pieces and causing the deaths of the passengers. U.S. Atty. Response at 17.

OIG Reply

This point is addressed in the Report at 181, note 119.

SECTION F: ROGER MARTZ'S TESTIMONY IN O.J. SIMPSON CASE

FBI Response

The FBI objects to the draft Report's criticism of Martz's courtroom presentation during the Simpson trial on the grounds that such criticism is (1) outside the scope of the OIG's mandate, (2) inherently subjective, and (3) unfairly singles out Martz for criticism. FBI Response at 30-31.

OIG Reply

The FBI's objections are not persuasive:

(1) The OIG's mandate is broad enough to encompass analyses of Martz's courtroom demeanor, especially since Martz's demeanor was related to his lack of preparation. Also, courtroom presentation is a essential element of the Laboratory's mission and therefore is an appropriate area of comment.

(2) Our judgments about Martz's courtroom presentation were not unfairly subjective: We reviewed a video tape of his testimony and could easily and appropriately use our experience as testifying experts and prosecutors to conclude that his testimonial presentation was sub-standard. Moreover, according to SAS Chief Randy Murch, even Martz acknowledged that his courtroom performance could have been better.

(3) Finally, we did not unfairly single out Martz for criticism. Rather, we examined the allegation that was made.

SECTION G: OKLAHOMA CITY CASE

FBI Response

Although generally not disputing our assessment of Williams' "incomplete, categorical, and otherwise too specific conclusions" (FBI Response at 15), the FBI objects to language indicating that Williams tilted his conclusions in favor of the prosecution's theory of the case. FBI Response at 16-17.

OIG Reply

There are several items at issue:

(1) In the Introduction to the draft Report, we stated: "As explained below, we conclude that certain conclusions in Williams' report are scientifically unsound, are not explained in the body of the report, and *are biased in* favor *of* the prosecution (italics added)." In the final Report this sentence was rephrased to put the emphasis on incrimination of the defendants rather than bias in favor of the prosecution.

(2) Regarding Williams' incomplete statement of the VOD of urea nitrate, the draft Report stated: "Williams thus stated that the approximate VODs of both the main charge and ANFO were each 13,000 feet per second, which *supported the prosecution's theory of the case* that the defendants caused the Oklahoma City bombing by detonating an ANFO explosive (italics added)." The sentence was rephrased to put the emphasis on support for Williams' theory rather than the prosecution's.

(3) Regarding Williams' identification of the explosive as ANFO, we stated in the draft Report:

> We conclude that it was inappropriate for Williams to render a categorical opinion in his report that the main charge was ANFO. As discussed with reference to the World Trade Center case, it is inappropriate for a forensic examiner to identify the main charge based in whole or in part on prior knowledge of the explosive components purchased by a defendant. Such an identification is not based on scientific or technical grounds and appears to *tailor* the opinion to evidence associated with the defendants.

Report at 4-5 (italics added). We believe the word "tailor" is appropriate here, since it is an accurate general observation. Moreover, that Williams may have estimated on the day of the bombing that 4,000 pounds of ANFO were used (FBI Response at 16) does not alter our view regarding the word "tailor," because (1) when he wrote the report he was aware of the evidence associated with the defendants, (2) he told us he relied on that evidence in

reaching his conclusion, and (3) in Williams' report the conclusion is presented as a categorical expert opinion whereas the statement on the day of the bombing could only have been an educated guess.

(4) In the draft Report, we stated, "We are troubled that Williams' opinion as to weight may have been tailored to conform to the evidence associated with the defendants." We deleted this comment from the body of this section but included the following statement in the Conclusion regarding all of Williams' errors: "We are troubled that the opinions in Williams' report may have been tailored to conform to the evidence associated with the defendants." The section of the Conclusion regarding Williams was rewritten accordingly.

(5) In the Conclusion of the draft Report we stated: "These errors were all tilted in favor of the prosecution's theory of the case." In the final Report this sentence was rephrased to put the emphasis on incrimination of the defendants rather than support of the prosecution.

FBI Response

The FBI "agree[s] with the draft report's conclusion that Thurman should not have approved Williams' report in the Oklahoma City bombing case," but has two specific complaints regarding our discussion of Thurman. First, the FBI contends that Thurman was interrupted in his response to the OIG regarding "home-made type" explosives and should be given the opportunity to clarify his response. FBI Response at 43.

OIG Reply

This point is addressed in the Report at 236, note 167.

FBI Response

Second, the Report states: "Thurman acknowledged that 2000 pounds of ANFO and 500 pounds of commercial dynamite could have been used in the [Oklahoma city] blast." The FBI states that "[a]ccording to Thurman, the inquiry concerning this composition was posed as a hypothetical scenario rather than as a specific reference to the Oklahoma City case." FBI Response at 43.

OIG Reply

The "hypothetical scenario" was a reference to the Oklahoma City case. Thurman's answer was, "[T]hat [referring to 2000 pounds of ANFO and 500 pounds of commercial dynamite] could have happened." Thus, the statement in the Report is accurate.

SECTION H1: YU KIKUMURA

The FBI's comments regarding Thurman's testimony in this case are set forth in our discussion of Thurman in Part Five, below.

U.S. Attorney's Response

The U.S. Attorney objects to our criticism of Thurman for his testimony that a finding of three prills of ammonium nitrate in a paper bag indicated that the person "likely had a much larger quantity of amonium nitrate." The U.S. Attorney argues that Thurman's testimony was an accurate statement because "one would not purchase three prills of ammonium nitrate, because that quantity has no useful value."

