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10 MOST UNWANTED *Gov't Forensic Witnesses* Top of page

UNWANTED BY AMERICA'S CRIMINAL JUSTICE SYSTEM

UNDER SUSPICION

Michael P. Malone

Supervisory Special Agent

Occupations: Malone was employed in the Hairs and Fibers Unit from 1974 until 1994, when he was transferred out of the Laboratory.

OFFENSES AGAINST JUSTICE

The OIG Report found that Malone has given incorrect, inaccurate, and misleading testimony. (*OIG Report p. 457-458)*

REMARKS

The OIG Report recommends that Malone's testimony in future cases be monitored to assure that he is accurate and testifies to matters within his knowledge and competence. The report fails to recommend that the FBI review past cases in which Malone testified.

For an salient review of other cases in which Malone's laboratory findings have been questioned, see Laurie P. Cohen, *Strand of Evidence: FBI Crime-Lab Work Emerges As New Issue in Famed Murder Case*, Wall Street Journal, April 16, 1997, at A1.

If you have any information concerning this individual, contact the

National Association of Criminal Defense Lawyers
at 202-872-8600
1025 Connecticut Ave NW, Ste 901
Washington DC 20036

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Next Unwanted

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THE WALL STREET JOURNAL.

DOWJONES VOL. CCXXIX NO. 74 EE/PR ★★★ WEDNESDAY, APRIL 16, 1997 INTERNET ADDRESS: http://wsj.com

Strand of Evidence

FBI Crime-Lab Work Emerges as New Issue In Famed Murder Case

Jeffrey MacDonald's Lawyer Alleges Fraud by Agent With History of Problems

Mystery of the Blond Fibers

By Laurie P. Cohen
Staff Reporter of The Wall Street Journal

It has been nearly two decades since former Army surgeon Jeffrey MacDonald was convicted of murdering his wife and two daughters in their Fort Bragg, N.C., home. This is the story that was told in Joe McGinniss's best-seller "Fatal Vision," dramatized on television, chronicled in hundreds of newspaper articles and examined in a dozen judicial opinions.

Why it warrants attention again is quite a different story: one that involves a longtime star of the once-fabled FBI Laboratory and a Boston criminal-defense lawyer who is still seeking to overturn Dr. MacDonald's conviction.

Jeffrey MacDonald

Whatever the truth about Dr. MacDonald's guilt or innocence, a close examination of his long-moribund case raises serious concerns about the FBI crime lab, which is already under scrutiny for allegedly biasing its findings to favor prosecutors over criminal defendants.

Yesterday, the Justice Department inspector general issued a long-awaited report on the Washington-based lab; while very critical of the accuracy of some of its work, the inspector general said he could find no instances of perjury or fabricated evidence. (See related article on page A10.) The report made no mention of FBI Special Agent Michael P. Malone's pivotal role in keeping Jeffrey MacDonald behind bars, but it rebuked him sharply in an unrelated matter.

The MacDonald saga was already old and exceedingly tired when lawyer Harvey Silverglate took over the appeal in 1989, at Dr. MacDonald's request. The two men had been contemporaries at Princeton University in the early 1960s but had pursued very different callings. Mr. Silverglate, scruffy and left-leaning, had attended Harvard Law School and then gone on to defend draft resisters, student protesters and Black Panthers. More straitlaced, Jeffrey MacDonald had obtained a medical degree, joined the Army and become a Medical Corps captain. "If we had met Jeffrey in 1968, we would have hated him and he would have hated us," says Elsa Dorfman, Mr. Silverglate's wife.

But, in 1989, the MacDonald case intrigued Mr. Silverglate. From the start, Dr. MacDonald had claimed that his family had been clubbed and stabbed to death by a drug-crazed band of hippies, led by a woman wearing dark clothing, a floppy hat and a long, blond wig and chanting "acid is groovy, kill the pigs." He said he had been awakened by the screams that night in February 1970 and been stabbed — though mostly superficially — by the assailants. But physical evidence of any intruders was scant, and neither a jury nor, ultimately, onetime supporter Joe McGinniss, had believed him. All his appeals had failed, and he was serving his life sentence in a Sheridan, Ore., prison.

Yet buried in the voluminous appellate-court file were documents that Mr. Silverglate felt were tinged with mystery and promise. Dr. MacDonald's lawyers hadn't been aware of them at trial, and they had only been uncovered by a later team of defense lawyers through a Freedom of Information Act request.

The documents were handwritten lab

What's News—

Business and Finance

TWO TOP CIGARETTE MAKERS are in talks with tobacco plaintiffs about a settlement that would cover most of the industry's liability for smoking, people familiar with the matter said. The talks by Philip Morris and RJR Nabisco involve the industry accepting strict advertising curbs and a payment that could total $300 billion over 25 years. A deal faces major challenges, including Congressional passage of complex legislation. (Article in Column 6)

* * *

Stock and bond prices soared on signs inflation isn't picking up. The Dow Jones Industrials surged 135.26 to 6587.16. The 30-year Treasury bond's price rose 31/32 and its yield fell to 7.09%. The dollar retreated slightly.

Consumer prices rose a scant 0.1% in March, slowing its pace from February's 0.3% rise. Excluding food and energy, prices were up just 0.2%. (Articles on Pages C1 and A2)

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Chase and Citicorp posted quarterly profit in line with expectations, buoyed by strong corporate-banking results and cost cutting. Wells Fargo's profit fell short of projections. (Article on Page A3)

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Calpers will pay average rate increases of 2.7% to 11 HMOs in 1998, the first rise in five years by the nationally influential California state agency. (Article on Page A3)

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Felix Rohatyn's planned departure to become U.S. Ambassador to France leaves Lazard Freres without a clear top deal maker to fill his shoes. (Article on Page B13)

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Cable giant TCI said it will restructure into six geographical divisions and said it will seek partnerships with other cable firms in some markets. (Article on Page B2)

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An investigator for WebSecure expressed the belief that the indicted former chairman of Centennial Technologies arranged a deal in which WebSecure transferred 43% of its stock to an Irish firm for nonexistent software. (Article on Page A4)

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Sun Microsystems posted a 56% increase in quarterly profit, moderately topping analysts' expectations. (Article on Page B7)

* * *

The SEC filed an insider-trading suit against two people who bought API options before an announcement

World-Wide

THE JUSTICE DEPARTMENT ISSUED a devastating report on the FBI crime lab.

The inspector general said lab employees gave testimony distorted to fit prosecutors' needs and produced flawed reports in many cases, including ones as prominent as the Unabomber and World Trade Center bombings. In the Oklahoma City case, an agent decided on the bomb's composition based on defendants' alleged purchases, not scientific analysis. But the report found scientists didn't commit perjury or fabricate evidence. (Articles in Column 1 and on Page A10)

The report recommended structural changes in the lab and disciplinary actions against five of the employees, three of whom already have been transferred.

* * *

China blocked a U.N. resolution criticizing its human-rights record for the seventh year in a row. Several nations abstained from the 27-16 vote after an unprecedented campaign of threats by Beijing. Meanwhile, Secretary of State Albright will attend ceremonies July 1 marking Hong Kong's transfer to Beijing's rule. (Article on Page A4)

* * *

A fire at a Mecca pilgrim camp killed at least 217 people and injured 1,290, the Saudi government said, and witnesses contended the toll was higher. The tent city housed Muslims making the hajj, or pilgrimage to Mohammed's birthplace. Faulty cooking-gas cylinders were blamed. Most of the dead were from India, Pakistan or Bangladesh.

* * *

A suppressed drug study was published after a unit of Germany's BASF agreed not to sue researchers who found the company's Synthroid thyroid medication, which dominates a $600 million market, works no better than cheaper rivals. The study was to have run in January 1995, but was withdrawn due to lawsuit threats. (Article on Page B8)

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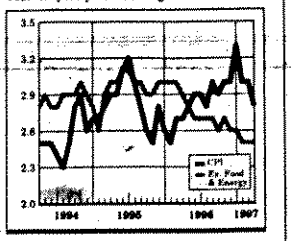
Consumer Prices

Year-to-year percent change.



CONSUMER PRICES ROSE 2.8% in the 12 months ended in March. Excluding food and energy sectors, the change was 2.5%. (Article on page A2).

Did Armstrong Turn This Shade of Green On His First Flight?

* * *

NASA Lets Students Aboard Its Zero-Gravity Plane; 'Wow! This Is Awesome'

By Kevin G. Salwen
Staff Reporter of The Wall Street Journal

OVER THE GULF OF MEXICO — The scene at 34,000 feet could be dubbed the Science Fair From Hell.

About half the 16 college students aboard NASA's experimental zero-gravity plane have spent at least part of the past hour throwing up. The worst-off sit slumped in their olive-green jumpsuits, ashen like shell-shocked soldiers.

The still-standing, however, are testing theories of physics, engineering and biology. "The experiment is working, man!" screams Sameh Wanis, watching on a video monitor as soundwaves inside his experiment box sculpt Styrofoam into three-dimensional shapes. "You know what this means? It means we've done something nobody else has done!"

Astronauts for a Day

Let other collegiates head for the beaches this spring break. Mr. Wanis, a Georgia Institute of Technology sophomore, and about 90 other undergrads are having their own most excellent adventure conducting science projects aboard the National Aeronautics and Space Administration's KC-135A plane. The agency for the first time is opening up its jet for six flights this week to 24 U.S. colleges and universities, allowing them to test such diverse projects as plant pollination without gravity and how a single knee joint reacts in space.

For many students, these two-hour flights are as close as they will get to space travel. "What are my chances of becoming an astronaut?" asks Chet Kumar, a Purdue University senior who yesterday participated in a test on moving fluids to the bottom of a fuel tank without gravity.

But there is a massive catch; This is a midair experience that would give even the most iron-gutted business traveler white knuckles.

In protected airspace off the Texas coast, the craft, which NASA has nicknamed the "Vomit Comet," flies roller-coaster-type parabolas. It climbs at a 45-degree angle to 34,000 feet, arcs over the top, then plummets earthward for more than two miles at 20,000 feet a minute. Level off for a few seconds, then do it again. And again. Forty times in all.

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The plane, a modified Boeing 707, was originally built to fuel Air Force jets in midair. NASA's version has allowed the

Tax Report

A Special Summary and Forecast Of Federal and State Tax Developments

A NATIONAL TAX AMNESTY attracts interest among GOP leaders.

House Speaker Gingrich predicts a one-time amnesty would raise "several billion dollars" and allow "an even deeper tax cut" for "honest taxpaying Americans." House Ways and Means Chairman Archer says he is "clearly interested" in the idea and has ordered staffers to study it. Since 1982, 35 states and Washington, D.C., have offered various types of amnesty. In a typical offer, a state agrees to waive civil and criminal penalties for most people who agree to pay back taxes, plus interest.

But critics, such as former IRS Commissioner Sheldon Cohen, say amnesties are unfair to honest taxpayers. Some also fear that floating the idea in mid-April may only encourage more cheating. Mike Murphy, a former IRS deputy commissioner and now executive director of Tax Executives Institute, a corporate-tax group in Washington, says an amnesty "wouldn't make sense" unless Congress gives the IRS more money for a postamnesty crackdown on those who don't come clean.

The IRS's chances of getting any such additional funding appear dim.

CHECKOFF OVERLOAD: Enthusiasm wanes for special causes on state-tax forms.

States are offering taxpayers more opportunities to check boxes on their returns to fund special programs, such as AIDS research or wildlife preservation. But these checkoff programs are generating less money than they did in past years, says the Federation of Tax Administrators in Washington. A survey says contributions generated by checkoffs fell to $23.4 million on returns processed in 1996, from $25.7 million in 1994 and $27.8 million in 1992.

The survey finds 163 checkoff programs available to taxpayers in 41 states and Washington, D.C., on 1996 forms. That was up from 156 programs in the 1994 survey. Most state checkoffs reduce the taxpayer's refund, the survey says. That differs sharply from the federal checkoff to help pay for presidential-election campaigns. This federal checkoff allows each taxpayer to designate $3 of tax liability to go to the fund. It doesn't affect the size of the refund or the amount the taxpayer owes.

AN IRS DEFEAT could help people battling the agency over joint liability.

A recent Tax Court decision may give fresh hope to some divorced or separated taxpayers who signed joint returns. Filing jointly generally makes each spouse liable for all of a couple's taxes. It is usually very tough to persuade the IRS or a court to make exceptions, especially if the person claiming to be an "innocent spouse" went to college.

But the Tax Court said Sue Hemmings, with a master's degree, had no reason to know of certain transactions by her husband. "She was not educated in any financial or business disciplines," the court said. Thus, "well educated doesn't mean fully informed," says Washington lawyer Marjorie O'Connell. For this and other reasons, the Hemmings case is "very important," says former IRS Commissioner Donald Alexander, who represents Elizabeth Cockrell of New York in a similar struggle.

Ms. Cockrell's plight has drawn the attention of influential lawmakers such as Rep. Charles Rangel of New York, the Ways and Means Committee's ranking Democrat.

REFUND UPDATE: The IRS authorized $66.9 billion in individual income-tax refunds as of April 11, up 6% from a year earlier. The average refund also rose about 6%, to $1,314. Total refunds approved: 50.9 million, about the same as a year earlier.

DIRECT DEPOSIT gains popularity among taxpayers. The IRS says that as of April 11, about 13.9 million people chose to have refunds routed directly to their bank accounts, instead of waiting for a check in the mail. That was up 49% from a year earlier.

PROFESSIONAL HELP: About half of all individual income-tax returns filed so far this year were also signed by professional

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The documents were handwritten lab notes made by a former Army investigator, whose cryptic jottings suggested that she had found a 22-inch blond synthetic fiber in a hairbrush in the MacDonald home shortly after the murders. Could this be a hair from the blond wig of the alleged hippie leader? Why was it withheld from the jury? The questions were tantalizing enough to draw Mr. Silverglate into the case, unpaid.

Michael Malone

Working out of a townhouse overlooking Boston Harbor, he quickly dug into the evidence and by October 1990 was ready to bring the case back to court. He asked U.S. District Judge Franklin Dupree, the same Fayetteville, N.C., judge who had tried the case in 1979, to grant a new trial. His argument: There now was new evidence — the blond hair mentioned in the investigator's lab notes and some additional dark fibers that might have come from an assailant's clothing. These, he claimed in his court papers, potentially corroborated Dr. MacDonald's story but had been suppressed by the government during his trial.

The hair, Mr. Silverglate suggested, might have belonged to Helena Stoeckley, who at the time of the murders was a 19-year-old Fayetteville resident and

Please Turn to Page A10, Column 1

(Article on Page A3)

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The SEC filed an insider-trading suit against two people who bought APL options before an announcement the container shipper will be bought.

(Article on Page B14)

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Markets—

Stocks: Volume 506,853,680 shares. Dow Jones industrials 6587.16, up 135.26; transportation 2440.92, up 35.91; utilities 211.85, up 0.98.

Bonds: Lehman Brothers Treasury index $470.08, up 54.01.

Commodities: Oil $19.83 a barrel, off seven cents. Dow Jones futures index 157.11, off 0.77; spot index 151.75, off 0.82.

Dollar: 126.10 yen, off 0.51; 1.7275 marks, off 0.0035.

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* * *

The cost of the TWA-crash inquiry may exceed $100 million, according to the top U.S. transportation-safety official, who called it the largest accident-reconstruction effort in history. Hearings on the July 17 crash that killed 230 will be held in the late summer.

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By flying in human-sickening loops, the KC-135A provides a zero-gravity environment, 25 seconds at a time. Piece enough of those loops together, and it is possible to do real science.

That option was irresistible for Mr. Wanis, who saw a NASA flier one day last November while wandering bored around

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DIRECT DEPOSIT gains popularity among taxpayers. The IRS says that as of April 11, about 13.9 million people chose to have refunds routed directly to their bank accounts, instead of waiting for a check in the mail. That was up 49% from a year earlier.

PROFESSIONAL HELP: About half of all individual income-tax returns filed so far this year were also signed by professional preparers, an IRS official says. That is roughly the same percentage as in the past few years.

FEARS GROW about an electronic-filing deadline confronting many businesses.

Some business groups are deeply concerned about a law requiring about 1.2 million businesses to start depositing federal payroll taxes electronically as of July 1. The law, which is being phased in over several years, was designed to rake in cash more quickly, thus increasing Treasury revenue. But businesses fear that there may be technical glitches in the electronic federal tax payment system, and that companies may get hit with IRS penalty notices.

Carolyn Kelley of the American Payroll Association in Washington hopes IRS penalties will be waived at least until the end of this year "so that some unresolved technical problems can be fixed." A House Ways and Means subcommittee, headed by Rep. Nancy Johnson, will study the issue at a hearing today.

Rep. Johnson, a Connecticut Republican, criticizes the IRS for failing to address "legitimate technical concerns about the system's design."

BRIEFS: Comedian David Letterman discovers a new way to cut his taxes: He says he is claiming CBS as a dependent. . . . Senate Finance Chairman Roth, a Delaware Republican and a strong advocate of overhauling the tax system, calls President Clinton's new tax-simplification proposals the equivalent of "giving an aspirin to a patient who needs a heart transplant."

—Tom Herman

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FBI Agent's Lab Work Is an Issue in MacDonald Case

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heavy drug user who had admitted that she owned and wore a blond wig and at times had confessed to being involved in the crime. (Other times, she said she took too many drugs to remember – and the judge had ruled her testimony inadmissible.) She died in 1983.

To evaluate these materials for the government, the prosecution in 1990 brought in Special Agent Malone, then the top hair-and-fiber examiner in the Federal Bureau of Investigation crime lab and a near-legend among prosecutors for his powerful performances as an expert witness.

In reviewing the evidence, Mr. Malone discovered two additional blond strands, one 24 inches and one 9 inches long. He determined that the dark fibers were ordinary household debris and that the synthetic hair – made of a substance known as saran – came from dolls that had been owned by the MacDonald girls. He further asserted in an affidavit that the saran fibers were "not consistent with the type of fibers normally used in the manufacture of wigs."

When defense lawyers pointed out that the government hadn't proved the synthetic fibers actually came from dolls, Mr. Malone offered another, more detailed, affidavit, dated May 21, 1991. In it, he said he had consulted "numerous standard references which are routinely used in the textile industry and as source material in the FBI Laboratory" and that "none of these standard references reflect the use of saran fibers in cosmetic wigs." A reason, he suggested, was that saran couldn't be made in the "tow" – or clumped – form essential to the manufacture of human wigs.

He summed up by saying, "In the absence of any evidence to the contrary, I conclude that the . . . blond saran fibers in this case are not cosmetic wig fibers."

Mr. Malone's willingness to reach such an unequivocal conclusion was a hallmark of his work, and it had already made him a controversial figure among forensic scientists. He didn't respond to repeated requests, by phone and in writing, to comment for this article.

Physically imposing at 6 feet 2 inches and a muscular 200 pounds, Mr. Malone had joined the FBI in 1970 and entered the bureau's crime lab four years later. Prosecutors quickly came to love him, or at least the testimony he provided. Though forensic specialists maintain that hair testimony is seldom definitive – and is far less reliable than fingerprints – Mr. Malone consistently projected a higher degree of certainty.

A Wall Street Journal review of more than a dozen of his past cases shows that, in trial after trial over a period of years, Mr. Malone gave nearly the identical assurances to juries about the reliability of his hair identifications. Regardless of the year, he routinely said he had examined the hairs of "10,000 people" in his career. Then he asserted that there had been only two occasions – later he said three – "in which the hair from two different people was so similar that it couldn't be distinguished."

Mr. Malone was so effective in winning convictions that Florida state prosecutors would bypass the more-cautious state hair examiners and rely on the FBI instead, according to Deborah Lightfoot, a crime-lab examiner for the Florida Department of Law Enforcement.

But questions were already being raised about whether his self-assuredness was justified. In both 1987 and 1988, Florida appellate courts overturned guilty verdicts – citing insufficient evidence – in cases in which Mr. Malone had testified for the prosecution. In the 1988 case, Mr. Malone had told jurors that the chances were "almost nonexistent" that hairs found on the victim originated from anyone other than the defendant. In ordering the defendant's acquittal and immediate release from prison, the court wrote: "We do not share Mr. Malone's conviction in the infallibility of hair-comparison evidence. Thus we cannot uphold a conviction dependent on such evidence."

Harvey Silverglate

[illegible] working alone. It couldn't be determined whether the agency was aware of concerns about Mr. Malone's work as far back as the 1980s, though some former agents say the FBI doesn't keep close track of their court testimony in most routine cases.

On May 21, 1991, the same day that Mr. Malone provided his affidavit in the MacDonald appeal, he also testified in a case that would call his credibility into question more sharply than any previous trial. The Warren County, Pa., case involved the 1988 murder of a 33-year-old woman, Kathy Wilson. The defendant, Jay William Buckley, had been accused by an alleged accomplice. Hair evidence was sent to the New York State Police Crime Laboratory for evaluation because Mrs. Wilson was from upstate New York.

Outside Help

Cathryn Oakes, the examiner there, reported that she was unable to conclude that any of the hair belonged to Mr. Buckley. Lacking fingerprints or other physical evidence, District Attorney Joseph Massa Jr., says he decided to call upon the FBI's top hair-and-fiber man, Mr. Malone, to lend his expertise.

At first, the May 1991 trial went badly for the prosecution, with the alleged accomplice admitting hundreds of times that he had lied or changed his story. But Mr. Malone seemed to turn the tide. In two days of testimony, he tried hard to link Mr. Buckley to the murder. At one point, Mr. Malone said he believed there was a "very, very strong possibility" that hair in Mrs. Wilson's van came from Mr. Buckley, who police had said was driving the vehicle. In a devastating blow to the defense, he further testified that a hair he believed was Mrs. Wilson's was found on a white blanket in the van belonging to Mr. Buckley's alleged accomplice. In contrast, Ms. Oakes, the New York State examiner, had found what she termed "unaccountable dissimilarities" between the victim's hair and the hair in the van.

There was good reason for Ms. Oakes's conclusion: It turned out that the evidence had been mislabeled and that Mr. Malone had actually tested a plain white blanket belonging to Mr. Buckley that had never been anywhere near the crime scene. The blanket from the van had flowers on a white background.

Confronted with proof of the mislabeled evidence, Mr. Malone persisted: "I matched a hair on the blanket to Kathy Wilson. I don't know how it got there, but all I knew is . . . it's consistent with coming from her."

Mr. Buckley was acquitted. Now the defendant's lawyer, Barry Lee Smith, has this to say about Mr. Malone: "The guy's a total liar. My client could have been electrocuted based on his testimony if I hadn't discovered that he'd been shipped the wrong blanket."

Relying on Malone Affidavit

Mr. Malone's other effort on May 21, 1991 – his statements in the MacDonald case – appeared to turn out better for the prosecution. In a July 1991 ruling on Mr. Silverglate's plea for a new trial, Judge Dupree relied heavily on Mr. Malone. "According to Malone," the judge wrote, "the blond synthetic fibers . . . were not consistent with blond wig hairs from any known wig fibers currently in the FBI laboratory reference collection. . . . MacDonald has presented no evidence that blond saran fibers have ever been used in the manufacture of human wigs." Therefore, he ruled, there was no cause to reopen the case. (Judge Dupree died in 1995.)

Mr. Silverglate appealed, to no avail. Indeed, a federal appeals court in June 1992 chided Mr. Silverglate for continuing. Noting that the MacDonald court record already "contains over 4,000 pages" and that nothing in it "probably would have raised reasonable doubts in the minds of jurors," the court concluded: "While we are keenly aware of MacDonald's insistence as to his innocence, at some point we must accept this case as final."

Here the story could have ended. But the court's words nettled Mr. Silverglate, who is active in the American Civil Liberties Union and objects to the notion that any case is ever really final. "No justice system ever benefited by having a case end with an innocent man in prison," Mr. Silverglate says. "Here was a court saying, 'It's really time to go away.' But truth is more complicated than that."

Already $175,000 in the hole, Mr. Silverglate remained on the case. For the next four years, he and an associate, Philip Cormier, and several other lawyers filed numerous new Freedom of Information Act requests, interviewed nearly a dozen manufacturers of wigs and makers and users of saran – all with the goal of getting into court yet again.

Book Search

Was Mr. Malone accurately describing what FBI texts said about saran? To find out, the lawyers requested all materials in the FBI's possession about the possible uses of the fiber. In April 1993, the Freedom of Information Act search turned up two books belonging to the Justice Department that said saran was indeed used for wigs. One of the books was clearly marked as belonging to the FBI crime lab's own collection. Mr. Malone had made no mention of these in his affidavit – and the court had relied on the absence of any such materials in reaching its decision not to reopen the case.

Was[illegible] actually im[illegible] make saran in the "tow" [illegible] required for wig-making? The MacDonald lawyers obtained from National Plastic Products Co., in Odenton, Md., a "tow" of blond saran fibers that the company had once made, contradicting Mr. Malone's statement that saran couldn't be manufactured in this form. The MacDonald defense team also located wig manufacturers and wholesalers who asserted that saran fibers were used in wigs in the 1960s and 1970s.

