

PROCEEDINGS

1 THE CLERK: This is on for trial, calendar
2 number four, indictment no. 8552 of 2000, James Hyatt.
3 Defendant is produced by the Department of Corrections.
4 The defendant is present in the courtroom, the A.D.A. is
5 present.

6 MR. ZUSS: Robert Zuss, Legal Aid Society for
7 James Hyatt.

8 MS. STEPNER: Caryn Stepner for the Office of
9 the District Attorney.

10 MS. SCHAEFFER: Hillary Schaeffer for the
11 People, good morning.

12 THE COURT: The Court has directed a Frye
13 hearing prior to trial to determine whether an expert
14 witness proffered by the defense will be permitted to
15 testify to establish a foundation that can qualify him
16 as an expert. The ruling is within the Court's
17 discretion, so the structure of the hearing will be that
18 the defendant will call the proffered expert witness,
19 conduct the examination, and then I will allow the
20 People to cross-examine the proffered expert.

21 MS. STEPNER: Your Honor, I have the latent
22 print examiner who evaluated the prints in this case and
23 I ask that he be present for the testimony of the
24 proffered defense expert.

25 THE COURT: Do you have any problem with that,

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1 Mr. Zuss?

2 MR. ZUSS: No.

3 THE COURT: He may stay.

4 MS. STEPNER: Thank you.

5 THE COURT: Mr. Zuss, will you call your
6 witness, please?

7 MR. ZUSS: The defense calls Simon Cole.

8 (Whereupon, the witness approaches the witness
9 box.)

10 D R . S I M O N C O L E , having been called as a
11 witness by and on behalf of the Defense, after having been
12 first duly sworn, testified as follows:

13 THE CLERK: Put your hand down, please be
14 seated. State your first and last name and spell your
15 name, please.

16 THE WITNESS: Simon, S-I-M-O-N, Cole, C-O-L-E.

17 THE COURT: Dr. Cole, I am going to ask you to
18 keep your voice up, project it out towards Mr. Zuss so
19 that myself and the attorneys and the defendant can all
20 hear your answers.

21 THE WITNESS: Okay, how's that?

22 THE COURT: That's good.

23 You may inquire, Mr. Zuss.

24 MR. ZUSS: Thank you.

25 DIRECT EXAMINATION BY

DIRECT - DR. COLE / MR. ZUSS

1 MR. ZUSS:

2 Q Good morning, Dr. Cole.

3 Dr. Cole, please tell the Court of your
4 educational background?

5 A Bachelor's degree from Princeton University in
6 history and I have a Ph.D. in science and technology studies
7 from Cornell University.

8 Q Could you tell the Court --

9 THE COURT: I'm sorry, Ph.D. in what?

10 THE WITNESS: The field is called science and
11 technology studies.

12 THE COURT: Go ahead.

13 Q What are science and technology studies, Dr. Cole?

14 A Science and technology studies is an
15 interdisciplinary field that tries to understand what science
16 and technology are and their role in society. It's composed
17 of the history of science, sociology of science, philosophy
18 of science and policy studies.

19 Q Do you have a specialty in any area?

20 A My specialty was my dissertation research, which
21 was on the history and sociology of criminal identification
22 technology, starting with photography and going through DNA
23 typing, the bulk of that research was, of course, about
24 fingerprinting.

25 Q Now, did you get involved in this area of study?

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1 A I got involved because the department had a grant.

2 Q Excuse me?

3 MR. ZUSS: Your Honor, can you hear the
4 witness?

5 THE COURT: If you step back a little bit
6 further, he will project his voice to you. I can hear
7 him, I'm worried about the defendant and the
8 prosecutor. If you step back a little bit, he will
9 project to you.

10 MR. ZUSS: Okay.

11 THE COURT: That's good.

12 Q I was asking you how you got involved in that area?

13 A I was there with people in the department that were
14 studying the reception of DNA typing in courtrooms, in legal
15 settings, this was in the early 1990s. I was interested in
16 comparing that to the reception of fingerprint evidence. I
17 essentially wanted to compare fingerprint evidence and DNA.
18 One of the main questions I wanted to understand was why
19 people believe fingerprint evidence. People being both the
20 public at large and courts.

21 Q Have you published any articles or have you
22 published in this area?

23 A Yes, my pain publication is my book called Suspect
24 Identities, a history of fingerprinting and criminal
25 identification.

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1 MR. ZUSS: Your Honor, would you like to see
2 the book?

3 THE COURT: Yes.

4 MR. ZUSS: The witness has it with him.

5 MS. STEPNER: Objection.

6 THE COURT: I'm sorry.

7 MS. STEPNER: Objection, your Honor.

8 THE COURT: Overruled.

9 Q Dr. Cole, would you show the Judge the book?

10 THE WITNESS: Here you go.

11 (Handing)

12 Q Was your dissertation published, Dr. Cole?

13 A A dissertation is published in a sense by
14 university microfilms. They make it available to people on
15 microfilm and in print copies, it's not published in the
16 sense that it's -- a cover is put on it and sold in book
17 stores, but it's considered published. I also published two
18 peer-reviewed articles on the subject of latent print
19 identification.

20 Q Could you tell the Court what peer review means?

21 A Peer reviewed means that a scholarly journal,
22 before they publish something, will send it out to other
23 qualified scholars in the discipline to see if they approve
24 of what's in it and whether its valid conclusions and data
25 and they will either recommend that it be published or

1 recommend that it not be published or recommend that it be
2 revised and then published, so it's sort of a reality check
3 on scholarly work.

4 Q In addition to your book and your dissertation, Dr.
5 Cole, did you publish anything else?

6 A I've published other articles on other
7 peer-reviewed articles on other topics. I've published some
8 popular magazine articles that, because they are in
9 magazines, they are of course not peer-reviewed, chapters of
10 books, scholarly anthologies and so on.

11 Q In relationship to forensic fingerprint
12 methodology, have you published anything else besides the
13 book?

14 A Book, two scholarly articles, and I believe two
15 magazine articles.

16 Q Could you tell the Court about the two scholarly
17 articles?

18 A Yes, the first one was called, Witnessing
19 Identification, if I can refer to my CV, I can give you the
20 title of that article. It was Witnessing Identification
21 Latent Fingerprint Evidence and Expert Knowledge. It's
22 published in a journal called Social Studies of Science.

23 Q The other article?

24 A Which is a journal that does social studies of
25 science, sociology of science, primarily. The other article

1 was called, What Counts for Identity? The Historical Origins
2 of the Methodology of Latent Fingerprint Identification, that
3 was in the journal called Science in Context, which is
4 another interdisciplinary science studies journal.

5 Q Could you tell the Court -- give the Court some
6 indication of the nature of the kind of work that went into
7 publishing both the book and the articles?

8 A Yes, the research that I did for this project
9 consisted of doing legal history, the cases involving
10 fingerprints evidence from its earliest days until the
11 present, research on the professional literature that
12 fingerprint examiners published in various journals, books
13 written by fingerprint examiners, technical manuals,
14 scholarly articles, et cetera.

15 It also consisted of a small amount of field
16 work done in a police crime laboratory where I watched what
17 the latent fingerprint examiners did, some e-mail
18 communications with working fingerprint examiners, a small
19 e-mail survey of fingerprint examiners, in which I had
20 questions and sent them via e-mail to examiners who were
21 willing to participate in this survey, that's the bulk of the
22 research.

23 Q Over what period of time, Dr. Cole, have you been
24 engaged in that research, that work?

25 A From late 1993 until the present. The project

1 began in 1993.

2 Q So from late 1993 until the present, you've been
3 engaged in a study of the fingerprint profession?

4 A That's correct.

5 Q By the way, when did you get your Ph.D.?

6 A The Ph.D. was granted in 1998.

7 Q What do you describe as your specialty?

8 A My general specialty would be law, science and
9 technology and I think I have specific expertise in criminal
10 identification technology and especially about
11 fingerprinting.

12 Q Do you have a view of what science is, what makes
13 something a science?

14 A Yes, part of what the field of science and
15 technology studies is is to understand what science is and
16 what it isn't, what makes something science and what makes it
17 not science. Obviously, I thought about that question a lot
18 in the course of my research and in my course work. A
19 definition of science is a subject of great debate within the
20 field, it's very hard to pin something down, but the general
21 agreement seems to be around the idea that science consists
22 of testing of statements that have been tested in some way
23 through experiment or some other way rather than simply
24 asserted and assumed or believed because somebody, an
25 authority, says that they are true, that your statements must

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1 be tested.

2 Another prime characteristic of science, I
3 think that pretty much everyone in the field would agree
4 upon, is organized skepticism. Science, as a community, is
5 designed to subject all statements to scrutiny by the general
6 community itself. The idea is that if you say something that
7 isn't true, somebody within the scientific community will
8 eventually catch you, will call you at it because they will
9 test your assumptions. They scrutinize what you are saying
10 and they will find the error. So, science has this faith
11 that errors will eventually be found out, they can't
12 promulgate themselves forever.

13 Q Is it your view, Dr. Cole, that science, for
14 something to be a science that hallmarks of that discipline
15 would be error rating, testing, measuring; would I be
16 correct?

17 A I think those are good hallmarks, those are the
18 hallmarks that the Supreme Court came up with in its recent
19 Dawbert case, where they were faced with a difficult task of
20 defining what science is. I think those are pretty good
21 hallmarks. I think philosophers of science would quibble
22 about them a little bit, but I think they are pretty good as
23 a minimum sort of standard for science.

24 Q Do you view yourself as a philosopher of science or
25 sociologist of science? What's your description of your

1 expertise?

2 A I view myself primarily as a sociologist and
3 historian of science and technology. In my degree program, I
4 learned a little bit about the philosophy of science, but
5 that wasn't my primary area.

6 Q So since 1993, since you've been studying the
7 methodology of the fingerprint profession, have you come to a
8 conclusion about whether or not fingerprinting, forensic
9 fingerprint identification, is a science or not?

10 A Yes, I have.

11 Q Can you share that opinion with the Court?

12 A My opinion is that it does not meet a reasonable
13 definition of being a scientific field or scientific
14 conclusion.

15 Q Would you explain to the Court why that's your
16 opinion?

17 A My reason for that is what fingerprint examiners
18 claim to be able to do is incredibly strong. They claim to
19 be able to bring in a crime scene print and an ink print, as
20 you will see in this case, and they claim that they can
21 conclude that the finger that made the inked print is the
22 only finger in all the world of all the fingers known in the
23 world, living or dead, that could have made that crime scene
24 print. That's an incredibly strong claim and I don't think
25 they have the scientific research to back it up and I don't

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1 think that they have tested whether or not they can do that
2 in a reliable way.

3 Now, in order to test it, they would need to
4 set up some tests for themselves and see how good they are at
5 doing this and those tests have never been done.

6 Q Based on your studies of the fingerprint
7 profession, has the fingerprint profession tested itself in
8 the way that you are describing a science would have or
9 should have?

10 A The closest that there has been such a thing has
11 been some nonblinding proficiency test.

12 Q Could you explain to the Court what that means?

13 A They were proficiency tests in which, when I say
14 they were nonblind, what I mean is that the examiners who
15 took the test knew it was a test. A blind test would mean
16 you would somehow be able to pretend it was a real case and
17 they wouldn't be aware that it was a test.

18 The test essentially gave these examiners some
19 fake crime scene prints and it gave them a set of fingerprint
20 cards to compare those crime scene prints to. The test was
21 to see how some of those crime scene prints did match -- did
22 in fact match some of the inked fingerprints and some of them
23 did not. The test was to see how often they got the right
24 answer and how often they didn't.

25 The results on the first test were very poor.

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1 The figure was 22 percent of examiners made a false positive;
2 that is, they matched a latent, a crime scene print to an ink
3 print that was not the print. It was an error that would
4 have incriminated an innocent person as well as a lease false
5 negative.

6 Q When did this take place?

7 A A 1995 test.

8 Q Do you know who the testing agency or group was?

9 A The testing agency was called the Collaborative
10 Testing Service. It is, I believe, an organization that does
11 testing of labs, so they do not do just forensic testing,
12 they would do, you know, medical labs and things like that.
13 They are an independent for-profit corporation.

14 The test was designed with the cooperation of
15 the International Association of Identification, which is the
16 leading professional organization of fingerprint examiners in
17 this country and probably the world.

18 Q Based upon your studies, you are saying that there
19 was an error rate of 22 percent?

20 A In that 1995 test, there were subsequent tests
21 where the error rate went down.

22 Q Can you describe those?

23 A I have them here.

24 THE COURT: You may make reference to them, if
25 you wish to refresh your recollection.

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1 MR. ZUSS: Judge, by the way, when I'm asking
2 questions for the witness to explain to the Court, I
3 know, based on your experience, you probably know a lot
4 of these things about false positives and error rates
5 and things like that, but I think, to make a complete
6 record, we need to do that, okay?

7 THE COURT: You can assume my knowledge to be
8 that of the ordinary juror.

9 MR. ZUSS: Thank you, Judge.

10 Q Go on. You said there were subsequent tests in
11 '95?

12 A That's correct. The 1996 test -- sorry that's
13 '97. The 1996 test reported that three percent of the
14 laboratories made false positives.

15 Q By the way, can you explain what a false positive
16 is?

17 A Again, a false positive means you're matching the
18 crime scene print to the wrong inked print. The finger that
19 made the inked print is not the finger that made the crime
20 scene print, but the examiner is reporting that it is. The
21 examiner is again making this very strong conclusion that the
22 finger that made the ink print is the only finger in all the
23 world that could have made that crime scene print and the
24 examiner was wrong.

