Foster Documents

Loose documents

SCP

Nussbaum ignored paper bits

Scraps made up Foster's note

BY TERRY LEMONS
Democrat-Gazette Washington Bureau

WASHINGTON — President Clinton's lawyers spotted paper scraps inside Vincent Foster's briefcase four days before they pieced them together into a torn-up note that documented the deputy White House counsel's despondency, the Senate Whitewater hearings revealed Thursday.


Spafford

A White House aide found the pieces during a search of Foster's West Wing office two days after his 1993 suicide, three eyewitnesses testified. But then-White House Counsel Bernard Nussbaum ignored the scraps, a move that delayed the discovery of a key piece of evidence that helped confirm Foster's suicide.

Foster's note lamented his place in the Washington spotlight. "Here ruining people is considered sport," he wrote.

"This is deeply troubling to me ... that it didn't turn up for four days," said Sen. Alfonse D'Amato, chairman of the Senate Special Whitewater Committee.

During the sixth day of Whitewater hearings, the committee heard more than

See WHITEWATER, Page 8A

Whitewater

• Continued from Page 1A

four hours of testimony about Nussbaum reneging on an agreement with the Justice Department to let investigators review documents and search for clues in Foster's office. Nussbaum refused to let them examine almost everything in the room, ranging from Foster's computer to his trash.

Michael Spafford, an attorney representing Foster's family, recalled how lawyers and investigators gathered in Foster's office two days after the Hope native's death on July 20, 1993. Spafford said that Nussbaum, who was running the meeting, pulled a thick stack of files from Foster's briefcase.

"He picked the briefcase up by the handles," said Scott Salter, an FBI special agent. "He stated it was empty."

A short time later, White House lawyer Clifford Sloan made "an off-the-cuff remark" about paper scraps in the bottom of the briefcase, Spafford said.

Spafford said Nussbaum's reaction was "something to the effect of, 'We'll get to that later.' " Nussbaum's priority was sorting through Foster's files, Spafford added.

Others in the office couldn't see inside the briefcase. Salter said he would have liked to.

A U.S. Park Police official has testified that the department's "oldest and blindest" detective would have turned up the note sooner than the White House did.

It was not until four days later, on July 26, that the White House realized the paper scraps could be pieced together into a note written by the anguished Foster. White House aides then did not notify police of the note's existence for 30 hours.

Republican members spent much of Thursday scrutinizing Nussbaum's handling of the review of Foster's office on July 22.

Roger Adams, a Justice Department attorney, recounted how an agreement had been reached with Nussbaum the day before, creating a "joint review" that would let investigators see the cover sheet and first page of documents in Foster's office.

When lawyers and investigators arrived on July 22, they discovered that Nussbaum had changed his mind. Instead, Nussbaum said he would sort through Foster's documents and relay the general point of the papers to those gathered.

"It violated the spirit of the agreement we reached the day before," Adams said.

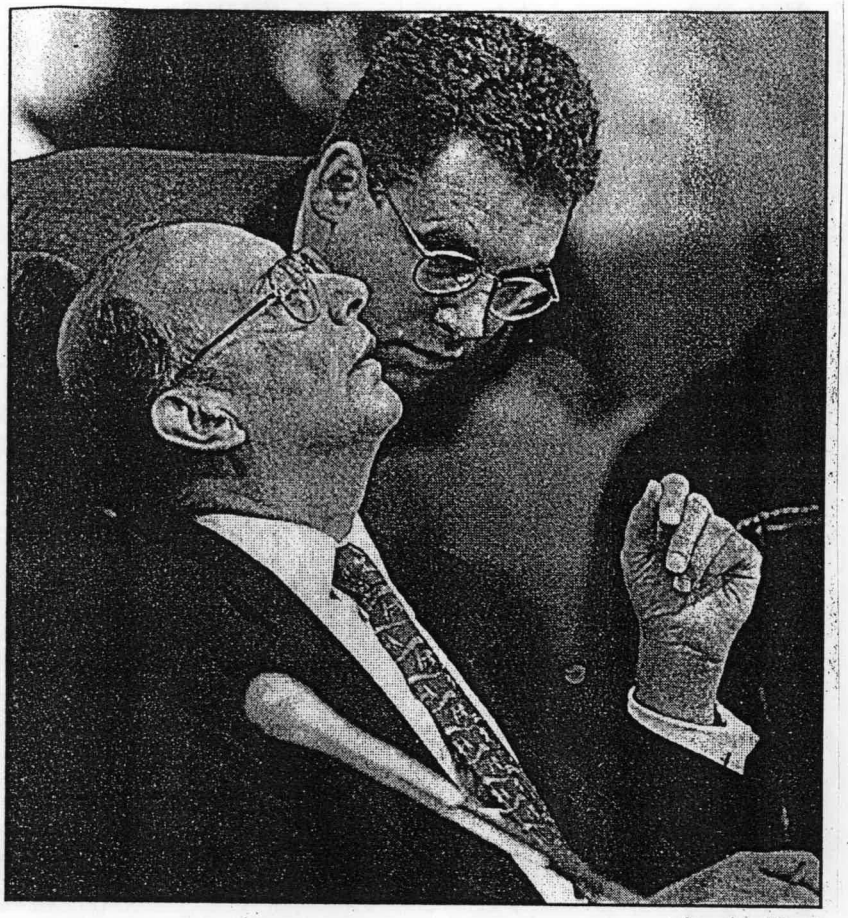
Philip Heymann, the deputy attorney general, immediately passed along word to Nussbaum that he was "making a mistake" in blocking a firsthand review of the papers.

"All I had was Mr. Nussbaum's word on what those documents contained," said Adams, an aide to Heymann.

Nussbaum's approach meant federal officials could have simply let Nussbaum review Foster's papers and "mail the results," Adams said. But Justice Department officials had few alternatives. Adams noted that it would have been an "extraordinary step" to get a subpoena issued.

"I don't think we had any legal tool that we could've pulled out to demand the documents," Adams said.

Spafford said that Nussbaum worried that turning over individ-



Associated Press

TROUBLING DAY — Sen. Alfonse D'Amato, R-N.Y., confers with chief counsel Robert Giuffra Jr. during Senate Special Whitewater Committee hearings Thursday on Capitol Hill. "This is deeply troubling to me," D'Amato said after learning that former White House Counsel Bernard Nussbaum ignored scraps of paper found in Vincent Foster's briefcase.

7/28/95
Cont.

ual papers might create an avenue for investigators to obtain more documents and set a legal precedent that could affect future White House cases.

Sen. Paul Simon, D-Ill., suggested Nussbaum was being "overzealous" in his protection of Foster's papers.

During the search of Foster's office, Spafford and Adams said, they heard no references to Whitewater. Foster's files included tax records and other documents involving President Clinton and Hillary Rodham Clinton's participation in the Marion County real estate development.

"At the time, Whitewater meant nothing to me," Adams said.

Investigators wanted to examine Foster's office for signs of "a scandal he couldn't handle," Adams said. He added that there probably would have been little interest in the Clintons' personal financial records if Nussbaum had allowed a review.

"I would've assumed it didn't have much to do with a suicide investigation, but it would've been nice to have seen them," Adams said.

Under questioning by Republicans, the witnesses said White House officials did not reveal to them that Whitewater-related documents were removed from Foster's office later that day. At Nussbaum's direction, Margaret Williams, Hillary Clinton's chief of staff, moved the records.

Despite that and other problems with Nussbaum, Adams said that he didn't feel as if the White House was trying to hide anything. "I don't have an indication that there was an attempt to cover anything up," he said.

Thursday's testimony wrapped up the second week of hearings. The sessions resume Tuesday, with the witnesses still to be determined.

Nussbaum, who returned to his New York law practice last year after being criticized over Whitewater, is yet expected to make a lengthy, dramatic appearance before the committee.

Sampling of hearings

A sampling of what was said at the Senate Whitewater hearing:

Michael Spafford, an attorney representing Vincent Foster's family, on the search of Foster's office:

"So as questions came up, what happened was that the documents were separated into three separate piles. One pile represented personal documents of Mr. Foster, such as his credit union slips, things like that. Another pile represented documents of interest to the investigators that they identified, one of them being the map of metropolitan Washington. A third pile represented documents of no apparent interest. ...

"The FBI agent was seated at the sofa, and I remember him standing up, and it looked like he was trying to look at the documents. Mr. Sloan (Associate White House Counsel Clifford Sloan) confronted him and said, 'Are you trying to look at the documents?' Mr. Nussbaum (White House Counsel Bernard Nussbaum) quickly intervened and rebuked Mr. Sloan and said, 'That's not why we're here, we're here to cooperate,' and the search continued. ..."The briefcase was behind him (Nussbaum). He picked it up, brought it up to the desk. The briefcase was stuffed full of files or documents. He then picked the documents up out of the briefcase, stacked them on the table, returned the briefcase behind him against the wall, and then proceeded to review the documents that he had taken out of the briefcase. ... At some point in time — I was talking to Mr. Nussbaum, and at some point in time Mr. Sloan had the briefcase in his hands. I didn't see him pick it up. And he made the comment at that point in time that there appeared to be scraps in the bottom of the briefcase."

Sen. Bill Frist, R-Tenn.: "And what did Mr. Nussbaum say in response to Mr. Sloan's statement and his demonstration that there were scraps of paper in the bottom of the briefcase?"

Spafford: "Mr. Nussbaum was sitting on the couch — or the sofa at the time, and his comment was something to the effect that we will get to all of that later, we have to look through the materials, and we will look through that later."

7/28/95
8A

TELECOPY COVER SHEET

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Court Use of Polygraph Tests Gets Boost

By WADE LAMBERT
Staff Reporter of THE WALL STREET JOURNAL

Polygraph test results probably will be used more often in court proceedings as a result of a recent decision by the federal appeals court in New Orleans.

Citing improvements in the technology and new legal standards for scientific testimony, the court in June lifted its ban on allowing the use of the test results as evidence. Although the decision applies only to federal courts in Texas, Louisiana and Mississippi, the Fifth Circuit is the highest court yet to rule on whether polygraph results meet the new standard set for scientific evidence in a 1993 Supreme Court case.

Polygraphs, commonly known as lie-detector tests, measure a person's blood pressure, pulse, breathing and other factors in response to questions. A trained examiner studies the results to determine whether a person has answered truthfully. Researchers say the test, when done under proper conditions, has improved to the point where it is now accurate between 70% and 90% of the time.

But most courts still reject polygraph data as too unreliable to admit as evidence. Two other federal appeals courts have bans similiar to the one lifted by the Fifth Circuit, as do many state courts around the country. Other federal circuits allow the evidence in some circumstances, such as to impeach or corroborate a witness's testimony or if both sides agree to its admission. But such use is still rare. Only New Mexico state courts regularly allow polygraph evidence to be used.

"Judges are saying that there is an appropriate place for lie-detector evidence in the courts. 'Not admissible, period,' is no longer right," said Joel Cohen, a criminal-defense lawyer at Stroock & Stroock & Lavan in New York. "The polygraph is no more fallible than other fact-finding tools."

The Fifth Circuit said that under the 1993 Supreme Court ruling on admitting scientific evidence, in a case known as Daubert, polygraph evidence could no longer be automatically rejected. The court said polygraph testing has improved enough over the years to leave it to trial court judges to decide when it can be used.

Under Daubert, a trial judge must determine that the science involved is legitimate and that the results are significant to a case before allowing scientific evidence. Lie-detector tests were barred by many courts under the old rule, which required judges to determine that evidence was based on science or technology that was "generally accepted." That standard, known as the Frye test, was based on a 1923 Supreme Court ruling preventing a murder defendant from using what the high court has since called a "crude predecessor" to the polygraph to demonstrate his innocence.

