

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION—FELONY BRANCH**

UNITED STATES OF AMERICA)	Case No. 2017 CF1 9869
)	
v.)	Judge Milton C. Lee, Jr.
)	
RONDELL MCLEOD)	Status Hrg.: April 6, 2021
)	

Praecipe

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, hereby informs the Court of the following:

1. On November 10, 2020, Judge Edelman ordered the District of Columbia Department of Forensic Sciences (“DFS”) to produce documents in response to the government’s July 15, 2020 subpoena. Following his *in camera* review of documents, Judge Edelman called attention to a DFS PowerPoint presentation dated April 30, 2020. (Document 29). Judge Edelman stated the following concerning this document:

As a footnote here, I’ll also note with regard to that document that part of that document also seems, which is, again, from Mr. Fried and Ms. Rachel, to reach the same elimination conclusion as to these shell casings as had been reached by Mr. Spinder earlier. It’s neither here nor there for the purposes of this motion, but it does seem that the conclusion of that document by the examiners is at odds with what was represented elsewhere as the purported conclusions by those two individuals.

November 10, 2020 Transcript at 29 (attached hereto as Exhibit 1).

2. That PowerPoint presentation was produced to the government, but was subject to a protective order, requested by DFS, that limited the disclosure of that document to individuals other than the litigants in this case. The government moved to vacate the protective order to comply with its *Brady* and other discovery obligations, and the Court lifted the protective order on November 20, 2020. The government broadly disclosed the PowerPoint presentation (and other documents ordered produced by Judge Edelman) to defense counsel in pending Superior

Court cases. The government also provided the presentation to the District of Columbia Office of the Attorney General (“OAG”) to allow it to comply with its discovery obligations. OAG, in turn, provided these documents to the District of Columbia Office of Inspector General (“OIG”). As a result of the receipt of these documents, OIG initiated a criminal investigation of DFS on December 3, 2020.

3. OIG’s criminal investigation has involved the review of thousands of documents and the interview of numerous witnesses. As part of that investigation, OIG requested that OAG seek the assistance of the USAO/OAG audit team to provide a report concerning DFS and its Firearms Examination Unit (“FEU”). OAG, in turn, requested such a report. The audit team provided a Final Audit Report to OAG on March 18, 2021, which OAG then shared with USAO. A copy of that report (with exhibits) is attached hereto as Exhibit 2.

4. The Executive Summary of that report states, in part:

Based on the above findings, the audit team does not have confidence in the analytical results of the FEU. The audit team recommends that the FEU immediately cease performing casework and that clients and stakeholders not rely on results from the FEU. A comprehensive evaluation of the technical competence of all current examiners is required, followed by retraining and testing to establish that they are competent to perform casework and reach appropriate conclusions. Casework already completed by the FEU should be reexamined by qualified examiners in an effort to determine if additional errors have been made. It does not appear that the DFS possesses the qualifications to perform the necessary evaluations, retraining, testing, and casework review that is required, and the audit team recommends that appropriate qualified persons from outside of the DFS be brought in to perform these activities.

The above findings also illustrate very serious, and perhaps more troubling, problems associated with DFS management. DFS management not only failed to properly address the conflicting results reported to the DFS by the USAO, but also engaged in actions to

alter the results reached by the examiners assigned to conduct a reexamination of the evidence. DFS management then misrepresented the various activities undertaken and analytical conclusions reached to their clients and stakeholders, including the USAO, the OAG, their accrediting organization (ANAB), and the SAB. In the opinion of the audit team, such actions by management indicate a lack of adherence to core principles of integrity, ethics, and professional responsibilities. Management has cast doubt on the reliability of the work product of the entire DFS laboratory.

Exhibit 2 at 3-4.

5. The Final Audit Report summarized, at length, the account of FEU Supervisor Jonathan Fried. Although Fried at first denied any wrongdoing, he ultimately admitted the following (as summarized by the auditors):

...Fried and Rachael reached a conclusion of elimination (meaning that Items #16 and #45 were not fired in the same firearm). This conclusion of elimination agreed with the conclusion of the USAO's independent examiner. Fried and Rachael presented their findings in a PowerPoint presentation to Wayne Arendse, with Jonathan Pope listening by phone, on April 30, 2020. After that presentation, Fried and Rachael met with Senior Deputy Director Abdel Maliky and General Counsel Todd Smith to present their findings. Fried stated that Pope and Arendse had concerns over the conclusion of elimination and that it showed the DFS had made a mistake. Fried said there was "lots of chaos" as a result. The evidence was subsequently presented to Michael Mulderig and Elizabeth Bustamante, who both examined it and reached a conclusion of identification. Fried was aware that Mulderig then changed his finding to inconclusive, but acknowledged that there was insufficient time for Mulderig to have conducted a full examination in the time that Mulderig had the evidence. Fried stated he may have asked Cody Elder to examine the evidence "in passing". Fried stated it was possible Steven Chase may have also examined the evidence. Fried described this as "answer shopping, looking for consensus", a practice not uncommon at the DFS, and described it as having other examiners look to "see if they see what you see." Through a discussion with Pope and Arendse it was decided to report a finding of inconclusive because of all the different conclusions reached by the various examiners. Fried was aware of a letter sent to the SAB (and the similarly worded letter sent

to ANAB on May 6, 2020). By that point in time no examiner, other than Michael Mulderig, who did not have sufficient time to conduct a full examination, had actually reached a finding of inconclusive. Because of his knowledge of the various conclusions that had been reached, Fried felt that he was inherently biased and recommended that the evidence be sent to an outside examiner for review. He stated he “pushed back as long as I could” on the decision for him to do the reexamination. His request was denied, and he was told by Pope that the orders for him to do the reexamination came from DFS Director Jenifer Smith (but he never received those orders directly from Director Smith). On May 12, 2020 he began his official examination of the evidence. He stated that this was the first time he had conducted a firearm examination at the DFS, and if he could do it over again, he would have resigned rather than conduct the reexamination. Though never directly told to reach a finding of inconclusive, Fried believes that he was manipulated by management into conducting an examination when he had a bias. The disparate findings of the other examiners caused him to question his initial conclusion of elimination. When asked why the DFS never disclosed the conflicting conclusions to ANAB and the SAB, Fried stated that “they [DFS] played with the semantics.”

Exhibit 2 at 11.

6. Following Fried’s interview, according to an OIG confidential source at DFS (“CS2”):

[O]n March 10, 2021, Jonathan Pope, FEU Manager, DFS, emailed FEU employees and informed them that T. Smith wanted to meet with FEU regarding an urgent matter. At approximately 2:00 p.m., Pope, T. Smith, and Wayne Arendse, Assistant Director, DFS, met with FEU employees. CS2 stated that T. Smith was the only one to speak during the meeting. T. Smith informed the FEU employees that they should not feel bullied by the OIG. CS2 further stated that T. Smith told employees to notify him if the OIG contacts them, and if the OIG requests documents, FEU employees should respond, via email, copy T. Smith on the email and refer any OIG officials to T. Smith. CS2 said that T. Smith informed the FEU employees that the OIG investigation was unlawful, and if the OIG visits any of the FEU employees’ home for an interview, the FEU employee should decline the

interview, and request that the interview be conducted at DFS during normal DFS business hours.

...

T. Smith further informed the FEU employees that they should not be bullied into changing their opinion. T. Smith added that he was speaking on behalf of Dr. Smith because she could not attend the meeting.

OIG Memorandum of Activity/Interview, March 11, 2020 (attached hereto as Exhibit 3).

7. CS2 also informed OIG of the following:

CS2 stated that Dr. Smith was meeting with Fried during the time the FEU meeting occurred. CS2 said that Dr. Smith met with Fried because Fried informed DFS management of his intent to resign from DFS and that Fried met with OIG officials. CS2 told the OIG investigators that Fried stated that he was “chewed out” for meeting with the OIG. CS2 did not know the specifics of Fried’s conversation with Dr. Smith.

Id.

8. OIG’s investigation has obtained numerous documents that appear obviously responsive to the government’s July 15, 2020 subpoena that were neither produced to the government by DFS nor listed on DFS’s privilege log.

9. The above information obtained by the OIG necessitates further Court review in this case and the government requests an immediate hearing.

Respectfully submitted,

CHANNING D. PHILLIPS
ACTING UNITED STATES ATTORNEY

/s/ _____
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Exhibit 1

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

-----x
: UNITED STATES OF AMERICA :
: :
: V. : Criminal Action No.
: 2017 CF1 9869 :
: RON DEVIN MCLEOD, :
: :
: Defendant. :
: :
-----x

Washington, D.C.
Tuesday, November 10, 2020

The above-entitled action came on for a motions
before the Honorable TODD EDELMAN, Associate Judge, in
courtroom number 210-R, starting at approximately 9:15 a.m.

THIS TRANSCRIPT REPRESENTS THE
PRODUCT OF AN OFFICIAL
REPORTER, ENGAGED BY THE COURT,
WHO HAS PERSONALLY CERTIFIED
THAT IT REPRESENTS THE TESTIMONY
AND PROCEEDINGS OF THE CASE AS
RECORDED.

APPEARANCES:

On behalf of the Government:

MICHAEL SPENCE, Esquire
ANDREA CORONADO, Esquire
Assistant United States Attorneys

On behalf of the Defendant:

STEVEN KIERSH, Esquire

On behalf of D.C. Department of Forensic Sciences:

ROBERT TROUT, Esquire

Reporter: Julie T. Richer, RPR, (202) 879-1279

P R O C E E D I N G S

COURTROOM CLERK: Calling the matter of United States versus Ron Devin McLeoud, 2017 CF1 9869. Parties, please state your names.

THE COURT: All right. I'm going to ask the counsel to state their names, beginning first with counsel for the government.

MR. SPENCE: Good morning, Your Honor. Mike Spence for the United States.

THE COURT: Good morning.

And, Ms. Coronado, do I have you as well?

All right. Mr. Spence, you're going to be handling this hearing; is that correct?

MR. SPENCE: I am, Your Honor. I think Ms. Coronado is online, but she may be -- but she's here.

THE COURT: Okay. And let me get counsel for the defendants to put their names on the record, please, beginning with you, Mr. Kiersh.

MR. KIERSH: Good morning, Your Honor. Steven Kiersh on behalf of Mr. McLeoud. Ms. Allburn will not be present this morning, but I do see that Mr. McLeoud is present via hook-up at the D.C. jail.

THE COURT: And counsel for the other defendants, please.

MR. McDANIEL: Yes. Good morning, Your Honor.

1 May it please the Court, Brian McDaniel on behalf of
2 Mr. Joseph Brown.

3 THE COURT: All right. Keep looking forward,
4 Mr. McDaniel.

5 MR. McDANIEL: Yes, Your Honor.

6 THE COURT: And for Ms. McCoy?

7 MS. MCCOY: And good morning, Your Honor. Rachel
8 McCoy on behalf of Ms. Alicia McCoy.

9 THE COURT: All right. Good morning.
10 And, Mr. McLeoud, could you state your name,
11 please.

12 THE DEFENDANT: Ron McLeoud.

13 THE COURT: Good morning.

14 THE DEFENDANT: Good morning.

15 THE COURT: And we also have counsel here for the
16 Department of Forensic Science. Could you state your name
17 please.

18 MR. TROUT: Yes. Robert Trout of the firm of
19 Trout Cacheris and Solomon for DFS.

20 THE COURT: Good morning, sir.

21 All right. We're here for a hearing on the motion
22 to compel. I want to begin by first of all asking that all
23 parties mute their microphones when they're not speaking. I
24 see that a number of our participants have their microphones
25 open.

1 That includes you, Mr. Kiersh.

2 It also includes Mr. Towe, who is not part of this
3 hearing. You've got to mute your microphone, sir. Thank
4 you.

5 We're conducting this hearing via WebEx. It's
6 entirely remote. All participants are attending via video
7 on WebEx at this point, including Mr. McLeoud, who is at the
8 jail.

9 We're here, as I stated, for a hearing on the
10 government's motion to compel production of documents from
11 the District of Columbia Department of Forensic Sciences.
12 It was filed on September 2nd of this year. DFS filed its
13 opposition on September 15th. I've reviewed those documents
14 and the attachments closely. I've also read a number of
15 other filings from the parties, including a DFS notice of
16 correction. The government replied with a supplemental
17 brief the government filed yesterday evening. In the event
18 that the motion is granted, DFS also filed a motion of
19 protective order on September 15th, which I believe was not
20 opposed by the government. Counsel for DFS has filed a
21 motion to withdraw that I will deal with once we've dealt
22 with this discrete issue regarding the documents.

23 I don't believe at this point it makes sense for
24 me to spend our precious time here delving into the
25 extensive background of this case and what has brought us

1 here. Suffice it to say that the U.S. Attorney's Office had
2 subpoenaed certain documents related to the work of the DFS
3 Firearms Examination Unit as it pertains to physical
4 evidence in this case. Some of the documents that were
5 subpoenaed have been provided. Others have been provided
6 only in redacted form.