25 Q I have two questions out of that, we will get back

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1 to the tests.

2 What's the practical result, in your view, of
3 a false positive?

4 A Well, were it a real case, that would lead to the
5 examiner giving false testing, not deliberately false, but
6 incorrect testimony, and with what I know about the way
7 fingerprint evidence is received in courtroom, in court, that
8 would lead to the jury believing that an identification had
9 been made with the power of science and in almost all cases,
10 that would lead to a conviction of somebody who may or may
11 not be innocent, but that wasn't their fingerprint.

12 Q Thank you.

13 THE COURT: Let me ask you a question: Was
14 there anything relative to the 20 percent in the 1995
15 study and the three percent in the 1996 study, was there
16 any analysis of the cases that the error was caused by
17 either an inexperienced -- by the examiner or by the
18 quality of the print, was there any follow-up on that?

19 THE WITNESS: There was no official follow-up
20 in that sense, there was a lot of debate within the
21 profession over what that was. There were people in the
22 profession who claimed, and I haven't seen the evidence
23 for this, but that some of those people on that first
24 test were not the best people who should have been
25 taking the test. The other point they made was that the

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1 test was international, so they weren't all from the
2 United States.

3 THE COURT: Okay.

4 Q One other question before we go on in your study.

5 Dr. Cole, has there ever been a measurement or
6 a test of the assertion that no two prints are alike?

7 THE COURT: Wouldn't you have to check all of
8 them to make that assertion?

9 A Yes, I think -- I think the Judge is correct.
10 There has been no test of that assumption. There have been
11 various arguments made to support that assumption.

12 THE COURT: Any two have ever been found to be
13 alike?

14 THE WITNESS: It all depends by what you mean
15 by alike. No two have been found to be exactly alike.
16 The question is whether they have been found to be very
17 similar or how similar that is. I think the more
18 relevant question is whether they might be mistaken for
19 one another, and to research that question
20 scientifically, we need to do something like that kind
21 of test in which we're testing the -- what the
22 examiner's matching process rather than trying to do
23 experiments to find out if there are any two exactly
24 alike in the world.

25 Q You were telling the Court about the subsequent

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1 tests, you said there was one in '97 or '98?

2 A The 1997 test, 16 incorrect identifications were
3 made by 13 participants and the total number of participants
4 was 124, so I haven't done the math, but I did in the book,
5 if you want me to refer to that, I think that's in the area
6 of 10 percent.

7 Q It's about 10 percent, let's leave it at that.
8 It's about 10 percent, somewhere in that area.

9 Were there subsequent tests to the 10 percent?

10 A Yes, there would be the 1998 test, 21 erroneous
11 identifications made by 14 participants. Again, if you were
12 calculating an error rate, you can do it different ways based
13 upon the total number of errors or the total number of people
14 who made an error, but again, 14 examiners made a false
15 positive out of 128 total participants. Again, that would be
16 in the area of 10 percent.

17 Q Are there tests post '98, after 1998?

18 A Yes. After that, I have the most recent one, I have
19 a gap after that, but I do have the 2001 test.

20 Q This is also by the Collaborative Testing Service?

21 A Yes, these are all by the Collaborative Testing
22 Service.

23 Q In association with the IAI?

24 A The first one is in association with the IAI, the
25 second one, I mean, this last one does not seem to say

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1 explicitly.

2 Q Do you know what the results were from the results
3 of the 2001 test?

4 A Yeah, 10 false positives reported by eight
5 participants out of 296 total participants, that's a low
6 error rate, that's .3 percent.

7 Now, again, that was in answer to your
8 question of whether there has been adequate testing. You can
9 argue about whether this testing is adequate or not, but this
10 is the closest that the profession has come to doing a test
11 of its own reliability.

12 Q Now, based upon the studies that you have done
13 since 1993 and all the work you have done in this field, the
14 methodology and the recovery of fingerprints and their
15 identification by examiners, your opinion is that this is not
16 a science, is that right?

17 A My opinion is that this does not meet my definition
18 of science, the Supreme Court's definition of science or most
19 philosophers of science's definition of science or most
20 scientists' definition of science.

21 Q What do you say forensic fingerprint identification
22 is?

23 A I would say it's a technical process that's been
24 devised over the years in which people have acquired skills
25 and knowledge, much like any other technical process like, be

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1 it like an auto mechanic, repairing a car, something like
2 that, and whose reliability has not been measured.

3 Q When you speak of a reliability, Dr. Cole, what are
4 you referring to?

5 A Reliability would be some kind of measurement of
6 how often these guys are right and how often they are wrong
7 when they make these conclusions.

8 Q Is that the same thing as an error rate?

9 A An error rate would be a crucial part of that. It
10 would lead to an error rate, yes.

11 Q Again, based upon your studies, since '93, that
12 assertion that fingerprint -- forensic fingerprint examiners
13 aren't wrong has not been tested?

14 A Correct, it has not been tested or it has been
15 tested by these tests. If you accept these tests, then the
16 assertion that the error rate is zero is obviously false,
17 because these tests show that they are false and real live
18 cases of mistaken identification show that it's false. The
19 reason I say the argument that the error rate is zero is
20 because, to my knowledge, in the literature and in other
21 hearings that I've been at, a leading fingerprint examiner
22 still claims that fingerprint identification has a zero error
23 rate.

24 Q You just mentioned real live cases based upon your
25 studies in this field since 1993, are you familiar with real

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1 live cases in which there were misidentifications?

2 A I am familiar with several real live cases in which
3 there have been erroneous fingerprint identifications leading
4 to that is false positives, again, leading to convictions,
5 false convictions.

6 Q Would you describe one or two of them for the
7 Court?

8 A Yes, I will start with a case called State versus
9 Caldwell (phonetic), the case was in Minnesota in 1997. I
10 believe the Appellate decision dates to a bill later in 1981
11 or in 1982, a murder case in which there was fingerprint
12 evidence against the defendant. He was convicted.

13 In the trial, subsequent trial of his wife,
14 the fingerprint evidence was reexamined and discovered to be
15 a bad match, a false match. It was not his fingerprints as
16 attested to.

17 THE COURT: Is that by another fingerprint
18 expert?

19 THE WITNESS: By another fingerprint expert and
20 I believe three fingerprints experts were brought in to
21 agree with his testimony. I should say that that first
22 false match was attested to by three experts, all of who
23 were members of the International Association of
24 Identification, two prosecution witnesses and one
25 defense witness.

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1 Q You have another example to give the Court?

2 A The second case I would refer to, the defendant's
3 name was Richard Jackson, this case dates from 1999 in
4 Delaware County in Philadelphia. Mr. Jackson was convicted
5 of murder and sentenced to life based primarily on
6 fingerprint evidence. That match was attested to by three
7 police examiners, I believe. It was disputed by, I believe,
8 two or three defense experts who, at trial, the jury believed
9 the prosecution experts and he was convicted.

10 Subsequently, those defense experts took the
11 prints to the International Association for Identification,
12 they took them to the FBI, and those bodies eventually agreed
13 that it was a false match, went to the Court and eventually
14 Mr. Jackson was freed.

15 Q Are you familiar with the National Institute of
16 Justice?

17 A Yes, I am.

18 Q Has the National Institute -- what is the National
19 Institute of Justice?

20 A The National Institute of Justice describes itself
21 as the research arm of the Department of Justice. It's a
22 part of the Department of Justice.

23 Q Now, in your experience and study in this field, do
24 you know of a National Institute of Justice appeal regarding
25 the methodology involved in forensic fingerprint

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1 examinations?

2 A Yes, I do.

3 Q Can you explain that to the Court?

4 A The National Institute of Justice issued, I don't
5 have the exact date, but it would have been around in 1999 or
6 2000, a, what's called a request for proposals.

7 MS. STEPNER: I didn't hear that.

8 A A request for proposals, an RFP, which is
9 essentially a document that says, we would like you to submit
10 research grants in this area. Here is what we want you and
11 if successful, here is what we're funding research in, here
12 is what we want to develop grants in.

13 Q What is the request for?

14 A They wanted fingerprint research on the validity on
15 the scientific validity of fingerprint identification. We
16 would like grants demonstrating the scientific validity of
17 fingerprint identification. The reason that that is so
18 significant is that it sounds to me like a statement that
19 research on the scientific validity of -- research on the
20 scientific validity of fingerprint identification did not
21 exist, that's why they were asking for it.

22 I should note also that that request for
23 proposals was drafted by something called the -- a
24 fingerprint research advisory committee, which had, as
25 members, many of the leading fingerprint examiners in this

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1 country.

2 Q Do you know the results of that article?

3 A They received four proposals, they deemed three of
4 them irrelevant, which, you know, I think means they were
5 just about something else and they received one relevant
6 proposal which, again, I think speaks to the number of
7 scientists out there who are interested in this problem,
8 which is very few. That proposal was not funded, it was sent
9 back for revision. I believe that that proposal has now been
10 withdrawn.

11 Q Dr. Cole, based, again, upon your experience and
12 study in this field, since 1993, your opinion as to the
13 methodology of forensic fingerprint examination, not being a
14 science, are there people that you are familiar with,
15 academics, whoever, who agree with you or who you agree with?

16 A Yes, I would say the majority of academics who have
17 written on this subject tend to agree with the position that
18 it does not qualify as science.

19 Q Could you give some examples to the Court who those
20 individuals might be?

21 A Yes, one is named David Stoney (phonetic), he has a
22 Ph.D. in forensic science from Berkeley. He practices in all
23 kinds of forensic science, not just fingerprinting, and he is
24 also of the opinion that it does not qualify as science. He
25 has published this opinion in several places, including --

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1 MS. STEPNER: Your Honor, I am going to object
2 to this.

3 THE COURT: Overruled.

4 Continue.

5 A Including a legal treatise called Modern Scientific
6 Evidence and I believe a forthcoming book that's edited by
7 Henry Lee, the famous forensic scientist on fingerprint
8 identification.

9 A second one is Professor James Starrs, he is
10 a professor of law and of forensic science at George
11 Washington University, editor of a forensic science
12 newsletter called Scientific Sleuthing Review, and he also is
13 of the opinion that it does not qualify as science. He also
14 has expertise in many other areas of forensic science other
15 than fingerprinting.

16 Q Are there others?

17 A Both professors, Starrs and Dr. Stoney, have been
18 admitted to testify to this in court, in front of a jury.

19 Q Where in court?

20 A Professor Stoney, sorry, Dr. Stoney was in a state
21 case in Georgia, death penalty case, Professor Starrs was in,
22 I believe, also state cases in Arizona and most recently in
23 California. The California case, the defendant was called
24 Robert Nawi, N-A-W-I.

25 Q Are there other individuals who you know of

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1 academic law professors, professors of any type who are on
2 the same side of --

3 A There are several law professors, one named Michael
4 Saks, S-A-K-S, at Arizona State University who has written
5 extensively on all kinds of forensic identification
6 evidence. He has argued in law review articles vociferously
7 that fingerprinting does not qualify as science.

8 Professor David Faigman, F-A-I-G-M-A-N, at
9 Hastings Law School has given newspaper interviews saying the
10 research is too thin to qualify as science.

11 The NIJ, as I referred to, which had on its
12 board-qualified forensic scientists and fingerprint examiners
13 and even some fingerprint examiners -- leading fingerprint
14 examiners themselves have stated in print that the scientific
15 research into the validity of fingerprint identification has
16 been lacking, that fingerprint identification has been
17 accepted in court essentially through default. I'm thinking
18 specifically --

19 Q Who would that be, Dr. Cole?

20 A I'm thinking specifically of Sergeant David
21 Ashbaugh, A-S-H-B-A-U-G-H, of the Royal Canadian Mountain
22 Police, who was certainly one of the leading fingerprint
23 examiners of the world, and his book, which is titled, let me
24 get it right, Quantitative-Qualitative Friction Ridge
25 Analysis.

MM

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1 Q Who is this Sergeant Ashbaugh?

2 A Sergeant Ashbaugh is a fingerprint examiner for the
3 Canadian Mountain Law -- Canadian Mountain Police. He is one
4 of the most active fingerprint examiners in terms of
5 publishing in the literature, publishing books, instructing
6 other fingerprint examiners and so on. He is the inventor of
7 the term ridgeology, R-I-D-G-E-O-L-O-G-Y, which is a very
8 important term within the field.

9 Q What are you saying, that Sergeant Ashbaugh asserts
10 --

11 A Should I read?

12 MR. ZUSS: Your Honor?

13 THE COURT: You may.

14 A This is from Page 3 of a draft of his book:

15 "It is difficult to comprehend that a
16 complete scientific review of friction ridge identification
17 has not taken place at some time during the last 100 years.
18 A situation seems to have developed where this science grew
19 through default." I don't want to read too much of this.

20 Next paragraph begins: "In the past, the
21 friction ridge identification science has been a kin to a
22 divine following."

23 Q Dr. Cole, do you have a view as to how that came to
24 pass, that forensic fingerprint identification examination
25 and identification came to be so well accepted in measure,

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1 popular culture and in courtrooms?