"There can be no doubt that tremendous advances have been made in polygraph instrumentation and technique in the years since Frye," the Fifth Circuit said. The three-judge panel stressed, however, "It is with a high degree of caution that we have today opened the door to the possibility of polygraph evidence in certain circumstances. We may indeed be opening a legal Pandora's box."

Prosecutors generally oppose allowing such evidence. They say lie-detector results are subject to varying interpretations, making it likely that disputes over polygraph results could turn into battles between expert witnesses.

"There is a perception that the level of expertise differs from examiner to examiner," said Michael P. Barnes, county prosecuting attorney in South Bend, Ind., and president of the National District Attorneys Association. "It's not like you just strap on the box and you get an answer. It's not like a blood test."

Criminal-defense attorneys and polygraph examiners say courts are becoming more comfortable with the reliability of lie-detector tests. Federal trial court rulings in New York, Arizona and New Mexico this year also have said the tests may be allowed under Daubert. "There has been a slow trend toward admitting polygraph evidence, and it now has accelerated," said David C. Raskin, professor emeritus at University of Utah in psychology and a polygraph specialist.

In the case before the Fifth Circuit, the polygraph testing was done to bolster three defendants' claims that police had illegally searched their baggage for drugs at a Houston airport. Drugs were found in the bags, and the trial judge refused to consider the polygraph results when he ruled in a pretrial hearing that the search was proper. The tests had shown that the defendants were telling the truth about how police handled the search.

The appeals court sent the case back to the trial judge to reconsider whether the polygraph tests should make a difference in his ruling on the police search. Prosecutors in the case conceded that polygraph testing could no longer be barred under Daubert, but argued that the results in their case were properly excluded.

Lawyers said the Fifth Circuit decision leaves open the possibility that the court would allow polygraph evidence to be presented to jurors as well. In the past, many courts have raised concerns that jurors would be overly influenced by lie-detector results. But similar concerns also have been raised about DNA evidence, which has become more common in criminal cases, even though expert witnesses sometimes disagree about the results.

Judges believe that "polygraph evidence will overwhelm the jury, which clearly doesn't happen," Prof. Raskin said.

Federal Judges to Consider Easing Court Camera Ban

WASHINGTON (AP)—Federal judges will consider easing their ban on courtroom cameras next year, but O.J. Simpson's televised state-court trial has hardened resistance to cameras in federal criminal trials, a federal judge said.

"Lawyers, judges and the public have been influenced by the perception that cameras are not good for a trial because of the Simpson case," Judge Gilbert Merritt of Sixth U.S. Circuit Court of Appeals said.

Judge Merritt, who heads the U.S. Judicial Conference's executive committee, said the 27-judge conference voted unanimously at its closed-door meeting Tuesday to defer until March the cameras-in-the-courtroom issue. The conference sets policy for the federal courts.

A group of judges has proposed letting each of the 13 federal appeals courts decide for itself whether to allow TV and radio coverage of appellate hearings.

The conference voted last year to end a three-year experiment that had allowed some televised proceedings. The ban on such coverage, dating back to 1937, was restored.

57 F.3d 428
64 USLW 2023
(Cite as: 57 F.3d 428)

UNITED STATES of America, Plaintiff-Appellee,
v.
Miriam Henao POSADO, Pablo Ramirez and Irma Clemencia Hurtado, Defendants-Appellants.

No. 94-20285.

United States Court of Appeals,
Fifth Circuit.

June 20, 1995.

Defendants were convicted of one count of conspiracy to possess and one count of possession with intent to distribute in excess of five kilograms of cocaine, in the United States District Court for the Southern District of Texas, Norman W. Black, Chief Judge. Defendants appealed. The Court of Appeals, DeMoss, Circuit Judge, held that: (1) polygraph evidence would no longer be per se inadmissible for any purpose, and (2) remand would be required, to determine whether polygraph evidence offered by defendants, to support position that their consent to search of their baggage at airport was not voluntary, would be admissible.

Reversed, vacated and remanded.

[1] CRIMINAL LAW ⇐ 469.1
110k469.1
The determination as to whether evidence sought to be admitted as scientific and technical assists trier of fact, so as to be admissible under Evidence Rule 702, is essentially a relevance inquiry. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[2] CRIMINAL LAW ⇐ 469.1
110k469.1
In order to satisfy requirement that scientific or technical evidence be "helpful" to trier of fact under Evidence Rule 702, evidence must possess validity when applied to pertinent factual inquiry. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[3] CRIMINAL LAW ⇐ 388.1
110k388.1
Evidentiary reliability, or trustworthiness, of scientific or technical evidence sought to be admitted under Evidence Rule 702, is demonstrated by showing that knowledge offered is more than speculative belief or unsupported speculation. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[4] CRIMINAL LAW ⇐ 388.1
110k388.1
For scientific knowledge to have sufficient reliability or trustworthiness to be admissible, under Evidence Rule 702, there should be proof that principle supports what it purports to show, i.e., that it is valid. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[5] CRIMINAL LAW ⇐ 388.1
110k388.1
Validity of proposed scientific or technical information, sought to be admitted under Evidence Rule 702, can be measured by factors including whether theory or technique can be tested and whether it has been subjected to peer review or publication, and for particular techniques such as polygraph or voice identification, known or potential rate of error may be helpful in making validity determination. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[5] CRIMINAL LAW ⇐ 388.5(1)
110k388.5(1)
Validity of proposed scientific or technical information, sought to be admitted under Evidence Rule 702, can be measured by factors including whether theory or technique can be tested and whether it has been subjected to peer review or publication, and for particular techniques such as polygraph or voice identification, known or potential rate of error may be helpful in making validity determination. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[5] CRIMINAL LAW ⇐ 486(2)
110k486(2)
Validity of proposed scientific or technical information, sought to be admitted under Evidence Rule 702, can be measured by factors

including whether theory or technique can be tested and whether it has been subjected to peer review or publication, and for particular techniques such as polygraph or voice identification, known or potential rate of error may be helpful in making validity determination. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[6] CRIMINAL LAW ⇐ 388.1
110k388.1
In determining whether proposed scientific or technical information is admissible, under Evidence Rule 702, extent to which particular theory or technique has received general acceptance may be relevant to whether it is scientifically valid. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[7] CRIMINAL LAW ⇐ 388.5(1)
110k388.5(1)
Polygraph test results are not per se inadmissible in criminal proceedings; admissibility would be governed by United States Supreme Court Daubert decision and Evidence Rule 702, and other applicable evidentiary requirements. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

*429 Michael B. Cohen, New York City, for Posado.

Joel Cohen, New York City, for Ramirez.

Ivan S. Fisher, New York City, for Hurtado.

James L. Turner, Paula C. Offenhauser, Asst. U.S. Atty., Gaynelle Griffin Jones, U.S. Atty., Houston, TX, for U.S.

Appeals from the United States District Court For the Southern District of Texas.

Before POLITZ, Chief Judge, HIGGINBOTHAM and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:

This appeal concerns the admissibility of polygraph evidence in a pretrial hearing to suppress forty-four kilograms of cocaine recovered after an airport interdiction and search of the defendants' luggage. The district court refused to consider polygraph evidence offered by the defendants to corroborate their version of events preceding the arrest. Our precedent, with few variations, has unequivocally held that polygraph evidence is inadmissible in a federal court for any purpose. See, Barrel of Fun, Inc. v. State Farm Fire & Cas. Co., 739 F.2d 1028, 1031 (5th Cir.1984) (collecting cases). However, we now conclude that the rationale underlying this circuit's per se rule against admitting polygraph evidence did not survive Daubert v. Merrell Dow Pharmaceuticals, Inc., --- U.S. ----, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Therefore, it will be necessary to reverse and remand to the district court for determination of the admissibility of the proffered evidence in light of the principles embodied in the Federal Rules of Evidence and the Supreme Court's decision in Daubert. Given the sparsity of the record, however, we express no opinion about whether, based on that analysis, the evidence possesses sufficient evidentiary reliability and relevance to be admissible in the suppression hearing on remand.

BACKGROUND

Defendants Miriam Henao Posado, Pablo Ramirez and Irma Clemencio Hurtado were each indicted and subsequently convicted of one count of conspiracy to possess and one count of possession with intent to distribute in excess of five kilograms of cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(a)(A) and 846. Prior to trial the defendants moved to suppress the cocaine found in their luggage and certain post-arrest statements. At issue was whether the defendants validly consented to a search of their luggage. The prosecution sought to justify the search solely on the basis of consent, offering a Spanish-language consent form executed by all three defendants. [FN1] The three defendants, by way of affidavit, claimed (1) that they were not asked to consent and did not consent, either orally or in writing, to the search of their luggage until after the bags had been opened, (2) that they were told they were under arrest before their bags were searched, and (3) that they were not

given Miranda warnings before the bags were opened. Defendants contended that the consent was invalid either (1) because it was given after the bags were opened, or (2) because it followed and was tainted by an illegal arrest without probable cause.

FN1. As counsel for the government stated in oral argument, this case was treated "only as a consent case." It would be inappropriate, on the basis of the present record, to determine whether independent probable cause existed for the search. We note, however, that that issue may well be appropriate for consideration on remand.

Events Leading up to the Search

On September 17, 1993, Miriam Henao Posado, Pablo Ramirez and Irma Clemencio Hurtado arrived at Houston Intercontinental Airport in a maroon car driven by an unidentified third party. As they unloaded their *430 baggage, they were observed by Houston Police Department (HPD) Officers Rodriguez and Furstenfeld and an agent with the Drug Enforcement Agency (DEA). The officers became suspicious that the defendants might be carrying narcotics based on certain characteristics of the defendants' baggage and behavior. Based on those suspicions and prior to confronting the defendants, the officers retrieved from the airline the three suitcases checked by the defendants and "prepped" one of the bags. "Prepping" involves squeezing the sides of a bag, which causes the odor of whatever is contained inside to be emitted. In this case, the officers detected fabric softener, which is often used by narcotics traffickers to mask the odor of narcotics in transport.

Shortly thereafter, the two HPD officers approached the defendants in the snack bar area, identified themselves as police officers and asked the defendants for their tickets and identification. When it became apparent that none of the defendants spoke English, Officer Rodriguez conversed with them in Spanish. Neither Posado nor Hurtado were carrying any identification, and the name on the identification produced by Ramirez did not match either his ticket or the name placed on the baggage tag. Ramirez' identification was examined and then returned to him.

When asked about luggage, the defendants responded by indicating three carry-on bags. When Officer Rodriguez pointed to the baggage tags stapled inside the defendants' ticket folders, one of the defendants conceded that they had checked three suitcases. Here the stories diverge. Officer Rodriguez testified that, after expressing some concern about missing their flight, the defendants agreed to accompany him downstairs so that he could inspect the luggage. He also testified that he advised the defendants at that time that they were free to leave. The defendants testified that Officer Rodriguez never informed them that they were free to leave and that they were under the impression that they were not free to leave. See Florida v. Bostick, 501 U.S. 429, 439-41, 111 S.Ct. 2382, 2389, 115 L.Ed.2d 389 (1991) (seizure occurs when police conduct would communicate to a reasonable person that they are not free to leave). The defendants also testified that Officer Rodriguez insisted they accompany him despite protests from defendant Ramirez that the delay would cause them to miss their scheduled flight. Defendant Ramirez testified that the officers took and maintained possession of two of their carry-on bags at that time. Once downstairs, the two HPD officers and the three defendants were joined by the DEA agent who had possession of the three larger suitcases checked by the defendants. The defendants were asked for keys to the padlocks, which they did not have.

The officers testified that immediately after asking for keys, Officer Rodriguez secured the defendants' consent to search, both orally and in writing. Officer Rodriguez also testified that he advised the defendants in Spanish that they were not required to consent. Next, Officer Furstenfeld unsuccessfully attempted to open the suitcases using a master set of luggage keys. Only then, according to the officers, were the padlocks pried open and the bags searched.