7 Although the contours of what has been disclosed
8 and the assertion of various privileges by DFS has evolved
9 as the litigation has progressed -- and I don't blame DFS
10 for that. I think that's the natural course of litigation.
11 I encourage the parties to try to work things out, and it
12 does seem some things were worked out. But at this point
13 approximately 53, by my count, documents were either
14 withheld or provided in redacted form with deliberative
15 process, work product, and attorney-client privileges being
16 asserted by DFS.

17 I've reviewed all of those documents in camera
18 along with the privilege log that was helpfully provided by
19 DFS, although I do have some complaints about what I would
20 estimate to be about a four-point font on that document.
21 But I did review the log, and I reviewed all of the
22 documents in camera in preparation for today's hearing, so I
23 think I have a pretty thin grasp of what's in the documents
24 and the doctrines that apply. I do have a few questions for
25 both DFS and the government, and I don't know if there's

1 anything else you want to add to what's already in the
2 record.

3 Mr. Trout, I want to start with you with some -- I
4 think it's a rather basic question about, in particular, the
5 first set of documents, the documents that relate to the
6 retesting and reanalysis of the ballistics evidence by DFS.
7 My question is: Wasn't at least some of the work that was
8 done on this case after the complaint was received from the
9 government in January of 2020 and as described, the
10 documents that I've read -- wasn't this retesting of
11 evidence done with actual pieces of physical evidence seized
12 in relation to a pending case and in the context of that
13 case, and doesn't that in and of itself take it outside of
14 the deliberative process privilege?

15 And here's why I ask that question. It's clear
16 that after January, DFS was still doing analysis of evidence
17 with regard to these pending homicides. Certainly that was
18 the case in January, and it seems as recently as in May
19 Mr. Mulderig and Mr. Fried and Ms. Rachael and perhaps
20 Ms. Bustamante were actually looking at the physical
21 evidence and analyzing it. While this work was going on
22 through January and February at least and probably later,
23 DFS was still at that point taking the position that its
24 initial analysis, Ms. Vallario's initial conclusion, was the
25 one that was correct and that the U.S. Attorney's Office

1 independent analysis was wrong.

2 As far as I can tell, there's no acknowledgment
3 that there was even what was, I think, first called an
4 administrative error by Ms. Vallario. That admission was
5 not made until May 22nd. Certainly the January 23rd of 2020
6 letter from general counsel -- DFS General Counsel Todd
7 Smith to U.S. Attorney Ambrosino claimed that no error had
8 been made by DFS. The February 14th, 2020 memorandum from
9 DFS Director Jenifer Smith to Kevin Donahue, who at the time
10 was Deputy Mayor for Public Safety, indicated DFS has made
11 no error and the U.S. Attorney's Office was the one that
12 made the error. And again, I think Director Smith first
13 admitted that there had been an administrative error in the
14 letter to the then U.S. Attorney on May, the 22nd.

15 So I guess my question is: How could it be that
16 at that point, you know, up through that point, that DFS
17 could be thinking that its analysis, regardless of whether a
18 result was reached, would not become part of an upcoming
19 trial, whether used by the government or the defense? And
20 why isn't this work, since at that point the DFS is still
21 maintaining our initial conclusion was correct -- how can we
22 view that as something where DFS is trying to, you know,
23 come up with a quality-corrective course of action for a
24 mistake when they're not even at that point acknowledging
25 that there was a mistake? So that's kind of a long setup

1 for that question, Mr. Trout. You're muted still. There
2 you go.

3 MR. TROUT: Thank you, Your Honor. So I think it
4 might be useful to give a little bit more context to this
5 and background. First of all, I think Mr. -- I think the
6 correspondence between Mr. Smith and DFS on the one hand and
7 the U.S. Attorney's Office on the other made clear that this
8 was the initial reaction that they were -- there was any
9 ongoing investigation. At the time, Your Honor, the actual
10 casings had been sent to Travis Spinder, the U.S. Attorney's
11 Office consultant, so that's where the casings were. What
12 DFS had was the case file, and in the case file was the
13 photograph, the microscopic comparison photo that you see
14 reproduced on page 4, I believe it is, of the -- excuse
15 me -- of the government's -- of the U.S. Attorney's Office
16 memorandum.

17 Now, what I think is clear at this point -- but it
18 took a while to figure this out -- the chain of custody logs
19 show that the U.S. Attorney's Office consultant,
20 Mr. Spinder, had the actual correct casings for his review,
21 and we know that now. The chain of custody logs also show
22 that Alicia Vallario, the DFS examiner who issued the
23 questioned report on August the 8th -- we know that she had
24 the correct casings for review as well, and we know that
25 now. The DFS was able to -- after all of this developed,

1 they were able to retrieve microscopic photos made by
2 Ms. Vallario showing a comparison, the actual casings from
3 the two murders. The problem was that that photo or those
4 photos were not in the case file. What was in the case file
5 was a comparison photo taken six weeks before in another
6 case. And that photo, as you can see, again reproduced on
7 page 4 of the U.S. Attorney's Office memorandum, makes a
8 compelling case of identification.

9 DFS makes -- accepts -- and again as a result of
10 their ongoing investigation, they accept that Ms. Vallario
11 had the actual bullets for review, that she looked at them
12 microscopically, and that she made a photograph of
13 comparison. But it does seem pretty clear now that when she
14 made her report, she was relying on a wrong comparison
15 photo, but DFS didn't figure that out until after the actual
16 evidence was returned to them in April, I believe it was, of
17 2020. And that was when they were able to determine that
18 the comparison photos did not show the actual casings from
19 the two murders.

20 THE COURT: Right. No, I understand your -- that
21 the conclusion now is that she essentially made two separate
22 errors. She made an initial error in analysis and a second
23 error in terms of what photographs she used to support her
24 conclusion, because those were not the correct photos.

25 MR. TROUT: Right. But it was not until April

1 when we got the casings back. What happened is if you -- if
2 you look at that comparison photo, the erroneous one, on
3 page 4 you will see, you know, at -- basically on the actual
4 casing, you will see at about 7:30 -- you will see a
5 sideways F. And if you look at about 9:30 on the casing,
6 you will see a letter C. I think it was Mr. Fried, once he
7 had the actual casings back, basically looked at all of the
8 casings from the two murders in issue, and there were no
9 letters C on any of the casings. So that told him -- that's
10 what -- that was the clincher that essentially said we've
11 got the wrong photo in here. They were able to find, yes,
12 there was an actual photo that Ms. Vallario took. It just
13 happened not to be in the case file as this one was.

14 So the point is that there was an ongoing
15 investigation, and I think Mr. Smith made that clear. You
16 know, I will say I think that there has been on both sides a
17 certain hyperventilated rhetoric going back and forth
18 between the U.S. Attorney's Office and DFS about this. And
19 maybe if they had slept on it, you know, before pushing
20 send, they -- maybe they would have rethought some of the
21 language that was used. But in any event, I think Mr. Smith
22 made clear that it was his -- what he was reporting was
23 what -- was the information he had at that point, but they
24 were continuing their investigation as they would be
25 expected to do, given that there was a complaint. And that

1 investigation is what was being done all the way into May
2 and --

3 THE COURT: Right. But I mean am I supposed to
4 look at that -- I mean the investigation they were doing was
5 not an investigation -- you know, a quality-curative
6 investigation as has been sort of asserted here as what was
7 going on. I would think we'd have to start from the
8 assumption: We made a mistake. How do we fix it to make
9 sure it doesn't happen again?

10 It seems to me through that period DFS is not
11 accepting that they made a mistake. They're saying: We're
12 going to reanalyze this to show that we didn't make a
13 mistake so that it can be used. And, again, at this point
14 the evidence is evidence that is going to be used in a
15 criminal trial. So how is this not just reanalysis of the
16 evidence? You know, DFS analyzed evidence. They're told
17 that there are some questions about the analysis. I see the
18 point of the analysis at that point to get the right answer
19 for that case so that the criminal justice system can rely
20 on it. And if that's the case, how is that deliberative
21 process? To me that's just DFS doing forensic analysis.

22 MR. TROUT: Okay. I don't think that that
23 actually is the case. I don't think that DFS was -- at that
24 point was ever going to be -- that their analysis was going
25 to be used in the actual cases.

1 THE COURT: How do you know? I mean how do you --
2 I mean just because they hired Mr. Spinder, that's not just
3 some inalterable conclusion that they had made. The
4 evidence could be used. The analysis could be used still by
5 the government. It could be used under certain
6 circumstances by one of the defendants. I don't know how
7 they could reach that conclusion.

8 MR. TROUT: Well, I think, for example,
9 Ms. Vallario was no longer a contractor with DFS at that
10 point. Mr. Barrett was no longer a contractor with DFS at
11 that point.

12 THE COURT: The people who were reanalyzing --
13 again, the reanalysis of the evidence by these other
14 technicians and the discussion of that, those people were
15 still working for DFS.

16 MR. TROUT: But there has been -- there still has
17 been no -- in other words, the document, for example, that
18 you see -- let me see. I guess it's the report of
19 evaluation or -- excuse me -- the report of examination.
20 That sort of report was never prepared as part of what
21 happened in 2020. They were not doing a report of
22 examination at that point. They were basically doing an
23 investigation of a complaint.

24 THE COURT: All right.

25 MR. TROUT: And that's what the activity was, a

1 litigation of a complaint, consistent -- you know, in
2 keeping with the procedure for what do we do when we get a
3 complaint.

4 THE COURT: Right. I understand your position as
5 to that. Is there anything else you want to say before I
6 turn to Mr. Spence in response? You've laid out your
7 position with regard to the waiver of privilege in your
8 pleading. Is there anything you feel you need to say in
9 response to the supplement that was filed last night by the
10 government?

11 MR. TROUT: Yes, I would like to address that.
12 Thank you, Your Honor. So there -- there is the
13 suggestion -- well, let me just back up. I think there was
14 this hearing on October the 16th, 2020. It was more
15 conversational, and it was a public proceeding that -- you
16 know, as was pointed out, Ms. Wieser is there. She's asking
17 questions. She's trying to understand the situation. And
18 the officials from DFS, whether it was Mr. Fried or the
19 director, Smith, were basically trying to be responsive to
20 the questions. I think it is clear that what they are
21 simply reporting to her is yes, an exam was done on the
22 correct items. That's what I've already stated earlier, an
23 acknowledgment that yes, we agree that Vallario examined the
24 correct items. We know now that she had taken a photograph.

25 Then it says Ms. Wieser then posed a follow-up

1 question, quote: "So then her conclusion was based upon her
2 examination of the correct evidence?"

3 And Fried responded, "Yes."

4 At which point Director Smith interjected to that,
5 quote, "To be honest, Liz, I think the issue is -- and I
6 think in talking to Kerri, the ANAB auditor, she believes
7 she could have made her interpretation off the incorrect
8 photograph once she put it into a record." And then it goes
9 on to say --

10 THE COURT: Everyone who is not speaking should
11 have their microphone muted, so that's everybody but
12 Mr. Trout. Thank you.

13 MR. TROUT: Thank you. Then she goes on --
14 Director Smith went on to say, "We have asked her, Vallario,
15 and she doesn't remember."

16 Now, Mr. Spence, I guess, I think, misread that to
17 say that Ms. Vallario -- that Ms. Vallario had spoken with
18 the auditor, the ANAB auditor, Kerri. I don't think that's
19 the correct reading. I think all that's happening is that
20 Ms. Smith spoke with Kerri, the ANAB auditor, and is
21 reporting what she, Kerri, the ANAB auditor, believes she,
22 Ms. Vallario, could have made her interpretation off an
23 incorrect photograph once she put it into the record. So
24 the point is that all that's really being reported there is
25 that Ms. Smith, based on her conversations with Kerri,

1 believes that Kerri believes that Ms. Vallario may have made
2 her interpretation off the incorrect photograph. And that's
3 really all that's being said. Ms. Smith went on to say,
4 "We've asked her, and she doesn't remember."

5 Ms. Vallario, it was reported, basically
6 essentially said: Look, I would have looked at the correct
7 evidence; I would never have relied just on a photograph.
8 And we don't quarrel with that. But it does seem pretty
9 obvious that when she got around to making a report, she was
10 relying or she was, say, moved by the mistaken and incorrect
11 photograph that we found in her case file. And it seems
12 pretty clear that she really has no recall that will allow
13 her to give any further detail, which is all that Ms. Smith
14 reported. So I think that when I read the supplement, I
15 actually don't think it really adds anything to what we
16 already know.

17 THE COURT: All right. Let me dovetail in part
18 off that and turn to Mr. Spence. You know, this motion, as
19 I see it, is a narrow one. It relates to a subpoena for
20 documents to allow the government to respond to Mr. Kiersh's
21 motion to dismiss that was joined by -- at least by
22 Mr. McDaniel and to litigate an evidentiary hearing on that
23 motion to dismiss and also to make disclosures to the
24 defense on the issues. There appears to be a side battle at
25 minimum or if not between the U.S. Attorney's Office and DFS

1 over what's going on with the labs and these audits. I
2 realize that this case and my other case in *Tibbs* launched
3 the hostilities to some extent. But I don't view the role
4 of this motion in this case to provide everything that the
5 government would want in order to deal with these questions
6 of -- well, for example, essentially provide discovery for
7 the audit. These things seem to be different issues to me,
8 related but different.

