IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CR-00-N-0422-S
ERIC ROBERT RUDOLPH, Defendant.	)	

REPLY TO RESPONSE IN OPPOSITION TO MOTION TO EXCLUDE TESTIMONY OF FORENSIC FINGERPRINT EXAMINER AND REQUEST FOR A DAUBERT HEARING

Introduction

On January 24, 2005, the Government filed a Response In Opposition To Defendant's Motion To Exclude Testimony Of Forensic Fingerprint Examiner And Request For A Daubert Hearing (doc. 439)(hereinafter "Government's Response"). Much of the Government's Response is devoted to the argument that the Court should not conduct any evidentiary hearing at all, a point now rendered moot by the defendant's agreement to submit the issue on the basis of the existing pleadings, affidavits, and the three volumes of exhibits filed in support of Mr. Rudolph's Motion to Exclude Testimony OF Forensic Fingerprint Examiner And Request For A Daubert Hearing (doc. 409)(hereinafter "Motion to Exclude") .

The remainder of the Government's Response can be quickly summarized and is easily refuted. While the government pays lip service to *United States v. Frazier*, 387 F. 3d 1244, 1259-1263 (11th Cir. 2004), which the government admits mandates a "rigorous three-part inquiry" under *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and places the burden of proof squarely on the government on this motion, the government is content with citing legal

authorities in defense of the proposition that latent print evidence is scientifically reliable. Not a single citation is made to any scientific authority supporting this position. There are no affidavits rebutting the analysis of defense fingerprint experts Dr. Simon Cole and professor James Starrs. No validation study of latent print identification is cited. No study measuring the accuracy of latent print identification is cited.

In what follows, the defense will show that the government's legal analysis is flawed and that it simply ignores controlling facts which demonstrate that the government's fingerprint testimony does not comply with *Daubert* or with the more specific requirements of Rule 702. The government's scientific analysis, such as it is, is addressed in the attached Exhibit C, the Rebuttal Affidavit of Simon Cole in Support of Motion to Exclude Testimony of Forensic Fingerprint Examiner and Request for a Daubert Hearing (Hereinafter "Cole Rebuttal Aff.").

I

THE GOVERNMENT'S LEGAL ANALYSIS IS FLAWED AND IT IGNORES CONTROLLING FACTS WHICH DEMONSTRATE THAT THE GOVERNMENT'S FINGERPRINT TESTIMONY DOES NOT COMPLY WITH DAUBERT OR WITH THE MORE SPECIFIC REQUIREMENTS OF RULE 702

A. The Government's Flawed Legal Analysis

Stripped to its essence, the government's position appears to be that because the use of fingerprint testimony has not been held to be an abuse of discretion by some federal appeal courts ruling on some unknown records in the past, this Court should allow the government to use this evidence at trial without any scrutiny of the scientific reliability of the alleged science underlying the testimony, and without any inquiry into the case specific foundational requirements of Rule 702. The government seeks to buttress the argument by claiming that the

defense is really offering nothing new to what has been considered and rejected by other courts, ignoring the fact that the defense has presented a wealth of newly emerging scientific criticisms and startling instance of recent erroneous identifications that have yet to be considered by any court.

Notably, the government does not and cannot claim that the Eleventh Circuit unpublished opinion it cites, *United States v. Williams* (Government's Exhibit A), is binding on this Court. The Eleventh Circuit provides by rule that unpublished opinions are not considered binding precedent. They may only be cited as "persuasive authority". (Eleventh Circuit Rules, Rule 36-2). The *Williams* case is not "persuasive authority" for the following reasons.

First, the Court in *Williams* did not hold that fingerprint testimony would withstand *Daubert* and Rule 702 scrutiny in all cases as a matter of law. Rather, it held that "the district court did not abuse its discretion in declining to hold a hearing or in admitting the government's fingerprint evidence at trial." (Government's Exhibit A at p. 4). Obviously, this Court is not operating under an abuse of discretion standard and the Eleventh Circuit's decision says nothing about how that Court would have ruled were it not confined by an abuse of discretion standard . See, *United States v. Frazier,* 387 F. 3d 1244, 1259 (11th Cir. 2004)("'By definition ... under the abuse of discretion standard of review there will be occasions in which we affirm the district court even though we would have gone the other way had it been our call.'").

Secondly, the Eleventh Circuit's finding of no abuse of discretion must be considered in the context of the argument it was presented with on appeal. That argument, in its entirety, was as follows:

The District Court erred in denying the Defendant's Motion to Exclude fingerprint

> evidence. The Court also erred in denying the Defendant's request for a *Daubert* hearing. The Defendant filed a Motion in Limine and Memorandum of Law in support of the Motion in Limine to exclude the fingerprint identification evidence on August 14, 2002. [R. 1-15-1, 1-16-1]. In this motion, the Defendant argued that finger print identification evidence does not meet the standards to satisfy *Daubert* and its progeny. The Defendant argued that there has been no testing for the field's fundamental premises, no known error rate for latent finger print examiners exists, finger print examiners do not possess uniform objective standards to guide them in their comparisons and no set number of pints for comparisons exists and finger print literature confirms these issues. [R. 1-16-1]. Further, the 11th Circuit has no post *Daubert* decision addressing admissibility of fingerprint identification evidence. There has been no published decision granting the Defendant's motion to exclude fingerprint evidence entirely from trial. However, several District Courts have allowed defendant's to present evidence regarding the lack of scientific integrity in fingerprint identification. The Defendant draws the Court's attention to *United States v. Llera Plaza*, 179 F. SUPP 2d 492 (E.D.Pa. January 7, 2002) (Llera Plaza I.), In *Llera Plaza I*, the District Court Judge allowed expert testimony regarding fingerprint identification under Rule 702. Judge Pollack, the District Judge presiding, excluded the experts testimony. See also *U.S. v. Ramsey* mo.01-005-05 (E.D.P. 2001; *U.S. v. Allteme* 998131 Fla April 7, 2000. Based upon the above, Mr. Williams should have been allowed to have a hearing on the admissibility of the fingerprint evidence. Additionally, Mr. Williams' Motion to Exclude the fingerprint evidence should have also been granted.