The defendants testified that immediately after they were asked for keys, Officer Furstenfeld began trying to open the suitcases

with the master set of keys. When he could not, Officer Furstenfeld pried open the padlock and opened the zipper slightly. At that point, the defendants claim, Officer Furstenfeld stopped suddenly and ran upstairs. In his absence, the DEA agent continued opening the suitcase with a pen knife, looked inside and announced that it contained drugs. At that point, the defendants testified, Officer Furstenfeld returned with the consent form and it was executed by the defendants. Afterwards, the other two suitcases were opened.

The Polygraph Examinations

Perceiving that the suppression hearing would amount to a "swearing match" between the three officers and the three defendants (that the defendants would be likely to lose), the defendants arranged to submit to polygraphs to establish the truth of the assertions in their affidavits. Well before the tests were given, counsel for the defendants *431 contacted the prosecution and extended the opportunity to participate in the tests. The defendants also offered to stipulate that the results would be admissible in any way the government wanted to use them, at trial or otherwise. The prosecution declined this opportunity.

Subsequently, the defendants were examined by polygraph experts Paul K. Minor and Ernie Hulsey. In separate examinations each defendant was asked the following questions and each gave the following answers:

A. Before opening that first bag, did any police official ever ask for permission to search any of those bags? No.

B. Before searching your luggage, were you told that you were under arrest? Yes.

C. At the airport, were you ever told that you were free to leave? No.

D. Did you deliberately lie in your affidavit? No.

E. Before opening your bags, did the police officials advise you of your Miranda rights? No.

Both Minor and Hulsey concluded that in each case "deception was not indicated." Thereafter, the defendants moved for an order allowing Minor and Hulsey to testify regarding the results of the three tests at the pretrial suppression hearing or, in the alternative, for a hearing on the admissibility of polygraph results as expert evidence under the Federal Rules of Evidence and the standards enunciated by the Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, --- U.S. ----, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Defendants' proffer included the reports on the polygraph examinations as well as the curriculum vitae for both Minor and Hulsey. In support of their request for a Daubert hearing on the issue, defendants submitted the affidavit of another polygraph expert, Dr. Stan Abrams, Ph.D., to establish that polygraph technique possesses sufficient scientific validity to be admissible.

At the beginning of the subsequent suppression hearing, the district court summarily refused to consider the polygraph testimony and also refused to consider whether the testimony was reliable and relevant under the Federal Rules of Evidence, stating:

> I am a great believer in polygraph, that polygraph technique, I think it's extremely effective as a law enforcement tool. I do not believe, however, that it belongs in the courtroom, either before the Court or before the jury, for several reasons, one of which is that it will lead to an impossible situation where we will have to hear polygraph experts on both sides, and we'll get into the same battle of experts that we get into in so many areas of the law.
>
> I am very concerned that it does have some valid use in determining whether people are likely to be truthful or likely not to be truthful, however, I think it opens up some policy questions that belong either to Congress or to the appellate courts to resolve before we get into it here in the courtroom.

At the conclusion of the suppression hearing, the district court denied the defendants' motion to suppress, holding that the defendants knowingly and voluntarily consented to a search of their luggage before any of the bags were opened, and that the defendants were not arrested until after the

bags were searched. Shortly after the hearing, the defendants and the government entered into a stipulation that the defendants would be tried by the court on the evidence presented at the suppression hearing. All three defendants were convicted on both the conspiracy to possess and possession counts, and this appeal followed.

APPLICABLE LAW

On appeal, the defendants contend that Daubert required the district court to conduct a hearing on the admissibility of the polygraph evidence as expert testimony under Federal Rule of Evidence 702. Defendants also argue that the district court erred in refusing to consider polygraph evidence where it was offered solely for use in a pretrial suppression hearing, relying on Bennett v. City of Grand Prairie, Texas, 883 F.2d 400 (5th Cir.1989). Finally, the defendants maintain that the district court erroneously found that consent was knowing and voluntary, and therefore valid. The government ***432** concedes that a per se rule against admitting polygraph evidence, without further inquiry, is not viable after Daubert, but argues that the proffered evidence in this case was properly excluded under Rule 403.

We reject the defendants' argument that Bennett controls. Bennett held that it was not error for a magistrate to consider an affidavit referring to polygraph results, along with other evidence, to determine whether there was probable cause to issue an arrest warrant. 883 F.2d at 405-06. That case does not extend so far as to control the admissibility of polygraph testimony in all pretrial proceedings. Daubert, along with the Federal Rules of Evidence, provide the guiding principles.

We also reject the government's invitation to short-circuit the Daubert analysis by finding that the district court implicitly relied on Rule 403 to exclude the evidence. We conclude that the district court applied a per se rule against admitting polygraph evidence. Even the government concedes that that rule is no longer viable after Daubert. Therefore, the case must be remanded.

From Frye to Daubert--Rule 702

Before Daubert, the standard for determining the admissibility of scientific or technical evidence in our circuit was the Frye "general acceptance" test, which required the proponent to demonstrate that the science or technology relied upon enjoyed general acceptance in the relevant scientific or technical field from which it arose. The Frye test originated in a short and citation-free case in which a criminal defendant attempted to introduce what Daubert called a "crude predecessor" of the polygraph to demonstrate his innocence in a murder trial. Daubert, --- U.S. at ----, 113 S.Ct. at 2793; Frye v. United States, 293 F. 1013 (D.C.Cir.1923). Frye thus became the seminal polygraph case, and many of our precedents discussing polygraph or similar evidence either cite Frye or conclude that such evidence is unreliable because the polygraph does not enjoy general acceptance and use. See e.g., Barrel of Fun, Inc. v. State Farm Fire & Cas. Co., 739 F.2d 1028, 1031 (5th Cir.1984); United States v. Martino, 648 F.2d 367, 390 (5th Cir.1981); United States v. Cochran, 499 F.2d 380, 393 (5th Cir.1974), cert. denied, 419 U.S. 1124, 95 S.Ct. 810, 42 L.Ed.2d 825 (1975); United States v. Gloria, 494 F.2d 477, 483 (5th Cir.), cert. denied, 419 U.S. 995, 95 S.Ct. 306, 42 L.Ed.2d 267 (1974); United States v. Frogge, 476 F.2d 969, 970 (5th Cir.), cert. denied, 414 U.S. 849, 94 S.Ct. 138, 38 L.Ed.2d 97 (1973).

Daubert expressly rejected the "austere" Frye standard, holding that the Frye approach was superseded by adoption of the Federal Rules of Evidence. --- U.S. at ----, 113 S.Ct. at 2794. In its stead the Supreme Court outlined a "flexible" inquiry driven primarily by Federal Rules of Evidence 401, 402, 403, and 702. After discussing the "liberal thrust" of the federal rules, as reflected in Rules 401 and 402, the Court noted that nothing in Rule 702, which governs the admissibility of expert testimony, makes "general acceptance" an absolute prerequisite to admissibility. [FN2] What that rule does require, the Court held, is

that the trial judge make initial determinations under Rule 104(a) [FN3] that the proffered evidence possesses sufficient evidentiary reliability to be admissible as "scientific, technical, or other specialized knowledge" and that the proffered evidence is relevant in the sense that it will "assist the trier of fact to understand the evidence or to determine a fact in issue." Daubert, --- U.S. at ----, 113 S.Ct. at 2796.

FN2. Rule 702 governing expert testimony provides: If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

FN3. Rule 104(a) provides: "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions (b) [pertaining to conditional admissions]. In making its determination it is not bound by the rules of evidence except those with respect to privileges."

[1][2] Whether evidence assists the trier of fact is essentially a relevance inquiry. *433 Daubert, --- U.S. at ----, 113 S.Ct. at 2795-96. To be "helpful" under Rule 702, the evidence must possess validity when applied to the pertinent factual inquiry. [FN4] If polygraph technique is a valid (even if not certain) measure of truthfulness, then there is no issue of relevance. The defendants' polygraph answers, which are consistent with their testimony, tend to prove that they did not consent to a search of their bags until after the bags were searched. That fact is clearly relevant, because it tends to prove that the search was not valid.

FN4. The example given by the Supreme Court demonstrates that particular evidence may have validity for some purposes and not for others: The study of the phases of the moon, for example, may provide valid scientific "knowledge" about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent credible grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night. --- U.S. at ----, 113 S.Ct. at 2796.

[3][4][5][6] Evidentiary reliability, or trustworthiness, is demonstrated by a showing that the knowledge offered is "more than speculative belief or unsupported speculation." Daubert, --- U.S. at ----, 113 S.Ct. at 2795. Certainty is not required, but the knowledge asserted must be based on "good grounds." Id. For scientific knowledge, there should be proof that the principle supports what it purports to show, i.e. that it is valid. Id. Validity can be measured by several factors, including whether the theory or technique can be tested and whether it has been subjected to peer review or publication. Id. at ----, 113 S.Ct. at 2796-97. For particular techniques, such as polygraph or voice identification, the known or potential rate of error may be helpful in making the validity determination. Id. at ----, 113 S.Ct. at 2797. Finally, although it is not dispositive, the extent to which a particular theory or technique has received general acceptance may be relevant to whether it is scientifically valid. Id.

[7] What remains is the issue of whether polygraph technique can be said to have made sufficient technological advance in the seventy years since Frye to constitute the type of "scientific, technical, or other specialized knowledge" envisioned by Rule 702 and Daubert. We cannot say without a fully developed record that it has not.

Even before Daubert, this court's view of polygraph evidence had expanded somewhat. See Bennett, 883 F.2d at 405-06 (magistrates may consider polygraph evidence when determining whether probable cause to issue an arrest warrant exists); United States v. Lindell, 881 F.2d 1313, 1326 (5th Cir.1989) ("[i]mpeachment evidence includes the results of a polygraph test" for purposes of the Brady rule), cert. denied sub nom. Kinnear v. United States, 493 U.S. 1087, 110 S.Ct. 1152, 107 L.Ed.2d 1056 (1993). In 1980, twelve judges of this court agreed that whether polygraph was

generally accepted would be subject to reconsideration given a proffer tending to show that polygraph technique had improved in the years since Frye. United States v. Clark, 622 F.2d 917, 917 (5th Cir.1980) (en banc) (Gee, J., concurring), cert. denied, 449 U.S. 1128, 101 S.Ct. 949, 67 L.Ed.2d 116 (1981). [FN5] In 1984, we recognized the considerable controversy surrounding our circuit's continued adherence to a per se rule against polygraph evidence, but concluded that en banc consideration would be required to change our existing precedent. Barrel of Fun, Inc. v. State Farm Fire & Cas. Co., 739 F.2d 1028, 1031 n. 8 (5th Cir.1984). After Daubert, a per se rule is not viable. Because no panel has squarely addressed the issue of polygraph admissibility since Daubert, en banc consideration is not required for this decision.

FN5. Several other circuits went further by granting the district court limited discretion to consider polygraph evidence in certain circumstances. E.g., United States v. Johnson, 816 F.2d 918, 923 (3d Cir.1987); United States v. Flores, 540 F.2d 432, 436-37 (9th Cir.1976); United States v. Mayes, 512 F.2d 637, 648 n. 6 (6th Cir.), cert. denied, 422 U.S. 1008, 95 S.Ct. 2629, 45 L.Ed.2d 670 (1975); United States v. Infelice, 506 F.2d 1358, 1365 (7th Cir.1974), cert. denied sub nom., Garelli v. United States, 419 U.S. 1107, 95 S.Ct. 778, 42 L.Ed.2d 802 (1975); see also United States v. Piccinonna, 885 F.2d 1529, 1532-35 (11th Cir.1989) (summarizing various circuit approaches to polygraph admissibility).