2 A I think the reason fingerprint examiners never
3 tested their own reliability or their own assumptions is
4 because they were never forced to. And in large parts,
5 that's because the courts, when it was first introduced as
6 scientific evidence pretty much accept the -- accepted it on
7 faith. Fingerprint examiners came in and said this is
8 science, this is 100 percent reliable. We can make these
9 conclusions with certainty and courts pretty much agreed to
10 that and said okay.

11 I think it's important to understand that this
12 was 1911, 1910, around that time and courts did not think
13 about science in the way that they do today or know as much
14 about science or have the same conception of science. So the
15 Court, there is no reason to expect that the courts at that
16 time would have asked the kinds of questions about something
17 purporting to be scientific evidence that they would ask
18 today knowing what they know now.

19 Once the courts had declared that this was
20 science and that this was reliable, no one had any incentive
21 to question, not defense attorneys, not scientists
22 themselves, not the scientific community, which rapidly
23 became uninterested in fingerprint identification. It became
24 sort of marginalized as this area of forensic science, that
25 wasn't a sexy area of research for people in the hard

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1 sciences and not fingerprint examiners themselves and not the
2 courts and not the person in the street. It sort of became a
3 shrine as reliable and factual just through that momentum.

4 Q Going back one moment to individuals who you are
5 aware of, based on your studies, who agree with your view
6 that forensic fingerprint examination is not a science. Do
7 you know of a judge in any case who has come down on that
8 side?

9 A There was a case in the early -- in 1995, that I
10 read the transcript of, a federal case called United States
11 versus Parks, in which after hearing testimony from three
12 fingerprint examiners and with the judge questioning them as
13 to where their scientific literature was, what the standards
14 were for a match and so on, the kinds of questions that I
15 think should be asked about science ended up excluding
16 fingerprint evidence and saying he was never going to use it
17 again. That was in the transcript, saying that he -- the
18 expertise of this group was as fragile as any group of
19 experts that he had ever seen.

20 Q Is it your opinion, Dr. Cole, your position, based
21 upon your experience and study, that the fingerprint matching
22 process that is used by examiners is not reliable?

23 A It's my opinion that its reliability has not been
24 measured. It may or may not be reliable, but we don't know
25 because we haven't tried to find out, we haven't tested it or

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1 measured it. It's an unknown reliability.

2 MR. ZUSS: One moment, Judge, I think I'm
3 finished. Give me one moment.

4 I'm finished and I'll hand the witness over to
5 the District Attorney.

6 MS. STEPNER: Your Honor, can I have five
7 minutes? I was handed Mr. Cole's new CV as he stepped
8 onto the witness stand, I need to look at it.

9 THE COURT: Let's take a 10-, 15-minute break
10 at this point.

11 MS. STEPNER: Okay.

12 THE COURT: We'll call you in about 15 minutes.

13 THE WITNESS: Okay.

14 THE COURT: Thanks.

15 (Brief recess taken.)

16 THE COURT: We will continue the hearing. The
17 defendant is present, both attorneys are present.

18 Dr. Cole, I would just remind you that you are
19 still under oath.

20 Cross-examination.

21 MS. STEPNER: Thank you, your Honor.

22 CROSS-EXAMINATION BY

23 MS. STEPNER:

24 Q Dr. Cole, you are being paid for your testimony,
25 are you?

CROSS - DR. COLE / MS. STEPNER

1 A Yes.

2 Q Can you please inform the Court of what your fee
3 arrangement is in connection with your testimony?

4 A Yes, I'm charging \$50 an hour.

5 Q So how many hours have you billed in connection
6 with this case?

7 A I'm trying to calculate it in my head, I would say
8 in the area of 10. I would say in the area of 10 hours.

9 Q Now, currently, are you employed? Besides doing
10 this consulting, are you employed?

11 A Yes, I am.

12 Q As what?

13 A As a visiting scientist at Cornell University.

14 Q How long are you going to be at that position?

15 A For one year.

16 Q When did you start?

17 A I started Monday.

18 Q This past Monday?

19 A Yes.

20 Q Prior to that, over the course of this year, where
21 were you employed?

22 A Over the course of this year, I was unemployed
23 until starting in November and I was doing various consulting
24 jobs, some like this and some totally unrelated to this.

25 Q How old are you?

CROSS - DR. COLE / MS. STEPNER

1 A 34.

2 Q Now, you are not a scientist, are you?

3 A I am a social scientist, I'm not a scientist in the
4 sense of a laboratory scientist, no.

5 Q So the answer to that question would be no, you are
6 not a scientist?

7 A That's right.

8 Q You would agree that fingerprint identification has
9 been recognized as a science for years, isn't that correct?

10 A It has been called a science by the courts, yes.

11 Q And by society?

12 A Has society thought of fingerprinting as science,
13 yes.

14 Q You are simply a part of a group of academics who
15 are challenging that 100-year old tradition, is that correct?

16 A I don't know what you mean by part of a group, I
17 came to my conclusions independently.

18 Q But the people that you say agree with you and the
19 other people that you mention, Starrs and Stoney, they are
20 also academics, correct?

21 A Stoney is not really an academic, he is a
22 practicing forensic scientist, he works as a forensic
23 scientist.

24 Q The others that you mentioned agree with you, they
25 are academic?

CROSS - DR. COLE / MS. STEPNER

1 A They are academic, yes.

2 Q As you said yourself, you are simply a historian?

3 A I didn't say simply.

4 Q Primarily?

5 A I was -- I was primarily a historian and
6 sociologist.

7 Q You indicated on direct examination that your work
8 has been devoted since 1993 to the present of the study of
9 fingerprints, isn't that right?

10 A I said I had been working since 1993 to the present
11 on fingerprint identification, it was not devoted exclusively
12 to that.

13 Q But primarily?

14 A Primarily, yes.

15 Q And that is the basis, that research and that work
16 is the basis for the expertise that you are claiming you have
17 in connection with this area, is that right?

18 A That's correct.

19 Q But, as you indicated, your research and work was
20 not exclusively relating to fingerprints in the time from
21 1993 to the present?

22 A That's correct.

23 Q You were involved in many other areas, isn't that
24 correct?

25 A I had other research projects going on as well,

1 yes.

2 Q As a matter of fact, you wrote an article regarding
3 Megan's Law?

4 A Yes, that's correct.

5 Q It's entitled the Sexual Psychopath Statute to
6 Megan's Law, Psychiatric Knowledge in the Diagnosis and
7 Treatment of sex Criminals in New Jersey, that was your
8 article, right?

9 A That's correct.

10 Q That article was published in July of 2000?

11 A That's correct.

12 Q Obviously, you did research for that article?

13 A Yes.

14 Q Clearly, during the research for that article, you
15 weren't working on your research for the fingerprints?

16 A That's correct.

17 Q You also wrote an article and a book, both an
18 article and a book chapter entitled, "Do androids Pulverize
19 Tiger Bones To Use As Aphrodisiacs," you wrote that as well?

20 A Yes, I did.

21 Q That article was published in 1995?

22 A That's correct.

23 Q The chapter was published in 1997?

24 A That's correct.

25 Q Again, nothing having to do with fingerprints?

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1 A That's right.

2 Q With respect to that research and study --

3 A Yes.

4 Q -- you also wrote some book reviews?

5 A Yes.

6 Q In 1999, you did a review of detective fiction and
7 the rise of forensic science?

8 A Yes.

9 Q History book, right?

10 A That is -- it's really an English literary studies
11 book actually.

12 Q Nothing to do with fingerprints?

13 A It has a lot to do with fingerprints, it's the rise
14 of forensic science. There is a whole chapter on
15 fingerprints.

16 Q A whole chapter, what about the other chapters?

17 A On other kinds of forensic science.

18 Q But not fingerprints?

19 A No.

20 Q You also did research into those other topics?

21 A No, you don't do research for a book review, you
22 read the book and, based on your knowledge, you review it.
23 Obviously, I knew the most about fingerprinting, so that's
24 where I have the most knowledge.

25 Q There were other areas that were in that book that

1 you claim to have knowledge of?

2 A Yes.

3 Q Not having to do with fingerprints?

4 A That's right, although they had to do with forensic
5 science and fingerprinting is part of forensic science.

6 Q Did you also do a review of a book entitled,
7 "Creating Born Criminals From Punishment and Society"?

8 A Yes.

9 Q Did you also review new books on child sexual
10 abuse?

11 A Yes, I did.

12 Q You also gave a series of lectures as well during
13 that time period where you are claiming you did your research
14 on fingerprinting?

15 A Yes, I gave lectures, it wasn't a series of
16 lectures.

17 Q But you gave more than one?

18 A Yes.

19 Q 1999, as an example of one of those lectures, you
20 gave a lecture on stalking sexual predators in cyber space,
21 isn't that right?

22 A Yeah. I don't know if it's a representative
23 example, since it's the only one that doesn't have to do with
24 fingerprinting, but yeah.

25 Q You agree it doesn't have to do with

1 fingerprinting?

2 A Yes.

3 Q That was during this time period where you were
4 working on fingerprints that you were studying another area,
5 would that be fair to say?

6 A Yes, although it has to do with DNA, which has to
7 do with fingerprinting, so I would say it's peripherally
8 related.

9 Q But not directly related?

10 A No.

11 Q You are not a qualified latent print examiner, are
12 you?

13 A No.

14 Q You never actually examined the latent print lifted
15 in connection with this case, did you?

16 A I looked at those prints, I didn't examine them in
17 the way that a fingerprint examiner would. I didn't look at
18 the originals, I looked at copies.

19 Q You didn't look at the original prints that were
20 lifted from the crime scene in connection with this case?

21 A No.

22 Q It wouldn't be worthwhile for you to do so because
23 you are not qualified to give an opinion on a fingerprint
24 comparison, isn't that correct?

25 A That's correct.

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1 Q Your working knowledge of latent prints is actually
2 minimal, isn't that right?

3 A My knowledge is in how the profession developed and
4 what's in their literature.

5 Q I am going to ask a question again: Isn't it true
6 that your working knowledge of latent prints is minimal?

7 A If by that you mean by knowledge of how to examine
8 latent prints and make comparisons the way that fingerprint
9 examiners do, yes, it is minimal.

10 Q Now, are you aware that in this case, the defense
11 hired a latent print examiner named Mr. Brifa (phonetic)?

12 A I am aware of that.

13 Q And he examined the latent prints found in
14 connection with this case?

15 A I am aware of that.

16 Q You are aware of the fact that he made a --

17 MR. ZUSS: Judge, objection. Can we have a
18 side-bar on this?

19 THE COURT: Overruled. It's a hearing.

20 MR. ZUSS: There is an issue out there about
21 this. This individual is on her witness list and we
22 need to make a record regarding that.

23 THE COURT: Overruled. You may continue.

24 Q He made -- his findings were consistent with the
25 expert hired by, not hired, the expert assigned to this case

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1 by the prosecution, do you know that?

2 A Yes, I do.

3 Q Did you ever have a conversation with Mr. Brifa?

4 A No.

5 Q You never interviewed Mr. Brifa in connection with
6 your testimony here?

7 A No, I did not.

8 Q Don't you think that would be relevant in terms of
9 your alleged expertise of fingerprint evidence to find out
10 what techniques and what methods he used to come to that
11 decision?

12 A No, because my expertise is in whether this meets
13 the scientific method or not as in whether this is science or
14 not, so the particular analysis done by the defense expert is
15 not particularly relevant.

16 Q It wouldn't make a difference to you at all what
17 methods he used to evaluate these fingerprints?

18 A Well, if the defense expert used completely invalid
19 experts, sorry, method, if he waived a magic wand over it and
20 made a decision, I guess that would be relevant, but my
21 understanding is that he is an ex police officer, latent
22 fingerprint examiner, so I assumed he used the methods that
23 are standard in the profession or were standard at the time
24 that he was employed by the Police Department.

25 Q But you didn't think it was important for your

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1 testimony to find out?

2 A No, I did not.

3 Q You also never interviewed Detective Otero, did
4 you?

5 A No.

6 Q Don't you think it would be important for the
7 purposes of your testimony to interview or find out what
8 methods Detective Otero underwent in order to make a
9 determination of this case?

10 A Well, I'm not sure that he would have spoken with
11 me.

12 Q But you didn't try, did you?

13 A No, I did not. I don't think it would be -- I am
14 familiar with the methods that are used in this country. I
15 recently attended a five-day Dawbert hearing in which the
16 leading fingerprint examiners in the country spent three full
17 days of court explaining the methodology that is current in
18 the United States, so I think I'm pretty familiar, and I've
19 read extensively in their literature, so I think I'm pretty
20 familiar with the methods that are used and I assume that
21 Detective Otero doesn't use different methods.

22 Q Isn't it possible that he did use a different
23 method? I mean you are testifying here and making
24 assumptions, isn't it possible that he used a different
25 method? Wouldn't you think it would be relevant to find out

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1 what method he used before you testified here?

2 MR. ZUSS: Judge, that's two questions.

3 THE COURT: Do you have an objection?

4 MR. ZUSS: Yes, objection.

5 THE COURT: Sustained.

6 Q Isn't it possible that he used a different method?
7 I'm not talking about the entire country, I'm talking about a
8 specific case in New York City. Isn't it possible that he
9 used a different method?

10 A A different method than most fingerprint examiners
11 in this country use?

12 Q Yes.

13 A It seems unlikely if he is employed by the New York
14 Police Department that he is using some independent method,
15 but if that were true, I had prepped the defense lawyer for
16 cross-examination and I assume it would come out then. That
17 would make his testimony less credible rather than more.