9 So I guess my question to you is -- you know, this
10 motion relates to the allegation -- I mean the uncontested
11 allegation between the parties to the case that incorrect or
12 false testimony was put before the grand jury with the
13 detective describing Ms. Vallario's conclusion. So he, the
14 detective, testifies about the source attribution of the
15 shell casings and the linkage between the two homicides
16 based on the error that Ms. Vallario made and that
17 Mr. Mulderig verified in August of 2017. How is the rest of
18 this stuff relevant to the litigation of the motion? In
19 other words, the question is: Was that true or false, and
20 maybe, maybe, why was that mistake made? But the issues
21 regarding the subsequent work by DFS, the things that DFS
22 did subsequently, and what DFS has told, for example,
23 ANAB -- how does that relate back to the issue litigated in
24 the motion?

25 MR. SPENCE: Thank you, Your Honor. And, one,

1 yes, there is a dispute going on between the U.S. Attorney's
2 Office and DFS. I think I state the obvious by stating
3 that. And I agree with Your Honor that this -- the issue
4 being litigated before Your Honor is a far more narrow one.
5 But to respond to Your Honor's specific question, what makes
6 these other documents relevant are the arguments that
7 Mr. Kiersh is making in his motion to dismiss, which is not
8 simply that this was an error that was presented to the
9 grand jury but that this was a conspiracy to frame his
10 client by DFS. Those are the arguments made by Mr. Kiersh.
11 He's not making the argument that we intentionally, the
12 government, myself, put that evidence before the grand jury
13 but that DFS has engaged in a conspiracy to put evidence
14 before the grand jury that improperly frames his client for
15 these murders. And that is what makes all these other
16 documents relevant.

17 We would like to establish that there is no
18 conspiracy, that there was an error that was made, although
19 we're not -- still not quite certain exactly how that was,
20 and that what DFS has done since then is attempt to get to
21 the bottom of that error, and there is no conspiracy here.
22 And those documents would establish the record for doing
23 that, I assume, but I haven't seen them. And so that is
24 what we're trying to do in obtaining these documents is to
25 lay a solid evidentiary foundation so that we can rebut

1 Mr. Kiersh's argument, which, frankly, I find farfetched and
2 extremely unlikely, but nevertheless I think for purposes of
3 this litigation it's important that that allegation be
4 rebutted by actual evidence and not simply by a shrug of the
5 shoulders and sort of a roll of the eyes.

6 THE COURT: But why is it even -- I mean I haven't
7 read these cases in a while, but *Hunter* and the other cases
8 that are relevant here -- I think the case is called *Hunter*
9 about false evidence being put in the grand jury. I mean
10 the question is just the falsity of the information;
11 correct? It's -- which is uncontested -- whether or not
12 they -- you know, what the nature of the falsity was. In
13 other words, if the government puts in the testimony of a
14 civilian witness that it doesn't know is lying, it doesn't
15 matter whether the witness was lying or mistaken. The
16 question is just the falsity of it. And so why does -- I
17 don't know that the litigation of the motion would really
18 necessarily need to get to all of that extraneous
19 information.

20 MR. SPENCE: Well, I think the case law, Your
21 Honor, is different when there's a possibility that the
22 government knew that that evidence was false and that they
23 deliberately put that evidence in front of the grand jury.
24 And again, Mr. Kiersh is not presently making that argument.
25 But if there was, in fact, a conspiracy for DFS to frame

1 Mr. McLeoud, which again I find farfetched, it would stand
2 to reason that the government may be part of that conspiracy
3 as well. And we would like to dispute that with documents
4 that are solely in the possession of DFS.

5 THE COURT: Right. But wouldn't that -- I mean,
6 again, I can understand even on that ground, even if this
7 was some, you know -- and I don't think what you're saying
8 is unreasonable in terms of what the decision ultimately
9 would be on the motion to dismiss, that it's sort analogous
10 to a *Napue* type decision. The government knew or should
11 have known the information it was putting up was false.
12 That might be an argument. Yeah, there are other elements
13 that the defense has to prove about the impact on the
14 process, but I can see that.

15 I can also see how some of this information is
16 just relevant to disclosure, because DFS is involved in the
17 case, in terms of the integrity of the evidence due to
18 recovery and subsequent chain of custody and analysis. I
19 could see it being relevant to -- you know, I read -- this
20 is outside the contours of this motion, but I read the
21 notice of filing that related to a letter Mr. Spence wrote
22 to Mr. Kiersh, I believe, about the results of the audit and
23 other cases in which significant errors had been made, which
24 I found, even given my background on this issue, a fairly
25 startling set of conclusions. But it may be relevant to an

1 argument for further restrictions on the firearms expert
2 testimony or exclusion of that testimony beyond what I had
3 decided in the *Tibbs* case.

4 But I guess, even with all of that taken into
5 account, doesn't that just relate to what happened in
6 between 2017 when the analysis was made and when the grand
7 jury testimony was presented? All of this stuff is now a
8 year or more after the testimony in the grand jury. How
9 does that even relate at all to any of those arguments? In
10 other words, these things that are going on with DFS and
11 ANAB now, how does that relate to -- whether DFS is being
12 candid with ANAB now, how in the world does that relate to
13 the good or bad faith of the government in, you know, 2017
14 and 2018?

15 MR. SPENCE: Well, Your Honor, I think the
16 argument would be that if DFS is not being forthcoming with
17 ANAB today and is covering up its conduct today, that would
18 relate back to its conduct back in 2017, which again would
19 go towards Mr. Kiersh's conspiracy theory that DFS has
20 intentionally created false results in this case with the
21 intention that those false results be put in front of a
22 grand jury and that the grand jury rely on those results.
23 If --

24 THE COURT: It's a consciousness of guilt kind of
25 thing?

1 MR. SPENCE: Correct, correct, correct.

2 THE COURT: You sound like a defense lawyer,
3 Mr. Spence.

4 MR. SPENCE: Thank you, Your Honor (laughing).
5 But no, I do think it's relevant for that reason. Again,
6 all of this strikes me as farfetched in terms of
7 Mr. Kiersh's argument. But if, in fact, Ms. Vallario's
8 conclusions were not simply wrong but wrong in sort of a bad
9 faith sense and that DFS has not owned up to those mistakes
10 and, in fact, is intent on covering them up, those documents
11 would play a role at least in sort of laying out the factual
12 basis that we need to litigate this motion over. And we
13 simply don't -- I don't know. I mean Your Honor will know
14 far better, because you've seen these documents. I have
15 not. Mr. Kiersh has not.

16 THE COURT: All right. Mr. Kiersh, I don't view
17 you right now as anything other than an interested
18 spectator. I think that unless you have a different
19 perspective, I think what's proper for me to do here is
20 rule. There will be some disclosures of documents. I have
21 no doubt that Mr. Spence is going to provide those to you
22 and to the other defense counsel when they are received,
23 because they are relevant. If they're relevant to
24 Mr. Spence's need for them, they're relevant to defense as
25 well. And then if you have further material that you think

1 you have an independent basis for obtaining, you can
2 separately attempt to subpoena and litigate them from DFS.
3 Does that make sense to you, Mr. Kiersh? Okay. You've had
4 your microphone on mute the entire hearing, and you've
5 turned it off only at about the moment you were about to
6 speak.

7 MR. KIERSH: I'm on -- can you hear now?

8 THE COURT: Yeah, you're good.

9 MR. KIERSH: Okay. Yes, the Court's suggestion is
10 fine.

11 THE COURT: Okay. Thanks.

12 All right. Where I think I am -- I appreciate the
13 arguments of counsel. They did help me clarify a couple of
14 things. I am ready to rule with regard to these issues.

15 So with regard to all of the remaining subpoenaed
16 documents, DFS has asserted a deliberative process
17 privilege, so I'll start there. So for every document that
18 remains in dispute, that privilege has been asserted. The
19 parties don't really disagree as to what that privilege is
20 as described by our Court of Appeals in *Fraternal Order of*
21 *Police v. District of Columbia*, 79 A.3d 347 at 355 (2013).

22 The Court described the deliberative process
23 privilege as, quote, sheltering "documents reflecting
24 advisory opinions, recommendations and deliberations
25 comprising part of a process by which governmental decisions

1 and policies are formulated," end quote. To fall within the
2 ambit of a privilege, the document first must be
3 predecisional, must be prepared to assist the policymaker in
4 making a decision. It must stem from the agency's
5 deliberative policymaking process. In addition, the
6 document itself must be deliberative; that is, it must
7 reflect the consultative process. It must reflect the
8 deliberations and personal opinions of the writer. So the
9 privilege does not extend to factual material that does not
10 reveal such opinions or process, even if decisions may be
11 based on such factual material.

12 So as we've been discussing, DFS here has argued
13 that the documents within the privilege log for which this
14 privilege has been asserted were created in response to the
15 January 2017 complaint by the U.S. Attorney's Office. Its
16 complaint: The source attribution conclusion made by DFS
17 firearms examiner Alicia Vallario, verified by another DFS
18 examiner, Michael Mulderig, was incorrect. According to
19 DFS, the documents not disclosed by it pursuant to this
20 assertion of privilege were generated by the agency as it
21 carried out an internal investigation and engaged in quality
22 assurance procedures, that it withheld the documents related
23 to the agency's decision making process as it evaluated its
24 error and considered what policies it would need to adopt in
25 the future to prevent certain mistakes.

1 So having analyzed all of the documents here, I
2 find that the deliberative process privilege justifies the
3 nondisclosure of only some and certainly not all of the
4 subpoenaed documents. I'll explain the manner in which I've
5 analyzed these issues and these documents, and I'm going to
6 go through what it means in terms of each specific
7 subpoenaed document. Many of the documents here, in my
8 view, simply do not involve the type of deliberative process
9 that would justify use of the privilege.

10 First of all, with regard to the bulk of documents
11 created in January 2020 and some of the documents that were
12 created later, the documents themselves and the context of
13 the case that we're in the hearing on now reveal that DFS
14 was not, in my view, trying to develop some sort of policy
15 to correct the error that occurred. It was taking action
16 because the U.S. Attorney's Office had complained about an
17 error. But DFS was at that point still analyzing the
18 evidence to determine what conclusion could be drawn from
19 it. It was still interpreting the evidence as DFS does,
20 given its statutory charge, still examining the ballistics
21 evidence taken from the crime scenes and making -- or
22 attempting to make, I suppose, what the government, I think,
23 well describes as the objective binary scientific decision
24 as to the origin of the shell casings.

25 DFS at that point was not really focused on

1 corrective action. It was still focused on the same
2 question generally posed to DFS in the context of criminal
3 cases, the question of: What does this evidence mean? What
4 conclusions can be drawn from it? In this case, at the time
5 these documents were created, the question was more
6 specific. The question was: Was our original
7 interpretation of what this evidence means correct? Again,
8 in combination with the context and history of this case,
9 these documents show, again in my opinion, that DFS was not
10 at first trying to develop a policy in response to an error.
11 It was trying to determine whether there was any error at
12 all and at that point, as I mentioned when I was speaking
13 with Mr. Trout earlier, at that point still resisting the
14 U.S. Attorney's Office's conclusion that there was an error.

15 DFS has argued that the fact that the U.S.
16 Attorney's Office had already decided to hire an outside
17 consultant, Mr. Spinder, means that all the work that was
18 completed by DFS after the complaint was made had to have
19 been corrective in nature, because there no chance DFS was
20 going to be involved in the trial anymore. But I think that
21 is not at all clear. It wasn't clear at that point at all,
22 and it's not even clear now that analysis by DFS would not
23 be evidence in the trials related to these homicides. After
24 all, until May DFS was still pushing back against the
25 conclusions that they had made any error. They were still

1 saying, "We are correct," still promoting the conclusion
2 that there is this source attribution that can be made and
3 that would allow these cases, these two homicides in this
4 case, to be tried together.

5 It's not the case, as I mentioned earlier, that
6 the U.S. Attorney's Office decision to hire an outside
7 expert, even because, as Mr. Spence has acknowledged, they
8 did that to get someone that they were confident would be
9 able to testify within the contours of my ruling in *Tibbs*
10 and hire one expert instead of a series of experts -- that's
11 not an irreversible decision not to use DFS analysis. And,
12 of course, analysis done of the evidence could be presented
13 in court by one of the defendants if they found that useful
14 for some reason.