OIG Reply

The U.S. Attorney misunderstands our conclusion, stating that we concluded that Thurman should have said that it was "logical" as opposed to "likely" that a person would have had a larger quantity. Our point was that Thurman erred when he stated that it was "likely" that a person in possession of three prills of ammonium nitrate once had a larger quantity. The most Thurman could have said was that possession of a larger quantity was a possibility. Accordingly, we have revised the wording of this paragraph to clarify our point but have otherwise not changed the conclusion.

SECTION H2: NORFOLK TANK FARMS

The FBI did not make any comments on this section.

SECTION H3: MELISSA BRANNEN

The FBI did not make any comments on this section.

SECTION H4: PAOLO BORSELLINO

FBI Response

The FBI argues that Robert Heckman does not deserve criticism for testifying (1) that C-4 is increasingly used in mining and quarry operations, (2) that RDX usually appears as a solid block, (3) that most detonators use RDX, and (4) that the FBI had "electronically examined" fragmented circuit boards. The FBI seems to concede that Heckman's testimony was imprecise, but argues that we should recognize what Heckman meant to say. FBI Response at 31-32.

OIG Reply

The FBI's objections are not persuasive.

(1) Heckman testified that it is increasingly common for C-4 to be used in quarry and mining operations. The FBI argues that Heckman only meant to say that C-4 is no longer exclusively a military explosive. That may be true, but he did not say that. Moreover, it is still relatively rare for C-4 to be used in mining.

(2) Heckman testified that RDX usually appears as a solid block but can be pulverized into powder. The FBI argues that Heckman nevertheless recognizes that RDX is manufactured as a powder. Again, that may be true but Heckman did not say that. In any event, RDX is normally not found as a solid block unless it is in a block of C-4 or some other explosive.

(3) Heckman testified that most detonators use RDX. The FBI argues that Heckman did not testify inaccurately since most detonators use either RDX or PETN. Still, RDX is not the most common ingredient of detonators.

(4) Heckman testified that the FBI had "electronically examined" the circuit board fragments. The FBI argues that Heckman only meant to say that the FBI "did an electronic analysis of the circuit to determine what electrical component were in the circuit board fragments." Again, however, Heckman did not say that. His testimony implies that a more extensive electronic examination had been performed by the FBI.

SECTION H5: GINO NEGRETTI

FBI Response

The FBI objects to the way we characterized Alan Jordan's conduct in the draft Report. (1) The FBI contends that we should not have stated that Jordan "inaccurately" reported

Whitehurst's findings. Rather, we should have stated that the testimony "could have been more accurate." (2) Also, according to the FBI, we should not have stated that Jordan "doubted" that the explosion was caused by low explosive, since Jordan was sure that it was not caused by a low explosive. (3) The FBI contends that we should not have stated that there was no basis to conclude that Jordan colluded with counsel to prevent Whitehurst from testifying, because there was no allegation that Jordan colluded with counsel. FBI Response at 32-33.

OIG Reply

(1) Contrary to the FBI's suggestion, Jordan did not accurately testify to Whitehurst's findings. Jordan was asked on direct examination if Whitehurst sent Jordan a positive chemical analysis on a piece of evidence. In response, Jordan stated that Whitehurst sent back "findings of materials, residues consistent with RDX and HMX." In fact, Whitehurst identified RDX and found residues consistent with HMX.

The FBI suggests that we should be less critical of Jordan because Jordan's misstatement actually favored the defense. In fact, Jordan's misstatement favored the prosecution. The prosecution's cooperating witness said that he used dynamite to construct the bomb. As a rule, dynamite does not contain RDX. Thus, by characterizing the identification of RDX less positively, Jordan's misstatement tended to favor the prosecution by not so directly undercutting the prosecution's witness.

The FBI also argues that Jordan's testimony should be viewed in context, since immediately before this testimony he was asked whether the device was "consistent with" a booster. Thus, according to the FBI, Jordan was predisposed to use the phrase "consistent with." Contrary to the FBI's suggestion, an examiner is not free to paraphrase another examiner's findings based on the way the question is asked. Findings are findings. The way those findings are reported should not turn on the vagaries of the phraseology used by the attorney at trial.

(2) We have revised this portion of the section to reflect that Jordan formed the opinion that a low explosive could not have caused the damage he saw. We sought to convey this point in the draft Report by saying that Jordan "doubted" that a low explosive could have caused the damage, but, as the FBI suggests, a reader might perceive that Jordan was not sure about this.

(3) In the draft Report, we stated: "Likewise, we find no basis to conclude that Jordan colluded with counsel to prevent Whitehurst from testifying." The FBI claims that there is no allegation that Jordan colluded with the prosecutor in Negretti. We made this statement based on statements by Whitehurst during his interview. We agree, however, that "collude" is too strong, and we removed the word "collude" from the final Report.

SECTION H6: CONLON CASE

FBI Response

The FBI complains that we criticized Heckman too harshly. Specifically, the FBI argues that: (1) Heckman's addition to Whitehurst's dictation was based on Heckman's discussions with Whitehurst and therefore, strictly speaking, Heckman did not "add his own observations about the IMS results from the explosion scene," as stated in our draft Report; and (2) since Heckman was just trying to be helpful by making the report more understandable, it is unduly harsh to criticize Heckman's additions as "improper." FBI Response at 34.