18 THE COURT: Is there any method, in your
19 opinion, that would be scientifically accepted that can
20 be employed by --

21 THE WITNESS: No, not that I am aware of.

22 THE COURT: Next question.

23 Q But despite -- but you still didn't seek to
24 interview Detective Otero to find out what his experience
25 level was, what type of lab he works in, none of that, you

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1 didn't find that to be relevant?

2 A No, I was provided with materials in the case file
3 that indicated the courses he had taken and the conclusions
4 that he had made, all of which suggested that he was in the
5 mainstream of fingerprint -- latent fingerprint examiners in
6 this country.

7 Q But you never sought to interview him?

8 MR. ZUSS: Objection, asked and answered.

9 THE COURT: Your objection is sustained.

10 Next question.

11 Q Did you ever speak with Drew Bey?

12 A Repeat the name.

13 Q Drew Bey?

14 A No.

15 Q Do you know who he is?

16 A No.

17 Q Okay, he is the police officer who lifted --

18 MR. ZUSS: Is the prosecutor testifying in this
19 hearing or is Dr. Cole?

20 THE COURT: This is cross-examination, Counsel,
21 let me hear the end of the question.

22 Q Police officer Drew Bey was a member of the New
23 York City Police Department who lifted the latent prints from
24 the crime scene.

25 THE COURT: Your objection is overruled. You

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1 may answer the question.

2 A No, I do not know him.

3 Q Up until this moment in your testimony, you didn't
4 even know how the latent prints were lifted from the
5 apartment which was the crime scene of this case?

6 A I know that they were lifted.

7 Q It wouldn't matter to you who lifted it or how they
8 were lifted?

9 A No, the practice is pretty much standard.

10 Q But you don't know what the practice was in this
11 case?

12 A No, but I assume that it's the same as it usually
13 is.

14 Q But you don't know?

15 A No, I don't know.

16 Q And you never sought to find out?

17 A Again, I assume it would come out on
18 cross-examination if he used non-standard practices.

19 Q Whether it comes out on cross-examination is not
20 what I'm asking you. I'm asking you, did you try to find out
21 this information?

22 A No, I did not.

23 Q Have you ever been, during the research that you
24 conducted, have you ever been to one of the latent print
25 offices of the New York City Police Department?

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1 A No, I have not.

2 Q And have you ever specifically researched any of
3 the work by Detective Robert Otero?

4 A No.

5 Q Now, you said that you had experience in a crime
6 laboratory, when was that?

7 A When was that?

8 Q Yes.

9 A I believe it was around 1994, maybe '95, around
10 that period.

11 Q At least six years ago?

12 A That's correct.

13 Q And it was in a Midwestern city, isn't that
14 correct?

15 A That's correct.

16 Q Never done in New York, right?

17 A No, they wouldn't. I tried to, they wouldn't let
18 me in.

19 Q When?

20 A Around that time, 1994.

21 Q Have you tried since?

22 A No.

23 Q Have you tried in connection with this case?

24 A No, I'm not a popular figure among fingerprint
25 examiners these days.

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1 Q You didn't try, nevertheless?

2 A No, I did not try.

3 Q You testified on direct examination how you wrote a
4 book and you showed it to the Court, right?

5 A That's correct.

6 Q That's the only book you have ever written, isn't
7 that right?

8 A Yes.

9 Q It was published when?

10 A This year.

11 Q Your book is really a history book, isn't it?

12 A Yes, I think it's primarily a history of
13 fingerprinting and other criminal identification technology.

14 Q The book actually has twelve chapters, isn't that
15 right?

16 A That's correct.

17 Q Totalling 311 pages?

18 A If you say so.

19 Q You have the book, you can check.

20 A That's correct.

21 Q The first 10 chapters deal with history,
22 specifically with history, right?

23 A I would say that's a fair characterization, yes.

24 Q Specifically, you talk about fingerprinting in
25 those chapters dating from the 1700s until World War II,

1 isn't that right?

2 A Yeah, I think there might be things in this chapter
3 that go past World War II, but that is largely correct, yes.

4 Q Nothing about current fingerprint practice in New
5 York City in those chapters?

6 A No.

7 Q Now, that chapter 10 ends at page 258, isn't that
8 right?

9 A Yes.

10 Q So 258 pages of the 311 are devoted exclusively
11 primarily to history, right?

12 A Yes.

13 Q And then chapter 11 is entitled False Positives,
14 Fabrications and Fraud, isn't that right?

15 A It's entitled Fraud, Fabrications and False
16 Positives.

17 Q But I had the three right?

18 A Yes.

19 Q It's the only chapter in the book when you discuss
20 anything between 1970 and 1990, isn't that right?

21 A Again, I'm not sure that that's entirely correct,
22 if I can refer to the book, I can give you a better answer to
23 that. I think you are largely correct, but I don't want to
24 say you are if you are not.

25 On page 251, we get to the 1960s, 1970s, 1979,

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1 1985, so there it goes past World War II a little bit.

2 Q Nothing in that chapter with respect to the New
3 York City Police Department and any errors made in your
4 research?

5 A There probably is stuff about the New York Police
6 Department.

7 Q Do you know?

8 A You're asking, sorry, in the chapter 11, is that
9 what you are asking about, errors by the New York City Police
10 Department?

11 Q Yes.

12 A No.

13 Q Now, specifically in that chapter, you talk about a
14 resolution from 1973, right?

15 A Yes.

16 Q You talk about a pamphlet from 1983 written by a
17 constable in the Royal Canadian Mountain Police?

18 A Yes, entitled ridgeology, that's the same David
19 Ashbaugh that I mentioned before.

20 Q You also write about a 1982 Minnesota case as one
21 of your examples of unreliable fingerprint comparison, isn't
22 that right?

23 A Yes.

24 Q In that case, it was specific practitioner error,
25 isn't that correct?

1 A Well, there would always be practitioner error if
2 there were an erroneous identification.

3 Q There are different scenarios. For example, there
4 was another case that you wrote about in your book where the
5 police officers were lying, it was fraud, so there would be
6 other ways in which the fingerprint comparison could be
7 considered unreliable, right?

8 A Yes, but I wouldn't call that a misidentification.
9 I would call a misidentification a case where an examiner did
10 not deliberately misidentify the print, so that would be an
11 error and, therefore, there would always be a practitioner
12 error.

13 Q Right, but there could be reasons for practitioner,
14 or for example, incompetence, not enough training versus
15 lying?

16 A Yes, I would distinguish it from fraud, yeah.

17 Q In your book, one of the theories you put forward
18 is that fingerprint evidence is not reliable over the course
19 of history because most experts have agreed to agree, right?

20 A Yes, I think that contributes to it.

21 Q That was part of one of the -- that was one of the
22 basis for you to come to this conclusion that fingerprint
23 evidence is unreliable, right, as a science, right?

24 A That was one of the explanations I posed for why
25 they became so believable on the witness stand. I think that

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1 what --

2 Q That was one of the, I'll call it an accusation,
3 that you made that it was your theory that they agreed to
4 agree. I think your words were: They go behind closed
5 doors, they sit down and they work out their differences and
6 they present a unified front when they come out of that
7 closed room, right?

8 A That really wasn't an accusation, it was an
9 explanation for why there has been so little open
10 disagreement between them in the courtroom.

11 Q Did you in your research for your book contact
12 defense attorneys throughout the United States to see how
13 many opportunity they had to present latent print expert
14 witnesses who testified against each other?

15 A No, that seemed too difficult to research project
16 to do.

17 Q Did you try?

18 A I looked into how one would do that kind of
19 research and talked to some people and it just seemed too
20 difficult to get good data on what defense attorneys do with
21 fingerprints. Defense attorneys are scattered all over the
22 place in different jurisdictions and so on.

23 Q I understand that, but did you try? Did you
24 contact any public defender associations throughout the
25 country, did you check the internet, did you do any of this

1 research?

2 A I talked to some people who worked, investigators
3 who worked at public defender associations as to whether
4 there was data out there, as to how this would be researched
5 and it seemed like a difficult research question.

6 Q When it was -- you determined it was a difficult
7 research question, you decided not to bother, isn't that
8 right?

9 A I decided that my information was better spent on
10 other things.

11 Q This could have affected your theory, so to speak,
12 don't you agree?

13 A I think that it would be interesting to have that
14 data. I didn't think it was crucial to what I was trying to
15 argue.

16 Q Did you think it would be helpful?

17 A To have that kind of data on defense attorneys, how
18 often they consult experts and so on, it would be nice to
19 have it, but it didn't seem --

20 Q That wasn't what I asked.

21 A Yes, it would be helpful.

22 MR. ZUSS: Let him finish the answer.

23 THE COURT: Overruled. Next question.

24 MR. ZUSS: He has to let him finish the answer.

25 Q I'll ask again and I will let you finish, would it

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1 have been helpful for you to collect that data?

2 A It would be helpful to have that data, yes.

3 Q But you did not do it, did you?

4 A I did not.

5 Q Now, another one of the discussions that you wrote
6 about -- withdrawn.

7 Another one of your opinions in the book was
8 that historically, your research showed that defense
9 attorneys didn't intend to expend resources on scrutinizing
10 fingerprint evidence, isn't that right?

11 A That's correct.

12 Q And as a result, it made fingerprint evidence
13 somewhat unreliable because they -- withdrawn.

14 As a result, they found fingerprint evidence
15 somewhat unreliable, right?

16 A Can you repeat that last part of the question?

17 Q As a result, because they didn't expend resources,
18 they have found fingerprint evidence to be somewhat
19 unreliable?

20 A Defense attorneys did not find it to be unreliable.

21 Q Because they didn't?

22 A Because they didn't expend resources on it. It was
23 not tested.

24 Q Right, that was one of your theories in the book,
25 right?

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1 A That's right.

2 Q How many defense attorneys did you reach out to
3 find out whether or not they expend their resources?

4 A My research was historical in that area.

5 Q How many did you speak to?

6 A I didn't speak to defense attorneys, I read the
7 literature.

8 Q From there you came to the conclusion that they
9 didn't extend to expend their resources?

10 A Yes, one of the reasons I came to that conclusion
11 was, for example, the New York State trooper scandal in which
12 numerous cases of what you were talking about, the lying,
13 occurred and the defense attorneys had not exposed any of
14 these fabricated fingerprint identifications.

15 Apparently, some of these fingerprint
16 identifications had -- were obvious fabrications. They had
17 lied about the 10 print cards in the crime scene print, yet
18 the defense attorneys either didn't higher experts or their
19 experts did not catch it, so that was one anecdotal, but a
20 useful piece of evidence about the amount of scrutiny that
21 this was receiving from the defense bar.

22 Q So based on -- maybe I'm misunderstanding, based on
23 that case with the state troopers, you came to the conclusion
24 that generally defense attorneys weren't expending enough
25 resources on contesting --

1 A I'm saying.

2 Q Let me finish my question. Contesting fingerprint
3 evidence?

4 A Based on that and other anecdotal evidence, that
5 was my conclusion.

6 Q How much other anecdotal evidence?

7 A There were also articles in fingerprint magazines
8 dating pretty far back saying defense attorneys, you know,
9 essentially don't want to take cases where there is
10 fingerprint evidence.

11 Q You didn't call to speak to anyone specifically,
12 you just picked out this information from other journals and
13 articles on the area?

14 A That's correct, I did not do interviews with
15 defense attorneys on the question.

16 Q Don't you think that would have been helpful?

17 A Again, my purpose in writing this book was not to,
18 it was to write an accurate history of fingerprint
19 identification, not to make the argument that it's not
20 getting scrutiny from the defense bar or something like
21 that. It wasn't a crucial question for constructing the
22 history that I was trying to construct.

23 Q But that's part of your reasoning for the
24 unreliability of the evidence and history, right?

25 A Again, the fact that defense attorneys don't

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1 scrutinize it doesn't make it unreliable, it just is an
2 explanation for why more errors haven't been exposed.

3 Q But you know in this case, the defense attorney did
4 higher an expert to evaluate the fingerprint evidence in this
5 case?

6 A Well, yes, but then that raises the other question
7 as to how much we can trust defense experts, and since some
8 of these cases of misidentification that I mentioned the
9 defense expert confirmed erroneous identifications, so
10 therefore, it's my conclusion that it's not -- it doesn't
11 solve the problems of fingerprint evidence to just have
12 defense experts.

13 Q Because, in general, you are not sure if you can
14 trust them, any of them, is that what you are saying?

15 A You can't trust them to expose erroneous
16 identifications, that's right, that's been shown.

17 Q According to your testimony, you can't trust
18 anyone?

19 A The only thing you can trust is science, that's
20 right. You don't want to trust any one person or even three
21 people, you need to trust a scientific process that measures
22 how much you should trust these guys.

23 Q What about DNA evidence, is DNA evidence reliable
24 as a science?

25 A I know something about DNA evidence, I'm not an

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1 expert on DNA evidence. DNA evidence, I'll say this, DNA
2 evidence comes closer to meeting the Dawbert criteria that
3 the Supreme Court uses. Error rates have been calculated,
4 standards have been drawn up, proficiency tests have been
5 done, the technique exists in biology -- academic biology
6 laboratories as well as in forensic science laboratories.
7 All those things tend to make DNA closer to science than
8 fingerprint identification.

9 Q But you can't really say that it is a science
10 because it hasn't gone through the rigorous scientific
11 examination that you claim is lacking in fingerprint
12 evidence, isn't that right?