15 In the end, at that point, the point that many of
16 these documents were created, DFS had not even concluded
17 that there was an error, and so it's very difficult for me
18 to say that what they were doing was adopting corrective
19 policy in response to that error. That's certainly the case
20 in January and February, as we have described. Even in the
21 case review document that was created by Jonathan Fried and
22 Ashley Rachael on April 30th of 2020, which is item 29 on
23 the privilege log, there the DFS is analyzing why
24 Ms. Vallario had made the error that she did. The final
25 page of that document, described as next steps, does not

1 speak at all to quality assurance or to changes in protocol
2 for future cases. It talks about reworking the evidence and
3 trying to do further work to establish the cause of the
4 error.

5 As a footnote here, I'll also note with regard to
6 that document that part of that document also seems, which
7 is, again, from Mr. Fried and Ms. Rachel, to reach the same
8 elimination conclusion as to these shell casings as had been
9 reached by Mr. Spinder earlier. It's neither here nor there
10 for the purposes of this motion, but it does seem that the
11 conclusion of that document by the examiners is at odds with
12 what was represented elsewhere as the purported conclusions
13 by those two individuals.

14 So many of the documents that I reviewed are ones
15 in which DFS simply seems to engage in casework, examining
16 evidence that was seized from a crime scene and that was
17 going to be potentially used in criminal trials,
18 reevaluating the work it had already done in order to see
19 whether a different conclusion needed to be rendered in that
20 context, in the context of those cases. And in my view, the
21 deliberative process privilege, for the reasons I've just
22 set forth, does not apply to documents created for that
23 purpose.

24 Secondly, and in a similar vein, even to the
25 extent that some of these documents may relate to policy

1 changes that were being considered and adopted by DFS, some
2 of this material at least appears to be predecisional and
3 factual in nature. In some of the documents, DFS was
4 developing and describing facts about what happened in the
5 original analysis and about whether or not the casings can
6 be analyzed in a particular way. Other documents focus on
7 developing timelines for when analyses were completed, when
8 evidence was viewed, or when evidence was moved. This type
9 of factual information, again, is not covered by the
10 deliberative process exception.

11 There are some other documents, in particular many
12 of the documents created in May 2020 and after, that do
13 reflect the type of deliberative policymaking that falls
14 within the privilege. The documents that fall within the
15 privilege are marked by two key features. First, they're
16 focused on DFS's efforts to create new protocols or QCARS
17 for improving quality and avoiding analyst error and to work
18 with accrediting agencies to develop and explain those
19 policies. And secondly, they don't include any factual
20 material. They reflect discussion, deliberation, and
21 policymaking among DFS administrators and staff.

22 With regard to those documents that strike me as
23 falling under the privilege, I will also note, although this
24 is not necessarily part of the decision here, that the vast
25 majority of those documents that I think do fall within the

1 privilege primarily combine information and documents that
2 the government already has with other materials that really
3 have no relevance here at all. And so I view those
4 documents as not necessary to respond to the motion to
5 dismiss and that would not really be relevant to defense
6 either. They would -- if the objection were made on
7 materiality with regard to some of those documents, it would
8 be very hard for me to find materiality to any of them.

9 The government has also argued that to the extent
10 that any of these documents fall within the ambit of a
11 privilege, the disclosure of them to third parties
12 constitutes a waiver of that privilege. These waiver issues
13 can be somewhat tricky. And fortunately for me, most of the
14 documents identified in the portion of the government's
15 motion to compel discussing waiver have apparently already
16 been provided or provided subsequent to the initial
17 government filing, as they don't appear on the most recent
18 version of the privilege log.

19 The parties have a remaining dispute regarding
20 whether there was a waiver effected by the disclosure of
21 documents to the ANSI -- that's A-N-S-I -- National
22 Accreditation Board, which is DFS's accrediting body.
23 Essentially I do agree with the government's position that
24 the case law -- although it's not specific as to this point,
25 that the tenor of the case law supports the notion that such

1 disclosures do constitute a waiver, given the role that ANAB
2 plays.

3 Documents 44, 66, and 72 contain communications
4 between DFS and ANAB for which the privilege has been
5 waived. They also include DFS internal communications about
6 the communications with ANAB for which the privilege I don't
7 believe has been waived. So in other words, those documents
8 are a mix. They contain some communications between DFS and
9 ANAB. I do find that there's a waiver of privilege for
10 those discussions with an outside party. DFS discussions
11 about those communications which are also included in those
12 documents -- I don't find that there's any waiver with
13 regard to those communications. I don't believe the
14 government would argue that there's a waiver with regard to
15 those communications either.

16 So for those reasons I have a sort of multi-part
17 ruling here. I'm going to describe it now, and I'll also
18 put it in sort of a summary order. So if you don't get down
19 every number that I say, don't worry about it. You'll get
20 an order today that will set this out. I'm going to grant
21 the motion to compel in part and deny it in part. I'm going
22 to grant the motion to compel and overrule the assertion of
23 deliberative process privilege with regard to the following
24 documents, all of which must be provided by Friday,
25 November 13th, 2020 to the government in unredacted form.

1 Those are documents 3 through 8, 11, 12, 20, 24 through
2 28 -- excuse me -- 24 through 26, 29 through 32, 35, 48, 51,
3 52, and 73.

4 Now, I say they're to be provided in unredacted
5 form. I've reviewed the redactions on some of those
6 documents, and I believe they should be provided unredacted.
7 The only exception I have to that is DFS has redacted on the
8 top of many documents what appears to be the name of the
9 person who printed the document out. If it's an email, the
10 name of the person who printed it appears on the top.

11 That's -- if there's some reason, Mr. Trout, that
12 you want to keep that redacted, that's fine. It's of no
13 moment to the substance of the document, just whoever
14 printed the email whose name appears in the top as I
15 understand.

16 Secondly, I'm going to grant the motion in part
17 and overrule the assertion of privilege in part with regard
18 to the following documents: 44, 66, and 72. And as I
19 described earlier, those are the documents involving the DFS
20 and ANAB communications. My ruling with regard to those
21 three documents is that by November 13th, 2020, DFS must
22 disclose the communications between DFS and ANAB and may
23 redact any DFS internal documents or communications that are
24 contained within those same documents.

25 Finally, I deny the motion and uphold the

1 assertion of the deliberative process privilege with regard
2 to the following documents: 2, 22, 27, 36, 37, 39, 41
3 through 43, 45 and 46, 49, 50, 53 through 57, 59 through 65,
4 and 68 through 71.

5 Now, as it turns out, the ruling I have made on
6 the deliberative process privilege also resolves most of the
7 assertions of the attorney-client and work product
8 privileges, because for the vast majority of documents for
9 which those two privileges are also asserted, I have denied
10 the motion to compel on deliberative process grounds.

11 There's one exception; that's document number 29.
12 This is a report that was forwarded to many people, and on
13 the CC list is DFS General Counsel Todd Smith. There's no
14 indication that this was a communication relating to legal
15 advice. And, of course, the fact that a document was
16 forwarded to a lawyer does not mean that the underlying
17 document or report becomes then shielded with the
18 attorney-client privilege, so I do find that there's no
19 attorney-client privilege that attaches to that document.
20 And I believe that that ruling resolves all three
21 attorney-client work product objections as well.

22 So I will issue, as I said, a brief order that
23 simply states -- goes through what those rulings are in
24 summary fashion. There's a protective order -- a motion for
25 protective order that was filed by DFS that will govern the

1 disclosure of those documents. I believe the government has
2 indicated that they do not object to the protective order.

3 Is that correct, Mr. Spence?

4 MR. SPENCE: We actually do object to the
5 protective order, Your Honor. We filed an opposition.

6 THE COURT: I apologize. I did not -- I did not
7 see that. So what's the objection to it?

8 MR. SPENCE: Well, the objection to the protective
9 order is that it would limit the dissemination of the
10 documents within the Justice Department and within
11 individuals retained by the Justice Department. And that's
12 simply inconsistent with all the statutes that sort of lay
13 out the statutory obligations of the Department of Justice,
14 you know.

15 THE COURT: Can you point me to where that
16 limitation is.

17 MR. SPENCE: Yes, Your Honor. One moment. So
18 within the protective order -- the proposed protective order
19 itself, page 2, paragraph 3: The confidential documents
20 shall be disclosed to the prosecutors who have entered their
21 appearance in this case and to other prosecutors who are
22 considering disclosure duties to defendants in other matters
23 but not to any other person.

24 THE COURT: So how do you propose that that be
25 changed?

1 MR. SPENCE: I would propose that that be
2 eliminated in its entirety. I mean I need to have the --
3 you know, for example, I would not be able to share, under
4 the provisions of that order, conceivably with my own
5 superiors within the office so that I can get instruction on
6 how to proceed in this matter. I might not be able to share
7 it with appellate counsel, other than with regard to
8 disclosure obligations. It just really -- it prevents me
9 from doing my job.

10 THE COURT: Okay. All right. Once again, we've
11 had the introduction of PDS lawyer Michael Spence with
12 regard to that argument.

13 Mr. Trout, do you have any objection to me
14 changing the wording of it to permit disclosure to extend to
15 other individuals within the Office of the United States
16 Attorney who are working on this matter?

17 MR. TROUT: Excuse me, Your Honor. I think that
18 you're aware of the sensitivity of DFS to the idea that they
19 do not want the discovery process in a criminal case to
20 bleed over into an audit process that they do not approve
21 of, and that's the -- that is the context in which we've
22 asked --

23 THE COURT: Right. I understand that. I
24 understand that, but I think that it is hard to sort of
25 restrict within an office where everyone has the same

1 ethical obligations, to designate just Mr. Spence and
2 Ms. Coronado as the only ones who are working on this case.
3 At a minimum, it also extends to the supervisors, to
4 appellate attorneys, or anyone else who's working on this
5 individual case.

6 MR. TROUT: All right.

7 THE COURT: Okay. Is there any other objection to
8 it, Mr. Spence?

9 MR. SPENCE: Yes, Your Honor. Let me see here. I
10 believe -- let's see here. Actually, no. I take it back.
11 That was my only objection.

12 THE COURT: All right. So I'll issue that with
13 that modification.

14 So, Mr. Trout, I don't want to pry into your
15 business regarding the motion to withdraw. Are you still in
16 the same posture with regard to the motion to withdraw as
17 you were when you filed the motion?

18 MR. TROUT: We are, Your Honor. I suppose I
19 should add our lease is expiring for this firm, and so at
20 the end of the year, I expect we're going to close our firm.

21 THE COURT: Okay. Well, what I'm going to do
22 is -- you know, I didn't rule on the motion just because you
23 were already 90 percent in, and so getting resolution on
24 this issue I think required me to lean on you a little bit
25 more --

1 MR. TROUT: Right.

2 THE COURT: -- than I otherwise would. Once the
3 disclosures have been made on Friday, if you could let my
4 chambers know, then I will relieve you of your obligations
5 with regard to representing DFS in the case.

6 MR. TROUT: Thank you, Your Honor.

7 THE COURT: Okay. All right. So at this point, I
8 guess in terms of scheduling, what we need to figure out is
9 what's going to happen next. Now, obviously, the case is in
10 the same terrible posture as every other criminal case and
11 other type of case is in Superior Court. I guess the next
12 step would be to have the evidentiary hearing with regard to
13 the motion to dismiss. I don't know when the parties -- do
14 the parties know now when they think they'll be ready to do
15 that or whether we should wait to do that?

16 MR. SPENCE: Well, Your Honor, I would defer to
17 Mr. Kiersh on that. I'm happy to pick a date now. I would
18 like to do it, obviously, sooner rather than later so that
19 we can resolve this issue. But, again, without knowing
20 what's in these documents and what arguments Mr. Kiersh will
21 make from these arguments and whether he'd want to call
22 additional witnesses than we would, but I do think setting a
23 date makes sense to just force the issue and then keep us
24 moving forward.

25 THE COURT: All right. Mr. Kiersh?

1 MR. KIERSH: Yes, Your Honor. I think we should
2 at least set a placeholder date, maybe in January. Again,
3 I'm in the same position as Mr. Spence. I need to see these
4 documents or at least try to see these documents before I
5 can make a full assessment of the nature of the hearing.
6 But if we set a placeholder date when we can revisit that,
7 we can -- well, prior to that date, we can revisit the issue
8 of whether or not we can go forward, depending on the
9 production of the documents.

10 THE COURT: Okay. So, you know, I have forgotten
11 or maybe -- we just got new procedures about how we're
12 supposed to be setting matters. And I have -- in part
13 because I'm leaving the division at the end of December,
14 I'll admit to not having focused on how it's supposed to
15 work.

16 Does the -- Madam Clerk, do you know, if we're
17 just setting this case down for a felony status conference,
18 is that what we set down in courtroom 314 or is that
19 something where the calendar judge should try to find some
20 additional time?

21 COURTROOM CLERK: Your Honor, I have on this case
22 that there's a status hearing set for December 23rd at
23 11:30, and this case is also set for a jury trial in
24 January. Am I vacating those dates?

25 THE COURT: Well, I don't think that vaccine is

1 coming quite quickly enough that I expect we'll be picking a
2 jury. But given that the administrative order now extends
3 through January 15th, there won't be any juries even if
4 things go as well as miraculously possible till March 15th.
5 I think that date is to be vacated. And I'm not here
6 December 23rd, so yes, we should vacate both dates.