Mr. Silverglate also learned that Mr. Malone had sought, but failed to get, a statement from a Mattel Inc. doll specialist, Judith Schizas, that a 24-inch saran fiber might have come from a Mattel doll. Though Ms. Schizas says she told Mr. Malone and two of his colleagues that neither Mattel nor other manufacturers she knew had used such long fibers, the government agents continued to press her, she says. "You aren't trying to railroad this guy, are you?" Ms. Schizas says she asked. She says Mr. Malone laughed and then responded, "No, we know he's guilty, and there's a ton of other evidence to prove it."

A couple of weeks after the visit, Miss Schizas says, she received a draft affidavit from federal prosecutors. It stated that saran was "the major fiber used for doll hair by Mattel" and others until the 1980s. The affidavit also said that doll hairs could be doubled during the weaving process to reduce a 24-inch fiber into a foot-long hair. Disagreeing with both assertions, Ms. Schizas refused to sign.

No Disclosure

Similarly, Mr. Malone sought a statement from A. Edward Oberhaus Jr., senior vice president at Kaneka America Corp. in New York, saying saran wasn't used for wigs. But Mr. Oberhaus, whose company manufactures wig fibers made of other substances, says he didn't have information about saran so declined to sign an affidavit later provided by prosecutors. Instead, he provided his own sworn statement that didn't commit one way or the other on saran.

Mr. Oberhaus's affidavit was neither used by the government nor disclosed to Dr. MacDonald's defense team. The failure of Mr. Malone and prosecutors to disclose what happened with both Ms. Schizas and Mr. Oberhaus was significant, according to Mr. Silverglate, because prosecutors and government agents have an obligation to turn over anything that might be important to the defense, even if it undermines the prosecution.

In late February of this year, Mr. Silverglate was about ready to seek a new review of the case based on the information he and his team had gathered since they lost their last appeal in 1992. But despite his years of work, he wasn't too optimistic. He worried that the courts were so disposed against the well-trodden MacDonald case that they wouldn't pay much attention to further motions on his behalf.

Working against the appeal, too, was the weight of the circumstantial evidence against Dr. MacDonald at the time of his seven-week trial in 1979. Among other things, the prosecution had made much of the fact that the house was remarkably tidy after the murders, despite Dr. MacDonald's story of an epic struggle with intruders. In addition, Dr. MacDonald's testimony was inconsistent in some instances with the actual location of blood stains, spatterings and footprints in the house.

Alleged Coverup

Prosecutors argued at the trial that Dr. MacDonald had committed the murders, then fabricated a crime scene based on an Esquire magazine article about the murders committed by Charles Manson and his cult. They also argued that Dr. MacDonald's own mostly superficial stab wounds were self-inflicted, as part of the coverup. In light of all this, Mr. Silverglate says, he and his colleagues debated whether their new information about Mr. Malone was going to be "dramatic enough" to get the court's attention.

Then, on Feb. 26, a big story broke, one that "made my eyes bug out," Mr. Silverglate says. The widely reported news involved a memo that FBI lab examiner William Tobin had written in 1989, alleging that Mr. Malone gave 27 instances of false or misleading testimony in 1985 proceedings that led to the impeachment and ouster of former U.S. District Judge Alcee L. Hastings. In the memo to a superior, Mr. Tobin called his colleague's testimony – which didn't involve hair or fiber – "scientifically unfounded, unqualified and biased."

Yesterday, Justice Department Inspector General Michael Bromwich reported on an 18-month investigation of the FBI crime lab, a probe that had been launched because of broad allegations of bias first made by supervisory special agent Frederic Whitehurst in 1995. The inspector general concluded that Mr. Malone had indeed "testified falsely and outside his expertise" in the Hastings matter. But in his report yesterday, the inspector general stopped short of finding intentional wrongdoing by Mr. Malone and left it up to the FBI to "assess what disciplinary action is now appropriate for Michael Malone" in connection with the Hastings matter. According to the report, the FBI defended Mr. Malone, stating "it is not appropriate to characterize Malone's testimony as false because it was not intentionally deceptive."

The report recommended that the FBI monitor Mr. Malone's future expert testimony to "assure that it is accurate and limited to matters within his knowledge and competence." But the inspector general didn't allude to the MacDonald case or to any of Mr. Malone's other testimony over two decades.

Mr. Silverglate says he believes the Tobin memo will prove to be the real turning point in the 27-year-old MacDonald case. "It not only raised the issue of FBI infallibility, but it made the scam in the MacDonald case part of a larger pattern that would be harder for the court to ignore," Mr. Silverglate says. "Now we believe that somebody in a black robe will pay serious attention to this case."

Further Hurdles

Whether the federal court in North Carolina will be swayed, however, is far from certain. Mr. Silverglate's court filing, expected next week, argues that the last appeal was rejected based on allegedly fraudulent statements in Mr. Malone's affidavit. But despite well-documented questions about Mr. Malone's work, there are further hurdles: In order to win a new trial, Mr. Silverglate will have to prove both that the evidence was withheld by the government in 1979 and that it might have led to an acquittal.

The hair evidence is, Mr. Silverglate maintains, "crucial" because it lends credence to Dr. MacDonald's story about a band of intruders led by a woman wearing a long, blond wig. It also adds potential significance to the testimony of a police officer at the 1979 trial. Officer Kenneth Mica told the jury that on the way to the MacDonald home on the night of the murders, he spotted a woman standing blocks away, in the rain, with long blond hair and a floppy hat and boots.

He said that he thought it strange that she should be there at 3:30 a.m. but that he didn't have time to stop because he was responding to a call for help. The jury didn't think much of that testimony at the time, but Mr. Silverglate is hoping that, in light of the new information on saran, the court will see things differently.

As for Mr. Malone, he is currently [illegible] FBI [illegible]

FBI Lab Is Faulted for Sloppy Work
But Report Clears Scientists of Perjury

Lawmakers Support Plans to Give the IRS More Independence

Continued From Page A2

ment should be changed. But the commi sion plans to suggest improvements i service to taxpayers and simplify t tax code.

Mr. Portman, a member of the tax-wri ing House Ways and Means Committe said he liked a set of Treasury Depar ment proposals made earlier this week simplify the tax code, but he promise "We will go further."

The move to criminalize browsing l IRS employees was spurred by two rece cases in which employees arrested for su unauthorized access were acquitted l cause the courts said they hadn't violat the law. An additional impetus came fr a recent General Accounting Office rep asserting that the IRS, despite vows recent years to crackdown on the practi had failed to take significant steps.

Mr. Summers himself, in congressio testimony yesterday morning, blasted t agency, saying that "it is clear that . . . aggressive policy to combat unauthori access to taxpayer records . . . was effectively designed or implemented." said that he and Mr. Rubin have order the IRS to issue a report within one mo proposing new measures to address issue.

The antisnooping measure was proved 412-8 in the House. Under the b an IRS employee convicted of brows could face a fine of as much as $100,000 a year in jail, as well as face civil lia ity.

Republican leaders portrayed measure as part of a broader effort by 105th Congress to overhaul the unpopu agency. Senate Majority Leader Trent (R., Miss.) promised to "audit" the I and House Speaker Newt Gingrich (Ga.) emphasized more legislation is on way. "This step, in beginning to curb abuses, is only the first step," Rep. grich said. "The IRS is out of touch, arrogant."

The Senate, voting 97-0, approve companion measure. "Our legislation get the snoops out of the IRS," said John Glenn (D., Ohio). "Browsing an me, it's like being violated persona almost."

The House and Senate versions similar. A handful of differences, howe will have to be worked out before legislation is sent to the White House.

The Senate, significantly, added amendment sponsored by Senate De cratic Leader Thomas Daschle of So Dakota intended to speed insurance be fits to victims of the recent floods. amendment, adopted by voice vote, w allow victims to begin collecting benefit days after purchasing federal flood in ance, rather than 30 days as now requi by law. The change would apply to policies issued in the first six month 1997.

"It would be an extraordinary matte assistance to many people today who without homes," Sen. Daschle said.

Also, the House, as expected, defe a proposed constitutional amendment would require a two-thirds vote of House and Senate to increase taxes.

Calpers Plans to Pay 2.7% Rate Increase To 11 HMO Firms

Continued From Page A3

zations said. In addition, up to 10 the incentive compensation for five 18 executives at PacifiCare's Califo will be tied to the health pl performance.

"We're trying to be the leader demonstrating and verifying qualit said Jon Wampler, president and c executive of PacifiCare of California. goal is to achieve an 80% member-satis tion number and to provide Calpers 85% of its members' "encounter data" physicians, Mr. Wampler said. PacifiC already has about an 80% satisfact rating, but hopes to raise to that level satisfaction of members of FHP Inter tional Corp., which PacifiCare recer acquired. "We've got to put all our m bers on a single system," Mr. Wamp said.

the FBI Laboratory" and that "none of these standard references reflect the use of saran fibers in cosmetic wigs." A reason, he suggested, was that saran couldn't be made [illegible] "tow" — or clumped — form essential [illegible] manufacture of human wigs.

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Also in 1988, with Ms. Lightfoot working for the state, defense lawyers took the unusual step of calling her as a witness in a separate murder case involving Mr. Malone's testimony. She told the jury that a particular hair couldn't be linked definitively to the defendant, despite Mr. Malone's confident assertion that it could. She had never testified for a defendant before. Nonetheless, James A. Duckett, a former police officer who still says he is innocent, was convicted and sentenced to death. The defense has since won the right to get the hair retested.

Forensic scientists have long griped about Mr. Malone's testimony, which some say gives hair testing a bad name and endangers defendants' rights. "I've been concerned over the years that Malone tends to overstate evidence and presents things in a stronger fashion than I believe is justified," says Peter DeForest, a New York hair-and-fiber expert for both prosecutors and defense attorneys. Edward Blake, a Richmond, Calif., forensic scientist uninvolved in any of Mr. Malone's cases, goes so far as to call Mr. Malone's claims of near-certainty "fraudulent." Dr. Blake says hair evidence can't be precise because "there's too much variation, and it's all too subjective."

Yet the FBI crime lab brought Mr. Malone into the highest profile, most sensitive matters, such as the investigation of the 1985 murder of U.S. drug-enforcement agent Enrique Camarena in Mexico. And former FBI colleagues say Mr. Malone's role in cracking the Camarena case won him a bonus and a letter of commendation from the Justice Department in 1989. Mr. Malone's hair-and-fiber testimony in the case was credited with winning the conviction of a wealthy Honduran businessman in 1990.

The FBI didn't respond to phone calls and written questions related to Mr. Ma-

As for Mr. Malone, he is currently working not in the crime lab but in the FBI's Norfolk, Va., field office, as a special agent. He was transferred there, as part of a general FBI move to put agents back in the field, in 1994. Since then he has continued to participate in high-profile cases, including the investigation of John Salvi 3rd's shooting rampage at Boston-area abortion clinics.

Meanwhile, courts continue to challenge his testimony. On March 6, the Florida Supreme Court reversed a murder conviction of serial killer Bobbie Joe Long. In its ruling, the court specifically found Mr. Malone's hair-and-fiber testimony insufficient to justify that conviction.

FBI Lab Is Faulted for Sloppy Work

But Report Clears Scientists of [illegible]

By Joe Davidson

Staff Reporter of The Wall Street Journal

WASHINGTON — Federal Bureau of Investigation scientists gave distorted testimony to meet prosecutors' needs and did sloppy analytical work in some cases, according to a stinging 500-page Justice Department report.

The department's inspector general said FBI laboratory employees gave inaccurate testimony and produced scientifically flawed reports in such high-profile cases as the bombings of the World Trade Center in New York and the Oklahoma City federal building.

The FBI scientists, however, didn't commit perjury or fabricate evidence, the report said.

Inspector General Michael Bromwich, who convened an international panel of experts and lawyers for the 18-month inquiry into the laboratory, recommended structural changes in the lab and disciplinary action against five employees, three of whom already were transferred. The probe was limited to three units in one section, out of five, in the lab.

The report criticized David Williams, a former examiner in the explosives unit, for his work on the World Trade Center and Oklahoma City bombings. Mr. Williams based his Oklahoma City conclusions "not on a valid scientific analysis but on speculation from the evidence associated with the defendants," the inspector general said. The report, for example, said Mr. Williams decided a 4,000-pound ammonium nitrate-fuel oil bomb was used based on the defendants' alleged purchases rather than on scientific evidence.

At the World Trade Center trial, Mr. Williams "gave inaccurate and incomplete testimony and testified to invalid opinions that appeared tailored to the most incriminating result," the report said.

Mr. Williams didn't respond to an interview request, but in a written reply to the inspector general's report, he conceded that his Oklahoma finding is "categorically overstated."

Frank Handelman, a lawyer for Mohammad Salameh, who was sentenced to 240 years in prison for his role in the World Trade Center bombing, said the report may lead to motions for a new trial. The lawyer for Timothy McVeigh, now on trial for the Oklahoma City bombing, declined to comment on the report.

Despite the report, Justice Department officials don't believe the lab's problems have caused the innocent to be convicted. The FBI said several hundred cases are being reviewed to determine if there is evidence favorable to the defense.

The FBI said it has adopted the inspector general's 40 recommendations to improve the lab. "The problems identified by the inspector general should never have been permitted to develop," said FBI Deputy Director Bill Esposito. "There was a clear and serious failing in not adequately detecting these problems and, in many instances, not moving swiftly enough to resolve them."

The inspector general's probe was sparked by complaints from Frederic Whitehurst, a supervisory special agent and a lawyer and chemist who was assigned to the lab. He was placed on administrative leave with pay in January.

While the report "substantiated some important allegations made by Whitehurst," Mr. Bromwich said it "did not substantiate the vast majority of the hundreds of allegations made by Whitehurst, including the many instances in which he alleged the laboratory examiners had committed perjury or fabricated evidence."

WEYERHAEUSER CO.

Weyerhaeuser Co. said lower prices for the pulp, paper and packaging materials it produces led to a sharp decline in first-quarter earnings. Weyerhaeuser, one of the world's largest forest-products concerns, reported net income of $21 million, or 10 cents a share, down 85% from $142 million, or 72 cents a share, a year earlier. The 1997 results include a special restructuring charge of $25 million, or 12 cents a share, that the company, based in Federal Way, Wash., announced in February. The results, not including the charge, were below the mean estimate of 25 cents a share, from an analysts' survey conducted by First Call Inc.

NationsBank's Georgia Purchase

CHARLOTTE, N.C. — Banking company NationsBank Corp. said it completed its previously reported acquisition of First Federal Savings Bank of Brunswick, Ga., in a stock swap valued at about $115 million. The acquisition and terms were ordered by a Georgia state judge after NationsBank fought to negate an agreement between First Federal and a NationsBank predecessor.

proved 424 in the House. Under … an IRS employee convicted of bro… could face a fine of as much as $100,0… a year in jail, as well as face civil … lity.

Republican leaders portrayed … measure as part of a broader effort … 105th Congress to overhaul the … agency. Senate Majority Leader Tre… (R., Miss.) promised to "audit" th… and House Speaker Newt Gingric… Ga.) emphasized more legislation is … way. "This step, in beginning to cu… abuses, is only the first step," Re… grich said. "The IRS is out of touc… arrogant."

The Senate, voting 97-0, appro… companion measure. "Our legislati… get the snoops out of the IRS," sa… John Glenn (D., Ohio). "Browsing … me. It's like being violated pers… almost."

The House and Senate versio… similar. A handful of differences, ho… will have to be worked out befo… legislation is sent to the White Hou…

The Senate, significantly, ad… amendment sponsored by Senate … cratic Leader Thomas Daschle of … Dakota intended to speed insuranc… fits to victims of the recent floo… amendment, adopted by voice vote… allow victims to begin collecting ben… days after purchasing federal floo… ance, rather than 30 days as now … by law. The change would apply … policies issued in the first six mo… 1997.

"It would be an extraordinary … assistance to many people today … without homes," Sen. Daschle sai…

Also, the House, as expected, … a proposed constitutional amendm… would require a two-thirds vote … House and Senate to increase tax…

Calpers Plans to P… 2.7% Rate Increase To 11 HMO Firm…

Continued From Page A3

zations said. In addition, up to the incentive compensation for 10 executives at PacifiCare's C… will will be tied to the healt… performance.

"We're trying to be the l… demonstrating and verifying … said Jon Wampler, president a… executive of PacifiCare of Califor… goal is to achieve an 80% member… tion number and to provide Cal… 85% of its members' "encounter d… physicians, Mr. Wampler said. P… already has about an 80% sa… rating, but hopes to raise to that … satisfaction of members of FHP … tional Corp., which PacifiCare … acquired. "We've got to put all … bers on a single system," Mr. … said.

Calpers also released HMO … ance rankings based on informa… vided by the plans in January. Pa… ranking fell into the midrange. … est customer-satisfaction rating … Health Plan of the Redwoods, a … plan. The lowest ranking was F… Health Plan, which recently me… Health Systems International In… Foundation Health Systems Inc., … land Hills, Calif.

The nation's largest HMO, K… manente, received a 2.7% rate in… its northern region and a 0.7% … its southern region. The regi… recently combined. Foundation … ceived an increase of 2.9%, re… blended rate for its two predece… panies. Other increases for ope… publicly traded companies includ… Health, a unit of Aetna Inc., 3.2… Health Care, a unit of Cigna Co… and Maxicare California, a unit … care Health Plans Inc., 6.4%.

CORNING INC.

Corning Inc., benefiting from … all its businesses, reported firs… net income of $92 million, or … share, up 47% from $62.6 milli… cents a share, in income from c… operations, the year-earlier qua… cause Corning spun off its health … divisions in December, continu… tions are used for year-to-year … sons, including the businesses … now separate, the Corning, N.Y., … high-technology materials had … of $71.8 million, or 31 cents a sha… 1996 first quarter. Corning … of $955.9 million, up 17% fr… million in the year-earlier qu… composite trading on the New Y… Exchange, Corning shares closed … up 62.5 cents.

NACDL News Release

For More Information:
Jack King, Director of Public Affairs
202-872-8600 ext. 228, media@nacdl.com

Memorandum to All US States Attorneys
from Acting Assistant Attorney General, John C. Keeney

U.S. Department of Justice
Criminal Division
Office of the Assistant Attorney General
Washington, D.C. 20530

January 4, 1996

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: John C. Keeney, Acting Assistant Attorney General

SUBJECT: Allegations by FBI Laboratory Examiner Frederic Whitehurst

As most of you know, Supervisory Special Agent (SSA) Frederic Whitehurst, who serves as an examiner in the Laboratory Division of the Federal Bureau of Investigation (FBI), has made allegations, some of which are public, relating to the scientific analysis of evidence in the FBI laboratory. These allegations may involve disclosure obligations in cases that have been or are being prosecuted in your district.

For a period of time, Dr. Whitehurst has been making allegations of perceived problems in the FBI's laboratory to officials within the FBI's Office of Professional Responsibility and the Office of the Inspector General of the

Department of Justice. Those Department components have endeavored to examine the allegations in accordance with their respective missions. In addition, written materials prepared by Dr. Whitehurst were made available to attorneys in this Division.

Upon receipt of Dr. Whitehurst's materials, the Criminal Division created a task force of attorneys to conduct a preliminary review of the materials in an effort to determine the nature and scope of the allegations and the identity of criminal cases and examiners involved in the allegations. Generally, Dr. Whitehurst contends that certain FBI examiners who testify in criminal cases are not qualified to perform the testing and analysis of the evidence involved in those cases; that certain examiners slant their scientific conclusions to favor the prosecution's case; and that certain units within the FBI's laboratory maintain insufficient scientific protocols and procedures.

The Department is in the process of evaluating the validity of the wide-ranging allegations raised by Dr. Whitehurst. That evaluation will be time-consuming, and will require substantial legal and scientific resources. The purpose of this memorandum is to advise you of the nature of the allegations made by Dr. Whitehurst; to request that your office determine whether the Government may have disclosure obligations in specific cases prosecuted in your district; and to seek information from your office that will assist the Criminal Division in its further assessment of the discovery issue.

Categories of Whitehurst Allegations

Following our initial review of the written materials, we categorized the allegations in an effort to deal with them in an efficient and comprehensive manner. We have concluded that there are three general categories of allegations, as follows:

Category 1

Dr. Whitehurst has identified specific federal cases and investigations in which he alleges one or more improprieties occurred in the analysis and/or presentation of evidence by FBI laboratory personnel. We have notified or will shortly notify the U.S. Attorney's Office that handled or is handling each case. Each of these offices should assign an attorney to review Dr. Whitehurst's written materials that relate to the case. That review is necessary to determine whether the Government may be obligated to disclose the materials to the defendant[s] involved, under Brady v. Maryland and its progeny. Attached to this memorandum is an analysis of the application of the Brady principle,

prepared by this Division's Appellate Section. The memorandum is intended to provide you with general guidance on the issue of disclosure.

With respect to cases already prosecuted, each affected U.S. Attorney's Office needs to analyze the importance of the laboratory evidence used in each case to decide whether such evidence meets the threshold materiality standard established in United States v. Bagley, 473 U.S. 667 (1985). In accordance with the Supreme Court's pronouncement in Bagley, Whitehurst's information would be material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at 682. The attached memorandum also sets forth general guidance on disclosure obligations in cases pending trial. Of course, the general principles set forth in the memorandum should be considered in light of relevant precedent in your circuit.

Each office that concludes that disclosure of Whitehurst materials is necessary should notify the Criminal Division so that appropriate technical assistance can be provided to evaluate the allegations and, if appropriate, rebut them for litigation purposes. The Division will assign an attorney to work with your office in an effort to ensure that the Government takes consistent positions on similar issues that may arise in other matters. Additionally, as discussed infra, every decision made by a U.S. Attorney's Office not to disclose Whitehurst materials in a specific matter should likewise be reported to the Criminal Division.

Category 2

In his materials, Dr. Whitehurst criticizes the work of a number of FBI laboratory personnel. He contends that certain examiners lack proper qualifications, are not competent to perform the scientific analysis required in a case, slant their opinions to favor the prosecution, or have inappropriately changed Whitehurst's reports. A list of the FBI laboratory personnel criticized by Whitehurst is set forth below. While we are providing a list of the examiners' names to accommodate an effective and speedy review, we wish to emphasize that there is no basis to conclude at this time that any of the examiners acted inappropriately in any case. The presence of an examiner's name on the list is solely a result of the fact that Dr. Whitehurst has criticized the individual in the information he has provided to Department officials.

If any of the listed individuals participated in a case (by testifying for the Government, preparing a report, whether or not it was disclosed in discovery, or conducting laboratory analysis) that is currently being litigated in your district (including at the appellate level), or in an active grand jury

investigation, we request that an attorney from your office contact Ms. Ronnie Edelman, a senior attorney with the Criminal Division, at (202) 616-2505. We will promptly provide your office with the materials we have obtained relating to that individual. Upon review of the materials, a determination can be made as to whether the Government should disclose the information to the defense. If your office has such a case in which trial is about to commence, we will assist in expediting the review so that required disclosures can be made on a timely basis.

Even if the information provided to you may not relate specifically to an examiner's work on the particular case or cases within your district, the allegations may be such that disclosure may still be required under applicable legal standards (e.g. that the examiner habitually slants his scientific conclusions to favor the prosecution). If a determination is made that Whitehurst materials relating to a specific examiner should be disclosed to the defense, it will be necessary to coordinate the disclosure with the Criminal Division so that a consistent approach to evaluating the allegations can be taken.

The list of FBI laboratory personnel and their assigned units follows:

Personnel Units

1. Rod Asbury Former Chief, Scientific Analysis Section

2. SSA Edward Bender Materials Analysis Unit

3. SSA Richard Hahn Explosives Unit

4. SSA Don Haldiman Case Agent, Atlanta Field Office

5. SSA Robert Heckman Explosives Unit

6. SSA Al Jordan Explosives Unit

7. SSA James Kearney Former Chief, Scientific Analysis Section

8. SSA Lynn Laswell Chemistry and Toxicology Unit

9. SSA Richard Laycock Materials Analysis Unit

10. SSA Roger Martz Chief, Chemistry and Toxicology Unit

11. Dr. Bruce McCord Forensic Science Research & Training Center, Quantico

12. SSA Thomas Mohnal Explosives Unit

13. Kenneth Nimmich Deputy Assistant Director, Research Section Quantico

14. SSA Wayne Oakes Hair & Fibers Unit

15. SSA Mark Olson Administration Unit

16. SSA Al Robillard Former Assistant Chief, Scientific Analysis Section

17. SSA James C. Ronay Explosives Unit

18. SSA Terry Rudolph Materials Analysis Unit

19. SSA James T. Thurman Chief, Explosives Unit

20. SSA David Williams Explosives Unit

Category 3

The third category of allegations relates to specific units within the FBI's laboratory. Dr. Whitehurst contends that the Explosives Unit and the Chemistry and Toxicology Unit inappropriately structure their conclusions to favor the prosecution. He also alleges that the Materials Analysis Unit and the Documents Unit maintain insufficient scientific protocols for the work conducted in those units. It will be necessary to obtain more specific information concerning these generic allegations to be able to evaluate their validity. That inquiry will be undertaken, in conjunction with the Inspector General's Office, by a team of attorneys assigned by the Criminal Division, who will be assisted by technical experts.

To assist the Criminal Division in its evaluation of these allegations, please identify cases still in litigation within your office that may be implicated by Dr. Whitehurst's contentions relating to these units. Accordingly, we ask each office to report to the Criminal Division on cases currently being litigated (including at the appellate level) in which FBI laboratory personnel from the four identified units either testified or are expected to testify, prepared a report for purposes of the case, whether or not it was disclosed in discovery, or conducted laboratory analysis in the case.

