U.S. Department of Justice
Office of the Inspector General

The FBI Laboratory:
An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases

RESPONSE/REPLY APPENDIX

EDDIE COX

Michael R. Bromwich
Inspector General
April 1997

LIST OF DOCUMENTS IN RESPONSE/REPLY APPENDIX

1) The Federal Bureau of Investigation's (FBI) Comments dated February 12, 1997, on the Office of the Inspector General's (OIG) draft report titled, "The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases."

2) The FBI's Comments dated March 24, 1997, on Part Three, Section H11: Higgins' Alleged Alteration of Dictation.

3) The FBI's Comments dated April 4, 1997, on Part Three, Section D: The Bush Assassination Attempt.

4) FBI Supervisory Special Agent Roger Martz's reply dated February 4, 1997, to the OIG's draft report.

5) FBI Supervisory Special Agent David Williams' reply to the OIG's draft report.

6) Comments dated February 11, 1997, from Stanley Rothstein, Terrorism and Violent Crime Section, Criminal Division, on Part Three, Section B: The VANPAC Case.

7) Comments dated February 27, and March 10, 1997, from the United States Attorney's Office Southern District of New York, on Part Three, Section C: World Trade Center Bombing.

8) Comments dated February 13 and March 7, 1997, from the United States Attorney's Office Eastern District of New York, on Part Three, Section E: Avianca Bombing.

9) Comments dated February 20, 1997, from the United States Attorney's Office District of New Jersey, on Part Three, Sections H1 and H6: Yu Kikumura and the Conlon Case.

10) Comments dated March 3, 1997, from Robert Cleary, Special Attorney to the United States Attorney General, on Part Three, Section H9: The UNABOM Article.

11) Comments dated February 3, 1997, from the United States Attorney's Office Middle District of Pennsylvania on Part Three, Section H12: Tobin Allegations.

12) Comments dated February 7 and 13, 1997, from Attorney John Doar on Part Three, Section H12: Tobin Allegations.

13) OIG's Replies to responses to the draft report.

RESPONSE BY:

(February 12, 1997)

FEDERAL BUREAU OF INVESTIGATION

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Comments on the
January 21, 1997 Draft Report
of the Department of Justice
Office of the Inspector General:

"The FBI Laboratory: An Investigation Into
Laboratory Practices and Alleged Misconduct in
Explosives-Related and Other Cases"

February 12, 1997

U.S. Department of Justice

Federal Bureau of Investigation

Office of the Director

Washington, D.C. 20535

February 12, 1997

Mr. Michael R. Bromwich
Office of the Inspector General
United States Department of Justice
950 Pennsylvania Avenue, Room 4706
Washington, D.C. 20530

Dear Mr. Bromwich:

Thank you for the opportunity to submit these comments on your January 21, 1997 draft report entitled, "The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases."

This document represents the FBI's response after its initial review of the draft report. Unfortunately, it was not possible in these few weeks for the FBI to evaluate each of the findings, conclusions and recommendations contained in the draft report, which we understand was the product of over 16 months of investigation. In addition, the FBI has not been furnished the underlying reports of investigation which form the basis for the draft report. Also, the FBI's comments are necessarily limited to the extent that certain sections of the draft report have not been provided to the FBI as of this date. Nonetheless, we believe that this period of review has afforded us the ability to provide your Office with a number of significant comments, which I am now submitting for your consideration.

These comments represent the dedicated review of many individuals within the FBI, who have worked under extremely tight time constraints to assist in this phase of the Laboratory inspection. In that regard, I would especially like to thank Inspector-Deputy General Counsel James M. Maddock and those who assisted him within the FBI's Office of the General Counsel and Laboratory Division. Also on behalf of the FBI, I would like to

extend our most sincere appreciation for the extensive work of the fourteen persons identified by your Office as assisting in this effort. Their thorough review of the matters contained in the draft report is certain to have a positive impact on the FBI's Laboratory and on law enforcement efforts throughout the nation and abroad.

Respectfully,

Weldon Kennedy
Deputy Director

February 12, 1997

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EXECUTIVE SUMMARY

A. Introduction

The Federal Bureau of Investigation welcomed the recent opportunity provided by the Department of Justice Office of the Inspector General (OIG) to review the OIG's January 21, 1997 draft report concerning certain units within the FBI's Laboratory Division. We hope that the comments provided in this document assist the OIG in reaching its final conclusions, and in issuing its final report on these matters.

The FBI's primary focus during this period of review was to provide the OIG with comments concerning the accuracy of the initial findings in the draft report. In furtherance of that objective, the FBI enlisted the assistance of its Office of the General Counsel and Laboratory Division. Due to the gravity of the concerns raised in the draft, the FBI also reviewed the OIG's initial findings in contemplation of taking swift action to ensure that any problems that have been identified in the Laboratory will never recur.

The FBI takes full responsibility for the failings which have been identified within its Laboratory. Those that have not already been addressed will be addressed promptly. In that regard, the FBI remains grateful for the OIG's assistance in identifying, isolating, and remedying these matters.

The FBI's commitment to holding its Laboratory to the highest possible standards is reflected in the Laboratory's history. Since its 1932 inception, the FBI Laboratory has consistently strived to enhance its services to the law enforcement and criminal justice communities. Today, we believe the FBI Laboratory remains the best forensic laboratory in the world. The Laboratory is preeminent in a wide range of areas, including the examination and analysis of chemical-toxicological evidence, DNA, fingerprints, explosives, firearms, toolmarks, paints, polymers, metals, hairs and fibers, shoe prints, tire treads, photographic images, and documents. The Laboratory also is a leader in psycholinguistic analysis, polygraphy, computer analysis, and racketeering records analysis.

The FBI Laboratory recognizes the need to provide prompt, accurate, and thorough responses to the thousands of requests it receives annually from international, federal, state and local law enforcement organizations. The FBI Laboratory also is committed to developing innovative uses of technology to facilitate investigations. In fact, over the past several years alone, the FBI Laboratory has been instrumental in critical forensic science developments ranging from validated new uses of capillary zone electrophoresis tests to analyze inorganic materials found in explosives residues, to the recent development (mentioned in the OIG's draft report) of analytical methods for determining the presence of the preservative EDTA in dried bloodstains to provide probative information when allegations of evidence tampering have been made in criminal cases. The FBI Laboratory routinely employs the most sophisticated state of the art technology, and has made enormous contributions to the field of forensic science.

Like other laboratories around the world, the FBI Laboratory continues to evolve, both in the use of the latest available scientific methods and in monitoring and refining its quality assurance programs. With respect to quality assurance, the FBI Laboratory operates under the guidance of detailed protocols, and its personnel are thoroughly trained and supervised. We have not, however, always lived up to our own or the public's expectations of perfection.

At various times over an approximate eight year period, one of the FBI Laboratory's scientists, Frederic W. Whitehurst, raised concerns about individuals and practices within three of the Laboratory's 23 units. Whitehurst's concerns took the form of highly charged accusations against his co-workers, including allegations of perjury and suppressing, fabricating, and tampering with evidence. Many of Whitehurst's charges were made in connection with cases he did not work on, and about trial testimony he had not personally reviewed. He placed blame with equal force and certainty regardless of whether he had any basis to level such charges. As the OIG would later find, Whitehurst "often accused others of wrongdoing when he did not know the pertinent facts, he has used hyperbole and incendiary language that blurs the distinction between facts and his own speculation, and he has otherwise displayed a serious lack of judgment."[1]

The sheer volume of accusations made by Whitehurst, the vitriol and certainty with which they were made, and the fact that most of his accusations – both facially and after review – lacked any foundation, contributed to the unfortunate consequence that the FBI failed to recognize the merit in some of his charges.

Whitehurst then decided to raise his concerns with the OIG through a series of letters which, according to the OIG, numbered in the hundreds. Whitehurst did not provide copies of those letters to the FBI. The OIG assembled the resources needed to investigate all of Whitehurst's allegations, employing a team of at least fourteen persons, including five worldwide scientific experts and a separate team of prosecutors and investigators. After a sixteen-month inspection, the OIG issued its January 21, 1997 draft report.

As reflected in the draft, the OIG found the vast majority of Whitehurst's allegations to be baseless. Included in the OIG's findings is a rejection of each of Whitehurst's charges of perjury, evidence tampering, evidence fabrication, and failure to report exculpatory evidence. Similarly, the report reflects that Whitehurst's broad allegations of systemic contamination, improper evidence handling and scientific analysis, and FBI retaliation against him, also lacked foundation. As concerns Whitehurst himself, the OIG found that "Whitehurst appears to lack the judgment and common sense necessary for a forensic examiner," and that Whitehurst could not effectively function within the FBI Laboratory. The OIG recommended that "the FBI consider what role, if any, he can usefully serve in other components of the FBI."

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[1] Part Five at 33.

Significantly, however, the OIG also determined that a number of Whitehurst's charges had some merit – findings which the FBI takes extremely seriously. Most important in this regard are the OIG's particular findings as to one FBI explosives-examiner and one FBI scientist-examiner who had performed unacceptably in connection with a total of three criminal cases. These performance problems relate to the accuracy of the examiners' opinions and conclusions, and the reliability of the basis for those opinions and conclusions. The gravity of the concern over the performance of one of these employees is magnified because the cases to which he was assigned included two that are particularly significant: the bombing of the World Trade Center in New York City and the bombing of the Alfred P. Murrah Federal Building in Oklahoma City. The FBI is relieved to learn from federal prosecutors assigned to these cases, who have reviewed the evidence and the OIG's initial findings, that the employee's performance errors did not compromise any defendant's right to a fair trial. Nonetheless, after reviewing these matters, the FBI agrees with the OIG's overall assessment that these two employees did not adequately perform their duties and that their supervisors inadequately reviewed their work. These failures will not be excused, nor will the FBI permit these failures to recur.

B. The FBI's Commitment to Quality

Within the draft report, the OIG provided the FBI with a number of detailed recommendations to enhance the Laboratory's quality. With few exceptions, the FBI fully concurs in these recommendations and has already implemented some of them. Moreover, the FBI has adopted other recent measures to improve the Laboratory Division, many of which exceed those recommended by the OIG. The FBI wants to assure not only the OIG, but the greater public, that it has no intention of "covering up" its problems. As is evidenced by our full cooperation in the OIG's investigation, we are committed to excellence, and will always pursue it.

The following list outlines the OIG's most significant recommendations to improve the Laboratory and describes a number of actions that the FBI has already taken to implement those recommendations:

(1) *External Review*: The FBI agrees that the Laboratory should undergo additional periodic review, and requests that the OIG conduct progress reviews on the implementation of its recommendations every six months, until both the OIG and the FBI are fully satisfied that the Laboratory has made the changes necessary to address the issues raised by this investigation. In addition, the Laboratory is pursuing an outreach effort to establish external peer review relationships with other forensic laboratories in various disciplines. Most importantly, the Laboratory will be subject to the intensive external review and monitoring associated with acquiring and maintaining accreditation by the American Society of Crime Lab Directors/Laboratory Accreditation Board (ASCLD/LAB), as further discussed below.

(2) *Accreditation*: The FBI agrees that the Laboratory should pursue ASCLD/LAB accreditation at the earliest possible time, and it has already begun to do so. ASCLD is nationally recognized and respected, and the FBI is proud to have been instrumental in the formation of that group. In preparation for accreditation, the FBI Laboratory is currently undergoing extensive internal audits of its operations and procedures. In the Spring of 1997, upon the completion of the internal audits, the Laboratory will have an external, pre-accreditation review conducted by qualified inspectors from the National Forensic Science Technical Center. The Laboratory anticipates that it will complete its preparations in time to permit it to submit an application for accreditation near the end of 1997. ASCLD/LAB's decision to accredit must be made within 12 months of the completion of its on-site inspection of the FBI Laboratory, providing a target accreditation date near the end of 1998.

(3) *Laboratory Restructuring*: The FBI agrees that the Laboratory's Explosives Unit should be restructured to clarify its mission and to ensure that both supervisory personnel and examiners have appropriate scientific and technical training. Such a restructuring is already underway, and will include merging the Explosives Unit with a portion of the Materials Analysis Unit, in order to link two related scientific areas.

(4) *Resolution of Scientific Disagreement*: The FBI agrees with the need to establish clear guidance for its examiners to follow when encountering disagreements over forensic methods or the interpretation of results. To address that need, the FBI recently distributed a communication to all Laboratory personnel describing in detail the procedures to be followed in the event a scientific dispute arises. That procedure, which will ensure that such disputes are satisfactorily resolved in accordance with applicable scientific principles, will be incorporated into the Laboratory's Quality Manual.

(5) *Examiner Reports*: The FBI agrees that, rather than follow a procedure whereby a principal examiner assembles a report based on dictation from other examiners, each examiner who analyzes evidence should prepare and sign a separate report. The Laboratory implemented this requirement before the OIG provided the FBI with its draft report. The FBI now requires that, prior to release, reports be reviewed by a unit chief or other qualified examiner for compliance with all applicable procedures. The FBI also has adopted an internal audit program, pursuant to which examiner reports will be subject to annual audits by the Quality Assurance Unit (QAU) to confirm that all necessary documents are included in the case file. Finally, the FBI is establishing a separate audit group in the QAU which will review a representative sample of closed cases to ensure that all aspects of the Quality Assurance Plan are strictly followed.

(6) *Examiner Training*: In addition to the specialized examiner training already provided for each unit of the Laboratory, the FBI agrees that the Laboratory should implement a uniform curriculum for examiner training that addresses common issues such as case documentation, report preparation, examiner ethics and testimony. In order to meet that

objective, the Laboratory is refining its current mandatory core curriculum for new examiner qualification, which addresses issues common to all forensic disciplines.

C. The FBI's Comments on the Draft Report

Although this Executive Summary will not highlight the FBI's review of the specific factual findings in the draft report, the following is a summary of the FBI's comments as to certain global aspects of the draft report, and as to a few recommendations in the draft report, with which the FBI disagrees.

(1) Implication that the Laboratory Has Not Already Modified Procedures

In Part Two of the draft report, the OIG recognizes that a number of changes in Laboratory practices have already occurred due to the Laboratory's decision over the last several years to implement a formal quality assurance plan and to seek accreditation by ASCLD/LAB. The OIG then notes that "[i]n evaluating Whitehurst's accusations that others have violated Laboratory policies or otherwise acted unprofessionally, it is important to recognize that the Laboratory's practices related to quality assurance have evolved significantly."[2]

Despite this acknowledgment that Laboratory policies and procedures have been modified significantly since many of the events at issue occurred, the draft report repeatedly comments that particular cases demonstrate the need for a change in those policies and procedures without also noting that changes have already been made.[3] We believe that the sheer number of those comments, made throughout the draft report, undermine the general statement quoted above, and may lead to the incorrect impression that many, if not most, of these issues have not been considered by the FBI at all. In fact, as discussed in detail in Section III of the FBI's response, the FBI has already implemented many of the OIG's recommendations and, in some instances, has surpassed those recommendations in adopting

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[2] Part Two at 4-5.

[3] See, e.g., Part Three, Section A at 35 (stating that problems in the Rudolph matter might have been prevented if the Laboratory had established a formal quality control program which provided guidelines for case documentation, adequate case review and the use of properly validated protocols, which the Laboratory has already done); Part Three, Section B at 29 (stating that the Laboratory would benefit from, among other things, clearer guidance as to the scope of principal examiner testimony regarding work performed by AEs, improved record retention and retrieval systems, written and validated protocols for standardized procedures, and file review to ensure conclusions are supported by appropriate analysis and data, changes that the FBI has already implemented); Part Three, Section C at 64 (Williams' testimony in World Trade Center case exemplifies the need for many of the Laboratory improvements described in Part Six, many of which have already been implemented); Part Three, Section E at 39 (Hahn's conduct exemplifies the need for additional training of examiners regarding courtroom testimony, which is already being undertaken by the Laboratory); Part Three, Section H1 at 14 (noting that the Yu Kikumura case illustrates the desirability of clearer guidelines for and effective monitoring of examiner testimony, policies that have been implemented by the Laboratory).

policies and procedures that will ensure that the high-quality work performed by the Laboratory continues.

As stated earlier, the FBI greatly appreciates the OIG's recommendations for improving the Laboratory. However, we believe that, by including those recommendations in the analyses of numerous individual cases as well as Parts Six and Seven of the draft report, the OIG fails to give sufficient recognition to the changes that have already been made. We therefore request that, to the extent sections of the draft report other than Parts Six and Seven discuss the need to improve Laboratory practices, those discussions be omitted.

(2) Failure to Always Recognize Courtroom Dynamics

While we generally agree with the draft report's recommendations on guidelines for examiner testimony, we are concerned that many of the OIG's comments in the body of the report regarding such testimony fail both to recognize certain courtroom dynamics and to acknowledge protocols that already exist within the FBI.

As noted in the draft report,

> one cannot expect an examiner's work or testimony to have been perfect in every case if it is subjected to a detailed, after-the-fact analysis like that employed in our investigation. Laboratory examiners work under time constraints and other pressures; scientists can legitimately differ in their interpretation of data; and knowledge and practices in forensic disciplines evolve over time. We also reviewed, with the benefit of hindsight, certain testimony given under courtroom examination, where a witness generally cannot reflect at length on the questions and answers.[4]

We agree with this prefatory remark, but believe that its impact and caution have been lost along the way.

A trial is an adversarial process with witnesses subject to both direct and cross-examination by parties seeking to elicit testimony which supports their respective theories of the case. The basic testimonial role of a Laboratory examiner in this process is the same as that of any expert witness in that, as reflected in the Federal Rules of Evidence, the expert examiner is present at trial to assist the trier of fact to understand the evidence or to determine a fact in issue.

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[4] Part Two at 1-2.

We agree that in order to maintain their objectivity and credibility Laboratory examiners must ensure that their responses on direct and cross-examination are not overstated or misleading and are supported by facts and data of the type reasonably relied upon by experts in the field. And, of course, examiners must testify accurately. Nevertheless, the draft report's approach towards this subject requires greater balance. It must be acknowledged that the examiner-witness is seeking to explain complicated scientific data and material to the average layperson (non-scientist) to assist the jury in making a determination regarding the ultimate issues in the case. Many of the OIG's comments that call for greater accuracy and precision in examiner testimony fail to recognize the role of the expert at trial as a translator of technical information and a facilitator of jury comprehension of scientific material. A hyper-technical discussion of scientific issues will not aid the trier of fact. Therefore, expert witnesses are constantly attempting to strike a proper balance between furnishing technical information and having their testimony comprehended by the average juror.

We believe that the OIG's findings that certain examiners testified outside the scope of their expertise fail to appreciate the role of the expert in the criminal process. The Federal Rules note that the fields of knowledge which may be drawn upon for expert testimony are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Under the Federal Rules, the expert is viewed not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education." Many of the OIG's findings fail to take into account the existing legal standard for expert testimony and, in turn, the OIG has placed inappropriately narrow constraints on the scope of an examiner's expertise. These findings often fail to acknowledge the wider boundaries of expert testimony envisioned by the Federal Rules and fail to account for the knowledge, training, and experience that our Laboratory examiners have developed during their careers. In addition, although not noted in the draft report, whether a witness is qualified to testify as an expert in particular areas is itself the subject of voir dire, and the court's oversight and express rulings. On some occasions, courts have requested that our examiners provide "summary testimony," while recognizing and explaining to the jury the limits of their expertise.

Moreover, although we agree with the OIG's finding that greater guidance is needed in the area of examiner testimony, the draft report suggests on numerous occasions that examiners were not previously instructed to testify accurately and within their expertise. The FBI has always recognized that the credibility of its Laboratory examiners relies not only on their performing objective forensic examinations, but in clearly and impartially testifying to their conclusions based on "facts or data relied upon by experts in the particular field in forming opinions or inferences upon the subject." To that end, FBI examiners have consistently been directed to provide straightforward, clear and objective testimony within the boundaries of their respective expertise. In accordance with these fundamental principles of expert testimony, the FBI has long held moot courts as a part of the Laboratory's qualification process to rigorously test the clarity, precision, logic and objectivity of a new examiner's testimony. To reinforce these principles in all of its examiners, the Laboratory

has adopted a Courtroom Testimony Policy which essentially codifies, and is sometimes more restrictive than, the guidelines for examiner testimony suggested by the OIG. The Laboratory will continue to emphasize the importance of clarity and accuracy in examiner testimony to ensure that the highest standards for expert testimony are met. It is improper, however, to suggest (as the draft report does) that there has been a complete absence of these standards, and that requiring accurate testimony would be new to the FBI.

(3) Discussions About Prosecutorial Bias

The FBI strongly objects to the draft report's suggestion, however limited, that one or more of the FBI Laboratory's examiners may have intentionally biased their findings, reports, or testimony in order to favor the prosecution.[5] It is paramount to the Laboratory's mission that its work be conducted with complete objectivity. To charge that the Laboratory acted otherwise is an extremely serious allegation, and one that lacks support.

A clear distinction must be made between a Laboratory examiner who develops his or her own expert opinion, based on all the available evidence, and somebody who provides "biased" testimony. Although an examiner's theory might be consistent with the prosecution's theory, to suggest that any of the Laboratory's examiners skewed his or her opinions to favor the prosecution is without basis. The draft report omits the fact that examiners usually reach their expert opinions as to certain findings well before the government's case is brought. Moreover, the FBI Laboratory routinely produces forensic evidence that exonerates suspects and which results in decisions by prosecutors to decline prosecutions. In fact, our examiners are frequently called upon to testify on behalf of defendants.

(4) Subjective Commentary

In the context of its review of examiner conclusions, the OIG repeatedly expresses "serious concern" and indicates that it is "deeply troubled" by certain findings. We take issue with the inclusion of such commentary and ask that these references be deleted. We believe that the fact-finding objective of the OIG is compromised by the insertion of such subjective opinion.

(5) Conclusions About the Proper Role of Explosives Unit Examiners

The draft report recommends that the investigative and crime scene management functions of the Explosives Unit (EU) be transferred out of the Scientific Analysis Section. This recommendation is based upon a view of the role of the EU examiner with which the FBI respectfully disagrees. Therefore, we are not inclined to follow this particular recommendation.

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[5] See, e.g., Part Three, Sections A at 10, G at 1, and E at 39.

Bomb scene investigations are unique. Observable damage to the post-incident site often has significant evidentiary value, sometimes providing clues to help solve these crimes. The knowledge of specific explosives devices and their effects on particular materials may be significant in searching for bomb-related evidence. Some of this evidence might, for example, include the rearrangement of the normal contents of a building or structure, and offer clues as to the explosive force of the device involved. It is not unusual for an explosives examiner, based on years of experience (which cannot be obtained in a classroom), to help develop the most systematic approach to the collection of explosives evidence at a crime scene. In addition, firsthand observations by EU examiners at crime scenes are among the facts and data upon which they may properly base an expert opinion.

Although the OIG notes that there is a trend toward increasingly technical and sophisticated techniques for forensic bombing examinations, the FBI, as well as the Forensic Explosives Laboratory in Great Britain, recommends that forensic explosives scientists be present at the scenes of certain explosions. The FBI believes that precluding EU examiners from an investigative role would eliminate a potential basis upon which they could learn about the workings and effect of explosive devises and an opportunity for them to share their knowledge to help apprehend those involved in these awful crimes. As a result of these considerations, the FBI is not inclined to transfer the EU's investigative and crime scene management functions to the Evidence Response Team (ERT) Unit. Rather than require completely different personnel to investigate explosive cases and oversee the collection of evidence, the FBI plans to continue, as it has long advised other forensic laboratories, the practice of having its experienced explosives examiners participate in post-incident examinations.

I. COMMENTS ON THE OIG'S ANALYSIS OF PARTICULAR MATTERS

A. World Trade Center

The OIG's investigation of Whitehurst's allegations against FBI Laboratory chemists Lynn Lasswell and Roger Martz in the World Trade Center case revealed no misconduct on the part of either chemist. The draft report also finds that Whitehurst "grossly overstated" his allegations against Donald Haldimann and that a Christmas Party conversation which Whitehurst considered "suppression of evidence" ultimately "signified nothing."[6]

The remaining issues with regard to the World Trade Center case focus upon explosives examiner, David Williams, the principal examiner (PE) in the investigation. We found that the draft report's discussion of the World Trade Center case contained several findings with which we disagree, in whole or in part. These matters and the bases for our objections are set forth below.

OIG Finding: *Williams gave inaccurate testimony regarding whether the urea nitrate was made pursuant to Arabic formulas from bomb-making books linked to defendants.*

Response: Williams testified in the first-person that he personally performed certain tasks, including following the formulas from the defendants' blue books to produce urea nitrate. According to Williams and others present during the Eglin Air Force Base project, Williams relied on the chemists' representation to him that the formula being used was "the same" as that in the Arabic formula. Although the chemists apparently indicated to the OIG that they do not recall this conversation, two of the bomb technicians we contacted did.[7] Both of the bomb technicians agreed that Williams specifically asked how the formulas compared because he would be the one called to testify in that regard. The better approach at trial, however, would have been for Williams to explain that he is not a chemist and that he was told by a chemist that the formulas were the same.

OIG Finding: *Williams gave inaccurate testimony regarding his role in the manufacture of urea nitrate.*

Response: Again, Williams testified in the first-person that he performed certain tasks during the Eglin experiment which were actually performed by others. We disagree with the OIG, however, as to the significance of this inaccuracy. While Williams may have

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[6] Part Three, Section C at 63.

[7] The bomb technicians, Ron Wirth and Dennis Durden of the Jacksonville FBI office, stated that it was "common knowledge" that the purpose of the Eglin experiment was to "duplicate" the formula associated with the World Trade Center defendants. They also agreed that Whitehurst was so aware.

testified in the first-person, he also made it clear that several people were involved in the manufacturing process. He even named them in his trial testimony. We do not believe that, when viewed in its entirety, Williams' testimony misled the jury into believing that he alone manufactured urea nitrate.[8]

The OIG also concludes that Williams was wrong to consider himself a supervisor of the project because he did not determine the types and amounts of chemicals to be added during the actual mixing process. We disagree with the OIG's assessment in this regard, as do the on-site bomb technicians we contacted. The Jacksonville FBI Agents involved in the project considered Williams to be the supervisor even though he did not direct the chemists on the specifics of the mixture.[9] In addition, Williams was the official PE in the World Trade Center case and, as such, was ultimately responsible for all of the Laboratory's work in connection with the case.

It is undisputed that Williams was responsible for assembling the team that manufactured the urea nitrate at Eglin Air Force Base. He personally requested that the Jacksonville Division of the FBI assign two bomb technicians to the project. He also coordinated their schedules and those of Eglin personnel on a daily basis. As Steve Burmeister, another examiner, told the OIG, Williams was responsible for supervising the logistics of the project. We, therefore, find it reasonable for Williams to have considered himself the supervisor and to refer to the individuals involved in the project as "my workers." The OIG, however, finds that Williams' testimony in this regard "manifests an intent to downplay the role of the others and to aggrandize his own."[10] We disagree with this characterization and with the OIG's speculation as to Williams' intent.

The significance of Williams' role, according to the draft report, is that it reflects on his expertise in the manufacture of urea nitrate. We disagree. Williams' testimony that he supervised the events at Eglin did not make him "appear to be an expert" in the manufacture of urea nitrate.[11] We believe, and AUSA Childers has confirmed, that the jury was not misled as to Williams' role or expertise in the manufacture of urea nitrate.

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[8] The lead prosecutor in the case, AUSA Gil Childers, advised that neither he nor the jury were under the impression that Williams individually and personally manufactured urea nitrate. He also advised that Williams' first-person testimony as to acts performed by others was inconsequential.

[9] Agents Wirth and Durden stated that Williams was "in charge"; was "running the show"; "gave us our marching orders"; and "was there the whole time supervising."

[10] Part Three, Section C at 12.

[11] Id.

OIG Finding: *Williams testified beyond his expertise regarding the defendants' capability to make urea nitrate and in a way that makes the testimony appear tailored to the most incriminating result.*

Response: While we understand the tendency of an expert witness to try to respond to questions posed to him, we also understand the need to resist such testimony.[12] The better approach in the World Trade Center case would have been for Williams to defer these questions to Steve Burmeister, the prosecution's expert witness on chemistry issues. While the draft report questions Williams' scientific calculations in determining the defendants' capability to produce between 1,200 and 1,800 pounds of urea nitrate, it concedes that any error in his calculations was inconsequential to the case against the defendants. As the draft report notes, had Williams accurately calculated the defendants' capability to make urea nitrate, "the result would have been perfectly acceptable to the prosecution's theory of the case."[13] Furthermore, we object to the OIG's commentary that Williams' calculations "conveniently produced the exact amount of urea nitrate -- 1,200 pounds -- that he later testified was used in the Trade Center bombing."[14] Williams testified to a range of 1,200 to 1,800 pounds and to "about 1,200 pounds."

We also maintain that the draft report's commentary that Williams' testimony appeared tailored to the most incriminating result is speculative and should be omitted.

OIG Finding: *Williams gave incomplete testimony concerning the VOD of urea nitrate.*

Response: Williams testified at trial that the velocity of detonation (VOD) of urea nitrate is 14,000 feet per second (fps) in smaller quantities and approaches 15,500 fps in larger quantities. The recognized VOD of urea nitrate, however, is 11,155 to 15,420 fps.[15]

We disagree with the draft report's commentary that "[a]t best, the testimony was incomplete. At worst, it was intentionally false."[16] According to Williams, he arrived at the 14,000 to 15,500 figure after consulting several experts in the field. While the experts told the OIG that they "did not recall" discussing the VOD of urea nitrate with Williams,

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[12] See Section III.A.9 below regarding changes the FBI Laboratory has adopted to ensure that Laboratory personnel limit their testimony to their areas of expertise.

[13] Part Three, Section C at 22.

[14] Id. at 18.

[15] Encyclopedia of Explosives and Related Items (U.S. Armament Research and Development Command 1983, p. U103).

[16] Part Three, Section C at 26.

none of them stated categorically that it did not happen. We therefore object to the OIG's assertion that Williams' testimony may have been "intentionally false" when there is no evidence to support such a claim. In the same vein, we find it inappropriate for the OIG to express "grave doubts" about Williams' veracity.[17]

OIG Finding: *Williams gave an invalid opinion regarding the VOD of the main charge.*

Response: Williams testified that the blast damage he observed at the scene led him to conclude that the VOD of the main charge was approximately 14,000 fps.[18] We agree with the OIG that a broader range should have been given. We disagree, however, with the OIG's criticism of Williams' methodology.

Williams cited numerous factors which he considered during his assessment of the crime scene, including damage to vehicles, concrete, steel-reinforcing rods, steel beams, other fragments of metal, as well as the size of the crater, and pushing and heaving effects. We believe such a visual examination is not only proper, but necessary. The OIG, however, criticizes Williams for filtering these observations through his 10 to 15 years experience as an explosives examiner to produce his VOD estimate. It calls such an assessment "an unscientific, unverifiable process of intuition," lacking any empirical data.[19] We find such criticism of Williams' methodology inappropriate, especially in light of the following passage in the draft report:

> We have no doubt that an experienced explosive examiner may properly draw certain inferences from observations at a crime scene. For example, an experienced expert will be able to discern the difference between the damage left by a high versus a low explosive, and can differentiate the damage caused by a heaving high explosive (like most commercial products) versus a brisant (like most military explosives) high explosive. Similarly, an observation of "pitting and cratering" will tell an experienced expert that the explosive used was a high explosive with a VOD typically in excess of 10,000 feet per second. All

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[17] Id.

[18] As noted in the draft report, Williams testified at the Salameh trial that the VOD was 14,000 to 15,500 fps "with a little bit of give on each side"; at the Sheik Omar trial, that it was 14,000 fps "with a bracket on both sides of a couple thousand feet"; and in a letter to the OIG, that it was "faster than 11,000 and slower than 16,000 fps." Part Three, Section C at 29-30.

[19] Id. at 36.

> of this involves the use of experience to recognize certain distinctive characteristics of explosive damage.[20]

We believe that the criticism of Williams' methodology, *i.e.*, assessing a crime scene and filtering it through his experience to estimate VOD, is unfounded. It is the precision with which Williams estimated the VOD that was improper, not the methodology he applied.

OIG Finding: *Williams gave invalid and misleading opinions identifying the main charge that appear tailored to the most incriminating result.*

Response: Although the draft report finds that Williams' testimony about the limited type of explosives that fit in the 14,000 to 15,500 fps range was "literally correct," it expresses "concern" that the court "may not have understood" that each type contains numerous commercial products.[21] We believe the OIG is overreaching in this criticism. There is nothing in the record to suggest that the court was unclear on this matter. Furthermore, if such were the case, Williams was available to answer clarifying questions.

As for Williams' identification of the main charge as urea nitrate, we note, as did the OIG, that he testified accurately on direct examination that the category of explosives that fit his VOD estimate and the damage he observed included, but was not limited to, urea nitrate. The OIG then criticizes Williams for his responses during cross examination in which defense counsel elicited Williams' opinion that the main charge was, in fact, urea nitrate. The questions posed by defense counsel were admittedly unclear and opened the door to Williams' opinion that urea nitrate was the main charge.

We believe that the draft report unfairly criticizes Williams for considering the results of the auxiliary searches in formulating his response to defense questioning. Defense counsel did not limit his questions to Williams' observations at the scene (as the prosecutor did) and, as a result, provided Williams with an opening to consider the results of the searches. We believe it is fundamentally unfair for the OIG to opine that defense counsel "clearly meant" to limit the question to Williams' analysis of the crime scene and that Williams, therefore, acted "unprofessionally" in not explaining that he was also considering the search results.[22] A trial is an adversarial proceeding and it is the responsibility of counsel to formulate precise questions. The fact that defense counsel failed to do so in this instance should not reflect on Williams' professionalism. Williams gave a truthful answer to the question posed.

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[20] Id. at 38-39.

[21] Id. at 43.

[22] Id. at 47-49.

Finally, we object to the draft report's conclusion that Williams' testimony regarding the identification of the main charge appeared "tailored to the most incriminating result."[23] Had this been the case, Williams' testimony on direct examination by the prosecutor would have categorically identified urea nitrate as the main charge, rather than merely one of several possibilities. The fact that Williams did not identify the main charge as urea nitrate until he was asked an open-ended question on cross examination militates against a conclusion that Williams tailored his testimony to favor the prosecution.

OIG Finding: *Williams gave misleading testimony concerning his attempt to modify Whitehurst's dictation.*

Response: We agree that Williams was incorrect in testifying that he was not dissatisfied with certain conclusions in Whitehurst's report. It is clear, however, that he mistakenly believed defense counsel was questioning him about a format change, not a substantive change, he had made to one of Whitehurst's reports.[24] The OIG concedes that defense counsel's questions "lack precision," but, again, holds Williams accountable for making the appropriate interpretation.

B. Oklahoma City

The OIG findings regarding the Oklahoma City investigation focus primarily on the conclusions formed by the PE, David Williams, an explosives examiner in the Explosives Unit of the FBI Laboratory. While the OIG concludes that Williams' report on the bombing was flawed, we believe it is important to note that these flaws reflect inadequate analysis and ineffective management; they do not evidence individual misconduct. The errors identified in the draft report involve Williams' incomplete, categorical, and otherwise too specific conclusions. Many of the changes which are already being implemented in the Laboratory will ensure that such errors do not recur and that conclusions are scientifically supportable and are not overstated.

Finally, we note several statements within the OIG's discussion of the Oklahoma City case with which we disagree. These matters and the bases for our objections are set forth below.

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[23] Id. at 63.

[24] The OIG, which found these format changes to be "innocuous," acknowledges that this was the matter to which Williams referred in his testimony. Id. at 61.

OIG Finding: *Williams' categorical identification of the main charge as approximately 4,000 pounds of ANFO was inappropriate.*

Response: We agree that Williams should not have stated categorically that the main charge consisted of approximately 4,000 pounds of ANFO. We disagree, however, with the draft report's suggestion that Williams tailored his opinion to implicate the defendants by using prior knowledge of the explosive components purchased by the defendant.

The draft report's use of the word "tailored"[25] unjustifiably suggests that Williams had the specific intent to mislead when he rendered a categorical opinion in his report that the main charge was approximately 4,000 pounds of ANFO without revealing that the opinion was based in part on his knowledge of Nichols' purchases. There is nothing in the record to suggest that this was anything other than a lack of care and precision on the part of Williams in preparing his final report.

The lack of an intent by Williams to mislead is supported by the fact that in reaching the categorical conclusions in his report that the main charge was approximately 4,000 pounds of ANFO, Williams was verifying the preliminary opinion he had reached before knowing of the results of the search of the suspects' residences.

Williams arrived in Oklahoma City on the day of the explosion, April 19, 1995. After observing the scene of the blast and the surrounding areas, Williams formed the preliminary opinion that the blast was caused by approximately 4,000 pounds of ANFO. This opinion was based on the extent of damage he observed and his assessment of the approximate VOD of the explosive. More importantly, we have confirmed that no later than the morning after the blast, Williams advised high-ranking FBI officials at the scene, including Special-Agents-in-Charge (SACs) Weldon Kennedy, Neil Gallagher, and James Adams, that he believed the explosion was caused by approximately 4,000 pounds of ANFO. Each of these SACs is certain that Williams expressed this opinion before any suspect had been apprehended in connection with the bombing and before any search of the suspects' residences had been conducted.

OIG Finding: *Williams' errors were all tilted in favor of the prosecution's theory of the case.*

Response: We disagree. In addition to stating this finding in its conclusion, the draft report makes no fewer than six references in its discussion of the Oklahoma City investigation to Williams' conclusions being biased in favor of the prosecution.[26]

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[25] Part Three, Section G at 4.

[26] Id. at 1 (Williams' conclusions are "biased in favor of the prosecution"); at 2 (his statements "supported the prosecution's theory of the case"); at 4 (he "appears to tailor the opinion to evidence associated with the defendants"); at 5 (his opinion "appears tailored to present the case in a way most incriminating to the

We object to each of these references and believe that they unfairly characterize Williams' conclusions. As discussed above, several of Williams' conclusions which the OIG portrays as being "tailored" to favor the prosecution were reached prior to the development of any prosecution theory in the case. Therefore, each of these references is speculative and unwarranted given the fact-finding mission of the OIG and should be deleted from the draft report.

C. Florida v. George Trepal

The draft report accuses Roger Martz of overstating the significance of his identification of thallium nitrate after examining adulterated Coca-Cola. We believe that Martz's expert opinion that thallium nitrate had been added to the Coca-Cola is supported by the forensic examinations performed in this case[27] as well as Martz's own experience with poisoning cases.[28] We further believe that once Martz was qualified as an expert by the court, he was permitted to give his expert opinion when asked.