7 I will say I'm -- my last day is December 18th.
8 If you want to have one last day -- you know, if these
9 issues regarding documents recur, it might be helpful to
10 have one last hearing in front of me, because you're going
11 to have to restart in front of Judge Lee in January. I
12 think with regards -- certainly if the next issue is to
13 discuss sort of where we're going forward and whether
14 disclosures have been adequate, it probably does make sense
15 to try to get something in before December the 18th.

16 MR. SPENCE: I agree, Your Honor.

17 THE COURT: Can we do that?

18 You know, does the courtroom clerk mind if we
19 don't set another date now and just note the date is to be
20 set through chambers, and then we can -- because we've got
21 so many parties here in a case with another judge waiting to
22 start at ten o'clock, that we just coordinate through my law
23 clerks and all the lawyers to pick a date in December?

24 COURTROOM CLERK: It's fine, Your Honor.

25 THE COURT: Okay. So the docket will just note

1 that the next date will be set through chambers. And
2 counsel, we'll do that in the next couple of days. Okay?
3 All right. Anything further in this matter?

4 MR. TROUT: No, Your Honor.

5 MR. SPENCE: No, Your Honor.

6 THE COURT: All right.

7 MR. KIERSH: Not on behalf of Mr. McLeoud. Thank
8 you.

9 THE COURT: All right. Thank you all very much.
10 And like I said, I'll get a written order to you shortly.
11 Okay? Thank you.

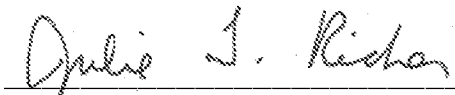
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CERTIFICATE OF REPORTER

I, Julie T. Richer, an Official Court Reporter for the Superior Court of the District of Columbia, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced, upon the motions hearing in the case of UNITED STATES OF AMERICA V. RON DEVIN MCLEOD, Criminal Action No. 2017 CF1 9869, in said Court, on the 10th day of November 2020.

I further certify that the foregoing 39 pages constitute the official transcript of said proceedings, as taken from my computer realtime display, together with the audio sync of said proceedings.

In witness whereof, I have hereto subscribed my name, this the 17th day of November 2020.

A handwritten signature in cursive script, reading "Julie T. Richer", is written over a horizontal line.

Julie T. Richer, RPR

Official Court Reporter

Exhibit 2

Final Report of
Review and Audit of Selected Casework
of the
Firearms Examination Unit
of the
Forensic Science Laboratory Division,
Department of Forensic Sciences,
District of Columbia

March 18, 2021

Final Report of Review and Audit of the DFS Firearms Examination Unit

I. Introduction

On March 12, 2021, the Washington, D.C. Office of the Attorney General (OAG) requested that the audit team prepare a final report of its findings based on a review of additional relevant source materials received after the issuance of the audit team's May 21, 2020 interim report and June 4, 2020 first addendum report. These additional source materials include, but are not limited to: 1) documents received by the United States Attorney's Office (USAO) pursuant to a subpoena and subsequent court order in the case of United States vs. Rondell McLeod, Case No. 2017 CF1 9869, that requested production of all documents from the Department of Forensic Sciences (DFS) related to CCNs 15-180-695 and 15-128-515 [Exhibits 20 and 23] and 2) interview summaries and other materials gathered by the Washington, D.C. Office of the Inspector General (OIG). A list of relevant source materials is contained in Appendix A at the end of this report.

II. Executive Summary

The DFS was created through the "Department of Forensic Sciences Act of 2011" by the Council of the District of Columbia. The DFS provides various services to a number of agencies/clients, including the Metropolitan Police Department, the Office of the Chief Medical Examiner, the OAG, the Department of Health, the Fire and Emergency Medical Services Department, the USAO, and other law enforcement or investigative agencies. Its mission is to provide "high-quality, timely, accurate, and reliable forensic science services...[using] best practices and best available technology; a focus on unbiased science and transparency; and the goal of enhancing public safety."¹

Though the DFS is composed of several units, this report (and previous reports) by the audit team specifically addresses the Firearms Examination Unit (FEU). However, many of the findings of the audit team expand beyond the FEU and into the entire management of the DFS.

Conflicting results were reported by the FEU and an independent examiner hired by the USAO in the case of United States vs. Rondell McLeod in which fired cartridge cases were compared between two homicide cases. The FEU reported that the same firearm fired the cartridge cases from the two homicide cases, while the USAO's independent examiner reported that two different firearms were involved. Because of concerns with the DFS's response to the conflicting results, the USAO, with support from the OAG and the OIG, initiated an audit to determine the validity of the results, determine the cause of the conflicting results, determine whether the DFS acted in accordance with professional practices of a forensic science laboratory in addressing the conflicting results, and determine if the DFS was reaching reliable conclusions in the work it performed.

Initially, only limited information was available to the audit team. However, that information was sufficient for the audit team to reach initial findings that raised concerns about the

¹ <https://dfs.dc.gov/page/about-dfs>, accessed 03/13/2021

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function of the FEU and the reliability of its results, as well as questionable practices by the management to address the conflicting results. Specifically, it was determined that the DFS's reported results were erroneous, that the DFS examiner's comparison photographs depicted different physical specimens than depicted in other examiners' comparison photographs, and the USAO's independent examiner reached correct results. Throughout the course of the audit, additional information in the form of laboratory records, emails, and interview summaries became available. The technical issues addressed by this audit are captured in the body of this report and the previous reports issued by the audit team.² The following is a summary of the most prominent findings:

- Two FEU examiners, one of whom is the FEU Supervisor, were tasked with evaluating the conflicting results between the DFS and the USAO's independent examiner. These two FEU examiners initially agreed with the conclusion of the USAO's examiner, who reached the correct conclusion that the cartridge cases from the two homicide cases were fired by different firearms (i.e. an "Elimination" conclusion). However, based on all documentation available to the audit team, this conclusion does not appear to have been disclosed outside of the DFS. According to an OIG interview summary, the FEU Supervisor stated that after the results were reported internally to DFS management, a meeting that included the FEU Supervisor and several DFS managers was held. The parties to the meeting collectively agreed that the DFS should report a finding of "inconclusive", meaning that no conclusion could be reached, despite the fact that the FEU Supervisor and the other FEU examiner had reached the conclusion that the two groups of cartridge cases had been fired by different firearms. Conclusions must always be reached with impartiality, based on the examination and interpretation of evidence. Laboratory management has an affirmative duty to ensure impartiality by shielding examiners from outside influence or other pressures. In this instance, laboratory management not only failed to safeguard the examiners, but actually served as the source of the influence. By these actions, the management of the DFS and the FEU Supervisor misled their accrediting organization, oversight boards, clients, and other stakeholders about their processes and conclusions.
- DFS management notified the ANSI National Accreditation Board (ANAB), which accredits the laboratory, and the Science Advisory Board (SAB) of an "inconclusive" result prior to initiating a properly documented examination of the evidence and issuing a report of analysis. DFS management dismissed the FEU Supervisor's recommendation to send the evidence to an unbiased, independent examiner. Instead, DFS management assigned the FEU Supervisor as the primary analyst to complete the examination documentation and author the report. It was this very FEU Supervisor who had helped draft the ANAB and SAB notifications, who was aware of the conflicting results by all DFS examiners involved in the case, and who up to that point had not conducted any casework since 2015 when he began employment at the DFS. These actions demonstrate poor judgment by DFS management that put their employees in an untenable situation.

² See Interim Report dated May 21, 2020 and Addendum to Interim Report dated June 4, 2020.

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- After the aforementioned examiners evaluated the evidence and determined that the DFS had previously erred, the verifying examiner of the original analysis was asked to conduct a re-examination. After standing by his original conclusion, he was called into the office of the FEU Manager³ and pressured to change his conclusion, to which the verifier relented. From the FEU Manager's office, the verifier sent an email from his personal cellular telephone to the FEU Manager notifying him of the change of conclusion. The FEU Manager accepted this change of conclusion, knowing that it was not based on any examination or reevaluation of evidence. This change of conclusion was then reported to the USAO, the ANAB, the SAB, and other stakeholders. This event is another example of improper practices by the DFS that are foundationally unacceptable and violate the DFS's tenets of integrity, accountability, and trust.⁴
- Though not reported, at least two additional current FEU examiners have examined the evidence in question, and at least one of them reached multiple erroneous conclusions. The other current examiner appears to have been leaning toward an erroneous conclusion but did not complete a full examination. It appears that DFS management has failed to report and completely ignored these analytical errors and their serious implications.
- The DFS has failed to adequately address the error in the in their previous report of analysis, dated August 8, 2017. The DFS has maintained the position that the error was administrative in nature (only), as the examiner incorporated an incorrect photograph into her case record. While it is not disputed that an administrative error did occur, there is compelling evidence that the examiner also made an analytical error and reached an erroneous conclusion. However, the DFS has only taken steps to address the administrative error. These steps are inadequate to address the analytical error and to determine if other erroneous conclusions were reported by the involved examiner.
- The DFS's representations to its accrediting body, the ANAB, and to the SAB about the handling of this matter were incomplete and misleading. Complete transparency with these two organizations is requisite (and is included in the DFS's own mission statement) for an oversight process(es) to have any credibility.

Based on the above findings, the audit team does not have confidence in the analytical results of the FEU. The audit team recommends that the FEU immediately cease performing casework and that clients and stakeholders not rely on results from the FEU. A comprehensive evaluation of the technical competence of all current examiners is required, followed by retraining and testing to establish that they are competent to perform casework and reach appropriate conclusions. Casework already completed by the FEU should be reexamined by qualified examiners in an effort to determine if additional errors have been made. It does not appear that the DFS possesses the qualifications to perform the necessary evaluations, retraining,

³ At the DFS lab the "Manager" and "Supervisor" are two separate positions, with the "Supervisor" reporting to the "Manager".

⁴ These tenets are found in the header of the DFS's Closeout Report of Complaint/Inquiry Review [Exhibit 41].

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testing, and casework review that is required, and the audit team recommends that appropriate qualified persons from outside of the DFS be brought in to perform these activities.

The above findings also illustrate very serious, and perhaps more troubling, problems associated with DFS management. DFS management not only failed to properly address the conflicting results reported to the DFS by the USAO, but also engaged in actions to alter the results reached by the examiners assigned to conduct a reexamination of the evidence. DFS management then misrepresented the various activities undertaken and analytical conclusions reached to their clients and stakeholders, including the USAO, the OAG, their accrediting organization (ANAB), and the SAB. In the opinion of the audit team, such actions by management indicate a lack of adherence to core principles of integrity, ethics, and professional responsibilities. Management has cast doubt on the reliability of the work product of the entire DFS laboratory.

III. Detailed Analysis and Conclusions

Summary of Conclusions from the Audit Team's May 21, 2020 and June 4, 2020 Reports

Source materials, that were listed in the previous reports, are referenced in this report and will use exhibit numbering from the original reports. Any new exhibit numbering and attachment lettering for this final report will continue from where the prior audit team reports ended.

The following is a summary of findings and conclusions reached in the aforementioned reports:

- Daniel Barrett and Luciano Morales (co-signed 1/27/2016 report) as well as Alicia Vallario (and her verifier, Michael Mulderig) concluded that two fired 10mm Auto caliber cartridge cases, Item #16 submitted under CCN 15-128-515 and Item #45 submitted under CCN 15-180-695, were fired in the same firearm. [Exhibits 02 and 03, respectively] Travis Spinder, an independent examiner hired by the USAO, (and his verifier) concluded that Items #16 and #45 were not fired in the same firearm. [Exhibit 04] FEU Supervisor Jonathan Fried (and his verifier Ashley Rachael) reported a finding of "inconclusive" in his May 27, 2020 report, indicating that they were unable to determine whether or not Items #16 and #45 were fired in the same firearm. [Exhibit 16]
- The photograph labeled as depicting a comparison of Items #16 and #45 contained in Alicia Vallario's examination documentation under CCN 15-128-515 and CCN 15-180-695, dated 08/08/2017, does not depict the same specimens examined and reported on by Daniel Barrett and Luciano Morales, Travis Spinder, and Jonathan Fried. [Attachment B-Figures 1 through 7]
- The findings of "inconclusive" by Jonathan Fried are not supported by his narrative notes and comparison photographs. Rather, his notes and photographs, as well as those of his verifier, Ashley Rachael, support the conclusion that Items #16 and #45 were not fired in the same firearm. [Attachment C-Figures 1 through 6] This conclusion

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is commonly referred to as an “elimination” or “exclusion”, which is the conclusion reached by Travis Spinder. [Exhibit 04]