United States v. Williams, Appellant's Opening Brief, 2003 WL 23413086

Manifestly, such anemic and perfunctory argument cannot reasonably be compared to the comprehensive, well documented attack mounted by Mr. Rudolph in the present case. There is not a single reference in the *Williams* briefing to the growing body of scientific and legal literature attacking fingerprint testimony, no supporting declarations or testimony of defense experts, and no legal analysis whatsoever. The Eleventh Circuit understandably responded in kind, but the decision that arises out of such a process is hardly persuasive authority, especially as it pertains to scientific and legal developments occurring after the date of the trial court's order in that case on August 29, 2002. (See, Government's Exhibit B).[1]

---

[1] The other cases cited by the government are subject to the same analysis. One of the cases cited by the government, *United States v. Janis*, 387 F. 3d 682, 690 (8th Cir. 2004)

As Dr. Cole's and James Starrs' unrebutted affidavits in support of the motion illustrate, since 2002 there has been a rising and near unanimous consensus among scientists and legal commentators alike that fingerprint testimony is not grounded in good science, a fact vividly and very recently illustrated by the Mayfield case in which four very experienced fingerprint examiners, using the same ACE-V methodology used in this case, falsely incriminated an innocent man.

The government would respond, citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137,

---

involved rolled inked prints, not latent prints, and the defendant in that case did not challenge the reliability of the expert's testimony and declined the court's invitation to fund a defense expert. The government also relies heavily on *United States v. Havvard*, 260 F. 3d 597 (7th Cir. 2000). But the Seventh Circuit has since ruled that in fingerprint cases, application of the *Daubert* factors "is a flexible test, its outcome varies with the circumstances of each case." *United States v. George*, 363 F. 3d 666, 672 (7th Cir. 2004). As for the other cases, one commentator has recently observed,

> "In the majority of the cases, the court reviewed the trial court's refusal to exclude the fingerprint expert testimony or to conduct a *Daubert* hearing regarding the admissibility of the expert testimony for abuse of discretion without ruling directly on the admissibility of the evidence. While appellate courts need only review the trial court for abuse of discretion, few opinions took the challenge to the admittance of the fingerprint evidence seriously. Most of the opinions dismissed the challenge and affirmed the lower court's ruling with little or no discussion."

Kristin Romandetti, Note*, Recognizing and Responding to a Problem with the Admissibility of Fingerprint Evidence under Daubert*, 45 Jurimetrics J. 41, 54 (2004).

She continues: "The reluctance of federal judges to apply strict *Daubert* standards to fingerprint expert testimony reflects the heavy reliance that both the legal and criminal justice systems place on the assumed validity of fingerprint expert testimony. However, this reliance on an assumption of validity is exactly what the *Daubert* test was intended to replace." Id. at 55. See also, David L. Faigman, David H. Kaye, Michael J. Saks & Joseph Sanders, 3 Modern Scientific Evidence: The Law and Science of Expert Testimony , *Fingerprint Identification: Legal Issues* § 27-1.2.11(2002 ed. and 2004 Supp.)(collecting and criticizing existing cases); Tara Marie La Morte, *Sleeping Gatekeepers: United States v. Ilera Plaza and the Unreliability of Forensic Fingerprinting Evidence Under Daubert*, 14 Alb. L.J. Sci. & Tech.171, 201(2003)(same).

150 (1999), that "the 'relevant reliability concerns may focus upon personal knowledge or experience', rather than upon scientific foundations..." (Government Response, p. 8)(emphasis in Response). The government has misread *Kumho Tire Co.* That decision explicitly emphasizes the importance of *Daubert's* gatekeeping requirement in the context of experienced-based expert testimony, stating that "(t)he objective of that requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." (Id. at 152).

The government has also ignored Eleventh Circuit law on this point. Thus, in *United States v. Frazier,* 387 F. 3d 1244, 1261 (11th Cir. 2004) the court stated:

> Of course, the unremarkable observation that an expert may be qualified by experience does not mean that experience, standing alone, is a sufficient foundation rendering reliable any conceivable opinion the expert may express. As we observed in Quiet Technology, "while an expert's overwhelming qualifications may bear on the reliability of his proffered testimony, they are by no means a guarantor of reliability.... [O]ur caselaw plainly establishes that one may be considered an expert but still offer unreliable testimony." 326 F.3d at 1341-42. Quite simply, under Rule 702, the reliability criterion remains a discrete, independent, and important requirement for admissibility.
>
> Indeed, the Committee Note to the 2000 Amendments of Rule 702 expressly says that, "[i]f the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.' " Fed.R.Evid. 702 advisory committee's note (2000 amends.) (emphasis added); see also *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (on remand), 43 F.3d 1311, 1316 (9th Cir.1995) (observing that the gatekeeping role requires a district court to make a reliability inquiry, and that "the expert's bald assurance of validity is not enough"). If admissibility could be established merely by the ipse dixit of an admittedly qualified expert, the reliability prong would be, for all practical purposes, subsumed by the qualification prong.

See also, Id. at 1265 ("Since Tressel was relying solely or primarily on his experience, it remained the burden of the proponent of this testimony to explain how that experience led to the conclusion he reached, why that experience was a sufficient basis for the opinion, and just how that experience was reliably applied to the facts of the case. Again, '[t]he court's gatekeeping function requires more than simply 'taking the expert's word for it.' "); *McDowell v. Brown*, 392 F. 3d 1283, 1298 (11th Cir. 2004)("The district court found all of[McDowell's experts qualified to testify .... Nevertheless, a 'supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based on some recognized scientific method.'"); *Rider v. Sandoz Pharmaceuticals Corp*, 295 F.3d 1194, 1197 (11th Cir. 2002)("In *Kumho Tire*, the Supreme Court made it clear that testimony based solely on the experience of an expert would not be admissible.... The expert's conclusions must be based on sound scientific principles and the discipline itself must be a reliable one.").[2]

---

[2] The government also asserts that "*Daubert* was aimed at expanding, not restricting, the admissibility of expert opinions under Rule 702..." (Government Response at p. 7 n. 9). Whatever *Daubert* was originally "aimed at", it is clear from the results in *Kumho Tire*, *Frazier*, *McDowell*, *Rider*, and countless other cases that the effect of *Daubert* has in fact been to restrict, not expand the admissibility of expert testimony in federal courts. The prevailing Eleventh Circuit philosophy on the matter is aptly summed up in *Rider*:

> Since *Daubert*, courts are charged with determining whether scientific evidence is sufficiently reliable to be presented to a jury. The *Daubert* court made it clear that the requirement of reliability found in Rule 702 was the centerpiece of any determination of admissibility....The *Daubert* trilogy, in shifting the focus to the kind of empirically supported, rationally explained reasoning required in science, has greatly improved the quality of the evidence upon which juries base their verdicts. Although making determinations of reliability may present a court with the difficult task of ruling on matters that are outside of its field of expertise, this is "less objectionable than dumping a barrage of scientific evidence on a jury, who would likely be less equipped than the judge to make reliability and relevance determinations."