As an initial matter, we take issue with the draft report's characterization of Martz's "overstatement" in this case as being similar to "what he did in the World Trade Center case, where he concluded that mass spectrometry had identified urea nitrate on certain evidence."[29] Although Martz was the Unit Chief who signed the World Trade Center report, Lynn Lasswell originally authored it. The OIG makes it appear, erroneously, that Martz was the examiner who drew this conclusion about urea nitrate. While Martz was certainly responsible as the Unit Chief for approving the report, the OIG draft report unfairly places virtually all of the blame for the error on Martz.

Based upon our review, discussed in detail below, we believe that the draft report is wrong both in concluding that Martz overstated the significance of his analytical results and also in positing an erroneous scenario (not borne out by the tests) that a mixture of thallium chloride/sodium nitrate had been added to the Coca-Cola. If sodium nitrate had been added as one of the adulterants, the SEM/EDXA elemental profile in Q1 would have indicated an elevated level of sodium, which it did not.

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defendants"); at 7 (his opinion "may have been tailored to conform to the evidence associated with the defendants"); and at 7 (his conclusions "appear tailored to conform to evidence associated with the defendants").

[27] We agree that since ion chromatography (IC) was not performed on Q3, Martz's opinion should have been confined to Q1 and Q2.

[28] Although the draft report notes correctly that Martz acknowledged that another examiner had originally identified thallium in the Coca-Cola, the draft report is incorrect when it implies that Martz did not identify thallium himself. The SEM/EDXA results, directed and evaluated by Martz, confirm the presence of thallium in Q1.

[29] Part Three, Section H13 at 1.

While we concede certain deficiencies here, such as inadequate notes and charts, we disagree with the assertion that "Martz appeared to have a lower threshold of scientific proof than is generally accepted in forensic science and to lack appropriate scientific rigor in his approach to examinations."[30] This sweeping condemnation is especially harsh given the variety of analytical techniques employed by Martz in this case and the correctness of his ultimate conclusion.[31] We have set forth below the analysis by which Martz determined that thallium nitrate had been added to the Coca-Cola at issue:

Martz initially screened Q1-Q3 and K61 with silver nitrate (AgNO3) and barium chloride (BaCl2).[32] Silver nitrate reacts with free halides (*e.g.*, chloride ion) and barium chloride reacts with the sulfate ion. In both cases, the questioned specimens and the known specimen exhibited the same qualitative results[33] -- these spot tests indicated no differences in any chloride ion or sulfate ion concentrations between the questioned and the known specimens.

Martz next tested the four specimens with the diphenylamine/sulfuric acid reagent, which is a presumptive test for nitrates.[34] In this instance, the spot test did differentiate the questioned specimens from the known -- Q1-Q3 gave a positive response, while K61 was negative. The preliminary conclusion at this early stage was that the anion added to the questioned specimens is not chloride or sulfate.

Martz then submitted a dried sample of Q1 for examination by x-ray diffraction (XRD). The match given for this specimen in the instrument's 32060-pattern library is for thallium chloride, although the confidence level for this match, 4.9 out of 15.0, is low. However, thallium nitrate is the least thermally stable of the three thallium salts under discussion (the chloride, sulfate, and nitrate), *i.e.*, it is the first to decompose with increasing temperature. This may also have had some impact on the XRD analysis -- if the thallium

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[30] Id. at 5.

[31] The language at the beginning of the OIG's discussion of Trepal which suggests that Martz should have been more tentative in forming his hypothesis and more open to alternative explanations of his analytical results seems seriously misplaced in light of our conclusions. This is especially so in light of Martz's concession on cross-examination that he could not, as a matter of absolute certainty, exclude the possibility that the nitrate could have come from some other substance. Of course, if the nitrate anion arose from some other source, this scenario does not account for the lack of ion chromatography to identify the counterion associated with the thallium cation addition.

[32] Although these reagents were mistakenly recorded in Martz's notes as "AgCl" and "BaNO3."

[33] We agree that the observations supporting the "same for all" comment in Martz's notes should have been recorded.

[34] A few other oxidizers (alkali halogenates, chlorates, periodates, permanganates, persulfates, peroxides and ferricyanides) will also give a positive reaction, as well some organic nitro compounds.

nitrate had been the thallium -- containing salt added to the questioned specimens, it may have decomposed to some extent as Q1 was taken to dryness on the hot plate, leaving the thallium cation to scavenge for available anions, for example, chloride.

Next, Martz took samples from Q1 and K61 to dryness and submitted them for examination by scanning electron microscopy with energy dispersive X-ray analysis (SEM/EDXA). In addition to these two specimens, standards of thallium chloride and thallium sulfate were run. Thallium nitrate was not run because the SEM in operation at that time was sensitive only to elements with atomic number 11 (sodium) and higher, and thus would not have detected nitrogen (N) or oxygen (O) of nitrate (NO3). In specimen Q1, phosphorous, thallium, chlorine, and calcium were detected. When this specimen was further heated, sodium and potassium were also detected. The thallium chloride and sulfate standards gave the expected thallium and chlorine as well as thallium and sulfur peaks. The K61 specimen gave indications of phosphorous, sulfur, chlorine, and calcium. The striking difference between the questioned and known Coca-Cola specimens was that the former contained thallium. At that point, it was of note that the Q1 and thallium chloride standard thallium/chlorine ratios were different (with Q1 being higher), which is consistent with the chlorine evident in Q1 not being the result of the addition of thallium chloride.

Specimens K61, K66, Q1 and Q2 were analyzed via liquid chromatography (LC) with an ultraviolet detection system set to optimize the caffeine sensitivity (273nm). The LC's inability to differentiate the caffeine concentrations between the Q and K specimens suggested that no appreciable dilution of the questioned samples had taken place. This is consistent with a powder, rather than a bulk liquid adulterant, being added to Q1 and Q2.

Mass spectrometry was twice applied in this case. In the first instance, gas chromatography/mass spectrometry (GC/MS) in the electron impact (EI) mode located caffeine (194 m/z) in Q1 as well as K61. The two chromatograms are qualitatively the same.[35] In the second application of mass spectrometry, negative ion chemical ionization (methane) (NICI) direct exposure probe (DEP) mass spectrometry was employed. This turned out to be of no real utility since an analysis of a thallium sulfate standard resulted in Martz's identification of a number of other thallium salts. Thus, this technique would be useless for differentiating the thallium salts under discussion here. A thallium nitrate standard was run and found not to be stable under these conditions because of its thermal decomposition sensitivity.

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[35] Apparently, the initial temperature/temperature ramping over the course of the two injections was not the same since the retention times for caffeine are 337 and 289 seconds, respectively. However, the relative retention times for the numerous GC peaks in Q1 appear to correspond to those on K61, and there is evidence that Martz confirmed some of these. Since caffeine has a retention time corresponding to about one third of a normal toxicology screening analysis GC run, Martz's analysis did not rule out the possible presence of an organic foreign substance with a retention time greater than the caffeine.

Finally, the most useful and revealing technique employed in this examination was ion chromatography (IC). Specimens Q1, Q2, K61, K66, a nitrate standard, as well as a water blank were run. The striking difference between the questioned specimens and the known specimen is that elevated levels of nitrate were indicated in Q1 and Q2. No elevated level of the chloride anion, whose position Martz provisionally established with the water blank, was noted in the questioned specimens versus the known soft drinks. This supports Martz's opinion that nitrate, rather than chloride, was the anion associated with the thallium added to the Coca-Cola.[36]

Moreover, while thallium sulfate -- the compound initially mistakenly identified by the local Medical Examiner's Office as being present[37] -- is 15 times as soluble in water as thallium chloride, thallium nitrate is 25 times as soluble. Thus, thallium nitrate is the most efficient of these three to employ as a poison. Also, at refrigerator temperatures, had the thallium containing salt added to Q2 in particular been thallium chloride, it would have been borderline insoluble (on the edge of precipitating out), while thallium nitrate has no solubility problems under these temperature and concentration conditions. Finally, the experience of forensic chemists who are familiar with poisoning cases suggests that it is more likely that one, as opposed to two, adulterants will be added to a substance in order to poison someone.

D. Avianca

The OIG's conclusions concerning the Avianca case (United States of America v. Dandeny Munoz-Mosquera) pertain in large part to the testimony of Richard Hahn, who testified as an FBI explosives expert based upon his post-blast examination findings. The draft report contains 40 pages devoted to the Avianca case, including a detailed critique of Hahn's trial testimony. While the OIG concluded that Hahn committed "error" by offering some opinions that under microscopic examination after the fact[38] lacked an adequate

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[36] While this argument is not as conclusive as it might be because of the "congestion" in the region of the chromatogram in which chloride elutes, it can fairly be asserted that although there is congestion in the early eluters in the ion chromatograms, had the chloride been present in the concentrations approaching that of the nitrate anion observed, that peak would have risen out of the manifold of early eluters, making its presence known, and demanding an explanation. This argument also rebuts the draft report's suggestion of a simultaneous thallium chloride/sodium nitrate addition to the Coca-Cola.

[37] This initial misidentification by the local Medical Examiner's Office was caught by Martz in his initial screening with the silver nitrate, barium chloride, and diphenylamine/sulfuric acid spot tests.

[38] For example, the OIG's conclusion that Hahn "slightly overstated his experience" when citing, as prior experience, crime scene processing and assessments made during the Pan Am 103 and World Trade Center cases, Part Three, Section E at 25, mischaracterizes Hahn's claim of "assessing" evidence as "analyzing" evidence -- two very different processes. The OIG's conclusion that Hahn's testimony in describing the location of different parts of the aircraft "appears to require expertise that Hahn lacked. . ." (id. at 26) ignores the fact that Hahn testified from official Boeing diagrams and with the knowledge base of other investigative team members.

scientific basis or were beyond his expertise, we are convinced that Hahn acted in good faith and based his testimony on a number of factors that he could properly rely on as an expert witness. Hahn's testimony, which was subject to cross examination, was not material to the ultimate finding of guilt, since there were numerous other witnesses who testified before Hahn and who supported the prosecution's theory of the case. Furthermore, as stated below, the draft report fails to note several factors relied upon by Hahn in forming his conclusions which belie the suggestion that his "errors" were intended to help the prosecution's case. We suggest that the OIG reexamine its findings regarding Hahn's testimony in Avianca. At a minimum, we request that the OIG delete any suggestion that Hahn formed his conclusions to support the prosecution's theory of the case.

OIG Finding: *Hahn gave scientific opinions correlating the pitting and cratering to a high velocity explosive that were unsound and not justified by his experience or by the scientific literature.*

Response: Hahn's testimony regarding the pitting and cratering has been taken out of context by the OIG. This word-for-word reading of one aspect of Hahn's testimony does not take into account its overall purpose and intent -- to describe the extent of the observable physical damage to the plane, verify the use of an explosive as the cause of the damage, and posit a theory and expert opinion, based on his experience and empirical knowledge, as to the type of explosive and the approximate VOD that could have caused the observable damage, including the pitting and the cratering.

The draft report states that, "taken literally," Hahn's testimony in the second trial indicated that he believed pitting and cratering "can only occur with a "very high explosive'--that is, an explosive with a VOD of about 20,000 feet per second or more."[39] However, Hahn's testimony was geared to photographs presented as exhibits at trial and, therefore, his statement was focused on the pitting and cratering found on the particular piece of evidence depicted in the photograph presented by the prosecutor.

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[39] Id. at 9.

If Hahn's testimony is followed in sequence, it tracks a series of photographic exhibits, which depict the particular damage to Avianca Flight 203 indicating that an explosive device had been used on the aircraft. For example, Hahn discussed the missing double I-beam -- "shattered, broken away";[40] the wing box cracked in half;[41] the "very specific explosives damage" on pieces of the aircraft shown in exhibits 623 to 626, namely the shattering effect of a brisant explosive;[42] and the generation of jets of gases causing pitting and cratering.[43]

Then Hahn pointed out the pitting and cratering on Exhibit 626 and stated in part: "High explosives did that damage. I'm talking about a very high explosive here functioning in the area of 20,000 feet per second. . . ."[44] He did not say that such pitting and cratering can only occur with an explosive with a VOD of 20,000 feet per second or more, only that the particular pitting and cratering depicted in that exhibit was sufficiently unique to have been caused by an explosive of that velocity.[45]

We recognize that drawing specific conclusions about VOD based on observable blast damage is problematic due to a lack of supporting scientific data. In this case, however, the draft report's criticism that Hahn's opinion, as seen with the benefit of hindsight, was offered in an attempt to help the prosecution's case is not justified. Hahn offered a broad range for the VOD and a number of other factors supported the VOD conclusions. For example, the draft report does not mention a report issued by the Colombian criminalistics laboratory (signed by a chemical engineer and an explosives technician) which Hahn reviewed prior to testifying, and which also concludes that the explosive had a VOD of from 20,000 to 23,000 feet per second. The Colombian report states in pertinent part:

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[40] Transcript at 2910.

[41] Id. at 2912.

[42] Id. at 2919.

[43] Id. at 2919. Hahn testified "that pitting and cratering is unique to explosives -- high explosives functioning. There's nothing else in the world that could cause it, and when you see it, when you have been trained to look for it and recognize it, there's nothing else that could have caused that." Id.

[44] Id. at 2920 (emphasis added).

[45] In the first trial, using a series of photographic exhibits, Hahn reviewed the extent of the damage, commenting as follows: "[t]he fuselage metal has been blasted out. It suffered severe blast damage here, and it's therefore been misshapen." Id. at 2257. He also noted "this particular piece of aircraft is so significant because this has what we call pitting and cratering on it." Id. at 2260. Finally, Hahn explained "that damage right there is damage done by a functioning extremely hot explosive. That is the only thing in the world that can do that kind of damage. No drill, no impact, nothing like that will do that particular type of damage. That is caused by extremely hot gasses at extremely high pressure that actually come at the metal and erode the metal away." Id. at 2261.

> The marks of impact which appear on one of the metal sheets that was collected and analyzed, show the effects of violent collision with other metal flung with great force. This is a physical action characteristic of high explosives traveling at a velocity of 20,000 to 23,000 feet per second, that is 7,000-8,000 meters per second. Other metal parts, which were examined, did not exhibit this type of impact. Only the tearing caused by the strong impact, normally caused by a fall of elements from air to land, was noticed.[46]

This report corroborates Hahn's conclusions and illustrates that he was not alone in his view as to the approximate range of the VOD.

The draft report further states that "Hahn's experience was inadequate to support his opinion" that the large pits were "necessarily caused" by a high explosive with a VOD of at least 20,000 feet per second.[47] 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. He had set off charges in range tests at lower velocities under various conditions and had never seen similar pitting and cratering. He had, however, achieved such pitting with "shaped charges." He also saw similar pitting and cratering in the Pan Am 103 investigation. Given the nature of forensic explosive examinations and the varied circumstances which the examiner must confront, every incident will involve unique circumstances, which must be interpreted in light of the explosives examiner's knowledge and experience at the time. The fact that Hahn may not have realized at the time he testified in Avianca that some degree of pitting could be caused by an explosive with a lower VOD does not suggest that his testimony was intended to buttress the prosecution's case.

OIG Finding: *Hahn erroneously failed to make inquiries about the validity of his jetting theory before the second trial.*

Response: While Hahn could have made additional efforts to validate his jetting theory before the second trial, that aspect of his testimony was neither material to a finding of guilt nor susceptible, at that time, to ready validation. Even the Whitehurst memorandum on this issue expresses doubt about the adequacy of the literature on pitting and cratering: "The literature leaves us unsure about the detonation velocity/power of high explosives required to cause pitting. . . ."[48] We think this section of the draft report is unfairly critical and we request that the OIG reconsider this finding.

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[46] See *Policia Nacional Direccion de Policia Judicial e Inteligencia, Atentado Terrorista Avion de Avianca HK-1803, Discriminalistica Seccion Laboratorio, Conclusion* at 7.

[47] Part Three, Section E at 11.

[48] Whitehurst memorandum at 2.

OIG Finding: *Hahn testified incorrectly and outside his expertise concerning a fuel-air explosion, the injuries to passengers, and other areas.*

Response: The draft report criticizes Hahn for testifying outside his area of expertise both with regard to a fuel-air explosion and injuries to passengers. For the reasons that follow, we believe both criticisms are unfounded and should be modified.

Conclusions as to fuel-air explosion: The draft report concludes that Hahn testified outside his expertise and experience in the second trial[49] by citing his use of the terms "fuel-air explosion" and "flash fire" interchangeably. Hahn stated at trial: "That sort of damage was seen in this particular incident, also again consistent with a flash fire or a fuel air explosion."[50] At another point, in describing the "potential" for a fuel/air explosion on board an aircraft, he stated: "Simply put, a fuel air explosion inside a diesel engine every time it fires you have a mixture of fuel and air. You compress it, [it] gets hot, it flashes over a fuel air explosion."[51]

While Hahn may have confused the two terms during his testimony, this does not support the OIG's suggestion that he attempted to mislead the jury.[52] Both prosecutors in Avianca have informed us that Hahn's role at trial was, at least 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.

The Avianca investigation was conducted by a team of investigators, including National Transportation Safety Board (NTSB) investigators, industry specialists, and agents of the Federal Aviation Administration (FAA) who have explosives background and training. The investigative team reached joint conclusions, supported by the observable physical evidence. Throughout most of his testimony, Hahn noted the joint effort by frequently using

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[49] Part Three, Section E at 23.

[50] Transcript at 2930-31.

[51] Id. at 2926 (emphasis added).

[52] Hahn readily acknowledged to us that he mistakenly used the two words interchangeably and that they do not mean the same thing. The report of Mr. Walter Korsgaard, FAA Program Manager, one of the individuals with whom Hahn investigated the scene, discussed the damage typical of "flashover" and "fuel-air explosion." Korsgaard's report states: "Evidence indicated severe burning in the area below the cabin floor and damage typical of flashover in the passenger cabin area." "Technical Investigative Findings of HK1803, Mr. Walter Korsgaard, FAA Program Manager and National Resource Specialist for Aviation Explosives Security," Notes for November 29. The next page of the report discusses problems with the number 3 fuel tank boost pump: "I believed that this pump could be a possible fuel/air explosion initiation source. . . ." Id., Notes for December 1.

the term "we" to preface his discussion.[53] As a result, we believe the OIG's conclusion that "[w]e are troubled by Hahn's willingness to testify . . . to areas about which he has no expertise and do so without making known . . . findings of other experts"[54] is groundless in this context, where the prosecutors themselves confirmed his use as a summary witness. The same is true of the OIG's conclusion that Hahn's testimony is "problematic" because Hahn is not an expert in "fuel-air explosions."[55] As is apparent from Hahn's entire testimony, he made a good faith attempt to summarize other witness' findings fairly, even if he unintentionally misspoke on some occasions.

Conclusions as to injuries to passengers: The OIG concludes that Hahn's testimony regarding injuries to passengers, which in the first trial he described as "consistent with extreme heat, flash-fire type of damage"[56] and in the second trial as "consistent with a flash fire or fuel-air explosion,"[57] were beyond his expertise and incorrect.[58] The OIG further concludes that Hahn's "testimony about the injuries was misleading, inaccurate, and outside his area of expertise" and that "he improperly used this testimony to support his theory of a fuel-air explosion."[59]

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. In the first trial, Hahn's testimony regarding passenger injuries was prompted by the following question from the prosecutor: "Was there other damage to the passengers or other parts of the plane that were consistent with the physical findings and conclusions that you

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[53] For example, "We did not find any other evidence . . . as far as the high-powered device, . . . we still . . . ." Transcript at 2925; "At this point we were satisfied that a device had functioned . . . ." Id. at 2926. Hahn did use some "I" statements in discussions regarding fuel-air explosions. In the middle of that discussion, he states: "Now, again, that's the type of blast damage I would expect to find from a fuel air explosion." Id. at 2928. Then he was asked to "summarize for the jury what you believe happened on November 27, 1989 to Avianca Flight 203." Id. at 2928. Although he began his answer: "what I believe happened . . . ," later in the discussion Hahn reverted to the pronoun "we." Id. at 2929. Thus, Hahn's isolated uses of the term "I" appear to have been minor misstatements.

[54] Part Three, Section E at 23.

[55] Id. at 22.

[56] Transcript at 2269.

[57] Id. at 2930-31.

[58] Part Three, Section E at 23.

[59] Id. at 24.

have just stated?"[60] Hahn's answer began: "We were informed by the medical pathologist . . ." and ended with the comment quoted above, that the injuries were "consistent with extreme heat . . . ."[61] His testimony in the second trial tracked a similar course, beginning with: "In talking to the medical examiners, they found damage to the bodies . . ."[62] and concluding as quoted above, "again consistent with a flash fire or fuel air explosion."[63]

The report of the medical examiner (a pathologist) theorized that both the loss of brain matter from the opened skulls and the lesions and burns to the bodies were produced during (and caused by) the explosions inside the aircraft.[64] Hahn informed us that he was aware of and had reviewed that report, which was included in the lengthy report of the "Air Security Division of the Department of Civil Aeronautics."[65] In addition, the medical examiner testified at the trials. If the report of the medical examiner (and it is assumed his testimony at the trials was the same as the report) is to be accepted as true, then the following statements in the draft report are not accurate: "Essentially, the injuries to the bodies told Hahn nothing about whether a fuel-air explosion occurred; they only told him that an intense fire burned for a period of time. This is quite different from his testimony that the injuries to the bodies were consistent with a flash fire or fuel-air explosion."[66] Hahn was only called upon to testify to the compatibility of the injuries with his theory of the cause of the damage to the aircraft. The purpose of Hahn's testimony was not to describe the extent of the damage to the bodies, but merely to give an opinion as to whether the injuries were consistent with the events believed to have occurred on board the aircraft. The jury was able to evaluate his testimony in light of that given by the medical examiner.

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[60] Transcript at 2268.

[61] Id. at 2269.

[62] Id. at 2930.

[63] Id. at 2930-31.

[64] That report (as translated from Spanish) states in a relevant portion of its "Summary": "Generalized explosion of head, apparently produced during the explosion (supposition made because no remains of the encephalic mass [brain tissue] was found where the head was recovered." "1.13 *Informacion Medica y Patologica*," Informe de Accidente de Aviancio," *Departamento Administrativo de Aeronautica Civil Division de Seguridad Aerea*, *Resumen* at 29, ¶ 1.(d). Additionally, the "Summary" includes the information that "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, combustible vapors, or some other element)." Id. at 29, *Resumen* at ¶ 2.

[65] Report of the *Departamento Administrativo de Aeronautica Civil Division de Seguridad Aerea*.

[66] Part Three, Section E at 24.

OIG Finding: *Hahn gave incomplete testimony regarding Whitehurst's scientific results.*

Response: The draft report faults Hahn for giving incomplete testimony regarding a memorandum prepared by Whitehurst. The draft also concedes, however, that "the impact of Hahn's failure to mention the opinions in the document was insignificant."[67] If, as the draft report notes, the Whitehurst memorandum was a "deeply flawed" document and that "Hahn's failure to mention the opinions in the document was insignificant,"[68] then we believe that criticism of Hahn for "incomplete testimony" in failing to mention those opinions is unsupported. Hahn's testimony at trial was responsive to the questions asked.

The Whitehurst memorandum was not a Laboratory report, and should not be considered one.[69] Moreover, the information included in the document did not change the results of scientific tests which Bender, Whitehurst's technician, and not Whitehurst, had conducted on the items of actual evidence.

Discussions of the information provided in the Whitehurst memorandum among Unit Chief Corby, former Unit Chief J. Christopher Ronay, and Scientific Analysis Section (SAS) Chief James Kearney did not result in any instruction to Hahn to consider the memorandum as a supplementary "report." The draft report makes clear that Kearney, Corby, and Ronay knew about Whitehurst's memorandum, had discussed it among themselves, and did not relay to Hahn any concerns they may have had in this regard. Hahn was left with a document that he justifiably did not consider a Laboratory report, which discussed speculations appearing to be a defensive reaction to the "confession" of Arete (which was not even introduced into evidence at trial) but contained no reported results of actual chemical tests done on the specimens involved. If Kearney, Corby, and Ronay were aware of the document and as managers failed to convey its status to Hahn, then Hahn is not to be faulted for disregarding its value to the trial proceedings.

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[67] Id. at 15.

[68] Id.

[69] As an indication of the way the Whitehurst memorandum was regarded by management, we note that Corby stated in his memo to James Kearney that "Whitehurst's memo to me is not a report . . . ." Memorandum dated 7/6/94 at 3 (emphasis in original).

E. Other Matters

1. VanPac

Whitehurst alleged that Tom Thurman and Roger Martz violated FBI policies and procedures, fabricated evidence, perjured themselves, and obstructed justice, and that then-prosecutors Louis Freeh and Howard Shapiro engaged in prosecutorial misconduct.[70] The OIG found no misconduct by any of these individuals.[71] The OIG did, however, conclude: (1) that Martz's testimony regarding his comparison of smokeless powder samples was ambiguous;[72] and (2) that Robert Webb, the examiner who analyzed the packaging tape, black paint, RTV sealant and glue found in the bombs, overstated his conclusions.[73]

OIG Finding Regarding Martz: *Martz's testimony on direct examination that he had been unable to "successfully compare" powder from the bombs with powder obtained from the Shootin' Iron Gun Shop sometime after the defendant had bought powder there was "ambiguous."*[74]

Response: The draft report's characterization of Martz's trial testimony appears erroneous, and should be deleted. Contrary to the OIG's findings, we believe an examination of Martz's trial testimony in VanPac reveals that he did not testify ambiguously and instead that he truthfully answered the questions put to him. Martz was asked: "Were you asked to compare the four specimens in front of you with the off-the-shelf can?" and he replied that he was. Martz was then asked, "Did you do that?" and he responded that he did. The next question was "Could you determine anything at that point?" to which Martz replied, "No, I was not able to determine it," and went on to explain why.[75]

This excerpt from the trial transcript in VanPac demonstrates that Martz simply answered the questions that were posed to him. Even if those questions were not as direct or artful as they might have been, that lack of clarity should not now be determined to be Martz's fault. Moreover, when Martz was specifically asked on cross-examination whether he could determine from his comparison of the powder samples whether they came from the

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[70] Part Three, Section B at 1.

[71] Id. at 2, 29.

[72] Id. at 24.

[73] Id. at 15.

[74] Id. at 23-24. The draft report further concludes, however, that Martz did not suppress exculpatory information regarding his comparison. Id. at 24.

[75] Transcript at 1933.

same batch, he answered that specific question truthfully, and said that he could not: Q. "They were both the Red Dot [powder] but you could not determine from your comparisons that they came from the same batch?" A. "I was trying to determine if they came from the same batch and I was not able to."[76] Thus, Martz expressly acknowledged the limits of his examination, and did not, even unintentionally, fail to provide the jury with complete and accurate information.

OIG Finding Regarding Webb: *Webb overstated his conclusions.*

Response: The draft report also concludes that Robert Webb, a former examiner in the Laboratory, overstated his findings in the VanPac case.[77] Based on that conclusion, the draft report recommends that any analysis by Webb be reviewed by another qualified examiner if used in future cases.[78] We submit that the OIG should consider whether these findings are overly critical and potentially inaccurate in light of information provided to us. First, it is unclear whether the OIG is aware of all of the tests performed by Webb in VanPac. The draft report states that Webb conducted "microscopic examination, so-called 'wet chemical' analyses, analysis with fourier transform infrared spectroscopy (FTIR), and pyrolysis gas chromatography (PGC)."[79] However, Webb informed us that he also examined the items at issue using "polarized light microscopy" (PLM), a technique that could permit a determination whether two items came from the same batch or lot.

Second, it is our understanding that the tests that the draft report does identify would be sufficient to allow an examiner to determine whether two items came from the same manufacturer.[80] The report does not take a firm position on this, but merely questions Webb's views regarding the efficacy of the tests.[81]

The draft report appears to reflect a misunderstanding of the nature and use of the FBI's databases to evaluate whether two items have a common origin. It is true that, at the time of the VanPac case, neither Webb nor the FBI had a database that would confirm that

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[76] Id. at 1950.

[77] Part Three, Section B at 15.

[78] Part Five at 16.

[79] Part Three, Section B at 14.

[80] Contrary to Whitehurst's allegations, those tests have been validated by both internal and external proficiency testing. We note that the draft report apparently disagrees with Whitehurst's assertion that "data do not exist to allow one to say that two samples with a similar chemical composition necessarily came from the same source," since the report specifically recognizes that a determination of origin may be possible with sufficient information. Id. at 16 n.8. However, the report never expressly refutes Whitehurst's claims.

[81] Id. at 15.

materials like those involved in the samples "did in fact differ among manufacturers in terms of their chemical composition and physical characteristics."[82] No such database exists. While the FBI does have some databases and reference files with respect to certain items (such as automotive paints and tape), those resources merely allow an examiner to determine what, if any, characteristics an unidentified sample has in common with known samples. The 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, the draft report states that questions regarding differences in certain of Webb's test results could not be resolved because documents were missing from some of the case files.[83] We do not believe that it is appropriate for the OIG to intimate there were deficiencies in Webb's analysis[84] and make a negative finding against him[85] when documents that the OIG claims to need to resolve this issue are not available. For all of these reasons, we request that the finding regarding Webb be reassessed.

2. O. J. Simpson

OIG Finding: *Roger Martz was not adequately prepared and did not exhibit the proper demeanor at trial.*

Response: Whitehurst alleged that after Martz testified in the Simpson criminal case, scientists at the Forensic Science Research Unit (FSRU) claimed that he had committed perjury by testifying that he had developed the method used to examine the blood evidence. Whitehurst also alleged that Martz misled the jury concerning the FSRU's validation studies and events surrounding the protocol, misled the defense by stating that all digital data from the analysis of the evidence had been erased, and generally testified in an arrogant manner. The OIG found that there was no basis to conclude that Martz committed perjury or misled the jury or defense, or that he improperly erased digital data. The draft report does, however, conclude that Martz lacked adequate preparation and had deficient note-taking and record-keeping practices. In the draft, the OIG also expresses its own dissatisfaction with certain non-substantive aspects of Martz's trial presentation and demeanor.

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[82] Id. at 15.

[83] Id. at 16-17.

[84] Id. at 17.

[85] Part Five at 16.

We object to the draft report's criticism of Martz's trial presentation,[86] and request that it be deleted. The characterization of Martz as "ill-at-ease" and "defensive" appears to be well outside the scope of the OIG's inspection and inherently subjective. Also, we do not believe this investigation subjected any other examiner's courtroom testimony to evaluation as to "demeanor." To single out Martz in this regard is unfair. To a great degree, "adroitness or maladroitness" in a witness is in the eye of the beholder. While we agree that it is fair for the draft report to comment on the adequacy of note-taking and record keeping, the manner in which these criticisms are portrayed in the draft appears to obscure the most important finding regarding Martz's testimony in the Simpson case -- that both his science and his testimony were correct and reliable as to whether the blood evidence from the rear gate and socks contained levels of EDTA that were consistent with blood from the test tubes.

3. Paolo Borsellino

OIG Finding: *Robert Heckman made several misstatements during his trial testimony.*

Response: Whitehurst alleged that Robert Heckman may have testified outside his area of expertise and improperly rendered an opinion concerning the explosives residue analysis.[87] The OIG rejected this claim and concluded that Heckman did not testify outside his area of expertise or improperly render an opinion in this case and that Heckman's testimony was not unreliable due to his alleged failure to consider potential contamination. The OIG, however, did conclude that Heckman made several minor misstatements during his testimony. Most of the discrepancies noted are relatively minor, and we find the criticism of Heckman to be unwarranted in light of the significance of the issues involved.

First, Heckman testified that it is increasingly common for C-4 to be used commercially in quarry and mining operations. The OIG found, however, that this is inaccurate because C-4 is not used for such purposes due to expense. Heckman acknowledged to us that C-4 is not used in quantity for this reason. His point, however, was that ten (10) years ago C-4 was seldom used commercially, whereas it is now more common to see C-4 used in the commercial sector in quarry operations, mining, and building demolition. During his testimony, Heckman was trying to indicate that C-4 is no longer exclusively a military explosive, but that it may also be found in some commercial contexts as well.

Second, Heckman testified that RDX usually appears as a solid block but can be pulverized into a powder. The OIG found this could be misleading because RDX initially is manufactured as a powder. This criticism is not well founded. Heckman recognized that RDX is initially manufactured as a powder but was trying to convey that RDX is commonly

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[86] Part Three, Section F at 15-16.

[87] Part Three, Section H4 at 1.

found in block form. We do not believe this rises to the level of an inaccuracy in his testimony.

Third, Heckman testified that most detonators use RDX in the charge while the OIG found that PETN is most commonly used for this purpose. Both PETN and RDX are frequently used for this purpose, so again we do not believe this rises to the level of an inaccuracy in Heckman's testimony.

Fourth, Heckman testified that the FBI had "electronically" examined fragments of components and determined that they were part of a transmitter/receiver.[88] When Heckman gave that testimony, he did not mean to say that the fragments had been examined with electrical leads, but that the FBI did an electronic analysis of the circuit to determine what electrical components were in the circuit board fragments. While Heckman could have been more precise in this testimony, characterizing his testimony as inaccurate seems overly critical.

4. Gino Negretti

OIG Finding: *Alan Jordan's testimony contained one minor inaccuracy.*

Response: We believe that the draft report contains a number of misstatements regarding Alan Jordan's testimony in court and his interview with investigators. Most significantly, the OIG's draft report incorrectly states that Jordan's testimony was "inaccurate" when it more properly should be said that he could have been "more accurate" in discussing whether the residue found was "identified" or "consistent with" RDX. At trial, Jordan was not asked to state exactly what Whitehurst found. Instead, Jordan was asked "did Mr. Whitehurst send back a positive chemical analysis on this piece of evidence?" and Jordan responded that Whitehurst found residues "consistent with RDX and HMX."[89] "Consistent with" is certainly more conservative than the term "identified," and it is unduly harsh to characterize this as an inaccurate or incorrect statement. In fact, if there were any effect from Jordan giving a more conservative response, it favored the defense, not the prosecution.

Furthermore, this exchange is taken out of context and the language in the draft report is unnecessarily critical given the context in which Jordan was testifying. In particular, the OIG's statements regarding how Jordan understated Whitehurst's reported results should be modified.[90] Prior to the excerpted section, Jordan had been asked questions on direct

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[88] The OIG incorrectly refers to Heckman as "Higgins" when it indicates that he acknowledged he was mistaken.

[89] Part Three, Section H5 at 4.

[90] Id. at 6 n.4.

examination regarding the use of boosters and whether the explosion, the damage, and the chemicals found were consistent with a booster having been used. It is in this context, *i.e.*, whether the residues could indicate that a booster was used, that Jordan used the phrase "consistent with."

In the draft report, the OIG indicated that Jordan "doubted whether a low explosive could have caused the type of damage Jordan had observed in certain pipe fragments."[91] Jordan indicated to us that he never said that he "doubted" whether a low explosive could have caused the type of damage observed. Instead, Jordan told the OIG it was his opinion that the damage could not have been caused by a low explosive. That is why he asked Whitehurst to re-examine other items for possible high explosives residue. Based on his experience, knowledge, and training, Jordan formed the opinion that the damage he observed simply could not be from a low explosive.

Finally, the OIG's statement that "we find no basis to conclude that Jordan colluded with counsel to prevent Whitehurst from testifying" is unnecessarily inflammatory.[92] There is no allegation in the draft report that Jordan colluded with counsel. The allegation as reported in the introduction is directed against the prosecutor, not Jordan. This sentence should be re-phrased to more accurately address the allegation and should not erroneously suggest that there was an allegation of collusion directed at Jordan when, in fact, there was none.

5. Conlon

OIG Finding: *Robert Heckman made improper additions to Whitehurst's dictation.*

Response: Whitehurst alleged that Heckman made unauthorized additions to his dictation. While the OIG noted that Heckman was apparently motivated by a desire to provide more helpful information, the OIG agreed that Heckman made improper additions to Whitehurst's dictation by adding statements outside his area of expertise to the section designated "Instrumental Analysis."[93] The OIG rejected the idea, however, that Heckman purposefully tried to mislead the reader concerning the authorship of the questioned paragraphs.[94]

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[91] Id. at 2.

[92] Id. at 8.

[93] Part Three, Section H6 at 1, 8.

[94] Id. at 9.

In our discussions with Heckman, he conceded that he has no knowledge of Ion Mobility Spectrometer (IMS), and that it would be inappropriate for him to make comments regarding IMS results.[95] He maintained, however, that he was not inserting his own impressions but was merely paraphrasing Whitehurst in an attempt to make the report "more understandable."

In light of these comments, we think the draft report mischaracterizes the nature of Heckman's additions and the basis for their inclusion in the report. First, Heckman was not "add[ing] his own observations about the IMS results from the explosion scene."[96] Instead, after reading Whitehurst's dictation, Heckman consulted with Whitehurst and, in an attempt to make Whitehurst's report "more understandable," added a section paraphrasing what Whitehurst had indicated in their discussions. Heckman did not add his own observations to Whitehurst's dictation but added a summary of what Whitehurst had explained to him.

Second, the report refers to Heckman's attempt at clarification as "improper" or "unauthorized" additions. Given Heckman's intentions to help the contributor, these characterizations of his actions appear unnecessarily critical.

6. Judge John Shaw

OIG Finding: *The analysis performed by the Laboratory may not have identified all substances present in the bomb.*

Response: Whitehurst alleged that Ronald Kelly prepared a report that identified smokeless powder in a pipe bomb sent to federal judge John Shaw and that the analysis was flawed because it did not determine if materials other than smokeless powder were present in the bomb. The OIG concluded that the analysis performed may not have identified all substances present in the bomb, and that Laboratory personnel had different understandings concerning applicable protocols for this type of analysis.[97]

The OIG's findings create the false impression that the Laboratory failed to follow up on important evidence. While it is fair to say that "[i]t is conceivable . . . that some other inorganic materials were present which, if not identified in the microscopic examination, might also have escaped detection through the GC/MS and FTIR analyses that Kelly performed,"[98] Kelly's microscopic examination did not detect the presence of inorganic

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[95] As noted by the OIG, Heckman also acknowledged that he should not have placed the paragraphs under the "Instrumental Analysis" section without somehow distinguishing his additions from Whitehurst's dictation.

[96] Id. at 4.

[97] Part Three, Section H7 at 1, 5.

[98] Id.

material on smokeless powder. That microscopic examination would have revealed significant other material and would have alerted Robert Heckman to have Steve Burmeister do further work. There was nothing to suggest that such additional testing was necessary in this case.