Please provide the following information to the Criminal Division for all cases still in litigation in your district in which the units of the FBI's laboratory identified above contributed (or will contribute) evidence: (1) the name and docket number of the case; (2) the date of indictment and the status of the case; (3) the identity of the FBI laboratory unit involved in the case and the examiners who performed analysis and/or testified for the Government; and (4) a short synopsis of the work performed by the unit and an assessment of the importance of the evidence presented by laboratory personnel.

In addition to cases still in litigation, the team of attorneys that will be assigned to review these issues will also focus on the Government's obligations with respect to closed cases. After the team evaluates the allegations and has an opportunity to analyze the legal issues involved in closed cases, we will inform you of our conclusions and, if necessary, seek additional information from you as to past cases litigated in your district that involved specific examiners or the affected units of the FBI's laboratory.

At this time, we are requesting the FBI to conduct a thorough search of its files in the Laboratory Division relating to the cases identified by Dr. Whitehurst and the examiners whom he has impugned. The purpose of that review is to help identify all matters, open and closed, that may be impacted by Whitehurst's allegations. Combined with the searches conducted by the U.S. Attorneys' Offices, a complete list of all cases and matters that may require a Brady review should be developed, As the Criminal Division identifies matters from the FBI's files that are or where venued in your district, we will forward all pertinent file materials to your Office.

As this memorandum makes apparent, the disclosure issue raised by the Whitehurst allegations is nationwide in scope, affecting a substantial number of criminal cases in numerous districts throughout the country. For this reason, it is important at the outset for supervisory personnel in each affected U S. Attorney's Office to participate in the decision-making process regarding the disclosure or nondisclosure of Whitehurst materials in individual cases. It is also necessary for the Criminal Division, at least on an interim basis, to monitor all decisions in the U.S. Attorneys' Offices relating to the Whitehurst materials. Accordingly, we request that the Chief of the Criminal Division for each U.S. Attorney's Office, or an equivalent or higher supervisory official, be involved in the decision-making process in every case in which the Government must decide whether Whitehurst materials should be disclosed. In addition, we request that every such decision be reported to the Criminal Division prior to implementation.

I am appointing a team of Criminal Division personnel, under the direction of

Ronnie Edelman, to coordinate the matters involving the Whitehurst allegations that I have detailed in this memorandum. Accordingly, to obtain the written materials described in Category 2, and to report to the Criminal Division every decision regarding disclosure of Whitehurst materials, please contact Ms. Edelman at (202) 616-2505. With respect to the information in Category 3 requested from your offices, please fax that information to Ms. Edelman at (202) 305-4624. Thank you for your cooperation in this matter of importance to the Department and the FBI.

Attachment

M E M O R A N D U M

SUBJECT: The Whitehurst Matter: Some Principles Governing the Brady Analysis

1. Governing Principles. A defendant is entitled to evidence in the hands of prosecutors under Brady v. Maryland, 373 U.S. 83 (1963), if that evidence is favorable to him and is "material" to guilt or punishment. United States v. Bagley, 473 U.S. 667 (1985). In order to be favorable to the defendant, evidence does not have to point directly to innocence; it is enough if the evidence does no more than demonstrate that a factor that "could link the defendant to the crime do[es] not." Patler v. Slayton, 503 F.2d 472 (4th Cir. 1974). Nor need the evidence defeat this factor conclusively; it need only tend to do so.

Evidence is "material" for Brady purposes "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 682. The "mere possibility" that undisclosed evidence might have affected the trial outcome does not establish materiality for Brady purposes. United States v. Agurs, 427 U.S. 97, 109-110 (1976). As a general matter, the courts find that inadmissible evidence is not material for Brady purposes. See, e.g., Wood v. Bartholomew, 116 S. Ct. 7 (1995); United States v. Kennedy, 890 F.2d 1056, 1059 (9th Cir. 1989), cert. denied, 494 U.S. 1008 (1990); United States v. Ranney, 719 F.2d 1183, 1190 (1st Cir. 1983). However, inadmissible evidence may qualify as Brady if it could lead to witnesses or other evidence that would be admissible. See, e.g., United States v. Phillip, 948 F.2d 241, 249 (6th Cir. 1991); Sellers v. Estelle, 651 F.2d 1074, 1077 n. 6 (1981), cert. denied, 455 U.S. 927 (1982).

In addition to purely exculpatory evidence. a defendant is entitled to disclosure

of information that could be used to impeach government witnesses. Giglio v. United States, 405 U.S. 150, 154-155 (1972). The same "reasonable probability" standard of materiality applies with respect to impeachment evidence an to other types of evidence. See 2 LaFave, Criminal Procedure sec. 19.5, 184 (1991 Supp.).

Generally, the good or bad faith of the prosecutor in withholding exculpatory evidence is irrelevant to the Brady analysis. In other words, a prosecutor's failure to produce all material evidence favorable to the defense constitutes a Brady violation even if the prosecutor acted in good faith -- that is, under the mistaken belief that the evidence in question was not exculpatory. Conversely, withholding evidence in bad faith does not require reversal if the evidence is not exculpatory. See Agurs, 427 U.S. at 110. However, a court might consider the prosecutor's bad faith in determining whether or not withheld evidence is material on the theory that "[]the fact that the government seeks in bad faith to suppress certain evidence indicates that such evidence may indeed be material." United States v. Jackson, 780 F.2d 1305, 1311 n.4 (7th Cir. 1986).

2. Application of Principles to Pending Cases. As a practical matter, the Brady standard of materiality is difficult to apply at the pretrial or early trial stages because, at those stages, prosecutors cannot know how the trial will play out and thus whether a particular item of evidence is likely to affect the final outcome. For this reasons prosecutors, in the name of prudence, ordinarily turn over questionably material evidence that is favorable to the defense in order to avoid jeopardizing their cases (and being cited for misconduct). In other words, the best Brady policy is to resolve all doubts concerning materiality in favor of disclosure. See Kyles v. Whitley, 115 S. Ct. 1555, 1568 (1995). At the very least, a prosecutor should ask the court to review the evidence in camera to determine if it should be disclosed, instead of taking it on himself to suppress evidence that might qualify as Brady material. See United States v. Schwimmer, 649 F. Supp. 544, 549 n.5 (E.D.N.Y. 1986).

To relate this to the instant matter: Suppose an independent investigation reveals Whitehurst's allegations of sloppiness in the FBI lab to be unmeritorious. That probably would not be a sound basis for withholding disclosure of the allegations. The trial court could refuse to admit the allegations on the ground that, in light of the independent investigation, the probative value of the allegations is substantially outweighed by the danger of jury confusion or considerations of undue delay. See Fed R. Evid. 403. Or the jury could refuse to credit the allegations in light of the independent investigation. But it would be inadvisable for the prosecutor to act unilaterally to suppress the evidence on his own belief -- with which the trial or appellate court might disagree--that the evidence would net be credited by the jury and thus could not affect the trial outcome. None of this is to say that it is never

appropriate for a prosecutor to make a materiality determination at the pre-trial or trial stage; he could, for example, justifiably withhold production of an allegation of historical fact that is patently and demonstrably untrue.

3. Application of Principles to Closed Cases. An already convicted defendant may challenge him Conviction on Brady grounds through a motion for a new trial under Fed. R. Crim. P. 33 or a collateral attack on his conviction under 28 U.S.C. 2255. With the full trial record in hand, the prosecution, at the post-trial stage, is in a position to resist such claims on materiality grounds -- that is, by demonstrating that there is no reasonable probability that the withheld evidence would have affected the verdict. In the instant matter this could be accomplished, for example, by a showing that Whitehurst's allegations are unmeritorious, or that the evidence of the defendant's guilt was so strong that Whitehurst's allegations, even if credited by the jury, could not have made a difference in the final result. Courts making a post-trial determination of materiality commonly turn the evidence oven to the defense so as to allow the defense an opportunity to show how it could have used the evidence to its benefit. See 2 LaFave, supra, at 185 (1991 Supp.). Under appropriate circumstances, however -- as where the evidence is arguably confidential or privileged -- the determination of materiality may be made in camera. See Pennsylvania v. Ritchie, 480 U.S. 39 (1987).

In any closed case that was tried after we came into possession of Whitehurst's allegations and in which we determine, upon a review of the trial record, that there is a reasonable probability that disclosure of the allegations would have affected the verdict, we have an affirmative obligation to bring the Brady violation to the attention of the defendant. On the other hand, we have no obligation to make any post-trial disclosure if our review of the record shows that the allegations would not have been material. Again, any doubts concerning materiality should be resolved in favor either of disclosure or turning the evidence over to the district court for in camera review.

Because a defendant has two years after final judgment to seek a new trial based on newly discovered evidence, see Rule 33, our obligation under the Due Process Clause to disclose Whitehurst's allegations might arguably extend to closed cases that reached final judgment within two years before the allegations came into the government's possession, assuming of course that the allegations would have been material. Moreover, the courts might find that we have a duty, in cases in which the allegations would have been material, to notify defendants of our failure to make post-final-judgment disclosure within the two-year period, since defendants might have recourse to Section 2255 for relief from any resulting constitutional violation. With respect to cases that reached final judgment outside the two-year period, a defendant has no judicial recourse for obtaining a new trial based on newly discovered evidence, unless the new

evidence establishes a violation of the defendant's constitutional rights (as would, for example, evidence of knowing use of perjured testimony by the prosecution). See Guinan v. United States, 6 F.3d 468, 470-471 (7th Cir. 1993).

4. Production of Materials other than the Whitehurst Allegations Themselves. The question arises as to what material, beyond Whitehurst's allegations, we might be obligated to produce, such as laboratory reports or notes of tests. First, under Fed. R. Crim. P. 16, a defendant is entitled, regardless of Brady, to discovery of laboratory reports that are material to the preparation of his defense. Second, laboratory paperwork would qualify as exculpatory only to the extent it supported Whitehurst's allegations; the prosecution is not required to produce evidence that is not in itself exculpatory but "might merely lay the groundwork for a favorable argument on the defendant's behalf." See United States v. Whitehorn, 710 F. Supp. 803, 827 (D.D.C. 1989). Finally, the production of Whitehurst's allegations will itself put a defendant on notice of the potentially exculpatory nature of the laboratory paperwork, which the defendant can then attempt to obtain by subpoena. It is well settled that a prosecutor's constitutional obligation is not violated, notwithstanding the nondisclosure of apparently exculpatory evidence, where the existence and possibly exculpatory content of the evidence is known to the defense. See, e.g., United States v. Valera, 845 F.2d 923 (11th Cir. 1988), cert. denied, 490 U.S. 1046 (1989); United States v. Young, 618 F.2d 1281 (8th Cir. 1980), cert. denied, 449 U.S. 844 (1980); 2 LaFave, supra, sec. 19.5, 546 (1984). Having said this, we nonetheless note that, in the event we judge any otherwise nondiscoverable laboratory paperwork to be exculpatory, the cautious approach would be to turn it over; a reviewing court might disagree with our contention that the defense should have known about it.

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U. S. Department of Justice

United States Attorney
Central District of California

John Carlton
Assistant United States Attorney
(213) 894-0619

United States Courthouse
312 North Spring Street
Los Angeles, California 90012

May 5, 1997

Patrick Q. Hall
Seltzer Caplan Wilkins & McMahon
2100 Symphony Towers
750 B Street
San Diego, CA 92101

Re: United States v. Caro-Quintero, et al.,
CR 87-422-ER

Dear Mr. Hall:

Enclosed are copies of the following documents:

1. Transcript of Proceedings Before the Investigation Committee of the United States Court of Appeals for the Eleventh Circuit in the Matter of: Complaints filed against United States District Judge Alcee L. Hastings, consisting of the testimony of Michael Malone on October 2, 1985, Bates stamped pages 43972-44009;

2. Transcript of Proceedings Before the Investigation Committee of the United States Court of Appeals for the Eleventh Circuit in the Matter of: Complaints filed against United States District Judge Alcee L. Hastings, consisting of the testimony of Michael Malone on April 8, 1986, Bates stamped pages 59637-42;

3. Memo to: Section Chief Ken Nimmich from SA William A. Tobin, Subj: Exceptions to Testimony of SA Michael P. Malone in the Matter of U.S. District Judge ALCEE S. HASTINGS, Bates stamped pages 43964-69;

4. The following portions of the report by the U.S. Department of Justice, Office of the Inspector General, entitled, "The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in

Explosives-Related and Other Cases".

a. Executive Summary, pp. 17, 21;

b. Report, pp. 363-91;

c. Report, pp. 457-458;

d. FBI Comments on the January 21, 1997 Draft Report, dated February 12, 1997, pp. 44-45;

e. Responses dated February 7, 1997 and February 13, 1997 to the January, 1997 Draft Report; and

f. OIG (Office of the Inspector General) Replies to Responses to the Draft Report, pp. 1, 45-46.

Very truly yours,

NORA M. MANELLA
United States Attorney

John L. Carlton

JOHN L. CARLTON
Assistant United States Attorney
Chief, Criminal Complaints

PARTICULAR ARTICLE?

A. TO SAY IT VERY -- WE WERE WINGING IT A LITTLE BIT. WE HAD TO DESIGN A TEST AND ADAPT SOME APPARATUS, BECAUSE THE APPARATUS THAT WE ULTIMATELY PERFORMED THE TEST ON WAS NOT DESIGNED FOR SOMETHING LIKE LEATHER.

Q. WELL, LET ME JUST SHOW YOU WHAT WE HAVE MARKED FOR IDENTIFICATION AS EXHIBITS 2001, 2002 AND 2003 AND ASK YOU IF YOU RECOGNIZE THOSE EXHIBITS.

A. YES, I DO.

Q. AND WHAT ARE THOSE EXHIBITS?

A. THIS IS THE BLACK PURSE AND THE TWO STRAPS WHICH HAD BEEN ATTACHED TO IT THAT I REFERRED TO EARLIER.

Q. REFERRING TO THE FIRST, THE BLACK PURSE, HOW IS THAT LABELED WITH RESPECT TO THE YELLOW EXHIBIT NUMBER?

A. WELL, THE YELLOW EXHIBIT NUMBER SAYS IC-2001.

Q. AND DOES THERE ALSO APPEAR ANOTHER EXHIBIT NUMBER ON THE FORM?

A. YES.

Q. AND THAT READS DEFENDANT'S EXHIBIT 36?

A. CORRECT.

Q. AND IS THERE ALSO ANOTHER STICKER BELOW THAT THAT MAKES REFERENCE TO CASE NUMBER 81-596-CRETG?

A. YES.

Q. AND U.S.A. VERSUS HASTINGS?

A. CORRECT, YES.

DO HAVE VERY SOPHISTICATED MICROSCOPIC EQUIPMENT TO EXAMINE FIBERS?

A. YES, WE DO.

Q. AND YOU DO HAVE THE CAPABILITY AFTER YOU EXAMINE IT UNDER A MICROSCOPE TO PHOTOGRAPH IT IN AN ENLARGED STATE?

A. YES.

Q. AND DO YOU DO ALL THAT WORK WITHIN THE LABORATORY?

A. CORRECT, YES.

Q. DID YOU RECEIVE A REQUEST FROM ONE OF YOUR SUPERIORS IN THE FEDERAL BUREAU OF INVESTIGATION TO CONDUCT CERTAIN TESTS ON A PIECE OF EVIDENCE THAT CAME TO YOU FROM THE INVESTIGATING COMMITTEE OF THE ELEVENTH CIRCUIT JUDICIAL COUNCIL?

A. YES, I DID.

Q. AND WHEN DID YOU CONDUCT THOSE TESTS?

A. I CONDUCTED THESE TESTS LAST WEDNESDAY OR ACTUALLY WEDNESDAY, THURSDAY AND THIS PAST MONDAY.

Q. AND IN CONDUCTING THE TESTS, COULD YOU DESCRIBE THE ARTICLE ON WHICH YOU PERFORMED THE TEST?

A. IT WAS A SMALL BLACK PURSE WITH STRAPS ATTACHED TO IT.

Q. AND HAD YOU PRIOR TO THAT TIME EVER CONDUCTED ANY LABORATORY TESTS ON LEATHER PURSES?

A. ON THE STRAPS, NO.

Q. WAS IT NECESSARY FOR YOU TO DESIGN A TEST TO DETERMINE WHAT YOU WERE ASKED TO DETERMINE WITH RESPECT TO THAT

WHITE BACKGROUND WITH RED LETTERS. WHAT IS THAT?

A. THE WHITE AND RED STICKER ON EXHIBIT 2003 JUST INDICATES THAT THIS IS THE RIGHT-HAND STRAP. IT ALSO HAS THE SPECIMEN NUMBER.

Q. AND ON 2002, WHAT DOES THAT REFLECT?

A. EXHIBIT 2002, THE RED AND WHITE LABEL INDICATES THIS IS THE LEFT-HAND STRAP AND ALSO INDICATES IT CAME FROM THE PURSE.

Q. NOW, ON EACH PARTICULAR STRAP THERE IS A PLAIN WHITE WRAPPING ON THE STRAP. WHAT WAS THE PURPOSE OF PUTTING THOSE TWO WRAPPINGS ON THE STRAP?

A. WELL, IT'S ACTUALLY TWO. ONE IS A LABEL AND ONE IS JUST --

Q. I'M TALKING FIRST ABOUT THE TWO UNLABELED PIECES.

A. THE TWO UNLABELED PIECES, SINCE THE STRAP IS BROKEN AND AT THE BREAK IS HELD TOGETHER JUST BY A SMALL PIECE OF THREAD, WE TAPED THEM TOGETHER JUST TO KEEP THEM AS CLOSE TO THE ORIGINAL CONDITION AS WE COULD.

Q. NOW, YOU SPOKE THERE OF A BREAK IN THE STRAP. WAS EITHER THE BREAK THAT YOU SEE ON IC-2003 OR THE BREAK THAT YOU SEE ON IC-2002, JUST ABOVE THE WHITE MARKERS, THE BREAK THAT EXISTED WHEN THE PURSE CAME TO THE F.B.I. LABORATORY?

A. NO. WE DID OR I DID BOTH OF THE BREAKS. THOSE BREAKS WERE NOT THERE WHEN WE ORIGINALLY RECEIVED THE STRAPS.

Q. NOW, THE BREAK THAT WAS THERE WHEN YOU RECEIVED THE

STRAPS, CAN YOU TELL ME WHETHER THAT BREAK IS ADJACENT TO THE TWO LABELS THAT HAVE A WHITE BACKGROUND BUT HAVE A RED PRINTING OF THE F.B.I. LABEL ON THEM?

A. THE SEPARATION OF THE STRAP, THE ORIGINAL SEPARATION THAT WAS THERE WHEN HE WE RECEIVED IT, IS CORRECT. IT'S ADJACENT TO THE RED AND WHITE LABELS.

Q. NOW, ABOVE THE TWO WHITE LABELS WITH NO MARKING ON THEM, ARE ANOTHER LABEL WITH, HAS SOME BLUE OR BLACK HANDWRITING ON IT WITH ARROWS.

DO YOU KNOW WHO MADE THAT WRITING?

A. I DID.

Q. AND WHAT DOES THE WRITING SAY?

A. IN EACH CASE, IT SAYS TEST TEAR. THE ARROWS ARE POINTING TOWARD THE TEAR, AND THEN IT HAS MY INITIALS UNDERNEATH.

Q. AND ARE THE TWO TEARS THAT ARE ADJACENT TO THE ..INDING OR THE MARKER THAT HAS YOUR WRITING AND INITIALS ON IT THE TWO BREAKS THAT YOU CAUSED TO OCCUR ON THE STRAPS THAT YOU WERE TESTING?

A. YES.

Q. NOW, DID YOU ALSO IN CONNECTION WITH THE EXAMINATION THAT YOU WERE REQUESTED TO MAKE MAKE CERTAIN PHOTOGRAPHS?

A. YES, I DID.

Q. AND NOW FIRST FOR THE PURPOSE OF IDENTIFICATION, HAVE ALL THOSE PHOTOGRAPHS BEEN LABELED BY ME FOR THE BENEFIT OF

THE COMMITTEE?

A. YES, THEY HAVE.

Q. AND DO THOSE PHOTOGRAPHS CONTAIN EXHIBIT NUMBERS IC-2004 THROUGH IC-2014?

A. YES, THEY DO.

Q. NOW, COULD YOU BRIEFLY IDENTIFY FOR THE MEMBERS OF THE COMMITTEE EACH OF THE EXHIBITS BETWEEN 2004 AND 2014?

A. THE PHOTOGRAPH EXHIBITED IN OR PRESENTED BY IC-2004 IS AN OVERALL SHOT OF WHAT I CALL THE FRONT VIEW OF THE PURSE. IT WAS TAKEN FOR TWO REASONS. NUMBER ONE, TO SHOW THE EXACT CONDITION OF THE PURSE AS WE RECEIVED IT AND, NUMBER TWO, TO BE USED LATER TO ORIENT YOU WHEN WE ARE TALKING ABOUT A PARTICULAR PIECE OF THE PURSE, TO ORIENT YOU TO EXACTLY WHAT WE ARE TALKING ABOUT.

EXHIBIT IC-2005 IS THE SAME PURSE. HOWEVER, THIS IS A SHOT OF THE BACK SIDE OR THE REVERSE SIDE OF THE SAME PURSE.

EXHIBIT 2006 IS A MAGNIFIED VIEW OF THE TEST TEAR THAT I MADE ON THE LEFT-HAND STRAP OF THE PURSE.

EXHIBIT IC-2007 IS ANOTHER MAGNIFIED VIEW OF ONE SIDE OF THE TEST BREAK I MADE ON THE RIGHT-HAND STRAP. THIS WOULD BE THE UNDER SIDE OF THE STRAP.

EXHIBIT IC-2008 IS A MAGNIFIED VIEW OF THE SAME TEST BREAK OF THE RIGHT STRAP. HOWEVER, THIS IS WHAT I WOULD CALL A TOP VIEW WHERE THE STITCHING IS PRESENT.

EXHIBIT 2009 IS AGAIN A MAGNIFIED VIEW OF THE

SEPARATION, THE ORIGINAL SEPARATION IN THE STRAP AS WE RECEIVED IT, IF YOU WANT TO CALL IT THE QUESTIONED SEPARATION. AGAIN, IT'S AN OVERALL MAGNIFIED VIEW LABELED SHOWING VARIOUS CHARACTERISTICS.

EXHIBIT 2010 IS A VIEW OF THE SAME SEPARATION, THE SAME STRAP. THAT IS THE LEFT STRAP. AT A HIGHER MAGNIFICATION, ALSO LABELED.

EXHIBIT 2011 IS A THIRD VIEW OF THE EXACT SAME STRAP, THE LEFT STRAP, ONLY THIS IS A VIEW DIRECTLY, AN END VIEW, LOOKING DIRECTLY AT THE END.

JUDGE TJOFLAT: OF THE LEFT STRAP?

THE WITNESS: YES, YOUR HONOR.

JUDGE JOHNSON: MR. DOAR, I BELIEVE IT WOULD BE GOOD TO GET HIM TO TELL US WHY HE WAS DOING THIS TESTING, WHAT WAS HIS INTENDED OBJECTIVE.

MR. DOAR: I WAS GOING TO DO THAT, YOUR HONOR.

I WILL DO IT RIGHT NOW.

BY MR. DOAR:

Q. WHAT WAS YOUR OBJECTIVE IN PERFORMING THIS TEST?

A. WHAT WE WERE ASKED TO DO IS, NUMBER ONE, LOOK AT THE SEPARATION AT THE MID POINT OF THE STRAP AND BASICALLY DETERMINE EVERYTHING WE COULD ABOUT IT. WAS IT A TEAR, WAS IT A CUT, ANYTHING ELSE WE COULD TELL ABOUT IT. THEN DO A TEST BREAK AND TO SEE WHAT A KNOWN TEST WOULD LOOK LIKE, A BREAK THAT WE KNEW OCCURRED.

ALSO WE WERE BASICALLY ASKED TO EXAMINE THE REMAINDER OF THE PURSE FOR ANYTHING ELSE THAT MIGHT BE OF VALUE, JUST ANYTHING THAT MIGHT TELL US HOW THE BREAK OCCURRED IN THAT STRAP.

Q. NOW, HOW DO YOU BREAK A STRAP IF YOU ARE GOING TO TEST IT TO SEE WHAT ITS CHARACTERISTICS WOULD BE UNDER THE CONDITIONS THAT YOU IMPOSE ON IT TO CAUSE IT TO BREAK?

A. WELL, VERY SIMPLY, THE FIRST THING I DID WAS I TRIED TO BREAK IT, MYSELF, AND I COULDN'T EVEN BEGIN TO BREAK IT. IT WAS MUCH TOO STRONG.

THEREFORE, I KNEW -- WHAT I WAS TRYING TO SEE THEN IS COULD AN AVERAGE PERSON BREAK THE STRAP.

THE NEXT THING I DO, I HAD TO HAVE A MACHINE THAT WOULD DO THE BREAK FOR ME. WELL, IN THE METALLURGIC UNIT OF OUR LAB, WE HAVE A MACHINE DESIGNED SPECIFICALLY FOR THIS PURPOSE, TO BREAK METAL. IT'S CALLED A TENSILE TESTER.