295 F.3d at 1197.

In sum, under the law, the *Daubert* inquiry is indeed a flexible one as the government maintains, but this means exactly opposite of what the government urges in this case. The court is not bound by badly reasoned and case-specific precedent that has nothing to do with this case or the lack of current science behind fingerprint analysis. Under Eleventh Circuit precedent, the focus must be on "the kind of empirically supported, rationally explained reasoning required in science". *Rider v. Sandoz Pharmaceuticals Corp*, 295 F.3d 1197.

B. The Government Has Ignored Controlling Facts

Neither the Eleventh Circuit nor any other court in the country has yet considered the impact of the Mayfield case or any of the other recent developments discussed in the affidavits of Dr. Cole and James Starr, yet these developments, especially the Mayfield case, have profound significance for the reliability of the ACE-IV methodology allegedly practiced in this case.[3]

The Mayfield case is important here because in that case three very experienced FBI fingerprint examiners and one court appointed expert, all using the ACE-IV methodology, all wrongly identified Mayfield on the basis of a "remarkable number of points of similarity between

[3] The defense says "allegedly", because up until recently Mr. Hankerson and the government have disavowed any reliance on "point counting". As the defense points out in its motion (p. 26-27,n.9), the fingerprint community is currently divided into two warring camps, the "ridgeologists" and the "point counters". The ridgeologists use the "holistic" ACE-IV methodology which utilizes "Level 2" and "Level 3" detail and they refuse to be pinned down on any decisional standard. The "ridgeologists" critique any reliance on point counting of "Level 2" detail as inherently unscientific, pointing out that even a sixteen point standard has led to false identifications. In this case, the Government's Response includes a Powerpoint presentation by Hankerson (Exhibit C) which clearly indicates that he is relying on Level 2 details as the basis for his comparison, and that there are far less than sixteen points of comparison for each comparison (Exh. 7A-9 points; Exh. 7B-10 points; Exh. 7C-9 points; Exh. 10-10 points; Exh. 57-9 points; Exh. 367-6 and 7 points). So, is Hankerson a "point counter" or a "ridgeologist" ? If the former, then the "ridgeologists" would maintain that his testimony must be excluded as unscientific. If the latter, then he is in violation of "ridgeologist" methodology, and according to the "point counters" his testimony is no more reliable than astrology.

Mr. Mayfield's prints and the print details in the images submitted to the FBI." (FBI apology to Mayfield, Exhibit 73).[4] The same print was subsequently identified by Spanish police as belonging to an Algerian suspect.

Of course, the underlying scientific hypothesis being advanced in Mr. Rudolph's case is that no two people in the world could share a "remarkable number of points of similarity" as determined by ACE-IV methodology. Yet in the Mayfield case they did.

The first *Daubert* factor is "whether a theory or technique ... can be (and has been) tested." 509 U.S. at 593, 113 S.Ct. 2786. According to the government, fingerprint testimony "has been proven accurate on countless occasions" and it is "subject to constant testing and review." (Government's Response at 21). As shown in the attached Affidavit of Dr. Cole, these assertions are wholly unsupported by any known scientific studies conducted to date. It is therefore a little unclear what kind of "testing and review" the government has in mind.

Presumably, the government may be following the lead of some of the cases it cites which have erroneously equated "adversarial" testing in the courtroom with the scientific testing mandated by *Daubert*. "Adversarial" testing in court is not, however, what the Supreme Court meant when it discussed testing as an admissibility factor.

In his brief elaboration on testing, Justice Blackmun quoted an evidence treatise with approval: " 'Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other

---

[4] An affidavit filed by FBI Special Agent Richard K. Werder in support of a material witness arrest warrant states that there were "in excess" of 15 points of identification, and that "the FBI lab stands by their conclusion of a 100 percent positive identification." **(http://www.katu.com/news/story.asp?id=67615)**

fields of human inquiry.' " *Daubert*, 509 U.S. at 593, 113 S.Ct. 2786 (quoting Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigation*, 86 N.W. U.L.Rev. 643 (1992)).

In an article on *Daubert*, Professor Imwinkelried explained the importance of falsifiability to scientific testing:

> Attempts to disprove the hypothesis are more significant [than verification] in two respects. First, although a single outcome consistent with an hypothesis furnishes little proof of the truth of the hypothesis, *a hypothesis phrased as a universal statement is disproved by even one singular inconsistent outcome.* Second, even when there are an impressive number of consistent outcomes and no inconsistent outcomes, the hypothesis is not definitively confirmed because it is always possible that an empirical test will some day demonstrate the theory to be incorrect. The theoretical possibility of disproof remains.

Edward J. Imwinkelried, *Evidence Law Visits Jurassic Park: The Far-Reaching Implication of the Daubert Court's Recognition of the Uncertainty of the Scientific Enterprise*, 81 Iowa L.Rev. 55, 62 (1995) (quotations and citations omitted) (emphasis added). Thus, by striving to falsify a certain premise or outcome, scientists can more closely approximate what is "true."(Id. at 61-62.].

The centrality of falsifiability to the scientific pursuit is further examined in another influential article:

> A universal statement can be shown to be false if it is found inconsistent with even one singular statement about a particular event of occurrence. But the reverse is not true; a universal statement can never be proven true by virtue of the truth of particular statements, no matter how numerous..... Thus no hypothesis can ever be proven absolutely true, but a hypothesis may become well corroborated if it survives a variety of tests that fail to falsify it.

