

E.D.N.C

1 THURSDAY, DECEMBER 7, 2000

2 (JURORS ABSENT FROM THE COURTROOM.)

3 THE COURT: YOU HAVE SOMETHING TO TAKE UP IN THE
4 ABSENCE OF THE JURY?

5 MS. ADAMS: YES, YOUR HONOR. WE ANTICIPATED THE
6 GOVERNMENT'S GOING TO BE CALLING AN EXPERT, A FINGERPRINT
7 EXPERT. WE WOULD LIKE TO CHALLENGE THE EXPERT. THE
8 FINGERPRINT EXPERT AREA DOES NOT COMPLY WITH THE
9 REQUIREMENTS UNDER DAUBERT. SIMPLY LOOKING AT THE
10 DEPARTMENT OF JUSTICE, THE FACT THEY HAD PERMISSION TO
11 STUDY, RECOGNIZING THERE'S A DEFICIENCY IN THE AREA
12 REQUIRED BY DAUBERT, WHICH REQUIRES SCIENTIFIC VALIDITY.
13 AND THE DEPARTMENT OF JUSTICE RECOGNIZED THAT THERE WAS A
14 NEED FOR VALIDATION OF THE BASIS FOR FINGERPRINT
15 IDENTIFICATION. TO DATE, THAT HAS NOT, IN FACT, BEEN
16 DONE.

17 THEY WERE COMMISSIONING A STUDY FOR THAT TO BE DONE,
18 RECOGNIZING THERE WAS A PROBLEM UNDER DAUBERT WITH THE
19 FINGERPRINT ANALYSIS MEETING THE REQUIREMENT, THAT BEING
20 SCIENTIFICALLY VALID. THAT'S A LAW ENFORCEMENT ANALYSIS,
21 NOT A SCIENTIFIC ANALYSIS. NO STUDIES HAVE BEEN CONDUCTED
22 WHICH INDICATES IT'S RELIABLE. THE PROBABILITIES THE
23 GOVERNMENT POTENTIALLY WOULD BE USING ARE, IN FACT,
24 SUPPORTED BY WHAT THE EXPERT WILL BE TESTIFYING TO.

25 IN ADDITION, THE OTHER PROBLEM UNDER DAUBERT, THERE'S

1 BEEN A TYPE OF STANDARDIZATION OF THE CRITERIA USED TO
2 EVALUATE FINGERPRINTS. THAT DOESN'T EXIST EITHER. IT
3 VARIES FROM AGENCY TO AGENCY, FROM AGENT TO AGENT. BUT
4 AGAIN, THE FACT THAT THE DEPARTMENT OF JUSTICE, WHOSE
5 RECOGNIZED THERE'S A DEFICIENCY IN THIS AREA, WE CONTEND
6 TO THE COURT CERTAINLY SHOWS THERE IS A PROBLEM UNDER THE
7 ANALYSIS.

8 THE SUPREME COURT ANNUNCIATED IN DAUBERT -- THE
9 SUPREME COURT IN DAUBERT HAD FIVE DIFFERENT CRITERIA. THE
10 FIRST BEING WHETHER OR NOT THE THEORY OR TECHNIQUE CAN BE
11 OR HAS BEEN TESTED. AGAIN, THAT'S THE PURPOSE OF THE
12 STUDY WITH THE DEPARTMENT OF JUSTICE IS TO, IN FACT, TEST
13 WHETHER OR NOT WHAT THE FINGERPRINT EXPERTS ARE TESTIFYING
14 ABOUT IS, IN FACT, VALIDLY SUPPORTED.

15 THE OTHER REQUIREMENT IS THAT THERE BE A KNOWN
16 POTENTIAL RATE OF ERROR OF THE PARTICULAR TECHNIQUE.
17 WITHOUT THE STUDY HAVING BEEN DONE, THERE'S NO WAY TO
18 ENGAGE THAT AT THIS POINT.