13 A No, I think it's a matter of debate and
14 interpretation as to whether it's gone through enough
15 testing.

16 Q I'm asking you, according to your theories, has DNA
17 evidence undergone the appropriate scientific examination
18 that you say is lacking in fingerprint evidence?

19 A It's gone through a lot more than fingerprinting
20 has.

21 Q That's not the question. Has it gone through
22 enough to make it a science?

23 A Again, I think it's a matter of interpretation.
24 I'm not a DNA expert and there are DNA experts on both sides
25 of that issue who know more about it than I do, so I would

1 defer to their opinions.

2 Q So you can't answer that question?

3 A I'm giving you as much of an answer as I can, which
4 is that I think it's gone through much more testing than
5 fingerprinting has.

6 Q But not complete absolute testing, isn't that
7 right?

8 A I believe the people who say that it has not gone
9 through complete and absolute testing.

10 Q As a result, you are saying to question fingerprint
11 evidence because it hasn't gone through complete and absolute
12 scientific examination, right?

13 A No, I would say it hasn't gone through any
14 scientific examination.

15 Q The fact that DNA has gone through some and not
16 complete makes it more reliable, is that what you are saying?

17 A Makes it probably more reliable, yes.

18 Q But you don't know?

19 A It makes it's scientific status higher.

20 Q But not absolute?

21 A It makes -- it would be more defensible to call it
22 science than it would be to call fingerprinting a science.

23 THE COURT: Move on. .

24 Q Isn't it true, Dr. Cole, studies have been done
25 which has proven that even identical twins have different

1 fingerprints?

2 A Yes.

3 Q So, obviously, there has been some type of reliable
4 comparison made through fingerprint identification?

5 A Some type of reliable comparison.

6 Q To make that determination, I should say?

7 A To make -- there has been studies done to
8 demonstrate that identical twins have different fingerprints,
9 yes.

10 Q That would mean that you would agree then, a
11 reliable comparison could be made?

12 A Reliable comparison between what?

13 Q Two fingerprints.

14 A No, because the fact that twins have different
15 fingerprints is irrelevant to the question of whether latent
16 fingerprint identification is reliable.

17 Q Why?

18 A Because a study designed to examine whether twins
19 have identical fingerprints would take two sets of identical
20 twins, roll their fingerprints in ink, stick them on a piece
21 of paper and look at them and say, are these two absolutely
22 identical or are they different? Then it would find that
23 they are different. That's not at all what happens in latent
24 fingerprint identification.

25 Q You say that that procedure, testing two prints

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1 against each other, has been scientifically examined enough
2 to make that reliable two ink prints?

3 A If the scientific question is do identical twins
4 have identical fingerprints and, yes, that has been
5 scientifically tested.

6 Q Who is making the comparison between the two ink
7 prints that the twins make?

8 A It could be anybody.

9 Q What do you mean by anybody?

10 A It do be a latent fingerprint examiner or a
11 biologist.

12 Q That case, the comparison made, would be reliable
13 according to your theories?

14 A The comparison made would be a comparison where you
15 are trying to distinguish two things rather than trying to
16 match them. Again, it's different from latent print
17 identification, but that comparison of saying these two are
18 not identical would seem, in a common sense way, to be
19 reliable, yeah.

20 Q Only to distinguish, not to match, is what you are
21 saying?

22 A It's different than matching. I'm saying, it's a
23 different kind of comparison that you are asking of.

24 Q Right, my question is: So the comparison done to
25 distinguish would be reliable but not the comparison done to

1 match it, is that what you are saying?

2 A Again, you have to tell me what you are matching.

3 Q Fingerprints of twins.

4 A Why would they match, they are different.

5 Q Let's say -- take two fingerprints, my fingerprints
6 and Ms. Schaeffer's fingerprint, you would say it's reliable
7 to say they were different, but not that they were the same
8 or of two fingerprints left by the same person?

9 A Right. Let's say I take an inked fingerprint by
10 you twice, that would, again, seem to be more reliable than a
11 latent fingerprint identification.

12 Q So a comparison can be made that's reliable between
13 two of my fingerprints, inked fingerprints?

14 A Two of your inked fingerprints? Again, you would
15 be on certainly more solid ground in terms of clarity and
16 stuff. Again, I'm not aware of tests of that.

17 Q According to your theories, it couldn't be reliable
18 because it wasn't sufficiently tested or are you saying it
19 could?

20 A I'm saying it's reliable. Again, it hasn't been
21 measured.

22 Q So you really don't know because you are
23 speculating?

24 A It's not I who doesn't know, it's the people who
25 run this field who don't know.

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1 Q That's your opinion?

2 A Yes, it's my opinion that they don't have the data,
3 yeah.

4 Q Do you believe that a positive identification can
5 be paid from a fingerprint?

6 A I would not -- I would have problems with a
7 positive identification, I'm not sure what that means, but
8 that I think it sounds like it means 100 percent certain
9 identification and I don't think they have a basis to make
10 that assertion.

11 Q Can you make an assertion on any science with 100
12 percent certainty?

13 A No, that's one of the reasons it's not a science.

14 Q Along with all other sciences, right?

15 A Along with all other sciences.

16 Q All other sciences, you can't say anything with 100
17 percent scientific certainty, can you, in recognized areas of
18 science?

19 A That's correct.

20 Q In your opinion, fingerprinting should not be
21 recognized in the scientific community?

22 A Should not be recognized by the scientific
23 community?

24 Q Yes.

25 A That's correct. In fact, I'm not sure it is

1 recognized in the scientific community if what you mean by
2 the scientific community is the academic scientific
3 community. I think they are unaware that fingerprint
4 examiners are calling themselves scientists.

5 Q Dr. Cole, I'm not asking you what other people
6 think, I'm asking you what you think. So in your opinion,
7 fingerprinting should not be recognized in the scientific
8 community?

9 A That's correct.

10 Q Let's go with the premise that everyone has a
11 unique print, okay, wouldn't you then agree that you could
12 then make an identification by fingerprint comparison?

13 A No, well, you could theoretically -- let's put it
14 that way.

15 Q What does that mean?

16 A You could be able to make them or you could not be
17 able to make them. You wouldn't know. The assumption that
18 all fingerprints are unique doesn't tell you either way.

19 Q In order to accept fingerprint evidence as a
20 science, according to you, you would have to print --
21 fingerprint every single person in the universe, right?

22 A No.

23 Q Why not?

24 A Because you would need to -- what you would need to
25 do is measure the reliability of how good these guys are at

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1 what they do.

2 Q No one did that in this case with respect to the
3 specific people involved in this case in doing the
4 comparisons?

5 A No, I'm basing my conclusions on measuring the
6 profession as a whole.

7 Q If you were the victim of a burglary in your
8 apartment, would you allow the latent print unit, the New
9 York City Police Department, to dust for prints?

10 MR. ZUSS: Objection.

11 THE COURT: Overruled.

12 A Sure, why not.

13 Q Why?

14 A Because it might be useful evidence.

15 Q But you are saying that it's not reliable evidence?

16 A It is of unknown reliability. It may turn out that
17 it's reliable, it may turn out that it's not very reliable,
18 we just don't know how reliable it is, I don't know either.

19 Q But you would allow them to dust for prints in your
20 apartment to use as a tool to possibly arrest someone?

21 A I would not bar the --

22 Q That wasn't the question.

23 A Yes, I would allow them.

24 Q You have no experimental data within a lab to prove
25 that fingerprints are -- withdrawn.

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1 Dr. Cole, you testified you mentioned before
2 in a Dawbert hearing, in a case entitled U.S. v. Mitchell, is
3 that right?

4 A I don't know if that was drawn out in testimony,
5 but it's true, yes.

6 Q You have mentioned testifying in a case with six
7 experts, the name of that case was U.S. v. Mitchell, is that
8 right?

9 A That's correct, yes.

10 Q You testified there that the premises of
11 fingerprint comparison practices have never been tested,
12 right?

13 A That's correct.

14 Q You were called to challenge a disciplined claim to
15 expertise, is that right?

16 A Yes.

17 Q Actually, in fact, your expertise was challenged in
18 that proceeding, isn't that right?

19 A Yes.

20 Q There, the Court ruled that only fingerprint
21 examiners were qualified to critique fingerprint
22 identification, isn't that right?

23 A It was an oral ruling and that appeared to be the
24 gist of it, yes.

25 Q But is that was what they said? I mean, you

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1 published that in a subsequent article, didn't you?

2 A Yes.

3 Q So that was what happened?

4 A That's correct.

5 Q So you were not permitted to testify before a jury
6 in that case, isn't that right?

7 A That's correct.

8 Q The judge in that case allowed one defense witness,
9 Mr. Stoney, who you mentioned before, said that he would be
10 allowed to testify, but only as a fingerprint examiner with
11 an opinion on the actual case prints themselves, isn't that
12 right?

13 A I believe that's correct.

14 Q You believe or you know?

15 A Again, the judge's ruling is somewhat difficult to
16 interpret, but that appears to be the most likely
17 interpretation.

18 Q So that wasn't what you published in your article,
19 that he was --

20 A That being the most likely interpretation, that was
21 how I wrote it up, yes.

22 Q So it's not that you were confused by the Court,
23 that's what the Court did, only you published in an article,
24 only if he testifies as to the actual print, can he testify,
25 what's confusing about that?

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1 A What's confusing is if you read the judge's ruling

2 --

3 Q You came to that same determination in the article?

4 A In speaking to the article -- lawyers, it appeared
5 to be that's what the judge meant.

6 Q That's what you understood the judge meant?

7 A Yes, that's what I understood him to have meant.

8 Q Have you ever been permitted to testify before a
9 jury with the expertise that you are claiming that you have?

10 A No.

11 Q Isn't it true that since the U.S. v. Mitchell case,
12 more than 10 other challenges have been filed with respect to
13 the unreliability of fingerprint evidence, the position that
14 you are taking here, and none have been successful in
15 disallowing the admission of fingerprint evidence?

16 A Yes.

17 Q As a matter of fact, there were approximately 17 of
18 those cases, isn't that right?

19 A That's about right, yes.

20 Q I am not going to go through all 17, I will provide
21 them to the Court following the testimony, but you mention
22 the case Robert Nawi in your direct examination, isn't that
23 right?

24 A Yes.

25 Q Isn't that one of the challenges that was made in

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1 the State of California?

2 A Yes.

3 Q That hearing was in October of 2000 in San
4 Fransisco, isn't that right?

5 A I don't have it in front of me.

6 Q So you don't know?

7 A I believe you, yeah.

8 Q You don't know where the hearing was conducted?

9 A No, I don't know where it was. I have the same
10 sheet you do. If you would like me to refer to it.

11 Q That's okay. There was a hearing held challenging
12 fingerprint expert procedure's standards, and verifiability
13 of those standards, is that right?

14 A Yes.

15 Q In that case, the defense presented the same
16 arguments as were presented in U.S. v. Mitchell, right?

17 A Again, I don't have specific knowledge of that
18 case. I haven't read the motions in that case or the
19 transcripts of that case. My understanding is that the
20 arguments were fairly similar to those in the Mitchell case.

21 Q Dr. Cole, that was one of the cases that you
22 mentioned as an example in your testimony?

23 A That's correct, because I also have knowledge that
24 Professor Starrs was eventually allowed to testify before the
25 jury.

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1 Q But you are telling this Court that you never read
2 that case, the Nawi case, enough to answer my questions --
3 withdrawn.

4 Are you telling this Court that you never read
5 that case, the opinion on that case?

6 A I don't know that there is an opinion.

7 Q Did you look?

8 A No, I didn't read that case.

9 Q In that case, isn't it a fact that the defense
10 requested the Court to issue subpoenas for you and to pay
11 expert witness fees for you, isn't that correct?

12 A Yes.

13 Q Isn't it true that the Court denied that motion?

14 A That's correct.

15 Q Refused to subpoena you, right?

16 A Yes, as far as I know.

17 Q And refused to pay fees for you, isn't that
18 correct?

19 A That's correct.

20 Q Then there is another challenge, case of U.S. v
21 Ahmad Ressam (phonetic), are you familiar with that case?

22 A I am familiar. That case is on that list, I had
23 one discussion with the attorney on that case.

24 Q What was the holding of the Court in that case?

25 A I don't know.

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1 Q Isn't it true that the Court held that fingerprint
2 evidence had been the mainstay of identification for defense
3 counsel aids --

4 MR. ZUSS: He said he didn't know, so how would
5 he know what the holding is?

6 THE COURT: Overruled.

7 Q I'll start again, that fingerprint evidence had
8 been the mainstay of identification evidence for defense
9 counsel aids and that the reliability of such evidence has
10 never been diminished by defensive acts?

11 A I have not read that opinion, no.

12 Q You didn't read that opinion? How many of the 17
13 challenges that were made after U.S. v. Mitchell have you
14 read?

15 A Again, very few of them have published opinions. I
16 have read the Havard (phonetic) case and that's about it.
17 That's the only one that had a published opinion as far as I
18 know.

19 I have knowledge of some of those other cases
20 from discussions with attorneys and so on, but I keep up to
21 date on those cases through a web site run by a fingerprint
22 examiner who lists those cases and summaries of them, that's
23 how I keep to date on those.