*434 There can be no doubt that tremendous advances have been made in polygraph instrumentation and technique in the years since Frye. The test at issue in Frye measured only changes in the subject's systolic blood pressure in response to test questions. Frye v. United States, 293 F. at 1013. Modern instrumentation detects changes in the subject's blood pressure, pulse, thoracic and abdominal respiration, and galvanic skin response. [FN6] Current research indicates that, when given under controlled conditions, the polygraph technique accurately predicts truth or deception between seventy and ninety percent of the time. [FN7] Remaining controversy about test accuracy is almost unanimously attributed to variations in the integrity of the testing environment and the qualifications of the examiner. [FN8] Such variation also exists in many of the disciplines and for much of the scientific evidence we routinely find admissible under Rule 702. See 1 MCCORMICK ON EVIDENCE § 206 at 915 & n. 57. Further, there is good indication that polygraph technique and the requirements for professional polygraphists are becoming progressively more standardized. [FN9] In addition, polygraph technique has been and continues to be subjected to extensive study and publication. [FN10] Finally, polygraphy is now widely used by employers and government agencies alike.

FN6. See 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5169 at 95 n. 7 (1978); Ronald J. Simon, Adopting a Military Approach to Polygraph Evidence Admissibility: Why Federal Evidentiary Protections Will Suffice, 25 TEX.TECH L.REV. 1055, 1059 (1994).

FN7. Bennett, 883 F.2d at 405 ("[p]olygraph exams, by most accounts, correctly detect truth or deception 80 to 90 percent of the time"). Even the most ardent polygraph detractors cite accuracy rates of 70 percent. See Brown v. Darcy, 783 F.2d 1389, 1395 n. 12 (9th Cir.1986) (collecting studies). In 1983 the Office of Technology Assessment (OTA) conducted a comprehensive inquiry for the United States Congress. That inquiry found that accuracy ranged anywhere from 58 to 98 percent. However, only ten of the thirty studies reviewed met even minimal standards for scientific validity in terms of the examiners and techniques used. Simon, supra note 6, 25 TEX.TECH L.REV. at 1062-63. A more recent comprehensive review of the OTA data reported that accuracy rates were much higher for studies which most resembled realistic polygraph practice, a factor which could explain as much as 65% of the observed variation in detection rates. See John E. Kircher, et al., Meta-Analysis of Mock Crime Studies of the Control Question Polygraph Technique, 12 LAW & HUMAN BEHAVIOR 79 (1988); see also David C. Raskin, The Polygraph in 1986: Scientific, Professional and Legal Issues Surrounding Application and Acceptance of Polygraph Evidence,

1986 UTAH L.REV. 29, 72 (1986) ("existing literature suggests an accuracy of 90% or higher when examinations are conducted to assess the credibility of suspects in criminal investigations."); 1 MCCORMICK ON EVIDENCE § 206 at 909-11 (John William Strong ed., 4th ed. 1992) and sources cited therein.

FN8. See United States v. Piccinonna, 885 F.2d 1529, 1540-41 (11th Cir.1989) (Johnson, J., concurring in part and dissenting in part) (citing research indicating that examiner expertise and test procedure affects accuracy); Simon, supra note 6, 25 TEX.TECH L.REV. at 1063-66 (discussing the affect of test integrity, countermeasures, and examiner competence on polygraph accuracy).

FN9. See Piccinonna, 885 F.2d at 1533 & n. 13. At least 30 states require licenses or regulate polygraphists. Raskin, supra note 7, 1986 UTAH L.REV. at 68. Dr. Abrams reports that the American Polygraph Association (APA), which has about 2,500 members, accredits schools of polygraphy, screens its members and administers written and oral tests to graduates to assure an established level of competency. Standard test protocol calls for pre-test collection of data, a pre-test interview, administration of the test questions (usually in a control question format) and a post-test interview. In addition, the APA sanctions members who do not follow enumerated testing procedures. See Charles M. Sevilla, Polygraph 1984: Behind the Closed Door of Admissibility, 16 U.WEST L.A. L.REV. 5, 18-20 (1984); Raskin, supra note 7, 1986 UTAH L.REV. at 66-69 (both discussing the need for additional measures to professionalize polygraph practice, which would have the effect of increasing overall accuracy rates). In this case, counsel for the government conceded at oral argument that the defendants' proffer sufficiently established reliability.

FN10. See 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE & PROCEDURE § 5169 at 92 n. 2 (collecting an impressive bibliography).

To iterate, we do not now hold that polygraph examinations are scientifically valid or that they will always assist the trier of fact, in this or any other individual case. We merely remove the obstacle of the per se rule against admissibility, which was based on antiquated concepts about the technical ability of the polygraph and legal precepts that have been expressly overruled by the Supreme Court.

***435** Rule 403 as Gatekeeper

Assuming that polygraph evidence satisfies the requirements of Rule 702 does not end the inquiry. Other evidentiary rules, such as Rule 403, may still operate to exclude the evidence. Daubert, --- U.S. at ----, 113 S.Ct. at 2797-98. While not discussed at length in Daubert, the presumption in favor of admissibility established by Rules 401 and 402, together with Daubert 's "flexible" approach, may well mandate an enhanced role for Rule 403 in the context of the Daubert analysis, particularly when the scientific or technical knowledge proffered is novel or controversial. See Conti v. Comm'r of Internal Revenue, 39 F.3d 658 (6th Cir.1994) (excluding polygraph evidence on the basis of Rule 403), cert. denied, --- U.S. ----, 115 S.Ct. 1793, 131 L.Ed.2d 722 (1995).

Aside from Frye, the traditional objection to polygraph evidence is that the testimony will have an unusually prejudicial effect which is not justified by its probative value, precisely the inquiry required of the district court by Rule 403. See Bennett, 883 F.2d at 404; Brown v. Darcy, 783 F.2d 1389, 1396 (9th Cir.1986). In the context of this case and on the present record, there are several factors that may operate to counterbalance the potential prejudicial effect of this testimony. First, the prosecution was contacted before the tests were conducted and offered the opportunity to participate in the exams, including stipulating as to any limited use for the evidence. In such a case, both parties have a risk in the outcome of the polygraph examination, simultaneously reducing the possibility of unfair prejudice and increasing reliability. Second, the evidence was not offered at trial before a jury, but in a pretrial hearing before the district court judge. A district court judge is much less likely than a lay jury to be intimidated by claims of scientific validity into assigning an inappropriate evidentiary value to polygraph

evidence. Bennett, 883 F.2d at 405. We have consistently held that the rules of evidence are relaxed in pretrial suppression hearings. See FED.R.EVID. 104(a); United States v. DeLaFuente, 548 F.2d 528 (5th Cir.), cert. denied sub nom. Stewart v. United States, 431 U.S. 932, 97 S.Ct. 2640, 53 L.Ed.2d 249 (1977); United States v. Lee, 541 F.2d 1145 (5th Cir.1976).

We note also that there are factors in this record which substantially boost the probative value of this evidence. The evidence at the suppression hearing essentially required the district court to decide between the story told by the officers and that told by the defendants, not an unusual situation, and perhaps not sufficient alone to justify admission of "tie-breaker" evidence carrying a high potential for prejudicial effect. In this case, however, there was more. Because Officer Rodriguez was the only Spanish-speaking officer on the scene, he alone could testify as to what the defendants were told and as to their understanding of whether they were under arrest or whether they were consenting to a search of their baggage. Although Officer Rodriguez testified that he explained the consent form to the defendants, he was unable to read the consent form (printed in Spanish) to the court at both the probable cause hearing and the suppression hearing. There was also evidence calling the officers' recollection of events into question. For example, Officer Rodriguez testified incorrectly at the probable cause hearing that the defendants were travelling with one-way tickets, a fact which he said contributed to his reasonable suspicion that the defendants were carrying drugs. The defendants were in fact holding round-trip tickets. In addition, the defendants offered the testimony of a disinterested witness, an airline employee, who contradicted the officers' version of the events surrounding their retrieval of the defendants' bags from the airline prior to the search. Finally, the defendants introduced at the suppression hearing an order from a similar case in another district court in the Southern District involving Officer Rodriguez. In that case, the district court judge found that Officer Rodriguez' version of the events leading up to the search in that case was "untruthful" and therefore suppressed evidence obtained after the defendants allegedly consented to the search. Taken individually, each one of these inconsistencies can be explained and may seem inconsequential. Taken together, however, we believe that they can be said to enhance the need for evidence, and therefore its probative value, for clarifying ***436** which of the competing versions of what happened that day is true.

CONCLUSION

The district court essentially applied the per se rule against admitting polygraph evidence established by our earlier precedent. Because the district court's assessment of the proffered polygraph evidence under the Daubert standard may well affect the other issues raised by this appeal, it is inappropriate at this time to address the district court's decision to exclude the polygraph evidence from its consideration on the motion to suppress or its fact finding that the search was supported by valid consent. Those issues can be adequately addressed on subsequent appeal, if necessary.

It is with a high degree of caution that we have today opened the door to the possibility of polygraph evidence in certain circumstances. We may indeed be opening a legal Pandora's box. However, that the task is full of uncertainty and risk does not excuse us from our mandate to follow the Supreme Court's lead. Rather, "[m]indful of our position in the hierarchy of the federal judiciary, we take a deep breath and proceed with this heady task." Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1316 (9th Cir.1995) (on remand from the Supreme Court).

Nor are we unaware that our opinion today may raise as many questions as it answers. We leave much unsaid precisely because we believe that the wisdom and experience of our federal district judges will be required to fashion the principles that will ultimately control the admissibility of polygraph evidence under Daubert.

For the foregoing reasons, the district court's ruling on the motion to suppress is REVERSED, the defendants' convictions are VACATED and the case is REMANDED to the district court for consideration of the evidentiary reliability and relevance of the polygraph evidence proffered by the defendants under the principles embodied in the Federal Rules of Evidence and the Supreme Court's decision in Daubert.

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The Washington Post

DATE: 5-31-95
PAGE: A17

U.S. Official Disturbs the Peace at U.N.

By Al Kamen
Washington Post Staff Writer

Sometimes those who are exquisitely skilled in the politics of diplomacy have trouble coping with Americans schooled in the rough and tumble of politics on the Hill. Take the United Nations, for example, where there had been friction between certain U.S. and U.N. officials even before the wheels came off the U.N. policy in Bosnia.

A "senior U.N. source," believed to be Secretary General **Boutros Boutros-Ghali**, said in a statement last week that a U.S. official, identified by sources as Ambassador **Madeleine K. Albright**'s spokesman **James P. Rubin**, recently had "intemperate and incorrect" things to say about the secretary general.

Rubin, once an aide to Sen. **Joseph R. Biden Jr.** (D-Del.) on the Senate Foreign Relations Committee, was quoted in the U.N. statement as saying during a background briefing: "What we cannot tolerate is the proposal the secretary general has made for the last year, namely that we have the same old UNPROFOR [United Nations Protection Force], with the same old rules of engagement, the same old reluctance to use air power."

Rubin's message merely seems to reflect Washington's increasing displeasure with the United Nations actions in Bosnia. The problem was that Rubin spoke plainly, which is a dire breach of protocol. What's more, he is apparently a repeat offender.

"This is not the first time this official has used such provocative language when discussing the secretary general's handling of United Nations affairs," the "senior U.N. source" said. Bosnia is "an immensely frustrating situation," he said, and people should not be "inflaming the debate by personal attacks."

Besides, the "senior U.N. official" added that Boutros-Ghali finds the status quo is "unacceptable" and he's "presenting the [Security] Council with a variety of options, some of which envisage substantial change."

That will certainly make all those U.N. observers chained to ammo dumps feel a whole lot better.

Dissenters Party On

■ The Clinton administration doesn't like to punish people for not adhering to the party line. Often that's because no one can figure out what the party line is. But even when there are disagreements on substance or process, the disenchanted are not shipped to Siberia or Massillon, Ohio, or some such place.

Look what happened to those two State Department officials unhappy with the administration policy change on Cuban refugees earlier this month. The two, Cuba desk director **Dennis Hays** and deputy director **Nancy Mason**, asked for transfers after Undersecretary of State **Peter Tarnoff** cut his secret deal with the Cubans to send the rafters back.