Bert Black et al., *Science and the Law in the Wake of Daubert: A New Search for Scientific*

Knowledge, 72 Tex. L.Rev. 715, 755-56 (1994).

This conception of scientific falsifiability is expressly adopted by the court in United States v. Mitchell, 365 F. 3d 215, 235 (3rd. Cir. 2004) , a fingerprint case heavily relied upon by both sides in this case:

> Proving a statement false typically requires demonstrating a counterexample empirically-for instance, the hypothesis "all crows are black" is falsifiable (because an albino crow can be found tomorrow), but a clairvoyant's statement that he receives messages from dead relatives is not (because there is no way for the departed to deny this)....The uniqueness proposition is testable because it would immediately be shown false upon the production of identical friction ridge arrangements taken from different fingers (either from different fingers on the same person, or from two different people)....(I)n the course of routine fingerprint examination, there are certainly opportunities to encounter identical fingerprints; as several witnesses testified, such a discovery would be very notable and word would spread quickly throughout the fingerprint examiner community. Yet no reports of non-unique friction ridge arrangements were introduced, and, indeed, the FBI survey sent to state agencies revealed that none had ever encountered two different persons with the same fingerprint.

Applying the court's analysis here, the Brandon Mayfield case, which broke after the decision in *Mitchell*, is the albino crow falsifying the government's claim that "no two fingerprints made by two different fingers are the same." (Government's Response at 4). The Government may now break its silence on this issue and claim that Mayfield's prints are not in fact the same as the latent. But, if so, then how did four experienced experts using the ACE-IV methodology, say that they were the same ? The underlying premise of uniqueness has effectively been falsified.

Moreover, the FBI's attempt to downplay the significance of the errors in Mayfield only underscores the weakness of the ACE-IV methodology, especially as it was allegedly applied in Mr. Rudolph's case. The FBI's initial response was to claim that the errors were made because

"the FBI identification was based on an image of substandard quality..." (FBI apology, Exhibit 73). More recently, however, as reported in the FBI's just released official report of the incident, a panel of international "experts" convened by the FBI found that "the quality of the images that were used to make the erroneous identification was not a factor." Robert B. Stacey, *A Report on the Erroneous Fingerprint Individualization in the Madrid Train Bombing Case*, 54 J. Forensic Identification 706, 714 (2004)(Exhibit 74, attached hereto). According to these experts, "(I) t was the examiners' application of (ACE-V) methodology that failed." (Id. at 712).

The report explains:

> The IAFIS (Integrated Automated Fingerprint Identification) search of latent fingerprint #17 involved the encoding of seven level II details. The search results provided digit seven of the fourth candidate (Mayfield). Upon reviewing the encoded detail and the candidate's print, it was comprehensible why IAFIS provided him as a candidate and why the initial examiner did not immediately dismiss him.
>
> *The power of the IAFIS correlation, coupled with the inherent pressure of working an extremely high-profile case, was thought to have influenced the examiner's judgment and subsequent examination.* This influence was recognized as confirmation bias (or context effect) and describes the mind-set in which the expectations with which people approach a task of observation will affect their perceptions and interpretations of what they observe.
>
> The apparent mind-set of the initial examiner after reviewing the results of the IAFIS search was that a match did exist; therefore, it would be reasonable to assume that the other characteristics must match as well. In the absence of a detailed analysis of the print, it can be a short distance from finding only seven characteristics sufficient for plotting, prior to the automated search, to the position of 12 or 13 matching characteristics once the mind-set of identification has become dominant. This would not be an intentional misrepresentation of the data, but it would be incorrect interpretation nonetheless.
>
> *Once the mind-set occurred with the initial examiner, the subsequent examinations were tainted. Latent print examiners routinely conduct verifications in which they know the previous examiners' conclusions. However, because of the inherent pressure of such a high-profile case, the power of an IAFIS correlation in conjunction with the similarities in the candidate's print, and the knowledge of the previous examiners' conclusions (especially because the initial examiner was a highly respected supervisor with many years of experience), it was concluded*

> *that subsequent examinations were incomplete and inaccurate. To disagree was not an expected response.*
>
> Additionally, this erroneous individualization was not made by an examiner alone, but by an agency that for many years has considered itself, rightfully so, as one of the best latent print units in the world. Confidence is a vital element, but humility is too. *It was considered by the committee that when individualization had been made by the examiner, it became increasingly difficult for others in the agency to disagree.* This is supported because the Latent Print Unit immediately entered into a defensive posture when the Spanish National Police issued its statement that the FBI was wrong.
>
> (Id. at 713-714)(emphasis added)

Addressing procedures and guidelines that should have prevented multiple misidentifications in a single case, the report states:

> Procedures that require descriptive documentation (graphic, textual, or a combination of both) of the ACE-V process and blind verification (i.e., should be implemented on designated cases. This documentation should also note areas of discrepancies in the prints and explanations for these discrepancies. The original examiner's document should be sealed or withheld from the verifer. The verifier would then conduct his or her examination independently and document the characteristics and discrepancies that were considered during the examination....The verifiers must do an independent and complete ACE-V examination of each print that they are verifying....
>
> A new quality assurance rule is needed regarding high-profile or high-pressure cases. This would include supervisory verification of conclusions regardless of the normal quality and quantity standard. These and all supervisory verifications must be independent and complete ACE-V examinations.
>
> (Id. at 713-714)

A number of observations need to be stressed about the FBI's report. First, as observed in the attached affidavit of Dr. Cole, "(i)f the report is correct, then latent print examiners are more prone to false positive errors, in both the initial examination and the 'verification' process, in 'high-profile' cases. If fingerprinting were a truly objective and scientific form of analysis, there would be no reason why this should be the case. This, therefore, highlights the subjective and unscientific nature of latent print analysis." (Cole Rebuttal Aff. p. 10) The FBI's explanation

is that the appearance of Mayfield's print as the number *four* (not number one) candidate on an IAFIS search geared to only seven level II points, coupled with the high profile nature of the case, tainted the initial examination and all subsequent examinations. A methodology this sensitive to subtle clues and "confirmation bias (or context effect)" cannot withstand *Daubert* scrutiny.