24 Q What troubles me, you mentioned a few cases as
25 examples of the success of your theories, Parks and you

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1 mention another case, but --

2 A I don't think -- finish your question.

3 Q But my question is: You have read and apprised
4 yourself of all the decisions made in connection with this
5 issue other than the one you mentioned on direct examination?

6 A Which was what?

7 Q Parks.

8 A Again, I was not citing them as proof of my
9 theories. I was citing them as I have anecdotal knowledge
10 that Professor Starrs and Dr. Stoney have been allowed to
11 testify.

12 Q At hearings or trial?

13 A At trial.

14 Q Were you present at the trials?

15 A No, I was not present at the trial.

16 Q Do you know specifically what they were allowed to
17 testify to?

18 A They were allowed to testify to the limitations of
19 fingerprint evidence.

20 Q In Parks?

21 A No, that's in Nawi, McGee (phonetic) and whatever
22 the errors on the case was.

23 Q And you know that how?

24 A From conversations with attorneys in those cases.

25 Q Not from speaking to them themselves?

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1 A I've spoken to Starrs about the Arizona case. The
2 California case was very recent, I have not spoken to him
3 about that. I didn't speak to Stoney about his testimony.

4 Q When you talk about the California case, which case
5 is that?

6 A The Nawi case.

7 Q Who did you speak to in connection with that case?

8 A I spoke to Robert Epstein, who is an attorney in
9 Philadelphia who did the Mitchell case and he told me, this
10 was yesterday, that Starrs had testified before the jury in
11 that case.

12 Q But do you know, did he tell you the specifics of
13 his testimony?

14 A He described them to me as, you know, the usual
15 position that Starrs takes, which is, that this is not
16 science.

17 Q Was he present at the trial?

18 A No, he was not.

19 Q Where did he get his information from?

20 A From the attorney who did the trial.

21 Q Do you know in connection with this case, the
22 methods that Detective Otero used in terms of making his
23 comparison, the safeguards he used?

24 A The safeguards that he used?

25 Q Yes.

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1 A Um, I don't know what safeguards he would use. I
2 know that it was that another supervisor signed off on that
3 fingerprint, that would be the closest to a safeguard that I
4 can think of.

5 Q Do you know his sequence of events in which he came
6 to the determination that the latent print lifted was the
7 prints of the defendant?

8 A No, I can only assume that it was the sequence of
9 events that they teach at the FBI.

10 Q But you don't know?

11 A No.

12 Q So you don't know that he first had done a
13 comparison between the latent and a computer fingerprint?

14 A Well, I assumed that he did, based on the case
15 file, but I don't know it, no.

16 Q Did you know that he then compared that latent
17 print to an old print from a defendant's prior arrest, do you
18 know that?

19 A Again, you're asking if I have personal knowledge
20 of it by talking to Detective Otero about it?

21 Q Yes.

22 A No.

23 Q You said that you know from reading the file that
24 it was reviewed by -- his results were reviewed by a
25 supervisor?

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1 A That's what I said.

2 Q Do you also know that it was also reviewed by
3 another latent print examiner who had been on the job for 22
4 years?

5 A Yes.

6 Q You did know that?

7 A I think so, yeah.

8 Q You think or you know?

9 A I reviewed the case file and there was two
10 examiners that had examined it.

11 Q Did you speak to either of them?

12 A No.

13 MR. ZUSS: Objection, asked and answered.

14 THE COURT: Overruled.

15 Q Dr. Cole, isn't it a fact that your specific
16 theories are not recognized by the scientific community?

17 A You have to tell me what theory you are referring
18 to.

19 Q Your theory that fingerprint evidence is not
20 reliable and is not recognized by science, isn't that theory
21 not recognized by the scientific community?

22 A I would say that most of the people in the
23 scientific community who are aware of it seem to agree. I
24 would refer to Professor Starrs, I would refer to Dr. Stoney.

25 Q Who else?

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1 A I would refer to Mr. Sacks, and other than that,
2 not a lot of people have weighed in on this issue. Let me
3 refer to a couple of others: Dr. James became a believer
4 that it is scientific, so he disagrees with me, Professor
5 Moenssens (phonetic) doesn't agree, he thinks that it's
6 science. I would think that it's sort of a split.

7 Q A split you said?

8 A Yeah.

9 Q How many -- you mentioned three people who would
10 agree with you specifically that the theories that you
11 promote are accepted by the scientific community, how many of
12 those three are scientists?

13 A I would say that two of them are scientists. I
14 would say that Dr. Stoney and Professor Starrs are
15 scientists.

16 Q Other than those two who notice scientific
17 communities has recognized your theories and their theories
18 as science, recognized by the scientific community --

19 A My theory does not purport to be science. I
20 haven't tested it. Through experiment, it purports to be
21 scholarship.

22 Q So, Dr. Cole, your theory is not technically
23 recognized by the scientific community, isn't that right?

24 A I'm not sure what recognition would consist of.
25 There is not a scientific community in a building somewhere

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1 that stamps things as recognized. Recognition occurs through
2 other public indications and so on. The bulk of the public
3 indications in the scientific community seem to agree with
4 me, depending on how you define the scientific community.

5 Q But your theories, as you said before, haven't been
6 sufficiently tested to know whether or not it would be
7 considered a science, isn't that correct?

8 A Right, because it's not a scientific theory, it's
9 an opinion based on scholarly research.

10 MS. STEPNER: One moment, your Honor.

11 THE COURT: Yes.

12 Q Are you familiar with the opinions of Dr. Henry
13 Lee?

14 A On this issue?

15 Q Yes.

16 A No, I'm not. I've talked to people who say they
17 have talked to Henry about this.

18 Q And does Henry disagree with your opinion?

19 A I didn't get an answer to that. They just
20 mentioned that they had talked to him, so I am not familiar
21 with Dr. Lee's opinion on this question.

22 Q You didn't ask them what his opinion was?

23 A It didn't really come up.

24 Q Why? Don't you think that would be relevant? He
25 is one of the --

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1 MR. ZUSS: Objection.

2 THE COURT: Let the question be finished.

3 Q He is one of the preeminent experts in the area and
4 you never sought to find out what his opinion was?

5 THE COURT: Sustained.

6 You don't have to answer that.

7 THE WITNESS: Okay.

8 Q The Collaborative Testing Service that you
9 mentioned before, who runs that service?

10 A You mean a person?

11 Q Yes.

12 A I don't know.

13 Q Do you know the qualifications of the person who
14 runs that service?

15 A I don't know. Again I'm not vouching for that
16 test, I'm just saying that's the only test that's out there.

17 MS. STEPNER: Nothing further.

18 THE COURT: Any redirect?

19 MR. ZUSS: No, your Honor.

20 THE COURT: Dr. Cole, you are excused with the
21 thanks of the Court.

22 THE WITNESS: Thank you.

23 (WITNESS EXCUSED)

24 THE COURT: Can I see Counsel?

25 Approach the bench.

COLLOQUY

1 (Whereupon, an off-the-record discussion was
2 held at the bench.)

3 THE COURT: We will proceed at two o'clock.

4 (Luncheon recess taken.)

A F T E R N O O N S E S S I O N

5
6 THE CLERK: Back on the record, this is James
7 Hyatt, appearances stay the same.

8 MR. ZUSS: Robert Zuss for the Legal Aid
9 Society.

10 Before I begin my argument, can your Honor be
11 clear with what it is you are going to take judicial
12 notice of?

13 THE COURT: I'm sorry, I haven't heard a
14 request for the Court to take judicial notice.

15 MS. STEPNER: Your Honor, at the bench
16 conference this morning, off the record, I asked the
17 Court to take judicial notice of the fact that
18 fingerprint evidence, comparison evidence is recognized
19 by the scientific community.

20 THE COURT: More importantly, by the Courts of
21 the State of New York for all purposes.

22 Yes, I will hear you, Counsel.

23 MR. ZUSS: Okay. It comes as no surprise, your
24 Honor, that I object strenuously since that is the point
25 of the hearing.

COLLOQUY

1 THE COURT: I don't think so.

2 MR. ZUSS: Let me say --

3 THE COURT: I don't think that's the point of
4 the hearing, but you can go ahead.

5 MR. ZUSS: Dr. Cole's --

6 THE COURT: I don't think the point of the
7 hearing is whether the current state of the law is that
8 fingerprint comparison evidence is acceptable as expert
9 evidence. I think the point of the hearing is whether
10 evidence that goes to attack that should be admitted to
11 the trier of fact at a trial in a fingerprint case, I
12 think that's what the gist of the hearing is.

13 MR. ZUSS: It's our position that it's outside
14 of the abilities of the Court to take judicial notice of
15 that, that's the fact of the point where the hearing
16 was. It was for the Court to take -- to allow the
17 defendant to put on a witness whose expertise,
18 professional expertise, has taught him that in fact
19 forensic fingerprint identification and recovery is not
20 a science.

21 All be it, that it has been so for 100 some
22 odd years during the course of the State of New York,
23 it's sort of like asking in 1492, a bunch of guys --
24 Columbus asking a bunch of guys whether or not they
25 thought the world was round. They say, of course not,

COLLOQUY

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it's flat, everybody knows that. It's very much objected.

MS. STEPNER: Your Honor, may I be heard on that point?

THE COURT: Yes.

MS. STEPNER: Your Honor, Mr. Zuss is incorrect in his statement of his position. He didn't address this Court to have a hearing to determine whether my fingerprint expert should testify and whether fingerprint evidence is recognized by the scientific community; rather, I asked that we have a hearing like the one the Court of Appeals thought the Lee case should have had to determine whether or not the expert Mr. Zuss is proffering is an appropriate expert and whether he can give relevant or competent testimony and whether his theories and his position is recognized by the scientific community.

THE COURT: That is what the issue is of this case and that's why we conducted a Frye hearing on that. I will make it my decision on the People's proffer of the request for the Court to take judicial notice concerning their expert who will testify at trial concerning fingerprint analysis.

This Court takes judicial notice that the current state of the law in the State of New York allows

COLLOQUY

1 expert testimony concerning an expert's opinion as to
2 the -- as to how recovered fingerprints compared to
3 those of the defendant in the criminal case. Such
4 expert testimony concerning fingerprint comparison has
5 long been, to our courts, a subject matter appropriate
6 for expert testimony. There is no need for a Frye
7 hearing concerning that issue to determine whether a
8 proffered expert in this field is generally accepted by
9 the relevant and scientific community concerning
10 fingerprint analysis and comparison and identification.

11 The current state of the law is that it is and
12 has been, so therefore, the courts will take judicial
13 notice of People's expert's right to testify in this
14 case.

15 I will cite a Court of Appeals case concerning
16 fingerprint analysis as an accepted scientific area for
17 an expert opinion, People v Roach, R-O-A-C-H, 215 New
18 York 592.

19 I will now hear arguments from both sides.
20 Beginning with you, Mr. Zuss, as to what the Court
21 perceives the issue here is, well, to allow the
22 testimony of your proffered expert under the Frye
23 standard to facilitate the jurors in resolving the issue
24 of fact in this case concerning the analysis of
25 fingerprints.

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1 MR. ZUSS: It shouldn't matter to the Court
2 whether or not Dr. Cole spoke to Detective Otero or any
3 of the other people in the latent print unit or any of
4 the thousands and thousands of latent print examiners
5 throughout the country, nor any other member of the
6 police department, or many of the defense attorneys
7 across the country, nor how many pages of Dr. Cole's
8 learned book are devoted to the items that the
9 prosecutor believes are most germane here.

10 In fact, Dr. Cole's book is a history. It's a
11 history of a fraud technique. It's a history that
12 demonstrates, again and again and again, how it was that
13 fingerprint evidence came to be viewed by the courts and
14 by popular culture as unflawed, irrefutable and
15 immutable.

16 Dr. Cole is who he is. I mean, Dr. Cole is a
17 prime -- he is not a cop. He has not looked at a
18 thousand of prints, that's not what we put Dr. Cole on
19 the witness stand for. Dr. Cole has looked at these
20 prints, but that is only incidental to what he is here
21 to say. Dr. Cole is here to say very clearly and simply
22 that in his view, based upon his experience over the
23 past eight years of scholarship, research and study,
24 regardless of how many times Ms. Stepner was able to
25 say, well, he was drinking a Coke in 1995, as opposed to

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1 studying fingerprints, I guess we all have been doing
2 other things since 1993 other than being defense
3 attorneys and prosecutors.

4 Regardless of that, Dr. Cole's position, based
5 upon his research and his study and his -- it looks like
6 his life's work to me, is that the technique of forensic
7 fingerprint recovery and identification is not a
8 science. It does not mean any of the indicia of
9 scientific study or standards, it's not error rated,
10 it's not peer reviewed, it's not tested or measured, it
11 is only accepted as God's word among those people who
12 practice it.

13 There are no, according to Dr. Cole's
14 testimony that the record will reflect, there are no
15 significant communities outside of the forensic
16 fingerprint examiner community who put the faith in the
17 fingerprint identification that that community does,
18 other than the unfortunate traditional and time-honored
19 reliance that courts of the United States do and popular
20 culture in the United States do.

21 I would point out to the Court that
22 fingerprint evidence is so ingrained in popular culture,
23 that each day in the New York Times, when New York Times
24 reports on the horrible tragedy that occurred on
25 September 11th, the little summary has a fingerprint on

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1 top.

2 And what Dr. Cole -- as far as Dr. Stoney, the
3 various law professors that Dr. Cole has cited are
4 saying, maybe they are off, they are saying it and
5 everybody is making fun of him, but then they made fun
6 of Columbus and Galileo also and other numbers of people
7 like that.