So where did they go? Hays ended up as director of the Mexico desk, clearly not a demotion. Given the importance of Mexico to this country, one might call it a promotion.

Hays is due to be leaving soon under normal foreign service rotation, to be No. 2 at the embassy in Uruguay, which was scheduled long before the Cuba flap.

Seems none other than Secretary of State **Warren Christopher** called Hays, telling him he would not be penalized for asking to be transferred. Christopher also instructed the staff that there was to be "no retribution" against Hays or Mason, a knowledgeable source says.

Cuba Policy Makes Airwaves

■ Speaking of Cuba, Radio and TV Marti, long-renowned as snakepits of constant intrigue, continue in turmoil. **Richard M. Lobo**, a former Miami television journalist who was head of the office of Cuba broadcasting for the last 15 months, quit abruptly Friday, citing personal reasons.

His departure comes as folks at the parent U.S. Information Agency are awaiting the results of an inspector general's investigation into the Cuba-directed broadcasting operations. Although said to be unrelated to Lobo's departure, the State Department, according to a Miami Herald report, has complained of Radio Marti's coverage of the Cuban refugee policy change, saying it was biased and irresponsible.

White House Aide Wasn't Given the Gate

■ **Patsy L. Thomasson**, director of the White House office of administration, is moving over to the personnel shop as a deputy director, replacing **Craig T. Smith**, an Arkansan and former Democratic National Committee political director, who moves over to work for White House political affairs head **Douglas B. Sosnick**.

White House press secretary **Michael McCurry** dismissed suggestions that Thomasson, a Little Rock native who had been accused by conservatives of involvement in the travel office troubles, controversial issuance of White House passes and removal of a file from the late deputy counsel **Vincent Foster**'s office, was being moved out.

Smith's move left an opening in personnel, McCurry said. "This is a good career move for her, nothing more, nothing less."

Green Around the Gills, No Doubt

■ The American Forest and Paper Association, the trade group for the timber and paper industry, was intrigued by Audubon Society vice president **Brock Evans**'s threat last week that enviros would stay home in '96 if Clinton double-crossed them on an important timber issue.

"Dear Brock," wrote the association's spokesman, **Luke Popovich**. "I was encouraged by your quote in today's *Post* that environmentalists may stay home rather than support the administration if it fails to deliver on the green agenda. In hopes that your stay at home will be a very long and enjoyable one, please accept the enclosed gift certificate for a free video rental (*Home Alone*?) and this box of chocolates.

"May you find that there truly is no place like home.

Environmentally yours,

"Luke Popovich"

83

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-3006

September Term, 1997
95ms00446
95ms00447

In re: Sealed Case

United States Court of Appeals
For the District of Columbia Circuit

FILED NOV 21 1997

Consolidated with 97-3007

BEFORE: Wald, Williams and Tatel, Circuit Judges

ORDER

Upon consideration of appellees' petition for rehearing filed October 8, 1997, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judge Tatel would grant the petition.

Foster - Hamilton 5th

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-3006

September Term, 1997
95ms00446
95ms00447

In re: Sealed Case

United States Court of Appeals
For the District of Columbia Circuit

FILED NOV 21 1997

Consolidated with 97-3007

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Appellees' Suggestion For Rehearing In Banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Robert A Bonner
Robert A. Bonner
Deputy Clerk

A statement of Circuit Judge Tatel dissenting from the denial of rehearing in banc, in which Circuit Judge Ginsburg joins with respect to the issue of attorney-client privilege, is attached.

Circuit Judges Sentelle and Garland did not participate in this matter.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed November 21, 1997

No. 97-3006

IN RE: SEALED CASE

Consolidated with
No. 97-3007

Appeals from the United States District Court
for the District of Columbia
(No. 95ms00446; No. 95ms00447)

BEFORE: EDWARDS, *Chief Judge*; WALD, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, *Circuit Judges*.

On Appellees' Suggestion
for Rehearing *In Banc*

O R D E R

Appellees' Suggestion for Rehearing *In Banc* and the response thereto have been circulated to the full court. The

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED that the suggestion be denied.

A statement of *Circuit Judge* TATEL dissenting from the denial of rehearing *in banc*, in which *Circuit Judge* GINSBURG joins with respect to the issue of attorney-client privilege, is attached.

Circuit Judges SENTELLE and GARLAND did not participate in this matter.

TATEL, *Circuit Judge*, with whom GINSBURG, *Circuit Judge*, joins with respect to the issue of attorney-client privilege, dissenting from the denial of rehearing *in banc*: Dramatically departing from the common law rule that protects the attorney-client privilege after a client's death, and threatening the vitality of that privilege, this case raises issues of exceptional importance worthy of *in banc* consideration. *See* FED. R. APP. P. 35(a)(2). The case especially warrants *in banc* review because the consequences of the court's new balancing test will extend far beyond federal criminal cases in the District of Columbia. Clients involved in civil or criminal proceedings anywhere in the country have no way of knowing whether information they share with their lawyers might someday become relevant to a federal criminal investigation in Washington, D.C. As the Supreme Court noted regarding the psychotherapist privilege, "any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court." *Jaffee v. Redmond*, 116 S. Ct. 1923, 1930 (1996).

As I pointed out in my dissent, the common law rule has been incorporated in the Uniform Rules of Evidence and the Model Code of Evidence, adopted by the Supreme Court's Advisory Committee, and codified by at least twenty state legislatures. *In re Sealed Case*, 124 F.3d 230, 238 (D.C. Cir. 1997) (Tatel, J., dissenting). The Independent Counsel cites two cases that have abrogated the privilege after a client's death, but neither is relevant here. In both *State v. Gause*, 489 P.2d 830 (Ariz. 1971), and *State v. Kump*, 301 P.2d 808 (Wyo. 1956), courts held that an accused husband could not invoke the privilege on behalf of his dead wife to bar his wife's lawyer from testifying, a situation quite different from this case where the attorney himself has invoked the privilege on behalf of his deceased client. As the court in *Gause* said, "the privilege is that of the client and must be claimed by the client or someone authorized by law to do so on the client's behalf." *Gause*, 489 P.2d at 834. Until this court's decision, only one reported case—a never-cited opinion of a mid-level Pennsylvania appellate court—actually supported posthumous abrogation of the privilege when asserted by the lawyer in a

nontestamentary dispute. *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. Ct. 1976).

According to the Independent Counsel, empirical support is "nonexistent" for the proposition that abrogating the attorney-client privilege after the client's death will chill client communication. Opposition of the United States to Appellees' Petition for Rehearing With Suggestion for Rehearing In Banc at 12. But because the Independent Counsel himself urges overturning the common law rule, and because that rule rests on the proposition that preserving the attorney-client privilege after the client's death is necessary to promote client disclosure, the Independent Counsel bears the responsibility of producing evidence to the contrary. In place of such evidence, he offers only his opinion that "any hypothesized chilling effect would be minimal," *id.*, citing only this court's opinion that it "expect[s]" its balancing test's "chilling effect to fall somewhere between modest and nil," *Sealed Case*, 124 F.3d at 233. Without convincing evidence that abrogating the privilege will do no harm to client communications, this court should not abandon centuries of common law.

Invoking a parade of horribles not before us, the Independent Counsel claims that injustice will result if courts cannot abrogate the attorney-client privilege after the client's death. While in some cases the privilege will deny information to the trier of fact, it does so in order to promote a broader and more important value—encouraging the free flow of information from client to lawyer. The common law long ago determined that the benefits gained by recognizing the privilege posthumously outweigh whatever damage might flow from denying information to the trier of fact in any particular case. *Id.* at 241 (Tatel, J., dissenting).

Petitioner also seeks rehearing *in banc* with respect to the court's work product ruling. *Id.* at 235–37. Because drawing a precise line between fact and opinion work product is a difficult and sensitive question with serious implications for the attorney-client relationship, and because I think the court has drawn the line in the wrong place, this issue also warrants *in banc* review.

The court's conclusion that because the interview was "preliminary" and "initiated" by the client, the lawyer may not have "sharply focused or weeded" the words of the client, *id.* at 236, reflects a view of the lawyer's role very different from my own experience. No lawyer approaches a client's problems with a "blank slate." Appellees' Petition for Rehearing With Suggestion for Rehearing En Banc at 14. Even at a first meeting, regardless of who initiates it, lawyers bring their own judgment, experience, and knowledge of the law to conversations with clients. Of course lawyers may want to encourage wide-ranging discussions at first meetings, but they do so in order to draw out and record information they think might be important. Unless they take verbatim notes, the questions they ask and those facts they write down reflect their own views about what is important to their client's case. Whether courts can require production of attorney work product should turn not on the stage of representation or who initiates a meeting, but on whether the attorney's notes are entirely factual, or whether they instead represent the "opinions, judgments, and thought processes of counsel." *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982).

The notes in this case demonstrate quite clearly that the lawyer actively exercised his judgment when interviewing his client. In two hours, he created only three pages of notes. Far from taking verbatim notes, the lawyer obviously wrote down what he thought was significant, omitting everything else. The notes bear the markings of a lawyer focusing the words of his client; he underlined certain words, placing both checkmarks and question marks next to certain sections. The notes clearly represent the opinions, judgments, and thought processes of counsel.

After this decision, no lawyer will risk having his notes end up before a grand jury because of a judicial finding that he had not "sharply focused or weeded" the words of the client; lawyers will simply stop taking notes at early, critical meetings with clients. Not only will this damage the ability of lawyers to represent their clients but in the end there will be no notes for grand juries to see. Similar consequences, of course, may flow from the court's new attorney-client privi-

lege balancing test; advised that their disclosures might be unprotected after death, clients may simply not talk candidly. As the Supreme Court noted in the psychotherapist privilege context, "[w]ithout a privilege, much of the desirable evidence to which litigants ... seek access ... is unlikely to come into being." *Jaffee*, 116 S. Ct. at 1929. This court's two new holdings—one chilling client disclosure, the other chilling lawyer note-taking—will damage the quality of legal representation without producing any corresponding benefits to the fact-finding process.

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*** ACTIVITY REPORT ***
****

RECEPTION OK

TX/RX NO.	5626
CONNECTION TEL	
CONNECTION ID	
START TIME	11/21 16:15
USAGE TIME	02'54
PAGES	9
RESULT	OK

-- DRAFT --

POINTS

Statistics: 85 suicides per day; 52 by firearm per day in USA in 1993

Primary Issues:

(See generally the summary of conclusions at pp. 110-114 of OIC's report)

Amount of Blood:

There was blood on ground under body. More blood spilled in body bag. (Pp. 48-49, 66-67)

Soil on Shoes:

There were soil and vegetative materials on the shoes. The photos from 1994 FBI exam depict this as well. (Pp. 49-51)

Ownership of Gun:

A variety of circumstantial evidence links Foster to the gun. This includes the residue and sunflower residue in the oven mitt and the pants pocket; the fact that one gun was missing from the Foster DC house; the .38 ammunition found in the Foster family house in Hope; the testimony of the Foster children that they saw a .38 unpacked in DC; and the evidence that Foster took guns from his father near the time of his father's death. (Pp. 79-85). (Even if skeptics ignore the oven mitt, they still have to address the lead residues in the pocket.)

Blood Spatter:

intact and thus not wrapped (Pp. 48)

Bone Chip on clothes (p.51-52) // residue in soil (p. 58) // blood spatter on vegetation (p.59) -- further circumstantial support

Poisoning:

Ruddy claims in a Pittsburgh Tribune-Review interview that Foster was poisoned and taken to the park where he was presumably shot for cover. Evidence does not support that. Moreover, Dr. Blackbourne found that Foster was alive when the shot was fired. (P. 61)

Location of Body in Park:

There is no dispute among the many witnesses where Foster's body was found in the park -- at the second cannon. (P. 25 n.47)

"Neck Wound":

There were no other gunshot wounds on Foster's body, as the autopsy photos, as analyzed by numerous experts, establish. (P. 33 n.77 and p. 64 n.188)

Carpet Fibers:

They were largely matched to those on Foster's house at the time. (Pp. 56-57)
Not the kind of numbers one would expect if truly wrapped.