7. The FBI's Office of Professional Responsibility and Office of the General Counsel

a. Office of Professional Responsibility (OPR)

The OIG's draft report addresses a number of different investigations conducted by the FBI's Office of Professional Responsibility (OPR). As an initial matter, we note that in the summary of Whitehurst's allegations, the report states that OPR "advised" Terry Rudolph that its inquiry had not developed facts warranting any administrative action.[99] The report later states that OPR "concluded" that the evidence did not warrant administrative action, and did not support Whitehurst's claims.[100] This characterization of OPR's conduct suggests a lack of understanding of OPR's role within the FBI. OPR investigates allegations of employee misconduct; it neither draws nor offers any conclusions based on its investigations, and it does not advise employees whether action will be taken. Rather, OPR makes its investigation available to the Administrative Summary Unit for evaluation and, ultimately, adjudication. To the extent the draft report suggests some other process, it must be corrected.

With respect to specific findings by the OIG, the draft report addresses an investigation conducted by OPR in 1991 regarding allegations made by Whitehurst against Terry Rudolph. The OIG concludes that OPR should have conducted further investigation with respect to Whitehurst's claim that Rudolph committed perjury in an unidentified case in the Southwest.[101] However, in reaching that conclusion, the OIG implies that the only investigation conducted by OPR with respect to that claim was to interview Whitehurst and Rudolph. In fact, we have been informed that even though Rudolph denied Whitehurst's allegation, OPR interviewed other individuals as well, none of whom could corroborate Whitehurst's assertion that Rudolph had talked about perjury or that Rudolph had committed such an act. Moreover, the OIG incorrectly suggests that a review of a transcript of Rudolph's testimony would necessarily disclose whether he had perjured himself.[102] OPR properly exercised its discretion not to expend further resources to investigate a nebulous allegation.

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[99] Part Two at 16.

[100] Part Three, Section A at 17-18.

[101] Id. at 19.

[102] Id. at 20.

The OIG also concludes that OPR should have further investigated an incident involving Whitehurst's wife, Cheryl Whitehurst, and Kenneth Neu to ensure that Neu's supervisors had addressed the matter with him.[103] In reaching that conclusion, the OIG fails to give sufficient weight to Cheryl Whitehurst's statement to OPR that Neu's supervisors were in fact aware of the incident.[104] Given that fact and given also that the incident involved a minor conflict between colleagues, not employee misconduct, OPR was justified in determining that the appropriate personnel had been notified of the incident and that no further investigation was required.

b. Office of the General Counsel (OGC)

In the analysis of the FBI's publication of the UNABOM article, the OIG includes a gratuitous finding regarding a statement in an October 5, 1995 letter from Inspector-Deputy General Counsel James M. Maddock.[105] In that correspondence, Maddock forwarded to the OIG a copy of a memorandum prepared by Thomas J. Mohnal for Criminal Division trial attorney Tom Roberts which responded to allegations raised by Whitehurst. Mr. Maddock advised the OIG:

> Based on my discussions with Mr. Mohnal, Mr. Roberts has apparently concluded, after reviewing the memorandum, that Mr. Whitehurst's allegations are unsubstantiated. This information is being provided because it bears on the credibility of Mr. Whitehurst and also illustrates the disruptive impact that his allegations have had on FBI operations.

The draft report finds that "the OGC was not justified in concluding, . . . that Roberts' conclusions bore on Whitehurst's credibility and Whitehurst's disruptive effect on the FBI."[106] We find this to be an unfair criticism. Maddock was transmitting information he believed may be relevant to the OIG's ongoing investigation concerning the voluminous accusations Whitehurst had made concerning the FBI Laboratory. Maddock, however was not making any finding regarding credibility in his letter but was only providing potentially useful information to the OIG to facilitate the investigation. In any event, we note the OIG's draft report finally concludes that "Whitehurst appears to lack the judgment and common sense necessary for a forensic examiner . . . [and] . . . we do not think that Whitehurst can

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[103] Part Four, Section B at 12-13.

[104] We note that, in quoting Cheryl Whitehurst's sworn statement to OPR, the OIG omits the paragraph in which she describes how she became aware that Neu's supervisors had been notified of the incident. Id. at 12. That omission is misleading because the OIG fails to indicate, through ellipses or other punctuation, that the paragraph had been deleted.

[105] Part Three, Section H9 at 5-6, 8.

[106] Id. at 8.

effectively function within the Laboratory."[107] Implicit in this determination is a finding regarding Whitehurst's credibility.

The draft report acknowledges, as Maddock's October 1995 letter implied, that Whitehurst's reckless charges of perjury, fabrication of evidence, conspiracy, and suppression of documents evidenced a serious lack of judgment on Whitehurst's part[108] that contributed to a disruptive and "uncooperative atmosphere" in the Laboratory.[109] As the draft report indicates, "[p]artly as a result of the sweeping accusations Whitehurst has made against others, it has become increasingly difficult for him to work with examiners in the EU and other units of the Laboratory."[110] The OIG, therefore, recognizes, as Maddock observed in his letter, that Whitehurst's "sweeping accusations" did indeed have a "disruptive effect" in the Laboratory.

We recommend, therefore, that the reference to Maddock and the October 5, 1995 letter be removed as serving no useful purpose.

II. COMMENTS ON THE OIG'S FINDINGS AND RECOMMENDATIONS CONCERNING INDIVIDUALS

A. Roger Martz

The draft report is highly critical of Roger Martz's review of Terry Rudolph's casework.[111] While Martz's response to Kenneth Nimmich's request to conduct that review was somewhat misleading, the OIG fails to recognize the fact that Martz was neither Rudolph's supervisor nor responsible for his work. His only part in the review was to respond to Nimmich's admittedly imprecise oral request. The OIG's findings, in our view, are disproportionate in the blame they assess to Martz. Ultimately, the failure to recognize the seriousness of the allegations concerning Rudolph's manner and methods of work was a management failure for which Martz should not be held responsible.

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[107] Part Five at 36.

[108] Id. at 33.

[109] Part Three, Section H6 at 12.

[110] Id. at 36.

[111] Part Three, Section A at 15-16.

In the Trepal case, we disagree with the conclusion that Martz overstated the significance of his results by testifying that thallium nitrate had been added to the Coca-Cola.[112] We believe that Martz was correct and the draft report wrong in its analysis of the results of his examinations. Furthermore, as pointed out above, the draft report errs in stating that Martz did not himself identify thallium.[113] The SEM results, as performed by Martz, show the presence of thallium on Q1.

The comments that Martz appeared to have a "lower threshold of scientific proof" and "to lack appropriate scientific rigor in his approach to examinations" are unduly sweeping. In fact, as shown by the draft report, Martz's conclusions in the Simpson case and, we believe, in Trepal, fully comport with appropriate levels of proof and scientific rigor. We believe that the accusation that he "sometimes formed conclusions too quickly without acknowledging legitimate questions about their validity" is again too sweeping, and only holds true for the urea nitrate incident in the World Trade Center case, where Martz was not the original examiner.

As indicated above with respect to VanPac, we take issue with the draft report's finding that Martz testified "ambiguously," when in fact, the draft report actually objects to the form of the question put to Martz, something not within his control.

In the Simpson criminal case, also addressed previously, we believe that the draft report unfairly singles out Martz for criticism of his "demeanor" as opposed to the substance of his testimony. The criticism unfairly obscures the reliability of his scientific results in this case.

We do not quarrel with many of the draft report's criticisms of Martz, such as inattention to note taking and failure to properly mark charts and exhibits. However, the language used by the OIG, especially the attack on Martz's general credibility, does a grave disservice to someone whose ultimate scientific conclusions in the cases under investigation, with one exception, have withstood scientific scrutiny. The conclusion that Roger Martz "lacks the credibility, judgment, and temperament that is essential for a unit chief" seems to be an overly broad condemnation in light of the record.

B. David Williams

1. World Trade Center

With regard to the World Trade Center investigation, the OIG draft report concludes as follows:

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[112] Part Three, Section H13 at 1.

[113] Part Five at 4.

> 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.[114]

As set forth in our response to the OIG's findings with respect to the World Trade Center case,[115] we believe it is unfair to criticize Williams' testimony in this regard when that testimony was elicited by unartful questioning by defense counsel. We therefore object to the draft report's finding that Williams' opinion was "improperly based on information linking the defendants to urea nitrate."[116] Williams only stated this opinion in response to an open-ended question on cross-examination which allowed him to consider more than the "scientific analyses of the bomb scene."

Moreover, according to AUSA Gil Childers, the lead prosecutor in the Salameh case, Williams' testimony on cross-examination was proper and none of the inaccuracies criticized by the OIG were significant in the jury's determination of guilt.

To the extent we disagree with the draft report's findings regarding Williams' role in the manufacturing of urea nitrate, we object to the report's conclusion in that regard. In addition, we object to the conclusion that Williams' testimony "appears intended" to reach the most incriminating result.[117]

2. Oklahoma City Bombing

Again, we object to the OIG's speculative conclusion that Williams' opinions "appear to be biased in favor of the prosecution."[118]

In addition, because we believe Williams' consideration of search results was proper in the context of his World Trade Center testimony, we object to the OIG's conclusion that Williams "again" improperly relied on information linking the defendants to ANFO.[119]

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[114] Id. at 8.

[115] Part Three, Section C.

[116] Part Five at 8. We note that Williams' opinion in his Laboratory report and on direct examination was that urea nitrate could have been the main charge.

[117] Id. at 8.

[118] Id. at 9.

[119] We note, however, that Williams opined that the main charge was approximately 4,000 pounds of ANFO prior to the search of the defendants' residences.

C. J. Thomas Thurman

Tom Thurman's performance as an explosives examiner and unit chief is discussed in several sections of the draft report[120] because Whitehurst alleges that Thurman is responsible for 12 types or instances of misconduct, William Tobin alleges Thurman engaged in misconduct in two respects, and Steve Burmeister alleges that Thurman acted improperly in one instance.[121] Although the OIG found that Tobin's allegations of misconduct were without merit, ten of Whitehurst's allegations were unfounded, and one of Whitehurst's allegations involved a misunderstanding regarding procedure for handling AE dictation which was resolved in 1992 with a simple oral request, the treatment of these allegations leads the reader to believe that, by their sheer weight, they must imply some serious misconduct on Thurman's part. The laborious treatment of each allegation without clear indication that these allegations were unfounded inaccurately creates the impression that "where there is smoke, there is fire." This deprives the reader of a clear road map to the OIG's conclusions and deprives Thurman of the recognition to which he is entitled as a dedicated civil servant of 27 years who has committed a few minor mistakes and one significant managerial error in approving Williams' report on the Oklahoma City bombing.

In addition to the draft report's tone, we request review of the following findings to ensure that the report is both accurate and fair.

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[120] Primarily in Part Three, Sections B, G, H1, H10, and H12.

[121] Whitehurst has alleged that Thurman engaged in the following misconduct: (1) purposely slanted reports to favor the prosecution (We are unable to specify Whitehurst's precise allegation concerning Thurman because the FBI has not been provided a list of these allegations or permitted to review materials that may assist us in identifying Whitehurst's concerns. We assume that Whitehurst has alleged that Thurman "slanted" reports because the draft report indicates that "Whitehurst has generally alleged that FBI examiners in explosives-related cases have purposefully slanted reports to favor the prosecution," (Part Three, Section A at 10) and the OIG has drawn conclusions regarding Thurman's culpability in this regard.); (2) circumvented Laboratory procedures in VanPac by having Martz analyze material from the mail bombs; (3) improperly based his opinion on Martz's flawed analysis in VanPac; (4) improperly testified outside his field of expertise regarding various matters in VanPac; (5) lacked a factual basis for certain testimony regarding explosives used in the bombs in VanPac; (6) lied on the stand about examinations done by the Laboratory in Yu Kikumura; (7) violated FBI procedures or protocols by testifying outside his expertise in Yu Kikumura; (8) failed to inform the court that his undergraduate degree was in political science in Yu Kikumura; (9) otherwise misled "the jury" in Yu Kikumura; (10) incorrectly suggested that the defendant intended to make a large and powerful bomb from ammonium nitrate, aluminum powder, and mercury fulminate in Yu Kikumura; (11) altered Whitehurst's AE dictation during the period 1987-1992; and (12) erroneously approved Dave Williams' Laboratory report regarding the Oklahoma City bombing. William Tobin has alleged that EU examiners inappropriately and inaccurately reported wire gauges and that EU Chief Thurman failed to arrange for necessary training. In an unrelated matter, Tobin asserted his belief that examiners in the Firearms and Toolmarks Unit (FTU) and EU reported results of metals-related examinations in the La Familia case in a misleading or incorrect manner. Steve Burmeister alleged that Thurman included inappropriate conclusions in a 1993 case (William Wirt Middle School) in which Burmeister was AE and Thurman was PE.

OIG Finding: *In the William Wirt Middle School case, Steve Burmeister had validly informed Thurman of misstatements in his report, but Thurman failed to revise the report accordingly.*[122]

Response: There does not appear to be a valid basis to infer that Thurman was aware of Burmeister's concerns regarding the William Wirt Middle School report. The draft report recognizes that Thurman does not recall these complaints,[123] but reaches the conclusion that he must have known, solely because "Burmeister . . . wrote a contemporaneous memorandum documenting the complaints, in which he stated he told Thurman about them."[124] Our reading of the draft report suggests that the "contemporaneous memorandum" to which the draft report refers is a single page note written by Burmeister entitled, "Comments by Steven Burmeister regarding case #30422012." Burmeister informed us that: (1) he does not recall advising Thurman of this information; (2) he is fairly certain that he did not show Thurman his memorandum; (3) he does not recall an instance in which Thurman was not receptive to his corrections or suggestions; and (4) it would be inconsistent with his relationship with Thurman, both then and now, for Thurman to have disregarded Burmeister's input. In the absence of documentary or other evidence that Thurman was aware of Burmeister's concerns in this case or that Burmeister conveyed his concerns to Thurman, the conclusion that Thurman was culpable in failing to revise the report should be reevaluated.

OIG Finding: *Thurman as the EU chief should have taken more seriously Tobin's concern that EU examiners were not measuring or reporting the wire gauge in accordance with industry standards*[125] *and should have issued an appropriate directive to EU examiners so they understood the industry practice and reported their findings in a clearly understandable manner.*[126]

Response: The draft report's finding implies that the OIG inquired into Thurman's response to Tobin's concerns and found this response inadequate. It is our understanding, however, that the OIG did not so inquire. We are advised that Thurman attempted to arrange for Tobin to conduct the requested training but, because Tobin often worked off-site, was unsuccessful. Unable to obtain this training from Tobin, Thurman contacted a non-Agent examiner who assisted Tobin (Mr. Michael Smith), Greg Carl, Thomas Mohnal, and an industry contact specializing in threading machines for pipes and related issues, such as

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[122] Part Three, Section H10 at 14-16.

[123] Id. at 15 n.5.

[124] Id.

[125] Part Three, Section H12 at 3.

[126] Part Five at 7.

wire gauge, for assistance. Thereafter, Thurman instructed the EU regarding wire gauging as Tobin had requested; Tom Mohnal recalls this instruction, a number of those present, and a subsequent occasion on which Thurman required that a report be redrafted to clarify the gauging measurements in compliance with Tobin's request. Because it appears that the questions that would elicit this information were not asked, we request that the conclusions regarding Thurman's response to Tobin's request be omitted. We also note that a factual recitation would be preferable to repeated expressions of "concern."

We also request review of the following matters which do not affect the OIG's ultimate findings or conclusions but which are important to the accuracy of the report.

- Tobin alleged that examiners in the Firearms and Toolmarks Unit (FTU) and EU reported results of metals-related examinations in the La Familia case in a misleading or incorrect manner. The draft report states that "[b]oth Thurman and Mohnal seemed to be concerned more about Tobin's motive for issuing [dictation conflicting with EU and FTU reports] than about the merits of the points [Tobin] raised," and that "Thurman appeared to be chiefly concerned with defending the report issued by EU examiner Mohnal and attempting to persuade others that Tobin's February 13 dictation should be withdrawn."[127] According to Thurman, however, the OIG did not interview him about his concerns. The OIG also indicated no basis for establishing the issues that actually concerned Thurman.[128] We would request that the OIG either further investigate this matter or delete this conclusion.

- With respect to the allegation that Thurman altered Whitehurst's AE dictation during the period 1987-1992, the draft report fails to note that none of the 13 cases in which AE reports were substantively altered resulted in prosecution; in 10 of the cases no subject has been identified and in the remaining 3 cases unexploded devices were recovered intact and resulting prosecutions would be unlikely to rely on the PE reports involved. Consequently neither defendants' rights nor prosecution efforts were affected in any way.[129] The draft report also fails to note that Thurman has not revised Whitehurst's reports, whether to improve their readability or otherwise, since 1992.[130]

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[127] Part Three, Section H12 at 8.

[128] We understand Thurman's primary concern was resolution of the potential problems created by the submission of conflicting Laboratory reports.

[129] Memorandum from J. J. Kearney to Mr. Ahlerich regarding Alterations and Changes in AE Reports by PE Examiners Without Approval of the AE Examiner dated 3/31/95 at 6 (provided to the OIG by the FBI on 9/27/95, but not discussed in the draft report).

[130] Id. at 7 ("The practice of altering AE dictation . . . was discontinued by Thurman in December 1992 when the potential difficulties of continuing the practice were brought to his attention by SSA Corby, Unit Chief, MAU. Thurman's discontinuance of the practice is borne out by the fact that no reports after November 1992 where Whitehurst was an AE examiner to Thurman have been shown to be altered.").

• With respect to the finding regarding Yu Kikumura that "[i]n some areas, Thurman's testimony contains ambiguities or minor inaccuracies,"[131] this finding cannot be understood in context unless the OIG's previously discussed understanding of the pressures of in-court testimony is restated along with this criticism. To expect a reader to relate a qualifying statement appearing in the early pages of the draft report[132] to a criticism appearing sections later is unrealistic. Therefore, we request that the OIG either omit the comments concerning "ambiguities or minor inaccuracies," an issue with respect to which no allegations were made and regarding which no conclusions of misconduct were reached, or add the qualifying language regarding the pressures of in-court testimony contained in Part Two.

• We agree with the draft report's conclusion that Thurman should not have approved Williams' report in the Oklahoma City bombing case. The discussion of this case is, however, misleading and inaccurate in at least two respects.

First, although the draft report concludes that Thurman's reference to "home-made-type mixtures . . . is an inadequate ground to eliminate the commercial explosives in total,"[133] the OIG did not ask whether Thurman had advised them of all bases for his approval of this conclusion and, in fact, this was only one factor raised in the discussions between Thurman and Williams. During Thurman's interview, he began his response to the OIG inquiry as indicated, but was asked unrelated questions before he had completed his response. If the OIG believes Thurman's bases for approving this conclusion to be important to their investigation, they should permit him to clarify this issue in another interview.

Second, we believe it is inaccurate to state that "Thurman acknowledged that 2000 pounds of ANFO and 500 pounds of commercial dynamite could have been used in the [Oklahoma City] blast."[134] According to Thurman, the inquiry concerning this composition was posed as a hypothetical scenario rather than as a specific reference to the Oklahoma City explosive.

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[131] Part Three, Section H1 at 1.

[132] The draft report itself acknowledges that "one cannot expect an examiner's work or testimony to have been perfect in every case if it is subjected to a detailed, after-the-fact analysis like that employed in our investigation." The OIG reviewed "with the benefit of hindsight, certain testimony given under courtroom examination, where a witness generally cannot reflect at length on the questions or answers." Part Two at 1-2.

[133] Part Three, Section G at 23.

[134] Id. at 23.

D. Other Individuals

Whitehurst made numerous allegations of impropriety including unethical conduct, scientific fraud, and prosecutorial misconduct against many individuals within the FBI. The OIG concluded, after investigating these allegations, that in many cases Whitehurst's allegations were "grossly overstated" and "without merit."[135] The OIG found that the following individuals engaged in no misconduct: Rod Asbury, Louis J. Freeh, Donald Haldimann, Alan Jordan, Ronald Kelly, Lynn Lasswell, Richard Laycock, Bruce McCord, Thomas Mohnal, Mark Olson, Alan T. Robillard, and Howard Shapiro.[136]

1. Michael Malone

William Tobin, a metallurgist with the Materials Analysis Unit (MAU), told the OIG that Michael Malone, formerly of the Hair and Fibers Unit, testified inaccurately and outside his area of expertise during the 1985 hearing related to the impeachment of former U.S. District Judge Alcee Hastings.[137] The draft report agrees, and repeatedly states that Malone testified "falsely,"[138] thereby implying that Malone deliberately attempted to deceive the impeachment panel.

There is no evidence to support such an implication. The OIG's draft report itself finds that Malone did not knowingly and deliberately testify contrary to Tobin's report in the Hastings case -- a report which was not issued until nearly one month after Malone's testimony.[139] Moreover, the OIG fails to give sufficient weight to the fact that Malone was present at the time Tobin conducted the tensile test on the purse strap being analyzed. Because he was present when the test was conducted, Malone had a legitimate basis for testifying about how that test was performed (*i.e.*, that the purse strap had to be "jury rigged" before the test could be completed).

While Malone may not have been entirely accurate in this regard, it is not appropriate to characterize his testimony before the impeachment panel as "false."[140] Malone's testimony may have been misleading, but it was not intentionally deceptive. To the contrary,

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[135] Part Five at 28.

[136] The OIG has not yet provided us with its findings regarding Wallace Higgins.

[137] Part Three, Section H12 at 1.

[138] Id. at 17, 18, 21; Part Five at 13, 14.

[139] Part Three, Section H12 at 18.

[140] See Webster's II New Riverside University Dictionary (1994) at 463 (including "deliberately untrue and "intentionally deceptive" as two meanings of the word "false").

Malone specifically told the impeachment panel that he was not an expert regarding the tensile test.[141] Malone's testimony is more properly described as inaccurate, and we would request that the report's findings be revised accordingly.

2. Richard Hahn

After an exhaustive analysis of Hahn's Avianca testimony, the OIG concludes that Hahn did not commit perjury, fabricate evidence or mislead the court. We concur in that judgment. We believe, however, that the OIG's findings regarding Hahn are unfair and erroneously suggest that his conclusions were structured to help the prosecutor's case. Hahn's conclusions, some of which were independently buttressed by Colombian and other authorities, were reached after his consideration of a number of factors that he could properly rely upon as an expert witness.

The suggestion that Hahn should have done more to validate his jetting theory before the second trial unfairly implies that additional effort would have established the weaknesses of that theory when, in fact, there was a paucity of literature and scientific analysis on this issue at the time. The suggestion that Hahn should have restated Whitehurst's 1994 memorandum verbatim mischaracterizes the nature of that document and Hahn's role as an expert.

Reflective of the inherent unfairness of the OIG's highly detailed, retrospective analysis of Hahn's testimony is the OIG's implicit recognition that science is an evolving process and that new events and new information frequently dispel or alter extant hypotheses. As evidence of this point, we note the OIG's reliance on evidence acquired from the Oklahoma City bombing, which occurred in April 1995, to dispel an opinion expressed by Hahn in his Avianca testimony in 1994.[142] It is unknown whether the OIG's "experience," absent the Oklahoma City case, would have been sufficient to fault Hahn's opinion in Avianca that the pitting was caused by an explosive with a VOD of at least 20,000 feet per second. We request that the analysis of Avianca be reevaluated, and that any suggestion that Hahn's actions or conclusions were intended to support the prosecution's theory of the case be deleted.

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[141] See Part Three, Section H12 at 14 ("You are getting out of my area of expertise now as far as exactly what that figure means. I am a person who does microscopic examinations . . . .").

[142] Part Three, Section E at 12.

3. Robert Heckman

The OIG found that in Conlon, Robert Heckman made improper additions to Whitehurst's dictation by adding statements outside of his expertise to the section of the report designated "Instrumental Analysis."[143] The OIG also found that Heckman's conclusion about whether the explosive could have been of military origin was stated in a way that may have been misinterpreted.[144]

Heckman did not add his own observations about the IMS results from the explosion scene but was paraphrasing Whitehurst in an attempt to make the report more understandable. We do not think it is accurate to characterize his additions as Heckman's "personal opinion" since they were only a reiteration of what Whitehurst had told him. While we agree that Heckman should have labeled his inserts, it is not appropriate to characterize his attempt at clarification as "improper" or "unauthorized" additions.

4. J. Christopher Ronay

The draft report states, "[J. Christopher] Ronay told the OIG that he read the EU reports to check their format, but he did not 'reexamine' the evidence with regard to conclusions reached by EU examiners and he did not always review the work notes, test results, or the original dictation by other examiners."[145] To the extent this implies that Ronay only reviewed EU reports for stylistic checks, Ronay informs us it is in error. Ronay states that he used the term "format" before the OIG to describe a review for facial validity of the report (*i.e.*, a review that the examiner was trained and properly qualified to reach the conclusions in the report, and that the conclusions appeared valid).

5. Robert Webb

As discussed above in connection with the VanPac case, the OIG's draft report finds that Robert Webb, the examiner who analyzed the packaging tape, black paint, RTV sealant and glue found in the bombs, overstated his conclusions. We request that the OIG consider whether its findings regarding Webb are overly critical and potentially inaccurate in light of information provided to us. Although the OIG does not specifically identify that test, we have been informed that Webb performed polarized light microscopy on all of the materials. We have also been informed that the tests that the OIG does identify would permit Webb to conclude that materials came from the same manufacturer.

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[143] Part Five at 11.

[144] Id. at 11.

[145] Id. at 14 (emphasis added).

6. Charles Calfee

The draft report states:

> [Charles] Calfee told us that he did not think it necessary that [Terry] Rudolph record in his work notes all the tests performed. To justify this position, Calfee said that he told Rudolph not to use all the evidence in his tests so it could later be reexamined if necessary. When asked how another examiner could later tell from incomplete notes what Rudolph had done, Calfee said he thought it would be a 'very good test of the capability of any explosive examiner' if they could testify based on the incomplete notes of another examiner.[146]

It appears that this passage misstates Calfee's intentions. Calfee informed the FBI that he was trying to express to the OIG his more rigorous view that an examiner should not rely on notes taken some time before a trial, but should be forced to go back and do an analysis of the underlying charts and data. According to Calfee, reliance on old notes could make an examiner complacent and lead to a lack of preparation at trial. Similarly, Calfee told us that under no circumstances would he want an examiner to testify from the incomplete notes of another examiner (as recounted by the OIG), because he does not believe it is best for an examiner to testify from the notes of another examiner at all -- rather, the second examiner should do the analysis themselves and prepare their own notes from the charts and data. We believe this portion of the report should be revised to more accurately reflect Calfee's statement.

7. Wallace Higgins

The draft report provided to the FBI does not include its section labeled "Wallace Higgins." The FBI is, consequently, unable to comment on that section.

8. Alan Jordan

Whitehurst claims that Alan Jordan may have changed or misreported Whitehurst's dictation while testifying at trial.[147] The OIG found that Jordan did not change or misreport Whitehurst's results but that his testimony contained a minor inaccuracy.[148]

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[146] Id. at 17.

[147] Id. at 12.

[148] Id. at 13.

We object to the assertion that Jordan failed to include dictation verbatim when he prepared a brief summary report for the White House concerning the attempted assassination of former President George Bush in Kuwait in April 1993. Due to the unique circumstances involved, we find this criticism to be unduly harsh given the nature of the report and the reason it was requested. 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 in any document generated for any purpose whatsoever appears to us to be not only unnecessarily inflexible but inappropriate. It is important to emphasize that this document was not a laboratory report and that Jordan did subsequently prepare an official laboratory report which incorporated the dictation verbatim as now required.

The OIG's report should indicate that Jordan's testimony in the Negretti case could have been "more accurate" in discussing whether the residue found was "identified" or "consistent with" RDX instead of characterizing his testimony as "inaccurate." "Consistent with" is certainly more conservative than "identified" and it is unfair to characterize this as an inaccurate or incorrect statement. In fact, if there was any effect from Jordan being more conservative in his response, it was in favor of the defense, not the prosecution. Furthermore, this exchange is taken out of context. Prior to the excerpted section, Jordan had been asked on direct examination questions regarding the use of boosters and whether the explosion, the damage, and the chemicals found were consistent with a booster having been used. It is in this context, *i.e.*, whether the residues could indicate that a booster was used, that Jordan used the phrase "consistent with."

9. Kenneth Nimmich

The draft report states that "Kenneth Nimmich was the chief of the Scientific Analysis Section from January 1987 until February 1993."[149] Nimmich informs us, however, that he was chief of that Section from July 1987 until February 1993. The draft should be corrected accordingly.

10. Rod Asbury

Whitehurst alleged that Rod Asbury told him that Rudolph was "blackmailing" the FBI and that the Laboratory "practiced Black Magic" rather than science. The OIG did not find that Asbury engaged in any misconduct.[150] In fact, the OIG even appeared to praise Asbury for realizing that he did not have a sufficient background to substantively evaluate Rudolph's casework and for noting in a 1987 progress review that Rudolph's communication of results would improve with more comprehensive and detailed notes in preparing

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[149] Id. at 19.

[150] Id. at 25.

reports.[151] The OIG noted, however, that it would have been desirable if Asbury had taken further steps to address his concerns about Rudolph's casework.[152]

There are some minor inaccuracies in this portion of the draft report. For example, "Forensic Science Research Division" should read "Forensic Science Research Unit."[153] Asbury was not Associate Director of ICITAP from 1989 to 1993.[154] While he did work in ICITAP during this period, he was only Associate Director for the last year or so before he retired (he could not remember the exact dates but believes it was 1992 to 1993).

11. Thomas Mohnal

The OIG did not find any misconduct on the part of Thomas Mohnal yet its conclusion implies that perhaps there was misconduct but action need not be taken against him. The OIG concludes as to Mohnal that "[w]e do not recommend that any action be taken against Mohnal with respect to this matter."[155] The OIG concludes as to other similarly situated individuals, however, that "we do not find any misconduct by" the subject with regard to those matters investigated.[156] We believe that the conclusion regarding Mohnal should mirror that of others who engaged in no misconduct.

12. Howard Shapiro

Whitehurst claimed that FBI General Counsel Howard Shapiro engaged in misconduct while prosecuting the VanPac case in 1991.[157] Whitehurst also claimed that Shapiro is a "liar" because he assured Whitehurst that he would suffer no retaliation, and yet Whitehurst was subsequently reassigned to become a paints and polymers examiner.[158] The OIG's draft

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151 Id. at 25.

152 Id. at 25.

153 Id. at 24.

154 Id. at 25.

155 Id. at 30.

156 See, e.g., Part Five at 29-31 (OIG findings regarding Richard Laycock, Bruce McCord, and Mark Olson).

157 Part Three, Section B at 1-2.

158 Part Five at 31.

report does not find any misconduct by Shapiro or Louis Freeh, the prosecutors in the VanPac case, and we concur fully in that finding.[159]

We note, however, that although the draft report also rejects Whitehurst's retaliation claim against Shapiro, the manner in which it does so is misleading. The draft report states that the OIG found no basis to conclude that Shapiro "was involved in the decision to reassign Whitehurst or that Shapiro directed or otherwise participated in any retaliation against him."[160] This erroneously suggests that there was some retaliation against Whitehurst, even if not committed by Shapiro. In fact, the immediately preceding section of the draft report states that the OIG has no factual basis to believe that Whitehurst's reassignment to a different unit constituted retaliation, or that he suffered retaliation for raising concerns about the Laboratory.[161] Accordingly, Shapiro could not have directed or participated in any such retaliation, and the report should expressly recognize that fact.

13. Frederic W. Whitehurst

The FBI understands that the OIG will take the steps it deems appropriate to allow Whitehurst the opportunity to review and comment on the draft report, including the OIG's findings regarding him.

III. PLAN OF ACTION

A. Quality Assurance

In Parts Six and Seven of the draft report, the OIG makes a series of recommendations for steps to improve the FBI Laboratory and ensure that the Laboratory provides forensic services of the highest quality.[162] With few exceptions, the FBI concurs in the recommendations made by the OIG. Many of those recommendations involve initiatives that were first pursued by the Laboratory before Whitehurst made any allegations. In addition, the FBI has adopted other recent measures to improve the Laboratory Division, many of which go beyond the steps recommended by the OIG. These measures are

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[159] Part Three, Section B at 2, 19; Part Five at 31.

[160] Part Five at 31.

[161] Part Four at 39, 43.

[162] The report makes it clear that the OIG's review was focused on the Explosives Unit (EU), the Chemistry-Toxicology Unit (CTU), and the Materials Analysis Unit (MAU) of the Laboratory. Part Six at 2. The OIG's recommendations are not meant to imply that the shortcomings addressed exist in other units of the Laboratory which were not reviewed.

described in the Conclusion below. Our responses to the specific recommendations by the OIG, as summarized in Part Seven of the draft report, follow.

1. ASCLD/LAB Accreditation and External Review

The draft report includes the following recommendations:

(a) The Laboratory should pursue accreditation at the earliest possible time.

(b) In addition to the inspection required for accreditation, external reviews of the Laboratory should occur periodically through audits by the OIG or reviews involving scientists from other forensic laboratories.

Response: The FBI fully concurs in the first recommendation, and has been preparing to apply for formal accreditation by the American Society of Crime Lab Directors/Laboratory Accreditation Board (ASCLD/LAB) for the past two years.

Accreditation is a voluntary process involving an external inspection of the Laboratory's procedures and requires the Laboratory to meet the standards prescribed by ASCLD/LAB. In preparation for accreditation, the FBI Laboratory is currently undergoing extensive internal audits of its operations and procedures. In the Spring of 1997, upon the completion of the internal audits, the Laboratory will have an external, pre-accreditation review conducted by qualified inspectors from the National Forensic Science Technical Center. The Laboratory will then make changes in response to any recommendations resulting from that external review. The Laboratory anticipates that it will complete these preparations in time to permit it to submit an application for accreditation by the end of 1997. The decision to accredit by ASCLD/LAB must be made within 12 months of the completion of its on-site inspection of the FBI Laboratory, giving a target accreditation date at the end of 1998.

To those unfamiliar with the process, this may seem an unreasonably long time to complete accreditation. The filing of an ASCLD/LAB accreditation application, however, is always a time consuming process, typically taking a standard laboratory two years of preparation. Preparing the FBI's Laboratory for accreditation is even more complex, given the fact that it is one of the largest and most diverse forensic laboratories in the world. It is also one of the busiest laboratories in the world. Indeed, in addition to its normal annual case load involving sixteen thousand evidence submissions and several hundred thousand examinations, the FBI Laboratory has had a number of major investigations to which it has had to respond since it began preparing for accreditation over the last two years. During the same period, the Laboratory has been undergoing fundamental changes, including the implementation of numerous new policies and procedures and the transition from nearly all agent examiners to a significant number of non-agent examiners as part of a general reduction in the number of agents at FBI Headquarters. This transition has involved the hiring and training of approximately 100 new examiners.

These factors have slowed the Laboratory's preparation for the accreditation process. At the same time, it is essential that the Laboratory be fully prepared to pass the ASCLD/LAB inspection upon its first application. The importance of the FBI Laboratory's role as a current and future leader in the forensic science community is too great to risk failing to achieve accreditation because of a hastily filed application.

In hindsight, as suggested in the OIG report, the Laboratory could and should have sought ASCLD/LAB accreditation a decade ago. The failure to do so must be attributed in large part to prior Laboratory management having had an insufficient appreciation of the benefits conferred by accreditation and giving insufficient priority to the completion of the application process. Also, limited resources combined with the always competing demand of a heavy work load undoubtedly played a role. The current Laboratory management is, however, fully committed to applying for accreditation at the earliest possible time and no later than the time frame set forth above.

We think it should be emphasized that, even though explosives is not a forensic discipline accredited by ASCLD/LAB, the FBI Laboratory is taking the additional step of requiring the Explosives Unit (which is to be integrated into a new Materials and Devices Unit) to model its substantive personnel qualifications, functions, practices and standards on those required of the eight accredited disciplines which will be subject to inspection (controlled substances, toxicology, trace evidence, serology, DNA, firearms/toolmarks, questioned documents and latent fingerprints). This will ensure that all of the units within the Scientific Analysis Section of the Laboratory which analyze physical evidence either (1) adhere to or exceed established forensic science community standards or (2) in unique disciplines such as explosives analysis, create standards which can withstand peer review and become benchmarks for other experts in the field.

It is also important to emphasize that the fact that the FBI Laboratory has yet to be accredited by ASCLD/LAB does not mean that its past and present work is unreliable or untrustworthy. As noted in the ASCLD Laboratory Accreditation Board Manual, "[t]he fact that a laboratory chooses not to apply for accreditation does not imply that a laboratory is inadequate or that its results cannot be trusted."[163] While there are clear advantages to ASCLD/LAB accreditation, good laboratory practices are established and followed by forensic laboratories without accreditation. There are many non-accredited labs whose practices and work-product are demonstrably professional and trustworthy. With very few exceptions, we believe that has been true of the FBI Laboratory. This is a point which has been lost in press discussions of this issue. That point should be made prominently and strongly in the OIG's discussion of its recommendation that the Laboratory should pursue accreditation at the earliest possible time.

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[163] ASCLD/LAB, Laboratory Accreditation Board Manual 1 (1994) [hereafter Manual].

The FBI agrees in principle with the OIG's second recommendation that, in addition to the reviews that are part of the accreditation process, the Laboratory should undergo periodic external reviews through audits by the OIG or reviews involving scientists from other forensic laboratories. The nature and extent of such additional reviews, however, should be clarified.

With respect to OIG audits, the FBI believes the OIG can play a useful role by conducting periodic progress reviews regarding the implementation of its recommendations. The FBI makes a specific request for such further OIG inspection below.

With respect to additional periodic external reviews by outside scientists, the draft report does not make it clear as to whether this recommendation is referring to the same kind of quality assurance review that is performed as part of the ASCLD/LAB accreditation process or some more limited type of external review. In order to maintain ASCLD/LAB accreditation, once approved, the FBI Laboratory will be required to (1) file reports annually with ASCLD/LAB documenting compliance with ASCLD/LAB standards; (2) follow a program of internal case review ensuring that examiners are following established procedures and that findings are properly documented; (3) successfully complete internal and/or external proficiency tests; and (4) undergo a complete reinspection every five years. As detailed below, the Laboratory has already established a review procedure before final results are issued by examiners and is developing, under the auspices of the Quality Assurance Unit, an internal audit group which will review a representative sample of closed cases. In addition, Appendix L of the Laboratory's Quality Manual requires each unit to perform annual external proficiency testing.[164]

The FBI does not believe that it is necessary for additional full-scale, external inspections of segments of the Laboratory in the nature of the reinspection that will be performed by ASCLD/LAB at five year intervals. This would unduly disrupt the operations and work of the Laboratory. The Laboratory will, of course, like other FBI Headquarters Divisions, be subject to periodic audit by the FBI Inspection Division. In addition, the Laboratory is pursuing an outreach effort to establish external peer review relationships with other forensic laboratories in various disciplines, which would provide annual consultation on quality assurance issues. An example of this is the current dialogue between the FBI Laboratory and the New York State Crime Laboratory in Albany, New York. In the Spring of 1997, a delegation from the FBI Laboratory will go to Albany to discuss quality assurance measures and a full range of other forensic issues. Thereafter, a delegation from Albany will come to the FBI Laboratory. This type of continuing collaboration should achieve the "perspective broadening" goal sought by the OIG recommendation of additional external review.