- In response to a letter from Assistant United States Attorney Michael Ambrosino dated January 17, 2020 in which Ambrosino notified the DFS of the discrepancy between the conclusions of Alicia Vallario and Travis Spinder [Exhibit 12], Assistant General Counsel Todd Smith issued a reply letter dated January 23, 2020 indicating that Alicia Vallario and Travis Spinder had not examined the same specimens and, therefore, Ambrosino’s statements were “erroneous” [Exhibit 14]. DFS Director Jenifer Smith reiterated this position in a memorandum to Deputy Mayor Kevin Donahue dated February 14, 2020. [Exhibit 13]
- DFS Director Jenifer Smith issued a letter to United States Attorney Timothy Shea dated May 22, 2020, indicating that a review of Alicia Vallario’s work revealed an “administrative error” in that Vallario incorporated the wrong photograph into her examination documentation. This letter also indicated that Vallario’s verifier (Michael Mulderig) reexamined the evidence and changed his conclusion from “identification” to “inconclusive.” [Exhibit 15]

Analysis of Additional Source Materials Pertaining to the Examination of Items #16 and #45

John Murdock, another independent examiner retained by the USAO, issued a report dated June 15, 2020, containing his conclusion that Items #16 and #45 were not fired in the same firearm. Murdock’s conclusions were verified by a second qualified examiner⁵. [Exhibit 24] Murdock’s (and the verifier’s) conclusion is in agreement with that of Travis Spinder (and his verifier) [Exhibit 04], who was previously retained by the USAO to examine these same items. Thus, all independent examiners (a total of four) reached the same conclusion that Items #16 and #45 were not fired in the same firearm. At the time of their examinations, neither Spinder nor Murdock were aware of any prior conclusions reached by any other examiners.^{6 7}

In its June 4, 2020 report, the audit team expressed concern over the “inconclusive” results regarding the comparison of Items #16 and #45 reported by FEU Supervisor Jonathan Fried in his May 27, 2020 report. The narrative notes and photographs from Jonathan Fried and his verifier, FEU firearms examiner Ashley Rachael, support the definitive conclusion of “elimination”, meaning that the items were not fired in the same firearm. A significant point to note is that Fried’s report clearly states an **analysis start date of May 12, 2020**. [Exhibit 16]

⁵ This verifier is Todd Weller, a member of the audit team and one of the authors of the audit reports. His examination of the actual evidence was disclosed in the body of Exhibit 8 of the Audit Team’s May 21, 2020 report. His verification is also disclosed in the body of John Murdock’s June 15, 2020 report [Exhibit 24].

⁶ Audit team interview with Travis Spinder on May 19, 2020.

⁷ John Murdock’s examination documentation under Laboratory Number PCF 20-2-2, page 1 of 38, dated 05/11/2020, under the Remarks section: “I was asked to do the comparisons blind-without any info about previous exams.”

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Amongst the source materials received since the audit team's June 4, 2020 report is an email from Ashley Rachael to Wayne Arendse, and others, dated April 30, 2020. [Exhibit 25] Attached to that email is a slide presentation entitled "Confidential Case Review", dated April 30, 2020, which contains the names Ashley Rachael and Jonathan Fried on the cover slide (slide 1 of 21). In summary, the presentation contains a timeline of the various examinations of Items #16 and #45. It indicates that Fried and Rachael reviewed the documentation from prior examinations and then conducted their own examination of the evidence items.⁸ The 16th slide contains the following bullet points:

- "All the cartridge cases in both homicide cases were examined in an attempt to locate the cartridge cases pictured in Vallario's file"
- "After a thorough review, it was determined that the photograph in Vallario's case file was not a picture of any of the items in either of the two homicide cases"
- "Conclusions reached by independent reports were also confirmed"

The 19th slide contains the following bullet points:

- "Based on a microscopic examination conducted by both Jonathan Fried and Ashley Rachael of Items #1 (16) and #22.24 (45), it was determined to be an **elimination** and not an identification as indicated by Morales and Vallario" (Note: the word elimination was **bold-faced** and underlined on the slide; emphasis was not added by the undersigned audit team)
- "This elimination transitively agrees with the conclusion reached by the private examiner"

The 21st slide is entitled "Next Steps" and contains the following bullet points:

- "Assign re-work of NIBIN Verification to another qualified examiner not involved thus far"
- "Report to stakeholders for transparency"
- "Locate photograph of Item #1 (16) and #22.24 (45) taken by Vallario if it exists"
- "Determine root cause of the incorrect photograph being printed, initialed by both examiner and verifier and then making it into case file"

The audit team also received an email sent by Forensic Science Laboratory Director Wayne Arendse to ANSI National Accreditation Board (ANAB) Compliance Investigator Anna Yoder dated May 6, 2020. [Exhibit 29] Attached to the email was a letter from Arendse to Yoder and a slide presentation. The letter contains the following statement (emphasis added):

"At the **conclusion of their review of the relevant physical evidence**, the FEU Supervisor and senior Firearms Examiner **concluded that the original identification should have**

⁸ This is further supported by an email chain between Ashley Rachael and Jonathan Fried on April 29, 2020. Email from Fried to Rachael states in part: "I was thinking that at some point we (or I) will be asked why we did not catch this in January, so I was kicking around a couple of bullet points that we may want to look at". Rachael replied: "Absolutely. I was planning on putting a slide in there about that. I mean, it's simple: document review vs. evidence review. This error would not have been caught without examining the evidence. And on paper it appears that 4 people looked at the items and agreed via the documentation. And then you have Travis saying he didn't look at the same items as Alicia. Also true. It's gonna be fine. And **now evidence review turned up different results. No problem!**" (emphasis added) [Exhibit 42]

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been determined inconclusive. Based on this determination, the FEU manager discussed the matter with the original verifying examiner to review the physical evidence. Upon review, the original verifying examiner concluded that the association between the two cartridge casings at issue should be determined inconclusive.”

This statement conflicts with statements and findings in the slide presentation emailed by Ashley Rachael to Wayne Arendse just six days prior, which indicates that Jonathan Fried and Rachael reached a conclusion of elimination and agreed with Travis Spinder’s conclusions. No documents have been provided indicating an analysis by Fried and/or Rachael to support this change in interpretation, which occurred after the April 30, 2020 slide presentation and before the May 6, 2020 email to ANAB.

During a presentation to the DFS SAB on July 31, 2020, FEU Manager Jonathan Pope provided an explanation of the DFS’s inquiry into the conclusions reached by Alicia Vallario regarding Items #16 and #45. One of his accompanying slides, the 108th slide in the series, contained the following statement: “The change in findings from verifier prompted re-examination by the FEU Supervisor yielded a [sic] inconclusive finding.” [Exhibit 30] This position taken is in conflict with the April 30, 2020 slide presentation in which Jonathan Fried and Ashley Rachael reached a conclusion of elimination. [Exhibit 25] Furthermore, the sequence of events presented by Pope contradicts the sequence of events contained in 1) Wayne Arendse’s May 6, 2021 letter to the ANAB [Exhibit 29], which states that the FEU Supervisor’s (Jonathan Fried) review of the evidence prompted the review by the original verifying examiner (Michael Mulderig) and 2) the April 30 slide presentation [Exhibit 25], which is dated one day prior to Michael Mulderig’s reexamination of the evidence.

During a presentation to the DFS SAB on October 16, 2020, FEU Supervisor Jonathan Fried provided an explanation of the DFS’s inquiry into the conclusions reached by Alicia Vallario regarding Items #16 and #45. His accompanying slides, the 129th through 136th slides in the series, indicate that he evaluated all 10mm Auto caliber cartridge cases from both shooting events, 16 from one event and 12 from the other, which include Items #16 and #45, respectively. He reached a finding of “inconclusive”. [Exhibit 31] No mention was made during this meeting of his and Ashley Rachael’s original conclusion of “elimination”, nor the reasons the conclusion was changed.

Three emails were sent from Michael Mulderig to Jonathan Pope on 05/01/2020.

- The first email, sent at 1:17PM from Michael Mulderig’s DFS email account, indicates that 12 of the 10mm Auto caliber cartridge cases under CCN 15-180-695, including Item #45, were fired in the same firearm. Two comparison photographs were attached. [Exhibit 26]
- The second email, sent at 1:20PM from Michael Mulderig’s DFS email account, indicates that Items #16 and #45 were fired in the same firearm. Three comparison photographs were attached. [Exhibit 27]
- The third email, sent at 3:00PM from michaelmulderig@gmail.com, indicates that “After further review of comparison between homicide DFS 15-00253 and NIBIN DFS 15-

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000673 I am reversing my opinion to be inconclusive due to a sufficient agreement [sic] of individual characteristics.” No photographs or notes were attached to this email. At the end of the email is the text “Sent from my iPhone”.⁹ [Exhibit 28]

Michael Mulderig was interviewed by the USAO on December 7, 2020. [Exhibit 32] The following is a synopsis based on the summary prepared by the USAO: Mulderig stated that he was called into FEU Manager Jonathan Pope’s office after he sent his email reaffirming his conclusion that Items #16 and #45 were fired in the same firearm. [Exhibit 26] During the meeting, Pope told him that other examiners were “inconclusive”, and repeatedly asked Mulderig if his conclusion was actually “inconclusive”. Though Pope never told Mulderig to change his conclusion, Mulderig believed that Pope was pushing him to reverse his decision. As a result, Mulderig sent his 3:00PM email [Exhibit 28] from his personal email account on his iPhone while he was still in Pope’s office, without any further examination of the evidence. Mulderig still believed that his original conclusion of identification was correct, but he felt pressured by Pope to change his conclusion. He believed it was a mistake to change his conclusion the way he did.

Images of the packaging for Items #16 and #45 were contained within John Murdock’s examination documentation. [Exhibit 24 and Attachment D] The notes pages containing the images were dated May 28, 2020 and June 8, 2020, respectively.

Images of the Item #16 envelope reveal the following sets of initials and dates:

- EAB (Bustamante) 05/01/2020¹⁰
- EAB (Bustamante) 05/04/2020
- JAF (Fried) 05/01/2020
- JAF (Fried) 05/12/2020
- JAF (Fried) 05/(?)/2020
- AV (Vallario) 08/08/2017¹¹

Other initials and dates are present. Some are from previous examinations by Travis Spinder, John Murdock, etc., and some are illegible to the audit team.

Images of the Item #45 envelope reveal the following sets of initials and dates:

- EAB (Bustamante) 05/04/2020
- EAB (Bustamante) 5/(?)/2020
- M with circle around it (Mulderig) 05/01/2020¹²
- JAF (Fried) 05/(?)/2020
- JAF (Fried) 05/12/2020
- JAF (Fried) 05/27/2020

⁹ Chain of custody records [Exhibits 21 and 22] indicate that Michael Mulderig relinquished custody of Items #16 and #45 for the final time on May 1, 2020 at 2:07PM.

¹⁰ Michael Mulderig identified the initials “EAB” as belonging to Elizabeth Bustamante during an interview with the audit team on August 13, 2020.

¹¹ Alicia Vallario identified these initials as hers during an interview with the audit team on July 8, 2020.

¹² Michael Mulderig identified these initials as his during an interview with the audit team on August 13, 2020.

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- AV (Vallario) 08/08/2017

Other initials and dates are present. Some are from previous examinations by Travis Spinder, John Murdock, etc., and some are illegible to the audit team.

A review of chain of custody records for Items #16 and #45 [Exhibits 21 and 22] reveals that both items were in the possession of the following individuals on the following dates:

04/28/2020 - Ashley Rachael

05/01/2020 - Jonathan Fried, Michael Mulderig, Elizabeth Bustamante

05/04/2020 - Jonathan Fried, Elizabeth Bustamante

05/12/2020 through 05/27/2020 (various dates) - Jonathan Fried¹³

FEU examiner Elizabeth Bustamante was interviewed by the OIG on January 27, 2021 and again on January 28, 2021. [Exhibits 33 and 43] The following is a synopsis based on the summary prepared by the OIG: Bustamante stated, in part, that she was asked by FEU Manager Jonathan Pope to review Items #16 and #45 and report her findings to him. Pope told her there would be no report and no verification, and the assignment was not recorded in the laboratory information management system (LIMS). As a result, worksheets were not completed to document her examination. However, the chain of custody was recorded in LIMS and Bustamante initialled the evidence packaging. On May 1, 2020, Bustamante examined Items #16 and #45 and reached a conclusion of identification. She sent an email to Pope notifying him of her conclusion and attached three photographs to that email. [Exhibit 34] On May 4, 2020, Bustamante examined all of the 10mm Auto caliber cartridge cases, 12 from one CCN and 16 from the other CCN. She concluded that the 12 cartridge cases from one CCN were all fired in a single firearm. She also concluded that the 16 cartridge cases from the other CCN were all fired in a single firearm. She then intercompared five pairs of cartridge cases, with each pair including one cartridge case from each CCN. For each of these five pairs she reached a conclusion of identification, meaning that, in her opinion, all of the cartridge cases (28 in total) were fired in one firearm. She took hand-written notes of her examination and then emailed those notes to herself. [Exhibit 35] Regarding the hand-written notes and the reason she emailed them to herself, Bustamante stated: "I imagine I scanned them to myself because I typically write these on scratch paper that could easily be lost or misplaced. When I'm working on a case I'm assigned, any information I write on scratch paper gets transcribed into an electronic format (either LIMS or Mideo systems), but since I wasn't recording this examination in any official capacity, I scanned the page to have a record of what I did." Bustamante later learned that FEU examiner Cody Elder had also examined Items #16 and #45, and she stated that Elder told her he reached a conclusion of identification. Regarding the DFS's decision to report an inconclusive, Bustamante surmised because it was a "safer answer". Bustamante explained that inconclusive can be the right answer, but in this case, it happened to be the safest answer, "because you can't be wrong".