Depression:

Dr. Berman's analysis establishes beyond a shadow of a doubt that Foster's state of mind was consistent with suicide. (Pp. 97-102)

Note:

written by Foster (p. 107-08)

Investigation and Report:

thorough and exhaustive
considered all theories
many experts and experienced agents
involvement in report preparation and review by all attorneys, experts, and investigators
5 federal investigations (2 congressional) reaching same conclusion

Specific Points (Ruddy)

Location of Body in Park and First Observer

At pages 28 and 31-33, Ruddy suggests that Foster's body was not found at the second cannon in Fort Marcy Park. That is inconsistent with the testimony of every witness at Fort Marcy Park on July 20, as the OIC's report explains on page 25 n.47. It is also inconsistent with the observations of persons, including a reporter, who went to the park on July 21 and July 22 and observed a blood stain in front of the second cannon. See OIC Report at 25 n.47. As to the reporter's observation, Ruddy dismisses it at page 34, saying it is "anyone's guess" how the reporter observed the blood spot.

At page 33, Ruddy further states that the area depicted in the photographs is not consistent with the area in front of the second cannon. The pictures refute this; in addition, two botanists from the Department of Agriculture reviewed the photographs and the scene and determined that they were consistent with the second cannon location. See page 25, footnote 47 of the OIC report.

At page 39, Ruddy speculates that Park Police personnel might have falsified the location where Foster's body was found. Those theories have no support, nor do they make sense. Why would they do that?

At page 29, Ruddy suggests that Gonzales was the first responder after the 911 call to see the body, but Gonzalez has never said this in his many official interviews, including his first in Feb. 1994. See OIC Report at page 25. Gonzalez' first interview report is reprinted on page 1047 of the Jan. 1995 Senate Report appendix (Gonzalez: "Hall and a USPP officer arrived at Foster's body first."). Officer Fornshill of the Park Police was the first official to find the body.

Position of Body

At pages 45 and 46, Ruddy suggests that the position of the body when found was inconsistent with Foster shooting himself there. The conclusion of every investigator, pathologist, and criminalist who has examined this case is contrary.

Poisoning

In a recent news interview in the Pittsburgh Tribune-Review, Ruddy puts forth his scenario -- that Foster was poisoned at the White House and taken to Fort Marcy Park. At page 48 of his book, Ruddy implies the poisoning theory. But as Dr. Blackbourne concluded, the evidence shows that Foster was alive when the fatal shot was fired, which is inconsistent

with poisoning. Nor is there evidence of drugging from the examination of the organs and fluids.

"Lack" of Blood at Scene

At page 48 and 71, Ruddy refers to a supposed lack of blood at the scene. That issue is addressed in the OIC's report at page 68. There was a quantity of blood observed under Foster's body and on the back of his shirt and head once he was turned over at the scene. More blood spilled after he was placed in the body bag, as revealed in the autopsy photos. In addition, there was blood in the body bag, according to Dr. Beyer. The picture of the shirt when taken into evidence after autopsy shows it covered with bloodstains (every inch of the back completely stained).

The further issue whether Foster was carried into the park with his head wrapped, which Ruddy posits on page 72 of his book, is addressed on page 48 of the OIC's report. As the OIC's report states, the intact blood spatters observed in the photos of the face at the scene is inconsistent with any theory that the head was wrapped for movement.

At page 71, Ruddy complains that there was not a search for blood, bone, and tissue at the scene. On page 72, he also notes that there was no blood on the vegetation at the scene That may be true with respect to the initial USPP investigation. But in the OIC's investigation, Dr. Lee did find gunpowder residue in the soil (page 58 of OIC's report); he also detected apparent blood in photographs of the vegetation at the scene (page 59 of OIC's report); and he found a bone chip from Foster's head in scrapings from Foster's clothing (pages 51-52 of OIC's report).

Exit Wound Size

On pages 51 and 91, Ruddy discusses the supposed size of the exit wound. He has not seen the autopsy photos, which clearly depict the exit wound and a trajectory rod through the wound.

Second Gunshot Wound?

The so-called neck wound theory on page 52 of Ruddy's book (which is not part of his poisoning theory), is in any event flatly refuted in the OIC's report. There simply was no second wound, says everyone of the numerous experts and investigators to review the photos. See OIC report at page 64, footnote 88; pages 33-34, footnote 77. There also were 6 persons at the autopsy (all concealing a neck wound?) (Also, how does the neck wound fit with the poisoning?)

On page 94, Ruddy refers to the Haut report's reference to a neck wound. As stated on page 27 n.57 of the OIC's report, Haut's several reports (including the report referenced by Ruddy) and the death certificate (which Haut completed) all correctly refer in numerous places to the mouth-head wound.

Ruddy cites Arthur's observations as support for the neck wound. As indicated in the OIC's report at p. 34 n.77, Arthur has since observed the autopsy photos and believes he was mistaken about a neck wound.

Different Gun in Hand Theory

On page 91 and elsewhere, Ruddy implies that a gun different from the one found in Foster's hand was used to fire the shot. The theory makes no sense, nor is it explained by Ruddy. What is the theory here?

Ownership of Gun

The theory that Foster did not own the gun is refuted on pages 79 to 85 of the OIC's report. There is a wealth of evidence linking Foster to the gun. This includes the residue in the oven mitt and the pants pocket; the fact that one gun was missing from the Foster house; the .38 ammunition found in the Foster parents' Hope house; the testimony of the Foster children that they saw a .38 unpacked in DC; and the evidence that Foster took guns from his father near the time of his father's death.

Gun in Hand

On page 97, Ruddy discusses the thumb indentation, but he does not address the significance of it. The indentation demonstrates that the trigger guard caught on the thumb, which explains why it remained in Foster's hand.

Ruddy nonetheless suggests that the gun in the hand shows that Foster did not fire the shot. First, every investigator and criminalist who has examined this case has found the gun in the hand consistent with the conclusion of suicide. Second, there was an indentation on the thumb which explains how the gun caught on the hand. Third, even Vernon Geberth (quoted by Ruddy) says in his treatise that the gun can remain in the hand.

Trace Evidence on Gun

On page 91, Ruddy says there were no traces of blood and tissue on the gun. First, the gun was processed for other tests (fingerprinting) before trace evidence was obtained. Moreover, there were traces of DNA and blood on the gun, as indicated in the OIC's report on pages 38 and 40.

Eyewitnesses in Park

Ruddy suggests at page 63 that the lack of eyewitnesses is odd. But there are no witnesses who saw Foster being carried into the park, which would be far more noteworthy to a passer-by or bystander than a man such as Foster simply walking in the park.

Ruddy notes at page 64 that the man and woman in the parking lot (Mark and Judy) saw no signs of Foster. But Foster was likely deceased at that point.

[[At pages 40 through 42, Ruddy further discusses the observations of Judy and Mark, referred to as C3 and C4 in the OIC report. Their statements are discussed on page 22 and pages 68-70 of the OIC report.]]

Bullet Search

Ruddy says at page 65 that the Park Police did not search for the missing bullet. The OIC did so.

Ruddy's calculations on page 66 of the possible distance the bullet traveled are inconsistent with those reached by experts at the Army Research Lab as indicated on pages 95 and 96 of the OIC's report.

Gunpowder Residue on Hands

On page 66 and 68, Ruddy questions the grip on the gun because of the amount of residue. Dr. Lee explained (see pages 42 and 43 of the OIC's report) that this gun had an extraordinary cylinder gap, which would cause a substantial amount of gunpowder to be expelled.

Pants Pocket/Jacket

On page 71, Ruddy suggests that Foster must have taken the jacket with him into the park to conceal the gun. As the OIC's report makes clear at pages 52-55, the evidence suggests that the gun was in Foster's pants pocket, and his jacket remained in the car.

Identification of Gun

Ruddy suggests that the family could not conclusively identify the gun. But one gun was missing from the Foster house, Lisa Foster essentially identified the gun, the children recalled a .38 caliber gun in the DC house, the family recalled Foster taking possession of the guns from his father's house, and .38 caliber ammunition was found in Foster's father's house -- all of which links Foster to the gun.

In addition, there is the oven mitt and pants pocket evidence. It is hard to believe someone staging the suicide would have thought to place the gun in the oven mitt and pants pocket. See pages 52-55 and pages 79-85 of the OIC's report.

On page 71, Ruddy suggests that no matching ammunition was found in the Foster homes. That is false, as page 80, footnote 231 of the OIC's report makes clear.

On page 71, Ruddy says that no blood was visible on the barrel. However, Dr. Lee found blood on the weapon and on the paper that was initially used to wrap the weapon. See page 39-40 of OIC's report.

Blood Transfer Stain

On page 73, Ruddy refers to the blood transfer stain on the cheek and points out that the head was face up. He further says that none of the initially arriving rescue or police personnel acknowledged moving the head. That is true, but as the OIC's report explains at page 66 and n.191, several persons recall that vital signs were checked, and it is reasonable to conclude that there was some head movement during that process.

Soil on Shoes

On page 74, Ruddy writes: "Foster's shoes were found by the FBI lab not to have a speck of soil on them." He repeats this on page 96. That is completely wrong, as explained at pages 49-50 of the OIC's report. The soil traces are visible in the pictures of the shoes, and Dr. Lee detected soil materials in the shoes during his examination.

Fibers

At page 76, Ruddy makes much of the fact that carpet fibers were not matched. He criticizes the Park Police and Fiske investigations. But as indicated at page 56 of the OIC's report, the OIC did match the vast majority of carpet fibers to carpets that were in Foster's house or workplace at that time.

Ruddy suggests that the finding of a carpet fiber on the jacket and tie is inconsistent with suicide in he park. To the contrary, that finding greatly contradicts a theory that Foster was moved into the park in a carpet. How would the white fiber have gotten on the coat (yet no blood on the coat) if the body were wrapped in a carpet?

Semen

At page 77, Ruddy criticizes the Fiske report for providing no explanation of semen found on Foster's shorts. The OIC's report provides an explanation: As indicated on page 33 n.76 of the OIC's report, the discharge of seminal fluid or urine is common upon death, according to expert pathologists.

Foliage

At page 78, Ruddy refers to "dense" and "knee-high" foliage surrounding the body. The area below Foster on the berm was not that kind of foliage, however, as the pictures reveal. Ruddy's mischaracterization of the foliage is a necessary predicate to his conclusion that the glasses could not have ended up where they did. But that assertion is contrary to what every investigator and expert to examine the case has found. See page 58 of OIC's report.

Shirt Stain

As OIC's report indicates at page 49, examination of the shirt found evidence of blood, not of wine.

"Missing" Polaroids

There are 13 crime scene Polaroids, including relationship photos that Ruddy claims are missing on page 56-58 of his report. One photo shows the cannon and the top of Foster's head.

No Polaroids mysteriously disappeared, as Ruddy claims on page 57. He says that the Polaroids taken by Ferstl are missing. That is false. They are accounted for and in the possession of the OIC, as indicated on page 57 of the OIC's report.

Briefcase

At page 79, Ruddy is critical of the Fiske report for omitting discussion of the briefcase issue. The OIC's report thoroughly discusses the briefcase issue at pages 85-91.

* Ruddy says that Gonzalez of the FCFRD had seen a briefcase in the car. As the OIC report indicates at page 88, however, Gonzalez said in his Senate deposition that he could not say if he saw a briefcase in the car.

* The supposed black briefcase on the ground was a Park Police case, not Foster's.