8 The point of Dr. Cole's testimony and why he
9 should be allowed to testify at trial is real simple.
10 This case is about, as your Honor will see, as it goes
11 forward, this case is a burglary case in which James
12 Hyatt is charged with committing a burglary on September
13 18, 2000, here in Brooklyn Heights. The only evidence
14 in this case, only evidence that's credible and real is
15 a fingerprint that's recovered by the lifter and then by
16 Police Officer Drew Bey and then is analyzed by
17 Detective Otero. There is no property that is ever
18 recovered from the defendant, there is no statement that
19 the defendant made to inculcate himself, there is no
20 identifications, there is nothing. This is only a
21 fingerprint case, and in a case like this where the only
22 relevant and credible evidence before this jury that we
23 are going to pick, if we pick it, is going to be those
24 fingerprints.

25 It's our position that given the state of

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1 scientific study or lack of scientific study that Dr.
2 Cole can and will testify to, testified to today, that
3 your Honor, I'm going to say, don't be offended, has to
4 and should allow him to testify on our client's behalf.

5 Dr. Cole doesn't make any pretensions to being
6 an expert at looking at fingerprints. We know Detective
7 Otero has been a police officer for a long time and he
8 has looked at a lot of fingerprints. He looked at these
9 fingerprints, looked at other fingerprints in cases I
10 know about and he says there is a match.

11 Dr. Cole is not going to come in here and say
12 that Detective Otero doesn't know what he is doing or
13 that is he incompetent or that he has committed fraud,
14 he is not going to do any of that. What Dr. Cole is
15 going to put before this jury is both simple and
16 complicated. It's both easy to do and very courageous
17 for the Court to allow it to happen.

18 What the Court will be doing by allowing it to
19 happen will in fact be giving the defendant a truly fair
20 trial because Dr. Cole will put an issue in question,
21 the flawed nature, the nonscientific nature of
22 fingerprint recovery, forensic fingerprint recovery,
23 recovery and identification. For those reasons, as well
24 as some others, if the Court will indulge me, I would
25 like to let the Court know that we believe, on James

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1 Hyatt's behalf, that you should allow this in.

2 Dr. Cole says, based upon his study, that
3 fingerprint recovery and identification is not a science
4 and I would like the Court to just hear some of the
5 words that I think are very important in this matter and
6 that is the Supreme Court in Dawbert --

7 THE COURT: You better deal with Frye if you
8 are going to deal with me.

9 MR. ZUSS: I want to say I think the Supreme
10 Court has said science is -- let me give you --

11 THE COURT: I'm bound by the rulings of the
12 Court of Appeals, so you are going to show me how it
13 fits in under Frye, because if you argue Dawbert to me,
14 you are arguing apples and oranges.

15 MR. ZUSS: Okay.

16 As Dr. Cole testified, fingerprint evidence
17 has been available to courts in the United States since
18 about 1910 or 1911, which is, I believe, when the first
19 cases arguing fingerprint identification were allowed to
20 be brought in this, a criminal matter.

21 As Dr. Cole has tried to point out this
22 morning, the courts in 1910 were busy with a lot of
23 other things. They were not asking the kind of
24 searching questions regarding what his science is as
25 they do today.

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1 The case of Frye was decided in 1923. It's a
2 short non-citation opinion issued by the District of
3 Columbia circuit and unfortunately, you know, both
4 throughout the course of American history and American
5 legal history, this case has been cited almost in, if
6 you will, I'm not being disrespectful, but in a kind of
7 knee jerk kind of fashion, if that is what Frye said
8 that's what we have to do.

9 In 1993, whatever it was, the Supreme Court
10 decided Dawbert and the Supreme Court had available to
11 it 70 more years of scientific inquiry on any number of
12 scientific subjects, so it also points out that Frye is
13 about an earlier ancestor of the polygraph machine,
14 which, in 1923, was very unreliable and the Frye court
15 decided that.

16 It's our position that the Court is free to
17 reject Frye. One of the things I think we have to
18 remember, your Honor, is that, you know, life in the law
19 and science and technology is clearly non-static. There
20 is a lot of stuff that went on since 1923. They weren't
21 going to the moon in 1923, nobody knew anything about
22 DNA evidence. The Frye court decision does not answer
23 the kinds of problems that are put before courts in
24 2001. It just doesn't. It's an outmoded, integrated
25 issue.

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1 THE COURT: Counsel, if recently the Court of
2 Appeals in the Lee case took on eyewitness
3 identification, and my reading of that case shows that
4 there was a lot of scientific-founded, tested evidence
5 that went to allow the challenge to eyewitness
6 identification, which is, it rose into the Frye ruling
7 of the State of New York allowing scientifically placed
8 evidence to be presented to a jury just imposed, the
9 witness identification issue.

10 MR. ZUSS: As Richard Nixon once said -- let me
11 say this about that, I would suggest to the Court that
12 the question of experts in identification, the question
13 of using an expert in regard to identification testimony
14 stands almost in the same position as fingerprints. The
15 one thing fingerprint methods do, because courts, courts
16 that I have been before, when I've tried to introduce
17 identification experts, my colleagues have regularly
18 come up against the idea from the Court and from the
19 prosecutor, you don't need one of those. People know
20 what they see, people remember what they see. It will
21 only confuse the jury.

22 I would suggest to your Honor that even though
23 the Lee decision says what it says, because it's about
24 identification and expert testimony that, again, the
25 Court, this court, should feel free to be much more

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1 expansive and liberal in what I decide ought to be the
2 subject of expert testimony. Therefore, I would suggest
3 to the Court that some of the messages in Dawbert and
4 certainly some of the instances in which the Supreme
5 Court says what it believes science is goes directly to
6 what Dr. Cole is talking about.

7 The judge in Dawbert said "science is subject
8 to further testing and refinement." The Dawbert court
9 says, "Arguably, there are no certainties in science."
10 And they talked about a fit, F-I-T, and does the
11 proposed evidence aid the jury in resolving a factual
12 issue in dispute. Furthermore, one more quote, "But in
13 order to qualify as scientific knowledge, an inference
14 or assertion must be derived from the scientific
15 method."

16 I would suggest that each of those quotations
17 go exactly and essentially to what Dr. Cole will testify
18 forensic fingerprint recovery does not do. That
19 forensic fingerprint recovery is not about testing over
20 and over and over again, it's hypothesis, it's never
21 been error tested.

22 When individuals, when there are mistakes,
23 when there are false positives, the fingerprint
24 community says they are outcast. They make mistakes.
25 It's not about the method, it's never been measured in

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1 any real sense as Dr. Cole testified and would testify
2 before a jury.

3 For all of those reasons, your Honor, in
4 addition to a couple of more, it's our position that you
5 should allow Dr. Cole's testimony. As I said, this case
6 revolves around only a fingerprint, that's the only
7 credible evidence in the case.

8 This, allowing the defense from putting on Dr.
9 Cole to refute that Detective Otero's time-honored
10 methods are just by themselves, because they are time
11 honored, are hollow and irrefutable, will deny the
12 defendant a right to a fair trial. I would suggest to
13 the Court that under the Chambers of Mississippi, the
14 defendant has an irrefutable and unbreakable right to
15 present witnesses in his own defense. The chambers
16 court says somewhere that it's one of the most hollow,
17 one of the most important rights of the defendant.

18 I would also suggest to the Court that the
19 case of Iake, I-A-K-E, versus Oklahoma Supreme Court
20 case decided, I think in the '70s, I think the Court
21 must know, I can find the cite to it, stands for
22 proposition that courts should not interfere, overly
23 interfere, in the defendant's right to call expert
24 witnesses on their behalf.

25 There is also a case called People v Gilleon

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1 (phonetic) your Honor, 37 NY2d 722 reversed on the
2 dissent at 45 AD2d 744, which is our position the New
3 York counterpart in some ways -- the New York
4 counterpart in some of the courts of Chambers v
5 Mississippi. For those reasons, if I may -- one moment,
6 Judge.

7 THE COURT: Yes.

8 MR. ZUSS: My colleague reminds me, under Frye,
9 the relevant scientific community can't be limited to
10 fingerprint technicians. The courts must allow us to
11 examine their method against scientific methods as
12 considered by scientists in general.

13 For those reasons above, your Honor, we
14 respectfully request that you allow Dr. Cole to be our
15 witness in the trial.

16 THE COURT: Thank you, Mr. Zuss, I will hear
17 from the People.

18 MS. STEPNER: Thank you, your Honor.

19 Your Honor, it's the People's position under
20 the Lee case that the -- there are two prongs to that
21 case.

22 First, that the Court has to make a
23 determination that the proffered testimony by the
24 defense in this case is evidence that is recognized by
25 the scientific community. If the Court finds that to be

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1 the case, then the Court goes on to the second prong,
2 which is using discretion whether it is or not to allow
3 this evidence at the trial.

4 It's the People's position that the defense
5 has failed to meet their burden under the first prong,
6 which is that Dr. Cole's theories are not at all
7 recognized by the scientific community, never have been
8 and haven't been up until this point. As a result, he
9 should be precluded from testifying.

10 I state in my position, initially in my
11 application to this hearing, I am directing the Court
12 first to the cases that I mentioned and I provided to
13 the Court and Mr. Zuss at that time.

14 With respect to People v Lee and in the People
15 v Lee case, it says that whether the jury would be
16 benefited by the specialized knowledge of an expert
17 witness, I suggest to this court that Dr. Cole is not an
18 expert witness. He has no expertise in this area
19 whatsoever. He has been denied expertise in the past by
20 the other courts that he has testified in. He has never
21 been permitted to testify before a jury.

22 Detailing a few instances where a mistake was
23 made in a fingerprint case, and saying that it's never
24 been tested, so we don't know, is speculation and his
25 theory which, again, is not competent evidence and not

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1 recognized by the scientific community.

2 When I asked him if it was or not, he wavered,
3 then he gave us the names of two people, one who is an
4 academic, one who might be a scientist, but was never
5 freely able to tell us that his theories were recognized
6 by the scientific community, which is the standard in
7 this case. There has been no evidence put forth to show
8 that his theories and his speculation and review of
9 history is recognized by the scientific community.

10 With respect to the case of U.S. v Rincone
11 (phonetic), which I already provided the language in
12 that case, is the proposed expert witness.

13 Identification testimony is being offered by the defense
14 more in the role of advocate and not as a scientifically
15 valid opinion, which is the People's position.

16 Dr. Cole is going to testify to examples, when
17 there were mistakes made throughout the thousands and
18 hundreds of thousands of examples when there weren't
19 mistakes made. Interestingly enough, he can bring those
20 forward to the Court, examples where there were mistakes
21 made, even though, according to him, the fingerprint
22 history hasn't been evaluated by the scientific
23 community one way or the other, but he feels comfortable
24 enough to say, use those mistakes as an example, but
25 with respect to comparisons, oh, no, that's not

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1 reliable.

2 Here, he is acting purely as an advocate. He
3 is not basing anything on a scientifically valid
4 opinion. Your Honor, it would be the same thing as
5 going into any type of scientific evidence, psychiatric
6 testimony, ballistic testimony and finding someone to
7 come on the stand and say, you know what, I read some
8 articles, there was a case in Texas and in Wisconsin
9 where the ballistics expert made a mistake and, you know
10 what, I decided there has been an adequate review of
11 ballistics testimony, so I want to get on the stand and
12 say, you know what, your ballistics evidence is not
13 reliable. You know what, Judge, there is no basis for
14 that and it's improper. It would be improper in any
15 situation.

16 Medical testimony, ballistics testimony, Dr.
17 Cole himself says nothing is absolute. What he is doing
18 is throwing out a theory here, which I suggest would be
19 strictly to confuse the jury when it's not based on
20 anything scientific but according to his standard.
21 That's his standard.

22 I bring the attention again to US v Mitchell,
23 then, Judge, I'm not going to read the ruling again,
24 I've done it enough and I've provided the ruling to the
25 Court. I will also provide to the Court and Mr. Zuss,

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1 the fact of cases. When I asked Dr. Cole whether there
2 were 17 additional cases where the Court's ruled on the
3 reliability of the fingerprint evidence, he said there
4 were. I'm providing that, these documents, to the Court
5 and to Mr. Zuss.

6 Judge, there is one part that you can't read.
7 For some reason, it didn't come out when I printed it.
8 It's on the second or third page, Page 3, it says:
9 Byron Mitchell, and if you need to find what that says,
10 just put it in the web site, but basically it says, all
11 challenges to fingerprint evidence, up until this point,
12 have been denied and there have been at least 10
13 challenges.

14 Attached to the documents I just gave you are
15 all the challenges and all the rulings. I'm
16 specifically drawing your attention to four of them,
17 State of Georgia versus McAvee (phonetic), motion to
18 exclude fingerprint evidence is denied. In that case,
19 the Court will take judicial notice of the fact that the
20 fingerprints of each human being are different from
21 those of any other human being and that said individual
22 fingerprints are permanent and they are not altered by
23 the passing of time or traumatic event.

24 Fingerprint identification of individuals has
25 been accepted as accurate by all state and federal

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1 courts of the U.S., as well as by the courts throughout
2 the entire world for the past eight years.

3 Dr. Cole says, sure, they might be reliable,
4 but we don't know. So what is that but pure
5 speculation. He can't say one thing one way or the
6 other, but throw out theories.