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[164] Such external testing serves, as noted in the ASCLD/LAB Manual, "as a check on 'inbreeding' within a laboratory or laboratory system." Id. at II.

2. Restructuring the Explosives Unit

The draft report includes the following recommendations:

(a) The unit should be restructured to clarify its mission and to assure that scientific analyses are performed by qualified examiners.

(b) Within the Laboratory, the primary mission of the EU should be the forensic examination of evidence by qualified scientists.

(c) The investigative and crime scene management functions of the EU should be transferred out of the Scientific Analysis Section of the Laboratory.

(d) The unit chief and examiners in the EU should have scientific backgrounds in pertinent disciplines such as chemistry, metallurgy, or engineering, as well as technical training in the assembly, deactivation, and reconstruction of explosive devices and the examination of bombing scenes.

(e) To avoid contamination, swab kits, clothing, and evidence that are to be examined for traces of explosives should be first sent to a designated area that is physically separate from the main EU facility. The area designated for the receipt of evidence requiring residue analysis should have strictly controlled access and appropriate procedures to monitor and prevent contamination.

Response: The FBI generally concurs with the views expressed in the OIG's first, second and fourth recommendations -- that the EU should be restructured to clarify its mission and to ensure that both supervisory personnel and examiners have appropriate scientific and technical training. Such a restructuring is already underway.[165] The Bomb Data Center (BDC), which primarily provides training and operational support for bombing matters, is being separated from the EU, and established as a separate unit in the Forensic Science Research and Training Center. In addition, the EU will be merged with the greater portion of the Materials Analysis Unit (MAU) to form the Materials and Devices Unit, which will immediately link two related forensic disciplines.

The restructuring will also involve a number of personnel changes. The prior chief of the EU has been reassigned. The new chief will be Dr. Thomas Jourdan, an accomplished and experienced scientist who is now the chief of the MAU. The current head of the Scientific Analysis Section is Dr. Randall Murch, also an accomplished and broadly experienced scientist. The FBI intends to select a similarly qualified individual as Assistant Director (AD) of the Laboratory.

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[165] See Electronic Communication from Laboratory Division to Director Freeh dated 1/23/97.

The FBI also concurs in the OIG's fifth recommendation, that evidence to be examined for traces of explosives should first be sent to an area that is physically separate from the main EU facility and strict procedures to monitor and prevent the contamination of evidence should be in place. The Laboratory has been aware of the risk of potential contamination in connection with explosives residues, and has taken a number of actions to identify, limit and avoid such contamination. The Bureau is now in the process of reallocating space at its Headquarters building in Washington, D.C., the Laboratory's current location, to provide the EU and other units with additional work space.[166] This new space, which is expected to be available by July 1, 1997,[167] will greatly improve the facilities in which cases involving explosives and other trace evidence are worked.

In addition, the Bureau is in the process of planning a new, state-of-the-art Laboratory facility in Quantico, Virginia. That new facility will be specifically designed to prevent and monitor potential contamination.

The FBI respectfully disagrees with the OIG's third recommendation, that the investigative and crime scene management functions of the EU should be transferred out of the Scientific Analysis Section of the Laboratory.[168] The OIG suggests that the EU's multiple functions would be "better achieved" if the investigative and crime scene management functions of the Laboratory were "dispersed," and "the functions appropriately left within the Laboratory were performed by qualified scientists."[169] As noted previously, however, in reaching this conclusion, the OIG has misunderstood the role of forensic explosives examiners.

As the OIG recognizes, the EU's many functions include the investigation of bombing incidents and management of complex crime scenes.[170] There are substantial reasons why EU examiners have those investigative responsibilities as well as more traditional Laboratory duties. Even if examiners with more extensive scientific backgrounds are brought into the EU, as the FBI intends to do, those examiners will not merely be experts in a specific scientific field, such as chemistry. They will also be experts in explosive devices generally, in particular the effect those devices can have when detonated. That more general expertise, based upon years of examining explosives and investigating crime scenes, clearly gives EU

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[166] See Electronic Communication from Laboratory Division to Deputy Director Kennedy dated 2/7/97.

[167] The space sought by the Laboratory is now being used by a number of different FBI divisions. As a result, those divisions must be moved and the space redesigned before it will be ready for use by the Laboratory.

[168] Part Seven at 1-2.

[169] Part Six at 7.

[170] Id.

examiners valuable "specialized knowledge" that can "assist the trier of fact to understand the evidence or to determine a fact in issue . . . ."[171] In addition, firsthand observations by EU examiners at crime scenes are among the facts and data upon which they may base an opinion or inference as expert witnesses.[172] Precluding EU examiners from an investigative role, as the OIG suggests, would eliminate a significant basis on which those examiners learn about explosive devices, eliminating a potential basis upon which they can provide useful expert testimony and reducing the FBI's overall understanding and knowledge of the workings and effect of those devices.[173]

As a result, the FBI would not be inclined to transfer the EU's investigative and crime scene management functions to the Evidence Response Team (ERT) Unit.[174] Rather than require that completely different personnel investigate explosives cases and oversee the collection of evidence, the FBI will continue, as it has long advised other forensic laboratories, to have its experienced explosives examiners participate in that process.[175]

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[171] Fed. R. Evid. 702.

[172] See Fed. R. Evid. 703, and Advisory Committee Notes thereto.

[173] Through interaction with the field divisions involved in major bombing cases, the Laboratory has learned that they expect and desire more, not less, leadership by Laboratory personnel in crime scene management. To maximize the Laboratory's efforts, however, the FBI has begun initiatives to provide additional training and equipment to the ERT Unit and field ERTs so they may respond even more effectively with Laboratory personnel in major bombing cases.

[174] Part Six at 6. The FBI is also not inclined to transfer the chemical analysis of explosives from the Chemistry Unit (previously named the Chemistry Toxicology Unit) to the EU. (Id.). Even if examiners with more extensive scientific backgrounds are brought into the EU, the Laboratory's general approach is to have examiners with the greatest expertise in a particular forensic discipline -- *i.e.*, chemical analysis -- conduct all analyses within that discipline. The OIG's report does not criticize that practice in any way. In the FBI's view, continuing to have examiners in the Chemistry Unit perform the chemical analysis of explosives is more consistent with the OIG's primary recommendation, that the forensic examination of evidence be conducted by highly qualified scientists, than having explosives examiners conduct those tests, even if they have the necessary scientific and technical training. In any event, some of the OIG's concerns will likely be resolved by the FBI's current plan to merge the Materials Analysis Unit (MAU) with the EU, to form the Materials and Devices Unit (MDU). See Electronic Communication from Laboratory Division to the Director dated 1/23/97 at 2.

[175] See FBI Handbook of Forensic Science at 55 (advising state and local law enforcement authorities to obtain trained specialists to handle and process bombing crime scenes, stating: "Although the basic principles of conducting a crime scene search apply in a bomb scene search, individuals with specialized knowledge of explosives, improvised explosive devices, damage produced by explosive charges, and other facets associated with bomb scene searches, such as the search and collection of physical bombing evidence are extremely valuable to the effective and efficient processing of a bombing crime scene.").

The FBI disagrees with the OIG's statement that its conclusions "reflect certain trends in forensic science generally and in the examination of explosives in particular."[176] It is true that knowledge of and analytical techniques for the forensic examination of bombing evidence have become increasingly technical and sophisticated, in part because bombers are becoming more sophisticated in their use of explosives.[177] However, the Bureau does not believe that the growing complexity and impact of bombing cases supports the removal of explosives examiners from the crime scene -- an area where they not only can provide substantial assistance, but also have an opportunity to add significantly to their own level of knowledge. Instead, the FBI supports a system that allows EU examiners to develop broad expertise, by exposing them to all areas related to explosives, including crime scene assessment and management.

The FBI does recognize that having a single individual act as both crime scene investigator and forensic analyst could create a risk that examiners will not clearly distinguish their "separate and distinct roles," particularly while testifying at trial.[178] Accordingly, as a general rule, the explosives examiners who participate in the crime scene investigation will not conduct the scientific analyses that may later be required. In addition, unless specifically designated as a summary witness (see discussion below) or special circumstances arise, the EU examiners investigating the crime scene will not testify at trial regarding the results of those scientific analyses.[179]

3. Principal and Auxiliary Examiners

The draft report includes the following recommendations:

(a) In place of the existing distinction between "Principal" and "Auxiliary" examiners, the Laboratory should instead identify a "Coordinating Examiner" for each case. That person would serve as the contact with the entity requesting the examination of evidence and would coordinate work by other examiners within the Laboratory.

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[176] Part Six at 8.

[177] Id.

[178] Id. at 6, 9.

[179] While the Laboratory's general practice will be to have different examiners assist the crime scene investigation and conduct the scientific analyses, some modification may be required if extraordinary circumstances arise, such as an extremely large or complex bombing investigation which demands all of the resources of the EU, or an unusual case which requires both the investigative and analytical services of one employee with unique expertise. In that event, all affected employees will receive additional, case-specific training to ensure that trial testimony is appropriately limited.

(b) The Laboratory should develop guidelines for the respective roles of the coordinating examiner and other examiners in case work, preparation of reports, and the presentation of testimony.

(c) Disagreements among examiners over forensic methods or the interpretation of results should be resolved based on pertinent scientific knowledge. If supervisors become involved in resolving such disputes, it is important that their ultimate decision be clearly communicated to the examiners involved and that it be reflected in any resulting reports.

Response: The FBI agrees with the OIG that the terms "principal examiner" and "auxiliary examiner" are somewhat misleading given examiners' actual functions.[180] As a result, the FBI has already adopted the OIG's first recommendation and has notified Laboratory personnel of the redesignation of examiner positions.[181] The Principal Examiner will now be known as the "Coordinating Examiner" (CE). As in the past, that examiner will serve as both the contact with the entity submitting evidence for examination and the coordinator for the work done by other examiners in the case. The auxiliary examiner will be known as the "Associate Examiner" (AE).

In accordance with the OIG's second recommendation, the FBI has developed specific guidelines regarding the respective roles of the CE and AE.[182] Those guidelines, which will be incorporated into the Laboratory's training programs, clarify examiners' respective responsibilities for report preparation and testimony. Laboratory personnel have already been instructed that they should avoid testifying as to the analyses or conclusions of other examiners. As discussed more fully below, Laboratory personnel have also been instructed to limit their testimony to their area of expertise or personal knowledge.[183]

In reviewing the Laboratory's major case management procedures, the FBI determined that it would be appropriate to do more than just redesignate examiner positions. As a result, the Bureau is also establishing a program to provide a group of senior examiners with specialized, in-depth training on the management of major cases and evaluation of emerging needs. That group will serve as a source of advice and guidance for CEs handling particularly large and/or complex matters, as well as Laboratory management.

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[180] Id. at 10.

[181] See Electronic Communication from Acting Assistant Director Donald Thompson to Laboratory Division, dated 1/30/97.

[182] See Quality Manual, Appendix F (Evidence Control Policy and Procedures) and Appendix J (Case Documentation and Review Policies and Procedures).

[183] See Electronic Communication to Laboratory Division, dated 2/6/97 (outlining court testimony policy for examiners).

The FBI has also taken steps to implement the OIG's third recommendation, to ensure that examiner disagreements over forensic methods or the interpretation of results are resolved based on applicable scientific principles. A communication was recently sent to all Laboratory personnel describing in detail the procedure to be followed in the event a scientific dispute arises.[184] That procedure is now being incorporated into the Laboratory's Quality Manual.

Under the Laboratory's dispute resolution policy, examiners who have a disagreement over forensic results must first attempt to work out their disagreement informally. If they cannot do so, they must raise the issue with the appropriate supervisor(s). If necessary, the supervisor(s) will consult the chief of the relevant section or the special Scientific Resolution Board being established by the Laboratory for this purpose. In any event, if supervisors become involved, their ultimate decision, based on scientific principles, must be clearly communicated to the examiners and reflected in the appropriate documentation.

4. Report Preparation

The draft report includes the following recommendations:

(a) In place of the existing procedures whereby the principal examiner assembles a report based on dictation from other examiners, each examiner who analyzes evidence should prepare and sign a separate report.

(b) In cases where it is desirable for the coordinating examiner to prepare a summary report interpreting the overall significance of findings by other examiners, the CE should circulate drafts of the summary report among the relevant examiners to solicit their views before the report is released.

(c) Reports should be clear, concise, objective, and understandable. They should fully disclose the involvement of the issuing examiner in the case and all pertinent information and findings.

(d) Examiners should limit their conclusions to those that logically follow from the underlying data and analytical results. An examiner should not draw conclusions that overstate the significance of the technical or scientific examinations; nor should an examiner base forensic conclusions on unstated assumptions or information that is collateral to the examinations performed.

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[184] See Electronic Communication to Laboratory Division, dated 2/3/97 (addressing resolution of scientific, technical, and administrative conflicts during case examinations and unit operations).

Response: The FBI agrees with all of the OIG's recommendations. The Bureau has required each examiner to prepare and sign his or her own report for several months.[185] That requirement will obviate some of the concerns raised by the OIG. For example, alteration of AE dictation will no longer be possible because AEs will prepare and sign their own reports of examination. To further clarify the individual reporting requirement in light of the redesignation of examiner positions, the FBI will include instructions regarding summary reports in its guidelines on the respective roles of CEs and AEs, as well as in its training materials.

Detailed requirements for Laboratory reports are set forth in Appendix J of the Laboratory's Quality Manual. To the extent that the Quality Manual does not specifically include the language suggested by the OIG, the FBI will make whatever revisions are needed. Those revisions will expressly state that all Laboratory reports must not only be clear, concise, objective, and understandable, but also fully disclose the involvement of the issuing examiner and all pertinent information and findings.[186]

The FBI already requires that, prior to release, reports be reviewed by a unit chief or other qualified examiner for compliance with all applicable requirements.[187] The FBI has also adopted an internal audit program, pursuant to which reports will be subject to annual audits by the Quality Assurance Unit to confirm that all necessary documents are included in the case file.[188]

Consistent with the OIG's recommendation, the FBI further requires that, in both reports and testimony, examiners limit their conclusions to those that logically follow from the underlying data and analytical results. However, to emphasize that point and better monitor examiners' compliance, the Bureau will be reexamining its training materials and has modified its program to evaluate examiner testimony. (See discussion below).

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[185] See Quality Manual, Appendix J (Case Documentation and Review Policies and Procedures).

[186] As recommended by the OIG (Part Six at 14), the Quality Manual currently requires Laboratory reports to include detailed information regarding the person submitting evidence for analysis, the type of evidence received, the date and manner of receipt, and the later disposition of the evidence, as well as the results obtained from examination. See Quality Manual, Appendix J, §§ 6 and 7. In addition, the Quality Manual states that case documentation must be sufficient "to allow a technically competent individual, examiner, or supervisor, independent of the primary examiner, to evaluate what was done." Id. at 8.

[187] Id., Appendix J.

[188] Id., Appendix M.

5. Adequate Peer Review

The draft report includes the following recommendation:

(a) Before being released, each report should be substantively reviewed to confirm that its conclusions are reasonable and scientifically based. This review should be done by the unit chief or by another qualified examiner if the unit chief lacks the requisite expertise.

Response: The FBI fully concurs in this recommendation. As already stated, the FBI requires that, prior to release, reports be reviewed by a unit chief or other qualified examiner for compliance with all applicable requirements.

6. Case Documentation

The draft report includes the following recommendations:

(a) The Laboratory should assure that case files include all notes, printouts, charts and other data or records used by examiners to reach their conclusions.

(b) The case files should contain sufficient information that another qualified scientist can understand all the analyses that were done, the results obtained, and the basis of the examiner's conclusions.

(c) Retrospective case file reviews or "audits" -- which we distinguish from a substantive review at the time of report preparation -- should be conducted periodically to assure that reports are supported by appropriate analysis and documentation.

Response: The FBI has already taken a number of steps to implement these recommendations, and ensure that case files contain sufficient information that another qualified scientist can understand all of the analyses that were done, the results obtained, and the basis for the examiner's conclusions.[189] The Bureau's Quality Manual imposes that precise requirement,[190] which will be explained in more detail in a communication to Laboratory personnel. In addition, the FBI has adopted an internal audit program which provides for an annual review of Laboratory files for appropriate documentation.[191]

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[189] Part Six at 17.

[190] Quality Manual at 8.

[191] Id., Appendix M, Audit Questionnaire at 5 (during audit, Quality Assurance Unit to determine, among other things, whether examiners generate and the Laboratory maintains all the notes, work sheets, photographs, spectra, printouts, charts and other data or records used by examiners to support conclusions).

The FBI is also in the process of developing an additional internal audit system, separate from the program already established, which will provide for a new internal audit group within the Quality Assurance Unit. That group, which will be comprised of qualified individuals in each forensic discipline practiced by the Laboratory, will conduct an independent, all-encompassing review of a statistically representative sample of closed cases, from inception through final disposition. This additional review process will ensure that Laboratory management continues rigorously to enforce the Quality Control Program.

7. Record Retention

The draft report includes the following recommendation:

(a) The Laboratory must develop a record retention and retrieval system that assures case files are complete and readily retrievable.

Response: The FBI is implementing this recommendation as well. The plans for the new Laboratory facility at Quantico include room for a separate file system for Laboratory records. Until the new facility is complete, however, the Laboratory will utilize a room recently established at FBI Headquarters for all of its case-related files.[192] Files will be retained in the Laboratory file room for a period of five years. Unless the case remains active after that time, Laboratory files will then be transferred to the FBI's general record system.

The new Laboratory file room has already been equipped with necessary shelving and other equipment. Laboratory personnel are now in the process of organizing existing files and transferring them to the new space. That process is expected to be completed within the next six months.

8. Examiner Training and Qualification

The draft report includes the following recommendations:

(a) The Laboratory should implement a uniform curriculum for examiner training that addresses common issues such as case documentation, report preparation, examiner ethics, and testimony.

(b) The moot courts used in the qualification process should address not only substantive knowledge and presentation skills, but also an examiner's ability to recognize the limits to his or her opinions and expertise.

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[192] See Electronic Communications from Special Projects Section to Laboratory dated 12/10/96 and 2/7/97.

(c) The Laboratory should consider using experienced examiners from other laboratories as participants in moot courts for examiner qualification.

(d) Qualified examiners should participate periodically in exercises simulating court room testimony, both to reevaluate their skills and to provide training demonstrations for less-experienced examiners.

(e) The uniform training curriculum should emphasize that the Laboratory's function is to provide reliable and objective forensic results. The training program should also address the roles and responsibilities of the various Laboratory components and the importance of open communication and cooperation among examiners.

(f) Training curricula for specific units should be clearly stated. Documented completion of the approved curriculum should be required before an examiner issues reports and conclusions. Any departures from the specified curriculum should also be documented and approved by both the unit chief and the SAS chief.

Response: The FBI concurs in all of these recommendations. Many steps have already been taken by the Laboratory to improve its training and examiner qualification program.

As for the first and fifth recommendations, the Laboratory is refining and expanding its preexisting core curriculum for new examiner qualification, which addresses issues common to all forensic disciplines. The newly expanded core curriculum will include, among other things, Laboratory policies and procedures relating to (1) the Laboratory's basic mission of providing objective analysis of evidence based on recognized scientific methods in accordance with either validated protocols or procedures which can otherwise withstand peer review; (2) Laboratory organization and the roles and responsibilities of its various components; (3) evidence response and evidence control; (4) case documentation; (5) report preparation; (6) open communication and cooperation among examiners; (7) scientific dispute resolution procedures; (8) the quality control program; (9) the fundamentals of reliable expert testimony (including the Laboratory's new court testimony policy, detailed below); (10) science and the law; and (11) examiner ethics. The revised core curriculum is being developed by the Forensic Science Training Unit and will be finalized by June 1, 1997.

Concerning the second and third recommendations relating to moot courts, the Laboratory will invite experienced examiners from other laboratories to participate in all future moot courts used to qualify examiners. In addition, the Laboratory will coordinate with the Office of the General Counsel to provide experienced trial lawyers at the moot courts to assist in providing comment and direction on recognizing the limits of an examiner's expertise, when and how it is appropriate for an examiner to act as a summary witness regarding results produced by others in the Laboratory, and the general care and precision with which the examiner's opinions must be stated in response to aggressive questions asked in the pull and tug of the adversarial process.

To address the fourth recommendation, the Laboratory will hold an annual seminar for experienced examiners to update them on new developments in procedure and policy and provide refresher training on courtroom testimony. The seminar will include a featured speaker, such as a Federal district court judge or prosecutor with substantial experience in cases involving testimony by forensic experts. The seminar also will include exercises led by experienced examiners, followed by discussion and critiques. The Laboratory's target date for the first such seminar for experienced examiners is the Fall of 1997.

With respect to the sixth recommendation, over the last several years the Laboratory has sought to clearly define and document examiner progress in the existing training programs of the forensic units. Refinements to these training programs are in progress and will be completed by June 1, 1997. In addition, it is the current policy of the Laboratory that examiners must complete their unit's training program before being qualified, and that only qualified examiners may issue reports and conclusions. Most units already require examiners to sign-off on their training manuals as their training progresses, although this has not been a universal practice. All unit chiefs will now be required to ensure that a new examiner's completion of the unit's training program is documented.

9. Examiner Testimony

The draft report includes the following recommendations:

(a) The Laboratory should include courtroom testimony as part of the uniform training curriculum for new examiners.

(b) The Laboratory should adopt written guidelines concerning examiner testimony. Such guidelines should expressly state that examiners in testifying should: (a) accurately and completely disclose their involvement in the matter; (b) be clear, straightforward, and objective in their answers to questions on direct and cross-examination; (c) limit their conclusions to those that logically follow from the underlying data and analytical results; (d) decline to answer questions beyond their expertise; (e) attempt to avoid phrasing their testimony in an ambiguous or possibly misleading manner; and (f) be accurate and complete in describing the analyses done or conclusions made by others, while remaining careful not to stray beyond their own expertise.

(c) Where it will be necessary for one examiner to testify about work done by others, the Laboratory should attempt prospectively to identify which examiner is best able to address the various matters and to assure that he or she is adequately prepared.

(d) Testimony by examiners should be monitored at least once each year through observation or transcript review by the unit chief or another qualified examiner.

Response: The FBI concurs in all of these recommendations.

A preliminary comment is in order with respect to the OIG's second recommendation relating to guidelines for testimony. It should be emphasized that the principle of providing straightforward, clear and objective testimony within the bounds of one's expertise is not new to the FBI Laboratory and its examiners. The basic testimonial role of a Laboratory examiner is the same as that of any expert witness, *i.e.*, "assisting the trier to understand the problem they are to decide and use discriminating judgment in reaching a decision."[193] The FBI has always recognized that the credibility of its Laboratory examiners relies not only on their vigorous exercise of a scientific ethic in performing objective examinations, but in clearly and impartially testifying to their conclusions based on "facts or data relied upon by experts in the particular field in forming opinions or inferences upon the subject."[194] As noted by one commentator, to be useful and persuasive, an expert's explanation of the techniques and reasoning used in reaching his conclusions must be such that "a juror should be able to say 'My conclusion is in accordance with the opinion of the expert, not because he has expressed the opinion, but because he made me understand the facts in such a way that my opinion is the same as his."[195] In accordance with these fundamental principals of expert testimony, the moot courts that have long been a part of the Laboratory's qualification process have rigorously tested the clarity, precision, logic and objectivity of a new examiner's testimony. The OIG report should acknowledge that these are not new concepts to the Laboratory. To suggest otherwise is unfair and inaccurate.

The nature of the adversarial process is such that the party sponsoring an examiner's testimony will naturally attempt to present the examiner's opinions in a manner which best supports that party's position. At the same time, cross-examination has played, and will continue to play, an important role in checking the reliability of the testimony of experienced examiners. Overstated, incomplete, inaccurate, ambiguous, or unsupported testimony by examiners is subject to attack on cross-examination or rebuttal by opposing experts.[196] To

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[193] Ladd, Expert Testimony, 5 Vand. L. Rev. 414, 429 (1952).

[194] See Fed. R. Evid. 703, and Advisory Committee Notes thereto.

[195] Ladd, "Expert Testimony," 5 Vand. Law Rev. at 428.

[196] One commentator lists the following points for testing an expert upon cross-examination:

> The cross-examination of skilled and expert witnesses, if undertaken, should be directed to: (a) showing a lack of qualification, (b) a motivating interest, (c) error in the observed or assumed facts, (d) error in conclusions or opinions, (e) specific impeachment, *i.e.*, previous contradictory or inconsistent statements or writings, or lack of general credibility. Unless a cross-examination can be effectively directed to one of these objectives, it should not be undertaken.

Busch, Law and Tactics in Jury Trials 633, 635 (1949).

maintain their objectivity and credibility, however, Laboratory examiners must ensure that their responses to questions on both direct and cross-examination are not overstated or misleading and are supported by facts and data of the type reasonably relied upon by experts in the field.

In order to reinforce these principals in all of its examiners, the Laboratory has adopted a Courtroom Testimony Policy which codifies the guidelines suggested in the second recommendation. The policy incorporates all of the guidelines for examiner testimony suggested in the items (a) through (e) of the recommendation.[197] The Policy is more restrictive, however, concerning an examiner's description of the analyses and conclusions of others (item (f) of the second recommendation). The OIG suggests that examiners should "be accurate and complete in describing the analyses done or conclusions made by others, while remaining careful not to stray beyond their own expertise." On this point, the Laboratory policy states that examiners should "avoid describing the analyses or conclusions of others, particularly when the discussion is outside the discipline or expertise of the employee."[198] The policy then goes on to state that if instructed by the court to answer questions about the work performed by others, the examiner:

> should begin by indicating he/she did not perform the examination(s) under discussion, or he/she lacks the qualifications to provide that kind of testimony if outside the examiner's discipline. If instructed by the judge, it is permissible to read the report prepared by another into the record. If it becomes necessary to testify about the work performed by others, the examiner (employee) should be one who is qualified in that discipline. If an examiner (employee) is assigned to handle the testimony for another examiner, the new examiner should have access to notes, charts, tests, reports, and any other material relevant to the case.[199]

This restrictive policy concerning testimony about the work of others supports the third recommendation. Knowing that examiners must be qualified in the relevant discipline before they may testify about the analyses and conclusions of others, the coordinating examiner will be required to determine before trial, in consultation with the prosecutor, which examiner or examiners will be best able to testify in order to present all the required elements of the forensic analyses performed in a particular case.

With respect to the first recommendation, as noted above, courtroom testimony is a key part of the core curriculum being developed for new examiners and will train future examiners in the Courtroom Testimony Policy. In addition, moot court training in a

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[197] See Electronic Communication, dated 2/6/97, to the Laboratory Division from Donald W. Thompson, Jr., entitled, "Court Testimony and Court Testimony Monitoring Policy."

[198] Id. at 1.

[199] Id. at 2.

substantive discipline will now include detailed training on the testimony policy. Finally, the annual seminar for the Laboratory's experienced examiners, described above, will include refresher training on courtroom testimony.

The Laboratory has amended its policy with respect to court testimony monitoring in a manner that satisfies the fourth recommendation. Unit Chiefs are now required to monitor an examiner's courtroom testimony at least once per calendar year by either direct observation (in person or by videotape) or by obtaining and reviewing an official written transcript.[200] If the monitoring is done by transcript review, the issues of demeanor, appearance and conduct will be monitored through either written or telephonic evaluations provided by court officials.[201] In addition, the Laboratory has taken the added step of requiring that the testimony review include a finding that the examiner's testimony remained within the bounds of his/her discipline or area of expertise.[202]

10. Protocols

The draft report includes the following recommendations:

(a) The Laboratory should complete the preparation of written protocols that is under way as part of the accreditation process.

(b) Through an effective program of file review, the Laboratory should assure that the authorized protocols are followed in practice.

Response: The FBI concurs in these recommendations. With respect to the first recommendation, the Laboratory is currently refining its existing protocols and writing previously undocumented protocols. This process should be completed by June 1, 1997. This will include the preparation of protocols in areas which are not subject to ASCLD/LAB inspection and accreditation.

It should be noted that our concurrence on this point should not be read to imply that the Laboratory has not previously established and followed validated protocols in its various forensic disciplines. The use of established methods and procedures for analyzing evidence is and has been the general policy and practice of the Laboratory. In some cases, examiners may determine that a departure from an established protocol is appropriate or the development of a new analytical method is in order to perform an accurate and informed analysis of the evidence. Such departures from established protocols must be scientifically

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200 Id.

201 Id.

202 Id.

justifiable and documented with enough specificity so that another examiner can determine from a review of the records what was done and why.

With respect to the second recommendation, all cases are now being technically reviewed before examiner reports are formally issued. In addition, as noted above, the Laboratory plans to have the Quality Assurance Unit create an internal audit group. This group will be made up of qualified personnel who will be responsible for conducting an independent review of a statistically representative sampling of closed cases, from their inception through their final disposition.

11. Evidence Handling

The draft report includes the following recommendations:

(a) The Laboratory should continue to refine its written procedures for handling evidence and for avoiding contamination.

(b) Concerns for the appropriate handling of evidence and prevention of contamination should be incorporated into the design of the proposed new Laboratory facility.

(c) The Laboratory should support continuing efforts to address contamination issues. Examiners and technicians in the Explosives Unit should receive focused training on this topic. Knowledge of contamination issues should be addressed in the training, qualification, and periodic review of all Laboratory examiners.

Response: The FBI concurs in these recommendations. With respect to the first recommendation, the Laboratory issued an Evidence Control Policy in November 1996 which expanded and clarified prior policy in this area. The policy requires the processing of all evidence under sufficient controls to ensure and document the integrity of the evidence at all times while it is in the possession of the FBI Laboratory. Under the policy, the Evidence Control Center is responsible for receiving physical evidence and distributing it to units as assigned. The policy specifies procedures covering all stages of the handling of evidence by the Laboratory, including receipt of evidence, receipt of damaged or non-compliant submissions, sealing and labeling of evidence, chain of custody, transfers of evidence, storage of evidence, and return of evidence.

With respect to the second recommendation, we note that evidence handling and contamination avoidance is a high priority in the design of the new FBI Laboratory.

With respect to the third recommendation, we also note that evidence control is a part of the core curriculum for new examiners and new developments on this issue will be part of the annual seminar for experienced examiners. Moreover, greater collaboration between the Explosives Unit and the Chemistry Unit has already taken place on the issue of

contamination avoidance. Finally, as discussed above, steps are being taken to expeditiously increase the physical space available in the current Laboratory in order to reduce the potential for cross-contamination.

12. The Role of Management

The draft report includes the following recommendations:

(a) The Laboratory Director and others with significant management responsibilities in the Laboratory should have scientific backgrounds, preferably in forensic sciences. Such persons must also be strongly committed to advancing the Laboratory's quality assurance program and to effective and responsive management.

(b) Management should strongly reaffirm that the Laboratory's primary function is providing reliable and objective forensic results.

(c) Management should seek to cultivate among examiners and other Laboratory personnel a stronger attitude of cooperation and commitment to objective inquiry.

(d) The Quality Assurance Unit (QAU) should be physically located where the Laboratory's forensic work is primarily conducted, and the person in charge of the QAU should report directly to the Laboratory Director.

(e) Management should promote more interaction with other laboratories through such things as technical working groups, and in appropriate cases, FBI examiners consulting with scientists from other laboratories.

(f) In responding to concerns about the quality of the Laboratory's work, management must assure that issues are investigated promptly and thoroughly, that the investigation is conducted appropriately by qualified persons, and that any necessary corrective steps are taken. Disagreements about methodology or the interpretation of data must be resolved professionally based on pertinent scientific knowledge and the resolution must be clearly communicated to those involved.

Response: The FBI concurs in the recommendation that those with significant management responsibilities in the Laboratory have scientific backgrounds. The FBI is initiating a search for a new Assistant Director (AD) to lead the FBI Laboratory. That search will encompass individuals outside the FBI and among the principal qualifications for the position will be an outstanding academic and practical background in forensic science and a reputation for excellence in the forensic community. A strong commitment to quality assurance will be expected of the new AD.

In addition, the Laboratory is creating the new position of Deputy Assistant Director (DAD) for Science and Operations. The new DAD must also possess outstanding scientific credentials and extensive experience in the practice of forensic science. In close collaboration with the AD, the DAD for Science and Operations will spearhead the Laboratory's quality assurance programs and accreditation process. Consistent with the fourth recommendation, the Quality Assurance Unit will be transferred to the Laboratory Division's Front Office and report to the new DAD for Science and Operations. This measure will affirm and emphasize to Laboratory personnel that the management is fully committed to quality assurance and is taking aggressive steps to ensure that quality assurance procedures and policies are vigorously followed in practice.

The Laboratory is also taking steps to establish four supergrade level scientist positions in the areas of biological sciences, chemical sciences, physical/materials sciences, and computer/information sciences. These individuals will have management responsibilities that include special problem solving, scientific and technical advancement, liaison with the relevant scientific communities, and, most importantly, quality assurance of the scientific practices in the Laboratory.

With respect to the sixth recommendation, as discussed above, a Scientific Dispute Resolution process has been established to deal with disagreements about methodology or the interpretation of data. Concerns raised about the quality of the Laboratory's work will be promptly investigated by the Quality Assurance Unit under the supervision of the new DAD for Science and Operations and, when appropriate, corrective steps will be taken.

Consistent with the second and third recommendations, the Laboratory management has and will continue to emphasize and communicate a steadfast commitment to its recently articulated core values of integrity, excellence, responsibility, respect, teamwork and growth.[203] The core value of "integrity" is defined as "The Laboratory serves justice and pursues truth by ensuring its work is ethical, lawful, objective, and credible." The core value of "excellence" is defined as "The Laboratory provides products and services of the highest quality through a personal commitment to hard work, accuracy, thoroughness, and timeliness." The Laboratory will reinforce these core values in its employees through regular staff conferences and seminars and appropriate communications.

Finally, consistent with the fifth recommendation, the Laboratory has and will continue to interact with other laboratories both on specific cases and in technical working groups and professional organizations studying broader questions. The Laboratory recognizes the value of seeking outside expertise and capabilities to assist it in problem-solving in complex cases. This was done in the UNABOMB, OKBOMB and TWA 800 investigations, and assistance was sought from and provided by the Oakridge National

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[203] See 11/21/96 communication to All Laboratory Employees, from Don Thompson, Acting Assistant Director, Laboratory Division, enclosing "FBI Laboratory Core Values."

Laboratory and Sandia National Laboratory. In addition, as detailed in the conclusion below, the Laboratory is keeping current with, and advancing, developments in various fields of forensic science by initiating technical working groups and maintaining a regular liaison with professional groups such as ASCLD and the American Academy of Forensic Science.

B. FBI Request to the OIG for Further Inspection

The FBI remains firmly committed to enhancing the quality of its Laboratory, and we are grateful that the OIG has dedicated significant resources and time to this inspection. The FBI requests 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 OIG draft report.

IV. CONCLUSION

The OIG has made a number of valuable recommendations for improving the FBI Laboratory. The FBI concurs in most of those recommendations, and has already implemented a large number of them. In addition, the FBI has initiated a number of other efforts to improve the Laboratory's responsiveness and effectiveness. Those efforts include:

- Creating an Evidence Response Team (ERT) Unit, with responsibilities at every Field Office, in order to expand the number of personnel who are fully trained and equipped to handle the identification, collection, and preservation of evidence at crime scenes.

- With others in the scientific community, developing technical working groups in various forensic disciplines to develop and standardize protocols and analytical practices. These working groups consist of experts in scientific disciplines from both inside and outside the FBI. For example, technical working groups for DNA, Latent Fingerprints and paints, polymers and fibers have been formed and have already resulted in improved procedures and practices. Additional working groups are being planned in connection with the analysis of shoe prints, handwriting, and tire treads.

- Forming a technical working group for bombing and explosives analysis. The group will include world-class explosive and forensic bombing experts from several international laboratories, as well as labs in the United States.

- Initiating communications with relevant sectors of the Federal scientific community (*e.g.*, Department of Energy, Department of Defense and Environmental Protection Agency) to improve and share information regarding forensic applications, the transfer of technology, research and development, and specialized training.

- Forming and strengthening a Quality Assurance Unit to implement its Quality Assurance Program and assist the Laboratory in obtaining accreditation.

- Dedicating $30 million to modernizing laboratory equipment and instrumentation. Significant funding has been obtained to enhance the following programs: the ERT, the Computer Analysis and Response Team (forensic electronic media analysis), the Bomb Data Center (bomb technician and investigator training), and the Hazardous Materials Response Unit (response to and analysis of the illicit use of dangerous biological, chemical and nuclear materials).

- Enhancing the educational opportunities for laboratory personnel by reestablishing a partnership with the George Washington University for a Master of Science Program.

Many of the OIG's suggestions reflect the criteria for accreditation by ASCLD/LAB. While such accreditation is by no means required of any forensic laboratory, the FBI believes that the ASCLD/LAB standards provide a useful basis to measure the performance of its Laboratory. Thus, the Bureau intends to have all of the components of the Laboratory comply with ASCLD/LAB standards by October 1, 1997, even if formal accreditation is not available in a particular forensic discipline.[204]

The FBI remains very proud of its Laboratory and the dedicated men and women who serve it. A commitment to quality has always been a central part of their values and mission. The OIG has identified several areas where improvement is needed, and the FBI has and will seriously consider all of its comments. It is important to emphasize, however, that the OIG has also praised the Laboratory's forensic services, stating that in the three units that were the subject of inquiry, as well as the rest of the Laboratory, some "very impressive" forensic work was observed.[205] The FBI remains committed to continuing that work and maintaining the premier criminal investigative Laboratory in the world, while performing its duties with the highest scientific and ethical standards.

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[204] See Memorandum to Mr. Ahlerich from R.S. Murch dated 10/2/95 (requesting that the EU be included in the Laboratory's accreditation process).

[205] Part Two at 1; Part Eight (Conclusion).