Second, the report attempts to create the illusion that fixing the problem with fingerprint analysis is simply a matter of instituting some "new" procedural reforms. But it is important to stress that the proposed procedural mechanisms are nothing new.[5] Indeed, many of them, such as documentation, supervisory review and multiple levels of verification were in fact used in the

---

[5] For instance, in this case, the government provided a 1988-1998 *ATF Standard Approach for Fingerprint Examinations* which states in part: " Examination notes will be accomplished through the use of the Latent Fingerprint Section Worksheet....The worksheet will record...(6) The result of the examination of each exhibit, including the identification of latent prints....In laboratories which have more than one fingerprint examiner, all identified and non-identified...latent prints must be re-examined for verification. Concurrence must be recorded in case notes....The conclusions expressed in laboratory reports should be complete, concise, and accurate statements of the examiners findings. They must conform to the requirements described in the operating Manual." (BH-ABL-005180-005182).

The ATF's 1994 *Operating Manual* provides that examiners are required to "keep complete records on the work performed and its results" and that reports of laboratory examinations "must...clearly and accurately state conclusions (and) use technical illustrations where required to effectively convey information." (BH_ABL-005562). It states that "(a)ll results and conclusions that will be testified to in court must be included" in a report (BH-ABL-005599). It states that "(a)ll identifications in latent print cases will be peer reviewed", that (a0ll cases will be reviewed by the supervisor for consistency with laboratory policy", and that review "will consider" (1) Conclusions are consistent with technical findings; (2) All requested examinations have been performed; (3) The approved format was used; (4) Standard Approaches were used; (5) Examinations were conducted within times available; and (6) The report contains no significant errors, including grammatical." (BH-ABL-005606). Finally, the Manual provides that "(t)echnical reviews, methods reviews, and activity reports will be circulated." (BH-ABL-005604). As indicates above, the defense has alleged, and the government has nowhere denied, that these necessary aspects of the methodology were not followed in this case. The results of the examinations therefore do not comply with Rule 702(3).

Mayfield case and nevertheless lead to erroneous identifications by four separate highly trained senior fingerprint examiners. It is the "science" that needs fixing here, as well as the methodology implementing it.

Lastly, it is highly relevant to compare the kind of subtle pressures and cues found responsible for the misidentifications in Mayfield, as well as the methodology used in that case, to the more overt pressures operative in this case, and the specific methodology that was used by Hankerson. First, in Mayfield, unlike in the present case, the FBI complied with the requirement of *contemporaneous* documentation, including preparation of "a detailed exhibit delineating their analysis of the fingerprint in question." (Exhibit 74, p. 710). Here, by the government's own admission at the December 15, 2004 status conference (Motion to Exclude, p. 14 n. 3), neither Hankerson nor any reviewer has any contemporaneous documentation of the basis of any comparison, and this information was not in fact forthcoming until the magistrate ordered it in December 2004. The crucial question is, how reliable is this attempt in 2004-2005 to justify identifications made back in 1998-1999 when Hankerson has already committed himself to saying that the prints belong to Mr. Rudolph ? The answer is provided in the FBI's report of the Mayfield case: "Once the mind-set occurred with the initial examin(ation), the subsequent examinations were tainted." (Exhibit 74 at p. 713).

Second, one must compare the subtle suggestion operative in Mayfield's "high profile" case, where he was listing as number four on an AFIS search based on only seven level 2 details, which created what the FBI calls "confirmation bias (or context effect)", with the more overt pressures operating in this "high profile" case. In this regard, as pointed out in the attached affidavit of Dr. Cole, it is significant that Mr. Rudolph was a known suspect before the

fingerprint comparison process began. (Cole Rebuttal Aff. p. 10). Indeed, the record produced for the Court in connection with the change of venue motion reflects that Mr. Rudolph was identified as a named suspect or "material witness" in numerous media outlets as early as January 30, 1998. Mr. Hankerson's May 7, 1998 report attached to Government's exhibit B indicates that copies of Mr. Rudolph's known prints were "previously submitted" to his receipt and comparison of Exhibit 10 on February 5, 1998. Discovery also reflects that Mr. Hankerson personally participated in the highly publicized search of Mr. Rudolph's Nissan truck on February 8-9, 1998, right before his comparisons of Exhibits 7a, 7b, 7c, and 57 on February 10-11, 1998, and well before his comparison of Exhibit 367 on July 15, 1998. (BH-ABL-003305).[6]

---

[6] As indicated in defendant's motion, the bible of the ACE-V methodologists is David Ashbaugh's book *Quantitative-Qualitative Friction Ridge Analysis: An Introduction to Basic and Advanced Ridgeology* (1999)(Exhibit 5). It states that:

> Many police agencies completely overlook the fact that there are actually two separate roles with separate training needs involved in the duties of most identification specialists. One role is the scenes of crime officer fulfilling the police function of collecting evidence. The second is that of a forensic scientist comparing the evidence...The duality of the identification specialist role can put experts in a rather awkward position. They are, in effect, serving two masters with, at times, differing agendas. (Id at 5).

Asbaugh further teaches:

> Commencing a comparison with expectations or with hope can be dangerous unless a very objective position is taken. The situation becomes more precarious as the knowledge of the expert decreases. Comparisons conducted with expectations and without adequate knowledge or regard for scientific process will eventually result in disaster. (Id. at 108)

The Interpol European Expert Group on Fingerprint Identification (IEEGFI) was instigated in 1998 and issued a report in 2000 recommending that "The first fingerprint examiner should have minimal links with the case in order to be independent. In an ideal situation, the collector of the evidence of the scene of crime should be excluded." **(http://www.interpol.int/public/Forensic/fingerprints/WorkingParties/IEEGFI/ieegfi.asp)**

As indicated in the attached affidavit of Dr. Cole, this sequence of events means that " investigative information contaminated Mr. Hankerson's analysis, another potential source of bias." (Cole Rebuttal Aff. p. 11). He obviously knew before his comparisons began that Mr. Rudolph was the suspect in this case, just as, but with lesser justification, the initial examiner in Mayfield knew that Mayfield was a suspect because he was the number four candidate on an IAFIS search. Further, as in Mayfield, Mr. Hankerson, by the government's own account, was a highly respected supervisor with many years of experience, a fact that, according to the FBI, would undoubtedly influence any reviewer in this high profile case. Hankerson's opinions under these circumstances are not "the product of reliable principles and methods", and this witness has not "applied the principles and methods (of science) reliably to the facts of the case." (Rule 702).