OIG Reply

(1) The FBI is incorrect. Heckman added three paragraphs immediately after Whitehurst's findings. Heckman told us that the first paragraph of his addition to the dictation was a reiteration of his discussion with Whitehurst. In that paragraph, Heckman essentially states that an IMS was used at the scene but the results were not confirmed. But Heckman told us that the second paragraph concerning the degradation of explosive residues was "my information that I have picked up from discussions with experts like Fred Whitehurst and Steve Burmeister. . .also from reading different books. . . . It's knowledge that I have through my background, training and experience. . . ." As to the third paragraph, which states that the results of the IMS test at the crime scene "may well have been true," Heckman told us that it is "almost a reiteration of what Fred said . . . ." Whitehurst, on the other hand, commented that he did not agree with the statements in the third paragraph and that Heckman "was on his own" in arriving at the conclusion that the IMS results may well have been true. In sum, the evidence indicated that Heckman added his own observations about the IMS results and his own erroneous interpretation of what Whitehurst may have told him about the results. Contrary to the FBI's suggestion, this is not a case where Heckman simply reported what Whitehurst told him.

(2) The FBI also errs in contending that our criticism of Heckman's actions is too harsh since Heckman was only trying to be helpful. Heckman seriously erred when he added to Whitehurst's dictation without authorization, no matter what his motive. Heckman's overstatement of the data is not excused by his allegedly pure motives.

SECTION H7: JUDGE JOHN SHAW

FBI Response

In its response to the draft Report, the FBI states that because Ron Kelly did not microscopically observe inorganic materials in the smokeless powders, nothing suggested

additional testing was necessary. FBI Response at 34.

OIG Reply

The OIG considered the FBI's response and concluded that no revisions to the draft Report were appropriate. As noted in the draft Report, it is conceivable that other inorganic materials may have been present that Kelly did not observe microscopically and that would not have been identified by the analytical tests performed. Examiner Steven Burmeister, who is now the Laboratory's senior examiner of explosives residues, told the OIG that he thought smokeless powders generally should be tested for the presence of inorganic materials and that he understood Kelly is now doing so. This fact underscores the OIG's more general point that the protocols for the examination of smokeless powders and explosives residues should be integrated, so that the tests performed do not fortuitously vary depending on the examiner assigned.

SECTION H8: GHOST SHADOW GANG

The FBI did not make any comments to this section.

SECTION H9: THE UNABOM ARTICLE

U.S. Attorney Response

In response to the draft Report, Robert Cleary, a Special Attorney to the U.S. Attorney General, advised the OIG that the government would not be relying upon any of Rudolph's work in the UNABOM case in prosecuting Theodore J. Kaczynski. Cleary further requested that the Report be amended to reflect this information.

OIG Reply

The OIG concurs in this request, and the final Report has been revised accordingly.

FBI Response

The FBI in its response also urged that the OIG omit a reference in the draft Report to an October 5, 1995 letter from James Maddock of the FBI OGC. The letter stated that the AUSA determined that Whitehurst's allegations were unsubstantiated. The FBI OGC concluded that the AUSA's determination bore on the credibility of Mr. Whitehurst and also illustrated the disruptive impact that his allegations have had on FBI operations. The draft Report noted that the FBI OGC

was not justified in drawing its conclusion based on a non-scientist prosecutor's evaluation of the merits of Whitehurst's allegations. The FBI complains that this is unfair criticism of FBI OGC. FBI Response at 36.

OIG Reply

As explained in the report, given the other information that the FBI OGC had at the time, we do not think the FBI OGC could justifiably rely on conclusions from a non-scientist prosecutor to evaluate the merits of the allegations raised by Whitehurst, who had largely repeated concerns raised by examiner Steven Burmeister. Accordingly, we have considered the FBI's response on this point and concluded that no revisions to report are appropriate.

SECTION H10: THURMAN'S ALLEGED ALTERATION OF DICTATION

FBI Response

In the William Wirt Middle School case, one of the cases discussed in this section, we conclude that J. Thomas Thurman failed to revise his report in light of Burmeister's objections. Based on a recent interview of Burmeister by the FBI (in which he said he did not remember telling Thurman about his objections), the FBI argues that we should reevaluate our conclusion finding Thurman "culpable." FBI Response at 41.

OIG Reply

In a 1996 OIG interview, Burmeister stated that he did tell Thurman about his concerns. Based on Burmeister's contemporaneous memorandum noting that he told Thurman about his objections to Thurman's report and Burmeister's 1996 OIG interview, we reject the FBI's argument.

FBI Response

The FBI complains that we failed to note (1) that no prosecutions resulted in any of the 13 cases in which AE dictation was substantively altered and (2) Thurman has not revised Whitehurst's dictation since 1992.

OIG Reply

In the Report we included the information provided by the FBI, but as we note in the Report, Thurman's conduct cannot be excused on the ground that there were few prosecutions in cases where he made the errors.

SECTION H11: HIGGINS' ALLEGED ALTERATION OF DICTATION

FBI Response

The FBI contests our conclusion that Higgins should be reassigned. FBI March 24, 1997 Response at 1.

OIG Reply

The FBI's comments are not persuasive. Our reasons for recommending the reassignment of Higgins are set forth in Part Five of the Report.

FBI Response

The FBI states that David Williams, not Higgins, was the PE for Laboratory report No. 51. Therefore, the FBI requests that we omit this report from the ten reports for which the FBI could not produce signed dictation. FBI March 24, 1997 Response at 1.

OIG Reply

We have made the requested change based on the FBI's representation that an error was made and that Williams' name was erroneously omitted from this document.

FBI Response

The FBI objects to our statement that Higgins prematurely terminated his initial interview and had to be compelled to appear for future interviews. FBI March 24, 1997 Response at 1-2.