19 THE THIRD REQUIREMENT THAT THERE BE AN EXISTENCE OR
20 MAINTENANCE OF STANDARDS CONTROLLING THE TECHNIQUES. AND
21 AGAIN, THERE ARE NO STANDARDS IN THE FINGERPRINT INDUSTRY.
22 AGAIN, IT VARIES FROM AGENCY TO AGENCY OR FROM AGENT TO
23 AGENT.

24 SO THERE ARE NO STANDARD REQUIREMENTS. AND AGAIN,
25 THAT'S ANOTHER REASON WHY THE DEPARTMENT OF JUSTICE IS

1 ASKING THIS STUDY BE CONDUCTED. THE FOURTH PROBLEM IS
2 THAT THERE BE GENERAL ACCEPTANCE, CAN HAVE BEARING ON THE
3 INQUIRY BUT THAT IS NOT A CONTROLLING FACTOR.

4 THE FIFTH ONE IS WHETHER OR NOT THE THEORY OR
5 TECHNIQUE IS SUBJECT TO PEER REVIEW IN PUBLICATIONS.
6 BECAUSE THERE ARE NO SCIENTIFIC TESTS TO INDICATE WHETHER
7 OR NOT THE PREMISES THAT A FINGERPRINT EXPERT USES, THERE
8 WOULD BE NO ABILITY FOR A PEER TO REVIEW THE TECHNIQUE
9 THAT'S USED.

10 A SCIENTIFIC TECHNIQUE THAT'S USED IN ORDER TO
11 DETERMINE WHETHER OR NOT IT IS A FACT SCIENTIFICALLY VALID
12 ON ALL THE CRITERIA THAT DAUBERT LISTS, THE COURT SHOULD
13 CONSIDER IN DETERMINING WHETHER OR NOT SOMETHING IS
14 SCIENTIFICLY VALID. FINGERPRINT ANALYSIS FAILS UNDER EACH
15 ONE OF THOSE CRITERIA. WE THINK IT'S SIGNIFICANT THE
16 DEPARTMENT OF JUSTICE EVEN RECOGNIZES THE DEFICIENCY IN
17 THIS AREA. WE ASK YOU TO EXCLUDE ANY FINGERPRINT
18 TESTIMONY.

19 MR. DUFFY: THE NATIONAL INSTITUTE OF JUSTICE
20 THAT SHE PROVIDED YESTERDAY IS NO MORE THAN A
21 SOLICITATION. IT DOESN'T SPEAK FOR THE DEPARTMENT OF
22 JUSTICE AND THEY WERE TRYING TO GET ADDITIONAL INFORMATION
23 TO FURTHER CONFIRM THE FINGERPRINT ANALYSIS.

24 WITH RESPECT TO -- THERE HAVE BEEN A NUMBER OF
25 CHALLENGES RELATING -- SINCE THIS BECAME PUBLIC IN EVER

1 COURT THAT'S VIEWED, HAS HELD THAT FINGERPRINT AS A
2 SCIENCE PASSES DAUBERT. THE ONE THAT'S BEEN PUBLISHED SO
3 FAR IS THE ONE I FAXED TO YOU AND I FAXED TO DEFENSE
4 COUNSEL'S OFFICE THIS MORNING, UNITED STATES VERSUS HASSAD
5 (PHONETIC), A CASE OUT OF ANNAPOLIS.

6 THE COURT: MY LAW CLERK OBTAINED THAT. WE'VE
7 INDEPENDENTLY HAD THAT AND I'VE READ IT THOROUGHLY.

8 MR. DUFFY: WITH RESPECT TO THAT, YOU KNOW,
9 OBVIOUSLY DAUBERT APPLIES IN EVERY CASE WE HAVE AN EXPERT
10 IN. WITH RESPECT TO FINGERPRINTS, IN THOSE FIVE ELEMENTS,
11 THE FIRST ONE IS WHETHER THE THEORY OR TECHNIQUE HAS BEEN
12 TESTED WITH FINGERPRINT EVIDENCE. IT HAS -- THE USE OF
13 FINGERPRINTS HAS BEEN AROUND FOR A HUNDRED YEARS AND NO
14 ONE EVER MANAGED TO FALSIFY THE PRINTS, TO SHOW THAT TWO
15 PEOPLE HAVE THE SAME PRINTS.