RESPONSE BY:

(March 24, 1997)

FEDERAL BUREAU OF INVESTIGATION TO SECTION H11: HIGGINS' ALLEGED ALTERATION OF DICTATION

II. COMMENTS ON THE OIG'S FINDINGS AND RECOMMENDATIONS CONCERNING INDIVIDUALS

D. Other Individuals

7. Wallace Higgins

During the period January 10, 1991 to May 9, 1994, Wallace Higgins was the principal examiner (PE) in 51 cases in which Whitehurst conducted examinations as an auxiliary examiner (AE). According to the OIG's draft report, in 14 of these 51 laboratory cases, "Higgins prepared laboratory reports that contained material changes to the meaning of Whitehurst's dictations without Whitehurst's authorization."[1] We contest the draft report's conclusions as to Higgins' alteration of Whitehurst's dictation in the respects and for the reasons set forth below.

We also contest the draft report's conclusion that "Higgins should be reassigned to a component of the FBI outside the Laboratory."[2] It is unclear whether this conclusion is based solely on the OIG's prior recommendation as to the reconfiguration of the Explosives Unit[3] or whether it is based in part on the findings as to Higgins' alleged alteration of AE dictation. To the extent that this recommendation reflects adverse findings as to the alteration of dictation, we request that it be reconsidered in light of the comments herein.

In addition to revising the OIG's findings as indicated, we request that the reference to Higgins' termination of the first interview and compulsion to participate in a second interview be deleted from the report.[4] It is inappropriate to comment upon the fact that Higgins chose to exercise a right which the OIG afforded him. Inclusion of this information

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[1] Part Three, Section H11 at 23. The draft also indicates that the OIG cannot assess whether Whitehurst's AE dictation was revised in ten additional cases because the signed AE dictation was not in the file and, consequently, the AE dictation cannot be compared with the Laboratory report prepared by the PE. Part Three, Section H11 at 5. We note that Higgins was not the PE with respect to one of these reports (Report No. 51). In that case, Whitehurst's AE dictation erroneously indicates that the PE was Higgins, when in fact the PE in this case was Dave Williams and Higgins had no role in the case. Williams failed to detect this error, and the Laboratory report reflects the PE as Higgins (whose symbol is "ZL") and the AE as Williams (whose symbol is "YR"), omitting reference to the role of Whitehurst (whose symbol is "YB") as AE. Since Higgins was uninvolved in this case, this Laboratory report should be deleted from the ten reports by Higgins which are at issue.

[2] March 14, 1997, Insert to Part Five at 2.

[3] Part Six at 5-10.

[4] Part Three, Section H11 at 1.

in the report can only be intended to telegraph to the reader that Higgins' statements to the OIG are in some way tainted, an improper implication under these circumstances.

We also note that on numerous occasions the OIG acknowledges that its determination as to whether Whitehurst authorized Higgins' modifications of Laboratory reports relies on the relative credibility of the two examiners.[5] In addressing whether Whitehurst's or Higgins' version of a given event is more believable, the OIG determines that Whitehurst's version must be credited and Higgins' account must be in error based upon a blanket assumption the OIG has apparently made as to relative credibility. This is even true where circumstances clearly indicate that Higgins is more likely to be correct. We believe that assumption is flawed for several reasons.

First, the OIG has previously found that Whitehurst has made "numerous serious allegations that are not factually supportable,"[6] including allegations of perjury, fabrication of evidence, and improper circumvention of Laboratory protocols.[7] The OIG has also found that Whitehurst "has demonstrated poor judgment in several matters;" has "failed adequately to review his own work and otherwise acted unprofessionally;" has faulted others for drawing conclusions based on insufficient evidence while, "[i]ronically, he has exhibited that same fault in many of the accusations he has made against others in the Laboratory;"[8] and, with respect to Avianca, misstated a conversation on a material point, rendered a misleading and overstated opinion and raised the serious issue of contamination in the absence of any evidence.[9] The draft report concluded that Whitehurst "appears to lack the judgment and common sense necessary for a forensic examiner, notwithstanding his own stated commitment to objective and valid scientific analysis."[10] Given these findings, it is unclear why the OIG repeatedly credits Whitehurst's version of events over Higgins'.[11]

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[5] Part Three, Section H11 at 7, 8, 11, 13, 14, 15, 19, 20, 21, and 22.

[6] Part Five at 33.

[7] Id.

[8] Id. at 35.

[9] Id. at 34-35.

[10] Id. at 36.

[11] This is particularly true given that there is no evidence, and the OIG does not find, that any revisions Higgins may have made biased any reports or reflect any improper motive. To the contrary, the OIG specifically finds that "the evidence did not support the conclusion that Higgins intentionally altered Whitehurst's reports to bias the dictations in favor of the prosecution." March 14, 1997, Insert to Part Five at 1.

Second, it appears from our review of the draft report concerning Higgins' alleged alteration of Whitehurst's dictation that the OIG bases its findings in substantial part on Whitehurst's often stated claim that if he agreed to any changes to his AE dictation he would edit the dictations on his computer and reissue the dictations to his unit chief for approval,[12] even if these changes were minor and nonsubstantive.[13] As indicated by the draft report, however, Whitehurst did not follow that procedure in every instance. In one case (Report No. 2 on the OIG's chart) Whitehurst compared his computer-generated dictation with the Laboratory report and concluded that Higgins had inappropriately added a word to the dictation; in fact, Whitehurst had added and initialed the word in his own handwriting.[14] Contrary to Whitehurst's assertions to the OIG, he did not subsequently revise this dictation on his computer.

Similarly, with respect to Report No. 31, the draft report found that "Whitehurst . . . agree[d] to omit a . . . sentence from this dictation, which he crossed out and initialed."[15] As with Report No. 2, no revised dictation was created on his computer.

Additionally, it has been established to our satisfaction, and we believe to the satisfaction of the OIG, that Whitehurst added two paragraphs to his AE dictation underlying Report No. 37, although neither his initials nor the date on the dictation evidence that Whitehurst made these changes. This is a third circumstance in which Whitehurst revised his dictation but did not seek unit chief approval for the revision.[16]

Although apparently fully aware of the importance of this matter to the OIG's investigation, Whitehurst asserted that he would invariably revise AE dictation on his computer, print the revised version, and submit the revised copy to his unit chief for approval. In at least three cases, he did not. This should bear at least as much weight in the

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[12] Part Three, Section H11 at 3 and 6.

[13] Id. at 3 and 6.

[14] Part Three, Section H11 at 3 n.3.

[15] Part Three, Section H11 at 13 n.11.

[16] Laboratory Report No. 25 presents another example of Whitehurst's failure to revise dictation on his computer when he authorized changes orally. Although not addressed in the OIG's draft because the signed AE dictation underlying this report was unavailable for review, we note that Laboratory Report No. 25 contains the sentence, "This type of material has not been analyzed by this examiner in the past," whereas this sentence does not appear on Whitehurst's computer-generated AE dictation. Higgins assures us that he did not add this sentence. We find this assurance credible given the fact that the only information contained in the Laboratory report is drawn from Whitehurst's AE dictation, and Higgins would not have been able to characterize Whitehurst's past experience. Consequently, even in the absence of the missing signed AE dictation, this is apparently a third example of a circumstance in which Whitehurst failed to revise his AE dictation on his computer, print the new version, and seek unit chief approval of the revision.

OIG's assessment of credibility as Higgins' inability to recall minor events which occurred between three and six years ago.

OIG Finding: *Higgins prepared 14 laboratory reports that contained material changes to the meaning of Whitehurst's dictations without Whitehurst's authorization.*

Response: As conceded in the draft report, Laboratory policy during the period involved did not require PE Higgins to obtain written authorization from AE Whitehurst when they jointly agreed to revise Whitehurst's AE dictation. Nonetheless, the OIG finds that, in all 14 of the cases in which the OIG concludes a substantive change was made, Whitehurst's assertion that he did not authorize the change orally is credible and Higgins' position that he would not have made a substantive change in the absence of Whitehurst's oral approval is unbelievable. With respect to 12 of the 14 reports at issue, we believe that this conclusion is insupportable and must be revised, as discussed below. Consequently, we request that the OIG reevaluate both its individual determinations as to these reports and its conclusion that Higgins inappropriately revised Whitehurst's AE dictation in a significant number of reports.

• ***Report No. 16.*** Whitehurst's AE dictation indicates the results of "preliminary" analysis of a specimen, whereas Higgins' Laboratory report does not reflect this analysis as preliminary. The OIG finds, and Higgins agrees, that omission of the word "preliminary" is a substantive change. The OIG does not, however, indicate why it rejects Higgins' assertion that he would not have made this change without consulting Whitehurst. According to the draft report, "Whitehurst reviewed the official case file and found no evidence that he had agreed to remove the word 'preliminary.'"[17] However, the absence of evidence of an oral agreement is inconsequential because no such evidence was required at that time. While Whitehurst may only have reached "preliminary" conclusions when he drafted his November 13, 1990, AE dictation, he likely would have finalized these conclusions by the time Higgins drafted the January 10, 1991, final report. Furthermore, Higgins has advised us that he would not have deleted the word "preliminary" unless this was the case. We believe that it is unfair to conclude that Higgins lacks credibility in this regard without determining from Whitehurst whether, or when, he satisfied his obligation to finalize his conclusions. We request that the OIG do so before reaching any final conclusions in this regard.

• ***Report No. 17.*** In this case, Higgins' Laboratory report predates Whitehurst's AE dictation by 20 days. While neither Higgins nor Whitehurst was able to explain that circumstance to the OIG, Higgins has indicated that the Laboratory would not have reported conclusions concerning the main charge if Whitehurst had not advised him of these conclusions orally. Whitehurst has only indicated that he "doubts" that this occurred rather than recalling that it did not. Under these circumstances, the most likely explanation appears to be that Whitehurst provided a timely oral report and then altered this report when he later

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[17] Part Three, Section H11 at 8 (emphasis added).

documented it; any other conclusion is not supported by the draft report. In any event, the OIG cannot possibly conclude that Higgins altered Whitehurst's dictation when Whitehurst's dictation had not even been prepared at the time of Higgins' report.

• ***Report No. 20.*** We contest two aspects of the OIG's findings with respect to this Laboratory report.

First, we disagree with the OIG's conclusion that Higgins "misreported Whitehurst's findings" by adding information to the Laboratory report which was not included in Whitehurst's AE dictation.[18] Whitehurst's dictation with respect to analysis of K1 and K2 reads as follows:

> The results of these analysis [of specimens K1 and K2] are consistent with the presence of a mixture of aluminum powder, sulfur and potassium perchlorate. The combination of these materials form a low explosive/energetic mixture generally referred to as flash powder.

Contrary to the OIG's finding, Higgins did not "misreport" these findings in any way; they were reported verbatim in the Laboratory report. Higgins added to this analysis the following:

> The two items in specimen K1 contained approximately 45.4 grams and 41.9 grams of flash powder.
>
> The two items in specimen K2 contained approximately 3.7 grams and 4.3 grams of flash powder.

It is the PE's obligation to seek input from AEs with respect to all matters the PE believes should be addressed in analyzing the evidence at issue. A qualified explosives examiner such as Higgins can identify a substance generically termed "flash powder" without any chemical analysis based upon its physical characteristics, its dynamic response to the application of heat, spark, friction, or shock, and the circumstances of its seizure. The term "flash powder" is a descriptive label, rather than a designation for a unique chemical mixture, much like "salt" is a descriptive label for a family of chemicals which may include sodium chloride, potassium chloride, or other similar materials. Both flash powder and salt can be identified by those familiar with them even without knowing their precise chemical compositions. Consequently, even in the absence of Whitehurst's chemical analyses of K1

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[18] The draft report also erroneously refers to this addition as "changes" to and "alterations" of Whitehurst's dictation on several occasions. Part Three, Section H11 at 10. We request that all of these references be corrected to indicate that the Laboratory report contained information in addition to that provided by Whitehurst (as is the PE's responsibility), but did not in any way "change" or "alter" the AE dictation.

and K2, Higgins' reference to these specimens as flash powder in recording their weights, which he determined himself, was entirely appropriate. The fact that Higgins also asked an AE to perform chemical analysis so that he could include the chemical composition in his report does not diminish his own qualification and authority to identify this substance as "flash powder."

Second, the OIG indicates that "this is only one of several cases involving selective omission of Whitehurst's forensic opinion."[19] Of the cases in which the OIG has identified erroneous omissions, we believe the evidence available at this time supports the propriety of these omissions in all but one case.[20] We also believe that the OIG's characterization of these omissions as "selective" is misleading. Although we agree that certain material was omitted in order to ensure that the Laboratory report was clear, unambiguous, and defensible, there is no basis to conclude that those omissions constituted an attempt to manipulate the forensic analysis. In the absence of some evidence of an improper motive, which the OIG has not found, we request that the OIG delete the term "selective."

• ***Report No. 22.*** The underscored language from Whitehurst's AE dictation was omitted from the Laboratory report in this case:

> The results of the analyses are consistent with the presence of residues of double-based smokeless powder.
>
> It is the opinion of this examiner that the energetic material utilized in specimens Q1 and Q2 was at least in part double based smokeless powder.

Higgins advised the OIG that he did not believe this omission was substantial because Whitehurst had said the same thing in the prior sentence. Whitehurst indicated that this sentence was critical because it indicates that the chemical analysis could not exclude the possibility that other materials were present before the explosion. We disagree with the OIG's conclusion that Higgins erred in omitting this language. The term "consistent with" is specifically used to indicate that other results are possible and that additional substances may be present, but that these results or substances were not noted in the examinations reported. Having used that limited term, Whitehurst should not have added the underscored sentence, which appears to take a stronger position (the specimen is, at least in part, smokeless powder, rather than that it merely may be smokeless powder). Higgins properly omitted a statement by Whitehurst that did not appear to be supported by the evidence.

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[19] Part Three, Section H11 at 11.

[20] We are unable to ascertain at this time the circumstances of the omission in Report No. 20.

• ***Report No. 30.*** With respect to this report, the OIG faults Higgins for reporting "a more positive identification of explosive material than authorized by Whitehurst"[21] by adding Higgins' own conclusion regarding a potential source of the explosive at issue. While we do not disagree that the report could have been clearer by indicating the basis for Higgins' conclusion and including that conclusion under a separate heading, we contest the OIG's finding that Higgins' expression of his own conclusion in his Laboratory report somehow constitutes an "alteration" of Whitehurst's AE dictation. Higgins' sentence was included as a completely separate paragraph and was not incorporated into the AE dictation. We suggest that if the OIG believes the format of the Laboratory report warrants comment, it should indicate clearly that its criticism is one of format rather than one of "alteration of dictation."

• ***Report No. 31.*** According to the draft report, "[w]ith respect to Report No. 31, Higgins again prepared a report that excluded a sentence expressing Whitehurst's forensic opinion."[22] Contrary to the OIG's finding, however, the Laboratory report does contain the sentence expressing Whitehurst's forensic opinion at the top of page 3 in the exact sequence as it appears in Whitehurst's AE report.[23] Accordingly, we request that the OIG delete this criticism of Higgins. In addition, because the OIG has erroneously cited this as an example of "repeated and selective omissions"[24] by Higgins, we request that the OIG reevaluate the finding that there were such omissions and delete that finding as overly broad.

• ***Report No. 35.*** Higgins omitted the underscored language from Whitehurst's AE dictation in this case:

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[21] Part Three, Section H11 at 11.

[22] Part Three, Section H11 at 13.

[23] Our records indicate that we furnished to the OIG a copy of this Laboratory report on August 2, 1996. Our records further indicate that a complete copy of the file, including a second copy of the PE's report (excluding the AE dictation) was provided on November 13, 1996, and a copy of the AE dictation was provided on February 5, 1997 (the cover letter documenting the February 5th provision of this information is dated February 7, 1997; we elected to provide the material as quickly as possible in order to avoid the delay that would have occurred if we waited until we had prepared the cover letter).

[24] Part Three, Section H11 at 13. In this case, as in others, Higgins advised the OIG that, although the sentence may have been inadvertently omitted by a secretary, he would have consulted Whitehurst before intentionally omitting a sentence from the AE dictation, and Whitehurst contends that he did not concur in the omission. Given this discrepancy, the OIG finds that Higgins cannot be believed: "Again, given the repeated and selective omission of such opinion sentences from Whitehurst's dictations, . . . it is unlikely that anyone inadvertently omitted this sentence." Id. We do not agree that there is a pattern of "repeated and selective omission" from Whitehurst's dictations, and we find this conclusion to be both an inaccurate overstatement and an improper basis for concluding that error was committed.

> These analyses identified the presence of Pyrodex propellant in specimen Q5. The results of analyses of material on specimen Q2 are consistent with the presence of residues of Pyrodex propellant.
>
> It is the opinion of this examiner that the energetic material originally found in specimens Q2 and Q5 consisted in part of [P]yrodex propellant.

The OIG concluded that Higgins erred in failing to reproduce Whitehurst's AE dictation as written. We believe Higgins' deletion was appropriate for the following reasons. First, the underscored language was properly omitted from the Laboratory report because it is redundant with the preceding paragraph. Additionally, deletion of this sentence was appropriate because, although technically consistent with the prior paragraph, the sentence may lead the reader to believe that both Q2 and Q5 consist "in part" of Pyrodex, whereas Whitehurst indicates that he has "identified the presence of Pyrodex" only in specimen Q5.[25]

- ***Report No. 36.*** Higgins advised the OIG that he had asked his Unit Chief, James C. (Chris) Ronay, to review this report because he believed Whitehurst was making statements which were outside his area of expertise. Neither Higgins nor Ronay recall the circumstances under which the underscored language was omitted from the Laboratory report.

> The presence of chloride, nitrite, nitrate, sulfate and carbonate ion in the explosive residues is consistent with residues of smokeless powders, nitrate/sulfur/hydrocarbon energetic mixtures and also with naturally occurring materials. The relatively large abundance of carbonate in the residues is also consistent with the use of a hydrocarbon based, nonefficient energetic mixture. Such mixture might include improvised explosive components which were combined in improper ratios leading to inefficient reaction. When such inefficient energetic materials are initiated, the post initiation residues normally contain unreacted hydrocarbon fuels such as sugar, vaseline or charcoal. Microscopic examination did not reveal any of these materials on the specimens examined but their absence does not preclude their having been there in the original energetic mixture.[26]

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[25] Although the composition of Q2 is "consistent with" Pyrodex, it may clearly be composed, instead, of materials similar to Pyrodex.

[26] Part Three, Section H11 at 16.

Ronay informed the OIG that he did not believe the omission of this portion was a "substantial" change. The OIG nonetheless concludes that this omission is "substantive."[27] Although the OIG does not specifically find that Higgins inappropriately omitted this language from the Laboratory report, it appears from the OIG's disagreement with Ronay that this conclusion may have been drawn. To the extent that this is the case, we disagree.

Contrary to the OIG's conclusion, although commentary regarding the results of inefficient energetic mixtures might be interesting, such commentary would introduce issues irrelevant to the forensic analysis being performed and thus potentially cause confusion about the nature of that analysis. The word "substantial" is defined in relevant part as "material," "being of considerable importance, value. . . ."[28] The underscored language is not "material" to a determination of the explosive's composition. The OIG acknowledges that this language is "somewhat speculative,"[29] but it concludes that "this information [is] potentially useful to the requesting agency."[30] We disagree.

Instead of being instructive, the inclusion of such speculation may instead so mislead the requesting agency that important leads are overlooked or inappropriately discounted. Whitehurst's statement regarding the "normal" contents of post-initiation residues constitutes gratuitous comment that has no place in a report of forensic examination. Further, Whitehurst's statement that he found no evidence of particular substances on the specimens, but that they may nonetheless have been present originally, does not add to his analysis. Under these circumstances, we believe that Higgins' omission of this language was both appropriate and necessary to fulfill his obligation to ensure that the Laboratory report was unambiguous, clear, and defensible.

We also note that, with respect to both this omission and a second omission discussed in the draft report,[31] the OIG does not specifically conclude that Higgins erred in omitting this language, apparently because Ronay's possible role in omitting the language is unclear. This is significant both because the Laboratory report clearly cannot be found to be among the "several" cases in which the OIG finds that Higgins made "repeated and selective omissions,"[32] and because this report must be omitted from among the cases in which the OIG found that Higgins erred.

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[27] Part Three, Section H11 at 17.

[28] Webster's II New Riverside University Dictionary (1994) at 1155.

[29] Part Three, Section H11 at 17.

[30] Id.

[31] Part Three, Section H11 at 17.

[32] Part Three, Section H11 at 11.

• ***Report No. 37.*** With respect to this report, the OIG finds that "Higgins added a sentence concerning the absence of accelerants to Whitehurst's dictation, although Whitehurst did not perform any accelerant examination.[33] It does appear that Whitehurst and Higgins may have had a "miscommunication," as the draft report suggests,[34] but it is not accurate to characterize the result of this possible miscommunication as an alteration of Whitehurst's dictation. Whitehurst's dictation is reported in the Laboratory report substantially verbatim.[35] Consequently, we request that the OIG revise this finding and omit this report from among those in which it has determined that Higgins altered Whitehurst's dictation.

• ***Report No. 42.*** The OIG finds that, whereas Whitehurst's AE dictation indicates only that the main charge "consists of approximately 94% RDX high explosive," the Laboratory report states that the main charge "consists of approximately 94% RDX and 6% binders."[36] Although the draft report does not indicate Higgins' position as to this addition, he has insisted that he would not have made such an addition in the absence of express authority from Whitehurst because he would have had no basis on which to suspect that this remaining substance would be binders. We find it noteworthy that in this case, and it appears only in this case, Whitehurst indicated that this modification of his dictation was "not that big a deal."[37] Higgins has assured us that he is certain that he did not, and would not, have made such an addition in the absence of Whitehurst's authorization. The OIG may have found it to be mere coincidence that in an instance in which Higgins vehemently denies making an addition without Whitehurst's authorization, Whitehurst finds the addition to be inconsequential. We are not persuaded, however, that this is a mere coincidence. Accordingly, we request that the OIG reevaluate its findings with respect to this case.

• ***Report No. 46.*** According to the draft report provided to the FBI on January 21, 1997, Whitehurst has apparently alleged on at least 15 different occasions that at least four different examiners have rendered opinions outside their areas of expertise. Ironically, this case represents an instance in which Whitehurst himself attempted to render an opinion outside his area of expertise. Not only have we concurred in the OIG's recommendation that our procedures ensure that examiners do not render opinions outside their expertise, in this case the procedures already in place to prevent such an occurrence worked as designed.

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[33] Part Three, Section H11 at 18.

[34] Id. at 19.

[35] Whitehurst's dictation is restated verbatim in the Laboratory report with the following exceptions: a comma was omitted following "(EDGN)" on page 3 of the Laboratory report; Higgins revised "explosives materials" (emphasis added) to read "explosive materials" in the first paragraph of page 4; Higgins converted serial commas to serial semicolons in the same paragraph; and Higgins added the word "that" in the same paragraph in an apparent attempt to improve the readability of the paragraph.

[36] Part Three, Section H11 at 19 (emphasis added).

[37] Part Three, Section H11 at 19.

In addition to documenting the chemical analyses he is qualified to perform, Whitehurst's AE dictation discusses the construction of the explosive device. While Whitehurst may well have learned a great deal regarding explosive devices from his work with the Explosives Unit, just as Explosives Unit examiners learned a great deal about the chemistry and physics involved in explosives from the Materials Analysis Unit, Whitehurst is not qualified to render an expert opinion with respect to the construction of an explosive device. It was, therefore, both appropriate and consistent with the admonitions contained in the OIG's January 1997 draft report to rephrase this comment so that the expert in this area, Higgins, was confident in its accuracy.[38] Accordingly, we suggest that the OIG reconsider its finding that Higgins inappropriately altered Whitehurst's dictation with respect to this report.

- ***Report No. 47.*** As discussed with respect to Report No. 46, the language omitted from the Laboratory report in this case again reflects analysis outside Whitehurst's area of expertise. We believe this constitutes another instance in which the procedures then in place to prevent improperly rendered opinions worked as designed. Under these circumstances, we suggest that the OIG also reconsider its finding that Higgins inappropriately omitted language from the Laboratory report.

CONCLUSION

Notwithstanding the many respects in which we request reconsideration and revision of the draft report, we believe that the "remedial" steps identified by the OIG will assist us in improving the FBI Laboratory, and we have begun the steps to comply with these recommendations.[39]

We disagree, however, with the OIG's statement that completion of this aspect of its 18-month investigation "was delayed for several weeks due to the FBI's failure to produce [certain] dictations."[40] On July 19, 1996, the OIG requested 53 Laboratory reports based upon AE dictation prepared by Whitehurst. Because several of Whitehurst's reports were inaccurate, citing the wrong Laboratory number or PE, our ability to respond was impeded. Nonetheless, we provided 42 of the requested reports within 11 working days of the request,

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[38] Although the draft report characterizes this as the "omission" of a sentence expressing Whitehurst's opinion (Part Three, Section H11 at 20), Higgins did not omit Whitehurst's dictation but instead rephrased it. We request that the OIG correct this mischaracterization.

[39] Part Three, Section H11 at 25. We have also taken steps to comply with the OIG's recommendations (March 14, 1997, Insert to Part Five at 2) that the SAS Chief counsel Higgins on report preparation and that his work be monitored by both the SAS Chief and a qualified explosives examiner.

[40] Part Three, Section H11 at 1 n.2.

10 reports by November 25, 1996, and the final report on December 24, 1996.[41] During this period, we also satisfied additional requests for documents related to the Higgins investigation.[42]

We received no additional requests for files, and no indication that the information we had provided to the OIG was inadequate in any way until **after** the draft report was submitted to us on January 21, 1997. On January 29, 1997, following our receipt of the draft report, and while we were attempting to respond to the report on the time schedule dictated by the OIG, the OIG asked to review 24 Laboratory files, as well as Higgins' own work files with respect to 51 cases. With the assistance of several FBI personnel from various Divisions, the OIG reviewed those files later that same week and during the week of February 3, 1997. We provided to the OIG numerous other documents during this time frame. It was during this period that we became aware that the files we had provided to the OIG in 1996 lacked some of the particular documents that were sought. As indicated by letter dated February 10, 1997, nine additional documents were located during the OIG's review.

Although we recognize that it would have saved the OIG the four or five days required for this review if we had provided these documents ourselves, it is not clear why this review could not have occurred from August through November 1996, when we first provided the files. As is apparent from our record of complying with the OIG's requests, we have exercised diligence and demonstrated commitment in our efforts to satisfy the well over 100 requests for documents and other information and assistance. We remain committed to assisting the OIG, and we appreciate its efforts to assist us in improving the FBI's Laboratory.

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[41] Provision of this report was substantially delayed because the file number indicated on the AE dictation provided to us on July 19, 1996, was erroneous.

[42] On October 10, 1996, the OIG requested copies of the entire Laboratory file with respect to four cases; three of these were provided during the week of October 14, 1996, and the remaining file was provided on October 24, 1996. On November 8, 1996, the OIG requested copies of entire Laboratory file with respect to 20 additional cases; we made these files available on November 13, 1996.

RESPONSE BY:

(April 4, 1997)

FEDERAL BUREAU OF INVESTIGATION TO SECTION D: THE BUSH ASSASSINATION ATTEMPT

I. COMMENTS ON THE OIG'S ANALYSIS OF PARTICULAR MATTERS

E. Other Matters

8. The Bush Assassination Attempt

As a general matter, the OIG draft report concludes that a missile strike against a Government building in Baghdad was not the result of malfeasance or other inappropriate conduct by Laboratory or other FBI employees. The draft does, however, criticize Whitehurst for failing to document his forensic examinations and finds some fault with other Laboratory employees in minor respects.

Among these, the draft report indicates several times in various contexts that, although Whitehurst told the OIG that he had compared two explosives to detect similarities,[1] former explosives examiner Alan R. Jordan failed to include this comparison in his Laboratory reports.[2] The OIG recognizes that this comparison was requested by a Laboratory official other than Jordan, and that Jordan informed the OIG that "he was not even aware that Whitehurst had compared the Bush and Southeast Asia devices."[3] In addition, the OIG has apparently established that "Whitehurst did not incorporate the results of this comparison in any dictation or written report."[4] Under these circumstances, it is inappropriate to repeatedly reference the absence from Jordan's reports of information which Whitehurst orally communicated to parties other than Jordan without clearly indicating that Jordan bears no fault for this omission.

Also, as we indicated in our February 12, 1997, response to the January 21, 1997, draft report, we object to the assertion that Jordan failed to include Auxiliary Examiner dictation verbatim when he prepared his June 18, 1993, comparison report. Jordan has advised us that this document was prepared for use in briefing the White House, and was not intended to convey the detail expected of a "normal" Laboratory report. As we have stated previously, there may be some circumstances requiring that dictation be summarized, and a blanket rule requiring that dictation be included verbatim in any document generated for any purpose whatsoever appears to us to be not only unnecessarily inflexible but inappropriate. It is important to note that Jordan did subsequently prepare a Laboratory report which incorporated the dictation verbatim.

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[1] Part Three, Section D at 6.

[2] Id. at 8-9.

[3] Id. at 8 n.6.

[4] Id. at 7.

In addition, in discussing an interview with Neil Gallagher, the draft report indicates that "Gallagher thinks that he clarified for the Attorney General in the June 2, 1993 meeting that the explosives used in these cases were consistent with some type of PE-4A, but that this identification alone would not be enough to connect the devices."[5] Gallagher has indicated to us that he advised the OIG that it is "most likely" that he provided this clarification, and that he has very little doubt that he did so. Under these circumstances, we request that the report indicate that "Gallagher believes" that he provided this clarification, reflecting a relatively higher degree of certainty than is currently indicated. Additionally, we request that Gallagher's position be corrected to indicate that he was chief of the "counterterrorism" section, rather than of the "counterintelligence" section, on pages 2, 9, 10 (two instances), and elsewhere as appropriate.

Finally, Jordan, who is referenced throughout the April 1997 version, has requested that his name be deleted from the OIG's report and redacted from related documents that may be made public (including the FBI's response to the draft report) based upon his concern for his personal safety and that of his family members.[6] Also, as you are aware, the FBI received the draft report at approximately 5:00 p.m. on April 3, 1997, and was asked to respond by close of business on April 4, 1997. Jordan has advised us that this has afforded an inadequate opportunity to review the draft effectively in order to ensure accuracy and fairness.

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[5] Id. at 11 (emphasis added).

[6] We note that the April 3, 1997, OIG draft report concerning the 1993 Bush assassination attempt has omitted the identities of several Department of Justice and Central Intelligence Agency employees which were included in prior drafts.

RESPONSE BY:

FBI SUPERVISORY SPECIAL AGENT ROGER MARTZ

February 4, 1997

Reply to IG report from Roger M. Martz 2/4/97

At times employees of the FBI are called upon to perform duties which are far beyond what are required of them. The majority of the work for which I have been criticized involves cases in which I and others at the FBI went far beyond our normal duties. Throughout my career in the Laboratory, the majority of my performance appraisals, made by several different supervisors, have been exceptional. It is noteworthy that even after the allegations against me, my latest performance appraisal was an exceptional rating.

In the SIMPSON case, the FBI Laboratory was asked to perform an analysis for which the Los Angeles County Laboratory did not have the capabilities. As it turned out, the requested EDTA analysis in blood had not been performed by any Forensic Laboratory previously. I and other FBI employees worked long hours to develop a procedure for EDTA analysis in blood stains. When it was determined that the FBI had the capability to perform the requested analysis, FBI management agreed to work the case and assigned the analysis to me. I arranged for the evidence to be delivered to the Laboratory, and I and a Research Chemist went in on the weekend to perform the analysis.

After spending two days on the stand in the most grueling testimony of my career in a nationally televised case, I am now criticized in the IG preliminary report for the usage of certain words, lack of preparedness and demeanor. In testifying it often happens that people under extreme pressure don't perform to their maximum.

The IG's opinion differs somewhat from some individuals at the FBI. The Director took time out of his busy schedule to call me to his office and inform me that he had watched me testify. He then congratulated me on my testimony. The Assistant Director of the Laboratory gave me a letter of gratitude for my work on the SIMPSON case. This letter was written after the letter from Mr. Nimmich to Mr. Ahlerich which unfairly criticized my testimony. On 5/17/96, I received an exceptional performance rating from the Section Chief Dr. Murch. In this appraisal, Dr. Murch specifically mentions my testimony in the SIMPSON trial.

With these discrepancies between the IG's opinion and that of the Director, a different way to characterize my testimony could be to say that the main allegations of perjury were completely unfounded, that as a whole the testimony was unexceptionable but that Mr. Martz should have chosen better ways of answering several questions.

In the TRADEBOMB case Mr. Lasswell was the examiner in CTU assigned to this case. It was Mr. Lasswell's dictation that urea

nitrate was identified. I never provided dictation for an FBI report in this case. As Unit Chief, I was responsible for assuring that no administrative errors were present on SA Lasswell's dictation. When Laboratory management decided that all explosive residue dictation, in this case, was to be reviewed by the Materials Analysis Unit, no objections came from CTU.

When assigning and reviewing cases, I take many things into account to include the magnitude of the case and the experience of the examiner. Mr Lasswell was the senior examiner in CTU with approximately 20 years of experience. Mr Lasswell was given proportionately more difficult cases because of his experience, attitude, demeanor and his attention to detail. Ever since I began reviewing Mr. Lasswell's cases in 1989, I do not remember ever asking him to change his conclusion. Also, Mr. Lasswell always passed the proficiency tests he was assigned.

The IG's characterization of my role in this case appears to be overstated. I suspect that my reluctance to concede to the inadequate identification of Urea Nitrate was mostly due to the hostile treatment I was given by Mr. Cartwright and the fact that I was not prepared to defend Mr. Lasswell's work. Hopefully I will be given the time to review my transcript on the urea nitrate questioning and Mr Lasswell's notes before a closure is brought to this matter.

It is unfortunate, but it is almost impossible for a reviewer to have all the insights of the original examiner in a very complex case. I think this is best exemplified in the review Mr. Whitehurst did of Mr. Lasswell's work on the TRADEBOMB case and the mistake I found in Mr. Whitehurst review of the identification of nitroglycerin.

In the VANPAC case, after it was determined that primer material was present in the two unexploded bombs, the CTU was asked to determine the source of the primer material. Primer material had never been sourced in the Laboratory. Again, this request goes far beyond what is expected of an examiner in the Laboratory. As it turned out, the information I provided was used by investigators in the field to search for someone who had recently purchased the materials that I identified. During this investigation, it was determined that WALTER LEROY MOODY had purchased the ingredients which I identified.

Recently, WALTER LEROY MOODY was tried in Alabama for murder. In his possession, as well as the prosecutor's, were all the available allegations against me. In spite of this, not only did the prosecutor call me as a witness, but he resubmitted some evidence because of new techniques which I had become aware of since the first trial. If the prosecutor in this case had had any doubts whatsoever concerning me, he could have had the evidence

re-examined by another expert. To show his appreciation, the Deputy Attorney General of Alabama, sent a thank you letter to me stating " This has been an intrusion into your life".

The IG's summation of my testimony in the VANPAC case appears to stress the confusion in my testimony over the comparison of smokeless powder, which did not appear to me to be a relevant issue, and did not stress the positive fact that I was cleared of perjury and fabrication of evidence.

Shortly after the responsibility of explosive residue analysis was assigned to CTU, the bombing of the Federal Building in Oklahoma City took place. The only examiner doing explosive residue analysis at that time was Mr. Burmeister. I immediately sent Mr. Burmeister and Mr. Kelly to Oklahoma City and later sent Mr. Jourdan. To complicate matters, the two technicians who could have assisted Mr. Burmeister were not available. When the first samples from Oklahoma City arrived at the Laboratory, I was the person in CTU with the most experience in trace explosive analysis. I began the analysis; however, the only reports in this case on explosive analysis were provided by Mr. Burmeister.

I tried to the best of my ability to perform certain analyses in this case. My interpretation of visual and microscopic analysis, which was part of the protocol at that time, was that if something was observed by visual examination, that microscopic analysis would be performed and that is what I did in this case.

Regarding the TREPAL case, I am criticized for overstating the significance of my analytical results in a manner similar to that of the TRADEBOMB case. Before I address this issue, allow me to reiterate that I never prepared a Laboratory report in the TRADEBOMB case. The report dictation was prepared by the case examiner Special Agent Lynn Lasswell.

In the IG report concerning TREPAL, page two suggests that similar IC results might have been derived from the addition of thallium chloride and sodium nitrate. I disagree with this statement because thallium chloride would cause an elevated response for both the chloride ion and the element chlorine in its respective IC and SEM assays.

The IG report criticizes my testimony in this case by indicating that I rendered an opinion stronger than was warranted by my report dictation. Although in my view this did not occur, the accusation is still contrary to my understanding of Rule 702 which treats the subject of opinion testimony by experts. Simply stated, I was asked for my opinion and I duly complied with that request by asserting my opinion. There is no essential difference between my opinion that thallium nitrate was added to the specimen and my report dictation that states "...is consistent with

thallium nitrate having been added...". The only identified chemical difference between the known sample and the suspect sample was the presence of thallium and nitrate in the latter. Both thallium chloride and thallium sulfate, two other available compounds, were eliminated by the tests performed. Not only is it my opinion that thallium nitrate was added, it is the only reasonable explanation for the assay results. I concur with the sentiment that all opinion testimony is not absolute and I tried to convey that thought with my answer "No, not a hundred percent exclusion" which appears on the penultimate page of my transcript.

Forensic hair comparisons demonstrate the difference when statements such as 'is consistent with' and 'in my opinion' are not intended to be synonymous. If a report dictation states that the questioned hair specimen was consistent with the suspect's hair specimen, an expert should not testify that '...In my opinion the questioned hair came from the suspect'. This is because it is not the only reasonable explanation for the source of the hair sample in question. In my view, the statement "In my opinion thallium nitrate was added to the drink" is the only reasonable explanation for thallium and nitrate being present in the specimen and my opinion is supported by the report dictation.

Between page three and four of the IG report there is a suggestion that I should have performed a drug extraction. I disagree with that position. Drugs (chemicals) that are added to a liquid with the intent to poison are present in that specimen in higher concentrations than when those same amounts are ingested, absorbed, metabolized and distributed throughout the human body. Biological specimens, submitted as a result of drug (chemical) usage, usually mandate some form of an extraction procedure that allows the drug (chemical) to be isolated and concentrated to amounts compatible with analytical detection techniques. Spiked liquids do not mandate an extraction. Caffeine, a drug, is spiked into cola beverages by the manufacturers. I readily detected this drug through the assay methods I used. Of note, biological specimens can also be tested directly by selective immunoassay techniques that circumvent extraction. Urine drug screening programs employ this principle. Here, as elsewhere, extraction is not always mandated. It is also a truism that many more drugs (chemicals) yield SP/MS ionization data than GC/MS ionization data. The former technique is more inclusive than the latter technique due to interfacing gas chromatographic criteria that may preclude its use with certain types of drugs (chemicals). Both GC/MS and SP/MS techniques have been used by the FBI Laboratory since 1975.