OIG Reply

We commented upon Higgins' abrupt termination of the interview because we considered his actions in reaching our conclusions. Thus, it is proper for us to mention those actions in our report. Higgins was one of only two FBI employees who refused to appear voluntarily for an interview. He chose to terminate his initial interview when questioned about his alteration of one of Whitehurst's dictations. Our questions to Higgins about those alterations were appropriate and certainly were no more difficult than he might face at trial. Accordingly, we think that Higgins' conduct in terminating the interview was not warranted. The fact that Higgins was given the right to terminate the interview does not mean that we cannot consider the appropriateness of his actions.

FBI Response

The FBI contends that we made a "blanket assumption" that Whitehurst was more credible than Higgins. The FBI maintains that this assumption is flawed because (1) Whitehurst has made numerous factually unsupportable statements as discussed in other parts of our report, and (2) Whitehurst did not always generate new dictation when he agreed to alterations, contrary to his claims. FBI March 24, 1997 Response at 2.

OIG Reply

The OIG did not make blanket assumptions about credibility but considered each of the contested reports on a case-by-case basis. Specifically, with respect to each contested report, we considered the explanations provided by Whitehurst and Higgins during their interviews. In many cases, their explanations were wholly contradictory. We made certain credibility determinations based on the manner in which these examiners responded to our questions. We also considered their responses in light of other evidence, including (1) the dictation as initialed by Whitehurst's unit chief, (2) the presence or absence of documentation showing that the alterations were authorized, (3) the presence or absence of data supporting the changes made to the dictation, (4) the cogency of the explanations provided by Whitehurst and Higgins, (5) Higgins' admissions that he made what we considered to be substantive changes to dictations in at least some of the cases, (6) comments by Unit Chief Ronay concerning the practices of the Explosives Unit in making unilateral changes to AE dictation, and (7) the views expressed by Higgins and Whitehurst about the appropriateness of such unilateral changes.

The FBI seems to suggest that we must discount Whitehurst's allegations on this issue because in other parts of our draft Report, we found some of Whitehurst's allegations to be unsupportable. We disagree. Just as we did not make a blanket assumption about Higgins' credibility based on his answers to some questions, we did not make a blanket assumption about Whitehurst's credibility based on our findings in other parts of the Report. Again, we looked at each Laboratory report on a case- by-case basis.

The FBI also observes that while Whitehurst claimed he generated new dictation whenever he agreed to make a change to his dictation, he changed his own dictation without generating new dictation in at least three Laboratory cases. We note that in two of the three cases, Whitehurst personally documented the changes by making and initialing the change in his own handwriting on the face of his dictations. (See dictations for Reports No. 2 and 31.) In the remaining case, Whitehurst generated dictation that was initialed by his unit chief and then generated new dictation when he added the results from Dr. Mary Tungol's FTIR examination of three additional specimens. This evidence suggests that when Whitehurst added to or changed his own dictation, he would either re-issue such dictation or at least make the changes on the face of the dictations

in his own handwriting.[1] In contrast, we saw no evidence of such documentation with respect to the changes made by Higgins.

FBI Response

With respect to Report No. 16, the FBI states that it is unfair to conclude that Higgins altered the report by omitting reference to the fact that Whitehurst's results were "preliminary." The FBI argues that we should determine whether Whitehurst satisfied his own obligation to finalize his conclusion. FBI March 24, 1997 Response at 4.

OIG Reply

As indicated in our draft Report, Whitehurst reviewed the official FBI case file and found no evidence that he had agreed to remove the word "preliminary." The evidence suggests that Whitehurst would have generated new dictation if he had changed his dictation or otherwise documented such changes. Even if Whitehurst failed to "satisf[y] his obligation to finalize his conclusion," that failure did not permit Higgins to represent that a final conclusion had been reached.

FBI Response

With respect to Report No. 17, the FBI argues that we cannot conclude that Higgins altered the dictation, because according to the dates of the Laboratory report and dictation, Whitehurst did not prepare the dictation until after the Laboratory Report. FBI March 24, 1997 Response at 4-5.

OIG Reply

For the reason cited by the FBI, we stated in our draft Report that we are unable to determine whether Higgins improperly changed the dictation regarding PETN. We did conclude that Higgins improperly added the statement regarding lead styphnate and lead azide. Higgins acknowledged that he added this statement based on his own x-ray work, even though that x-ray work alone would not support such a finding. The FBI does not comment on this finding. Thus, we find no reason to change this conclusion.

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[1] In a footnote, the FBI also refers to the dictation for Report No. 25 as another instance in which Whitehurst failed to revise his dictation after adding a sentence. Because the FBI could not locate or produce the signed dictation in this Laboratory case, however, it is inappropriate to speculate as to what may appear in the signed dictation.

FBI Response

With respect to Report No. 20, the FBI objects to our conclusion that Higgins "misreported" Whitehurst's findings. The FBI contends that (1) Higgins accurately included Whitehurst's finding that specimens K1 and K2 are "consistent with" flash powder, but simply added to that finding by noting that specimens K1 and K2 "contained" flash powder; (2) in any event, Higgins was qualified to identify flash powder in specimens K1 and K2; and (3) the OIG should not characterize the omission of Whitehurst's opinions as "selective." FBI March 24, 1997 Response at 5.

OIG Reply

(1) Contrary to the FBI's suggestion, when Higgins stated that the specimens "contained" flash powder, he misreported Whitehurst's finding that the specimens were only "consistent with" flash powder.