16 FINGERPRINTS ARE USED IN CASES ALL THE TIME UNDER
17 ADVERSARIAL SETTINGS. WITH RESPECT TO IT'S SUBJECT TO
18 PEER REVIEW OR PUBLICATIONS, THERE ARE MASSIVE AMOUNTS OF
19 PUBLICATIONS WITH RESPECT TO FINGERPRINTS INTO AREAS GOING
20 ON ALL THE TIME, MOST RECENTLY A PUBLICATION REGARDING A
21 CLONED MONKEY. THEY FOUND OUT THE FINGERPRINTS OF THE
22 CLONED MONKEY WERE DIFFERENT BETWEEN -- EVEN WITH CLONING,
23 YOU DON'T COME OUT WITH THE SAME FINGERPRINTS, IDENTICAL
24 PRINTS. EVEN THOUGH THEY HAVE IDENTICAL GENES, THEY ARE
25 DIFFERENT FINGERPRINTS. THERE'S MASSIVE AMOUNTS OF

1 ARTICLES AND MY EXPERTS CAN TESTIFY TO THAT.

2 WITH RESPECT TO THE THIRD CATEGORY WHETHER THERE'S A
3 KNOWN OR POTENTIAL RATE OF ERROR, IT'S THE GOVERNMENT'S
4 POSITION, WITH RESPECT TO FINGERPRINTS, THERE'S NO RATE OF
5 ERROR. ONE, THE FINGERPRINTS MATCH. THERE'S NO RATE OF
6 ERROR. IT'S A MATTER OF SEPARATING THE METHODOLOGY FROM
7 THE PRACTITIONER. THE METHOD IS FOOLPROOF. IF THERE'S A
8 MISTAKE, IT'S WITH THE PRACTITIONER AND THAT GOES TO THE
9 QUALIFICATIONS OF THE WITNESS.

10 THE BEST EXAMPLE I CAN GIVE, IF YOU TOOK TEN
11 MATHEMATICIANS, GIVE THEM A LONG LIST OF NUMBERS, ASK THEM
12 TO ADD THEM UP IN A COUPLE OF MINUTES, A COUPLE WOULD COME
13 UP WITH THE WRONG ANSWER. THAT DOESN'T MEAN MATHEMATICS,
14 AS A SCIENCE, ISN'T A SCIENCE. IT MEANS THE PEOPLE ADDING
15 THE NUMBERS DID IT IMPERFECTLY. IT WOULD BE A MATTER OF
16 THEIR QUALIFICATIONS AND OBVIOUSLY THE CIRCUMSTANCES UNDER
17 WHICH THEY DID THE ADDING. IN ESSENCE, TWO PLUS TWO IS
18 FOUR. MATHEMATICS IS A SCIENCE, BUT WHETHER THE
19 PRACTITIONER QUALIFIES. THE SAME WITH THE FINGERPRINTS.
20 IF THERE'S A PROBLEM, THAT IS THE PEOPLE DOING THE
21 FINGERPRINTS.

22 THAT LEADS US TO THE NEXT ELEMENT, STANDARDS OF
23 OPERATION. THERE ARE GROUPS THAT CERTIFY FINGERPRINT
24 PEOPLE. THERE ARE LABS -- CERTIFICATION YOU CAN GET,
25 WHICH SECRET SERVICE DOES. AS I SAID, THE CERTIFICATION