Relating to page five of the IG report, I differ with the conclusion that I overstated the purity of the Q206 thallium nitrate specimen. The multiple test results acquired by analyzing that specimen with X-ray diffraction, Infrared Spectrophotometry

and Solids Probe Mass Spectrometry allowed me to infer the purity of that specimen. Any adulteration with crystalline material exceeding 15%(XRD) or infrared absorbing material exceeding 10%(IR) would have been detected by those respective tests. In addition, SP/MS would reveal parts per million contamination of a wide variety of organic substances. I maintain that I was conservative in my opinion on the estimate of thallium nitrate purity.

On the same page of the IG report, I am criticized for not stating that nitrate was found in the known Coca Cola specimen. This specimen did not give a positive diphenylamine color test. The questioned sample did give a positive diphenylamine color test. This test revealed the presence of an oxidizing agent in the questioned specimen in forensically significant amounts relative to the known Coca Cola sample. The Ion Chromatography (IC) testing of the samples further determined that the oxidizing agent response in the color test was due to large quantities of nitrate. As a result of this tandem testing, a meaningful conclusion could be drawn regarding nitrate amounts present in the questioned specimen. Strictly speaking, nitrate was spiked into the questioned specimen via some chemical.

Finally, this page issues a broad statement to the effect that I have a "...lower threshold of scientific proof than is generally accepted in forensic science". Since an opinion of this sort does not have a litmus test, it is difficult to address and either prove or disprove. The multiple testing used in this case generated a pattern of results from which I derived a meaningful conclusion based on my judgment and experience as a forensic scientist. I was asked as an expert for my opinion and under Rule 702 I am entitled to give my opinion. I did not identify thallium nitrate in the Coca Cola specimen but offered the only logical and reasonable conclusion that thallium nitrate was added to this sample. Regarding the statement "...and in certain other matters discussed earlier" that also appears on this page, I find this an indefinite reproach. I can only respond to definitive accusations.

From the beginning of Special Agent Whitehurst's allegations, I have been assigned more responsibilities by the FBI Laboratory management. Both explosive residue and paint analyses have come under my sphere of work as well as Acting Section Chief duties when Special Agent James Kearney retired. While making the effort during my FBI career, the judgment that I have exercised within the latitude of my responsibility has been recognized by my superiors. This recognition along with my work ethic in general will also be attested to by a preponderance of my colleagues.

RESPONSE BY:

FBI SUPERVISORY SPECIAL AGENT DAVID WILLIAMS

DAVID R. WILLIAMS

RESPONSE TO OIG FINDINGS RELATED TO THE ABILITY OF SSA WILLIAMS TO ACCURATELY PREDICT THE VELOCITY OF DETONATION OF AN UNKNOWN QUANTITY OF EXPLOSIVE AND THEN TO ACCURATELY PREDICT THE AMOUNT OF THAT EXPLOSIVE.

OKLAHOMA CITY
ESTIMATE OF VELOCITY OF DETONATION (VOD)
ESTIMATE OF WEIGHT OF THE EXPLOSIVE MAIN CHARGE

1. The need and requirements for an initial on scene rough estimate must be defined so that investigators may have a logical starting point. It has been an accepted policy of the FBI Laboratory Explosives Unit to make an approximation of what type of explosive could have caused the explosive damage viewed at a bombing crime scene. The purpose of an on-site estimate/approximation is to assist the investigators by providing them with a gross effects analysis regarding quantity and type of explosives used in the crime.
For more information regarding views of the initial on-site investigator and an initial assessment, see: Explosion Investigation and analysis, Kennedy on Explosives, Kennedy, Patrick M, John Kennedy, Investigations Institute, Chicago, Ill., 1990.

2. I have also had the personal experience of viewing known quantities of known commercial explosives with documented velocities of detonation, predicted by the manufacture, at less than 500 feet per second intervals. I have witnessed hundreds of these explosives on many assorted target materials, such as steel, vehicles, wood, concrete, cloth and other materials. I have through these experiences, gained the knowledge of what types of explosives could cause different explosive damage to different types of materials at varying distances.

3. "Following the detonation of a terrorist bomb one important forensic and investigative task is to determine the nature and the approximate size of the explosive charge employed. The general nature of the explosive can be identified from the physical evidence such as the degree of shattering close to the seat of the explosion." This quote may be located in the enclosed DERA report, PSLD/CES/FEL/CR9636 on page 1. This report also includes the results of visual and physical inspections of known quantities of improvised explosive mixtures, specifically 5,000 pounds of ANFO, 1,000 pounds of TNT, 1,000 and 5,000 pounds of ammonium nitrate and sugar mixtures (AN/S). I had the opportunity to be a part of testing and research involving AN/S and urea nitrate in 1994, prior to the explosion at the Alfred Murrah Federal Building in Oklahoma City, April 19, 1995.

4. To my knowledge, incident-specific empirical data was not available at the time of the Murrah Building bombing, with the exception of the CONWEP computer program, research and data acquisition gathered from the Dipole Mite (ATF) project, tests conducted during a joint project with the British DERA and the FBI at Socorro, NM., data gathering and the preparation of a book written by Mr. Paul Cooper entitled, Explosives Engineering, 1996. This book was in the research stage for a number of years prior to the Oklahoma bombing and I had spoken to Mr. Cooper and listened to his lectures regarding the predictability of explosives and explosive damage prior to the bombing.

5. A point taken by many of the explosives experts regarding the estimation of what type of explosive and the weight estimate of the explosive main charge is to observe damage, cratering, and all other physical indications, and work back to a rough charge weight and general type.

6. As an alternative to making an estimation of weight and type of explosive, and would be totally accurate, safe, and completely worthless input at a crime scene, would be to say, "the amount and type of explosives are unknown", "the velocity of detonation is between 3,000 and 30,000 feet per second" or "the weight of the explosive main charge is approximately 10 to 10,000 pounds."

7. Formal education or a doctorate in chemistry provides little basis for the analysis of explosives effects. A possible exception, if the thesis is so selected, degrees from mining/blasting locales or universities, such as the New Mexico Mining and Technical Institute.

8. One must also take into consideration, post crime scene analysis of the debris and componentry in the Laboratory. After the evidence is collected and submitted to the Laboratory, additional analysis of the debris is conducted to more completely verify the on-scene estimate. Should any indication of that initial estimate be disproved or modified, the Laboratory report would reflect that opinion.

9. Bombings such as have been experienced and directed at this country such as the World Trade Center, Oklahoma City, Pan Am 103, Beirut and others, by their nature, are considered a matter of public safety or extreme emergency for fear of other devices and linkage to other bombings. In nearly all cases, no chemistry examinations or laboratory findings are available initially, and in some cases never are known. It is therefore necessary to provide a timely estimate upon reasonable and prudent technical data and observational data used within the explosives community which may include:

-apparent crater/actual dimensions
-crater lip geometry
-crater ejecta
-localized scouring
-vehicle debris
-possible bomb debris
-gross explosive residues including soot, especially at blast diffraction zones
-fragment and hot particle impact on structures and objects
-injuries to people
-window and lightweight structure damage
-all possible device components
-eyewitness reports of preblast conditions such as fireball, odor sound, etc.

The above list is a brief summary. For a comprehensive list of additional factors concerning observational data that could be collected see the attached bibliography.

10. Information compiled from physical observations contribute to a sound basis for a reasonable and useful judgment and reconciliation as to the type of explosive after which a velocity of detonation can be estimated.

11. In both the World Trade Center and in the Oklahoma City bombings, the following observations were noted:

The condition of near field debris indicative that C-4 or Semtex like plastic explosives was not used :

-absence of deep cratering, severe spalling, and small fragments and items that are characteristic of a highly brisant explosive.
-the general appearance of a long push on the immediate structures.
-glass breakage function of quantity and distance.
-absence of a carbon soot at blast diffraction zones, dark soot being indicative of fuel-rich explosives such as C-4.
-absence of carbon soot indicative of either oxygen rich or stoichiometrically balanced fuel/oxygen explosives such as EGDN/NG based dynamites and ANFO.

12. The destructive power of an explosive is based upon: characteristic detonation velocity and pressure, confinement, tamping, method of initiation, impulse profile, and brisance value, site parameters such as stand-off from witness surfaces.

13. Ammonium nitrate and fuel oil (ANFO) has a broad spectrum of Velocities of Detonation according to numerous references. However, some of these references are more specific when establishing parameters.

-a military catering charge lists a VOD of 10,700 feet per second (fps).
-a 4" diameter steel tube confinement is at 10,000 fps
-a 16" diameter tube is at 16,000 fps
-when ANFO is used in boreholeing, the VOD has a positive slope as a function of depth, the VOD increases as the detonation front progresses down the borehole.
-enhanced effects of very large quantities, which is essentially self tamping, the VOD is expected to be in the 13,000-15,000 fps range.
-a ballpark approximation for very large quantities of blasting agents, which is accepted in the commercial industry, is roughly half the VOD of C-4/plastics, which equates to 13,000 fps.

14. During the crime scene evaluation in Oklahoma City, and during the Laboratory analysis of the debris collected, it was obvious that neither a 4" nor a 16" steel tube was used to create the physical observable damage. It was also obvious by the crime scene damage that the explosive main charge was not placed in a borehole. The logical conclusion is that there was a large quantity of explosive, and if it was ANFO it would have fallen into the parameters of a self tamping explosive having a VOD of approximately 13,000 fps. A cursory evaluation of the VOD approximation of 13,000 fps can seem that the value was too high, however, a reasonable examination of the data indicates that the VOD estimation is well within a logical bracket based upon physical indications and accepted professional publications, especially considering the large amount used.

15. No single VOD exists for a non-ideal explosive, such as ANFO, a complete answer must address charge size, diameter and confinement. There is a lack of data, except for borehole applications, especially for large improvised explosive devices.

16. Any precise VOD experimental results would require reference to and the limits of those test conditions only. A precise value serves no greater value when considering all the other variables and uncertainties. It is important to note that the significance of an accurate and precise VOD is very limited. It should also be noted that although the VOD of ANFO has a variance of nearly 8,000 fps, due to the factors affecting the VOD and the lack of non-consumed excessive blasting agent, soot deposits and near-target damage, the VOD's for ANFO in the lower areas was not worthy of mention. The approximation of a VOD

between approximately 12,000 fps and 14,000 fps is a reasonable and logical evaluation considering all of the physical and observable characteristics of the crime scene.

17. Early crime scene estimates are necessary to offer investigators a basis for investigative action. Certainly, long after Laboratory analysis and technical facts are known, critics and experts can and did surface, and indicated such statements as, "I would have analyzed the crime scene this way...". Monday morning quarterbacking does not get the immediate investigation underway. After detailed examination of the specimens submitted to the Laboratory, I conducted an analysis not in an attempt to prove my original estimation of VOD and weight of the main charge, but to disprove that theory. I focus on this aspect in every case that I examine. During the course of my examination, I found no conflicting data that would have or did change my original estimate. Should I have found conflicting data arguing that the VOD was not approximately 13,000 fps and the weight of the explosive main charge was not approximately 4,000 pounds, I would have incorporated the correct estimate in my report, indicating that the initial assessment was in error.

WORLD TRADE CENTER BOMBING
ESTIMATE OF VELOCITY AND WEIGHT OF MAIN CHARGE

18. During my original estimate of the VOD and weight charge of the explosive at the World Trade Center (WTC), I was more cautious due to the environment at the crime scene. The IED, as was apparent, was inside of an enclosed building. Much of the physical blast damage examined and used for an estimate, was material that was in the near-field blast damaged area. The explosive used, displayed characteristics unique to an "indoor arena" and many of the other physical damage was not available, such as: window breakage at great distances, overturned vehicles, no parking signs on posts, light and heavy structures that would have been affected by blast pressure at varying open air distances, etc. I do agree that there has been no published data on very large explosive devices functioning inside buildings, however, there is much documentation and modeling of small explosives functioning inside of a building.

19. Prior to the initial examination of the WTC crime scene, I had witnessed hundreds of explosives varying in VODs from 3,000 to 26,000 fps directed at an array of assorted target materials, such as steel, concrete and automobiles. Granted, the amount of explosive was never more than 100 pounds, however, the normal characteristic damage of known explosives on known target materials may be extrapolated. Due to the indoor arena and the fact that such a large explosive main charge was used, larger than 100 pounds, I feel that I am well within my boundaries to estimate the VOD in a bracketed parameter of approximately 14,000

fps with a bracket of 2,000 fps on either side, thereby making the VOD approximately 12,000 to 16,000 fps. This is reasonable and prudent estimate of the VOD.

20. At the time of testimony at the WTC trial, I had already witnessed the detonation of approximately 1 pound of TNT on a steel plate and approximately 1 pound of the urea nitrate, that was made in Eglin, detonated on a steel plate. Both test detonations used an exploding bridge wire. Assuming that the ideal VOD for TNT is approximately 20,000 to 22,000 fps, and is considered the lower end of the "brisant" explosives, I was able to witness unique, predictable explosive damage to the steel plate target material. The explosive damage caused to a similar steel plate during the explosive testing of urea nitrate was also unique, however at this time, not predictable. The explosive damage caused by the urea nitrate was approximately 2/3 of the mid range estimate of TNT (21,000 x 2/3 = 14,000) and displayed a longer impulse type damage. Pushing or long duration impulse is defined as a longer duration of terminal blast pressure as compared to the detonation pressure and duration of an ideal explosive, TNT. This was the first time I was able to truly "test" the theory that I had arrived at on my initial damage assessment at the WTC crime scene. This test confirmed that the VOD of the explosive was well within a reasonable and prudent parameter of my initial estimate. The explosive damage at the WTC displayed a long duration high pressure curve with none, or very, very little "brisant" explosive damage. Interior concrete block walls displayed the same type of long pressure wave duration. I would not expect to see that type of damage from a more brisant explosive or from an explosive having a VOD of much less than 13,000 fps.

21. To reiterate, although I had not, at the time of the WTC crime scene, witnessed first hand, such a large explosive device, I had viewed detailed photographs, conversed with crime scene personnel, and reviewed reports concerning the three Beirut bombings and several of the large IRA IEDs. Knowing the results of the chemical analysis and the opinions of the investigators involved in these bombings, I was able to compare this type of damage to the damage I viewed in the WTC. Several of the crime scene personnel and Laboratory examiners who had worked on the Beirut and IRA bombings concurred with me.

22. As far as the chemical analysis of the residues from the WTC, it has been the experience of many laboratories that explosive residues are not commonly recovered following the explosion of a fertilizer based IED, such as urea nitrate and ANFO, of this magnitude and non-ideal type of explosive. One must also consider that the British and Irish Laboratories have had very little success in identifying explosive residues from ammonium nitrate based bombs, but in fact many opinions are

available from them concerning a size/weight estimate of the AN/S IRA devices.

In addition, a double blind testing area occurred in the TWA 800 incident. This matter is one that could never have been duplicated and was in the worst possible scenario. The crime scene was underwater, under sea water. And prior to any knowledge of explosives on-board, the FBI laboratory found, and had confirmed by DERA, explosive residue consistent with C-4 on a piece of carpet. This was found prior to any knowledge by the FAA or NTSB that a dog training program had occurred on that aircraft in the exact location that the dog handlers had said they had placed the explosive, C-4.

23. During the course of your additional investigation concerning my veracity, your department should interview Mr. James A. Petrousky, Office of Special Technology, 10530 Riverview Road, Fort Washington, Maryland 20744, telephone (301) 292-8525. Mr. Petrosky has a degree in Chemical Engineering, has 22 years in EOD research and development at the Naval EOD Technology Center in Indian Head, Md., has published works on pre-blast and render safe techniques, several patents, is well known as an explosive expert by his peers around the world, including members of your panel. Mr. Petrousky will be able to shed some light on the ability of an experienced bombing crime scene investigator to accurately predict the VOD and weight of an explosive by an examination of the crime scene and the debris collected due to his observations following the explosions relative to his testing and research.

Your office should also interview Mr. Calvin Walbert, FAA security, who has also witnessed many explosives and will be able to speak coherently about my veracity.

Mr. Paul W. Cooper, who is also known to your panel, has been working on a book for the past several years. This book is now in print, "Explosives Engineers". Prior to my testimony at the WTC trial, I had spoken to Mr. Cooper on several occasions concerning blast damage and VOD. In Mr. Cooper's book he provides "empirical data" suggesting that a VOD may be estimated to within a dedicated bracket (refer to his book in the chapter entitled, "Predicting Velocity of Detonation"). I would recommend a conversation with Mr. Cooper. Please refer to his "Rule of Thumb" as published.

The U.S. Army Corps of Engineers and Engineering Waterways, Vicksburg, Mississippi was present at both the WTC and Oklahoma City bombings, and prepared a report concerning their findings on both bombings. Their results were incredibly similar to my findings. Waterways is a research agency who is also deeply involved in the DIPOLE MITE research project. I have read

the reports of findings on the DIPOLE MITE project prior to Oklahoma City.

In both the WTC bombing and the Oklahoma City bombing, I utilized the CONWEP system (advanced computer program for blast effects). At the time, this was one of the only available computer program available. Currently, due primarily to the upsurge in large fertilizer based bombings, the U.S. government is funding evaluation studies in this area with emphasis on fertilizer grade ammonium nitrate. If the WTC and Oklahoma City bombings were not ANFO or urea nitrate, the US government is wasting a lot of money.

Also enclosed herewith is a publication generated by the Canadian Bomb Data Center, which describes Fragment Analysis, in a size ratio with a faster, more brisant explosive causing "smaller" fragments, as compared to slower explosives.

24. The following is a bibliography of selected open publications on explosive effects. I was familiar with many of these publications and/or excerpts from these publications, prior to the bombing of the WTC.

-Kolsky, H., Stress Waves in Solids, Applied Physics Brown Dover Publications, Inc., New York, 1963.

-Reinhart, John S., Stress Transients in Solids, Department of Mechanical Engineering University of Colorado, Hyperdynamics, Santa Fe, New Mexico, 1975.

-Johnson, W., Impact Strength of Materials, University of Manchester Institute of Science and Technology, Edward Arnold, Ltd., 1972.

-Chou, Pei Chi, and Alan K. Hopkins, Dynamics Response of Materials to Intense Impulsive Loading, Drexel University, Philadelphia, Pa., and Air Force Materials Laboratory, Wright Patterson AFB, Ohio, 1972.

-Zukas, Jonas A., Theodore Nichols, Hallock F. Swift, Longin B. Greszczuk, and Donald R. Curran, Impact Dynamics, John Wiley and Sons Publishing USA, 1972.

-Kornhauser, M., Structural Effects of Impact, Spartan Books, Inc., Baltimore, Md., Cleaver-Hume Press, London, 1964.

-Billington, E.W., and A. Tate, The Physics of Deformation and Flow, Royal Armament Research and Development Establishment, Fort Halstead, U.K., McGraw-Hill International Book Company, 1981.

-High Velocity Deformation of Solids, Kozo Kawata and Jumpier Shioiri editors, Iutam Symposium Tokyo, Japan, August 24-27, 1977, Springer-Verlag Publishers, 1977.

-Baker, Winfield, Explosives in Air, Wilfred Baker Engineering, San Antonio, Published in cooperation with the Southwest Research Institute, 1983.

-Bartknecht, W., Explosions Course Prevention Protection, Translation from the German by Brug and T. Almond, Springer-Verlag, 1981.

-Chigier, N.A., Progress in Energy and Combustion Science, Volume 6, Pergamon Press, 1981.

-Noon, Randall, Engineering Analysis of Fires and Explosions, CRC Press, 1995..

-Field, Peter, Dust Explosions, Handbook of Powder Technology, Volume 4, Elsevier Scientific Publishing Company, 1982.

-Bulson, P.S., Structures Under Shock and Impact, Proceedings of the first International Conference, Cambridge, Mass., 1989.

-Structural Design for Hazardous Loads, The Role of Physical Testing, edited by, J.L. Clarke, F.K. Garas and G.S.T. Armer, Brighton, Uk, April 17-19, 1991.

-Bangash, M. Y. H., Impact and Explosion, Analysis and Design, CRC Press, , 1993.

-Henrych, Josef, The Dynamics of Explosions and Its Use, Developments in Civil Engineering., 1, Elsevier Scientific Publishing Company, 1979.

-Han, Zhaoyuan and Xiezhen Yin, Shock Dynamics, Kluwer Academic Publishers/ Science Press, 1993.

-Baker, W.E. P.A. Cox, P.S. Westine, J.J. Kulesz and R.A. Streshlow, Explosion Hazards and Evaluation, Elsevier Scientific Publishing Company, New York, 1983.

-Kohler, Josef and Rudolf Meyer, Explosives, Forth Revised and extended edition, VCH Weinheim, FRG), 1993.

-Cooper, Paul W., and Stanley R. Kurowski, Introduction to the Technology of Explosives, VCH Publishes, 1996.

25. According to the OIG findings, the OIG states that no empirical data available on the subject of VOD estimates and estimates of weight charges of an IED. I strongly disagree based upon the above mentioned references and experts in the field

26. I will concede that the conclusionary portion of my September 5, 1995 Laboratory report regarding Oklahoma City, is categorically overstated. One must consider two facts, first, my laboratory report is a compilation of comparison examinations concerning items found at the bombing crime scene and items recovered during auxiliary searches. This comparison examination is a request from the field offices to determine what, if any type of explosive device, could have been constructed from components recovered at the auxiliary searches and how these components could be associated with the bombing crime scene IED. I should have included a paragraph in my report stating that request was being addressed in that report. Secondly, all of the Laboratory reports that I prepare are required to undergo a technical and administrative review. It is apparent that the individual(s) who had reviewed my report were either in agreement with me or were not technically qualified to conduct the review and the report should have been amended.

RESPONSE BY:

(February 11, 1997)

DEPARTMENT OF JUSTICE, CRIMINAL DIVISION, TERRORISM AND VIOLENT CRIME SECTION TO SECTION B: THE VANPAC CASE

U. S. Department of Justice

Washington, D.C. 20530

FEB 1 1 1997

MEMORANDUM

TO: Michael R. Bromwich
Inspector General

FROM: Stanley A. Rothstein
Terrorism and Violent Crime Section
Criminal Division

SUBJECT: OIG Draft Report on FBI Laboratory

In accordance with your letter to me dated January 22, 1997, I have reviewed the portions of the draft report relating to the VANPAC case. I have the following comments.

1. There are two grammatical/typographical errors that I noticed. On page 20 of Part Three, Section B, first full paragraph, sixth line, the words "was the of same type" should be changed to "was of the same type." On page 24, first full paragraph, second line, the words "to make a 'successfully compare' the powders" is grammatically incorrect. You may wish to delete the words "make a" so that it reads "to 'successfully compare' the powders."

2. I do not believe that it is a fair criticism of Roger Martz to state that his testimony on direct examination about his attempts to compare the Hercules Red Dot smokeless powder obtained from the Shootin' Iron Gun Shop with the Hercules Red Dot smokeless powder in the IEDs was "unnecessarily ambiguous." (See pages 23-24 of Part Three, Section B of draft report). Reviewing page 1933 of the transcript of the federal Moody trial, the prosecutor asked Martz whether he was asked to compare the powder from the devices with the off-the-shelf can. Martz responded that he was. He was then asked the following two questions and gave the following answers:

> Q. Did you do that? A. Yes, I did. Q. Could you determine anything at that point? A. No, I was not able to determine it. Even the smokeless powder, as I mentioned, will break down over time. And I was not able to successfully compare this particular smokeless

> powder with that because of the different environments that the powders were in. That was a can that was sealed when I got it. These particular powders were placed into pipe bombs, some of them exploded, some of them didn't. And I was not able to make that comparison.

The prosecutor then elicited from Martz his opinion that it is not possible to take shell powder and powder from an exploded device and determine whether they are from the same batch. (See pages 1933-34 of trial transcript).

In my view, it is inappropriate to find that Martz "should have stated more directly that he found differences and similarities when he compared certain samples." (See page 24 of draft report). The trial transcript demonstrates that Martz attempted carefully to respond to the exact questions put to him. The questions posed to Martz may have been somewhat ambiguous. The fact that he attempted to answer them precisely is not the fault of the witness. In any event, the prosecutor then elicited from Martz that it is not possible to determine whether powder that has exploded comes from the same batch as unused powder. The prosecutor could have pursued the line of inquiry and next asked Martz whether it is possible to determine whether powder that has been placed in an unexploded IED and off-the-shelf powder come from the same batch. The prosecutor, however, did not ask that question.

Accordingly, I believe that the references to Martz's testimony on this issue should be deleted from the report. They appear on pages 23-24 of Part Three, Section B, and page 5 of Part 5.

* * *

As my February 6, 1997 memorandum to you stated, three other attorneys in this Section have had access to the draft report. James Reynolds and Ronnie Edelman reviewed portions of the report in connection with their supervisory responsibilities over cases and matters in this Section which involve FBI Laboratory personnel. Brian Murtagh reviewed portions of the report relating to specific examiners who have provided evidence in matters assigned to him. No copies of the report were made, and I am returning the original to you with this memorandum.

RESPONSE BY:

(February 27 and March 10, 1997)

UNITED STATES ATTORNEY'S OFFICE SOUTHERN DISTRICT OF NEW YORK TO SECTION C: THE WORLD TRADE CENTER BOMBING

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

February 27, 1997

BY OVERNIGHT MAIL
Michael R. Bromwich
Inspector General
Office of The Inspector General
U.S. Department of Justice
Washington D.C. 20530

Re: Preliminary Draft Report -- Whitehurst Allegations

Dear Mr. Bromwich:

I am enclosing this Office's comments on the preliminary draft report of OIG's investigation of the Whitehurst allegations.

We very much appreciate your and your staff's consideration and close personal attention to our comments and are available to discuss them with you at your convenience.

Very truly yours,

Mary Jo White

MARY JO WHITE
United States Attorney

Enc. (1)

MEMORANDUM

TO: Mary Jo White,
United States Attorney

FROM: J. Gilmore Childers
Senior Trial Counsel

DATE: February 26, 1997

RE: Comments On The Draft OIG Report Concerning
The Whitehurst Allegations

I have reviewed the Draft Report (the "Draft") and have spoken to the trial team concerning the World Trade Center ("WTC") section of the Draft. Set forth below are our comments, which fall into three categories. First, we correct specific factual inaccuracies in the Draft. Second, we set forth contextual information concerning Williams' testimony and its role in the trial, which is necessary to a complete and balanced account of the points raised in the Draft. Last, we note a problem in the summary of the OIG interview of Williams and also suggest two cautionary prefaces for inclusion in the final report.

As set forth below, we have a number of significant comments concerning the treatment the Draft gives to the context of Williams' testimony and the conclusions which may be drawn from the testimony. The authors of the Draft obviously (and understandably) did not review the transcript of the entire WTC trial, and our comments are directed at assisting the authors in their preparation of an accurate final report.

Needless to say, none of our observations should be

construed to minimize the importance of completely accurate testimony in the courtroom or to suggest that precise locution is not a critical component of such testimony.

A. Factual Corrections

Draft, Part II, p. 16: The date of the World Trade Center bombing is incorrectly listed as April, 1993 instead of the correct date of February 26, 1993.

Draft, Part II, p. 16: The World Trade Center trial began in September 1993, not in early 1994.

Draft, Part II, p. 18: No defendant in the Rahman trial was charged with executing the World Trade Center bombing. The bombing was charged as an overt act of the conspiracy count in the Rahman case, and none of the Rahman defendants are named in that overt act.

Draft, III(c), p. 1: The correct dates for the World Trade Center trial are from September 1993 to March 1994.

Draft, III(c), p.1: Whitehurst's pretrial complaints were resolved before trial. He also voiced complaints during the trial, and these additional complaints were resolved during trial before any relevant testimony was elicited.

Draft, III(c), p.2: Contrary to the Draft's understanding, the "blue manuals" were not indirectly or circumstantially linked to the defendants. (Draft, at p. 2). Rather, defendant Ajaj was in physical possession of the blue manuals when he attempted to enter the United States on September 1, 1992. He was carrying them in his luggage, and he admitted to possessing the manuals at

that time. Moreover, his latent fingerprints were found throughout the manuals, as were those of Ramzi Yousef. Most significantly, the fingerprints of both Ajaj and Yousef were found on specific pages in the books that included formulas for urea nitrate, ammonium nitrate dynamite, nitroglycerine and other explosives. All of this evidence was admitted at trial. The manuals were admitted against all defendants as, inter alia, proof of the charged conspiracy.

B. Contextual Information

1. The Nature Of Williams' Testimony At Trial

Although Williams' status as a summary witness is critical to a fair assessment of his testimony (see below), the Draft does not mention that Williams testified as a summary witness. The 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. No defense counsel objected to this procedure.

Nor does the Draft mention that the defense in the WTC trial had access to expert opinion of at least equal authority to that of Williams.

As set forth below, these two omissions should be corrected because similar contextual circumstances are provided in other portions of the Draft on other cases, and, in the interests of consistency and balance, we do not see why the drafters omitted the same factors in the WTC portion of the Draft.

For example, the Draft's discussion of the Vanpac case notes

three factors that may have ameliorated the effect on any inaccuracies in the testimony by the explosives examiner in that case. Specifically, the Draft discusses: (1) that the explosives examiner was testifying as a summary witness (Draft, at pp. 13, 20); (2) that the defendant had his own explosives expert (Draft, at p. 7); and (3) that defense counsel, if so inclined, could have pursued any of the questionable topic areas in cross-examination (Draft, at pp. 12, 18). All of these factors were also present in the WTC trial.

The Expertise Available To The Defense: The defense team included highly qualified expert witnesses. The Legal Aid Society, representing Mohammed Salameh, retained as their explosives expert John B.F. Lloyd of Great Britain, an internationally respected expert in the field of explosives. (Mr. Lloyd is well known to both Dr. Whitehurst and Steven Burmeister.) Mr. Lloyd is presently the defense expert on the Oklahoma City bombing case. Thus, the defense was well represented with respect to expertise in explosives. As a result, the defense could and did powerfully cross-examine Williams. (See B-4 below). Moreover, the defense could have called its witness to refute Williams' testimony. That the defense did not call Lloyd is obviously noteworthy in assessing Williams' testimony.

The Effect Of Williams' Status As A Summary Witness: The Draft (see Draft, Section C, II, A, at pp. 2-12) concludes that Williams gave misleading testimony by claiming that he made the

urea nitrate, when in fact other FBI personnel were responsible for the physical manufacture of the compound. Williams' status as a summary witness and principal laboratory examiner cast some relevant light on his use of the pronoun "I" when testifying concerning the manufacture of urea nitrate by FBI lab personnel.

Although the Draft accurately quotes the testimony where Williams testified that "he" made the urea nitrate, it does not quote or mention the numerous times Williams indicated that he was only one of several people involved.[1] The first time Williams testified concerning the manufacture of urea nitrate (Tr. 7898-907), he used the first person singular pronoun "I," "me", or "my" five times with respect to the manufacturing. In the same pages of the transcript, however, he used the plural "we" a total of nine times. In the second part of his testimony where he discussed the manufacture of urea nitrate (Tr. 8091-93), he used first person singulars four times and the plural five times. In the final section in which Williams discussed the manufacturing of urea nitrate (Tr. 8106-14), he used first person singular pronouns a total of three times and plural pronouns a total of thirty times. Thus, in each section of his testimony where he discussed the manufacturing of urea nitrate, Williams used plural pronouns more often than he used singular ones. Taken together, he used singular pronouns eleven times and used plural pronouns forty-four times.

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[1] There are three portions of Williams' testimony in which he discusses the making of urea nitrate. (See Tr. 7898-7907, 8091-93, 8106-14).

To ensure accuracy in the final report, the authors of the report should consider the Draft's present lack of balance with respect to this aspect of Williams' testimony. Of course, Williams should not have used "I" where "we" was more accurate on any occasion, but his predominant use of "we" and other plural pronouns should be considered and at least noted.

Furthermore, Williams' testimony also made clear the group nature of the operation by including the names of numerous FBI personnel present at Eglin Air Force Base when the lab personnel made the 1,200 pounds of urea nitrate. He mentioned by name several of the key participants in the project. (Tr. 8109-10). Williams also plainly testified that the "collective experience" of all involved was used to make the compound. (Tr. 8109, 8115).[2]

Additionally, as Burmeister's statement to the OIG acknowledges (Draft, at pp. 11-12), Williams was generally in charge of the operation at Eglin, including its logistical aspects, whether or not he directly supervised the actual physical mixing of the chemicals in the manufacture of the urea nitrate. Moreover, as principal laboratory examiner, Williams

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[2] We also do not understand the Draft to be suggesting that urea nitrate was not, in fact, the main explosive in the WTC bomb. Based on all of the evidence, the FBI experts interviewed by the WTC trial team all were of the belief as investigators that the main charge was urea nitrate and all were aware that at least one of the defendants had confirmed that belief prior to trial in a proffer. That belief led to the testing at Eglin of urea nitrate rather than other explosives. Following the trial, Ramzi Yousef was apprehended and told FBI agents that the WTC bomb was made of urea nitrate.

bore responsibility for all of the FBI laboratory work on the WTC case.

Again, we do not mean in any way to condone any inaccurate portions of Williams' testimony or his choice of words. The point is that the Draft should be comprehensive, not one-sided, in its presentation of the issue.

2. **The Blue Manuals**

The Draft states that Williams' testimony that formulas in the blue manuals were the source for the manufacture of urea nitrate by the FBI was untrue. The Draft further states that this was "misleading regarding whether the Arabic formulas were tested by the FBI and were shown to be workable formulas that could produce urea nitrate." (Draft, at p. 10).

We believe that in order to convey a more accurate picture, there are a few preliminary matters which should be included in the Draft with respect to the blue manuals.

First, the urea nitrate formula in GX 2783 (the blue manuals) was workable. When contacted by this Office, pursuant to authorization given by the Inspector General, FBI chemist Steven Burmeister stated that the formula contained in that exhibit was not only "workable" but that the formula was "close to the methodology that was used at Eglin." Burmeister continued that the Eglin methodology differed mainly in that additional calculations were done to insure that proper safety precautions were taken. Burmeister should be re-interviewed on this point.

Second, with respect to what actually happened at Eglin,

Williams claims that while at Eglin he received a fax containing one of the blue book formulas, and further claims that he showed this fax to Whitehurst and the Eglin chemist and was told that it was the same formula being used. The chemists who were on the scene do not recall this. (Draft III-C, at p. 8). This Office has been informed by the Office of General Counsel of the FBI that two special agent bomb technicians who were present for the Eglin production of urea nitrate confirm Williams' recollection that he compared with the chemists the faxed formula to the one used at Eglin. It is clear, as the Draft notes (Draft, at p. 8), that the fax was transmitted to, and received at, Eglin. It is not clear, however, why Williams would have gone to the trouble of obtaining the formula by fax and then done nothing with it. The new information from the two bomb technicians may support the logical inference that Williams showed the blue manual formula to the Eglin chemist and Whitehurst, as he has stated.

Third, and perhaps most important, the blue manuals were not offered at trial to establish that they contained the formula used to make the bomb that exploded at the WTC. To the contrary, the manuals were not available to the defendants and their coconspirators when the bomb was made, and this was made clear at trial. They were offered for their relevance in establishing the existence of the conspiracy and Ajaj's membership in it. As already mentioned, the blue manuals were seized at the airport when Ajaj entered the United States and since then had been in the Government's possession. The manuals were thus important

evidence, no matter what explosive was used (and the manuals contained dozens of explosive formulas), because they were probative of the existence of a bombing plan shared by Ajaj and Yousef (whose fingerprints were on the manuals). But, they were not crucial to establishing that urea nitrate was actually used in the WTC bomb. The evidence providing that inference came from the purchase of massive quantities of urea and nitric acid by the defendants and the seizure of urea nitrate at the shed and the "bomb factory" apartment used by the defendants. (See B-3 below). Accordingly, the Draft should mention that to the extent that Williams' testimony could be read to suggest that the blue manuals provided the formula used by the defendants to make the bomb, such a suggestion would have been substantially if not entirely undermined by the evidence in the case -- to wit, the unavailability of the manuals to the defendants.[3] For the same reason, Williams had no "reason" to testify inaccurately that the blue manual formula was used at Eglin.

It should also be noted that Williams testified that the formulas in the blue manuals were for the assembly of a pipe-bomb, which he affirmed were "relatively small devices." (Tr. 8137). He followed this testimony by stating that the blast in the WTC could not have resulted from a pipe-bomb. (Tr. 8138).

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[3] In fact, Williams did not testify categorically that the blue manuals were used to make the urea nitrate explosive at Eglin. He testified that the "first batch" of urea nitrate was made following certain instructions, and that the "first bit of instructions" came out of the blue manuals. . . ." (Tr. 8114-15).

Lastly, Williams made clear that the blue manuals were not necessary to the making of the bomb. (Tr. 8138-39).

3. The Role Of The Witness' Testimony On Urea Nitrate

The Draft states that Williams' testimony filled a void in the government's proof by establishing that a urea nitrate bomb -- the chemical constituents of which were found in the shed and the formula for which was in the blue manuals -- was the source of the blast at the World Trade Center. (Draft, III-C at pp. 13-14). In light of the trial evidence, however, this assertion is unfounded. There simply was no such "void" to fill.

The proof at trial, without Williams' testimony, overwhelmingly established that the defendants built a huge urea nitrate bomb and exploded it underneath the World Trade Center. Salameh and Yousef rented a storage shed to store chemicals and explosive mixtures. (Tr. 2928; GX 2828). Yousef and Ayyad ordered various chemicals, including urea and nitric acid, in quantities sufficient to construct a massive urea nitrate bomb. (Tr. 2975, 2981-85, 2991-95, 3002, 3004-05, 3170-73, 3181-82; GX 77, GX 634 A-B, GX 2938-2, GX 2938-3). Salameh accepted delivery of these chemicals at the storage shed. (Tr. 3035-37, 3043-45). Yousef and Salameh rented and resided at an apartment at 40 Pamrapo that became a "bomb factory." (Tr. 3325-29, 3340-41, 3346, 3352, 3389; GX 2475). Abouhalima helped mix chemicals to make the bomb at 40 Pamrapo, and was seen with other conspirators frequenting the apartment and moving various items, including large buckets, in and out of the apartment. (Tr. 3391, 3395-96,

3399). Ayyad ordered tanks of hydrogen gas to enhance the bomb's destructive impact, and had them delivered to the storage shed where Salameh accepted their delivery. (Tr. 3676-80, 3683, 3709-13, 3811-20, 3892-93, 3901-02; GX 2463 A-C, GX 2464 A-C).