(2) The FBI argues that Higgins was qualified to identify flash powder based on, among other things, physical characteristics and the circumstances of its seizure. In the context of a Laboratory report, the identification of a substance like flash powder requires expertise beyond that possessed by Higgins. This is especially true where, as here, Higgins identifies flash powder in the instrumental analysis section, suggesting that the results were obtained through instrumental analysis. If Higgins wished to identify flash powder based on physical characteristics alone, at the very least he should have included that opinion in another part of the report and clearly identified the basis for that opinion. (We note, however, that since Higgins submitted the specimen to Whitehurst for an opinion, there was no reason for him to include his own opinion, which necessarily would be less specific.)

(3) The use of the word "selective" is appropriate. It is clear that in many cases, Higgins chose to omit only those portions of Whitehurst's dictation expressing his forensic opinion. He included the remainder of the dictation verbatim. Thus, it is appropriate to conclude that Higgins selectively omitted portions of these dictations.

FBI Response

With respect to Report No. 22, the FBI contends that Higgins properly omitted Whitehurst's opinion statement because it was stronger than his earlier finding and was not supportable. The FBI also reports that Higgins believes that it was appropriate to omit the opinion statement because it was repetitive. FBI March 24, 1997 Response at 6.

OIG Reply

(1) The FBI's response ignores the real issue. Whether Higgins had reason to question Whitehurst's dictation is not the point. Whitehurst prepared the dictation, Whitehurst's unit chief approved the dictation, and hence Higgins had no authority to unilaterally change it. If Higgins objected to the dictation, he had every right to seek to change the dictation through the procedures established within the Laboratory for that purpose. Specifically, he should have discussed his objections with Whitehurst and/or Whitehurst's unit chief and sought their permission to change the dictation.

(2) Contrary to the FBI's assertion, the sentences at issue are not inconsistent. In the first sentence, Whitehurst states his specific analytical findings; in the next sentence, he states his forensic opinion based on those findings.

(3) Higgins did not have the mandate or the qualifications to determine the technical correctness of Whitehurst's report. For example, even if one of the sentences was "stronger" than the other, as the FBI contends, Higgins was not qualified to determine on his own which of the two statements should remain in the Laboratory Report.

(4) The FBI's contention that "Higgins properly omitted a statement by Whitehurst that did not appear to be supported by the evidence" constitutes an acknowledgment, contrary to the FBI's earlier argument, that Higgins was "selective" in omitting Whitehurst's opinion.

FBI Response

With respect to Report No. 30, the FBI acknowledges that the report could have been clearer, but states that Higgins erred in formatting the Laboratory report, not in altering the dictation. FBI March 24, 1997 Response at 7.

OIG Reply

The FBI's comments are not persuasive. We agree that Higgins' additions were potentially misleading because of the format, but they were equally misleading because of their content and substance. Higgins stated that the results obtained by Whitehurst were consistent with Portuguese PE-4A, even though Whitehurst, the explosives residue expert, told us that he did not have enough information to reach that conclusion. Higgins added this opinion to Whitehurst's dictation under the heading "Instrumental Analysis," suggesting that the opinion was the result of Whitehurst's instrumental analysis. Higgins also suggested that this opinion was based on "these results," when it was based on markings on the wrapper containing the explosives. Finally, contrary to the FBI's assertion, we note that we did not use the phrase "alteration of dictation" in the subsection describing Report No. 30.

FBI Response

With respect to Report No. 31, the FBI claims that Higgins did not omit Whitehurst's forensic opinion in this case as alleged in the draft Report. FBI March 24, 1997 Response at 7.

OIG Reply

The FBI is correct and the OIG has removed this subsection from the Report. In our draft, we stated that Report No. 31 was another instance in which Higgins prepared a report that omitted Whitehurst's forensic opinion. When we investigated the FBI's claim that the forensic opinion had not been omitted, we determined that the copy of Report No. 31 that the FBI provided on August 2, 1996 was incomplete. That copy did not include page 3, the page containing the missing forensic opinion. We relied on that incomplete copy in our investigation and in interviews with Higgins and Whitehurst, leading both examiners to believe that the forensic opinion had been omitted. (Our records further show that we requested and received a copy of the entire official FBI case file for Report No. 30 in mid-November 1996. That copy of the official FBI case file contained a complete copy of the Laboratory report; however, because we did not suspect the error, we did not compare the first copy of Report No. 30 provided by the FBI to the copy in the official FBI case file and did not discover the discrepancy.)

In light of these events, the FBI requests that we re-evaluate our finding that there were any improper omissions of Whitehurst's forensic opinions. We decline to do so. The evidence still establishes that Higgins omitted Whitehurst's forensic opinions without authorization from several reports, including Report Nos. 20, 22, 35, 36, 46 and 47.

FBI Response

With respect to Report No. 35, the FBI contends that Higgins properly omitted Whitehurst's forensic opinion, in this instance because it was redundant and potentially misleading. FBI March 24, 1997 Response at 7-8. With respect to Report No. 36, the FBI again contends that Higgins properly omitted Whitehurst's opinion, in this instance to ensure the report was "unambiguous, clear, and defensible." FBI March 24, 1997 Response at 8-9.

OIG Reply

The FBI acknowledges that Higgins violated the policy requiring verbatim incorporation of dictation, but attempts to justify that breach of policy. We reject that approach. The issue is not whether Higgins was correct in wanting to change the dictation, but whether he made those changes pursuant to established Laboratory procedures.

FBI Response

With respect to Report No. 37, the FBI asks that we revise our conclusion that Higgins altered this report. The FBI states that because Higgins and Whitehurst had a miscommunication about this report, it is not accurate to characterize this result as an alteration of dictation. FBI March 24, 1997 Response at 10.