MANY TIMES WE GET METAL THAT HAS FAILED FOR SOME REASON, AND THEY HAVE TO KNOW WHAT IS CALLED THE TENSILE STRENGTH OF THE METAL. THEY WILL PUT IT IN THIS MACHINE, AND IT WILL BREAK THE METAL AND TELL YOU EXACTLY THE AMOUNT OF FORCE THAT WAS REQUIRED TO DO THE BREAK.

NOW, THE PROBLEM WAS THIS MACHINE WAS DESIGNED FOR METALS AND NOT FOR A PLIABLE SUBSTANCE SUCH AS THE LEATHER STRAP, SO WE KIND OF HAD TO JURY RIG IT TO GET IT TO HOLD IT, IN OTHER WORDS, MAKE SOME ADAPTATIONS.

BUT AFTER A WHILE OF KIND OF FIDDLING AROUND WITH IT, WE WERE ABLE TO MAKE THE MACHINE HOLD IT IN SUCH A WAY THAT WE COULD DO THE TEST.

Q. NOW, BEFORE YOU SUBJECTED THIS STRAP TO A TEST, AND ACTUALLY YOU SUBJECTED BOTH PARTS OF THE STRAP TO A TEST, DID YOU NOT?

A. RIGHT, BOTH SIDES, OR BOTH SECTIONS OF THE STRAP WE HAD.

Q. DID YOU EXAMINE THE STRAP?

A. YES, WE DID.

Q. AND WHAT DID YOU FIND?

A. WHAT I WAS LOOKING FOR IS NUMBER ONE, WAS THE STRAP ORIGINALLY A CONTINUOUS PIECE OF LEATHER, ONE CONTINUOUS PIECE OF LEATHER.

IT WAS.

THE SECOND THING I WAS LOOKING FOR, WERE THERE ANY SPLICES IN THERE THAT MIGHT WEAKEN THE STRAP. WHEN I SAY SPLICES, I MEAN RUNNING ACROSS THE STRAP.

THERE WEREN'T.

I WAS LOOKING FOR ANY FLAWS, AREAS THAT MIGHT BE FLAWED AND JUST APPEARED WEAKER. I COULD DETECT NONE AT ALL, NO FLAWS THAT MIGHT CAUSE A WEAK POINT.

SO THIS WAS ALL DONE PRIOR TO BREAKING THE STRAP.

Q. AND WERE YOU ABLE TO DETERMINE HOW THE STRAP WAS CONSTRUCTED?

A. YES, I WAS.
Q. AND HOW WAS IT CONSTRUCTED?
A. BASICALLY YOU HAVE A LONG STRIP OF LEATHER WHICH IS WRAPPED AROUND A PLASTIC INSERT AND THEN THE LEATHER IS ACTUALLY STITCHED ALONG -- AS YOU RUN ALONG THE LEATHER, IT'S STITCHED TO HOLD THE WHOLE THING TOGETHER.
Q. NOW, DID YOU THEN AFTER MAKING THAT EXAMINATION, DID YOU MAKE ANY OTHER FINDINGS PRIOR TO THE TIME THAT YOU PUT THE TWO ENDS OF THE STRAP IN THE MACHINE FOR TESTING?
A. I LOOKED CLOSELY AT THE BUCKLES JUST TO, NUMBER ONE, NOTE WHERE THE STRAP WAS BUCKLED TO THE PURSE AND TO NOTICE, NOTE ANY DAMAGE OR ANYTHING ELSE UNUSUAL ABOUT ANY OF THE EYELETS THAT WERE IN THE STRAP THAT WERE ORIGINALLY USED FOR BUCKLING.
Q. WHAT DID YOU FIND?
A. THE LEFT-HAND EYELET I NOTED DAMAGE AT THE POINT WHERE IT WAS BUCKLED TO THE STRAP, CONSIDERABLE AMOUNT OF DAMAGE.
Q. AND WHICH EYE IN THE STRAP WAS THE STRAP BUCKLED TO THE PURSE?
A. IT WAS THE THIRD FROM THE BOTTOM.
Q. AND WAS THAT TRUE WITH RESPECT TO BOTH ENDS OF THE STRAP?
A. WELL, THE RIGHT-HAND STRAP AS IT WAS BUCKLED TO THE PURSE DID NOT EXHIBIT THIS SAME TYPE OF DAMAGE. IT EXHIBITED WHAT I CALL NORMAL WEAR.

IT WAS ALSO BUCKLED AT THE THIRD EYELET FROM THE END.

Q. DID YOU MAKE ANY OTHER FINDINGS PRIOR TO THE TIME YOU SUBJECTED THE STRAP TO YOUR TESTS?

A. NO.

Q. AND THEN WOULD YOU DESCRIBE WHAT HAPPENED WHEN YOU ADMINISTERED OR CARRIED OUT THIS TEST?

A. WHEN WE BROKE THE STRAP, WE RECORDED THE AMOUNT OF FORCE TO BREAK THE STRAP. IT WAS 29.9 POUNDS OF PULLING FORCE.

IT WAS THE EXACT SAME READING FOR BOTH STRAPS.

Q. COULD YOU DESCRIBE HOW THAT MACHINE WORKS? DOES THE AMOUNT OF PULLING FORCE INCREASE PROGRESSIVELY OVER A PERIOD OF TIME?

A. YES, IT DOES. NUMBER ONE, IT PULLS IT SLOWLY, BUT THE LONGER THE MACHINE IS ON, THE MORE FORCE IT'S GOING TO APPLY TO WHATEVER IT'S TRYING TO BREAK, AND WHEN YOU GET UP TO SOME METALS YOU ARE TALKING ABOUT THOUSANDS OF POUNDS OF FORCE.

SO THIS BROKE -- WELL, IT DIDN'T TAKE A LONG TIME TO BREAK.

ONCE IT BREAKS, YOU STOP THE MACHINE AND THEN NOTE THE READING.

Q. AND DID YOU ACTUALLY, YOURSELF, CONDUCT THIS TEST?

A. YES, I DID.

Q. AND DID YOU OBSERVE WHAT WAS HAPPENING WHEN THE STRAP BROKE?

A. YES, I DID.

Q. AND WHAT DID YOU OBSERVE?

A. WELL, TO BEGIN WITH, I OBSERVED THAT IT'S NOT A SUDDEN BREAK LIKE YOU WOULD HAVE WITH A METAL. WHEN A METAL BREAKS, BAM, IT'S GONE, IT'S BROKEN, IT'S INSTANTANEOUS.

THIS WAS A GRADUAL BREAK. A TEAR STARTED AT ONE SIDE OF THE STRAP AND SLOWLY ON A DIAGONAL LINE WENT ACROSS THE ENTIRE STRAP UNTIL FINALLY THE ENTIRE STRAP WENT, BUT IT WAS A GRADUAL PROCESS, NOT SUDDEN.

THIS IS TO BE EXPECTED BECAUSE YOU ARE DEALING WITH SOMETHING THAT HAS A LIMITED AMOUNT OF PLIABILITY IN IT. IN OTHER WORDS, IT WILL STRETCH BEFORE IT BREAKS.

Q. WHAT WAS THE LEATHER COMPOSED OF? COULD YOU OBSERVE THAT AFTER THE BREAK?

A. WELL, AGAIN, IT WAS A DIAGONAL BREAK. IT ACTUALLY CAME OFF IN LAYERS. AGAIN, AS I SAID, IT STARTED AT ONE PART, STARTED PULLING APART. IT SLOWLY WENT ACROSS THE ENTIRE BREAK AND WAS JUST PULLING OFF MANY TIMES IN LAYERS.

WHAT YOU ARE DEALING WITH HERE IS IT LOOKS LIKE A SOLID PIECE BUT IT'S MILLIONS OF FIBERS WHICH ARE JUST COMPACTED TOGETHER. THEY ARE LEATHER FIBERS. AND WHAT WAS HAPPENING IS THE LEATHER FIBERS WERE SEPARATING, SOME AT SOME TIME AND SOME A LITTLE BIT LATER, AT DIFFERENT TIMES AND AT DIFFERENT PRESSURES.

Q. NOW, HAD YOU EXAMINED THE SEPARATION IN THE STRAP AS

IT EXISTED WHEN THE PURSE CAME TO YOU?

A. YES, I DID.

Q. AND HAD YOU EXAMINED THAT MICROSCOPICALLY?

A. YES, I DID.

Q. AND DID YOU SUBSEQUENT TO THE TEST EXAMINE MICROSCOPICALLY THE TWO TEARS THAT YOU HAD CAUSED TO OCCUR ON THE STRAP?

A. YES, I DID.

Q. AND WHAT, IF ANY, DIFFERENCES DID YOU OBSERVE BETWEEN THE TWO OR THE THREE BREAKS IN THE STRAP?

A. WELL, THE TWO TESTS --

Q. OR THE THREE SEPARATIONS IN THE STRAP.

A. THE TWO TEST BREAKS WERE VERY, VERY SIMILAR IN HOW THEY BROKE, THE CHARACTERISTICS, ALL THE CHARACTERISTICS THAT WERE PRESENT.

THE ORIGINAL SEPARATION THAT WAS ON THE PURSE WHEN I RECEIVED IT WAS TOTALLY DIFFERENT.

AFTER EXAMINING THE SEPARATION, I CONCLUDED THAT MOST OF THE SEPARATION WASN'T A TEAR AT ALL, IT WAS A CUT, AND THIS WAS VERY, VERY APPARENT.

IT WAS ONLY A SMALL PORTION OF THE SEPARATION THAT ACTUALLY WAS A TEAR, SO WE HAVE GOT A COMBINATION OF A TEAR-CUT SITUATION. MAYBE ABOUT 75 PERCENT CUT AND 25 PERCENT TEAR.

THERE WERE SEVERAL OTHER DIFFERENCES BUT, AGAIN, ONE

OF THE MOST STRIKING ONES, THAT THE CUT WAS ALMOST COMPLETELY PERPENDICULAR TO THE STRAP, STRAIGHT ACROSS IT, WHILE ALL OF THE TEARS WERE ON A DIAGONAL.

Q. AND DID YOU IN CONNECTION WITH THAT EXAMINATION, AND I NEGLECTED TO ASK YOU THIS, WHEN THE STRAPS BROKE UNDER THE TEST CONDITIONS, IN RELATION TO WHERE THE STRAPS WERE FASTENED TO THE MACHINE, WHERE DID THE BREAK OCCUR OR THE SEPARATION OCCUR?

A. WELL, BECAUSE, NUMBER ONE, OF THE MANNER WE HAD TO PUT IT IN THE MACHINE AND, TWO, THE FACT THAT WE WERE TRYING TO DEAL WITH A SOLID PIECE OF LEATHER VERSUS AN AREA WITH A HOLE, WE HAD TO PUT THEM IN DIFFERENTLY, EACH STRAP DIFFERENTLY.

SO THAT ON THE LEFT-HAND STRAP, WE WERE ABLE TO PUT IT IN THE MACHINE SO THAT THE ONLY PORTION WE WERE TESTING WAS COMPLETELY SOLID, NO EYELETS, NO HOLES.

BUT THE WAY IT WORKED OUT WITH THE RIGHT-HAND STRAP WAS THERE WAS A SMALL AREA THAT WAS BEING STRETCHED THAT DID CONTAIN AN EYELET. WE WERE TRYING TO AVOID THIS BECAUSE WE THOUGHT IT WOULD BREAK AT THE EYELET.

AS IT TURNED OUT IT DIDN'T. IT BROKE ABOVE THE EYELET AT EXACTLY THE SAME FORCE AS THE OTHER STRAP, SO AT LEAST WITH THIS PARTICULAR TEST IT DIDN'T MAKE ANY DIFFERENCE WHETHER THE EYELET WAS IN THERE OR NOT. IT WAS NO WEAKER AT THAT POINT.

Q. NOW, DID YOU CAUSE PHOTOGRAPHS TO BE MADE OF TH... STRAPS, OF THE THREE SEPARATIONS?

A. YES, I DID.

Q. AND THE ONE SEPARATION YOU HAD LABELED AS THE Q SEPARATION AND THE OTHER TWO SEPARATIONS WOULD BE THE T SEPARATIONS? IS THAT FAIR?

A. WELL, WE CALLED THEM TEST BREAKS, THE TWO THAT I DID, AND WE DIDN'T REALLY LABEL THE UNKNOWN ONE, BUT LET'S JUST CALL IT A QUESTIONED SEPARATION. IT WAS THE ORIGINAL SEPARATION.

Q. OKAY.

AND YOU TOOK PICTURES OF ALL OF THOSE SEPARATIONS?

A. YES, I DID.

Q. ONE OR MORE PICTURES?

A. YES, I DID.

Q. AND YOU HAVE THOSE PICTURES WITH YOU?

A. I DO.

JUDGE GODBOLD: MR. DOAR, YOU GOT THROUGH 2011 AND THEN YOU MOVED AWAY TO THE TEST.

MR. DOAR: IF I COULD PICK UP.

JUDGE GODBOLD: YOU MAY WANT TO PICK UP AND IDENTIFY THE OTHER PHOTOGRAPHS.

BY MR. DOAR:

Q. COULD YOU GO TO 20012 AND 13?

JUDGE TJOFLAT: NO, 2012.

MR. DOAR: TWO ZERO ONE TWO.

THE WITNESS: YES, SIR.

TO PICK UP AT EXHIBIT IC-2012, THIS IS THE MAGNIFIED VIEW OF THE ORIGINAL SEPARATION OF THE RIGHT STRAP.

EXHIBIT IC-2013 IS, AGAIN, A MAGNIFIED VIEW OF THE THIRD EYELET FROM THE END OF THE LEFT STRAP, AND THIS IS THE EYELET THAT I ORIGINALLY SAID HAD THE DISTORTION OR THE DAMAGE.

FINALLY, IC-2014 IS A MAGNIFIED VIEW OF THE THIRD EYELET FROM THE END OF THE RIGHT STRAP.

MR. DOAR: I WOULD LIKE TO TENDER THE PICTURES TO THE COMMITTEE FOR THEIR CONSIDERATION AND WOULD LIKE TO ASK LEAVE TO USE THE MACHINE AND THE SCREEN IN THE COURTROOM SO THAT MR. MALONE COULD EXPLAIN TO YOU JUST WHAT HE OBSERVED AND WHAT HIS FINDINGS WERE FOLLOWING --

JUDGE GODBOLD: ALL RIGHT. TWO ZERO ZERO FOUR THROUGH 2014 ARE RECEIVED.

(THEREUPON, EXHIBITS NUMBER IC-2004 THROUGH 2014 WERE TENDERED AND RECEIVED BY THE COMMITTEE.)

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JUDGE GODBOLD: NOW, YOU HAVEN'T TENDERED 2001 THROUGH THREE.

MR. DOAR: WELL, I WOULD LIKE TO TENDER 2001 THROUGH THREE AS WELL.

JUDGE GODBOLD: ALL RIGHT. THEY ALSO ARE RECEIVED.

(THEREUPON, EXHIBITS NUMBER IC-2001 THROUGH 2005 WERE TENDERED AND RECEIVED BY THE COMMITTEE.)

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JUDGE GODBOLD: NOW, BEFORE WE GO ANY FURTHER, WHAT IS THE RELATION, MR. MALONE, BETWEEN THE -- I BELIEVE YOU SAID BOTH STRAPS BROKE AT 29.9 PULLING POWER.

THE WITNESS: YES, YOUR HONOR.

JUDGE GODBOLD: WHAT DOES THAT MEAN?

THE WITNESS: WELL, IT MEANS, NUMBER ONE, IT'S A LOT MORE THAN THE AVERAGE PERSON COULD EXERT.

SINCE NOBODY IN OUR UNIT OR OUR LAB HAD EVER DONE A TEST LIKE THIS, AND I HAVE NEVER HEARD OF ANY STUDIES BEING PUBLISHED, IT'S ALMOST A MEANINGLESS FIGURE OTHER THAN IT'S A LOT MORE THAN AN AVERAGE PERSON COULD EXERT.

JUDGE GODBOLD: WHAT I AM REALLY SEEKING IS WHAT DOES THE MEASURE OF POUNDS MEAN?

THE WITNESS: WELL, IT DID SHOW THAT THE STRAP IS CONSISTENT WHEN IT BREAKS AT ABOUT THE SAME POINT.

JUDGE GODBOLD: I DON'T UNDERSTAND THE UNIT OF POUNDS IS WHAT I AM TRYING TO GET AT.

THE WITNESS: IT'S BASICALLY HOW MUCH PULLING FORCE IS BEING EXERTED ON A PARTICULAR OBJECT IN ORDER TO BREAK IT. IT'S MEASURED IN POUNDS.

JUDGE GODBOLD: HOW MUCH PULLING FORCE CAN A PERSON EXERT WITH HIS HANDS AND ARMS?

THE WITNESS: I REALLY HAVE NO IDEA.

JUDGE POINTER: IT APPARENTLY THOUGH RELATES TO SOMETHING ON THE ORDER OF POUNDS PER SQUARE INCH OR SOMETHING, DOESN'T IT?

THE WITNESS: AGAIN, IT'S A PULLING TYPE FORCE NORMALLY USED AT THE TENSILE STRENGTH MEASUREMENTS OF METAL.

JUDGE TJOFLAT: IF YOU ARE GOING TO TAKE THE STRAP AND HANG IT FROM SOMETHING, THAT MEANS YOU WOULD PUT 29.9 POUNDS ON THE BOTTOM AND THE GRAVITY WOULD CAUSE IT TO BREAK? IS THAT WHAT YOU MEAN?

THE WITNESS: I THINK IT'S A LITTLE MORE THAN THAT.

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, AND I HAD TO USE THE MACHINE IN ORDER TO BREAK IT, AND I RECORDED THIS FIGURE.

THE FIRST THING I DID FROM MY OWN PRACTICAL THING WAS TRY AND BREAK IT MYSELF.

I COULDN'T EVEN --

JUDGE GODBOLD: I UNDERSTAND YOUR TESTIMONY THAT YOU COULDN'T BREAK IT, YOURSELF. WHAT I AM TRYING TO FIGURE OUT IS WHAT 29.9 TELLS US APART FROM YOUR INABILITY TO BREAK IT MANUALLY.

THE WITNESS: OTHER THAN SAYING HOW MANY POUNDS IT TOOK TO BREAK THE STRAP, IT'S A MEANINGLESS FIGURE.

JUDGE JOHNSON: WHAT PORTION OF THE STRAP LENGTHWISE

WAS INVOLVED IN THE TEST, MR. MALONE?

THE WITNESS: THE ACTUAL PORTION THAT WAS STRETCHED WAS APPROXIMATELY SIX INCHES OF THE STRAP. EITHER END HAD TO BE ACTUALLY INSERTED IN THE MACHINE TO HOLD IT.

JUDGE JOHNSON: SO YOU HAD SIX INCHES OF THE STRAP THAT WAS EXPOSED TO THE TENSION --

THE WITNESS: YES, YOUR HONOR.

JUDGE JOHNSON: -- THAT ULTIMATELY RESULTED IN BREAKAGE?

THE WITNESS: YES, YOUR HONOR.

JUDGE JOHNSON: AND YOU HAD TO PUT 29.9 POUNDS OF TENSION ON THAT SIX INCHES IN ORDER TO BREAK IT?

THE WITNESS: OF PULLING FORCE. EXACTLY.

LET ME SAY ONE OTHER THING. IT'S NOT A MEANINGLESS FIGURE IN THAT IT'S GOING TO SHOW YOU THAT BOTH STRAPS BROKE AT EXACTLY THE SAME POINT, SO YOU CAN'T SAY IT'S GOING TO BREAK AT ANOTHER PRESSURE HERE AND ANOTHER PRESSURE ALONG THE LINE.

JUDGE POINTER: I SUPPOSE ONE REASON WHY IT IS A LITTLE CONFUSING IS THAT ALTHOUGH YOU REFER TO IT AS POUNDS, YOU ARE PERHAPS USING THAT AS A UNIT OF MEASUREMENT THAT IS NOT THE SAME AS SIMPLY POUNDS OF HANGING SOMETHING THAT WEIGHS 29 POUNDS ON THE BOTTOM OF A STRAP AND SEEING IT BREAK. IT IS NOT THAT KIND OF UNIT THAT YOU ARE REFERRING TO.

THE WITNESS: THAT'S CORRECT.

I THINK THAT THIS STRAP WOULD HAVE NO TROUBLE SUPPORTING OR HANGING 30 POUNDS.

JUDGE GODBOLD: ALL RIGHT, SIR.

MR. DOAR: WELL, I WOULD LIKE TO ASK TO USE THE SCREEN NOW.

JUDGE GODBOLD: YOU MAY.

JUDGE O'KELLEY: JERRY, ARE YOU GOING TO TURN ALL THE LIGHTS OUT OR JUST A STRIP?

THE CLERK: I WILL TRY A STRIP AT A TIME.

BY MR. DOAR:

Q. EXHIBIT 2004 HAS BEEN PLACED UP ON THE SCREEN, MR. MALONE, AND WILL YOU DESCRIBE THAT FOR THE COMMITTEE?

A. THIS IS AN OVERALL VIEW OF THE PURSE IN QUESTION WHICH JUST FOR OUR PURPOSES WE LABELED IT Q-1, A SPECIMEN, BUT YOU HAVE GOT AN OVERALL VIEW.

THE LEFT-HAND STRAP THERE, OF COURSE, BUCKLES AT THE LEFT AND CONTINUES ON.

WHERE IT SAYS LEFT END IS JUST THE END OF THE LEFT-HAND STRAP.

THE RIGHT-HAND STRAP BUCKLES ON THE RIGHT SIDE.

IT'S HARD TO SEE ON THE PICTURE, BUT THE END IS JUST BELOW TO THE LEFT WHERE IT SAYS RIGHT END, AND BASICALLY THIS IS JUST TO ORIENT YOU OF WHAT I'M GOING TO BE TALKING ABOUT.

ANY TIME I'M TALKING ABOUT THE LEFT-HAND STRAP, IT'S

AS YOU ARE LOOKING AT THE PURSE FROM THE FRONT.

THE RIGHT-HAND STRAP OR RIGHT-HAND EYELET WOULD BE, OF COURSE, THE STRAP ON THE RIGHT.

Q. WHAT IS EXHIBIT 2005 AGAIN?

A. THE 2005 IS JUST THE REVERSE VIEW OF THE SAME PURSE.

WHERE IT SAYS RIGHT END IS THE END OF THE RIGHT THAT WAS ORIGINALLY DESIGNATED THE RIGHT-HAND STRAP.

WHERE IT SAYS LEFT END IS THE END THAT WAS ORIGINALLY DESIGNATED THE LEFT-HAND STRAP.

Q. AND THEN I WOULD PUT IN EXHIBIT 2006. EXHIBIT 2006, WOULD YOU DESCRIBE THAT?

A. EXHIBIT 2006 IS A MAGNIFIED VIEW OF THE TEST BREAK, THE FIRST BREAK WE MADE OF THE LEFT-HAND STRAP. IT'S A VIEW ACTUALLY OF THE TOP OF THE STRAP, THE SIDE WITH THE STITCHING. IT SHOWS YOU EXACTLY WHAT THE STRAP LOOKED LIKE IMMEDIATELY AFTER THE BREAK.

WHAT I HAVE DONE UP THERE IS JUST LABEL CERTAIN CHARACTERISTICS OF THE TEAR JUST TO HELP YOU OUT.

conclusory statement on my note/photo

BASICALLY WHAT HAPPENED IS WHEN THE STRAP BROKE, IT STARTED THERE FROM THE BOTTOM WHERE IT SAID TEST BREAK, PROCEEDED IN A DIAGONAL MANNER ACROSS THE STRAP AND FINALLY STARTED TEARING OFF LAYERS IN THAT UPPER TOP PORTION WHERE IT SAYS LAYERING WHERE IT WAS JUST PULLING OFF DIFFERENT FIBERS AT DIFFERENT TIMES.

SO IT WAS A GRADUAL BREAK AND NOT A SUDDEN BREAK. IT

WAS A DIAGONAL BREAK, AND DIFFERENT PARTS OF THAT STRAP WERE GIVING AT DIFFERENT TIMES.

THE OTHER THING YOU MIGHT WANT TO NOTICE IS A VERY JAGGED BREAK. IN OTHER WORDS, SINCE THE INDIVIDUAL LEATHER FIBERS, EACH HAS MAYBE A SLIGHTLY DIFFERENT TENSILE STRENGTH, THEY ARE GOING TO BREAK AT SLIGHTLY DIFFERENT TIMES. SO YOU ARE GOING TO GET A VERY IRREGULAR BREAK INSTEAD OF A NICE SMOOTH BREAK.

JUDGE GODBOLD: WHAT IS THE APPARENT THREAD IN THE CENTER? IS THAT A LEATHER FIBER? IS THAT SOME KIND OF METAL REINFORCING OR IS THAT PLASTIC OR WHAT?

THE WITNESS: IF YOU LOOK AT THE TOP OF THE STRAP WHERE THE STITCHING IS AND THE STITCHING RUNS COMPLETELY DOWN THE STRAP, IT'S BASICALLY THERE TO HOLD THE WHOLE THING TOGETHER.