* Ruddy says that four people identified a briefcase in the case. Only one (Knowlton) is sure of that, as the OIC's report explains.

* There was a green and white bag in the back of Foster's car, see p. 89 n.270 of OIC's report.

Keys

On page 81, Ruddy refers to the failure of the Park Police to obtain the keys from Foster's pockets at the scene. That issue is addressed on page 74 of the OIC's report.

On page 82, Ruddy says that Kennedy and Livingstone were at the hospital before the Park Police, implying presumably that they may have had an opportunity to place the keys in Foster's pocket. That is incorrect. The OIC's report at page 74, n. 220, discusses the hospital and morgue logs, which conclusively show this claim to be false.

Five-Hour Gap

Ruddy points out on page 83 that no one saw Foster during the five-hour period in the afternoon. That is true. But that defeats the homicide/movement theory as much as if not far more than the suicide-in-the-park conclusion.

Calendar

Ruddy says that Foster did not have a handwritten calendar. That is incorrect, as the Travel Office inquiries revealed.

Pager

At page 85, Ruddy says that the pager was found on Foster's car seat. There is no evidence to support that. Ruddy cites only an anonymous police officer; why is his name not mentioned? No person has ever testified consistently with Ruddy's assertion.

President involved, acc. to Ruddy

On page 101, Ruddy says that the President knew about Foster's death before the Larry King Show; on page 104, he makes an inaccurate claim about what a CNN makeup artist said about the President. She did not say that the President indicated awareness of the death before Larry King. (This has been confirmed since publication of Ruddy's book.)

Dickey/Perry

On pages 85 and 86, Ruddy says that Trooper Perry was notified of Foster's death before 8:30 p.m. That issue is addressed in the OIC's report at pages 91-94. The totality of the evidence is inconsistent with Perry's recollection.

The Note

At page 131-133, Ruddy terms it an "obvious forgery." The OIC's report at pp. 107-08 n.338 refutes this. There have been numerous FBI and independent expert examinations of the handwriting. The number of handwriting examinations, the experience and expertise of the many different examiners, the variety and quantity of known-sample documents, the fact that the examinations commissioned by the OIC and Mr. Fiske's Office were conducted with original documents (as opposed to photocopies used by the persons cited by Ruddy), and the unanimity of the examiners in their conclusions together lead clearly to the conclusion that Mr. Foster wrote the note.

Depression

Ruddy suggests at page 60 that Foster was not depressed. Dr. Berman's analysis in the OIC's report at pp. 97-102 refutes this.

Ruddy notes at page 61 that persons around Foster did not know he was depressed. As Dr. Berman indicated at page 101 of the OIC's report, these types of "executive" suicides are typically "complete surprises to others in the available support system." It is also common for friends and family to minimize their knowledge, which assuages their guilt somewhat. There also is a difference between knowing that someone is unhappy and knowing that someone is suicidal. Very few friends and associates would know the latter in advance.

Travel Office

Ruddy implies on pages 62 and 183 that Foster could not have been upset about the Travel Office matter because he was not blamed in the reports. But Foster visited a private attorney about the matter, and sought out other attorneys. In addition, he was clearly concerned both about future investigative scrutiny (fear) and about the fact that he had not prevented the "fiasco" (guilt).

Search of Office

On page 134, Ruddy says that the Park Police "could have sought a search warrant for Foster's office, which likely would have been issued pro forma." This assertion reveals a serious misunderstanding of the right of federal law enforcement to obtain access to Presidential materials.

Grand Jury

At page 156, Ruddy criticizes Fiske for not using a grand jury. As p. 2 of the OIC's report indicates, the OIC used a grand jury to investigate this matter.

X-Rays

On page 91, Ruddy says that the Medical Examiner's x-ray machine was working, contrary to their claims, and that the x-rays must have been destroyed. That is inaccurate, see pp. 75-76 of OIC's report. It should be noted that this assertion places Dr. Beyer squarely in the middle of a cover-up or conspiracy, not simply incompetence. Why would Dr. Beyer and the Medical Examiner's office destroy the x-rays? Also, the brain was dissected and no bullets or fragments were found. P. 31 n.70 and p. 71 n.224.

Autopsy Time

On page 88, Ruddy says that the autopsy was moved up at White House request. Dr. Beyer, who controlled the autopsy timing, denied this at page 29 n.63 of the OIC's report.

On page 89, Ruddy says that Dr. Beyer did not know much about the circumstances of the death. That is inaccurate. Dr. Haut (who had observed the body at the scene and been briefed there) had briefed Dr. Beyer, as indicated on page 29 of the OIC's report.

Autopsy Attendees

On page 88, Ruddy suggests that there were Secret Service and FBI present at the autopsy. That is incorrect, as indicated at pages 28 and 29 of the OIC's report.

Knowlton

Ruddy makes very little of Knowlton's insistence that the Arkansas car was not Foster's car. On page 89 and 166, moreover, Ruddy strongly implies that Knowlton saw Foster's car (where Ruddy discusses the briefcase issue).

Specific Points (Ambrose Evans-Pritchard)

Massive Cover-Up

On page 113, Ambrose states that the conduct of the Park Police, the Secret Service, the FBI, the Justice Department, the Virginia medical authorities, and Fiske's office "indicate[] that the police and judicial apparatus of this country has become dangerously politicized." In other words, Ambrose believes all of these entities were involved in some kind of malfeasance in connection with the Foster investigation. Why? How?

Hamilton

On page 115, Ambrose states that Hamilton did not let the Park Police interview the Foster family. But Mr. Foster's wife, sister, and brother-in-law were interviewed. Ambrose notes the children were not interviewed, and so he asks "by what authority can a private lawyer prevent the police from talking to relevant witnesses in the probe of a violent death?" This question reveals Ambrose's ignorance of the criminal justice system. The police have no power to compel witnesses to answer questions. Only by means of a grand jury subpoena can a witness be compelled to answer questions.

Silence

On page 120, Ambrose says that the park was "eerily silent." But planes regularly fly overhead, as the OIC report indicates on page 72 n.207.

Fornshill

On page 124, Ambrose implies strongly that Fornshill was already aware of Foster's death before he was notified about it on the radio. Ambrose further suggests that rapid response by Fornshill and the police is evidence of their involvement in some kind of wrongdoing. (But a tardy response no doubt would have been similarly criticized.)

Hall

On page 124, Ambrose writes that EMT Hall "saw men running away from the scene into the woods." That does not remotely resemble anything Hall has said in his numerous interviews.

Gun Visibility

On pages 120 and 124, Ambrose writes that the gun was clearly visible in the hand and thus Fornshill and C5 (a.k.a. CW) would have seen the gun had it been there. But photos taken from above the head clearly reveal that the gun was very difficult to see from that angle.

On page 124, Ambrose suggests -- in noting that Fornshill did not see the gun -- that the gun observed by Hall (and Gonzalez) was not really there. Why would Hall and Gonzalez (FCFRD paramedics) make up the existence of the gun when that could so easily be checked? Ambrose's theory here is incomprehensible.

"Missing" Polaroids

There are 13 crime scene Polaroids. No Polaroids mysteriously disappeared, as Ambrose claims on pages 126 and 141. He says that the Polaroids taken by Ferstl are missing. That is false. They are accounted for and in the possession of the OIC, as indicated on page 57 of the OIC's report. The pictures taken by Ferstl were given to Edwards who then gave them to Abt. Abt initialed them as having been given to her by Edwards (which is what has created some minor confusion). But Edwards himself took no photographs.

Park Police Involvement

On page 127 and 128, Ambrose complains that the Park Police conducted the investigation instead of the FBI. But the only other federal agency that might have conducted the initial investigation, the FBI, is simultaneously accused by Ambrose of a massive cover-up. If the FBI were involved in a massive cover-up, why didn't the FBI handle the investigation from the beginning, as it clearly could have?

On page 128, Ambrose says that the FBI was required by statute to conduct the investigation by statute. That is wrong. Foster was not covered by the statute in question, as explained on page 4, footnote 4 of the OIC's report.

FCFRD Coding of the Death

On page 127, Ambrose says that Ashford coded the death a homicide in completing his report. Ashford was an ambulance man who arrived at the park after 8:00 p.m. to transport the body. He was not involved in the initial investigation. By the time he arrived, the gun had been removed. Because there was no gun, Ashford simply coded it in his report as a homicide. He now has explained to the OIC that he obviously was mistaken in coding the death.

Moreover, one of the first FCFRD persons on the scene, George Gonzalez, coded the death as a "suicide" at 6:37 p.m. on the 20th.

Gun in Hand

On page 127, Ambrose writes that the gun in the hand should have been a "red flag" for the investigators. But the gun was trapped on he thumb, as is revealed in the photos and has been explained in the OIC's report. Ambrose simply ignores this obvious explanation for the gun remaining in the hand.

Identification of Gun

Ambrose suggests that the family could not conclusively identify the gun. But one gun was missing from the Foster house; Lisa Foster essentially identified the gun; the children recalled a .38 caliber gun in the DC house; the family recalled Foster taking possession of the guns from his father's house; .38 caliber ammunition was found in Foster's father's house -- all of which links Foster to the gun.

In addition, there is the oven mitt and pants pocket evidence. It is hard to believe someone staging the suicide would have thought to place the gun in the oven mitt and pants pocket. See pages 52-55 and pages 79-85 of the OIC's report.

On page 131, Ambrose says that the investigators showed Lisa Foster the wrong gun, a lighter gun than the one recovered at the scene. This is a bizarre allegation that makes no sense -- particularly since Lisa Foster says she seemed to remember the revolver she saw in the DC house being somewhat lighter in color than the one recovered from the scene.

On page 131, Ambrose says that Sharon Bowman was never shown the actual gun. She has been shown the actual gun, as noted on page 83 of the OIC's report.

On page 133, Ambrose says that no matching ammunition was found in the Foster homes. That is false, as page 80, footnote 231 of the OIC's report makes clear. There was .38 ammunition found in the Foster family house in Hope (where the gun likely came from).

On page 133, Ambrose says that no blood was visible on the barrel. However, Dr. Lee found blood on the weapon and on the paper that was initially used to wrap the weapon. See page 39-40 of OIC's report.

Bullet

On page 133, Ambrose says the bullet "should have been close by." The extensive testing conducted the OIC at the Army's Research Lab demonstrates that Ambrose is wrong, as noted on pages 95-96 of the OIC's report.

Second Gunshot Wound?

The so-called neck gunshot wound theory on pages 136-144 of Ambrose's book is flatly refuted in the OIC's report. There simply was no second wound, says everyone of the numerous experts and investigators to review the photos. See OIC report at page 64, footnote 88; pages 33-34, footnote 77. There also were 6 persons at the autopsy (all concealing a neck wound?)

On page 143, Ambrose notes a report completed by Haut. As stated on page 27 n.57 of the OIC's report, Haut's several reports (including the very report referenced by Ambrose) and the death certificate (which Haut completed) all correctly refer in numerous places to the mouth-head wound.

Exit Wound

On pages 145 and 146, Ambrose refers to supposed lack of an exit wound. As explained at page 30-31 and n.70 of the OIC's report, clear photographs from the autopsy depict the wound and a rod through the wound. The autopsy report also depicts the wound.

"Lack" of Blood at Scene

At pages 144 and 207, Ambrose refers to a supposed lack of blood at the scene. That issue is addressed in the OIC's report at page 68. There was a quantity of blood observed under Foster's body and on the back of his shirt and head once he was turned over at the scene. More blood spilled after he was placed in the body bag, as revealed in the autopsy photos. In addition, there was blood in the body bag, according to Dr. Beyer. The picture of the shirt when taken into evidence after the autopsy shows it covered with bloodstains (every inch of the back completely stained).

The further issue whether Foster was carried into the park with his head wrapped is addressed on page 48 of the OIC's report. As the OIC's report states, the intact blood spatters observed in the photos of the face at the scene are inconsistent with any theory that the head was wrapped for movement.