Finally, it is unclear whether a crucial step in the ACE-V methodology- verification- ever took place in this case. Independent *and documented* verification is the step that the FBI identifies in its report as the most important safeguard against erroneous fingerprint identifications, and such a requirement has long been part of ATF's own protocols (See, n. 5, supra). The defendant alleges in his motion, and it is nowhere rebutted by the government, that no documentation exists that the particular comparisons at issue in this case were ever verified.[7]

---

[7] The motion (doc. 409) states at pages 16-17:

> As with Mr. Hankerson's conclusions, no documentation exists as to the precise points of comparison being relied upon by the reviewer. On October 5, 2004, the government indicated in response to a request for such documentation that "[t]he BATFE and experts who conducted technical review do not maintain case jackets, work papers or bench notes of that review process." (Doc. 348, p. 11). However, on December 7, 2004, the government produced eleven Case File review forms, all signed by Andrew McIntrye, who is alleged to be the technical reviewer for Mr. Hankerson'swork.(BH-ABL-006054-006078). None of these eleven forms relate to the four reports listed in the Summary that relate to Mr. Rudolph. All the forms have check boxes, one of which reads, "[w]as data

As Dr. Cole states in the attached affidavit, "(u)nder all the circumstances, (one) must conclude that the failure to conduct and document any verification review in the circumstances of this high profile case is fatal to the government's assertion that 'Mr. Hankerson's analysis complied with approved methods of fingerprint identification . . .' (Government's Response at 24)." (Cole Rebuttal Affidavit, p. 11).

C. The Government Has Failed To Sustain Its Burden Of Showing The Scientific Reliability of its Fingerprint Evidence

The court opinions attached to the Government's Response (Exhibits A and D) are notable for their absence of reference to any scientific study establishing the validity, or measuring the accuracy, of latent print identification. And as indicated above, not a single citation is made in the Response to any scientific authority supporting this position. No validation study of latent print identification is cited. No study measuring the accuracy of latent print identification is cited.

Only in one paragraph (at 21) does the Government's Response advance arguments in favor of the reliability of fingerprint identification, other than the argument that other courts have said it is so. It is, therefore, instructive to examine this paragraph in detail, as has been done in the attached Affidavit of Dr. Cole. As Dr. Cole demonstrates, none of the government's five

---

properly interpreted, and are the conclusions fully supported by the data ?" McIntrye has checked this box "yes" on all eleven forms, although nowhere is the basis for his conclusions documented. Another part of the form reads, "[a]re all graphs, charts, photographs an/or photocopies used to support conclusions in the case jacket ?" (Id.) This form is also checked "yes" on all eleven forms, although the government now represents that Hankerson never produced any documentation used to support conclusions. The Summary clearly implies that no identification is reported unless the reviewer independently agrees with the person being reviewed. However, in at least six of eleven forms the review forms were signed a day or even days after Hankerson filed his report.

arguments provides convincing evidence of the scientific reliability of latent print identification. Those arguments, and Dr. Cole's answers to them, are as follows:

1. Latent print identification "rests on a painstaking comparison of unique fingerprint characteristics." (Government Response, p. 21)

"Just because a method of analysis is 'painstaking' does not mean it reaches correct results. Astrologers or psychics may be painstaking their analyses, but unless they can show that they reach correct results an acceptable percentage of the time they should not be permitted to offer expert evidence in court." (Cole Rebuttal Aff., p. 14)

2. "[I]ts methodology is grounded in over 100 years of academic and practical research." (Government Response, p. 21)

"The Government does not elucidate to what 'academic' research it is referring. Not a single citation is offered. Presumably, the government is referring to the anatomical and statistical literatures that address, but do not resolve, the matter of the uniqueness of friction ridge skin. The anatomical literature detailing the formation of friction ridge skin is almost entirely irrelevant to the issue of the accuracy of latent print identification. Similarly, the statistical literature on the individuality of friction ridge skin does not address the issue of the accuracy of latent print identification. Nor does the government elucidate what is meant by 'practical research.' I will again conjecture that it means the experience of trying to match latent print to databases of inked prints. The process of completing casework can in no way be construed as 'research' concerning the question of the accuracy of latent print identification. Such research would require knowing the true origin of the latent prints being analyzed in casework." (Cole Rebuttal Aff., p. 14-15)

3."[I]t has been proven accurate on countless occasions." (Government Response, p. 21)

"Again, the Government gives no indication as to what evidence it is referring to that establishes that fingerprint evidence was accurate on 'countless occasions.' If I again try to project a more focused argument onto the Government's blanket declarations, I would hazard that the government means that in many cases in which fingerprint evidence indicated the guilt of the perpetrator some sort of external confirmation corroborated this conclusion (such as a confession). Using casework in this manner is extremely hazardous: no one knows the 'ground truth' (whether the perpetrator truly is guilty) in a criminal case, and, therefore, criminal proceedings cannot be used as 'tests' of the accuracy of the evidence proffered in them. Even setting this point aside, the Government's statement is logically bankrupt. One could simply declare the defendant guilty in all criminal cases, and be 'accurate on countless occasions' because the 'baserate' of guilt in criminal trials is probably greater than 50%. The relevant question is not whether the evidence is 'accurate on countless occasions,' but how often it is accurate relative to how often it is inaccurate. Astrology may be 'accurate on countless occasions'; it is its rate of inaccuracy that renders it unacceptable as expert evidence." (Cole Rebuttal Aff., p. 15-16)

4."[I]t is universally accepted throughout law enforcement and civil communities." (Government Response, p. 21)

"This argument does not even purport to address reliability. As *Kumho Tire* states, 'Nor . . . does the presence of *Daubert's* general acceptance factor help show that an expert's testimony is reliable where the discipline itself lacks reliability." (*Kumho Tire v. Carmichael*, 526 U.S. at 151). Moreover, acceptance within the group (law enforcement) that promotes the technique

should be accorded even less weight. Finally, it is not clear what the government means by 'civil communities.'" (Cole Rebuttal Aff., p. 16)

5. "[I]t is subject to constant testing and review." (Government Response, p. 21)

"Again, it is difficult to address this point since the Government does not specify what processes or procedures it is construing as 'constant testing and review.' I can again surmise that the Government is referring to procedures like 'verification.' But, as stated above, the ground truth is not known in casework. Verification determines whether a second examiner agrees with the initial examiner's conclusion, but it does not determine whether the initial examiner's conclusion is, in fact, correct. Only controlled studies, in which the ground truth is known can accomplish that." (Cole Rebuttal Aff., p. 16-17).