1 GROUPS REQUIRE VARIOUS EDUCATIONAL REQUIREMENTS THAT THEY
2 TAKE EVERY YEAR. SO THERE ARE STANDARDS OF OPERATION.

3 AND THE FINAL ELEMENTS, THE GENERAL ACCEPTANCE IN THE
4 COMMUNITY, YOUR HONOR. AND ALL 50 STATES IN THE UNITED
5 STATES USE FINGERPRINTS FOR PURPOSES OF TRIALS, JUST LIKE
6 THIS. ALL COUNTRIES, ALL CIVILIZED COUNTRIES THAT HAVE
7 POLICE FORCES USES FINGERPRINTS AS WELL. WE FEEL THIS IS
8 CLEARLY A SCIENCE UNDER DAUBERT AND THIS NIJ IS BASICALLY
9 THE CONTEXT IN WHICH IT WAS DONE, WAS TO GET FUNDING TO DO
10 ADDITIONAL STUDIES TO BASICALLY ADDITIONALLY CONFIRM
11 STUFF. IT WAS A SOLICITATION FOR FUNDS. IT WASN'T THE
12 POSITION OF THE DEPARTMENT OF JUSTICE.

13 AND I FAXED TO YOU AND TO DEFENSE COUNSEL LAST NIGHT
14 THE LETTER OF JUNE 20 FROM THE DEPARTMENT OF JUSTICE
15 RESPONDING AND ENTITLED, "NIJ IS NOT SPEAKING FOR THE
16 UNITED STATES." SO WITH RESPECT TO THAT, IT'S OUR
17 POSITION THAT WE DON'T HAVE A DAUBERT PROBLEM HERE. WE'RE
18 WILLING TO PUT ON OUR EXPERTS, TO GO THROUGH THIS IF YOU
19 WANT. THANK YOU, YOUR HONOR.

20 THE COURT: WELL, I DON'T THINK IT'S NECESSARY
21 FOR ME TO HEAR ANYTHING FURTHER. THE WELL-REASONED AND
22 PUBLISHED OPINION OF JUDGE HAMILTON IN THE SOUTHERN
23 DISTRICT OF INDIANA, 117 F SUPP 2D 848, SETS OUT THE
24 REASONS THAT I WOULD ASSIGN AND I ADOPT THEM FOR SAYING
25 THAT FINGERPRINT IDENTIFICATION, IN GENERAL, AS IT'S USED

1 IN THIS COUNTRY, MEETS DAUBERT, MEETS THE TEST OF DAUBERT.
 2 OF COURSE, AS DAUBERT ITSELF POINTS OUT AND AS JUDGE
 3 HAMILTON POINTS OUT HERE, THE REAL -- THE BEST WAY TO TEST
 4 THE TRUTH AND VALIDITY OF ANY TESTIMONY IN THEORY IS
 5 VIGOROUS CROSS-EXAMINATION AND COMPETING VIEWS. AND
 6 THERE'S NOTHING AT ALL TO KEEP COUNSEL FROM PRESENTING AN
 7 EXPERT WITH A DIFFERENT VIEW, IF AN EXPERT WITH A
 8 DIFFERENT VIEW IS AVAILABLE.

9 SO THE MOTION TO PROHIBIT THE UNITED STATES FROM
 10 USING FINGERPRINT EVIDENCE ON THE GROUNDS THAT IT DOESN'T
 11 MEET THE DAUBERT CHALLENGE IS DENIED.

12 (JURORS ENTER INTO THE COURTROOM.)

13 THE COURT: YOU MAY CALL YOUR NEXT WITNESS.

14 MR. DUFFY: YOUR HONOR, THE GOVERNMENT CALLS
 15 ROBERT SCHUMANN.

16 ROBERT SCHUMANN, BEING FIRST DULY SWORN, TESTIFIED AS
 17 FOLLOWS DURING DIRECT EXAINATION:

18 BY MR. DUFFY:

19 Q. MR. SCHUMANN, COULD YOU TELL THE JURY WHERE IT IS
 20 THAT YOU WORK?

21 A. I WORK IN THE U. S. SECRET SERVICE IN WASHINGTON,
 22 D.C.

23 Q. WHAT'S YOUR POSITION IN THE SECRET SERVICE?

24 A. I'M A FINGERPRINT SPECIALIST.

Q. AND CAN YOU JUST VERY GENERALLY, TELL THE JURY