FEU examiner Cody Elder was interviewed by the OIG on February 12, 2021. [Exhibit 36] The following is a synopsis based on the summary prepared by the OIG: Elder stated that FEU

¹³ For large periods of time during this date range the records indicate that Item #16 was in a storage location.

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Supervisor Jonathan Fried casually asked him to look at the cartridge cases in question (Items #16 and #45) but did not ask him to document his examination or reach a conclusion. At the time of the examination, Elder was not provided with the case number nor any other information about the evidence, and he was not placed on the chain of custody record. At the conclusion of his examination, Elder returned the evidence to Fried and told him that they looked “pretty good” and that he observed some agreement in aperture shear marks. Elder realized at a later time that the evidence he was asked to examine was related to evidence that Fried was re-examining. Elder knew it had to be related to the USAO complaint because that was the only case that Fried was working. He considered the way the DFS was handling this matter to be unusual, as Fried does not conduct casework and this is the first case that Elder had known Fried to complete. Also, it is common for examiners to consult with one another and discuss their opinions, but Fried asked Elder to examine the evidence and no further discussion ever took place. Elder was not certain of the date he examined the evidence, but it was before Fried issued his report (on May 27, 2020).

FEU examiner Ashley Rachael was interviewed by the OIG on December 1, 2020 and again on March 9, 2021. [Exhibits 39 and 40] The following is a synopsis based on the summary prepared by the OIG: Rachael stated that in January 2020 she learned of a discrepancy between the conclusions of DFS contract examiner Alicia Vallario and the USAO’s independent examiner. She indicated that due to continued pressure from the USAO, the DFS decided to rework the case. Rachael was assigned as the examiner and Jonathan Fried as the verifier. Upon reviewing all of the cartridge cases, Rachael determined that Vallario had included the wrong photograph in the case file. Rachael and Fried completed a microscopic review of four cartridge cases and, based upon that review, she and Fried determined that the USAO examiner, Travis Spinder, had reached the correct conclusion of elimination. Because they had performed only a (microscopic) “review” and not a “re-examination”, no reports were created, and no updates were made in LIMS. Rachael and Fried worked together to create a PowerPoint to present their findings to Wayne Arendse and Jonathan Pope. General Counsel Todd Smith, Crime Scene Sciences Director Chris LoJacono, and Senior Deputy Director Abdel Maliky also viewed the PowerPoint presentation. In the PowerPoint presentation, Rachael and Fried recommended a re-examination by an independent firearms examiner, but instead the DFS assigned Fried to conduct the re-examination. Rachael was aware that Elizabeth Bustamante and Michael Mulderig also reviewed the evidence, but Bustamante and Mulderig were trying to “figure out what was wrong and who was wrong” as opposed to conducting an (official) examination. Rachael recalled that an email was forwarded to her indicating Mulderig’s change of conclusion. Rachael opined that if Mulderig had not changed his conclusion, the DFS may not have elected to conduct a reexamination. Rachael could not explain why the DFS had sent emails to the ANAB and the SAB on May 6, 2020, notifying those organizations that a re-examination had been conducted. Rachael admitted that sending the emails to the ANAB and the SAB with a conclusion prior to the start of the re-examination was troublesome. Rachael stated that when she conducted her verification for Fried in late May 2020, she examined all cartridge cases from both homicide cases and noted similarities and differences, which caused her to reach a finding of inconclusive.

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FEU Supervisor Jonathan Fried was interviewed by the OIG on December 1, 2020 and again on March 9, 2021. [Exhibits 37 and 38] The following is a synopsis based on the summary prepared by the OIG: Fried stated that he was first made aware of the discrepancy between the conclusions of DFS contract examiner Alicia Vallario and the USAO's independent examiner in January 2020. He reviewed Vallario's original case file and determined that her documentation, including her photograph, supported her conclusion of identification. In April 2020, Fried and Ashley Rachael were instructed to conduct a review of the evidence, which included a microscopic examination. Their examination revealed that Vallario had incorporated the wrong photograph into her case file. Additionally, Fried and Rachael reached a conclusion of elimination (meaning that Items #16 and #45 were not fired in the same firearm). This conclusion of elimination agreed with the conclusion of the USAO's independent examiner. Fried and Rachael presented their findings in a PowerPoint presentation to Wayne Arendse, with Jonathan Pope listening by phone, on April 30, 2020. After that presentation, Fried and Rachael met with Senior Deputy Director Abdel Maliky and General Counsel Todd Smith to present their findings. Fried stated that Pope and Arendse had concerns over the conclusion of elimination and that it showed the DFS had made a mistake. Fried said there was "lots of chaos" as a result. The evidence was subsequently presented to Michael Mulderig and Elizabeth Bustamante, who both examined it and reached a conclusion of identification. Fried was aware that Mulderig then changed his finding to inconclusive, but acknowledged that there was insufficient time for Mulderig to have conducted a full examination in the time that Mulderig had the evidence. Fried stated he may have asked Cody Elder to examine the evidence "in passing". Fried stated it was possible Steven Chase may have also examined the evidence. Fried described this as "answer shopping, looking for consensus", a practice not uncommon at the DFS, and described it as having other examiners look to "see if they see what you see." Through a discussion with Pope and Arendse it was decided to report a finding of inconclusive because of all the different conclusions reached by the various examiners. Fried was aware of a letter sent to the SAB (and the similarly worded letter sent to ANAB on May 6, 2020). By that point in time no examiner, other than Michael Mulderig, who did not have sufficient time to conduct a full examination, had actually reached a finding of inconclusive. Because of his knowledge of the various conclusions that had been reached, Fried felt that he was inherently biased and recommended that the evidence be sent to an outside examiner for review. He stated he "pushed back as long as I could" on the decision for him to do the reexamination. His request was denied, and he was told by Pope that the orders for him to do the reexamination came from DFS Director Jenifer Smith (but he never received those orders directly from Director Smith). On May 12, 2020 he began his official examination of the evidence. He stated that this was the first time he had conducted a firearm examination at the DFS, and if he could do it over again, he would have resigned rather than conduct the reexamination. Though never directly told to reach a finding of inconclusive, Fried believes that he was manipulated by management into conducting an examination when he had a bias. The disparate findings of the other examiners caused him to question his initial conclusion of elimination. When asked why the DFS never disclosed the conflicting conclusions to ANAB and the SAB, Fried stated that "they [DFS] played with the semantics." If there was no active examination request, there was no need to write a report or disclose findings. Fried stated DFS management was happy with the inconclusive finding and based this on an issue brought to

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him by Lyndon Watkins (the DFS Supervisor of Quality Assurance). Watkins brought to Fried's attention four 2016 FEU cases with contradictory conclusions, and the DFS issued new reports with inconclusive results. Fried stated the quality control documents provided no explanation or follow-up to support this change to inconclusive.¹⁴

The following is a summary of information obtained from and supported by the additional source materials pertaining to the examination of Items #16 and #45:

- In late April 2020, Ashley Rachael and Jonathan Fried examined Items #16 and #45 (as well as two other cartridge cases, one from each homicide case) and reached a conclusion of elimination.
- On April 30, 2020, Ashley Rachael emailed a slide presentation to Wayne Arendse (and others) indicating that she and Jonathan Fried compared Items #16 and #45 and reached a conclusion of elimination (with the word elimination **bold-faced** and underlined). This conclusion was followed by the statement "This elimination transitively agrees with the conclusion reached by the private examiner". The same presentation stated "conclusions reached by independent reports were also confirmed."
- In the same slide presentation, Jonathan Fried and Ashley Rachael recommended "Next Steps", including the reporting of these findings to stakeholders, the reexamination of the evidence by an examiner who has had no prior involvement (and presumably no prior knowledge), and a variety of quality assurance measures.¹⁵
- At the request of FEU Manager Jonathan Pope, Elizabeth Bustamante examined Items #16 and #45 on May 1, 2020, then examined these items along with all the remaining 10mm Auto caliber cartridge cases on May 4, 2020. Her results, along with photographs, were emailed to Pope. However, it does not appear that these results were ever disclosed by the DFS. Bustamante also produced hand-written notes that she emailed to herself. These notes, along with her May 1, 2020 email, reveal that she reached an incorrect conclusion of identification on six separate comparisons.
- Based on his emails, and supported by chain of custody records, Michael Mulderig conducted an examination of Items #16 and #45, as well as other items, on May 1, 2020. At 1:20PM he sent an email to Jonathan Pope indicating that he was standing by his original conclusion of identification. Other than the photographs he included with the email, there is no documentation of his examination. Less than one hour later, at 2:07PM, Mulderig relinquished custody of the evidence for the final time. At 3:00PM, Mulderig sent an email from a personal (non-DFS) email account to Pope indicating that after further review he was changing his conclusion from identification to inconclusive.

¹⁴ The audit team has made a good faith effort to accurately summarize the interview summaries of the OIG. Jonathan Fried's March 9, 2021 interview summary is 10 pages in length and contains many contradicting statements by Fried.

¹⁵ The audit team believes that these are sound recommendations and agrees with them.

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According to Mulderig, this change of conclusion occurred in Pope's office and was not based on any further examination or reconsideration of the evidence, but rather on pressure Mulderig felt from Pope. Despite the circumstances surrounding Mulderig's change of conclusion, the DFS reported this change to the ANAB on May 6, 2020, to United States Attorney Timothy Shea on May 22, 2020, and to the SAB on July 31, 2020.

- On May 6, 2020, Wayne Arendse notified the ANAB that Items #16 and #45 were reexamined by "the FEU Supervisor" and a "senior Firearms Examiner" and the finding was inconclusive regarding whether or not these items were fired from the same firearm. Neither FEU Supervisor Jonathan Fried nor Firearms Examiner Ashley Rachael reexamined these items between the date they reached their initial conclusion of elimination and May 6, 2020. According to Fried, the decision to report a finding of inconclusive was made in a meeting with Jonathan Pope and Wayne Arendse and was due to the conflicting results from the various examiners who had examined the evidence, rather than an examiner having reached a finding of inconclusive through examination and interpretation of the evidence.
- At some point in time prior to May 27, 2020, Cody Elder believes he examined Items #16 and #45. His examination was not documented, and he is not reflected in the chain of custody records. Elder did not reach a formal conclusion, but observed agreement in aperture shear marks and stated to Jonathan Fried that the cartridge cases he examined looked "pretty good", suggesting that he was leaning toward, even if preliminarily, a conclusion of identification.
- On May 27, 2020, Jonathan Fried issued a report of his examination of Items #16 and #45, with Ashley Rachael as his verifier. His report indicates that he reached a finding of "inconclusive" regarding these items. Moreover, his report states that his examination began on May 12, 2020. This date of the initiation of analysis is 1) twelve days after the April 30, 2020 slide presentation indicating a conclusion of elimination was sent from Rachael to Wayne Arendse; 2) eleven days after chain of custody records first indicate the items were in Fried's possession; 3) eleven days after Fried's initials and date first appear on the evidence packaging; and 4) six days after the DFS represented to the ANAB that the finding was inconclusive.

Analysis of Additional Source Materials Pertaining to the Quality Assurance Inquiry into Alicia Vallario's Reported Identification of Items #16 and #45

In his May 6, 2020 letter to the ANAB, Wayne Arendse indicated that the DFS's review of Alicia Vallario's August 8, 2017 report revealed an "administrative error" in that she incorporated the wrong photograph. [Exhibit 29] This position was reiterated by DFS Director Jenifer Smith in her May 22, 2020 letter to United States Attorney Timothy Shea [Exhibit 15].

During the July 31, 2020 SAB meeting, Jonathan Pope explained that the DFS was able to identify the source of the incorrect photograph that Alicia Vallario had incorporated into her

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report. It was taken by Vallario on June 29, 2017 as part of an unrelated case. [Exhibit 30, 109th slide in the series] Through the assistance of the Cyber Operations Section at the DFS, the photograph that Vallario actually took of her comparison of Items #16 and #45 was located. That photograph had a filename that corresponds with Items #16 and #45. [Exhibit 30, slide 110] The audit team has reviewed that photograph and has confirmed that Items #16 and #45 are, in fact, depicted. Furthermore, the items are arranged in the photograph in a manner that suggests to the audit team that Vallario was attempting to illustrate a correspondence of toolmarks in support of her conclusion of identification.