On the basis of the foregoing analysis, Dr. Cole correctly concludes: "The Government's Response thus continues the pattern I described in my affidavit of December 21, 2004 , that latent print examiners, prosecutors, and courts have used legal authority as a substitute for scientific studies of the reliability of latent print identification." (Cole Rebuttal Aff., p. 17.) The Government's Response does not withstand the "rigorous" *Daubert* inquiry mandated by *United States v. Frazier*, 387 F. 3d 1244, 1259-1263 (11th Cir. 2004), and therefore the government has not sustained its burden of proving the scientific reliability of its fingerprint evidence.

II

THE FORENSIC FINGERPRINT EXAMINATION IN THIS CASE IS INADMISSIBLE UNDER DAUBERT AND RULE 702 BECAUSE THE ANALYST HAS NOT RELIABLY APPLIED THE PRINCIPLES AND METHODS OF HIS OWN PROFESSION TO THE FACTS OF THIS CASE

The government contends that the issue of whether Mr. Hankerson's analysis complied

with approved methods of fingerprint identification is "something only briefly addressed in defendant's motion" and is one that should be addressed in cross examination before the jury. (Government's Response, p. 24). The government has misread defendant's motion because it cites numerous instances in which Hankerson did not follow reliable scientific protocol, some of which are discussed above. See also Motion to Exclude, pp. 13 n. 3, p. 16, p. 17-18, 45-47, 114-116. Moreover, after the filing of the motion, the government revealed in Exhibit B of its response that, contrary to it's prior representations, Hankerson will rely on Level 2 points as the basis for his comparisons. As indicated above (page 8 n. 3), Hankerson's Powerpoint indicates for the latents in question that in no instance does Hankerson rely on more than ten points of comparison and in one case he relies on six. Defendant's motion documents that there are numerous instances of two individuals sharing 16 level 2 points. (Motion to Exclude, p. 29-30, 66-67). The ridgeologists would condemn as unscientific any reliance on points. In this case, reliance on ten or less points would even be condemned by the point counters, especially in light of the Mayfield case, where there were "in excess" of 15 points and the four examiners were wrong. Even the FBI traditionally requires at least 12 points. (Exhibit 74, p. 715).

The government proposes that all these issues be left to the jury, but that proposal essentially nullifies the 2000 amendments to Rule 702. That Rule know provides:

> a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.
>
> "The proponent of expert testimony always bears 'the burden to show that... the

methodology by which the expert reach[ed] his conclusions is sufficiently reliable." *United States v. Frazier,* 387 F. 3d 1244, 1260 (11th Cir. 2004). And, "*Daubert's* requirement that the expert testify to scientific knowledge - conclusions supported by good grounds for each step in the analysis - means that any step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3rd Cir.1994). See also, *United States v. Sullivan*, 246 F.Supp. 2d 700, 2003 WL 680428 (E.D. Ken. 2003) ("Accepting the uniqueness and permanence of fingerprints, however, does not force the conclusion that law enforcement or other entities have developed a sound and reliable methodology for identifying or excluding individuals based on the comparison of fingerprints."); *United States v.Cruz-Rivera* (D. Puerto Rico 2000) 2002 WL 662128 ("Whether the principles for sound fingerprint identification analysis laid out in Judge Pollak's opinion have been followed in a particular identification is a separate question. Here, the critical police witness was unavailable at the scheduled evidentiary hearing because he was testifying at other trials. As a visiting judge about to leave the jurisdiction, I must therefore return that question to the Magistrate Judge originally assigned to the motion for the testimony. I observe the following, however. The ultimate question is the following: can the defendant establish that the Puerto Rico Police fingerprint identification practices followed in this case are so deficient under the standards described by Judge Pollak that the testimony must be excluded altogether; or is this simply a matter for cross-examination so that the jury can assess how much weight to give to the purported identification in this case?"). See also, *United States v. Allen*, 207 F. Supp. 2d 856, 869 (N.D. Ind. 2002) (same analysis applied to footwear impression evidence); *United*

States v. Beasley (8th Cir. 1996) 102 F.3d 1440,1448("In every case, of course, the reliability of the proffered test results may be challenged by showing that a scientifically sound methodology has been undercut by sloppy handling of the samples, failure to properly train those performing the testing, failure to follow the appropriate protocols, and the like."); *State v. Jackson*, 255 Neb. 68, 582 N. W. 2d 317, 325 (Neb. 1998) (the results of an unspecified STR procedure should not have been admitted absent a foundation that the lab had followed its own testing protocols).

On the present state of the record, the government has not sustained its burden of showing that Rule 702 has been satisfied. Defendant's motion should therefore be granted.

III

THE TESTIMONY OF A FORENSIC FINGERPRINT ANALYST IS INADMISSIBLE BECAUSE IT WILL NOT "ASSIST THE TRIER OF FACT" WITHIN THE REQUIREMENTS OF RULE 702 OF THE FEDERAL RULES OF EVIDENCE AND IT WILL BE MORE PREJUDICIAL AND MISLEADING THAN PROBATIVE UNDER RULE 403 OF THE FEDERAL RULES OF EVIDENCE.

"The final requirement for admissibility of expert testimony under Rule 702 is that it assist the trier of fact. By this requirement, expert testimony is admissible if it concerns matters that are beyond the understanding of the average lay person. See *United States v. Rouco*, 765 F.2d 983, 995 (11th Cir.1985) (expert testimony admissible if it offers something "beyond the understanding and experience of the average citizen"). Proffered expert testimony generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments." *United States v. Frazier,* 387 F. 3d at 1262-1263.