Salameh rented a Ryder van to hold the bomb. (Tr. 3581, 3586, 3590; GX 1). Numerous parts of the Ryder van rented by Salameh and the hydrogen tanks delivered to the storage shed were recovered in the crater at the World Trade Center. (See, e.g., Tr. 807-955, 1027-43; GX 3028, GX 448).

A search of the "bomb factory" apartment yielded urea nitrate crystals (GX 101, GX 2583, GX 2466; Tr. 6186, 6220-22, 6925, 6969-70, 6973, 6987-88), nitroglycerine (GX 2540, GX 2584, GX 81, GX 2533, GX 2487, GX 2520, GX 2521, GX 2522, GX 2523, GX 2537, GX 2582, GX 2585; Tr. 6194, 6980-88, 6185, 6858, 6969, 6197-201, 6982), various amounts of several other explosive-related chemicals and clear evidence of the manufacturing of explosive compounds, such as urea nitrate and nitroglycerine. (GX 2482, GX 2496, GX 2570, GX 2571; Tr. 6184, 6989, 6991-92, 6195, 7905). A search of the storage shed yielded urea nitrate (GX 55, GX 65, GX 75; Tr. 6297-300, 6922-27, 6305-06, 6956-57), nitroglycerine (GX 2884-1-7, GX 839-A; Tr. 6343-45, 6937), ammonium nitrate dynamite (GX 2681; Tr. 6966-67), and additional explosives-related chemicals and laboratory equipment. (See, e.g., GX 49, GX 62-64, GX 70; Tr. 6297-300, 6922-27, 6305-06, 6956-57).

Ayyad drafted a letter claiming responsibility for the

bombing of the World Trade Center, which stated that the conspirators had committed the bombing in response to United States foreign policy in the Middle East. (GX 196, GX 78 A-F; Tr. 5178-79, 5311-12, 5331-46).

In addition, an exhaustive analysis of telephone records for the relevant period linked the defendants to each other, to the rental of the apartment, to the purchase of the chemicals and the hydrogen tanks, to the rental of the van, and to the claim of responsibility. (GX 735, GX 802-T, GX 804-T, GX 805-T, GX 806-T, GX 807-T, GX 808-T, GX 809-T, GX 811-T, GX 812-T, GX 813-T, GX 818-T, GX 819-T, GX 820-T; Tr. 2040, 5162, 5168, 6631-761).

In view of this overwhelming evidence, the absence of chemical analysis confirming urea nitrate as the main charge in the bomb cannot convincingly be characterized as significant, let alone critical. Showing that one of the defendants had a formula for urea nitrate at one time did not "fill the void" of proving that the bomb actually used was made of urea nitrate. Likewise, given the overwhelming circumstantial evidence that the defendants built a urea nitrate bomb, Williams' testimony that urea nitrate likely served as the main charge was not crucial to the case. The drafters may wish to note this in order to provide proper context to the subject testimony.

4. The Cross Examination Of Williams

As we mention above, the cross-examination of Williams was searching and effective. Accordingly, it is not correct that the court or jury was "misled" by Williams' testimony that urea

nitrate was the main charge in the bomb, as the Draft states. (See, e.g, Draft, at 45).[4]

Williams was cross-examined extensively and quite effectively by four lawyers.[5] Defense counsel established that Williams was not a chemist and did not have a chemistry background. (Tr. 8070). They further established that there was "no reasonable scientific method of proving" that urea nitrate or

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[4] There is, of course, a difference between "misleading" testimony and testimony that actually "misleads" a court or jury. As to the latter, in light of the pertinent cross-examination by defense counsel and the court, it would simply not be accurate to conclude that the court or jury was actually misled.

Indeed, the record itself refutes any suggestion that the court or jury was misled. After Williams correctly testified on cross examination,as he had on direct examination, that a number of explosives could have caused the blast, and after he responded on cross-examination that it was his opinion (based on everything he knew) that the main explosive charge was urea nitrate, the following colloquy immediately took place:

> THE COURT: Could it be ANFO?
>
> MR. CAMPRIELLO: I didn't hear you, Judge.
>
> THE COURT: Could it be ANFO?
>
> THE WITNESS: Yes, it could be.
>
> THE COURT: In other words, there could have been an ANFO bomb sitting there, and if that exploded, it would have caused the same kind of damage?
>
> THE WITNESS: That's correct.

(Tr. 8137). Thus, Williams, as he had throughout his testimony, made clear in response to the court's own questions that explosives other than urea nitrate could have caused the blast damage to the World Trade Center.

[5] Williams was cross-examined by attorneys for each of the four defendants in this order: Abdellah (Abouhalima), Precht (Salameh), Campriello (Ajaj), and Ahmed (Ayyad).

ammonium nitrate were components in the World Trade Center bomb. (Tr. 8070-71).

Furthermore, counsel for Abouhalima asked Williams as his second question in cross examination: "And your primary purpose here today is to come in as the case agent and explain perhaps to the jury and give an opinion on particular areas where you, the government in this case may need some assistance. Am I correct? Williams answered, "[y]es." (Tr. 8070). Later, the same lawyer asked Williams whether "part of [Williams'] role" was "to tie this case up in a nice package." Williams answered, "[y]es it is." (Tr. 8086).

Counsel further elicited from Williams that in several respects, Williams' testimony amounted to no more than speculation. (Tr. 8073 (location of van parts after blast as basis for determining blast center), 8074 (location of a particular vehicle before blast), 8080 (placement of component parts of bomb within van), 8105 (weight of explosive)). Indeed, in assessing Williams' alleged bias, it is worth noting that Williams, if anything, understated the significance of his testimony in response to these questions.

Next, although the Draft does credit Williams with correcting one defense counsel (Abdellah) by clarifying counsel's misunderstanding that Williams had testified that urea nitrate was the bomb explosive when in fact, as Williams testified, other compounds "could have been" used at the World Trade Center (Tr. 8071; see Draft, at p. 48), the Draft does not mention that

Williams did the same thing some fifty pages later while being cross-examined by Campriello, when Williams stated: "I concluded that [various components] could have been in the bomb in the Trade Center." (Tr. 8119).

It must also be noted that it was the defense cross-examination of Williams which introduced substantial confusion into the testimony. Although he knew that Williams was a summary witness who had many sources for his opinion that urea nitrate was used in the bomb, including the trial testimony and physical evidence, Campriello did not limit his questioning of Williams to Williams' conclusions based on physical data and scientific analysis. He asked what Williams believed based on <u>everything</u> <u>he knew</u>.

Specifically, Campriello engaged in the following line of questioning. First, he asked, "[c]an you point to any single page or pages in any one book that has the formula for what you think may have been the bomb . . . ." (Tr. 8119). Two pages later Campriello asked a question that began, "[a] person is putting together what you think may have been the bomb . . . ." (Tr. 8121). Approximately fourteen pages later the following exchange took place:

> "Q. Correct me if I'm wrong. If I understood you correctly, you indicated that while you believe you have been able to figure out, No. 1, that it was a bomb that caused the damage in the World Trade Center, and No. 2, what you think were the components of that bomb, that if there was a bomb, there could have been other components as well? Did I understand you correctly or am I

misstating what you said?

A. Other components of explosives?

Q. Yes.

In other words, you said that this was basically a bomb, if I understand, made of urea nitrate and this substance and that substance.

MR. ABDELLAH: Objection. That's not what he said.

THE COURT: I think he's -- I don't think you're limiting yourself. Is that what you're saying? You think?

MR. CAMPRIELLO: That's all I'm saying.

THE COURT: Go ahead.

A. Yes, I do. I believe urea nitrate was the bulk of the constituent in that bomb with other explosive materials; yes.

Q. And have you concluded that that is the only possible bomb that could have caused this kind of damage based on everything you know or are there other possibilities as well?

A. Within the World Trade Center?

Q. Yes.

A. There was only one bomb in the World Trade Center.

Q. No, no. That, I understand to be the your testimony.

What I'm saying is was whatever caused it just this one possibility or were there other possible bombs as well, not two bombs or three bombs, but you described a bomb?

A. Yes, okay.

Q. Could it have been another kind of bomb or no?

A. Not likely. As I said, the bulk of the explosive material could have been urea nitrate with other things such as ammonium nitrate dynamite and certainly there was some type of initiator, but the bulk of the explosive was, in my opinion, urea nitrate.

Q. I guess it's the 'could have been' part that gives me pause.

THE COURT: Could it be ANFO?

MR. CAMPRIELLO: I didn't hear you, Judge.

THE COURT: Could it be ANFO?

THE WITNESS: Yes, it could be.

THE COURT: In other words, there could have been an ANFO bomb sitting there, and if that exploded, it would have caused the same kind of damage?

THE WITNESS: That's correct.

MR. ABDELLAH: Excuse me, your Honor. What's ANFO?

THE COURT: ANFO is a mixture, I think, of ammonium nitrate and diesel oil.

THE WITNESS: That's correct, sir.

THE COURT: Okay.

(Tr. 8135-37 (emphasis added)). Thus, defense counsel did not limit his questioning of Williams to Williams' conclusions based on physical data and scientific analysis. He did not ask, for example: "Based on the laboratory analysis of the evidence seized at the site of the blast, did you conclude that one of a number of bomb materials might have been used?" Rather, he asked a much more open-ended question (i.e., "based on everything you knew), and in direct response to this question, Williams provided

his opinion "based on everything he knew," as he had been asked.[6] To the extent that Williams should be criticized for failing to qualify or explain his answer fully, as he had earlier on direct and cross-examination, he clearly corrected himself and any misleading impression in answering the Judge's clarifying questions that immediately followed.

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[6] Through this point in Campriello's cross-examination, "damage" as a source of Williams' opinion had not been mentioned. The Draft states, however that "the context of the questioning was limited to an opinion based only on Williams' assessment of the damage at the crime scene." (Draft, at 46). This statement is inaccurate. In the passage transcribed above there is no mention of damage in the question that elicited Williams' first response that he "believed" urea nitrate constituted the bulk of the explosive. It was not until the follow-up question that Campriello introduced the notion of damage as a basis for Williams' opinion but then he linked "damage" and "everything you know," asking " . . . have you concluded that that is the only possible bomb that could have caused this kind of damage based on everything you know or are there other possibilities as well?" In the response to this question, several lines later, Williams stated that the "bulk of the explosive material could have been urea nitrate with other things . . . but the bulk of the explosive was, in my opinion, urea nitrate." As Campriello knew, Williams knew much more about the bomb than solely the damage it had caused. He knew about the searches and all of the other physical evidence. Moreover, unlike the authors of the Draft, Campriello did not interpret Williams' testimony to have been so definitive a declaration about urea nitrate, as is evidenced by defense counsel's next statement: "I guess it's the 'could have been' part that gives me pause."

The Draft's final paragraph on the subject of Williams' testimony concerning the main charge in the bomb reads: "In sum, when Mr. Campriello asked Williams, "Could it have been another kind of bomb or no?" (Tr. 8136) counsel clearly meant: Could it have been another kind of bomb or no, based on your analysis of the damage at the crime scene?" (Draft, at 49). As set forth above, the question was far from clear and if taken as actually asked did not limit Williams to damage evidence.

C. Additional Comments

1. The OIG Interview

At page 44, when analyzing Williams' direct examination concerning his identification of the main charge, the Draft states that, "in his OIG interview Williams stated that, based on his assessment of the damage at the scene, he really could not make any type of identification of the explosive used at the Trade Center." The draft report then quotes the following portion of Williams' OIG interview found at pages 38193-94 of the OIG record:

> "AGENT WILLIAMS: ....If I just had to work with that crime scene, there's no way I could have called any kind of explosive.
>
> OIG: Because it could have been ANFO?
>
> AGENT WILLIAMS: It could have been emulsions.
>
> OIG: Could have been emulsions.
>
> AGENT WILLIAMS: <u>It could have been anything</u>.
>
> We had two million gallons of sewage water pumped in on top of this.
>
> All of the fire extinguisher systems and the 30 inch sewer lines for the entire complex ruptured directly over the scene of the blast."

(Draft, at p. 44 (emphasis added in Draft)). The Draft then states:

> Williams' acknowledgement at the OIG interview that, based on the crime scene, the main explosive 'could have been anything' differs significantly from the opinions he rendered at the <u>Salameh</u> trial. <u>At the trial Williams testified that his observations at the scene enabled him to help the court</u>

> determine the explosive that may have been used in the blast. Now he has admitted that the 'sewage water' and 'fire extinguisher systems' so contaminated the scene that 'anything' may have been used as the main explosive in the bomb. In light of Williams' OIG testimony, we are deeply troubled that his trial testimony may have misled the court.
>
> In sum, we conclude that Williams' direct testimony was inaccurate and misleading, and suggested too strongly that a fertilizer-based explosive like ammonium nitrate or urea nitrate was used in the Trade Center bomb.

Five pages later when analyzing Williams' cross-examination on the identification of the main charge, the Draft states:

> "In sum, when Mr. Campriello asked Williams, 'Could it have been another kind of bomb or no?' (T8136), counsel clearly meant: 'Could it have been another kind of bomb or no, based on your analysis of the damage at the crime scene?' Williams should have answered him as he answered us: 'It could have been anything.' R038194. We conclude that by answering instead, '[T]he bulk of the explosive was, in my opinion, urea nitrate' (T8136), Williams failed in his responsibility to provide the court with an objective, unbiased expert opinion."

(Draft, at p. 49 (emphasis added)).

The literal reading of Williams' testimony relied upon in the Draft is unfair when examined in context. The testimony which immediately follows Williams's remark that the explosive at the World Trade Center "could have been anything" strongly suggests that he was referring to the inability to make a finding of bomb composition based on chemical analysis, not damage assessment. Nevertheless, the Draft uses his remark to support a conclusion that he testified misleadingly in the WTC trial as to

his ability to make a finding based on damage assessment.

Specifically, shortly after Williams stated in his interview that the explosive used at the World Trade Center "could have been anything" (R038193-94), the discussion continued and the following exchange took place:

> "AGENT WILLIAMS: Not necessarily true. The damage that I saw suggests to me, just the damage alone, a velocity of detonation and a weight charge. Yes, that came from the scene.
>
> OIG: But that could have been done by various explosives.
>
> AGENT WILLIAMS: It could have. And if I just had the scene, I could not have made the opinion of urea nitrate.
>
> I could have included it among the other explosives, of course.

(R038196-97 (emphasis added)).

Thus, Williams testified that his observations of damage would be able to assist him in narrowing the possible explosives used at the World Trade Center. His testimony at trial was in accord with this approach. (See above discussion of cross by Campriello). The omission of this testimony is troubling in light of the Draft's acknowledgment of the validity of this type of expert determination:

> We have no doubt that an experienced explosive examiner may properly draw certain inferences from observations at a crime scene. For example, an experienced expert will be able to discern the difference between the damage left by a high versus a low explosive, and can differentiate the damage caused by a heaving high explosive (like most commercial products) versus a brisant (like most miliary explosives) high

> explosive. Similarly, an observation of 'pitting and cratering' will tell an experienced expert that the explosive used was a high explosive with a VOD typically in excess of about 10,000 feet per second. All of this involves the use of experience to recognize certain distinctive characteristics of explosive damage.

(Draft, at pp. 38-39). When Williams remarked "it could have been anything," he was referring to the inability to perform chemical analysis at the bomb site due to flood conditions. Williams' mention of the fire extinguishers and sewage at the scene have nothing to do with blast damage analysis. And, given the discussion which followed the "could have been anything" remark, Williams could not have meant by this remark that the main explosive could have been "anything" based on the blast damage. As he knew, there was clear high explosive damage present at the scene including pitting and cratering. The damage to the heavy materials, steel, concrete, etc., was of the heaving type and demonstrated no brisance. Based on observations of these conditions, 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). Yet, the Draft concludes that Williams should have answered Campriello's question concerning his assessment of the bomb based on damage in the same manner in which he told the OIG he could make no assessment based on chemistry due to water conditions. While Williams is to be faulted perhaps for flagging attention to verbal precision at the OIG interview, his testimony therein

should not be misinterpreted.[7]

2. Cautionary Language

The Draft 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. It is one question to ask whether an expert's testimony, reviewed in hindsight, measures up to acceptable standards of precision. It is a distinct question, however, whether the testimony offered in a particular case -- considered in context -- misled a factfinder. To the extent that the final report attempts to address the second question, it is imperative that the report be balanced and fully accurate, after the entire record has been thoroughly reviewed and understood.

Lastly, to prevent any misperception on the part of the uninitiated reader, the final report should state, wherever relevant (as in the case of the WTC case), that Whitehurst's allegations do not concern any tampering with or destruction of evidence.

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[7] As the FBI noted in its comments on the Draft, Williams formed a preliminary opinion that the main charge in the Oklahoma City case was caused by approximately 4,000 pounds of ANFO before any arrests or searches were executed and before the prosecution theory was formulated. In the WTC investigation as well, Williams, within 24 hours of the World Trade Center bombing, and a full five days before any arrests, searches, or seizures, preliminarily opined that based on the damage at the scene the bomb probably consisted of 1,000 to 1,500 pounds of an explosive in the category of a fertilizer bomb.

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

March 10, 1997

BY TELECOPIER: (202) 616-4581

Barry Rand Elden
Special Investigative Counsel
Office of the Inspector General
Department of Justice
Washington, D.C. 20530

Re: OIG Preliminary Report On Whitehurst Allegations

Dear Mr. Elden:

I am attaching Gil Childers' memorandum to me in response to your letter of March 4, 1997.

Sincerely,

MARY JO WHITE
United States Attorney

Att. (1)

MEMORANDUM

TO: MARY JO WHITE

FROM: GIL CHILDERS GC

DATE: MARCH 10, 1997

RE: RESPONSE TO OIG INQUIRY OF MARCH 4, 1997

The OIG Whitehurst investigators have requested transcript support for our representation that David Williams testified at the World Trade Center trial as a summary witness with the consent of the defense.

On December 7, 1994, as reflected on page 3986 of the trial transcript (copy attached), the Government received the District Court's permission for an explosives expert to review the trial transcript. At the same time, the Government informed the Court and counsel that the expert would "base his testimony on a lot of other testimony." (Tr. 3986). Defense counsel, all of whom were present, did not object.

In Williams' direct testimony, he referred to his review of the trial transcript. (See, e.g., Tr. 7915-18 (testimony regarding a summary chart of the chemicals ordered by the conspirators from City Chemical); Tr. 8009-63 (testimony regarding pieces of the Ryder van and AGL hydrogen tanks found in the crater of the World Trade Center after the explosion)).[1]

Similarly, in Williams' cross examination, defense counsel referred to Williams' review of the trial transcript. (See Tr. 8151, 8154, 8155). One defense counsel, to advance his trial strategy of attacking the FBI lab's handling of evidence, examined Williams specifically concerning the testimony of an FBI agent who had made certain seizures during one of the searches. (See Tr. 8151-54). Defense counsel also questioned Williams concerning fingerprint reports. (See Tr. 8154-56).

Thus, all of the trial participants understood that Williams was testifying as a summary witness and that he was basing his testimony in part on the trial record that preceded his testimony.

GC

Att. (1)

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[1] The OIG investigators have the transcript of Williams' trial testimony, so I have not included it as an attachment.

(In open court; jury not present)

THE COURT: You said you had housekeeping matters?

MR. DE PIPPO: Yes, your Honor, two.

The first one, the witness identified in Exhibit 592, we apparently have a 592 in evidence. With the Court's permission, I would like to renumber that 692.

THE COURT: Sure.

MR. DE PIPPO: And then, secondly, recognizing that your Honor has excluded witnesses under 615. At some point, we are going to get to an expert witness, an explosive expert witness who will base his testimony on a lot of other testimony, we will request permission to show him the transcripts.

THE COURT: Sure.

MR. PRECHT: One other matter very briefly.

MR. CAMPRIELLO: I can't hear, Mr. Precht.

THE COURT: One other matter, very briefly.

MR. PRECHT: Defense counsel was provided certain 3500 material this morning with respect to what we viewed to be a very important witness. The material is somewhat lengthy and none of this material had been given to us before in any form. So, accordingly, I am speaking for all of defense counsel, I respectfully request that after the direct examination of this individual, that counsel be given

RESPONSE BY:

(February 13 and March 7, 1997)

UNITED STATES ATTORNEY'S OFFICE EASTERN DISTRICT OF NEW YORK TO SECTION E: AVIANCA BOMBING

U.S. Department of Justice

United States Attorney
Eastern District of New York

United States Attorney's Office
1 Pierrepont Plaza
Brooklyn, New York 11201

February 13, 1997

Michael R. Bromwich
Inspector General
U.S. Department of Justice
Room 4706
10th and Constitution Avenue, N.W.
Washington, D.C. 20530

Re: Draft Report on The FBI Laboratory: An Investigation into Laboratory Practices And Alleged Misconduct in Explosives-Related And Other Cases

Dear Mr. Bromwich:

This letter is submitted in order to comment on and correct certain errors[1] and misimpressions created by that portion of the report prepared by the Office of the Inspector General on the FBI Laboratory relating to the Avianca case (the "Report"). While we do not profess to have the scientific expertise or training to evaluate the technical criticism levied at Special Agent Hahn's testimony, the Report does omit or misstate certain facts and as a result, may be misleading in its conclusions.

Essentially, there are several major problems with the Report. First, the Report is premised on a misunderstanding of the prosecution's case: contrary to the assumptions stated in the Report, the type of explosive used in the Avianca bombing was irrelevant and immaterial to

[1]The first error that needs to be corrected is the misspelling of the first and last names of former Assistant United States Attorney Cheryl Pollak (now a U.S. Magistrate Judge, Eastern District of New York). In addition, on the first page of the Preface, there is a reference to "two 1994 trials in a case related to the 1989 bombing of an Avianca Airlines flight in route from Bogota, Colombia to Miami, Florida." In fact, the plane was en route from Bogota to Cali, Colombia, not Miami.

either the prosecution or the defense case. In fact, had the prosecution been able to prove that dynamite was used, as the Whitehurst Memorandum suggests, the Prosecution's case would have actually been strengthened. Thus, the conclusion reached by the Report that Agent Hahn's alleged "errors tended to help the prosecution's case or rebut a defense" is erroneous.

In addition to this fundamental misconception, the Report: (1) misstates certain facts regarding the genesis and significance of the "Confessor's" statements; (2) fails to review the testimony of the other expert witnesses and thus, ignores the fact that Agent Hahn was proffered in large measure as a summary expert witness; (3) fails to adequately define certain terms and, as a consequence, appears to express opinions contrary to other evidence that does not appear to have been reviewed. Each of these issues is addressed in detail below. However, regardless of whether these specific concerns are ultimately addressed in the Report, the Report needs to be clarified as to its position on Agent Hahn's basic opinion -- namely, that an explosive device functioned on board the Avianca plane. As currently drafted, it is unclear whether the experts involved in drafting the Report have concluded otherwise.

A. The Type of Explosive Was Irrelevant

First and foremost, the Report suggests that the dispute between Agent Hahn and Agent Whitehurst regarding the nature and type of explosive used in the bombing of the Avianca plane was somehow material to either the prosecution or the defense case. It was not. Agent Hahn was called by the government primarily as a summary expert witness, to put into context the testimony of the various experts who testified before and after Agent Hahn and to provide the simple opinion that an explosive device functioned on board the Avianca aircraft, in a location over the fuel bladder in the wings, and that, as a result, the plane crashed, killing all of the passengers and crew members on board the plane. The type and nature of the explosive used was neither relevant nor material, nor even necessary, to prove the government's case.

In fact, the government could have chosen to present its case without ever calling Agent Hahn to testify. The defense had offered to stipulate to Agent Hahn's testimony that an explosive device had functioned on board the plane, resulting in the death of all of the individuals on board. This, coupled with proof of defendant's participation in the bombing,

Indeed, Munoz Mosquera actually taught a course in the preparation of bombs using dynamite, with one witness describing in detail how Munoz Mosquera constructed a bomb using dynamite. (Tr. at 3628-29). Other witnesses testified about the Medellin Cartel's access to vast amounts of dynamite imported from Ecuador that were stored in a warehouse in Bogota. (Tr. at 4175, 4220, 4221-22, 4250, 4252). Still other witnesses were called to testify regarding the use of dynamite by Munoz Mosquera and his group of "sicarios" (assassins) in other Cartel bombings that were specifically charged as overt acts in the conspiracy, including the bombing of Las Drogas de Rebaja, a relay station in Bogota, a truck bomb designed to kill General Maza Marquez,[4] and the bombing of DAS headquarters, all of which involved bombs using dynamite or some type of ammonium nitrate-based explosive. (See Tr. 2220-22, 2213, 2281-83, 2294-5, 2415, 3012, 3045, 3051, 4174-5 4188, 4221).

Indeed, evidence that the same type of explosive was used in both the Avianca and the DAS bombings -- namely, dynamite or ANFO -- would have further corroborated the other witnesses' testimony and strengthened the inferences that the government was asking the jury to draw -- that both bombings were done by the same group, led by Munoz Mosquera. Thus, if there had been any scientific basis for claiming that dynamite or any ammonium nitrate-based explosive was used in the bombing of Avianca, it would have provided a further basis for tying Munoz Mosquera to not only the bombing of the plane, but to the DAS bombing which was charged as an overt act, and to the other bombings charged in the indictment as well.

By contrast, the government had no testimony or evidence suggesting that either Munoz Mosquera or the Cartel had access to Semtex, RDX or PETN.[5] Nevertheless, because the

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otherwise.

[4]The government presented the testimony of a Colombian member of the bomb squad responsible for defusing the truck bomb and hundreds of other similar bombs in Bogota during that period. His testimony included an explanation of the construction of the truck bomb, illustrated with actual photographs of the dynamite used. (Tr. at 2280-95).

[5]Apparently, the Memorandum of Interview ("MOI") reflecting Ms. Wilkinson's interview with representatives of the Inspector General's Office suggests that a cooperating witness testified that the Cartel often used Semtex. Ms. Wilkinson has advised me that she did

chemical analysis of the residues found on the fuel bladder of the plane, as explained to us by Agent Hahn, showed the presence of these chemicals, with no evidence of dynamite or an ammonium nitrate-based explosive being found in the wreckage of the plane, the government presented its case in accordance with the forensic evidence as we found it.

Indeed, given the fact that there was no residue of ammonium nitrate or dynamite found in the plane, the government, had they called Agent Whitehurst to testify, might have been accused of attempting unfairly to buttress the government's case with speculative and uncorroborated opinion testimony. Particularly in light of the criticism leveled at Agent Whitehurst's conclusions, and the speculative nature of his opinion, had the government elicited the testimony regarding the potential use of dynamite or an ammonium nitrate-based explosive as suggested by the Report and attempted to tie that opinion to the other evidence in the case, the government would have justifiably been subject to serious criticism. Thus, although Agent Hahn was extensively cross-examined on the availability of RDX, PETN and Semtex in South America, with a focus being access to these materials by terrorists in other parts of the world (Tr. at 2938-2942),[6] we believe that it was more prudent for the prosecution to present its case in accordance with the physical evidence found, rather than argue the possibility that dynamite was used. Even though the possible use of dynamite was consistent with our other witnesses' testimony, we had no physical forensic evidence to support that claim.

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not make such statements during her interview and perhaps the investigators misunderstood her discussion of the Medellin Cartel and its use of explosives. As stated above, several cooperating witnesses did discuss the terrorist training course and Munoz Mosquera's attendance at the course. Indeed, one of the key witnesses testified that Munoz Mosquera was involved in training other participants in the use of explosives, specifically, dynamite. This testimony supported the government's theory that Munoz Mosquera was knowledgeable about explosives. However, no witness ever suggested that the Cartel or Munoz Mosquera used or had access to Semtex.

[6]The defense theory at trial was that many, if not all, of the terrorist activities attributed to the Cartel by the government's witnesses were in fact the work of leftist guerrillas, such as M-19 and FARC, operating in Colombia at the time. To the extent that the defense was able to suggest the use of Semtex by these guerrilla groups and other terrorists not with the Cartel, Agent Hahn's testimony actually assisted the defendant's theory of the case.

Similarly, while we are not in a position to evaluate whether Agent Hahn was in error in that portion of his testimony that tied the pitting and cratering to a "high explosive,"[7] if anything, his testimony, to the extent it seemed to eliminate the use of dynamite, actually provided the basis for a defense challenge to Munoz Mosquera's involvement in the Avianca bombing.[8]

While we recognize that it is often difficult in preparing a Report of this type to become familiar with the evidence and arguments presented during the course of a lengthy trial involving over forty witnesses and more than eight weeks of trial, the Report as now drafted suffers from the fact that such a comprehensive review was not conducted.[9]

C. The "Confessor"

A second area in which the Report is seriously misleading as now drafted relates to the statements of the individual referred to in the Report as the "Confessor" -- Carlos Mario Alzate, a/k/a "Arete." Contrary to the impression left by the Report, Arete's statements were never

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[7]Walter Korsgaard, formerly FAA Program Manager and National Resource Specialist for Aviation Explosives Security, prepared a report entitled "Technical Investigative Findings of HK 1803" ("Korsgaard Report"), based on his investigation of the Avianca crash. It should be noted that Walter Korsgaard supported Agent Hahn's belief that a "high explosive" was used. In his Report, he specifically describes finding a "piece of fuselage skin with similar high explosive hot gas cratering effects" which he explained as "further substantiating the presence of an IED as the initiating event of the destruction of HK 1803." (Korsgaard Report at 3). As Korsgaard's Report makes clear, Agent Hahn's conclusion as to the use of a "high explosive" was not reached in a vacuum nor was it based solely on the pitting or cratering or the I-beam information; it was based on a consideration of all the evidence and on the collective views of other experts.

[8]Indeed, the Report notes that certain types of dynamite produce the same type of pitting and cratering effect as the high level explosive described by Agent Hahn. (Report at 9). Unfortunately, the Report fails to disclose what specific types of dynamite it is referring to or whether such types of dynamite were available in Colombia in 1989. Without this information, it is difficult to evaluate the Report's conclusion that the prosecution should have introduced testimony regarding this potential use of dynamite at trial.

[9]Because we were not permitted to review the MOIs summarizing the interviews conducted by representatives of the Inspector General's Office prior to the drafting of the Report, we cannot be sure there are not other inaccuracies or misunderstandings reflected in the MOIs.

admitted at trial; he never testified at either trial and never even came close to being called as a witness.

Arete's statements regarding the bombing of the Avianca plane were first brought to the attention of the Court by defendant's attorneys in April 1994 prior to the start of the first trial.[10] Defense counsel had interviewed Arete extensively in Colombia and were fully aware of his claims prior to the receipt by the Court of the letter from the Attorney General of Colombia. Indeed, defense counsel hand-delivered the letter to the Court. At the time of his so-called "confession," which to this day has remained sealed and was never disclosed to the government or the Court, Arete was confined in a high security prison in Colombia on charges brought by the Colombian government relating to his narco-terrorist activities. He gave his statement to the Colombian officials in exchange for a promise of a lenient sentence. However, since he was in prison in Colombia at the time, it was impossible for him to travel to the United States to give sworn testimony. Not only would the government of Colombia have had to agree to release him from jail to allow him to travel to the United States to testify, but the government of the United States would have had to grant him full immunity for the numerous criminal activities for which he was wanted in the United States, including the bombing of the Avianca plane to which he had confessed, as well as other acts of terrorism. Since the Department of Justice was not about to grant immunity to a confessed murderer and terrorist, the only alternative was to have the attorneys for both sides of the case travel to Colombia for a deposition of Arete. Although granted time and an opportunity to pursue this avenue, the defendant's counsel dropped the matter and never made any further requests regarding Arete's testimony.[11] Thus, to conclude in

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[10]At the time the issue was raised, the defendant sought to postpone the trial. The prosecution's belief is that when his request for postponement was unsuccessful, defendant dropped the issue of Arete because the defense was never seriously considering him as a witness.

[11]Indeed, after the initial mention of Arete's alleged confession shortly prior to the first trial, there was never <u>any</u> issue raised regarding Arete's statements relative to the second trial. It was for this reason and the fact that the issue was neither relevant nor material to either the government's or the defendant's case that AUSA Wilkinson who prepared and presented Agent Hahn as a witness during the second trial did not discuss the Whitehurst Memorandum nor ask him questions about it during the second trial. (See Report, note 18 at p. 18).

the Report in several places that Agent Hahn's testimony was used to "rebut" the Confessor's testimony or to "rebut" the defense case leaves the misimpression that Arete's statements were somehow placed before the jury or that the defense somehow presented a "case" based on any of this. They did not.[12] His statements were never an issue in either trial.

Nevertheless, the prosecutors, recognizing their obligation to ensure that Arete's claims were fully explored, requested permission from the Colombian government to have two agents (not one as the Report suggests) -- a DEA agent and an ATF agent -- interview Arete in an effort to verify the defendant's claim that Arete and Arete alone was responsible for the bombing of the Avianca plane. After the initial refusal by the Colombian Attorney General to allow the U.S. government agents an opportunity to interview the witness and several weeks of communication and negotiations between the State Department, the Department of Justice and the Colombian Ambassador, the two agents were granted permission to speak to Arete under certain strict limitations. During the interview, Arete told ATF Agent J.J. Ballasteros, an explosives expert stationed in Colombia and familiar with the types and nature of explosives available and utilized by the Cartels, that the explosive used to bomb the plane consisted of "gelatina" which was carried on board the plane in a black nylon bag. Arete further stated that this was "the kind used to bomb the DAS installation." (See Notes of Interview by J.J. Ballasteros ("Ballasteros Notes")).

From his experience and based on his expertise with the Medellin Cartel, Agent Ballasteros opined that in 1989, the type of dynamite described by Arete as "gelatina" would have most likely been "commercial dynamite made in Colombia, Ecuador or Peru which are [sic] predominately comprised of ammonium nitrate and nitroglycerine to a lesser degree." (Ballasteros Notes). As noted above, this type of dynamite, although inconsistent with the chemical residues found in the Avianca wreckage, was commonly used by Munoz Mosquera and the Medellin Cartel. Agent Ballasteros raised some concerns regarding the method described by Arete in carrying the bomb through the airport and onto the aircraft by an "unwitting," and

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[12]In fact, as noted above, defense counsel had possession of Arete's claims regarding the use of dynamite on Avianca long before Agent Hahn testified. They clearly could have used this information to cross-examine Agent Hahn. They chose not to.

questioned whether the bag as described "would have been greasy from the explosive material permeating through the nylon."

However, the government had no real need to "discredit" Arete[13] because: (1) he never testified, and (2) apart from the questions raised by Agent Ballasteros, there were other problems with the relevant portions of Arete's statements. They were flatly contradicted by established facts and by sworn testimony of other individuals who, unlike Arete, had testified under oath subject to penalties of perjury. Specifically, Arete stated that only he and one other individual had known about or been involved in the bombing. Yet the prosecution had several witnesses who testified to the contrary. One testified that he advised Escobar as to the placement of the bomb and another admitted to his role and that of his uncle in actually transporting a portion of the bomb to Bogota from Medellin. (See Tr. 2479-84, 2659-66, 3048, 4190-93, 4403-05). Thus, apart from the fact that Arete's statement regarding the use of dynamite might actually have strengthened the government's case, the prosecution possessed specific evidence to demonstrate the falsity of those of Arete's statements that were relevant and, in fact, never needed evidence to "'discredit' the Confessor's story" since his statements were never placed before the jury. (Report at 4). However, because we felt it was not appropriate, Agent Hahn was not informed of the details of the information provided by the cooperating witnesses[14] and thus, may not have been aware of the existing evidence contradicting Arete's statements.

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[13]Prior to learning of Arete's statements, the government had detailed and specific evidence linking Arete to Munoz Mosquera's activities and the bombing of the plane. Several witnesses ultimately testified that Arete and Munoz Mosquera acted together not only to bomb Avianca but to engage in numerous other terrorist activities. (Tr. 4403-4407, 4412). To the extent that Arete's statements raised an issue, it was limited to his claim that he acted alone in bombing Avianca -- a claim clearly false as demonstrated by the other evidence in the case.

[14]It would, in our view, have been improper to provide Agent Hahn with the statements of the cooperating witnesses, for fear that we would have been accused of coaching our witnesses so that their stories were consistent.

C. The Significance of the Whitehurst Memorandum

With respect to the Whitehurst Memorandum, again the Report omits critical facts previously conveyed to the interviewers and misstates certain facts. First, while former AUSA Pollak was irritated over the Whitehurst Memorandum, her concerns had nothing whatsoever to do with the opinions stated regarding the chemical analysis or the issues raised by Whitehurst relative to the dynamite. Indeed, contrary to the statement in the Report that "Pollack [sic] dismissed the concerns raised in the memorandum because Bender, not Whitehurst, had actually done the analysis," AUSA Pollak had no idea who either Bender or Whitehurst was at the time she first received the Whitehurst Memorandum. Rather, she dismissed the Whitehurst conclusions for the reasons stated above: they were irrelevant both to the government's case and to the defense. Her specific concern with the Whitehurst Memorandum was the format of the memorandum and specifically, the fact that Whitehurst had listed a series of questions which seemed designed as questions for the cross-examination of Agent Hahn relating, inter alia to potential contamination, etc. Although the government is clearly under an obligation to disclose Brady material,[15] there is no requirement that the government prepare cross-examination questions for the defense to use in its case, and indeed, Judge Pollak has never seen another FBI memorandum where such a format has been used. It was clear from the face of the Memorandum that Whitehurst's questions were based on sheer speculation, that he had no facts to suggest that contamination had occurred and, indeed, the prosecutors were satisfied after interviewing the two agents involved in the collection of the evidence that there was no reason for concern.