WHAT HAD HAPPENED IS WHEN WE TOOK THE PHOTOGRAPH, WHEN WE MADE THE BREAK, WE STOPPED THE MACHINE RIGHT AT THAT POINT, SO IT BROKE THE STRAP BUT IT DID NOT BREAK THE STRING. SO THE STRING IS STILL REALLY ATTACHED TO THE TWO PIECES, AND IT'S KIND OF WOUND ON ITSELF RIGHT THERE.

BY MR. DOAR:

Q. OKAY. EXHIBIT 2007. WHAT IS EXHIBIT 2007?

A. EXHIBIT 2007 IS THE MAGNIFIED VIEW OF THE -- THIS IS ACTUALLY THE BOTTOM. THIS IS THE SIDE THAT DOESN'T HAVE THE STITCHING OR HAS THE SEAM RUNNING ALONG IT. THIS IS THE

BOTTOM VIEW OF THE RIGHT-HAND TEST BREAK.

AGAIN, IN THIS PARTICULAR CASE THE WHITISH OBJECT REFLECTING THE LIGHT, THAT'S THE PLASTIC INSERT WHICH WAS ACTUALLY PULLED OUT OF THE STRAP WHEN IT BROKE. THAT'S WHAT THE LEATHER IS ACTUALLY WRAPPED AROUND.

BUT AGAIN, YOU HAVE THIS SAME EXACT TYPE OF TEAR. THE TEAR STARTED AT THE BOTTOM THERE WHERE IT SAYS TEST BREAK. IT WAS A GRADUAL BREAK. IT PROCEEDED IN A DIAGONAL DIRECTION ACROSS THE STRAP, AND FINALLY THE LAST PART TO TEAR WOULD BE THE TOP PART, VERY TOP PART.

YOU CAN SEE HOW IT'S DISTORTED AND PULLED OUT. IT'S AGAIN A VERY IRREGULAR BREAK. IT'S A GRADUAL BREAK, AND IT STILL HAS THE STRING ATTACHED.

AGAIN, WE STOPPED THE MACHINE SO WE DIDN'T PULL IT FAR ENOUGH APART TO PULL THE STITCHING APART.

Q. NOW, I WOULD LIKE TO PLACE EXHIBIT 2008.

A. EXHIBIT 2008 IS THE TOP VIEW OF WHAT YOU JUST SAW. IT'S THE TOP VIEW OF 2007.

AGAIN, THIS IS A SIDE WITH THE DOUBLE ROW OF STITCHING RUNNING DOWN THE STRAP. AGAIN, IT SHOWS HOW THE PLASTIC WAS PULLED OUT AND AGAIN SHOWS THE DIAGONAL MANNER OF THE TEAR AND THE FACT THAT IT'S VERY IRREGULAR AND CAME OFF GRADUALLY IN LAYERS INSTEAD OF ALL AT ONE TIME.

Q. THE NEXT EXHIBIT IS 2009. WHAT IS 2009?

A. OKAY, 2009 IS THE FIRST VIEW WE HAVE OF THE QUESTIONED

BREAK, THE BREAK IN THE PURSE OR THE ORIGINAL BREAK IN THE PURSE. IT'S A TOP VIEW OF THE LEFT-HAND STRAP.

FROM THIS I DID MOST OF MY TESTS AT MUCH HIGHER MAGNIFICATION, UP AROUND 70 POWER. THIS IS MAYBE ABOUT TEN POWER, BUT IT GIVES YOU A BASIC IDEA OF WHERE THE CUT STARTED.

SINCE THE LEATHER WAS ACTUALLY WRAPPED AROUND THE PLASTIC INSERT, THE CUT STARTED ON THE BOTTOM OF THE STRAP, PROCEEDED TO THE EDGE, CAME RIGHT ON OVER ALMOST TO THE RIGHT-HAND SIDE, ALL THE WAY TO THE RIGHT-HAND SIDE OF THE STRAP, AND STOPS JUST ABOUT WHERE THE LINE IS.

IF YOU WOULD MOVE THE POINTER JUST A LITTLE BIT MORE TO THE RIGHT.

OKAY. RIGHT ABOUT THERE IS WHERE THE TEAR OR WHERE THE CUT STOPS. FROM THERE ON, THE STRAP IS TORN, AND YOU GO RIGHT AROUND TO THE BOTTOM PORTION OF THE RIGHT-HAND SIDE. THAT'S ALL TORN, SO THIS IS ABOUT A TEN INCH VIEW OF THE QUESTIONED SEPARATION.

JUDGE GODBOLD: IF IT IS CUT ALL THE WAY OR APPROXIMATELY THREE-FOURTHS OF THE WAY ACROSS AS YOU PREVIOUSLY TESTIFIED, WHAT IS THE MATERIAL PROTRUDING FROM THE TOP OF THE CENTER SECTION?

THE WITNESS: THAT'S JUST SOME FIBERS FROM THE THREAD. THAT'S NOT THE LEATHER FIBERS. THAT'S ACTUALLY THE FIBERS FROM THE BLACK STITCHING.

JUDGE GODBOLD: WE ARE NOT UNDERSTANDING EACH OTHER. MOVE THE POINTER OVER TO THE LEFT. RIGHT THERE. WHAT IS THAT MATERIAL?

THE WITNESS: THAT'S THE BOTTOM PORTION OF THE STRAP WHERE IT'S TORN. JUST A CONTINUATION.

JUDGE GODBOLD: AM I CORRECT THEN IN UNDERSTANDING THAT IN DEFINING A CUT OR DESCRIBING WHAT YOU IDENTIFIED AS A CUT, THAT THAT CUT DID NOT GO ALL THE WAY THROUGH THE STRAP TOP TO BOTTOM?

THE WITNESS: CORRECT. THERE'S A SEAM RUNNING ALL ALONG THE BOTTOM OF THE STRAP BASICALLY. YOU CAN'T SEE IT FROM THIS VIEW. SO THE ACTUAL PIECE OF LEATHER STARTS -- IF YOU WOULD MOVE THE POINTER JUST A LITTLE TO THE LEFT. NO. A LITTLE BIT MORE TO THE RIGHT. A LITTLE BIT MORE TO THE RIGHT. JUST A HAIR. THAT'S WHERE YOUR LEATHER STARTS. RUNS AROUND THE INSERT AND THEN BACK UNDERNEATH IT, AND THE OTHER PIECE OF COURSE WAS TORN. SO YOUR SEAM IS KIND OF RUNNING ROUGHLY DOWN BETWEEN THOSE TWO STITCHINGS.

IT SHOWS UP MUCH BETTER IN SUBSEQUENT PICTURES.

JUDGE POINTER: I WONDER IF BEFORE WE GO TO THE NEXT PICTURE YOU MIGHT JUST SIMPLY PASS DOWN AMONG THE COMMITTEE MEMBERS ONE OF THESE STRAPS 2002 AND 2003, AND I THINK WE COULD GET A BETTER SENSE OF IT.

MR. DOAR: ONE THING, YOUR HONOR. IF YOU UNBAND THE WHITE BAND UNMARKED, YOU CAN GET A PICTURE OF THE TEST BREAK

BETTER THAN IT IS NOW.

IF I COULD ILLUSTRATE THAT FOR ONE -- JUDGE TJOFLAT, IF I COULD SEE ONE OF THE STRAPS.

IF YOU TAKE THIS OFF LIKE THIS JUST FOR A MINUTE AND THEN -- THAT IS THE TEST BREAK AS IT OCCURRED.

BY MR. DOAR:

Q. IS THAT CORRECT?

A. YES. YOU CAN TAKE ALL THAT WHITE TAPE OFF IF YOU WANT.

Q. I WAS AFRAID THE WHOLE THING WOULD COME APART.

JUDGE GODBOLD: WE WILL WANT IT BACK IN THE CONDITION THAT HE BROUGHT IT TO US.

JUDGE TJOFLAT: WAS THE STRAP CUT FROM UNDERNEATH THE STRAP UPWARDS?

THE WITNESS: LOOKING AT -- I BELIEVE I CAN TELL. ONE END OF THE STRAP, AND I DON'T HAVE A PHOTO OF IT, BUT AGAIN WE ARE DEALING WITH A PIECE OF LEATHER THAT'S WRAPPED AROUND A PLASTIC INSERT.

NOW, IF YOU CUT THROUGH THE ENTIRE STRAP AT ONE TIME, YOU WOULD CUT THROUGH THE PLASTIC ALSO.

IF YOU STARTED YOUR CUT AND JUST CUT AROUND THE LEATHER, THEN BROKE IT, YOU WOULDN'T CUT THE PLASTIC.

WELL, IT'S KIND OF HARD TO SEE, BUT IF YOU LOOK AND SEE THE PLASTIC THERE HAS BEEN PULLED APART. WHEREAS, THE LEATHER HAS BEEN CUT. SO WHAT I THINK HAPPENED, IT WAS JUST

SCORED AROUND HERE AND THEN --

JUDGE TJOFLAT: CUT AROUND THE OUTSIDE.

THE WITNESS: CUT AROUND THE OUTSIDE.

JUDGE GODBOLD: THE PIECE YOU ARE JUST SHOWING US AND DESCRIBING IS WHAT?

THE WITNESS: THIS IS THE ORIGINAL, THE RIGHT-HAND STRAP, THE ORIGINAL SEPARATION.

JUDGE GODBOLD: ALL RIGHT.

JUDGE O'KELLEY: MR. MALONE, ON THE PHOTOGRAPH 2009 THAT IS ON THE SCREEN, YOUR DIAGRAM, IF I READ IT CORRECTLY, INDICATES THAT THE STRAP IS IN THREE SEGMENTS ACTUALLY WITH THE TWO SEAMS. IS THAT NOT CORRECT?

THE WITNESS: NO. IT'S ACTUALLY ONE SEAM RUNNING UNDERNEATH PARALLEL ALMOST BETWEEN THE TWO STITCHINGS YOU SEE.

JUDGE O'KELLEY: YOU HAVE ON THE TOP SIDE, ON THE LEFT-HAND SIDE WHERE THE ARROW IS POINTING, MARKED A CUT. NOW, THAT IS THE FIRST THIRD OF THE STRAP. IS THAT CORRECT?

THE WITNESS: THAT IS CORRECT, YES.

JUDGE O'KELLEY: AND FROM THE WAY WE ARE LOOKING AT IT, THAT IS ON THE UNDERNEATH SIDE. IS THAT CORRECT?

THE WITNESS: CORRECT.

JUDGE O'KELLEY: AND THEN COMING AROUND ON THE TOP SIDE YOU HAVE MARKED A CUT THAT GOES OVER TWO-THIRDS OF THE WAY ACROSS, PROBABLY SEVEN-EIGHTHS OF THE WAY ACROSS.

THE WITNESS: CORRECT.

JUDGE O'KELLEY: NOW, THE FIBER THAT WOULD COME UP THROUGH THAT LEFT-HAND THIRD OF THE STRAP, THE PLASTIC FIBER OR THE PLASTIC ON THE LEFT-HAND SIDE, WAS THAT CUT OR NOT?

THE WITNESS: THE PLASTIC INSERT?

JUDGE O'KELLEY: YES. AT THAT POINT WHERE THE ARROW IS.

THE WITNESS: WELL, THIS VIEW RIGHT HERE IS OF THE LEFT-HAND STRAP. THE PLASTIC INSERT ISN'T IN THERE. THE ONE I WAS REFERRING TO JUST A SECOND AGO IS ON THE RIGHT-HAND STRAP, NOT THE LEFT.

JUDGE O'KELLEY: BUT IN YOUR EXAMINATION DID YOU FIND ANY EVIDENCE OF A PLASTIC INSERT IN THAT PARTICULAR PIECE OF THE STRAP?

THE WITNESS: NO.

JUDGE O'KELLEY: WHERE THE ARROW IS POINTING.

THE WITNESS: NOT RIGHT HERE, NO.

JUDGE O'KELLEY: SO YOU COULD NOT SAY WHETHER IT HAD BEEN CUT OR PULLED APART?

THE WITNESS: THE PLASTIC, NO, BECAUSE IT WASN'T THERE. IT WAS MISSING.

JUDGE O'KELLEY: OKAY.

JUDGE GODBOLD: NOW, HELP ME A LITTLE BIT. SOMETHING YOU SAID A MOMENT AGO HELPED ME WHEN YOU REFERRED TO SCORING AROUND THE STRAP RATHER THAN CUT IN THE SENSE OF A TOTAL

SEVERANCE.

NOW, IN THE LEFT-HAND THIRD OF THE STRAP AS PORTRAYED ON THE SCREEN NOW, IT LOOKS AS THOUGH THERE MAY HAVE BEEN A TOTAL SEVERANCE.

THE WITNESS: THAT'S CUT.

JUDGE GODBOLD: AND THEN AS WE MOVE ACROSS, IT APPEARS THERE MAY NOT HAVE BEEN A TOTAL SEVERANCE OF ALL ELEMENTS --

THE WITNESS: THERE WAS --

JUDGE GODBOLD: -- BUT RATHER WHAT YOU CALL A SCORING THAT GOES PART WAY THROUGH.

THE WITNESS: NO. THE NEXT TWO PICTURES WILL SHOW IT WITH MORE CLARITY. THE CUT GOES ALL THE WAY THROUGH.

JUDGE GODBOLD: ALL RIGHT. LET'S SEE THE NEXT TWO.

BY MR. DOAR:

Q. I AM NOW PLACING 2010.

A. IT'S ON A BIT HIGHER MAGNIFICATION. THIS IS, OH, APPROXIMATELY 20X.

Q. IS THIS THE SAME STRAP AS THE FORMER PICTURE?

A. THE SAME STRAP. WE ARE STILL DEALING HERE WITH --

JUDGE O'KELLEY: IT LOOKS LIKE IT IS MELTING, JERRY. SOMETHING IS MELTING. IS THE PHOTOGRAPH MELTING?

THE CLERK: THE HEAT IS BUBBLING THE PICTURE UP. IT'S NOT REALLY MELTING. IT'S SORT OF BUBBLING.

THE LAMP IS GETTING PRETTY HOT.

JUDGE TJOFLAT: YOU DO HAVE THE NEGATIVES, DON'T YOU?

THE WITNESS: YES.

JUDGE O'KELLEY: MAYBE YOU SHOULD TURN THE LIGHT OFF AND LET IT COOL FOR AWHILE.

LEAVE THE BLOWER ON, IF YOU CAN.

THE WITNESS: MR. DOAR, THE NEXT PICTURE, THE COMPLETE END VIEW, I THINK SHOWS THE CUT BETTER THAN ANY OTHER PICTURE IF YOU WANT TO JUST PASS THAT DOWN.

JUDGE GODBOLD: WHY DON'T YOU HAND THAT TO US UP ON THE BENCH AND LET US LOOK AT IT?

JUDGE O'KELLEY: IN THE MEANTIME, THAT WILL COOL DOWN RAPIDLY. MY EXPERIENCE IS IF YOU LEAVE THE LAMP OFF AND THE BLOWER GOING, IT WILL COOL DOWN.

BY MR. DOAR:

Q. YOU ARE LOOKING AT 2011. IS THAT RIGHT?

A. CORRECT.

JUDGE TJOFLAT: THAT SHOWS THE CUT VERY WELL.

THE WITNESS: IT'S AN END VIEW OF THE LEFT-HAND STRAP.

BY MR. DOAR:

Q. THAT'S AN END VIEW. IS THAT ALSO SOMETIMES REFERRED TO AS A CROSS-SECTION VIEW?

A. A CROSS-SECTIONAL VIEW.

MR. DOAR: PERHAPS I COULD PASS 2010 TO THE COMMITTEE AS WELL.

JUDGE GODBOLD: IS THIS THE ONE THAT WAS MELTING?

MR. DOAR: THIS IS THE ONE THAT WAS MELTING.

JUDGE O'KELLEY: HAS THE MACHINE COOLED DOWN SOME, JERRY?

THE CLERK: IT SEEMS TO BE.

JUDGE TJOFLAT: DID YOU ATTEMPT A TEST TO CUT THE STRAP ABOUT LIKE THE ORIGINAL WAS CUT?

THE WITNESS: NO, YOUR HONOR.

JUDGE TJOFLAT: AND THEN SEE WHAT KIND OF FORCE WOULD BE REQUIRED TO PULL THE REST OF IT?

THE WITNESS: NO.

JUDGE TJOFLAT: AS IF YOU HAD CUT IT UNTIL YOU COULD PULL IT APART.

THE WITNESS: NO.

THIS END OF THE RIGHT-HAND STRAP, AND WE ARE TALKING ABOUT EXHIBIT 2003, HAD HE CUT THROUGH THE ENTIRE STRAP, AND I MEAN THE STRAP OR THE LEATHER AND THE PLASTIC, THEN PULLED IT APART, HE WOULD HAVE CUT THE PLASTIC.

AS YOU CAN SEE, THE LEATHER WAS CUT BUT THE PLASTIC WAS PULLED APART. THAT'S WHAT MAKES ME THINK THAT HE SCORED IT, AND IT SHOWS UP VERY WELL IN THIS ONE.

BY MR. DOAR:

Q. WHEN YOU SAY "HE," YOU ARE ASSUMING --

A. WHOEVER DID IT. THE PERSON.

MR. DOAR: CAN WE USE IT AGAIN?

THE CLERK: I THINK SO.

MR. DOAR: I WILL PUT 2011 ON THE SCREEN.

JUDGE TJOFLAT: WE HAVE SEEN IT.

MR. DOAR: YOU DON'T NEED TO SEE THAT.

JUDGE TJOFLAT: NO.

MR. DOAR: PUT 2012 THEN.

BY MR. DOAR:

Q. WHAT IS 2012?

A. THIS IS A TOP VIEW OF THE ORIGINAL SEPARATION OF THE RIGHT-HAND STRAP, AND FOR SOME REASON THE PICTURE DIDN'T COME OUT AS WELL ON THE RIGHT STRAP AS THE LEFT. BUT THIS IS JUST ALMOST THE ENTIRE STRAP, AND IT'S BEEN -- BASICALLY, IT'S A REVERSE OF WHAT YOU SAW BEFORE, BUT IT'S BEEN CUT FROM RIGHT TO LEFT, AND THEN THERE'S A TORN AREA UNDERNEATH WHICH AGAIN YOU CAN'T SEE, AND IT'S JUST A MATE TO THE FIRST CUT, TEAR.

MR. DOAR: I THINK THAT'S ALL WE NEED BECAUSE WE CAN JUST PASS THESE AROUND.

JUDGE GODBOLD: ALL RIGHT, SIR.

MR. DOAR, I SUGGEST WE GET ANOTHER PRINT OF 2010 AND SUBSTITUTE IT. THIS ONE IS DAMAGED AT THE BOTTOM.

MR. DOAR: ALL RIGHT.

JUDGE TJOFLAT: DAMAGED BY THE HEAT OF THE PROJECTOR.

JUDGE GODBOLD: YES.

BY MR. DOAR:

Q. NOW, 2014 AND 2013, WHAT ARE THOSE PICTURES?

A. ONE THING, IF I CAN BACKTRACK JUST A SECOND, TOO. IF YOU WILL NOTICE ABOUT THE CUTS, THEY WERE PERPENDICULAR TO

THE STRAP, AND NONE OF THE BREAKS EVER OCCURRED IN THIS MANNER. THE BREAKS WERE ALL DIAGONAL.

I THINK THAT'S A VERY IMPORTANT POINT.

JUDGE TJOFLAT: THE TEST BREAKS WERE DIAGONAL?

THE WITNESS: RIGHT.

AND THE QUESTIONED ORIGINAL CUT, BREAK, WAS ALMOST COMPLETELY PERPENDICULAR TO THE STRAP WHICH WOULD NEVER OCCUR NATURALLY.

BASICALLY, WITH EXHIBIT IC-2013, WE ALSO LOOKED AT THE EYELETS AGAIN JUST TRYING TO COVER ALL THE BASES, FOR LACK OF A BETTER WORD.

IF THE STRAP OR THE PURSE WERE ON SOMEBODY'S SHOULDER WITH THE STRAP OVER THE SHOULDER, SOMEBODY TRIED TO GRAB IT OFF, AND THE BREAK OCCURRED AT THE MID POINT WHICH APPROXIMATELY IS WHERE IT HAS OCCURRED ON THIS STRAP, YOU THEN WOULD TRANSMIT AN EQUAL AMOUNT OF FORCE DOWN EACH STRAP AS YOU ARE PULLING IT OFF THE PERSON.

THEREFORE, EACH EYELET WHERE IT'S BUCKLED TO THE PURSE SHOULD RECEIVE ABOUT THE SAME AMOUNT OF FORCE.

WE CHECKED THE EYELETS TO SEE IF THIS CONDITION OCCURRED, AND IT DID NOT, NOT AT ALL.

THE TWO EYELETS EXHIBITED A TOTALLY DIFFERENT AMOUNT OF DAMAGE.

THE IC-2013 SHOWS THE EYELET ON THE LEFT STRAP, BUT WHAT YOU CAN SEE FROM THE PICTURES THERE'S A TREMENDOUS

AMOUNT OF DISTORTION ON THAT THIRD EYELET FROM THE END WHERE IT WAS BUCKLED WHICH INDICATES QUITE A BIT OF FORCE WAS APPLIED TO THAT STRAP. WHAT IT'S ACTUALLY DONE IS THE, ONE END OF THE HOLE IS ACTUALLY JUST PEELED BACK AND RIPPED.

THE THIRD EYELET FROM THE END OF THE RIGHT STRAP, AND THAT'S SHOWN IN IC-2014, SHOWS ALMOST NO DAMAGE AT ALL. IT SHOWS WHAT I WOULD JUST CALL NORMAL WEAR AND TEAR.

NOW, IF THE STRAP WERE ACTUALLY, LIKE I SAID, A TYPICAL PURSE SNATCHING OR SOMETHING LIKE THAT, PULLED OFF OF SOMEBODY'S SHOULDER, BOTH THOSE EYELETS SHOULD SHOW ABOUT THE SAME AMOUNT OF DAMAGE.

THEY DID NOT.

BY MR. DOAR:

Q. OF COURSE, IN CONNECTION WITH THAT, YOU HAVE NO WAY OF KNOWING WHAT THE CONDITION OF THOSE EYELETS WERE EXCEPT WHEN THEY GOT TO YOU?

A. CORRECT. I CAN'T SAY THE CONDITIONS THAT THE FORCE WAS APPLIED UNDER, BUT WHAT I CAN SAY WITH CERTAINTY IS THAT AT SOME POINT THE LEFT STRAP RECEIVED QUITE A BIT MORE FORCE THAN THE RIGHT.

JUDGE POINTER: WELL, I TAKE IT IF SOMEONE WERE CUTTING WITH A KNIFE BLADE AND HAD THE KNIFE BLADE BEING FORCED UP AGAINST THE LEATHER AND WERE HOLDING THE RIGHT END OF THE STRAP WHERE THE STRAP WOULD BE BENT AROUND THE KNIFE BLADE BUT WERE NOT HOLDING THE LEFT STRAP, THIS IS THE KIND

OF PICTURE YOU WOULD EXPECT. NAMELY, STRESS ON THE LEFT STRAP, BECAUSE IT IS GOING ALL THE WAY DOWN TO THE BUCKLE AND NO PARTICULAR STRESS ON THE RIGHT STRAP BECAUSE IT IS BEING HELD BY THE HAND.

THE WITNESS: CORRECT. THAT WOULD BE ONE EXPLANATION, YES.

MR. DOAR: THAT'S ALL THE QUESTIONS I HAD.

JUDGE GODBOLD: NOW, YOU BEGAN TALKING IN TERMS OF THE ORIGINAL SEVERANCE. AS WE MOVED ALONG, YOU BEGAN SPEAKING OF THE CUT, APPLYING THAT TERM TO THE ORIGINAL SEVERANCE.

NOW, AM I CORRECT THAT WHAT YOU ARE DOING IS EXPRESSING YOUR OPINION ON THE BASIS OF YOUR TUGGING AT THE STRAP, YOURSELF, YOUR VISUAL OBSERVATION AND THE TEST ON THE MACHINE TO FORM A CONCLUSION THAT THE ORIGINAL SEVERANCE REFLECTED A CUT?

THE WITNESS: A CUT AND A SMALL TEAR.

JUDGE GODBOLD: ALL RIGHT.

OF COURSE, I AM INCLUDING IN THE VISUAL THE MICROSCOPIC EXAMINATION.

THE WITNESS: CORRECT. THAT'S CORRECT, YOUR HONOR.

JUDGE GODBOLD: NOW, GOING BACK A MINUTE TO THE PULL OF THE MACHINE AT 29.5 POUNDS, AS I HAVE LISTENED TO YOUR TESTIMONY, IT SEEMS TO ME THAT THE FIGURE OF 29.5 DOESN'T REALLY TELL US ANYTHING AS A DISCREET MEASUREMENT. WHAT IT DOES TELL US IS THAT THE TWO STRAPS, THE TWO SIDES OF THE

STRAP BROKE AT THE SAME POINT WHEN YOU PUT THEM ON THE MACHINE.

THE WITNESS: EXACTLY.

JUDGE GODBOLD: NOW, AS TO WHETHER THE MACHINE AT 29.5 IS PULLING HARDER THAN YOU WERE ABLE TO PULL MANUALLY, I TAKE IT YOU CAN'T ANSWER THAT.