Further, "[b]ecause of the powerful and potentially misleading effect of expert evidence, see *Daubert*, 509 U.S. at 595, 113 S.Ct. at 2798, sometimes expert opinions that otherwise meet

the admissibility requirements may still be excluded by applying Rule 403. Exclusion under Rule 403 is appropriate if the probative value of otherwise admissible evidence is substantially outweighed by its potential to confuse or mislead the jury, ... or if the expert testimony is cumulative or needlessly time consuming. ... Simply put, expert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse." 387 F. 3d at 1262-1263.

The risk of undue prejudice and confusion is especially great when it comes to latent fingerprint identifications. With fingerprint evidence having been uncritically accepted by the American legal system for the past 80 years, the general public has come to firmly believe that fingerprint identifications are scientifically based and that they are invariably accurate. In a study that was conducted concerning jurors' attitudes toward fingerprint evidence, 93% of the 978 jurors questioned expressed the view that fingerprint identification is a science, and 85% ranked fingerprints as the most reliable means of identifying a person. Charles Illsley, Juries Fingerprints and the Expert Fingerprint Witness 16, presented at The International Symposium on Latent Prints (FBI Academy, Quantico, VA, July, 1987), Exhibit 67. As demonstrated in defendant's motion, however, these commonly held views are completely unwarranted. Latent fingerprint identifications are not scientifically supported and there are substantial questions regarding their reliability. Thus, while the probative value of the government's fingerprint evidence is, in reality, low, the danger of undue prejudice is extremely high, since there is a substantial danger that the jury will give the evidence considerably more weight than it deserves.

The Government responds to defendant's claim of low relevancy with the argument that

"Mr. Hankerson's testimony that defendant's fingerprints, and *no one else's*, were found inside the cab of the truck, would help the jury determine who was driving the truck *when it was seen in Birmingham*." (Government Response, p. 20)(Emphasis added). There are two answers to this argument. First, the government has apparently forgotten that it has previously represented to the Court that "Hankerson obtained three (3) latent lifts of value from Exhibits 55 through 59 (latents from driver's side seat belt buckle"). Of those lifts, Mr. Hankerson has concluded that the defendant made the latent prints on exhibits 57 and 58, *leaving one print unidentified*." (doc. 348, p. 18)(Emphasis added). This fact undermines the first prong of the government's relevancy analysis. Second, the government is assuming that the presence of Mr. Rudolph's print in the truck can somehow be related to the events in Birmingham on January 29, 1998. But it is well established in the scientific literature that one cannot time date a print. See Starrs, *Judicial Control Over Scientific Supermen: Fingerprint Experts and Others Who Exceed The Bounds*, (1999) 35 Crim. L. Bull. 234 (Exhibit 9). See also, *Mikes v. Borg*, 947 F.2d 353, 358 (9th Cir. 1991)("While the prosecution did not offer any evidence regarding the age of the fingerprints found on the posts, the defense expert testified that fingerprints can last indefinitely. This is consistent with the testimony of government experts in other cases."). This fact undermines the remaining prong of the government's relevancy argument.

The government's claim of relevancy for the latent on the back of one of the photographs found at Mr. Rudolph's trailer is even more far fetched. The government claims that the latent is relevant because its handwriting expert used it as a known sample to compare to questioned writing on a Loompanics receipt, and the presence of Mr. Rudolph's latent on the photograph would supposedly show that he wrote the writing on the photograph. (Government Response at

20-21) This proffer is absurd. If the government wants a sample of Mr. Rudolph's handwriting, all it has to do is ask for it. Moreover, an examination of its Exhibit C in support of the Government's Response In Opposition to Defendant's Motion To Exclude Testimony of Forensic Document Examiner (doc 445) indicates that the handwriting expert is relying on nine samples of knowns to compare to the Loompanics receipt, only one apparently came from the photographs. The government looked for Mr. Rudolph's prints on the Loompanics but none was found. The print on the photograph is of no probative value.

Finally, the government claims that the print on the bag found near the home of G.N. will help the jury to decide whether or not to believe G.N.'s account of his meeting with the defendant. How the presence of the print will do this is nowhere stated. In any event, whatever probative value there is for this print is vastly outweighed by the danger of misleading the jury about the so-called "science" of fingerprint testimony.

Conclusion

"*Daubert* put forth a two-pronged analysis, used to determine the admissibility of the proffered expert testimony on scientific issues under Rule 702. First, the expert testimony must be reliable, so that it must be 'scientific,' meaning grounded in the methods and procedures of science, and must constitute 'knowledge,' meaning something more than subjective belief or unsupported assumptions." *McDowell v. Brown*, 392 F. 3d 1283, 1298 (11th Cir. 2004). Fingerprint testimony is not grounded in the methods and procedures of science and is based on nothing more than subjective belief and unsupported assumptions.

Defendant asks that the Court exclude the government's fingerprint testimony for all of the reasons stated above and in defendant's motion to exclude. The government has not sustained

its burden of proof under *Daubert* and Rule 702.

Dated: February 18, 2005

Respectfully Submitted,

Judy Clarke
Bill Bowen
Michael Burt
Counsel for Eric Robert Rudolph

By:_____
s/Michael Burt
MICHAEL BURT
Bar Number: 83377
Attorney for Eric Robert Rudolph

OF COUNSEL:
FEDERAL DEFENDERS OF SAN DIEGO, INC.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 544-2720
Facsimile: (619)-374-2908

WHITE, ARNOLD, ANDREWS & DOWD
2025 Third Avenue North, Suite 600
Birmingham, Alabama 35203
Telephone: (205) 323-1888
Facsimile: (205) 323-8907

LAW OFFICES OF MICHAEL BURT
600 Townsend Street, Suite 329-E
San Francisco, California 94103
Telephone: (415) 522-1508
Facsimile: (415) 522-1506

CERTIFICATE OF SERVICE

I do hereby certify that on this date of February 18, 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following, who were also served by e-mail:

Michael W. Whisonant
Will Chambers
Office of United States Attorney
1801 Fourth Avenue North
Birmingham, Alabama 35203-2101

Raymond Joseph Burby IV
US Attorney's Office
75 Spring Street S.W., Suite 600
Atlanta, Georgia 30303

_____

s/Michael Burt
MICHAEL BURT
Bar Number: 83377
Attorney for Eric Robert Rudolph

EXHIBIT C