D. Agent Hahn Was a Summary Witness

Apart from the fact that certain of the Report's conclusions are flawed because Agent Hahn's testimony was analyzed out of context and without the benefit of reviewing the trial

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[15]The Report correctly notes that Judge Pollak did not believe the Whitehurst Memorandum constituted Brady material, but fails to mention that both Judge Pollak and Ms. Wilkinson believe that the Memorandum was in fact turned over to the defense during the course of the trial even though there is no document to confirm that disclosure.

testimony of other witnesses, the Report also fails to recognize that Agent Hahn was presented in large measure as a summary witness. His testimony was preceded by that of numerous witnesses, including other experts, who testified about the planning of the bombing, the accident scene itself, the state of the wreckage, the state of the bodies recovered from the wreckage and the investigation conducted of the incident. (See, e.g., Testimony of Luis Eduardo Munoz Espitia, head of security for the Colombian Civil Aeronautics Board at Tr. 2955-2985; and Dr. Pedro Morales, forensic pathologist at Tr. 2860-2866). Indeed, as several witnesses made clear in their testimony to the jury, everyone involved, including not only the NTSB, the FAA and the FBI, but the numerous Colombian experts involved in the investigation, met on a daily basis to compare notes, share information and jointly reach conclusions regarding the incident. (Tr. 2365, 2367-68; 2971-73). Prior to Agent Hahn's testimony, witnesses had already testified about the respective roles played by the FBI, NTSB, FAA and various Colombian members of the Task Force, as well as explaining fully to the jury the fact that the conclusions reached were the product of joint efforts and the sharing of joint expertise. Thus, to suggest that somehow Agent Hahn's inadvertent use of the word "I" instead of "we" in two spots during the second trial was somehow misleading to the jury and suggested a claim of greater expertise than Hahn was qualified for takes Agent Hahn's testimony out of context and implies that the jury was unaware of the input of other experts supporting Agent Hahn's conclusions. (See Report at 22).

For example, several witnesses testified regarding the nature of the investigation, the configuration of the plane and the autopsies conducted on the bodies of the victims. Many of these were Colombians, experts in their own right with hands-on experience in the investigation. Included among these witnesses was Luis Eduardo Munoz Espitia -- from the Colombian equivalent of the FAA -- and the Colombian coroner, responsible for conducting the autopsies on numerous victims of the crash itself.

Luis Eduardo Munoz Espitia, from the Colombian Civil Aeronautics Board, testified regarding his preparation of a detailed diagram of the crash scene and the numerous photographs taken of the damage to the plane. (Report at 26). He testified extensively about touring the scene of the wreckage with Agent Hahn, and identified a photograph taken of the two of them examining certain wreckage. He also testified based on his experience and expertise about

various parts of the airplane as they appeared in the photographs. In order to maintain clarity of the record and to ensure that the jury understood what the various parts of the plane were when referred to by Agent Hahn in his testimony, the same terms were used and in part the same testimony was repeated by Agent Hahn and by Espitia. Because of the context in which Agent Hahn testified, however, we felt it was unnecessary and cumulative for him to qualify each and every statement that he made with regard to the identification of the pieces of wreckage and the function and location on the plane when it was abundantly clear to the jury that he was summarizing evidence also testified to by Espitia and other witnesses. Given Espitia's testimony, we feel that the Report unfairly criticizes Agent Hahn's description of the structure of the aircraft based on the diagrams and other photographs.

Similarly, the Report criticizes Agent Hahn for "testify[ing] to a distinct demarcation line between his duties on the one hand, and the duties of the NTSB and FAA representatives, on the other, by saying that his assignment was to determine whether an explosive device functioned on the aircraft and the duties of the others was to determine whether the crash resulted from a mechanical failure." (See page 27 of the Report, subsection g). Not only does the Report ignore the fact that other witnesses had previously testified regarding Agent Hahn's role and that of the other agencies involved, but the Report misstates Agent Hahn's testimony. Agent Hahn was first asked what his "specific assignment" was, to which he responded: "my assignment here was to go through the wreckage and try to determine whether or not, perhaps, an explosive device had functioned in this aircraft." (Tr. at 2892). He was then asked: "How did your assignment differ from the assignment or duties of the individuals from the [NTSB] and the FAA?" His response, which was specifically directed to explaining the difference between his role and theirs was as follows:

> Their duties were primarily geared toward, again inspection of records to make sure the aircraft had been properly maintained; inspection of the flight data recorder, listening to the voice data recorder to try to determine if there was a failure -- mechanical failure of the aircraft for one reason or another that caused this crash.

(Tr. at 2892-3) (emphasis added). Even without considering the context in which the jury heard

this testimony and all the evidence that had gone before, Agent Hahn nowhere drew a "distinct line of demarcation," or suggested that the NTSB or FAA had no role in investigating the existence of an explosive device, but rather through the use of the qualifier "primarily" made it clear that the enumerated duties which they performed were not exclusive but were within areas of expertise and responsibilities beyond the ones that he possessed.

Finally, the Report also criticizes Agent Hahn for including in his testimony the fact that he participated in the investigation of the Pan Am 103 accident and the World Trade Center bombing because his role in these cases was limited to examining the personal effects of the victims and managing the crime scene. Surely the Report is not suggesting that it was improper for him to testify regarding these other investigations, his observations of the scenes and his examination of the effects of the explosions there. These observations and experiences clearly became a part of his overall experience and are clearly relevant and admissible as background under existing case law. See, e.g., In re "Agent Orange" Product Liability Litigation, 611 F. Supp. 1223, 1241 (E.D.N.Y. 1985) (Weinstein J.) (noting that "Rule 702 of the Federal Rules of Evidence provides for opinion testimony by experts 'if scientific, technical or other specialized knowledge will assist the trier of fact to determine a fact in issue' and the witness is 'qualified as an expert by knowledge, experience, training, or education' . . . . doubts should be resolved in favor of admissibility") (emphasis supplied).

Similarly, the case law is clear that experts are allowed to rely on facts or data made known to them by others, id. at 1242; Fed. R. Evid. 703, including hearsay reasonably relied upon by other experts in the field, id. at 1244-46, and to extrapolate and draw conclusions from prior experience even if they haven't had professional scientific training or conducted specific scientific study and research into a particular problem. (See Report at 11-12). See, e.g., Fox v. Dannenberg, 906 F.2d 1253, 1255 (8th Cir. 1990) (discussing the fact that Rule 702 "'does not rank academic training over demonstrated practical experience'") (quoting from Circle J. Dairy, Inc. v. A.O. Smith Harverston Products, Inc., 790 F.2d 694, 700 (9th Cir. 1986)). See also Loudermill v. Dow Chemical, Co., 863 F.2d 566, 570 (8th Cir. 1988) (holding witness competent to testify as expert as to cause of plaintiff's cirrhosis even though not a medical doctor); Southern Cement Co. v. Sproul, 378 F.2d 48 (5th Cir. 1967) (holding that "[a]s a general

rule, '(a) person may become qualified as an expert by practical experience . . . . Professional education is not a prerequisite'") (quoting Santana Marine Service, Inc. v. McHale, 346 F.2d 147, 148 (5th Cir. 1965).

The decision as to whether and to what extent a witness should be allowed to testify and give opinions is left to the discretion of the trial judge. In re "Agent Orange" Product Liability Litigation, 611 F. Supp. at 1242. In this case, Judge Johnson, the district court judge who presided over both trials was not only fully aware of the qualifications and testimony of Agent Hahn, but had heard the testimony of all of the other experts and witnesses and was fully aware of the defense case and the claims of Arete. In exercising his discretion to admit Agent Hahn's testimony, he considered all of these factors -- including many of the issues overlooked by this Report, most importantly, the lack of any controversy surrounding the issues to which Agent Hahn's testimony related.

In large measure, the Report unfairly criticizes Agent Hahn for any lack of specificity in his testimony. Apart from ignoring the context in which he testified, the Report fails to recognize that the prosecutors, being aware from conversations with the defense that Hahn's conclusions and opinions were not being challenged, and being cognizant of the criticism leveled at the government for the length of the trial and the cumulative nature of the testimony being elicited, made the deliberate decision to narrow Agent Hahn's testimony. As noted above, his testimony and that of the other witnesses made it clear that the conclusions reached by the Colombian investigators and all of the other team members were part of the information available to Agent Hahn in providing what was in essence his summary of all of the information that he garnered from all of the experts marshaled to investigate this incident and that it was all of this information that he used in forming his opinions.

E. The Report Fails to Define Terms and To Explain Its Findings In Light of Other Experts' Opinions

The Report criticizes Agent Hahn's conclusion regarding the existence of a fuel-air explosion or flash fire, stating that the injuries experienced by the bodies "on the plane are not consistent with a flash fire or fuel-air explosion, which are of short duration." As noted above,

the findings of the coroner and the Colombian physicians who actually examined the corpses "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." (Colombian Report at 48).[16] This was entirely consistent with Agent Hahn's opinion. However, the Report concludes: "rather, the injuries indicate that the bodies were subjected to substantial heat for a significant period of time." (Report at 24) (emphasis added). The Report further suggests that it was more accurate to conclude that there was "a hot fire burning for a continuous period of time which could have led to a fuel-air explosion." (Id.)[17]

We are troubled by this conclusion for a number of reasons. First, it flatly contradicts the conclusions reached not only by Agent Hahn, but by Walter Korsgaard and Calvin Walbert, the two experts from the FAA who were in Colombia and actually investigated the crash scene.[18] Similarly, the report issued by the Colombian government and its cadre of experts who were present and directed the investigation concluded that a fuel-air explosion had occurred.[19]

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[16]See Administrative Department of Civil Aeronautics Air Safety Division, Report of Aviation Accident, dated December 28, 1989 ("Colombian Report").

[17]This sentence on page 24 of the Report seems to suggest that there may have been a fuel-air explosion as a result of a hot fire, while in subsection E of Part Five (page 10), the conclusion seems to be that Agent Hahn "testified incorrectly . . . concerning a fuel-air explosion." This seeming contradiction in the Report itself needs clarification.

[18]In several places in the Korsgaard Report, Korsgaard presents his opinion that a fuel-air explosion occurred (Korsgaard Report at 4, 5) and indeed, notes that "[t]he APU located at the rear of center fuselage wing box section is blown to [the] rear of aircraft by the force of the fuel-air explosion within this center section fuel tank" (Id. at 5). He also observes that the "evidence indicated severe burning in the area below the cabin floor and damage typical of flash over in the passenger cabin area. (Id. at 1) (emphasis added). During an interview conducted prior to the first trial, Korsgaard's partner, Calvin K. Walbert, also with the FAA, independently confirmed Korsgaard's opinion that a "fuel-air explosion" had occurred.

[19]The Colombian Report concluded "after a careful examination of the bodies, their injuries and their types of burns, the finding is that there was an explosion inside the aircraft in mid-air, which was subsequently aggravated by the explosion of some type of gas (oxygen, fuel fumes or other substance)." (Colombian Report at 39) (See also pp. 44 of the Colombian Report, discussing the "fuel-air explosion" and p. 51 in the section labeled "Findings," where the report concludes that "an explosive device which used a relatively small amount of high power

It is not clear from the Report whether the experts reviewing Agent Hahn's testimony were given access to these other reports (copies of which are available upon request) or whether they ever discussed their analysis with any of these other experts who were actually present, saw the fire and structural damage first-hand, and spoke on a daily basis with all of the Colombian experts involved in the case. Indeed, one of the problems with evaluating and commenting on this section of the Report is that the Report fails to set forth the scientific or other foundation on which it bases its conclusion that there was no fuel-air explosion or "flash fire."

Moreover, the Report suffers from some of the same problems that it identifies in Agent Hahn's testimony. It fails not only to specify the basis for its conclusions, but it fails to define terms. For example, the Report concludes that the fire burned for "a significant period of time" or a "continuous period of time." (Report 24). What does that mean? Clearly, had the drafters of the Report reviewed all of the evidence, they would have realized that the bodies were subjected to fire for only a matter of a minute or two, possibly only seconds, between the time of the first explosion and the second explosion which blew the plane apart and brought it to the ground. As a review of the recordings on the black box showed, the plane was cleared for take-off from Bogota at 7:11:48 a.m., and travelled less than 6 minutes[20] before the crash occurred. The flight recorder data, which terminated at the time of the first explosion, showed that the plane had only reached an altitude of approximately 13,000 feet when the first explosion occurred. According to the eyewitness reports, the eyewitnesses heard the first explosion, observed fire emanating from the right side of the plane in the vicinity of the wing, and "after several seconds" observed a second explosion which blew the plane apart and brought it crashing to the ground. (Tr. at 2983). The voice data recorder and technical data recordings show that prior to the first explosion at 7:13 a.m., everything was fine on board the plane; there was no evidence of any fire, excessive heat or other problem prior to that time.

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explosives was detonated . . . . and that [i]t is likely that a fuel-air explosion caused by hot gases might have occurred shortly thereafter, causing the aircraft to break apart").

[20]The Colombian Report states the time of the crash as 7:16:39 local time. (Colombian Report at 1). The Korsgaard Report notes the time of the crash as "[a]bout 0717 (local time)." (Korsgaard Report at 6).

Thus, common sense tells us that at most, the people on the plane were subject to a "hot fire burning" or "substantial heat" for no more than two to three minutes. Indeed, given the eyewitnesses' accounts, it was probably even less time. If this is what the Report means by "a significant period of time" or "a continuous period of time," then it should so state. Otherwise, the Report's conclusions in this regard are not only misleading but appear to ignore all of the objective evidence in the case.

Conclusion

In summary, while we recognize the difficulties inherent in evaluating an expert's testimony in the context of a trial of several months duration, here there are some serious misconceptions upon which the Report is based that, in the end, has produced the erroneous conclusion which appears twice in the Report -- namely, that any errors committed by Agent Hahn "tended to help the prosecution's case or rebut a defense." (Report at 39; see also Part Five, subsection E at 10). Since it is obvious that the writers of the Report may not have had access to or did not recognize the significance of the other evidence, it is understandable how they could have reached the conclusion that Agent Whitehurst's questions regarding the possible use of dynamite were harmful to the prosecution's case and Agent Hahn's testimony was helpful to the prosecution. Nevertheless, we would suggest that the Report be clarified to reflect the true nature of the prosecution's case and the fact that at best Agent Whitehurst's testimony was irrelevant and at worst, the prosecution failed to present a stronger case for conviction than we did. Furthermore, we think that the Report should make clear whether it disagrees with Agent Hahn's ultimate opinion that there was an explosive device that functioned on board the plane, breaking the plane in pieces and resulting ultimately in the deaths of the passengers and crew members on board. Since this conclusion was the only issue even arguably relevant to the case, the Report's position and its basis for reaching that conclusion should be stated.

Magistrate Judge Pollak has reviewed the trial transcripts and the various reports prepared by the other experts in this case, and discussed the Report and this letter with both Beth Wilkinson, Special Attorney to the United States Attorney General, and Special Agent Trotman, case agent on the Munoz Mosquera prosecution. They would all be more than happy to speak to

anyone regarding this issue and to supply whatever additional materials or testimony may be required to understand or clarify the questions raised herein. Please do not hesitate to call Judge Pollak at (718) 260-2360, Ms. Wilkinson at (303) 313-2299 or Agent Trotman at (609) 757-5407.

Respectfully submitted,

Zachary W. Carter
United States Attorney
Eastern District of New York

CHERYL L. POLLAK
United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
225 CADMAN PLAZA EAST
ROOM 208
BROOKLYN, NEW YORK 11201

March 7, 1997

Barry Elden, Esq.
Special Investigative Counsel
United States Attorney's Office
219 Dearborn Street
Room 500
Chicago, IL 60604

Dear Mr. Elden:

Pursuant to our telephone conversation of February 26, 1997, I have copied those portions of certain transcripts which I think exemplify the way Special Agent Hahn's testimony appeared to the jury in context with the other witnesses who testified.

Specifically, I have included the transcripts of those witnesses who testified regarding the Avianca plane, such as Luis Eduardo Munoz Espitia and Dr. Morales, both of whom are mentioned in the earlier letter submitted by U.S. Attorney Zachary Carter. I have also included portions of the testimony of Special Agent Dwight Dennett who testified not only about the plane investigation, but also about the DAS bombing and certain rocket attacks against the U.S. Embassy. If you review, in particular, Mr. Munoz Espitia's testimony at pages 2956, 2963-2968, 2971-2974 and Agent Dennett's testimony at pages 2363-2368, 2370, 2372-2375, you will see that they both discuss, as does Agent Hahn, the nature of the investigative team formed, the members of the team, as well as the general procedures and methodology followed during the Avianca investigation.

I have also enclosed, per your request, the Colombian Report in Spanish and translated into English, as well as the Koorsgaard Report, in case you need a copy. Please let me know if there are any other transcripts or reports that you would like to see.

One thing you should understand, however, is that these witnesses were not the only expert or technical witnesses who testified in the case. As an example, I have also included the testimony of Detective Francisco Fonseca, who testified about the DAS bombing and Captain Pena, the Colombian bomb squad expert, who testified about the Avianca and Maza truck bombings.[1] In addition to the five witnesses whose transcripts I have provided, there were several other technical expert witnesses, including Special Agent Jordan from the FBI laboratory and several Colombian military and police officers, who testified relating to several of the other bombing/rocket incidents with which Munoz Mosquera was charged as part of the conspiracy in this case. Overall, even after deliberately eliminating a number of witnesses who had testified in the first trial, the government presented the jury in the second trial with over two and a half weeks of technical/expert testimony describing the methodology used by the defendant and his co-conspirators to perpetrate the acts charged. By the time the presentation of expert/technical evidence was completed, the jury had been saturated with technical terms and expert testimony -- none of which was critical to the case in that it did not relate to issues in dispute. Instead, as explained in Mr. Carter's earlier letter, this evidence was in essence background information for all of the incidents, presented to the jury to enhance their understanding, but not critical to establishing essential elements of the offenses charged.

We, as prosecutors, made the decision to have several witnesses, such as Agent Hahn, summarize for the jury the nature of the investigation of each act and the technical conclusions reached as a result of the investigation rather than have each individual who participated in each investigation testify about their particular findings in their area of expertise. In part, this was fueled by the extreme reluctance of certain of the Colombian witnesses to testify <u>at all</u> regarding the incidents for fear of retaliation by Munoz Mosquera's brothers, also terrorists and assassins for the Cartel. The decision was also influenced by a sense, gathered from the experience of the first trial, that there were too many witnesses, the trial was taking too long, and the key information -- in fact the only relevant information to the issue in controversy, namely, did

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[1]I have included these witnesses as extra examples because they, like Agent Hahn, also testified about the DAS and Avianca bombings.

Munoz Mosquera participate in these acts -- was to be derived from the testimony of the cooperating witnesses. Thus, while we could have called Walter Koorsgaard and Calvin Walbert to testify, or the individuals from Pratt and Whitney, we decided, based on the issues in controversy in the case to limit the number of witnesses and shorten the testimony on those areas where the defense had already conceded there was no dispute.

In retrospect, given that Agent Hahn's testimony was not critical to establishing the essential elements of the offenses charged, we might seriously have considered not calling Agent Hahn at all to present his summary testimony, simply to spare him the problems caused by this investigation. It is my position, based on the purpose and nature of his testimony, the decisions we made as prosecutors, and the fact that what he has been criticized for was simply not relevant to the issue in controversy, that he has been unfairly attacked.

I apologize for the time it has taken to put this information together for you, but as I indicated on the phone, I am currently trying a two-week medical malpractice case which is occupying most of my time right now. However, if you have any questions, please don't hesitate to call me and I'll try to return your call during a break or after trial. I am happy to assist you in any way that I can. Thank you for your consideration of this material and I hope my letter is of some assistance in responding to your questions.

Cheryl L. Pollak

cc: Michael Bromwich
U.S. Department of Justice
Room 4706
10th and Constitution Avenue, N.W.
Washington, D.C. 20530

RESPONSE BY:

(February 20, 1997)

UNITED STATES ATTORNEY'S OFFICE DISTRICT OF NEW JERSEY TO SECTIONS H1 AND H6: YU KIKUMURA AND CONLON CASE

U.S. Department of Justice

United States Attorney
District of New Jersey

Federal Building - Room 502
970 Broad Street
Newark, New Jersey 07102

201/645-2700

February 20, 1997

Hon. Michael R. Bromwich
Inspector General
U.S. Department of Justice
10th & Pennsylvania Avenues, NW
Washington, D.C. 20530

Dear Mr. Bromwich:

Please accept this letter regarding the draft report of your investigation into allegations of misconduct relating to certain sections of the FBI Laboratory. Two sections of the draft report related to cases handled by this Office: the Yu Kikumura and Conlon cases.

Former AUSA John Lacey reviewed Section H1 regarding the prosecution of Yu Kikumura. Subsection D addresses claims that Thomas Thurman testified improperly about the possible use of other materials in explosive devices. In particular, the report addresses Thurman's testimony that the finding of three prills of ammonium nitrate in a paper bag indicated that the person "likely had a much larger quantity of ammonium nitrate." The draft report concludes that Thurman should have said such a conclusion was "logical" but not "likely." It should be clear that one would not purchase three prills of ammonium nitrate, because that quantity has no useful value. Accordingly, Thurman's conclusion that it was likely there had been a much larger quantity appears accurate.

AUSA Irene Dowdy reviewed Section H6 regarding the Conlon case and found no inaccuracies in the draft.

In response to your request for information regarding access to the report, please be advised as follows: (1) Irene Dowdy reviewed the draft report on the Conlon case in my office on February 13, 1997, and at no other time; (2) John Lacey reviewed the draft report on the Kikumura case in my office on February 20, 1997, and at no other time. I was the only other individual who had access to the report. If you need a more formal submission on this issue, please do not hesitate to contact me.

Pursuant to your request, the draft report is being returned to you.

Very truly yours,

FAITH S. HOCHBERG
United States Attorney

By: STUART RABNER
Executive Assistant U.S. Attorney

Encl.

RESPONSE BY:

(March 3, 1997)

SPECIAL ATTORNEY TO THE UNITED STATES ATTORNEY GENERAL, ROBERT CLEARY, TO SECTION H9: THE UNABOM ARTICLE

U. S. Department of Justice

United States Attorney
District of New Jersey

Federal Building - Suite 700
970 Broad Street
Newark, New Jersey 07102

201/645-2700

March 3, 1997

BY TELEFAX & U.S. MAIL
Mr. Michael R. Bromwich
Inspector General
U.S. Department of Justice
10th & Pennsylvania Avenues, N.W.
Washington, D.C. 20530

Re: Draft Report Concerning FBI Laboratory

Dear Mr. Bromwich:

In Part Three, Section H9 of the draft report, you address certain criticisms made by FBI agent-examiner Steven Burmeister about the explosive residue examinations conducted by examiner Terry Rudolph. You found Burmeister's complaints to be well-founded in several instances. Based upon those concerns, you recommend that a qualified explosives residue examiner review all of Rudolph's UNABOM work before it is further used in the case.

This is to apprise you that we will not be relying upon any of Rudolph's work in prosecuting Theodore J. Kaczynski. To the extent that we will offer explosive residue evidence, we will be relying upon the examinations and conclusions of Burmeister and of other, non-FBI laboratories. I respectfully request that the report be amended to reflect this information.

Very truly yours,

Robert J. Cleary

ROBERT J. CLEARY
Special Attorney to the
U.S. Attorney General

RESPONSE BY:

(February 3, 1997)

UNITED STATES ATTORNEY'S OFFICE MIDDLE DISTRICT OF PENNSYLVANIA TO SECTION H12, TOBIN ALLEGATIONS

Memorandum

Subject	Date
U. S. v. Mauchlin Investigation by Office of the Inspector General into FBI Laboratory	February 3, 1997

To

Martin C. Carlson, Chief
U.S. Attorney M D PA
Harrisburg, PA

From

Frederick E. Martin, AUSA
U. S. Attorney M D PA
Williamsport, PA

In accordance with your memorandum of January 30, 1997, as well as the January 22, 1997, letter from the Department's Inspector General, Michael R. Bromwich, I have reviewed the draft investigation which relates to the above-referenced trial and subject. It appears from my perspective to be accurate and thorough.

The only person with whom I shared the report was SA Michael Hahn, the case agent in Mauchlin. He too agreed with my observations regarding the completeness and correctness of the Department's investigation into this matter.

Please feel free to contact me (717-524-7804) if you have any additional questions about this matter. The letter of Mr. Bromwich, the attached draft and your memorandum are herewith enclosed.

DMB:FEM;fm
Enclosure

RESPONSE BY:

(February 7 and 13, 1997)

ATTORNEY JOHN DOAR TO SECTION H12, TOBIN ALLEGATIONS

LAW OFFICES OF
DOAR DEVORKIN & RIECK
WOOLWORTH BUILDING
(212) 619-3730

JOHN DOAR
MICHAEL S. DEVORKIN
JOHN JACOB RIECK, JR.
CHRISTOPHER E. CHANG
WALTER MACK

JEREMY M. KLAUSNER

10TH FLOOR
233 BROADWAY
NEW YORK, N.Y. 10279-0173

FACSIMILE: (212) 962-5037

February 7, 1997

By Federal Express

Michael R. Bromwich
Inspector General
U.S. Department of Justice
Washington, D.C.

Dear Mr. Bromwich:

This will acknowledge your letter of January 20, 1997 which arrived in my office on January 28, 1997 while I was away on business in northwestern Wisconsin.

When I returned to my office on February 5th, I read the draft report carefully. I write to advise that I intend to comment on your report. I believe your quotations from the report make it appear that the Investigating Committee placed some weight on Agent Malone's testimony and that was not the case.

I also know that I did not tell Malone that I had forgotten to subpoena Tobin.

Before I send you my comments, I intend to review the Committee's report carefully as well as the record that I have preserved of my work for the Investigating Committee. The report

and the records are in storage and I will not be able to retrieve them until this weekend, but you will hear further from me early next week.

I have discussed the draft of the report which you sent me with Judge Gerald Tjoflat, formerly the Chief Judge of the Court of Appeals for the Eleventh Circuit. Judge Tjoflat was a member of the Investigating Committee. He has asked me to advise him further after I have reviewed the records.

Sincerely,

John Doar

cc: Hon. Gerard B. Tjoflat (by Federal Express)

LAW OFFICES OF
DOAR DEVORKIN & RIECK
WOOLWORTH BUILDING
(212) 619-3730

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MICHAEL S. DEVORKIN
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February 13, 1997

By Federal Express

Michael R. Bromwich
Inspector General
U.S. Department of Justice
Washington, D.C.

Dear Mr. Bromwich:

This letter is in further reply to your letter of January 20, 1997 in which you enclosed a section of the draft report into allegations of misconduct relating to certain sections of the FBI laboratory.

The section of the draft report purported to be a detailed examination of the investigation conducted by a Special Committee of Judges of the Eleventh Circuit of the United States into allegations contained in two complaints filed against then United States District Judge Alcee L. Hastings.

You requested that I review the section of the draft report for any factual inaccuracies.

As I indicated in my letter to you of February 7, 1997, I have advised Judge Gerald B. Tjoflat, formerly the Chief Judge of the United States Court of Appeals for the Eleventh Circuit

and a member of the Special Committee, of your letter and on February 7th, I sent him a copy of the section of the draft report.

My reactions upon reading the report were twofold. First, I am concerned that a reader of the report might conclude that Agent Malone's testimony had a significant bearing on the findings of the Investigating Committee and might also assume that in making its findings, the Investigating Committee had strictly observed the Federal Rules of Evidence in considering the matters that were brought to its attention. Neither the conclusion nor the assumption was the case.

Second, the meeting described by Malone when he conferred with me before testifying is not factually accurate. I am certain he did not tell me that Agent Tobin, rather than Malone, had conducted the tensile tests. I know that I did not tell Malone that "I forgot to subpoena Tobin", or ask Malone if "he could read Tobin's results into the record". Contrary to what Malone told your investigators, I am certain that I did not have "something in writing regarding the tensile tests."

While the draft report reflects that when interviewed by two of your investigators on August 6, 1996, I disputed Malone's recollection, the draft's failure to resolve this "dispute" may be construed as a reflection on me and I do not like it.

When I was interviewed I had not had a chance to go back to review my files, and I was not asked to do so.

During my interview I told your investigators that I had detailed records of my work product as counsel to the Investigating Committee and I would be glad to research my records to see if there was any information in the files that would assist them. During the interview, I produced for your investigators the detailed index to my records and from those records determined that Malone had testified on October 2, 1985. I believe your investigators had assumed that Malone testified later in October.

At that time I was told that it probably would not be necessary to search my records but if there were a need, I would be so advised.

Thereafter, someone from your office called to ask if I could provide a full transcript of Malone's testimony from storage. I did obtain the transcript, but thereafter my office was advised that the transcript had been obtained from another source.

Last weekend after reading the draft report, I went to my farm where my records are stored and now provide you with the following information:

With respect to the procedure of the Investigating Committee, I enclose the notice to U.S. District Judge Alcee L. Hastings that then Chief Judge John Godbold of the United States

Court of Appeals for the Eleventh Circuit and Chairman of the Investigating Committee sent to Judge Hastings on April 2, 1985. (Exhibit 1) You will note that on page 3 of that notice Judge Godbold told Judge Hastings the following:

> The Federal Rules of Evidence, and common law rules of evidence, will be utilized when in the judgment of the committee they are appropriate.

Thus, under the Committee's procedure, if Agent Malone had told me that Agent Tobin had conducted part of the FBI Laboratory tests on Judge Hastings' purse, I would have had Agent Malone read Tobin's report into the record. That did not happen because when Agent Malone testified I did not know that Agent Malone had not conducted the so-called tensile tests nor did I have any written report from the FBI to that effect. As to this latter matter, I will return to it later.

On page 15 of your draft report, you refer to two sentences of the Investigating Committee's report with respect to Malone's testimony to the effect that the separation of the strap on Judge Hastings' purse "wasn't a tear at all, it was a cut."

Your draft report then states that the Investigating Committee's report concluded that there was clear and convincing evidence that Hastings had participated in a bribery scheme and had later sought to conceal his participation and explain away evidence connecting him to the scheme.

This is not a fair summary of the Committee's findings. Rather, it suggests that the Committee, in makings its findings,

put some weight on Malone's testimony. However, anyone reading the report would readily appreciate that was not the case.

The Investigating Committee's report is in three volumes. The first two volumes consist of the Committee's summary of the evidence received and considered during the course of its investigation. As your draft report indicates the Committee heard testimony from approximately 110 witnesses and considered nearly 2,800 exhibits. Near the end of its summary on page 228 of Volume 2, the Committee devoted one-half page to the testimony of Agent Malone and one sentence to the finding on his microscopic examination. No reference was made to the results of the tensile test.

In Volume 3 of its report the Committee carefully analyzed the evidence. The purpose of the report was to advise the Judicial Council of the Eleventh Circuit of the results of its investigation. The Committee first reported to the Judicial Council that in analyzing the evidence, fourteen circumstances must be kept in mind, each of which the Committee documented in detail.

The Committee then discussed what it called "further corroboration" of various items of evidence. It is not possible for me to adequately convey to you the extent of the corroborative evidence, but I suggest that you read pages 291-317 of the report.

On page 318, the Committee analyzed the evidence as to events that occurred on October 9th, the day Judge Hastings "attempted to have a piece or pieces of luggage repaired" and how he purchased a new bag to replace the damaged item. On page 319, the Committee made only the following observation:

> The testimony concerning acquisition of an additional man's purse is troublesome because the strap which Judge Hastings claimed he tried to have repaired was not torn, worn, or broken; it was cut.

Thereafter, beginning on page 324, the Committee set forth its findings. The findings consisted of thirty-two separate specific findings to support its conclusion that:

> The evidence, considered in its totality, clearly and convincingly establishes that Judge Hastings was engaged in a plan designed to obtain a payment of money from defendants facing jail sentences imposed in his court by promising that with the payment they would receive lenient non-jail sentences.

I suggest that you attach as an exhibit to your report pages 324-329 (Exhibit 2) and note in your report that none of the findings make any reference to Judge Hastings' purse being cut.

As to that part of your draft report that discusses Agent Malone's meeting with me, there are several factual inaccuracies including incompleteness that might cause a reader to draw an inaccurate conclusion.

By way of background, among the persons in my office who worked on the investigation with me was Joseph Sullivan, a

former FBI inspector with whom I had worked extensively while I was in the Civil Rights Division.

In May 1985 as we were in the process of preparing for hearings before the Committee, one of our paralegals observed that it seemed strange that the strap to Judge Hastings' purse broke in the middle. I discussed this with Mr. Sullivan and he suggested that we send the purse to the FBI Laboratory to see if it were feasible to obtain a Laboratory examination of the strap.

On about May 22, 1985, Mr. Sullivan discussed the matter with Special Agent Peter W. Keller and arranged to forward the purse to the Laboratory through the Atlanta office of the FBI. On May 22, 1985, Mr. Sullivan drafted a letter to Mr. Keller for my signature in which he explained the purpose of the proposed examination. I do not know whether this letter was sent because in my file which I obtained last weekend from storage, I located two copies of a letter to the FBI with respect to Judge Hastings' purse (Exhibits 3 and 4). You will note that on one of the letters are my handwritten words "not sent". This letter was in my "Contacts with FBI File". The other copy of the letter was in my correspondence file.

On July 5, 1985, I sent an FBI request to Special Agent Dennis Aiken with respect to certain information we requested the Bureau to obtain about Judge Hastings' purse (Exhibit 5). Such a request was the customary and regular way I sought investigative support from the Bureau.

With respect to Agent Malone's testimony with respect to his contacts with me, at page 12 your draft report states that "According to Malone, he met with Doar to discuss his testimony the same day Malone appeared before the Investigating Committee."

This statement is factually inaccurate. Malone met me on Tuesday, October 1, 1985, the day before he testified. I have very rough notes of my interview with him dated October 1, 1985. Those notes were in Michael Malone's witness file together with a report of the FBI Laboratory dated September 30, 1985. The September 30, 1985 FBI report (Exhibit 6) and my notes as well as my witness outline (Exhibit 7) are enclosed.

My handwriting is bad so it may be difficult for someone to make out what I had written, but I can tell you that my notes clearly reflect that Malone described to me a tensile test that he participated in and observed.

The report states that the purse was delivered to the Laboratory on August 8, 1985. Malone testified that he conducted certain microscopic tests on September 25, 26 and 30, 1985.

Your draft report then states that Malone maintains that he then told Doar that he did not conduct the tensile tests but that Tobin had done so. According to your report, Malone recalls that I stated "Damn, I forgot to subpoena Tobin."

Malone's statement is factually inaccurate. I did not say that. In the first place, while approximately 25 FBI agents testified before the Committee, no FBI agent was ever subpoenaed

to testify. That was not our practice. I have bound a copy of all of the subpoenas the Committee issued. Nowhere is there a subpoena for an FBI agent. My practice was to write a letter to S.A. Aiken and request that a certain agent be present on a day certain to provide testimony.

Malone did not ever mention Tobin's name to me and I have searched my records high and low and I cannot find any reference to the name Tobin. My notes contain no reference to Tobin or any other agent in the FBI Laboratory who conducted any tests.

Next, the draft report states that "Malone says Doar asked if he could read Tobin's results into the record and Malone agreed to do so." At that time, all that had been provided to me was the Laboratory's September 30th report.

The draft report continues: "Malone thinks he may have then had Tobin's handwritten October 2, 1985, dictation, and says that Doar must have had something in writing regarding the tensile test because Doar knew about the 29.5 pound figure."

I did know about the 29.9 figure because Malone told me that number. It is recorded on page 3 of the notes of my interview with Malone. Prior to receipt of the Laboratory's November 7, 1985 report, I did not have anything in writing regarding the tensile test. At no time has the Bureau ever sent me something unofficial in writing, assuming that Tobin had

written something in his handwriting prior to his October 2, 1985 dictation.

On page 3 of my notes of the Malone interview, I have written:

> Broke exactly same tensile strength
> I couldn't break it
> normal average person - no more than I can exert
> Broke exactly at 29.9 lbs. of tensile strength.
> gave us a number
> only way break strap

Your report goes on to say that "he told Doar he was not an expert in the 'force test' but that he would try to answer the questions." That did not happen. Malone did describe the tensile test as an "odd ball" test because he said the test had never been done with leather.

Your next paragraph correctly states that I disputed Malone's recollection about the discussion. That was my recollection without any chance to review my records. As a matter of fact, my recollection is that when your investigators came to see me, I believe they said that Malone had told them that I had said to go ahead and testify as if he (Malone) had done the test, rather than what your draft report says about me asking Malone to read Tobin's report into the record.

Your draft report then analyzes Malone's testimony in part. It focuses on his testimony about the tensile test but says nothing about his microscopic tests which caused him to

conclude that the strap had been partially cut and partially torn.

The testimony about the tensile test that you outlined in your draft report was confusing to the Committee. Therefore, on October 5, 1985 I wrote the Bureau requesting further investigation about the force required to break the strap. (Exhibit 8).

On November 7, 1985, the FBI Laboratory issued a second report about the strap (Exhibit 9). This report, while contradicting Malone's testimony about the amount of static force required to break the strap, did not in any way, as Tobin later wrote, affect the Laboratory's "technical assessment" that the purse strap had been cut.

On November 20, 1985, I received the November 7, 1985 Laboratory report. There was no indication that Tobin had conducted the tests.

The Committee requested me to recall Malone to testify on April 8, 1985. Malone's testimony is summarized as follows:

On April 8, 1986 Malone testified as follows:

> He explained the tensile test and the significance of the 29.5 pounds of force. He said he went back to verify how test was done. He said using a "slow steady pulling force" when machine reached approximately 29.5 pounds of pull the strap broke. He said it reflected the breaking point of the strap under slow steady pressure.
>
> He also testified that by examining the two ends of the strap under high

> magnification, he had been able to determine it had been one continuous strap.
>
> "By fitting it together, looking at torn edges, and the grain of the leather under high magnification, I was able to determine that the point of the strap where it separated was originally adjoining portion of the same strap."
>
> Opinion based in part of his examination of strap under microscope, high magnification.
>
> He was asked was there one break or more than one break. He said one break. He said conclusion was arrived at, in part at least, on the basis of his examination of the ends of the strap under the microscope.

I enclose the transcript of that testimony (Exhibit 10). The Committee did not pursue Malone's testimony any further.

On May 14, 1986, I requested my paralegal to call Agent Malone to obtain more information about the strap on Judge Hastings' purse. Marta Campos reported her conversation with Malone (Exhibit 11).

I also have two objections to the portion of your draft report that quotes Agent Tobin's written opinion that Agent Malone's testimony:

> "Presents apparently and potentially exculpatory information as incriminating . . . Malone's testimony about the test breaks 'suppresses apparent exculpatory material behavior' . . . ."

I object to including Tobin's opinion as to what is "exculpatory information" because it is an opinion in a vacuum. I also object to the effect of Tobin's opinion on a reader of

your report when you provide no details as to the specific evidence of criminal conduct that was before the Committee.

In summary, I am concerned with the factual inaccuracies, the incompleteness, and the tone of your draft report. After you have considered my letter, I believe you have a responsibility to take care to make certain that your final report is factually accurate and not misleading in a way that might reflect, in the eyes of even one reader, badly on the Investigating Committee or on me.

Sincerely,

John Doar

This letter comes to you unsigned by Mr. Doar due to his absence from the City.

cc: Hon. Gerard B. Tjoflat (by Federal Express)

OIG REPLIES TO THE RESPONSES TO THE DRAFT REPORT

OIG REPLIES TO RESPONSES TO THE DRAFT REPORT

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.