THE WITNESS: THAT'S CORRECT.

JUDGE GODBOLD: ALL RIGHT.

ANY OTHER QUESTIONS?

DO YOU HAVE AN OPINION AS TO WHETHER THE MACHINE WAS PULLING WITH GREATER FORCE THAN YOU WERE ABLE TO PULL MANUALLY, BEARING IN MIND THAT THE MACHINE BROKE TWO PIECES OF THE STRAP AND THAT YOU COULD NOT BREAK THE STRAP?

THE WITNESS: YES. IN MY OPINION, IT WAS PULLING MUCH HARDER THAN MYSELF.

JUDGE GODBOLD: DO ANY OF YOU HAVE ANY FURTHER QUESTIONS?

ANYTHING FURTHER, MR. DOAR?

MR. DOAR: NOTHING, YOUR HONOR.

JUDGE POINTER: LET ME SEE THE STRAP BACK AGAIN, BOTH PIECES.

THE WITNESS: OKAY.

JUDGE TJOFLAT: HAS THAT GOT THE EYELETS ON IT?

THE WITNESS: CORRECT. YES, SIR.

JUDGE GODBOLD: I HAVE A COUPLE MORE QUESTIONS WHILE

THE OTHER JUDGES ARE EXAMINING THE STRAP.

YOU WEIGH HOW MUCH?

THE WITNESS: APPROXIMATELY 200 POUNDS.

JUDGE GODBOLD: ANY ATHLETICS?

THE WITNESS: JOGGING. I LIFT WEIGHTS, YES.

JUDGE GODBOLD: YOU LIFT WEIGHTS?

THE WITNESS: YES, YOUR HONOR.

JUDGE GODBOLD: WOULD YOU SAY THAT YOUR STRENGTH IN CHEST AND ARMS IS AT LEAST THAT OF THE AVERAGE 200 POUND PERSON?

THE WITNESS: YES. I GET TESTED EVERY SIX MONTHS ON IT.

JUDGE GODBOLD: WHAT DO YOU TEST OUT AT?

TELL US HOW LIFTING WEIGHTS CONVERTS INTO A MEASUREMENT OF YOUR STRENGTH.

THE WITNESS: ALL AGENTS ARE TESTED, BUT MY LAST TEST I COULD DO 40 PUSHUPS WHICH MEANS I HAVE GOT PROBABLY A LOT OF UPPER BODY STRENGTH IS WHAT THEY ARE LOOKING FOR. THE AVERAGE PERSON CANNOT DO 40 PUSHUPS. AND I COULDN'T WEAR IT.

JUDGE GODBOLD: ALL RIGHT, SIR.

JUDGE TJOFLAT. TWO HUNDRED POUNDS AND HOW TALL?

THE WITNESS: SIX, THREE.

JUDGE TJOFLAT: AND YOUR AGE?

THE WITNESS: THIRTY-NINE.

JUDGE GODBOLD: ANY FURTHER QUESTIONS?

ALL RIGHT. YOU MAY STEP DOWN, SIR.

THE WITNESS: THANK YOU, YOUR HONOR.

JUDGE GODBOLD: ANYTHING FURTHER FOR TODAY, MR. DOAR?

MR. DOAR: YES. WE HAVE ONE MORE WITNESS.

JUDGE GODBOLD: ALL RIGHT, SIR.

WE WILL TAKE A TEN MINUTE RECESS.

(THEREUPON, THE PROCEEDINGS WERE RECESSED AT 2:40 O'CLOCK P.M., AND THEN CONTINUED AS FOLLOWS.)

- - -

JUDGE GODBOLD: BE SEATED.

MR. DOAR, YOU MAY PROCEED.

BY MR. DOAR:

Q. MR. MALONE, I AM PLACING BEFORE YOU NOW EXHIBIT 2001 AND 2002 AND 2003, AND ASK YOU IF 2002 AND 2003 ARE IN THE SAME CONDITION WITH THE SAME WRAPPINGS AS THEY WERE WHEN YOU BROUGHT THEM TO THE WITNESS STAND.

A. EXACTLY THE SAME.

MR. DOAR: THAT'S ALL THE QUESTIONS I HAVE.

JUDGE GODBOLD: DURING THE EXAMINATION AT ONE POINT ONE PIECE OF TAPE WAS PARTLY DETACHED AND THEN SIMPLY WRAPPED BACK AROUND. DOES THAT APPEAR TO BE IN THE SAME CONDITION?

THE WITNESS: YES. THE ORIGINAL WHITE TAPE FROM 2002 IS WRAPPED IN APPROXIMATELY THE SAME CONDITION IT WAS.

JUDGE GODBOLD: ALL RIGHT, SIR. THANK YOU.

MR. DOAR: THANK YOU, MR. MALONE.

THAT'S ALL.

JUDGE GODBOLD: MR. DOAR, WE WILL RETAIN OF THE BENCH BUT WE WILL BE IN RECESS A MOMENT. JUDGE TJOFLAT HAS AN EMERGENCY TELEPHONE CALL.

(THEREUPON, A SHORT RECESS WAS HAD AND THEREAFTER THE PROCEEDINGS RESUMED AS FOLLOWS.)

- - -

JUDGE GODBOLD: COUNSEL, CALL YOUR NEXT WITNESS. WE ARE READY TO PROCEED.

MR. WEBB: THE NEXT WITNESS IS MS. BOONE. SHE'S A REPRESENTATIVE FROM EASTERN AIRLINES.

ON THE BASIS OF MR. BORDERS' TELEPHONE LOGS, WE ASKED EASTERN TO CHECK THEIR RECORDS FOR FLIGHT INFORMATION FOR MR. BORDERS IN APRIL AND MAY AND JULY OF 1981 AND FOR MR. DREDGE IN MAY OF 1981.

THE CLERK: MS. BOONE, COME TO THE COURTROOM, PLEASE.

RAISE YOUR RIGHT HAND, PLEASE.

YOU DO SOLEMNLY SWEAR THE TESTIMONY YOU ARE ABOUT TO GIVE SHALL BE THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, SO HELP YOU GOD?

THE WITNESS: I DO.

THE CLERK: BE SEATED, PLEASE, AND STATE YOUR FULL NAME FOR THE RECORD.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IN THE MATTER OF:

COMPLAINTS FILED AGAINST
UNITED STATES DISTRICT JUDGE
ALCEE L. HASTINGS

VOLUME XXII

TRANSCRIPT OF PROCEEDINGS BEFORE THE INVESTIGATING COMMITTEE, IN ATLANTA, FULTON COUNTY, GEORGIA, ON TUESDAY, APRIL 8, 1986, IN THE ABOVE-STYLED MATTER.

MEMBERS OF THE COMMITTEE:

THE HONORABLE JOHN C. GODBOLD, PRESIDING
THE HONORABLE GERALD B. TJOFLAT
THE HONORABLE FRANK M. JOHNSON, JR.
THE HONORABLE SAM C. POINTER, JR.
THE HONORABLE WILLIAM C. O'KELLEY

APPEARANCES OF COUNSEL:

REPRESENTING THE COMMITTEE: JOHN DOAR, ESQ.
G. STEWART WEBB, JR., ESQ.

LINDA E. FINCANNON
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
1949 U. S. DISTRICT COURTHOUSE
ATLANTA, GEORGIA 30303
[404] 221-3724

A. NO. NO. HUH-UH.

Q. DO YOU RECALL ANYTHING OF SUBSTANCE THAT WAS DISCUSSED THAT EVENING?

A. NO. NO.

MR. WEBB: I HAVE NOTHING FURTHER OF MS. OWENS.

JUDGE GODBOLD: ANY QUESTIONS FROM ANY MEMBERS OF THE COMMITTEE?

ALL RIGHT. THANK YOU, MS. OWENS. YOU ARE EXCUSED.

THE WITNESS: THANK YOU.

JUDGE GODBOLD: MR. DOAR, WE WOULD LIKE TO BE IN RECESS FOR TEN MINUTES.

WHO IS THE NEXT WITNESS?

MR. WEBB: MR. GONZALEZ.

(THEREUPON, THE PROCEEDINGS WERE RECESSED AT 3:45 O'CLOCK P.M., AND THEN CONTINUED AS FOLLOWS.)

- - -

MR. DOAR: CALL SPECIAL AGENT MICHAEL MALONE.

THE CLERK: SPECIAL AGENT MICHAEL MALONE, COME INTO THE COURTROOM, PLEASE.

MR. MALONE, YOU HAVE TESTIFIED PREVIOUSLY IN THESE PROCEEDINGS?

THE WITNESS: YES.

THE CLERK: YOU ARE STILL UNDER OATH.

YOU MAY BE SEATED AND STATE YOUR NAME FOR THE RECORD.

THE WITNESS: IT'S MICHAEL P. MALONE, AND THAT IS M-A-L-O-N-E.

JUDGE GODBOLD: EXCUSE ME A MINUTE, MR. DOAR.

THE COMMITTEE CALLS TO YOUR ATTENTION, AS IT DID BEFORE IN THE PRIOR PROCEEDINGS, THAT THESE PROCEEDINGS ARE CONFIDENTIAL BY LAW.

THE WITNESS: YES, YOUR HONOR.

JUDGE GODBOLD: MR. DOAR, GO AHEAD.

- - -

MICHAEL P. MALONE,

RECALLED AS A WITNESS, BEING PREVIOUSLY SWORN, TESTIFIED FURTHER AS FOLLOWS:

FURTHER DIRECT EXAMINATION

BY MR. DOAR:

Q. WHEN YOU TESTIFIED BEFORE, A QUESTION WAS RAISED WITH RESPECT TO THE AMOUNT OF PULL THAT WAS APPLIED TO THE STRAP ON EXHIBIT IC-2001 BEFORE THE STRAP BROKE. DO YOU RECALL THOSE QUESTIONS?

A. YES, I DO.

Q. AND DID YOU GO BACK AND VERIFY HOW THAT WAS DONE AND TO SEE IF THERE WAS ANY WAY THAT THAT COULD HAVE BEEN MEASURED?

A. WELL, AGAIN, IT WAS DONE ON A MACHINE CALLED A TENSILE TESTER, AND IT'S JUST A VERY SLOW STEADY PULLING FORCE.

WHEN IT REACHED APPROXIMATELY 29.5 POUNDS OF PULLING

FORCE, THE STRAP BROKE, SO IT'S SIMPLY THE BREAKING POINT OF THAT PARTICULAR STRAP UNDER A SLOW STEADY PRESSURE.

Q. ALL RIGHT. DID YOU ALSO EXAMINE THE STRAP WHEN IT FIRST CAME TO YOU TO SEE WHETHER OR NOT THE ENDS OF THE STRAPS WHERE IT HAD BEEN BROKEN REFLECTED WHETHER OR NOT IT WAS JUST ONE BREAK IN THE STRAP OR MORE THAN ONE BREAK?

A. YES, I DID.

Q. AND WHAT DID YOU FIND?

A. WELL, BASICALLY BY FITTING IT TOGETHER, LOOKING AT THE TORN EDGES AND THE GRAIN OF THE LEATHER. THE LEATHER UNDER HIGH MAGNIFICATION HAS A PRONOUNCED GRAIN. I WAS ABLE TO DETERMINE THAT THE POINT OF THE STRAP, THE TWO ENDS WHERE IT HAD SEPARATED WERE ORIGINALLY AJOINING PORTIONS OF THE SAME STRAP.

Q. DID YOU EXAMINE THOSE ENDS UNDER A MICROSCOPE?

A. YES, I DID.

Q. AND WAS YOUR CONCLUSION ARRIVED AT BASED UPON, IN PART AT LEAST, YOUR ANALYSIS OF THE APPEARANCE OF THE STRAP UNDER THE MICROSCOPE?

A. YES, IT WAS.

MR. DOAR: THAT'S ALL THE QUESTIONS I HAD, YOUR HONOR.

JUDGE GODBOLD: MR. DOAR, LET'S GO BACK TO THE LAST QUESTION YOU ASKED HIM AFTER RE-EXAMINING UNDER HIGH MAGNIFICATION, AND BASED IN PART ON THE APPEARANCE OF THE STRAP HE CONCLUDED WHAT?

BY MR. DOAR:

Q. WOULD YOU REPEAT YOUR CONCLUSION?

A. WHEN I RECEIVED THE STRAP, OF COURSE, IT WAS IN TWO PIECES. BY PLACING THE TWO PIECES DIRECTLY SIDE BY SIDE AND MAINLY EXAMINING THE TORN PORTION -- ABOUT A FOURTH OF IT WAS ACTUALLY TORN -- AND THE GRAIN PATTERN ON THE LEATHER, I CONCLUDED THAT THE TWO PIECES OF THE STRAP WERE ONCE ADJOINING PORTIONS OF THE SAME STRAP.

JUDGE GODBOLD: YOU MEAN BEFORE SEPARATION THEY FITTED TOGETHER IN ONE CONTINUOUS PIECE?

THE WITNESS: THAT'S CORRECT, YES.

JUDGE JOHNSON: IS THIS THE STRAP YOU TESTIFIED ABOUT WHEN YOU WERE HERE BEFORE THAT HAD APPEARED TO BE PARTIALLY CUT IN TWO WITH SOME SHARP OBJECT?

THE WITNESS: YES, YOUR HONOR.

JUDGE JOHNSON: ALL RIGHT.

MR. DOAR: I HAVE NO FURTHER QUESTIONS.

JUDGE GODBOLD: OKAY. THANK YOU.

THE WITNESS: THANK YOU, YOUR HONOR.

MR. DOAR: THE NEXT WITNESS IS HENRY GONZALEZ.

I WOULD SAY TO THE COMMITTEE THAT THE REMAINING WITNESSES THIS AFTERNOON ARE MR. GONZALEZ AND ONE OF THE COURT REPORTERS THAT TOOK THE RECORD OF THE TRIAL DURING APRIL AND EARLY MAY OF 1981 BEFORE JUDGE HASTINGS.

THAT WITNESS IS GOING TO BE TAKEN OUT OF ORDER BECAUSE

HE HAS TO GET BACK TO MIAMI TONIGHT.

THE MAIN REPORTER MAY NOT TESTIFY UNTIL TOMORROW MORNING.

THE OTHER WITNESS IS A MAN THAT HAS TO GET BACK TO NEW JERSEY TONIGHT, AND HE IS A MAN THAT PICKED UP JUDGE HASTINGS AT THE AIRPORT ON MAY 5TH.

JUDGE GODBOLD: OKAY.

MR. DOAR: HE WILL BE HERE. THAT'S WHY WE ARE TRYING TO GET THROUGH TODAY.

JUDGE GODBOLD: ALL RIGHT, SIR.

THE CLERK: MR. GONZALEZ, COME INTO THE COURTROOM, PLEASE.

RAISE YOUR RIGHT HAND, PLEASE.

YOU DO SOLEMNLY SWEAR THE TESTIMONY YOU ARE ABOUT TO GIVE SHALL BE THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, SO HELP YOU GOD?

THE WITNESS: I DO.

THE CLERK: BE SEATED, PLEASE, AND STATE YOUR FULL NAME FOR THE RECORD.

THE WITNESS: HENRY GONZALEZ, G-O-N-Z-A-L-E-Z.

JUDGE GODBOLD: MR. GONZALEZ, BEFORE YOU BEGIN TO TESTIFY, THE COMMITTEE CALLS TO YOUR ATTENTION THE CONFIDENTIALITY PROVISION OF THE STATUTE. UNDER 28 U.S.C., SECTION 372(C)(14), IT IS PROVIDED -- AND I AM READING NOW. "ALL PAPERS, DOCUMENTS AND RECORDS OF PROCEEDINGS RELATED TO

working

Memo:

To: Section Chief Ken Nimmich

From: SA William A. Tobin

Subj: Exceptions to Testimony of SA Michael P. Malone in the Matter of U.S. District Judge ALCEE S. HASTINGS

Purpose: To advise of exceptions taken to testimony of SA Malone in 11th Circuit judicial inquiry, Atlanta, Georgia.

Details: In preparation for anticipated congressional testimony on August 3, 1989, SA Tobin reviewed the transcript of the 11th Judicial Circuit testimony in Atlanta, Georgia, of SA Malone. Because of the potential for serious conflict and substantial embarrassment to the Bureau, an audience was requested with you late in the day of August 3, 1989, wherein you requested the specific details of my objections, my exceptions to SA Malone's testimony, and technical analysis as to the effect of the testimony.

Attached hereto are the requested exceptions and analysis, as well as two photographs of test breaks.

Recommendations: None. For information only.

Exceptions to Testimony of SA Malone Re U.S.District Judge ALCEE L. HASTINGS

1/ p.113,line 2: Metallurgical testing procedures utilized were not "winging it". I did not have to "design a test". The apparatus is, in fact, designed to test any solid material (including hairs).

This statement, repeated in various forms several additional times, undermines the legal value of the metallurgical testing as not in compliance with the Frye and "generally accepted guidelines" rules.

2/ p.116,line 23: False statement. SA Malone had no participation in the tensile testing, and had only requested to watch because he had "...never seen such a test..." and wanted to see how they were conducted.

3/ p.117,line 11: False statement. Either the writing is that of SA Tobin or the evidence has been altered subsequent to the tensile testing. On <u>every</u> nonmetallic item in which I have induced tensile failure on behalf of the FBI Laboratory, I have placed evidence or plain white tape at the fracture in order to identify Laboratory-induced failures, with Sharpie Marking Pen writing "test tear" and an arrow pointing to the failure. If my recollection serves me correctly, I believe I noticed when I saw the purse some time later that my own markings had been removed and those of SA Malone had replaced them.

4/ p.117,line ~~11~~ 21-23: False statement. Photos were made outside the presence of SA Malone by SA Tobin during the course of metallurgical examinations.

5/ p.118,lines 17,18: False statement. Neither the test tears nor the photographs were made by SA Malone

6/ p.120, line 22: Not true. I did not have to "jury rig it"...I used standard test fixtures for this type material and specimen. The equipment was designed for <u>any</u> solid material of suitable configuration. The testing was in conformance with the Frye and "generally accepted guidelines" rules, contrary to the manner in which the testimony is presented.

7/ p.123,line 23: False statement, particularly following the specific words "actually" and "yourself".

8/ p.124,lines 3-5: Incorrect. In fact, designers and users abhor sudden breaks because of the potential for catastrophic loss of life. Designers, therefore, attempt to insure gradual failures so that it is <u>not</u> instantaneous. The terms "gradual" and "slowly" are deceptive and relate only to the strain rate selected by SA Tobin for the testing: almost any strain rate could have been selected for the test.

9/ p.124, lines 6,7 and 15: The tears did not proceed (propagate) on a "...diagonal line across the entire strap until finally the entire strap went." The effect of this "observation" is to enhance differences between the questioned tear and the test tears. In addition, characterization of the test tears as "diagonal across the entire strap" puts the failure mode in a different category (when reviewed by a metallurgist or materials scientist), not supported by either expectations or actual test behavior.

10/ p.124,line 24: Use of the term "pressures" is not appropriate and is not interchangeable with "force", posing a potential technical review problem. On a strap approximately 3/4" wide and 1/8" thick, a force of 29 lbs. results in approximately 309 lbs/in^2 of pressure, whereas a pressure of 29 lbs/in^2 on the same cross sectional area results in a force of 2.7 lbs exerted on the strap, a significant difference on technical review

11/ p.126,lines 1-3: same comments as #9 above.

12/ p.127,lines13-15: same comments as #5 above

13/ p.126,line 9:

14/ p.129,line 9: Direct contradiction to laboratory (AE) findings supported by data. Presents apparently and potentially exculpatory information as incriminating.

15/ p.129,line 11: Contrived/fabricated response and false. Renders metallurgical test data very likely inadmissable because such data can be deemed to fail the Frye test and the "generally accepted guidelines".

16/ p.130,line 14,15: Deceptive, if not outright false

17/ p.130,line 24: Not true. The figure is not meaningless with regard to the strap.

18/ p.131,line 14: Contradicts #17 above, and not accurate. "Pressures" likely vary along the entire length of strap

19/ p.132,line 2: Unfounded and in direct contradiction to laboratory test data. In fact, test data indicates the strap would not be capable of supporting or hanging 30 pounds. Aggravates incriminating nature of evidence/data and omits assumptions, premises or qualifying stipulations which might be viewed as potentially exculpatory

20/ p.133,line 15: Inaccurate and deceptive.

21/ p.133,line 19: Failure initiation and propagation assessment is completely fabricated

22/ p.134,lines 3-8

23/ p.135,lines 6-10: Completely fabricated failure propagation assessment

24/ p.135,line 21: ditto

25/ p.136,line 4: ??? as to where cut started. Unfounded and not supported by data.

26/ p.143,line 17: Unfounded. There is no data or indication that the cut was made by a person.

27/ p.144,line 24 and p. 145,lines7,8: Inaccurate observations and contrary to expected and actual test data.

Again suppresses apparent exculpatory material behavior and presents test specimens as incriminating data.

EFFECT OF TESTIMONY

The misrepresentations and misstatements in the transcript would, on review by metallurgical/materials personnel, represent a glaring pattern of conversion of what should have been presented as neutral data into incriminating circumstances by complete reversal of established laboratory test data with scientifically unfounded, unqualified and biased testimony. [See exceptions #8, 9, 11, 14, 17, 18, 19, 21, 23, 24, 26, 27].

Additionally, the transcript reveals a pattern of complete omission of crucial conditions, caveats, premises and/or assumptions which may be viewed as tending toward exculpatory in nature. Even Mr. Doar had to intercede to bring the testimony back to reality (see p.146, line 14).

As an example, existing laboratory reports indicate that the strap failed consistently at approximately 29.2 lbs. and that a weight up to that of an individual can be exerted on the strap by anyone attempting to break the strap. After applying what is one of the weakest motions for exerting force by an individual (pulling an object with both hands exerting forces in opposite directions), he testified that, as a 200 lb. "weightlifter", he could not break the strap. [It does not require an expert to visualize how an individual might apply loads greater than what SA Malone exerted]. The strong inference is that it is impossible to accidentally or intentionally exert a breaking load on the straps and, therefore, the strap must be cut to successfully break it. Another example [exception #26] is the statement that a person made the cut.

The opinions expressed in the transcript can not be viewed as constituting professional differences. The witness has no apparent academic or empirical training to provide such testimony. Even had the witness undertaken the minimal studies for such testimony, to include Introduction to Materials, Strength of Materials, Engineering Materials, Behavior of Matter, Properties of Materials, Materials and Advanced Materials Laboratories, Mechanical Testing & Laboratory, and Failure Analysis courses or their equivalents (26 credit hours of study), he has not conducted any such testing, utilized the test apparatus, or even observed its use in the prior 15 years or more.

The testimony, almost in complete entirety, relates to material strain or deformation, stress applications, tensile test procedures, tensile data, and failure (propagation) assessment. It was very apparent even before SA Malone testified in Atlanta,Ga., that the metallurgical examinations and test results would be of importance to the inquiry, but I was told that I was not needed. From the early stages of judicial proceedings I was queried a number of times for information as to these topics with an explanation of "personal curiosity". However, both the number of queries and complexity (specificity) indicated more than a casual interest. I cautioned SA Malone about attempting to present the metallurgical data without some of the crucial caveats, premises or assumptions which must be made, such as system constraints (eg., wearer's hand grasping the strap), lack of complete specimen

adjustment to applied forces (varies with the manner in which individual is carrying purse), initial condition statements, strain rate considerations, and manner of stress application. All of these cautions have been ignored and omitted in the testimony, and all of them can be viewed as exculpatory in nature.

Contributing to the perception of complete exculpatory information suppression, review of the transcript reveals no indication that the Chief Judge or the 11th Circuit panel was in receipt of FBI Laboratory report 51025051 S RU; in fact, it suggests the contrary.

Further, the metallurgical test data may well be rendered inadmissable because the witness states that I was "...winging it", that I had to "jury rig" and "fiddle" with the test apparatus, and that "...nobody in our...lab had ever done a test like this, and I have never heard of any studies being published, it's almost a meaningless figure...". Testifying as, what the court thought was, an expert in that area, this is a fairly strong indictment of the testing. These statements beg for a ruling of inadmissability in view of the Frye and "generally accepted guidelines" standards.

These exceptions were originally discussed with Section Chief Ken Nimmich because of a potential for serious and embarrassing conflict in congressional testimony tentatively scheduled for August 3, 1989. Not unexpectedly, our testimony was not needed in the congressional proceedings. However, this is being made a matter of record to indicate that the testimony is not reflective of the metallurgical testing, test data and guidance provided.

Overall, the exceptions to the testimony of SA Malone do not affect the technical assessment that the purse strap has been cut.