OIG Reply

In our subsection concerning Report No. 37, we do not characterize Higgins' actions as an alteration of the dictation. We do state that Higgins erred by adding dictation concerning accelerants analysis reportedly done by Whitehurst without Whitehurst's express permission. We also stated that Higgins should have requested new dictation from Whitehurst, a request that would have revealed their possible miscommunication.

FBI Response

With respect to Report No. 42, the FBI requests that we re-evaluate our finding because Higgins "vehemently denies" adding "6% binders" to the dictation and Whitehurst stated that this addition was "not that big a deal." FBI March 24, 1997 Response at 10.

OIG Reply

In our interview of Higgins, Higgins did not "vehemently deny" making this addition; rather, he stated that he did not specifically recall this matter but assumes that he would not have written "6% binders" without being told by Whitehurst. Whitehurst has told us that he did not know why he said in his earlier interview that this alteration was "not that big a deal," and added that "it is a big deal when somebody changes your report." Whitehurst also told us, "To say it was 6 percent binder, it could have been wrong." We see no reason to change our conclusion.

FBI Response

With respect to Report No. 46, the FBI contends that Higgins properly omitted Whitehurst's opinion, in this instance because Whitehurst rendered an opinion outside his area of expertise. FBI March 24, 1997 Response at 10-11.

OIG Reply

As previously noted, the issue is not whether Higgins was correct in wanting to change the dictation, but whether he made those changes pursuant to established Laboratory procedures.

We also do not agree that Higgins merely omitted an opinion that encroached into his area of expertise or merely "rephrased" Whitehurst's opinion as suggested. Although Higgins apparently objected to part of the sentence describing the "red colored hobby fuse," he changed the entire sentence, including Whitehurst's analytical explosives residue results.

Finally, we reject the FBI's suggestion that the procedures in place in the Laboratory worked in this case. Those procedures required that Higgins obtain permission from Whitehurst before changing his dictation.

FBI Response

With respect to Report No. 47, the FBI again contends that Higgins properly omitted Whitehurst's opinion, in this instance because Whitehurst rendered an opinion outside of his area of expertise. FBI March 24, 1997 Response at 11.

OIG Reply

Our responses with respect to Report No. 46 apply to this matter as well.

FBI Response

The FBI objects to our statement that completion of this section was delayed for several weeks because of the FBI's failure to produce documents. The FBI explains that its ability to respond to document requests was impeded by erroneous case numbers on several of Whitehurst's dictations. FBI March 24, 1997 Response at 11-12.

OIG Reply

In mid-January 1997, we discovered that many of the copies of official FBI case files previously produced by the FBI were incomplete and did not include dictations that should have been in the file. At that time, our investigators undertook to personally review the original files at the FBI. We also learned about the FBI's documentation retention practices, which included the use of "Enclosures Behind Files" and "Bulkies" that accompanied the official FBI case files. In several cases, the FBI had not reviewed these accompanying files for missing dictations. As a results of our efforts, which took several weeks, we and the FBI were able to locate many of the missing dictations.

We have omitted any reference to these events in the Report for three reasons. First, this discussion is not germane to the topic of this section, Higgins's alleged alterations of dictation, and may distract the reader from our major points. Second, we have addressed deficient record retention practices generally in our conclusion. Third, we agree with the FBI that it has exercised

diligence and commitment in producing documents, information, and assistance in response to numerous requests in the course of our investigation.

SECTION H12: TOBIN ALLEGATIONS

IMPROPER WIRE GAUGING

FBI Response

In its response to the draft Report, the FBI states that after Thurman was unable to obtain training for the EU from Tobin on measuring wire gauge and certain other issues, Thurman contacted other examiners and an industry specialist and Thurman then himself instructed the EU on wire gauging as Tobin had requested. FBI Response at 41-42.

OIG Reply

The OIG has revised its draft Report to reflect the information supplied by the FBI. The final Report further notes that the events described by the FBI in its response evidently occurred after Thurman was interviewed by the OIG in September 1996, because he said at the time of the interview he did not know what the industry practice was and that he had told Tobin he could set up the training whenever Tobin wanted to do it.

THE LA FAMILIA CASE

FBI Response

In its response to the draft Report, the FBI asked that the OIG delete its conclusions that Thurman and Mohnal seemed to be more concerned about Tobin's motive for issuing certain dictation and that Thurman appeared to be chiefly concerned with defending a report issued by Mohnal and attempting to persuade others that Tobin's dictation should be withdrawn. The FBI states that, according to Thurman, the OIG did not interview him about his concerns. FBI Response at 42.

OIG Reply

The OIG Report has been revised to state that Thurman and Mohnal seemed to be more concerned about Tobin's motive or manner in raising his concerns than about the merits of the points raised. The OIG's conclusions in this matter regarding Thurman are based on what he told the OIG in his interview about how he responded to Tobin's concerns. We do not think any other revisions are appropriate.

FBI Response

In its response to the draft Report, the FBI urges that the OIG omit the conclusion that Malone testified "falsely" in the Alcee Hastings investigation because it incorrectly suggests he was intentionally deceptive. FBI Response at 44.

OIG Reply

The OIG has revised the draft Report to acknowledge the FBI's response and to note that we here use the term "false" as it is employed in other legal contexts, that is, to describe something that is untrue or not in accord with the facts. Accordingly, we treat as separate issues whether Malone's testimony was false and, if so, whether Malone gave such testimony deliberately or with an intent to deceive.