X-Rays

On page 146, Ambrose says that the Medical Examiner's office destroyed or lost the x-rays. That is inaccurate, as explained on pp. 75-76 of OIC's report. It should be noted that this assertion places Dr. Beyer squarely in the middle of a cover-up or conspiracy, not simply incompetence. Why would Dr. Beyer and the Medical Examiner's office destroy the x-rays? Also, the brain was dissected and no bullets or fragments were found. P. 31 n.70 and p. 71 n.224.

Congress

On page 148, Ambrose writes that the Congress really has not examined Foster's death. But both the Senate Banking Committee and Congressman Clinger issued conclusions on the cause, manner, and location of death. All agreed that Foster committed suicide in the park, as noted on pages 7-8 of the OIC's report.

Park Police

On page 149, Ambrose claims that one Park Police officer testified that the crime scene had been tampered with. That is incorrect (as is suggested by the fact that Ambrose does not even identify the supposed officer).

Man and Woman in Park

Ambrose notes at page 135 the observations of C3 and C4. Their statements are discussed on page 22 and pages 68-70 of the OIC report. Contrary to Ambrose's suggestion, they have made clear that they did not observe anyone in, or tampering with, the Honda that turned out to be Foster's. (Even Ambrose admits, moreover, that "they could not recall every detail" and that "their memories were sometimes contradictory.")

Knowlton

On page 158, Ambrose writes that the man observed by Knowlton "had been posted there to dissuade anybody from venturing into Fort Marcy." But the man did not say or do anything to Knowlton, did not threaten him or prevent him from going up into the woods, as noted on pages 21-22 of the OIC's report. How, then, can Ambrose suggest that this man was performing some kind of a lookout function? Also, C3, C4, and C5 subsequently entered the park without difficulty -- and did so at a time, according to Ambrose, when the gun still had not been placed into Foster's hand. This makes no sense.

On page 160, Ambrose says the man see by Knowlton had a "manicured appearance," but says on page 158 that he was a "threatening man." The two descriptions do not appear to mesh.

On page 161, Ambrose says that Knowlton talked to John Rolla on July 22. That is incorrect; it was not Rolla, but another USPP official.

On page 161, Ambrose does say that "[n]one of it made any sense."

On page 174, Ambrose says that Knowlton was asked by the OIC if the man in the park "touched his genitals." That claim is absolutely false, as the tape and transcript reveal, and as Ambrose and Knowlton have been specifically informed.

Car Color

Facts: The car was a 1989 greyish Honda Accord 4-door. It was used by the children (a college parking ID sticker on the car) and looked it. It had approx. 65,000 miles. It was grey.

Knowlton described the car he observed as a brown Honda, and a few others described it as brown or grey-brown.

Officer Ferstl, who was the beat officer on the scene, refers in his report to the car as "grey-brown." (It is clear that this was Foster's car because the report then lists that car by reference to the license plate of Foster's car.)

According to a 4-15-94 Fiske interview report, the so-called confidential witness (CW or C5) referred to the car that was Foster's (as best as can be determined) as "light brown." He also has described it as "light tan." In his OIC interview, he described it as "brown, light brown, tan."

George Gonzalez of the FCFRD prepared a brief incident report on July 20 that described the car as a "brown Honda Arkansas tags." (This report is an exhibit attached to his publicly available Senate deposition.)

James Iacone of the FCFRD described the car with Arkansas tags as either "red or maroon" in his 3-11-94 Fiske interview report.

Todd Hall of the FCFRD referred in his interview to the car that apparently was Foster's as brown.

In sum, a number of witnesses describe the color of the car known to be Foster's in slightly different hues -- but consistent with the description provided by Knowlton. That would suggest that the car seen by Knowlton could have been Foster's car.

On page 167, Ambrose says that Foster's car was not in the parking lot before 6:37 p.m. -- that it was somehow towed or driven into the park after that point. That makes no sense; in any event, the Park Police reports, the notes taken at the scene, and the statements of numerous witnesses all indicate that the car was there when they arrived.

Keys

On page 167, Ambrose refers to the failure of the Park Police to obtain the keys from Foster's pockets at the scene. That issue is addressed on page 74 of the OIC's report.

On page 168, Ambrose says that Kennedy and Livingstone were at the hospital before the Park Police, stating that they may have had an opportunity to place the keys in Foster's pocket. That is incorrect. The OIC's report at page 74, n. 220, discusses the hospital and morgue logs, which conclusively show this claim to be false.

On page 168, Ambrose also says that Kennedy and Livingstone were allowed into the room to see the body. That is incorrect, as revealed on pages 74-75 of the OIC's report.

Notification and Dickey/Perry

On page 180, Ambrose reports the unsurprising information that a Park Police officer had the number of the Secret Service written in his notes. That makes sense, as the Park Police informed the Secret Service of the death and later were in communication with the Secret Service, as is also indicated in the contemporaneously prepared Secret Service report and as confirmed by the testimony of numerous witnesses.

Ambrose also suggests that the Secret Service number is written in an odd place in the notes. In fact, it is written just before the number of the Foster family, of David Watkins, and of the Fairfax County police officer who was at the hospital. In other words, the number was written exactly where one would expect it.

On page 182, Ambrose writes that Watkins was notified at around 7:30 p.m. In fact, it was about 8:30 p.m., according to the contemporaneously prepared Secret Service record of the notification of Watkins.

On page 183, Ambrose writes that Haut arrived at 6:45 p.m. As the OIC's report explains at page 27 n.57, the best evidence is that Dr. Haut arrived at the park at about 7:40 p.m.

On pages 185-191, Ambrose says that Trooper Perry was notified of Foster's death before 8:30 p.m. That issue is addressed in the OIC's report at pages 91-94. The totality of the evidence is inconsistent with that recollection.

On page 191, Ambrose writes that the "real mischief" occurred in Foster's office before 8:30 p.m. But intern Tom Castleton was in the office during that time and reported no such mischief; in addition, he was the last to leave the office and closed and alarmed it at 8:04 p.m. (On page 195, Ambrose incorrectly reports that Pond alarmed the office at 7:00. Ambrose also reports that Castleton entered the office at 8:04 p.m.; that is wrong, the logs

indicates that he exited the office at that time.)

On page 197, Ambrose implies that Thomasson had been in Foster's office during the pre-8:30 time frame. That is simply made up. In any event, no one saw her in the office, the suite was occupied at that time, and Thomasson left the White House at 7:49 p.m., according to the gate logs.

President involved, acc. to Ambrose

On page 193, Ambrose says that the President knew about Foster's death before the Larry King Show, and Ambrose further makes an inaccurate claim about what a CNN makeup artist said about the President. Contrary to Ambrose's report, she has never said that the President indicated awareness of the death before Larry King. (This has been subsequently confirmed.)

The Note

At pages 212-213, Ambrose terms the note a forgery. The OIC's report at pp. 107-08 n.338 refutes this. There have been numerous FBI and independent expert examinations of the handwriting. The number of handwriting examinations, the experience and expertise of the many different examiners, the variety and quantity of known-sample documents, the fact that the examinations commissioned by the OIC and Mr. Fiske's Office were conducted with original documents (as opposed to photocopies used by the persons cited by Ruddy), and the unanimity of the examiners in their conclusions together lead clearly to the conclusion that Mr. Foster wrote the note.

On page 215, Ambrose refers to notes by Bill Burton, which Ambrose claims were taken on July 26. The notes, in fact, were taken on July 28, and they discuss possible public disclosure of the contents of the note (the contents were not disclosed until August 10).

Fibers

At page 217, Ambrose says that the clothes were not bagged together. As indicated on pages 44-45 of the OIC's report, the clothes still on Foster's body at the time of the autopsy (all but the jacket and tie) were bagged together. (Note: The OIC matched the vast majority of carpet fibers to carpets that were in Foster's house or workplace at that time.)

Depression

Ambrose suggests at pages 220-231 that Foster was not depressed. Dr. Berman's analysis in the OIC's report at pp. 97-102 refutes this.

Ambrose notes that some persons around Foster did not know he was depressed. As Dr. Berman indicated at page 101 of the OIC's report, these types of "executive" suicides are typically "complete surprises to others in the available support system." It is also common for friends and family to minimize their knowledge, which assuages their guilt somewhat. There also is a difference between knowing that someone is unhappy and knowing that someone is suicidal. Very few friends and associates would know the latter in advance.

Travel Office

Ambrose implies on page 220 that Foster could not have been upset about the Travel Office matter because it had "subsided." That was not true, as noted on page 106 of the OIC's report and as revealed by the fact that Foster consulted attys about the matter during the week of July 12. Ambrose also notes that Foster was not blamed in the reports. But Foster was clearly concerned both about future investigative scrutiny (fear) and about the fact that he had not prevented the "fiasco" (guilt).

Soil on Shoes

On page 226, Ambrose writes that Foster's shoes were found by the FBI lab not to have any soil on them. That is wrong, as explained at pages 49-50 of the OIC's report. The soil traces are visible in the pictures of the shoes, and Dr. Lee detected soil materials in the shoes during his examination.

OIC General

On pages 111 and 112, Ambrose states that the OIC looked the other way when presented with Rodriguez's evidence and that the investigation came to an abrupt end. In fact, after Rodriguez resigned, the OIC retained a number of experts (including Drs. Blackbourne, Lee, and Berman), a group of experienced homicide investigators who had not previously worked on the Foster matter (contrary to Ambrose's suggestion on page 140), a handwriting expert, a metal-detection expert, and others. The investigation conducted after Rodriguez's departure was thorough and professional, as reflected in the report. Ambrose's claim on page 152 that there was little investigation is wildly inaccurate.

On page 153, Ambrose says that Blackbourne has not seen all the photos, particularly the photo of the supposed neck wound. As noted in the OIC's report at pages 60-65, Blackbourne has seen, reviewed, and analyzed all of the photos. What he has not seen is a neck wound -- because there is no neck wound.

Other Issues

Inventory at Impoundment Lot on July 21 -- Oven Mitt

The car was photographed by E.J. Smith of the Park Police on July 21. He took certain items that were in the car into evidence. However, he left many items in the car. When the car was released to Livingstone and then Kennedy the following week, Kennedy packed the remaining items in the car. He turned them over to the Fiske team in June 1994.

The evidence receipts prepared by Smith record only those items that he took into evidence. Thus, the oven mitt, the canvas bag, a pair of moccasins, and numerous other items that were in the car are not recorded on the evidence receipts.

The pictures taken at the impound lot on July 21 clearly depict the oven mitt. It is a distinctive mitt with decorations on it. It is not a plain mitt.

Oven Mitt -- Rolla and Braun

Needless to say, the oven mitt was not viewed as significant by the Park Police, nor by the Fiske team.

The pictures taken at the inventory on July 21 clearly show the mitt in the glove compartment. When shown these pictures, Rolla and Braun then recalled it. In earlier interviews where they were not questioned specifically about the mitt and were not shown these pictures, they were simply recalling from memory the contents of the inside of the car and trunk. They listed items such as a canvas bag, a couple of textbooks, sunglasses, etc. (When asked specifically about the glove compartment at page 113 of his 1994 Senate deposition, Rolla said "nothing out of the ordinary" and referred to the registration.)

The fact that they did not identify the oven mitt in these interviews obviously means that they did not attach any significance to it (which Rolla has admitted in subsequent interviews re: the mitt). Neither of their reports refers in any detail to the contents of the car, and they did not take any contents (other than the jacket, tie, and wallet) into evidence that night. This does not mean, however, that the mitt was not there. (Note: None of the photographs of the car taken at the scene show the glove compartment open, so there is no way to confirm it in that manner.)

In sum, the theory that the mitt was never in the car is simply wrong. There was no opportunity for some "outsider" to place a mitt in the car before it was photographed at the impound lot on July 21.