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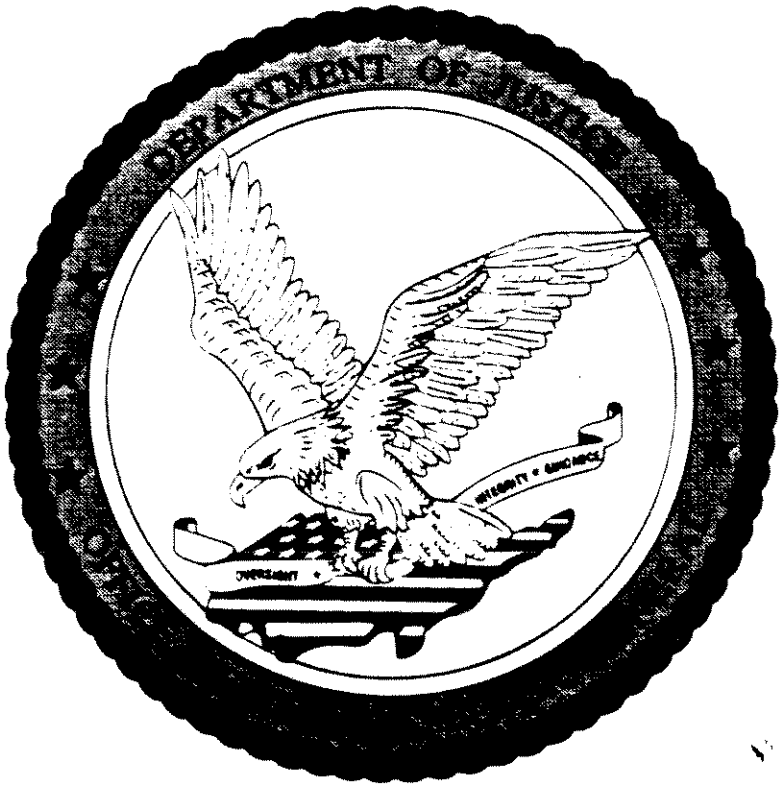

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follow Laboratory policy to ensure that the reports of analytical work prepared by Laboratory scientists are not substantively altered unless agreement is reached on the changes. Our views on the preparation of Laboratory reports are detailed in a later section stating general recommendations.

3) William Tobin, a metallurgist now working in the Materials Analysis Unit (MAU), brought several matters to the OIG's attention. These included cases in which he believed that other examiners (principally in the EU) had incorrectly conducted or reported metals-related examinations. He also contended that Michael Malone, who was formerly in the Hairs and Fibers Unit, testified inaccurately and outside his area of expertise in a 1985 hearing by a judicial committee of the Judicial Council of the Eleventh Circuit relating to then-U.S. District Judge Alcee Hastings, who was subsequently impeached. With respect to the Hastings matter, we concluded that Malone falsely testified that he had performed a tensile test and that he testified outside his area of expertise and inaccurately with respect to the test results. Tobin himself acknowledged that Malone's misstatements did not affect the assessment they both shared that a particular purse strap had been cut. The judicial committee appeared not to place any significance on Malone's testimony with respect to the purse, since there is no mention of it in the specific findings articulated by the committee to support its conclusion that Hastings had committed misconduct. Nonetheless, we found Malone's testimony inexcusable and criticized the Laboratory's failure properly to deal with Tobin's complaint about it.

4) Late in our investigation, Whitehurst wrote a letter to the OIG expressing concerns about testimony given by CTU Chief Roger Martz in Florida v. George Trepal, a case that resulted in the conviction and death sentence of Trepal for having added the poison thallium nitrate to bottles of Coca-Cola. We found that Martz could have properly opined that certain samples were consistent with thallium nitrate having been added to them. Martz, however, did not limit his conclusions that way, but instead offered an opinion stronger than his analytical results would support. He also failed to conduct certain tests that were appropriate under the

CTU Chief Roger Martz lacks the judgment and credibility to perform in a supervisory role within the Laboratory. If Martz continues to work as an examiner, we suggest that he be supervised by a scientist qualified to review his work substantively and that he be counseled on the appropriate manner for testifying about forensic work. We further recommended that another qualified examiner review any analytical work by Martz that is to be used as a basis for future testimony.

EU Chief J. Thomas Thurman deserves special censure for his inadequate supervisory review of Williams' report in the Oklahoma City bombing case. Because we concluded that all examiners in the EU, including the Chief, should have a scientific background, we recommended that he be reassigned outside the Laboratory when that restructuring occurs.

EU examiner David Williams should be reassigned outside the Laboratory. Although we did not find that Williams had perjured himself in the World Trade Center case, his work in that case and in the Oklahoma City investigation demonstrate that he lacks the objectivity, judgment, and scientific knowledge that should be possessed by a Laboratory examiner.

EU examiner Wallace Higgins should be reassigned outside the FBI Laboratory when the restructuring of the EU occurs. In the interim, while Higgins remains in the EU, the SAS Chief should counsel Higgins on the proper preparation of reports and monitor his work. A qualified explosives examiner also should review any reports prepared by Higgins.

Richard Hahn no longer works in the Laboratory. If in the future he is called upon to testify about his work as an examiner, we recommended that he be specially counseled about the importance of not testifying on matters beyond his expertise and that his testimony should be reviewed by qualified examiners to ensure that it is appropriately limited.

Michael Malone no longer works in the Laboratory, having been transferred from the Hairs and Fibers Unit in 1994. We concluded that Malone testified falsely and outside his expertise in the Hastings matter. We recommended that the FBI assess what discipline is appropriate and monitor future expert testimony to assure that it is accurate and limited to matters within his knowledge and competence.

U.S. Department of Justice
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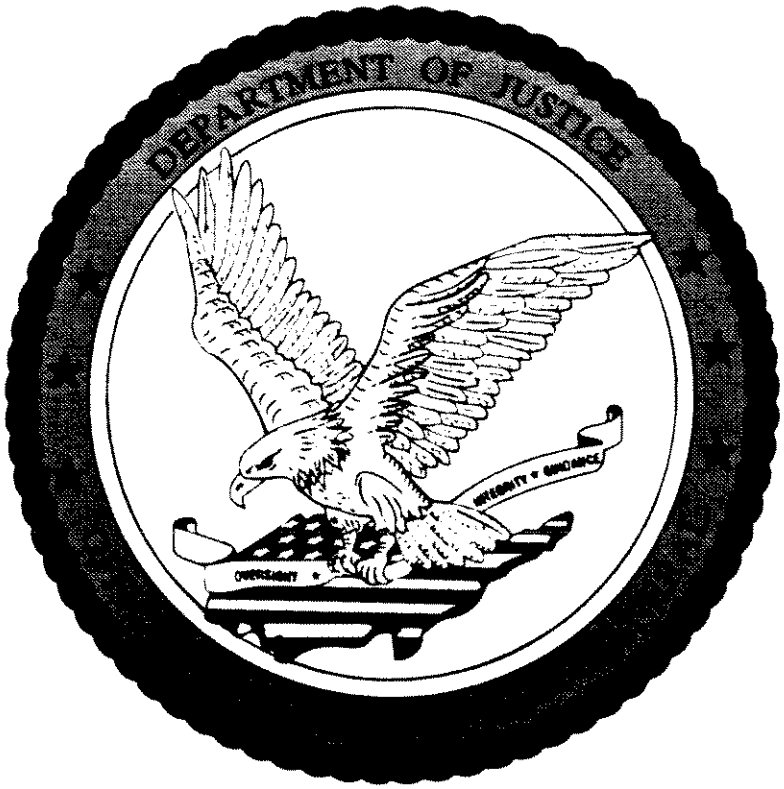

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Inspector General
April 1997

SECTION H12: TOBIN ALLEGATIONS

I. Introduction

This section discusses certain issues that William Tobin, a metallurgist now working in the Materials Analysis Unit (MAU), has brought to the attention of the OIG. Tobin has identified cases in which he believes other examiners, primarily in the Explosives Unit (EU), have incorrectly conducted or reported metals-related examinations. He also contends that SA Michael Malone, a former examiner in the Hairs and Fibers Unit (HFU), testified inaccurately and outside his expertise in a 1985 hearing related to the impeachment of United States District Judge Alcee Hastings.

To investigate these matters, we interviewed Tobin and several others, including: Dennis Aiken, Roger Avery, Alan Baron, John Doar, Michael Ennis, Christopher Fiedler, Bruce Hall, Michael Hahn, Congressman Alcee Hastings, John Hicks, Michael Malone, AUSA Frederick Martin, Thomas Mohnal, Kenneth Nimmich, Robert Sibert, Alan Robillard, J. Thomas Thurman, and Chief Judge Gerald Tjoflat of the United States Court of Appeals for the Eleventh Circuit. We also reviewed pertinent documents from the Alcee Hastings case and other cases.

Based on our investigation, we conclude that the Laboratory would benefit from a clear delineation of responsibilities between units with respect to metals-related examinations, better communication among examiners in this area, and recognition that differences among examiners should be resolved on a scientific basis. We also conclude that the EU should take steps to assure that its examiners properly conduct and report their examinations of wires or other metals-related evidence.

In the Alcee Hastings case, we find that Michael Malone falsely testified that he had himself performed a tensile test on a purse strap and also testified inaccurately and outside his expertise concerning the test results. The misstatements concerning the test results, Tobin acknowledged, did not affect the conclusion that the strap had been partially cut. After Tobin raised concerns about Malone's testimony in 1989, then-SAS Chief Kenneth Nimmich failed to assure that the serious allegations of examiner misconduct were appropriately investigated and addressed.

telling anyone that the gun barrel was Swedish steel. We could not identify the source of the information regarding Swedish steel that case agent Michael Hahn seems to recall.

III. Alcee Hastings Matter

Tobin alleges that, in 1985, former Hairs and Fibers Unit (HFU) examiner Michael Malone testified falsely and outside his expertise before a judicial committee that was investigating misconduct by Alcee Hastings, who then was a United States District Judge for the Southern District of Florida. As set forth below, we conclude that Malone falsely testified that he had himself performed a tensile test on a purse strap and he also testified outside his expertise and inaccurately concerning the test results. These misstatements, Tobin acknowledged, did not affect the conclusion that the strap had been partially cut. We also find that after Tobin raised concerns about Malone's testimony in 1989, then-SAS Chief Kenneth Nimmich failed to assure that the serious allegations of examiner misconduct were appropriately investigated and addressed.

In 1989, Hastings was impeached and removed from his judicial office based on his involvement in a bribery scheme and related misconduct. Our investigation focused on Tobin's allegations concerning Malone's testimony; we did not otherwise review or evaluate actions by the FBI or others related to the impeachment of Hastings.[234]

A. The Background to the Investigating Committee Proceedings

To place Malone's 1985 testimony into context, it is necessary to briefly summarize the events leading to the charges that Hastings had been involved in a

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[234] An earlier draft of this section was expanded and otherwise revised in light of several additional interviews conducted by the OIG and additional information received from John Doar, the attorney who served as chief counsel for the judicial committee that investigated alleged misconduct by Hastings, and Gerald B. Tjoflat, a former member of the committee who is now the Chief Judge for the Eleventh Circuit Court of Appeals. These revisions did 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 made by Tobin in 1989 about Malone's testimony were adequately investigated.

bribery scheme.[235] As a federal judge, Hastings had presided over the trial of Frank Romano and Thomas Romano, who were convicted in Miami in December 1980 on twenty-one counts of racketeering. In May 1981, Hastings ordered the forfeiture of $1.2 million of the Romanos' property; in July 1981, he sentenced each of the Romanos to a three-year prison term. In late July 1981, a person named William Dredge told federal prosecutors in Miami that he had been directed by William Borders, a Washington, D.C. attorney and long-time friend of Hastings, to solicit a $150,000 bribe from the Romanos in exchange for their sentences being reduced to probation. Dredge was a former client of Borders, had a criminal record, and was then facing federal criminal charges himself.

After corroborating certain statements made by Dredge, the Government decided to enlist his cooperation. On September 12, 1981, Dredge introduced Borders to a retired FBI agent named Paul Rico who was posing as Frank Romano. Borders told Rico that in exchange for $150,000 an order would be signed returning a "substantial amount" of the property and the Romanos would receive mitigated jail sentences. To demonstrate his influence with Hastings, Borders also told Rico that the judge would appear at a time and place selected by Borders and Rico. They agreed that Hastings would appear at the dining room of the Fontainebleau Hotel in Miami at 8:00 p.m. on September 16, 1981. Borders and Rico also agreed to meet again on September 19, 1981, for an "up front" payment on the bribery deal. On the evening of September 12 and the morning of September 13, 1981, Borders and Hastings were together in Washington, D.C.

Shortly before 8:00 p.m. on September 16, 1981, Hastings and a female companion entered the dining room of the Fontainebleau Hotel, where they ate dinner. On September 19, 1981, Rico paid Borders $25,000 as "up front" money. On October 2, 1981, Rico contacted Borders asking about the status of the forfeiture order. In a telephone conversation on October 5, 1981, Borders told Rico "the matter" had "been taken care of" and that the order would be mailed out that day or the next. Less than

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[235] This section presents a very abbreviated description of events that are set forth in greater detail in United States v. Borders, 693 F.2d 1318 (11th Cir. 1982), in the Report of the House of Representatives Committee of the Judiciary related to the impeachment of Hastings, H.R. Rep. 100-810 (1988), and in the Report of the Investigating Committee to the Judicial Council of the Eleventh Circuit, which is reprinted in Appendix 1 to the House of Representatives hearings related to the impeachment.

one hour later, Hastings telephoned Borders. During their brief conversation, Hastings said, "I've drafted those, ah, ah, letters for Hemp. . . ." Borders later said, "I talked to him and he wrote some things down for me." Hastings said he understood, and Borders stated, "And then I was supposed to go back and get some more things." Hastings told Borders, "I'll send the stuff off to Columbia in the morning." The next day, Hastings issued an order reversing in part his original $1.2 million forfeiture order and returning over $845,000 in property to the Romanos.

On October 7, Borders told Rico that the order had been issued the previous day. Rico agreed to meet Borders in Washington on October 9 for the final payoff. That same evening, a testimonial dinner was to be held in Washington to honor Borders, a past president of the National Bar Association. On Thursday, October 8, Hastings called Borders and told him he would arrive in Washington the next morning. On the morning of October 9, Borders picked Hastings up at the airport and took him to a hotel, where they had adjacent rooms; shortly thereafter Hastings went with Borders to the latter's law office. While at his office, Borders returned a call from Rico; Rico told Borders he had "brought all the necessary papers" and they agreed to meet at once at Rico's hotel. Borders went by himself to Rico's hotel. Hastings left Borders' office, made a few stops, and then returned to his own hotel.

Borders met Rico at his hotel and told him to "get it" because he wanted to "take a ride." Rico got into Borders' car and placed a bag containing $125,000 between them. FBI agents stopped and arrested Borders when he started to drive out of the hotel parking lot. That afternoon, Hastings learned that the FBI wanted to interview him and that Borders had been arrested. Rather than contacting the FBI in Washington, Hastings made an unplanned and hurried departure for Miami, where he was interviewed by FBI agents later that evening. Hastings denied any involvement with Borders in a bribery scheme.

On December 19, 1981, Hastings and Borders were indicted on federal charges of conspiracy and obstruction of justice. Borders was also charged with two counts of interstate travel with the intent to commit bribery. The proceedings against Borders were transferred to the Northern District of Georgia, where a jury convicted him on all counts in March 1982. The Court of Appeals for the Eleventh Circuit affirmed the conviction in December 1982. Hastings was tried in Miami in January 1983. He testified that he did not participate in the bribery scheme and had been taken advantage of by Borders. On February 4, 1983, the jury acquitted Hastings.

In March 1983, two district court judges filed a complaint with the Judicial Council of the Eleventh Circuit against Hastings based on his involvement in the bribery related to the Romano case and certain other conduct. To investigate the complaint, on March 29, 1983, Chief Judge John Godbold of the Eleventh Circuit appointed a committee consisting of himself, Circuit Judges Frank Johnson and Gerald Tjoflat, and District Judges Sam Pointer, Jr. and William O'Kelley (the "Investigating Committee"). The chief counsel for the Investigating Committee was John Doar, an attorney then in private practice who had formerly served both as Special Counsel for the Committee of the Judiciary of the House of Representatives in its investigation regarding the impeachment of former president Richard Nixon and as an Assistant Attorney General for the Civil Rights Division of the Department of Justice.

Hastings objected to the Investigating Committee's jurisdiction and did not thereafter participate in the proceedings either directly or through his counsel. Over the course of three years, the Investigating Committee conducted an extensive investigation that included not only a review of the records of the proceedings in the Romano, Borders, and Hastings cases, but also consideration of numerous documents and witness testimony, including evidence that had not been introduced at Hastings' trial of various contacts between Borders and Hastings between February 1981 and September 1981. Between May 1985 and July 1986, the Investigating Committee took sworn testimony on seven different occasions. The Committee heard testimony from more than 110 witnesses and received approximately 2800 exhibits.

In a report completed in August 1986, the Investigating Committee stated that there was clear and convincing evidence that Hastings had sought to conceal his participation in the bribery scheme with Borders and to explain away evidence connecting him to the scheme and that he had pursued these objectives by presenting fabricated documents and false testimony in his criminal trial. The Investigating Committee unanimously recommended that the Judicial Council determine that Hastings had engaged in conduct that might constitute one or more grounds for impeachment by: (1) conspiring with Borders to receive a bribe for an official judicial act and, (2) giving false testimony and obstructing justice in connection with his criminal trial in an effort to conceal the conspiracy.

B. Malone's Testimony before the Investigating Committee

In his criminal trial, Hastings had offered a leather purse with a broken strap as an exhibit. Hastings testified that the reason he had accompanied Borders to his law office on October 9, 1981, was to locate a luggage shop to have the purse repaired. As part of the investigation by the Investigating Committee, the purse was submitted to the FBI Laboratory in 1985 for examination, including an analysis of the nature of the break in the strap.

Within the Laboratory, the case was assigned to SA Michael Malone, an examiner who had worked in the HFU since 1974. Malone remained in the HFU until 1994, when he transferred out of the Laboratory as part of a general reassignment of FBI agents from FBI Headquarters to the field offices.

Malone examined the purse visually and found two things that he thought suggested the strap had been deliberately broken. An eyelet on one end of the purse was recognizably distorted, while an eyelet on the other end was not. Malone posited that if the purse had been accidentally snagged on something, then both eyelets would have been equally distorted. Malone also found that the break in the strap did not appear to be accidental. If the break had been accidental, Malone thought the strap would have been torn completely across its width with a jagged-edge tear. Malone found, however, that the strap had been cut across three quarters of its width, leaving a straight edge, and the remainder of the strap had been torn, leaving a jagged edge. Malone also attempted manually to break the strap in an undamaged area but could not do so.

According to Malone, when he found he could not manually break the strap, he took it to Tobin so it could be examined with a tensile tester, a device that measures the tensile force necessary to break an object. Sometime between September 26 and 30, 1981, Tobin ran the tensile test and the strap broke at 29.5 pounds of force. Malone told the OIG that he did not know what this number meant and that he did not ask Tobin to explain it because he assumed they both would be called to testify at any hearing. Malone issued a report dated September 30, 1985. Tobin issued handwritten AE dictation dated October 2, 1985, which stated:

> Examinations of the buckle holes in the strap of Q1 purse revealed that a relatively large amount of force(s) had been applied to one end of the strap and

a relatively small amount of force(s) had been applied to the opposite end of the strap. This non-uniform distribution of forces is not consistent with "snagging" or other accidental force application. Each of the two remaining portions of broken strap was subjected to tensile loading ("pulling") to failure. The strap sections failed at 29.5 lbs. and 29.0 lbs.

Malone's September 30, 1985, report includes language nearly identical to the first two sentences in Tobin's October 2, 1985, dictation. The September 30, 1985, report does not, however, refer to the strap sections failing at 29.5 pounds and 29.0 pounds or otherwise refer to the tensile test. From our investigation, we could not determine why Malone did not refer to these matters in his September 30, 1985, report.

On October 2, 1985, Malone testified before the Investigating Committee. Malone told the OIG that he met with Doar to discuss his testimony that same day. Malone maintains that he then told Doar that he did not conduct the tensile test, but that Tobin had done so. Malone told the OIG that Doar said, "Damn, I forgot to subpoena Tobin." Malone says Doar asked him if he could read Tobin's results into the record and Malone agreed to do so. 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. Malone says Doar also told him that the judges would probably have questions about the test and asked if Malone could handle the questions. Malone says he told Doar he was not an expert in the "force test" but that he would try to answer the questions.

Doar disputes Malone's recollection about the discussions before the testimony. Handwritten notes that Doar prepared on October 1, 1985, show that he met with Malone the day before Malone testified. Among other things, these notes also indicate that Malone then told Doar that the strap broke at 29.9 pounds of "tensile strength." The notes do not refer to Tobin. Doar insists that Malone did not tell him that Tobin performed the tensile test or even worked on the case, and Doar says he did not receive anything in writing from the FBI related to the tensile test before Malone testified on October 2, 1985. Doar denies ever telling Malone that he forgot to subpoena Tobin. On this point, Doar notes that he did not subpoena FBI witnesses for the proceedings, but instead requested their appearance by letter. Moreover, the Investigating Committee did not strictly observe the rules of evidence, and Doar told the OIG that if he had known that Tobin had conducted the tests, Doar would have had Malone read

the relevant report into the record. Doar also says he would not have presented certain testimony by Malone if the latter had told him Tobin had done the test.

At the hearing before the Investigating Committee, Malone testified about the examination of the purse and the tensile test results. Malone testified that he microscopically examined the original separation in the purse strap. He told the Committee:

> After examining the separation, I concluded that most of the separation wasn't a tear at all, it was a cut, and this was very, very apparent.

With regard to the tensile test, Malone stated:

> [W]e kind of had to jury rig it to get it to hold it, in other words, to make some adaptions. But after a while of kind of fiddling around with it, we were able to make the machine hold it in such a way that we could do the test.

Malone then described the results of the test:

> When we broke the strap, we recorded the amount of force to break the strap. It was 29.9 pounds of pulling force. It was the exact same reading for both straps.

Doar then asked Malone, "And did you actually, yourself, conduct this test?" Malone answered, "Yes, I did." Malone's testimony that the strap broke at 29.9 pounds used the same figure that appears in Doar's notes from his meeting with Malone the previous day. The dictation prepared by Tobin, however, referred to 29.5 and 29.0 pounds. Before the Committee, Malone generally talked about the strap breaking at 29.9 pounds.

The judges on the Investigating Committee questioned Malone further about the meaning of the 29.9 pound figure. Malone responded, "Well, it means, number one, it's a lot more than an average person could exert. . . ."

Judge Tjoflat asked, "If you are going to take the strap and hang it from something, that means you would put 29.9 pounds on the bottom and the gravity would cause it to break? Is that what you mean?"

Malone responded:

> I think it's a little more than that. 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, and I had to use the machine in order to break it, and I recorded this figure. The first thing I did from my own practical thing was try and break it myself. I couldn't even --

Judge Godbold then stated, "I understand your testimony that you couldn't break it, yourself. What I am trying to figure out is what 29.9 tells us apart from your inability to break it manually."

Malone answered, "Other than saying how many pounds it took to break the strap, it's a meaningless figure."

Judge Godbold later returned to the issue by asking, "Now, as to whether the machine at 29.5 is pulling harder than you were able to pull manually, I take it you can't answer that." Malone responded, "That's correct." The judge then asked, "[D]o you have an opinion as to whether the machine was pulling with greater force than you were able to pull manually, bearing in mind that the machine broke two pieces of the strap and that you could not break the strap." Malone answered, "Yes. In my opinion, it was pulling much harder than myself."

After Malone testified before the Investigating Committee, Doar on October 5, 1985, wrote to the FBI liaison officer on the case, Dennis Aiken, asking the FBI to conduct further investigation to determine the static force required to break the strap on the purse. Doar's letter stated, "We understand that the strap was inserted in a device which exerts pressure on two sides of the strap and that the machine measured 29.5 pounds when the strap parted. Please relate this number so that its significance can be appreciated." Doar also requested photographs of the two ends of the strap where the initial separation occurred.

As a result of Doar's request, Tobin prepared a report dated November 7, 1985, which further explained the 29.5 pound figure. The report stated that "[i]t was concluded that a force of approximately 7 pounds had been exerted to break the strap after it had been partially cut." The report also stated that "29 ½ pounds is not difficult for an individual of 'average' build to achieve by 'pulling'; a force of 7 pounds is very

easily exerted. In fact, a force up to the actual weight of an individual can readily be exerted." When Tobin prepared this report, he did not know what Malone's testimony had been concerning the pulling force needed to break the strap.

On November 20, 1985, Doar received a copy of the November 7, 1985, report. This report does not state that Tobin conducted the tensile test or prepared the report, although the initials "RU" appear on the report and these initials were the Laboratory's code for Tobin. Doar says that he did not know Tobin had done the tensile test until he was interviewed by the OIG during our investigation. Neither Malone's September 30, 1985, report nor Tobin's November 7, 1985, report was offered as an exhibit in the proceedings before the Investigating Committee. The Committee did receive the purse, the strap, and certain photographs related to the examination of the purse as exhibits.

Malone testified again before the Investigating Committee on April 8, 1986. He then told the Committee that the purse strap had been subjected to a slow, steady pulling force on the tensile tester and had broken when it reached approximately 29.5 pounds of pulling force. Malone also testified that when the purse was first received in the Laboratory, he had microscopically examined the two broken ends of the strap and concluded that they had previously been joined together in one piece. Consistent with his earlier testimony, Malone again testified that the strap had been both partially cut in two and torn.

The Investigating Committee described its investigation and conclusions in a 1986 report to the Judicial Council for the Eleventh Circuit. The report is in three volumes: the first two describe the investigation and summarize the evidence received by the Committee, while the third presents the Committee's analysis of the evidence and findings.