7 State of California versus Nawi, which is the
8 eighth case in that packet as brought out by my cross-
9 examination, in that case the Judge refused to subpoena
10 and refused to allow expert witnesses to be paid --
11 expert witness fees to be paid for Dr. Cole.

12 Number 11, U.S. v Ahmad Rasam (phonetic),
13 denied defense motion to exclude fingerprint evidence.
14 The Court held that fingerprint evidence had been the
15 mainstay of identification evidence for defense counsel
16 aids and that the reliability of such evidence has never
17 been diminished by defensive tacks.

18 Number 12, State of California versus David
19 Iake, I-A-K-E, fingerprint evidence is neither new nor
20 novel, no Kelly hearing is required, state expert is
21 qualified and will be permitted to testify.

22 I am also going to serve and file on the Court
23 and defense, U.S. Versus Alteme, A-L-T-E-M-E. Again,
24 there is another case which supports my position, or the
25 People's position.

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1 I am going to highlight on page five, expert's
2 testimony should be reliable based on valid reasoning
3 and reliable methodology rather than subjective belief
4 and speculation.

5 I suggest to the Court that's simply what Dr.
6 Cole's testimony is, subjective belief and speculation.

7 Additionally, on page seven, the bottom, of
8 Dr. Stoney's criticism of the process of fingerprint
9 identification were sufficient to preclude the testimony
10 of other experts' large categories of scientific and
11 technical testimony would be inadmissable.

12 At a minimum, it would be necessary to
13 eliminate the defense insanity since virually all
14 psychiatric opinions are subjective and apart.

15 Back to the first prong of Lee, if his
16 theories are not recognized by the scientific community,
17 it's Mr. Zuss's burden, he has not provided the Court
18 with any evidence that Dr. Cole's theories are
19 recognized by the scientific community, obviously
20 fingerprinting has comparison. It's our position he is
21 not a scientist, simply a historian who is here to offer
22 his opinion based on total speculation.

23 What's interesting from his testimony, it
24 becomes clear he didn't even do some of this research
25 himself. He relied on articles that other people wrote

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1 to give his opinion. He didn't interview defense
2 attorneys throughout the country, he didn't call the
3 Legal Aid Societys throughout the country, it would have
4 taken too much time for him, so he simply gave an
5 opinion without checking the other side because it would
6 have been too time consuming. Your Honor, that's
7 irresponsible, and someone who uses that as a basis for
8 their testimony shouldn't be allowed to confuse and
9 distort the issue for the jury.

10 The reason Mr. Zuss says he drank a coke
11 between 1993 and 2000, I suppose he is making fun of me
12 for bringing up all the other work he did. The reason I
13 did that, the defense would have you believe that this
14 is all he does and he spent the last seven years
15 evaluating fingerprint evidence and doing research, but,
16 in effect, that isn't his only area of "expertise". He
17 does seem to do significant research and work on sexual
18 psychopaths and Megan's Law and other things, so this is
19 not strictly, as Mr. Zuss would say, his life's work,
20 this is not his life's work. This is one of the areas
21 that interests him and he wrote a history book about it
22 and that is not competent evidence for the jury.

23 He is not a latent print examiner. He never
24 talked to the experts in this case. He doesn't even
25 know what methods the experts used in this case. When I

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1 asked him, he said, I assume, I assume, I assume, that
2 is not competent testimony. He didn't know who lifted
3 the prints, he doesn't know what method was used to lift
4 the prints.

5 He writes a book filled with an anecdote.
6 According to him, none of the anecdotes he is bringing
7 forth, as I stated before, have been sufficiently
8 examined, but when it constitutes him, he brings up
9 examples, otherwise, it doesn't work.

10 I submit to you, a specific part of his
11 testimony that I found to be extremely interesting, when
12 I talk to him about DNA, he wavered. I asked him is DNA
13 a science. It hasn't had the scientific review that he
14 claims is necessary to make fingerprinting evidence
15 competent. He couldn't see it wasn't a science because
16 everyone knows it does, so he wavered. It's more proven
17 than this is, but it's not completely proven and that's
18 reliable, but this really is. I mean, Judge, that's not
19 competent testimony.

20 Mr. Zuss indicates the only evidence in this
21 case is one fingerprint, that is not the case, there are
22 two fingerprints lifted which just makes evaluation more
23 thorough.

24 The fact that there is fingerprint evidence in
25 a case that hurts Mr. Zuss's client doesn't mean, as a

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1 matter of course, he can bring in whoever he wants to
2 testify at the trial, that's not how it works. It has
3 to be a competent expert.

4 As I said, he was precluded in Mitchell, he
5 was precluded in Nawi and in terms of his credibility,
6 he states a case in Nawi on his direct examination as an
7 example of how fingerprint evidence is flawed. He
8 didn't even read the opinion and he is saying that. How
9 can that be the type of witness that goes before a
10 jury?

11 We cannot say his theories are recognized by
12 the scientific community, if they were, then court after
13 court would not be letting fingerprint evidence in, so
14 it's clearly not recognized by the scientific
15 community.

16 He picks out one case from Upstate, New York,
17 where the troopers were fraudulent. So what. That
18 wouldn't be relevant evidence to put before the jury.

19 I suggest to you his other examples, how his
20 testimony is not credible. I talk to him about Dr. Lee,
21 he says he had conversations with people who got his
22 opinion on his very theory, Dr. Lee, who is one of the
23 foremost in the field, and what's his answer? Well, I
24 discussed it with them, that they talked to him about my
25 theories, but I never asked them what he said. Come on,

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1 Judge, it's all speculation.

2 He doesn't do complete research because it's
3 too burdensome. He doesn't do a lot of interviews
4 because he picks out of articles. Who knows what he
5 picked out of his articles and what he didn't.

6 He talks about a Collaborative Testing
7 Service, he can't even say who runs the program or the
8 qualifications of the person who runs the program.

9 He indicates no science would be perfect
10 including this one and every other. Nothing is
11 absolute, everything is subjective.

12 And as I said before, what about all other
13 sciences?

14 Your Honor, just to touch on some of the
15 things Mr. Zuss said quickly. Mr. Zuss says he is not
16 going to get on the stand and say that there was
17 anything wrong with the examination of the prints in
18 this case, that it was incompetent or fraudulent, but he
19 is going to say something that is both simple and
20 complicated? I mean, just the proffer for the testimony
21 doesn't make sense and it's speculative. He says that
22 fingerprint evidence is flawed and it's not a scientific
23 nature, but he doesn't know that either because he
24 hasn't done the test. To him it might be reliable, it
25 might not, we really don't know.

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1 So, your Honor, in conclusion, I just -- I
2 will sit down with the word, speculation. All Dr. Cole
3 is doing is speculating on some abstract theory that has
4 no basis in the scientific community. As such, it
5 doesn't even get to the second prong. He falls way
6 short and he doesn't get to the second prong, and even
7 if he did, I would suggest to the Court that his
8 testimony is not competent, it's irrelevant and it calls
9 for complete and total speculation.

10 MR. ZUSS: Judge, I would like to say a couple
11 of things, okay?

12 THE COURT: Go ahead.

13 MR. ZUSS: Personally, I'm sort of surprised at
14 what I consider to be the credible personal nature of
15 the attack by the prosecutor on Dr. Cole's testimony. I
16 think it's not necessary. I think there's probably far
17 better ways to criticizing him without being so
18 appalling and personal to say to the Judge, oh, come on,
19 now, it's too burdensome. She attacked his character as
20 well as his work. I think the work is one thing, to
21 attack the character of the individual as saying he is
22 too lazy and burdensome, that's off the charts.

23 I'm surprised at that. If two prints were in
24 fact lifted, I know there is stuff about finger four and
25 five, we only have submitted -- to us, it was only a

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1 live scan print of one finger and a latent of the same
2 finger. We don't have another print. I know there is
3 supposed to be an identification of a fifth finger as
4 well, number five finger. We don't have that.

5 THE COURT: I will certainly hear an argument
6 to the jury.

7 MR. ZUSS: It's sort of late in the game for us
8 to be getting Rosario material that should have been
9 turned over a long time ago.

10 Dr. Lee is irrelevant and immaterial through
11 this, it was in the questioning and certainly is now.
12 Ms. Stepner's opinion of who Dr. Lee is is also
13 irrelevant.

14 Of course Dr. -- Probably one of the most
15 important arguments here is the notion about how Dr.
16 Cole is going to confuse the jury, that is a very self-
17 serving argument. What we have here is fingerprint
18 evidence and, of course, the prosecutors and police
19 officers who want -- police officers who want to
20 maintain the notion that there is no assault on a time-
21 honored approach in a popular culture and legal history
22 of the United States to maintain the irrefutable and
23 immutable nature of the recovery and identification of
24 these prints.

25 Dr. Cole will give the jury hardly confusing

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1 testimony which a jury will be able to evaluate
2 especially considering the kinds of cross-examination
3 that went on this morning and I would expect would be
4 even better or more searching before a jury.

5 It would be for a jury to decide whether or
6 not they believe Detective Otero's methods as flawed or
7 not based upon measuring against Dr. Cole's testimony,
8 that the methods, the so-called time-honored unflawed,
9 immutable methods of fingerprint recovery and
10 identification are in fact scientific and reliable. So
11 it will hardly be confusing, but we can understand on
12 our side why the prosecution would be so concerned about
13 anything assaulting, not at all irrefutable, of forensic
14 fingerprints.

15 Dr. Cole hardly distorts the issue, Dr. Cole
16 in fact places the issue where it should be before the
17 trier of fact in a calm and rational and dispassionate
18 manner.

19 I would suggest to the Court that throughout
20 the Western European and American history, people have
21 been suggesting programs, theories, ways of life that
22 would be denigrated or criticized by a majority of a
23 culture.

24 It used to be, I guess, I would say it again,
25 if you asked a bunch of people in 1492 if the world was

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1 round, they would say of course, everybody knows it's
2 flat. Everybody knows it, this one knows it, that one
3 knows it. The courts at the time knew it. Certainly,
4 the most important institution in Western Europe at the
5 time, the church, said it, so it just was, but there
6 were people who said it wasn't, and I guess they were
7 right, weren't they? So maybe fingerprint recovery and
8 fingerprint recovery techniques are not so irrefutable
9 and immutable, and putting this before a jury of
10 individuals from Brooklyn would be the courageous and
11 right thing to do.

12 People in the population believe
13 overwhelmingly, based upon statistics that I have seen,
14 that over 90 percent of people believe that fingerprint
15 evidence is reliable and acceptable. How could putting
16 forward a theory that tries to criticize or debunk that
17 be confusing to the jury? It wouldn't be, particularly
18 with the kinds of cross-examination that we would see.

19 In addition, one last thing I want to argue
20 earlier on my first application and failed to do so, I
21 will do it now. That because fingerprint evidence is
22 not reliable, that no fingerprint evidence should be
23 admitted here under Frye or Dawbert.

24 MS. STEPNER: Very briefly.

25 Your Honor, Mr. Zuss says I attacked the

ARGUMENTS - DEFENSE

1 character of Dr. Cole, quite on the contrary, I attacked
2 his work, which is the basis for his opinions that he is
3 seeking to put forth to this jury and it's the People's
4 position that if his work wasn't complete and diligent
5 and exhaustive, then the theory is flawed, then it
6 shouldn't be put then forward to the jury. That's why I
7 highlighted for the Court what I think is deficiency in
8 his research.

9 Second, in the People's position, Dr. Lee and
10 his opinion is relevant because he is part of the
11 scientific community and if he doesn't accept Dr. Cole's
12 theories then, of course, it's relevant. When I asked
13 him, he refused to acknowledge that. Clearly, Dr. Lee
14 who, yes, is foremost in his field, his opinion would be
15 relevant. We heard about everybody else's opinion,
16 Professor Starrs, Dr. Stoney, but Dr. Lee, Mr. Zuss
17 suggest we shouldn't hear about.

18 Last, what's interesting in, and Mr. Zuss
19 comments just now, maybe fingerprint evidence is not
20 irrefutable, maybe that, in and of itself, is what this
21 is all about, maybe. Speculation, there is no concrete
22 theory that they are being forth, maybe that testimony
23 calls for speculation and it's not admissible in the
24 courts of this state.

25 Thank you.

COLLOQUY

1 THE COURT: Are we finished?

2 MR. ZUSS: Yes, I think that's enough.

3 THE COURT: I will reserve decision. It's been
4 an interesting day. I will put the case over till next
5 Wednesday for decision and then we will schedule jury
6 selection after that. I will give you a decision on the
7 Sandoval and on this application on Wednesday, the 10th,
8 and then, since I have a seminar to go to, we will then
9 adjourn to the following Monday for trial.

10 Same bail conditions. If you need to get a
11 hold of me with anything else, I will be in my chambers
12 all day tomorrow.

13 MS. STEPNER: 10 o'clock on the 10th?

14 THE COURT: Yes.

15

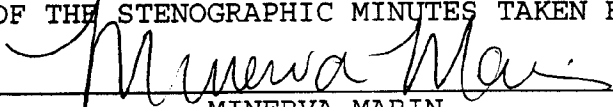
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18 CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT
19 OF THE STENOGRAPHIC MINUTES TAKEN HEREIN:

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MINERVA MARIN
OFFICIAL COURT REPORTER

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DEFENDANT'S WITNESSES

	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
DR. SIMON COLE	3	29	--	--

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