Doar Response

The OIG also received an extensive response to the draft Report from John Doar, the attorney who served as the chief counsel for the judicial committee that investigated alleged misconduct by Hastings. Among other things, Doar maintained that the draft Report incorrectly suggested that the judicial committee had been influenced by Malone's testimony.

OIG Reply

Based on the information supplied by Doar and several additional interviews, we revised and expanded the draft Report to: (1) state explicitly that the OIG investigation focused on Tobin's allegations concerning Malone's testimony, and we did not otherwise review or evaluate actions by the FBI or others related to the impeachment of Hastings; (2) expand the discussion of the events related to the alleged bribery scheme between Hastings and William Borders, so that Malone's 1985 testimony about a purse is placed in better context; (3) recognize that the findings and recommendations in the judicial committee's report and the articles of impeachment later passed by the House of Representatives do not refer to the purse or the tensile test that was the subject of Malone's testimony; (4) state explicitly our conclusion that Malone did not tell Doar during the proceedings before the judicial committee that Tobin, and not Malone, had performed the tensile test; and (5) to state that although the Laboratory failed in 1989 to investigate adequately Tobin's allegations about Malone's 1985 testimony, we did not conclude that its failure was part of a deliberate or concerted effort to conceal Tobin's concerns.

The revisions to the draft Report do not alter the OIG's conclusions that Malone testified falsely before the judicial committee in 1985 and that Laboratory management, specifically

Kenneth Nimmich, failed to assure that allegations Tobin made in 1989 were adequately investigated.

SECTION H13: GEORGE TREPAL

FBI Response

In its response, the FBI maintains that Martz correctly identified thallium nitrate in the adulterated Coca-Cola. The FBI states that the draft Report was wrong in stating that Martz had overstated the significance of his analytical results and in positing an erroneous scenario that thallium chloride and sodium nitrate had been added to the Coca-Cola. On the latter point, the FBI notes that the SEM/EDXA profile on Q1 did not indicate an elevated level of sodium and this result excludes the possibility that sodium nitrate had been added to the Coca-Cola. The FBI response then purports to set forth "the analysis by which Martz determined that thallium nitrate had been added to the Coca-Cola at issue." FBI Response at 17-20.

OIG Reply

After receiving the FBI's response, we interviewed FBI examiners Thomas Jourdan and Steven Burmeister, who assisted in preparing the FBI's response on this case. The interviews clarified that the FBI's response was not based on Martz's explanation of how he had reached the conclusions stated in his reports or testimony, but instead was based on Jourdan and Burmeister's own interpretation of analytical test results contained in the case file and on discussions with Martz. This distinction is significant, because Martz testified in his deposition and at trial that he had relied only on diphenylamine tests and ion chromatography tests to conclude that thallium nitrate had been added to the Coca-Cola. The FBI's response discusses the results of several other tests, including SEM/EDXA, MS, and XRPD, which Martz told the OIG that he did not rely upon in reaching his conclusion.

Based on the FBI's response and the follow-up interviews with Jourdan and Burmeister, we revised the Report in several respects. First, we acknowledge that given the tests Martz actually performed, he could have properly stated in his dictation and testimony that two samples of Coca-Cola, identified as Q1 and Q2, were "consistent with" thallium nitrate having been added to them. Alternatively, he correctly could have observed that Q1 and Q2 had elevated levels of thallium and nitrate ions as compared to unadulterated Coca-Cola. Martz, however, did not limit his conclusions this way, and as explained in the Report, we find his work on the case was deficient in several respects: (1) his dictation stated that the nitrate ion was identified in samples Q1 through Q3 and those samples were consistent with thallium nitrate having been added to them; this was incorrect insofar as he had not performed tests necessary to reach these conclusions with regard to Q3; (2) Martz did not acknowledge certain data obtained from the tests he performed; (3) he failed to perform additional tests that were appropriate under the circumstances;

PART FIVE: FINDINGS AND RECOMMENDATIONS CONCERNING INDIVIDUALS

ROGER MARTZ

FBI Response

The FBI contends that our findings assign disproportionate blame to Martz for his 1989 review of Rudolph's cases.

The FBI also repeated points otherwise made in its response concerning other cases on which Martz worked, such as World Trade Center, VANPAC, and Trepal. FBI Response at 37-38.

OIG Reply

We considered the FBI's response and concluded that no changes were appropriate in our discussion of the issue of Martz's review of Rudolph's cases.

We have considered the FBI's comments on Martz's work on other cases and made such revisions as are discussed earlier in the sections of this reply that concern the particular cases. Based on the responses of the FBI and Martz's own response, we did not think our overall findings should be modified. We did revise our comments concerning Martz's threshold of scientific proof and lack of scientific rigor to clarify that we draw our conclusions based on Martz's reporting of his 1989 review of Rudolph's casework, his defense of Lasswell's interpretation of mass spectrometry results in the World Trade Center case, and his work in Trepal. We also recommend in the final Report that another qualified examiner review any analytical work by Martz that is to be used as the basis for future testimony.

J. THOMAS THURMAN

FBI Response

The FBI complains that Part Five, Section I.C. regarding allegations against Thurman gives the false "impression that 'where there is smoke, there is fire'" because of the absence of a "road map to the OIG's conclusions." FBI Response at 40.

The FBI suggests that we omit from the Yu Kikumura section our criticisms that Thurman's testimony was ambiguous or contained minor inaccuracies in four respects. Alternatively, the FBI asks that we repeat the observation we made in Part Two about the pressures examiners face in giving in-court testimony. FBI Response at 43.

The FBI also makes several comments regarding our discussion of Thurman's conduct in light of Tobin's allegations about the reporting of wire gauging and the La Familia case. FBI Response at 41-42.