With regard to Malone, the report states in volume 2:

> Agent Malone testified that his microscopic examination of the strap revealed that most of the separation "wasn't a tear at all, it was a cut, and this was very, very apparent." He based this on his original examination of the severed ends of the strap and his examination of subsequent test breaks.

The Investigative Committee's report does not otherwise refer to the tensile test. Volume 3 of the report discusses the Committee's analysis of the evidence on various

issues. That discussion, which spans forty pages of the report, does not explicitly refer to Malone's testimony, but does observe that Hastings' testimony concerning a purse was "troublesome because the strap which Judge Hastings claimed he tried to have repaired was not torn, worn, or broken; it was cut."

Based on its nearly three-year investigation, the Investigating Committee concluded 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.

The report identifies thirty-two separate factual findings supporting this conclusion. In addition to finding that Hastings and Borders had agreed on the bribery scheme, the Investigating Committee identified fifteen points on which Hastings had presented false testimony at his criminal trial and found that he had introduced three fabricated documents as evidence. These findings do not refer to the purse, the purse strap, Malone, or the tensile test.

C. Tobin's 1989 Complaints about Malone's Testimony

In September 1986, the Judicial Council of the Eleventh Circuit accepted and approved the Investigating Committee's report and concluded that Hastings had engaged in misconduct that might constitute grounds for impeachment. The Judicial Council made a certification to this effect to the Judicial Conference of the United States, which in March 1987 certified to the House of Representatives its concurrence in the Council's determination that impeachment might be warranted. After the House returned articles of impeachment, the Senate in October 1989 voted to remove Hastings from his judicial office.

Attorney Alan Baron served as impeachment counsel for the House of Representatives and as prosecuting counsel for the Senate in connection with the Hastings impeachment. Baron told the OIG that he did not offer testimony by Malone in the impeachment proceedings before the House or the Senate, that he thought Malone's testimony before the Investigating Committee was confusing, and that the evidence concerning the purse was peripheral. Malone's testimony before the

Investigating Committee and the Laboratory reports dated September 30, 1985, and November 7, 1985, were not made exhibits in the proceedings before the House or the Senate. The articles of impeachment returned by the House of Representatives and the accompanying report of the House Committee on the Judiciary do not refer to the purse, the purse strap, Malone, or the tensile test.[236]

During the impeachment proceedings, Tobin and Malone, along with certain other potential FBI witnesses, were told by the FBI Office of Congressional Affairs to "stand by" should their testimony be needed. Neither Tobin nor Malone ultimately testified before Congress. In preparing for possible testimony, however, Tobin in August 1989 reviewed Malone's 1985 testimony before the Investigating Committee. Tobin says this was the first time he had seen Malone's testimony.

Tobin recalls that upon reviewing Malone's testimony, he immediately contacted Kenneth Nimmich, then the chief of the SAS, to discuss problems Tobin saw in the testimony. Tobin says that, in a brief conversation, he indicated to Nimmich that there was a "potential serious problem" that could be very embarrassing to the FBI regarding "evidence manipulation" and some "very inappropriate presentation of the data." He further recalls telling Nimmich that Malone had testified inappropriately and inaccurately, and says he also described Malone's testimony as "misrepresented" and "false." Nimmich, Tobin states, asked Tobin to provide a document detailing Tobin's exceptions to Malone's testimony.

Tobin says that within several days of his meeting with Nimmich, he prepared a memorandum describing his concerns about Malone's testimony. The memorandum, which is addressed to Nimmich and not dated, states:

> [A]n audience was requested with you late in the day of August 3, 1989, wherein you requested the specific details of my objections, my exceptions to SA

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[236] The first article of impeachment alleged that Hastings had engaged in the bribery scheme with Borders. Articles II through XV identified fourteen false statements made by Hastings in his criminal trial. Article XVI did not concern the bribery scheme, but instead charged that Hastings had improperly disclosed confidential wiretap information he had obtained as a judge. Article XVII stated that Hastings had, through his conduct related to the bribery scheme and improper wiretap disclosures, undermined confidence in the judiciary and betrayed the public trust. The Senate ultimately found Hastings guilty on articles I through V and VII through IX, and not guilty on Articles VI, XVI and XVII. The Senate did not vote on articles X through XV.

Malone's testimony and technical analysis as to the effect of the testimony. Attached hereto are the requested exceptions and analysis, as well as two photographs of test breaks.

Tobin's memorandum details serious concerns about Malone's testimony. According to Tobin, he first gave the memorandum to his unit chief, Roger Aaron. Aaron recalls discussing the concerns with Tobin, and Aaron wrote on the memorandum, "Sad to say, you are right on every point. This has to be done." Tobin says that after he talked with Aaron, he placed a copy of the memorandum in an envelope and either delivered it to Nimmich in person or placed it in Nimmich's in-box. Neither Tobin nor Aaron recalls hearing anything more about the matter after Tobin prepared his memorandum. Tobin also says he did not at the time discuss his concerns with anyone other than Nimmich and Aaron.

In his memorandum, Tobin criticized Malone for testifying that he had done the tensile test and other things, such as taking photographs, labeling evidence, and making test tears, that Tobin had in fact done. Tobin also took issue with Malone's testifying that it had been necessary to "jury rig" the test device. Tobin wrote, "The equipment was designed for any solid material of suitable configuration. The testing was in conformance with the Frye and 'generally accepted guidelines' rules, contrary to the manner in which the testimony was presented." (emphasis in original). Tobin also found areas where Malone misused metallurgical terms or was inaccurate.

Tobin's more serious allegations centered on Malone's testimony that the force needed to break the strap was "a lot more than the average person could exert." Tobin wrote that this testimony was in "[d]irect contradiction to laboratory (AE) findings supported by data. Presents apparently and potentially exculpatory information as incriminating." He also stated that Malone's testimony that the 29.5 figure was "meaningless" is "not true." With regard to how the tear was created during the test, Tobin wrote that Malone's testimony was a "[c]ompletely fabricated failure propagation assessment." Tobin complained that Malone's testimony about the test breaks "suppresses apparent exculpatory material behavior and presents test specimens as incriminating data." Tobin ended his memorandum, however, by stating that "[o]verall, the exceptions to the testimony of SA Malone do not affect the technical assessment that the purse strap has been cut."

The Laboratory apparently did not further investigate the serious allegations made by Tobin about Malone's testimony. Malone told the OIG that sometime after Hastings was impeached, Nimmich stopped him briefly in a hallway and said that Tobin had made an allegation against him. Nimmich, according to Malone, said that he had looked into the allegation and had concluded that "there was nothing to it." Malone said that before the OIG investigation, he was never questioned by anyone about his testimony before the Investigating Committee or Tobin's allegations, and he did not confront Tobin about the allegations.

When Nimmich reviewed Tobin's memorandum during the OIG investigation, he said he did not recall ever seeing it before, the allegations it described, or discussing the matter with Tobin. Although Nimmich did not deny that Tobin might have raised these matters with him, he said that if he had received Tobin's memorandum, he would have himself sent a memorandum to the Laboratory's Director and asked Malone to respond to the allegations. If it appeared Malone had acted inappropriately, Nimmich said he would have referred the matter to the FBI OPR.

Upon checking his calendar, Nimmich found references to two meetings on August 3, 1989, regarding the Hastings case. The first notes a meeting at 8:00 a.m. with Tobin, Malone, and another person who appears to have been Daniel Dzwilewski, who then worked in the FBI's Office of Congressional Affairs and who coordinated the appearance of witnesses before Congress for the impeachment proceedings. The second reference is for 4:00 p.m. and simply notes: "Aaron - Tobin - re Hastings Case."

Through our investigation, we could not confirm that Nimmich met with the persons indicated on his August 3, 1989, calendar. Nimmich does not recall any such meetings. Dzwilewski says that it is conceivable that he met with Nimmich, Tobin, and Malone, but he does not recall doing so. Both Tobin and Malone say that they did not ever meet together with Nimmich regarding the Hastings case. Aaron said he did not have a substantive conversation with Nimmich regarding Tobin's allegations, and Tobin says he did not inform Nimmich about Aaron's views on the matter.[237]

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[237] Nimmich also provided the OIG with a copy of his calendar for November 2, 1990, which contains his handwritten notes of a meeting that day with Laboratory Director John Hicks and Whitehurst related to Whitehurst's suspension as a result of his actions in the Psinakis case. Nimmich's notes include the entry "Tobin story re Malone perjury." Nimmich told the OIG he does not recall what was said about this matter in the 1990 meeting. Hicks said he did not remember

D. Analysis

Based on our investigation, we conclude that Malone, in his 1985 testimony before the Investigating Committee, falsely testified that he had himself performed the tensile test and that he testified outside his expertise and inaccurately concerning the test results.[238] The OIG questioned Malone about Tobin's allegations and, to his credit, Malone agreed with many points that Tobin had raised. Malone maintained, however, that he was justified in giving certain testimony because he was offering his own personal opinions rather than expert opinions. This is not a persuasive rationale for the presentation of inaccurate testimony by a Laboratory examiner.

Before the Investigating Committee, Malone testified falsely when he responded "yes" to the question, "did you actually, yourself, conduct this test?" In his OIG interview, Malone admitted he was "technically wrong" in his response but noted he had been "right there" when the test was conducted. Malone's presence when the test was performed does not justify his inaccurate response to the question whether he actually conducted the test.

Malone's testimony that he conducted the test is particularly egregious, because he proceeded to inaccurately describe how the test was performed and the significance of its results. Malone, as noted above, testified that 29.9 pounds of force is "a lot more than the average person could exert." In an interview with the OIG, Malone said this statement was his own "layman's opinion" based upon the fact that he was not able to break the strap manually. Malone was testifying outside his expertise and evidently did

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meeting with Nimmich and Whitehurst together at that time or Whitehurst describing to him possible misconduct by Malone. Whitehurst told the OIG that, near the time of his suspension, he met with Hicks alone and told him about various problems in the FBI, including that Tobin had been very upset about Malone's possibly perjuring himself before Congress. Whitehurst later gave Hicks a memorandum describing matters he had raised with Hicks in the meeting, but did not refer to Malone in the memorandum.

[238] The FBI responded to a draft of this section of the report by stating that it is not appropriate to characterize Malone's testimony as false because it was not intentionally deceptive. 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.

not understand the meaning of the 29.9 pound figure. He incorrectly told the Investigating Committee that "[s]ince nobody in our unit or our lab had ever done a test like this, and I have never heard of any studies being published, it's almost a meaningless figure other than it's a lot more than an average person could exert." He later admitted that the questions were "getting outside of [his] area of expertise," but he proceeded to again say that 29.9 pounds was "a meaningless figure."

Malone's testimony on this issue was inaccurate and unacceptable. Tobin in his 1989 memorandum noted that Malone's testimony was contradicted by the findings in Tobin's November 7, 1985, report. This report was not completed until nearly one month after Malone testified before the Investigating Committee in October 1985, and we did not find evidence establishing that Malone knew the information in the report when he then testified. Thus, we do not find that Malone knowingly or deliberately testified in contradiction to Tobin's conclusions as described in the November 7, 1985, report.

Moreover, Malone's testifying that he actually conducted the test, combined with other facts, causes us to believe Malone is incorrect in now claiming that he told Doar in 1985 that Tobin had conducted the test. As noted above, Doar states that Malone did not tell him, and he did not otherwise know, that Tobin had done the work. Doar's notes of his meeting with Malone do not refer to Tobin, and the questions Doar asked during Malone's testimony suggest Doar thought Malone conducted the test. Malone's statement to the OIG that Doar said in 1985 he had forgot to subpoena Tobin is not credible. We conclude that Doar did not know during the Investigating Committee proceedings that Malone had not performed the tensile test. Recognizing that we are reviewing events that occurred more than ten years ago, and given the record now before us, we are not able to find that Malone engaged in intentional misconduct by failing in 1985 to tell Doar that Tobin had performed the test or by inaccurately describing to the OIG his conversations with Doar before Malone testified.

Malone also testified inaccurately about other matters outside his expertise. For instance, regarding the break in the purse strap, Malone testified before the Investigating Committee that he "observed that it's not a sudden break like you would have with a metal. When a metal breaks, bam, it's gone, it's broken, it's instantaneous." Tobin noted that the statements about metals were "[i]ncorrect. In fact, designers and users abhor sudden breaks because of the potential for catastrophic loss of life. Designers, therefore, attempt to insure gradual failures so that it is not

instantaneous." Malone acknowledged to the OIG that he might have been wrong on this point, but said that he was conveying his own personal opinion that metal breaks suddenly.

The testimony that Malone gave before the Investigating Committee cannot be excused by his explanation that he was offering his "personal opinion" based on his own experience or subjective beliefs. Laboratory examiners generally are proffered as witnesses because they have expertise and can offer opinions based on their scientific examination of evidence. The questions that Doar asked Malone suggest that Doar thought that Malone had conducted the test and was competent to explain the results. By failing to tell Doar that Tobin had performed the tests, Malone not only misled the special counsel but may also have caused him to forgo the testimony of another expert who was appropriately qualified to answer certain questions raised by the Committee about the tensile test.

In testifying before the Investigating Committee, Malone should have candidly stated that he did not perform the tensile test and could not explain the significance of its results. The transcript instead suggests that when Malone was asked questions outside his expertise about the tensile test, he resorted to fabrication rather than admitting he did not know the answer. After reviewing Malone's testimony, Tobin observed, and we agree, that "it appears that someone's under pressure to be specific and can't because he doesn't have any personal knowledge of the actual physical phenomena that are occurring, and therefore, seems to make up, based upon very limited amount of information, a sequence of events that just flat didn't occur."

We recognize that the inaccuracies in Malone's testimony do not appear to have had any effect on the Investigating Committee's ultimate findings and recommendation. Tobin himself acknowledged in his 1989 memorandum that his complaints about Malone's testimony did not affect the technical assessment that the strap had been cut. Moreover, the thirty-two factual findings supporting the Investigating Committee's conclusion do not refer to Malone, the tensile test, or the purse. Both John Doar, the counsel for the Investigating Committee, and Chief Judge Gerald Tjoflat, who served on the Committee, told the OIG that Malone's testimony did not influence the Committee's findings. Although these facts indicate that Malone's misstatements did not affect the outcome of the Investigating Committee proceedings, they do not in our view excuse Malone's conduct.

We cannot understand the Laboratory's failure to further investigate the allegations that Tobin made regarding Malone's testimony. We could not confirm that Nimmich in fact reviewed Tobin's 1989 memorandum, but we are persuaded that Tobin expressed his concerns orally to Nimmich.[239] Tobin says he did so, and, as noted above, Malone recalls that Nimmich told him that Tobin had made an allegation and that Nimmich had determined there was "nothing to it." Aaron also recalls Tobin telling him in 1989 that he had met with Nimmich, expressed his concerns about Malone's testimony, and that Nimmich had asked Tobin to put his complaints in writing. Such a direction, Aaron noted, was an indication the matter was serious. Given the serious nature of Tobin's allegations, Nimmich should have taken steps to assure that they were adequately investigated, even if for some reason Nimmich did not ever receive Tobin's memorandum. If Nimmich did in fact conclude the allegations were unfounded, he did so without adequate justification.[240]

Nimmich should have assured in 1989 that Malone and Tobin were interviewed, that the matter was otherwise appropriately investigated, and that the resolution was documented. Such an investigation could have resulted in appropriate administrative discipline and conceivably a referral for investigation for possible criminal misconduct. Nimmich acknowledged to the OIG that Malone's claiming to have performed tests he had not conducted should, at the least, have resulted in a reprimand. We did not find any evidence that Tobin's allegations were appropriately investigated or resolved by anyone in FBI management.

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[239] As part of this investigation, the OIG asked the FBI to identify where copies of the undated Tobin memorandum were located among FBI files. The FBI advised the OIG that its file review had not located a copy in the central FBI files or in FBI field office files, and that the copy the FBI had previously provided to the OIG had been given by Tobin himself to the FBI OGC in July 1996.

[240] FBI Assistant General Counsel Steven Chabinsky reported in a February 26, 1997, memorandum that Nimmich had stated the previous day in a telephonic interview that he recalled a meeting in which Tobin alleged that Malone had failed to properly credit Tobin for some of his work; that Nimmich said he did not think this amounted to much; that he had told Tobin that if he wanted to write the matter up, he should do so; and that Nimmich did not recall hearing more about the matter. In a subsequent interview with the OIG, Nimmich said that his comments to Chabinsky were merely his "supposition" of what might have happened, and Nimmich again stated that he did not recall Tobin making a verbal complaint about Malone's testimony and he did not recall ever seeing Tobin's memorandum.

The concerns raised by Tobin in 1989 also evidently were not then communicated to Congress or otherwise outside the FBI. Alan Baron told the OIG that he did not know until recently that Tobin had made any allegations about Malone's 1985 testimony. Similarly, Hastings and Terence Anderson, an attorney who has represented Hastings since 1981 and who represented him in the impeachment proceedings, said that they first learned through media reports in February 1997 that Tobin had criticized Malone's testimony.

Tobin states that in 1989, he discussed his concerns only with Nimmich and Aaron. He also recalls that he told Aaron he would deal directly with Nimmich and he asked Aaron not to get involved in the matter himself. Tobin further says that Aaron returned to him the copy of the undated memorandum that Aaron reviewed, and Tobin says that he did not give the memorandum to anyone other than Nimmich until years later.[241] Finally, Tobin says that when he prepared the memorandum, he intended to defer to Nimmich if the latter thought it did not warrant additional action.

Aaron did not approach Nimmich to discuss the matter, and says that while he may have mentioned the matter to Malone's unit chief, he does not specifically recall doing so. Alan Robillard, who was the chief of Malone's unit in August 1989, says he only recently learned from news accounts that Tobin had made allegations concerning Malone's testimony related to the Hastings proceedings. John Hicks, who became Laboratory Director in August 1989, says he did not know of Tobin's allegations regarding Malone. Bernardo Perez, who served as Deputy Assistant Director in the Laboratory from May 1989 through March 1991, does not recall being aware of these allegations and says that if this matter had been brought to his attention, he would have sent a memorandum to the FBI OPR and to FBI legal counsel. Daniel Dzwilewski, who coordinated the appearance of FBI witnesses in the congressional impeachment proceedings, told the OIG that he did not know of Tobin's criticisms of Malone's testimony until he was advised in March 1997 that he would be interviewed as part of the OIG investigation. Given these facts, and Nimmich's claim that he does not recall this matter at all, we are unable to conclude that there was a deliberate or concerted effort within the FBI to conceal Tobin's allegations about Malone's testimony.

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[241] Tobin recalls that, sometime later, he mentioned the matter to Frederic Whitehurst and Tobin also says that, during the OIG investigation, he gave Whitehurst a copy of his undated memorandum.

IV. Conclusion

We conclude that the Laboratory would benefit from a clear delineation of responsibilities between units with respect to metals-related examinations, better communication among examiners in this area, and recognition that differences among examiners should be resolved on a scientific basis. We also conclude that the EU should take steps to assure that its examiners properly conduct and report their examinations of wires or other metals-related evidence.

With regard to both the issue of the EU's measurement of wire gauge and the controversy over the examination of holes in pipes in the La Familia case, we think EU Chief J. Thomas Thurman should have focused more on assuring that EU examiners were reporting the results of examinations in an appropriate manner. William Tobin displayed poor judgment by failing to discuss his concerns in the La Familia case with the principal examiner before Tobin issued his revised dictation. We also think that Tobin and FTU examiner Michael Ennis should have taken further steps, with involvement by their unit chiefs if necessary, to attempt to resolve the apparent differences in their conclusions about the holes found in the pipes. Because they did not reconcile their opinions on a scientific basis, Tobin and Ennis might have contradicted each other if they had testified about the results of their examinations.

In the Alcee Hastings case, we find that Michael Malone testified falsely and outside his expertise in discussing tensile tests performed by the Laboratory. Moreover, after Tobin raised concerns about Malone's testimony in 1989, then-SAS Chief Kenneth Nimmich failed to assure that the serious allegations of examiner misconduct were appropriately investigated and addressed.

In reviewing Tobin's allegations, we also identified ways in which the policies or the practices of the Laboratory could be improved:

(1) Laboratory management must assure that disputes about methodology or the interpretation of data -- such as those illustrated by the wire gauge issue or the examinations in the La Familia case -- are resolved professionally based on the pertinent scientific knowledge and that the resolution is communicated to those involved.

(2) There also appears to be a need, which the Laboratory seems to recognize, for clearer delineation of the respective roles of different units in the area of metallurgy and for improved communication between units. Defining the roles more clearly and improving communication should help to assure that the Laboratory's conclusions are reasonably supportable and properly reported, and should also reduce unnecessary conflict between units.

(3) The Laboratory should adopt guidelines for examiner testimony that, among other things, direct examiners to be accurate and to remain within their expertise in testifying. The Laboratory might also benefit from procedures aimed at identifying which examiner or other representative of the Laboratory is best able to testify on particular issues. The Laboratory also should implement an effective program for monitoring the testimony of its examiners. Such guidelines and procedures would have helped to avoid problems like those evidenced by Malone's testimony in the Hastings matter.

(4) Laboratory management must assure that concerns about the quality of the Laboratory's work, such as those raised by Malone's testimony, are investigated promptly and appropriately and that the resolution is documented.

We comment further on these issues in Part Six of this Report, which discusses our general recommendations regarding the Laboratory and the role of management.

We do not find any misconduct by Jordan with respect to those matters we investigated and we do not recommend any action concerning him.

I. Michael Malone

Michael Malone worked as an examiner in the Hairs and Fibers Unit from 1974 until 1994, when he transferred out of the Laboratory. As described in Part Three, Section H12, Malone in 1985 examined a purse that then United States District Judge Alcee Hastings had introduced as an exhibit in his 1983 trial related to an alleged bribery scheme. At his trial, Hastings had testified that he had sought to have the purse repaired because its strap was broken. The purse was later sent to the FBI Laboratory for examination in 1985, when a judicial committee for the Judicial Council of the Eleventh Circuit Court of Appeals was investigating allegations of misconduct by Hastings in connection with the alleged bribery and other matters.

Malone examined the strap microscopically and found indications that it had been deliberately cut. He also asked FBI metallurgist William Tobin to test the strap with a tensile tester, a device that measures the force required to break an object. Tobin did so and found that the strap broke at 29.5 pounds of force. As part of the judicial committee's investigation, Malone testified before the committee in October 1985 and again in April 1996.

Malone's 1985 testimony was incorrect and misleading in several respects. First, Malone falsely stated that he had actually conducted the test himself. He also opined, inaccurately, that the machine at 29.5 pounds would be "pulling much harder" than Malone could pull himself. He further testified inaccurately in stating that metal displays a "sudden" or "instantaneous break," which Malone distinguished from the break he observed in the purse strap. Finally, Malone said that the 29.5 pounds figure was "almost a meaningless figure other than it's a lot more than an average person could exert." This statement is inaccurate both in diminishing the significance of the tensile test results and asserting that the identified force was a lot more than an average person could exert. These various misstatements, as Tobin himself acknowledged, did not affect the conclusion that the strap had been partially cut.

We also conclude that Malone was incorrect in telling the OIG as part of this investigation that he in 1985 had told John Doar, the chief counsel for the judicial committee, that Tobin had conducted the test. For reasons set forth in Part Three,

Section H12, we find that Doar did not know that Malone had not performed the tensile test. Recognizing that we are reviewing events that occurred more than ten years ago, and given the record before us, we cannot conclude that Malone engaged in intentional misconduct by failing in 1985 to tell Doar that Tobin had performed the test or by inaccurately describing to the OIG his conversations with Doar before Malone testified.

Malone falsely testified before the judicial committee that he had himself performed the tensile test and he also testified outside his expertise and inaccurately concerning the test results. The FBI should assess what disciplinary action is now appropriate and should monitor his testimony in future cases to assure that Malone is accurate and testifies to matters within his knowledge and competence.

J. J. Christopher Ronay

J. Christopher Ronay was the unit chief of the EU from 1987 through October 1994.

As chief of the EU, Ronay did not sufficiently review reports prepared by examiners in his unit. 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. A specific example is provided by the Conlon case, in which Ronay acknowledged to the OIG that he would have questioned certain statements made by examiner Robert Heckman if he had read the report more carefully. Former SAS Chief James Kearney told the OIG that he had directed Ronay to review EU reports technically as well as administratively but that Ronay had responded that he did not want to "second guess" his examiners. In his review of EU reports, Ronay did not recognize the importance of assuring that each examiner's conclusions are reviewed by another qualified examiner to assure that the conclusions stated are scientifically reasonable and supported by the data.

Ronay also erred by allowing EU examiners to revise auxiliary examiner dictation when incorporating it into Laboratory reports. Ronay claimed that he did this only where the changes did not, in his opinion, affect the substantive results and he said he did not recall approving revisions to the dictation of any examiner other than Whitehurst. By allowing the EU examiners unilaterally to revise auxiliary examiner dictation, Ronay departed from the Laboratory's "unwritten rule" that dictation would

FEDERAL BUREAU OF INVESTIGATION

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

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.

RESPONSE BY:

(February 7 and 13, 1997)

ATTORNEY JOHN DOAR TO SECTION H12, TOBIN ALLEGATIONS

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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)

C58665

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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 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

THE ALCEE HASTINGS MATTER

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;