OIG Reply

Because Part Five, Section I.C. is a short section, we conclude that a "road map" is unnecessary.

The FBI does not challenge the accuracy of our conclusion that Thurman's testimony was ambiguous or inaccurate in the identified respects in the Kikumura case. We have considered the FBI's response on this point and concluded that no revisions are appropriate.

We have previously discussed, in Section H12, the FBI's response as it concerns Thurman's conduct with respect to Tobin's allegations about the reporting of wire gauging and the La Familia case.

ALAN JORDAN

The FBI's response to the OIG's discussion of Jordan's testimony in the Negretti case is discussed in Section H5, and its response to the OIG's discussion of Jordan's conduct in the Bush assassination matter is discussed in Section D.

MICHAEL MALONE

FBI Response

The FBI objects to the OIG's conclusion that Malone testified "falsely" before a judicial committee investigating conduct by former federal judge Alcee Hastings, because Malone's testimony was not intentionally deceptive.

OIG Reply

We clarified our conclusions by noting that we use the term "false" to signify something that is untrue or not in accord with the facts. We find that Malone falsely testified that he had himself performed a tensile test and that he also testified inaccurately and outside his expertise concerning the test results.

ROBERT WEBB

FBI Response

As noted above in our discussion of responses concerning the VANPAC case, the FBI in its response asked the OIG to consider whether its conclusions regarding Webb are overly critical or inaccurate. FBI Response at 46.

OIG Reply

We considered the FBI's response on this point and concluded that no revisions to the Report were appropriate.

CHARLES CALFEE

FBI Response

The FBI contends that in statements to the OIG, Calfee did not mean to express that one examiner should testify based on the incomplete notes of another examiner, but instead that the second examiner should do the analysis himself and not testify from the notes of another examiner at all. FBI Response at 47.

OIG Reply

We have revised the Report to acknowledge this information provided by the FBI and to observe that this does not excuse Rudolph's incomplete case notes.

KENNETH NIMMICH

A minor date change was corrected.

ROD ASBURY

Minor inaccuracies in the descriptions of the posts Asbury held were corrected.

HOWARD SHAPIRO

FBI Response

The FBI contends that the draft Report is misleading in stating that we found no basis to conclude that Shapiro was involved in the decision to reassign Whitehurst or otherwise directed or engaged in any retaliation against him. The FBI requests that we note that the OIG has no factual basis to believe that Whitehurst suffered retaliation, so Shapiro could not have directed or participated in any retaliation. FBI Response at 50.

OIG Reply

We have considered the FBI's response on this point and concluded that no revisions are appropriate. The conclusions regarding Shapiro do not, as the FBI suggests, indicate that Whitehurst in fact suffered any retaliation. Our conclusions regarding Whitehurst's retaliation claims are set forth in Part Five of the Report. Although we generally rejected Whitehurst's allegations of retaliation, our conclusion concerning his referral for psychiatric examination was qualified because Whitehurst himself would not consent to the release of certain information.

PART SIX: ENHANCING QUALITY IN THE LABORATORY

FBI Response

The FBI indicates that, with one exception described below, it agrees with each of the recommendations made by the OIG to enhance quality within the Laboratory and that it is taking or has already taken steps to implement those recommendations. In the final Report, we briefly summarize the FBI's response concerning the particular recommendations made by the OIG. FBI Response at 51-71.

The FBI noted its disagreement with the OIG's recommendation that the investigative and crime scene management functions of the EU should be transferred out of the Scientific Analysis Section of the Laboratory. The FBI notes that bomb scene investigations are unique and that it is necessary for explosives examiners to be involved at the scene. FBI Response at 55-57.

OIG Reply

As noted above, it appears that the FBI has misunderstood our recommendations in this regard. The OIG did not intend to suggest the EU examiners should be excluded from crime scenes, and we noted in the draft Report that "examiners in the EU should continue to advise and assist in the gathering of evidence at bombing scenes." To clarify our intent on this point, we revised the recommendation concerning the EU to state, "Examiners in the EU should continue

to advise and assist in gathering evidence at bombing scenes, but primary responsibility for conducting investigations and directing crime-scene management should rest with components of the FBI outside the Scientific Analysis Section."

PART SEVEN: SUMMARY OF OIG RECOMMENDATIONS FOR LABORATORY

The FBI's comments regarding the OIG's recommendations are set forth in Part Six.

PART EIGHT: CONCLUSION

The FBI, the U.S. Attorneys' Offices, and other responders did not make any comments to this section.

THE FBI REQUEST TO THE OIG FOR FURTHER INSPECTION

FBI Response

In its response to the draft Report, the FBI noted that it remains firmly committed to enhancing the quality of its Laboratory. The FBI further requested that the OIG conduct "progress reviews" on the implementation of its recommendations every six months until both the OIG and the FBI are satisfied that the Laboratory has made the changes necessary to address the issues raised in the draft Report. FBI Response at 71.

OIG Reply

The OIG acknowledges that some form of follow-up review by the OIG may be appropriate. The nature and timing of that review, however, should be the subject of further discussions between the FBI and the OIG to allow the new Laboratory Director to be selected and to settle into the position and to avoid unnecessary duplication with other reviews that are already contemplated. The FBI reports that it will have an external, pre-accreditation review conducted this spring by inspectors from the National Forensic Science Technical Center, and that it contemplates that it will submit its accreditation application to ASCLD/LAB by the end of 1997. Accordingly, at an appropriate time after the new Laboratory Director is named, we suggest that the OIG and the FBI address the issue of further OIG reviews of the Laboratory.