During the October 16, 2020 SAB Meeting, Jenifer Smith suggested that Alicia Vallario may have made her interpretation from the photograph, rather than the actual evidence items.¹⁶ However, chain of custody records indicate that Vallario had custody of Items #16 and #45 on the date of her examination. [Exhibits 21 and 22] The packaging contains seals with Vallario's initials and the date of her examination. [Attachment D] The photograph recovered by the Cyber Operations Section contains Items #16 and #45 in a relative orientation suggestive of an attempt to illustrate correspondence of toolmarks in support of her conclusion of identification. [Exhibit 30, slide 110] Furthermore, pages 3 and 4 of Vallario's examination documentation contain narrative notes indicating that she reached a conclusion of identification: "Item #22.24 [#45] submitted under DFS15-00253 and Item #1 [#16] submitted under DFS15-00673 are two (2) caliber 10mm Auto cartridge cases, Federal and PMC brands, which were microscopically examined and identified as having been fired in the same firearm based on firing pin aperture shear marks." [Exhibit 03] Of importance, it is standard practice in the field of firearm and toolmark identification to reach conclusions from the microscopic comparison of evidence items, not from photographs, and to prepare contemporaneous documentation. The standard to which the DFS is accredited by the ANAB requires contemporaneous documentation.¹⁷ The audit team interviewed Vallario on November 5, 2020. She was emphatic that she has only reached conclusions from the microscopic examination of evidence and has never reached a conclusion from the examination of photographs.

¹⁶ From the audio recording of the SAB meeting, part 2: 43:47 - OAG attorney Elizabeth Wieser: "But I thought she [Vallario] actually analyzed the physical evidence?"

43:55 - Jenifer Smith: "She did, we know she did, we know she took a picture of it. But she could have then looked at the wrong photograph after she put her notes together and made the actual interpretation off the wrong photograph. And that is, in fact, we don't know. We don't know. We have asked her and she doesn't remember, and um but that is, I think, what we struggle with, right, because we have a process in place and, and, in this instance it's possible she did not follow the process of looking ... making her conclusion under the microscope but in fact relying on a picture that she took and inserted it at, into the wrong time. And, you know, it's supported by the fact that when they pulled up the file and looked at the documentation and the paperwork that that's what they looked up at first, right, and so this is why we have really dug into changing our process, you know you will make sure that, you know, you look at these things, you verify these things, you take the right photos, you document the photos correctly, and then we're going to go into a little bit later, um, the review that John is doing of all of this examiner's cases, um, so we have a summary of where we are on that too, just to help you out, um, to kind of know, cause when you have a contractor like this who is no longer with you then you have to go back and look at all their work before and we'll talk about what we're doing in that instance and share that with you."

¹⁷ ISO/IEC 17025:2017 (the standard to which DFS is accredited), section 7.5.1, requires that "Original observations, data, and calculations shall be recorded at the time they are made ...".

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The above information provides compelling evidence that Alicia Vallario reached an erroneous conclusion based on her examination of the actual evidence items, which is an analytical error. She also incorporated the wrong photograph into her report, which is an administrative error. Thus, both an analytical error and an administrative error occurred, not solely an administrative error as stated by the DFS.

Analysis of the DFS Closeout Letter into the USAO Complaint of an Erroneous Conclusion

On March 5, 2021, the DFS issued a closeout letter [Exhibit 41] in response to the January 17, 2020 letter from the USAO reporting a potential false identification by Alicia Vallario [Exhibit 12].

The closeout letter indicates that “the verifier of the 2017 NIBIN confirmation reviewed his initial conclusion and changed it from *Identification* to *Inconclusive*. Based on the change of conclusion, FEU assigned two qualified examiners to re-examine the evidence associated with the 2017 NIBIN confirmation report, and to issue a re-work report if necessary.” “On May 27, 2020, DFS FEU issued a re-work report reaching a different conclusion from both the 2017 NIBIN confirmation report and the purported conclusion of the still unavailable USAO contract examiners.” [Exhibit 41, pg 4]

The “verifier” referred to in the closeout letter is Michael Mulderig, and the “two qualified examiners” are Jonathan Fried and Ashley Rachael. The sequence of events reported by the DFS, that the change of conclusion by the verifier prompted the re-examination of evidence which ultimately led to Fried’s May 27, 2020 report, is directly contradicted by the April 30, 2020 slide presentation [Exhibit 25] in which Fried and Rachael reached a conclusion of elimination *before* Mulderig ever reexamined the evidence and changed his conclusion. [Exhibits 21, 22, 26, 27, 28, and 32] Furthermore, based on the conclusion of elimination reached by Fried and Rachael on or before April 30, 2020, it was already apparent that a re-examination report would be needed.

The closeout letter also reaffirms the DFS’s position that Alicia Vallerio only made an administrative error, but it fails to recognize the compelling evidence that she made both an analytical and administrative error.

Additional Considerations

Based on the above findings and conclusions, the audit team notes that there are issues regarding disconcerting practices within the laboratory, the representations made by the DFS to its oversight bodies, clients, and stakeholders, and the corrective actions taken in response to the erroneous conclusions regarding Items #16 and #45.

- According to an OIG interview summary, the initial conclusion (elimination) reached by Jonathan Fried and Ashley Rachael was changed (to inconclusive) during a meeting with DFS managers. Conclusions must always be based on the examination and

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interpretation of evidence, yet DFS managers actively engaged in the change of conclusion as opposed to allowing examiners to arrive at independent, unbiased conclusions. Michael Mulderig's conclusion was changed in much the same manner, in the office of a DFS manager while under pressure. His change of conclusion, also, was accepted by DFS management. Laboratory management has an affirmative duty to ensure impartiality by shielding examiners from outside influence or other pressures.¹⁸ In these instances, laboratory management not only failed to safeguard the examiners, but was the source of the pressure and influence.

- The finding of "inconclusive" is a legitimate interpretation used in firearm and toolmark examination, as well as many other disciplines in forensic science. However, the finding of "inconclusive" is reached when the examiner has thoroughly evaluated the evidence and has determined that there is insufficient support for either a conclusion of identification or elimination. It is not appropriate to report "inconclusive" because laboratory management or staff views it as "safe" or that it "can never be wrong".¹⁹ Indeed, reporting a finding of inconclusive when the evidence supports an elimination or identification can leave the fact finder with an incorrect understanding of the evidence. According to the OIG interview summaries, as well as other documentation available to the audit team, there is no evidence that any of the DFS examiners reached an inconclusive finding based on an examination of the evidence prior to the DFS reporting this result to the ANAB (and the SAB) on May 6, 2020.²⁰ Instead, according to the OIG interview summaries, inconclusive was reached during managerial discussions in an attempt to reconcile conflicting identification and elimination conclusions. Proper conflict resolution should involve the consensus of unbiased, qualified examiners who provide interpretations based on an examination of the physical evidence and who fully document the bases for their interpretations. DFS management's decision to report an inconclusive finding instead of performing documented conflict resolution ignored their obligations of disclosure and accountability.
- Laboratory accreditation, such as that provided by the ANAB, relies upon accurate and complete representations by the laboratory. If the following were not provided:

¹⁸ ISO/IEC 17025:2017 (the standard to which DFS is accredited), section 4.1 et seq., requires that "Laboratory activities shall be undertaken impartially and structured and managed so as to safeguard impartiality." "The laboratory management shall be committed to impartiality." "The laboratory shall be responsible for the impartiality of its laboratory activities and shall not allow commercial, financial or other pressures to compromise impartiality."

¹⁹ A finding of inconclusive should be considered "wrong" when there clearly is sufficient support for a conclusion of identification or elimination.

²⁰ As discussed elsewhere in this report, Michael Mulderig stated in an interview with the USAO that he changed his conclusion from identification to inconclusive while under pressure in Jonathan Pope's office and not based on an examination of the evidence. Jonathan Fried stated to OIG investigators that Mulderig did not have the evidence in his possession long enough to conduct a full examination and change his conclusion from identification to inconclusive.

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- 1) the April 30, 2020 slides indicating that Jonathan Fried and Ashley Rachael reached a conclusion of elimination, based on microscopic examination, and that they concurred with the conclusion of the independent examiner(s);
- 2) the manner in which they changed their conclusion to “inconclusive”; and
- 3) Michael Mulderig’s multiple May 1, 2020 interpretations and the manner in which his final finding of “inconclusive” was reached

the ANAB may have the misunderstanding, based on the May 6, 2020 letter from Wayne Arendse, that inconclusive was the only finding reached, and that the finding was based on an examination of the physical evidence. The same would apply if the ANAB was not informed of Elizabeth Bustamente’s and Cody Elder’s examination of the evidence. The audit team shares the same concern that the SAB may not have had a complete understanding of the analyses and the manner in which changes of conclusions occurred. The DFS Director repeatedly held to the position that their accrediting body (ANAB), and the oversight of the SAB, were the entities to assess the validity of the work product.²¹ However, without all relevant information being disclosed to them, these organizations cannot provide effective oversight.

- In early May of 2020, the DFS’s oversight bodies (the SAB and the ANAB) were informed by DFS management that an inconclusive finding was reached. This was done prior to the DFS initiating a fully-documented examination of the evidence and issuing a report of analysis. FEU examiners had recommended that outside, uninvolved examiners reexamine the evidence. DFS management rejected this recommendation, and instead ordered FEU Supervisor Jonathan Fried, who had not conducted any casework since his start of employment at the DFS, to perform the (official) reexamination knowing that Fried was aware of the ANAB and SAB notifications. This placed Fried (and his verifier, Ashley Rachael) in a nearly impossible situation, for if they were to contradict the letters to ANAB and the SAB it would likely raise major concerns within the oversight organizations. The laboratory management should never have put their staff in this ethical dilemma.
- The DFS has represented that Alicia Vallario’s error is “administrative” only. However, Vallario made her interpretation on the correct evidence. Thus, Vallario’s conclusion of identification is an analytical error. All indications are that the DFS, to date, has not acknowledged that an analytical error occurred. As a result, the DFS’s corrective actions have focused on a review of photographs and documentation designed to detect similar administrative errors. [Exhibit 30, 134th slide in the series & Exhibit 31, 139th slide in the series] This corrective action is inadequate as it does not address analytical errors that may have occurred, which is a substantial gap in the inquiry by the DFS.

²¹ As examples, see the SAB meetings held on 10/16/20 and 1/15/21.

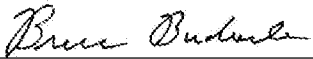
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- Of importance regarding the DFS technical practices is a lack of and/or incomplete documentation of examinations. On April 30, 2020, Jonathan Fried and Ashley Rachael reported to DFS management a conclusion of elimination regarding Items #16 and #45. This conclusion was reported in a slide presentation, but no contemporaneous documentation of the examination that led to this conclusion has been provided. Elizabeth Bustamante examined the evidence, but there is no official documentation of her examination. The only documentation that exists are hand-written notes that she emailed to herself and photographs that she emailed to FEU Manager Jonathan Pope. Cody Elder examined the evidence, yet there is no record that he ever had custody of the evidence and no documentation of his examination whatsoever. Policies should be implemented at the DFS to ensure documentation and disclosure of all analyses by the involved examiners.

IV. Report Limitations

The findings contained in this report are based on the information available to the audit team as of the date of the report. As noted in this report, some of the findings are based on interview summaries provided by the USAO and the OIG, and we assume these summaries are accurate and fair representations of what was discussed. If additional information becomes available these findings may be subject to revision.

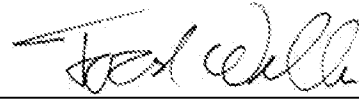
This report was completed on March 18, 2021 and describes the opinions and conclusions of the undersigned.



Bruce Budowle



James Carroll



Todd J. Weller

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Appendix A - Source Materials

Exhibit numbering in this report continues from where the prior audit team reports ended. Source materials that were listed in the previous reports may be referenced in this report but are not relisted below.

- Subpoena from the United States Attorney's Office to Todd Smith or an authorized representative of DFS in the case of United States vs. Rondell McLeod, Case No. 2017 CF1 9869, dated 07/15/2020. [Exhibit 20]
- Chain of custody report for DFS Lab Case #15-00673 (CCN 15-128-515) dated 12/07/2020. [Exhibit 21]
- Chain of custody report for DFS Lab Case #15-00253 (CCN 15-180-695) dated 12/07/2020. [Exhibit 22]
- Order of the Superior Court of the District of Columbia in the case of United States vs. Rondell McLeod, Case No. 2017 CF1 9869, dated 11/10/2020, and referenced privilege log. [Exhibit 23]
- Report and examination documentation by John Murdock under Laboratory Number "PCF 20-2-2", dated 06/15/2020. [Exhibit 24]
- Email from DFS examiner Ashley Rachael to DFS Forensic Science Laboratory (FSL) Director Wayne Arendse, Crime Scene Sciences Director Christopher LoJacono, Senior Deputy Director Abdel Maliky, and General Counsel Todd Smith, dated 04/30/2020, with subject "Confidential Case Review". Attached to the email is a slide presentation containing 21 slides, dated 04/30/2020, and titled "Confidential Case Review". [Exhibit 25]
- Email from Michael Mulderig (DFS email account) to Jonathan Pope, dated 05/01/2020, with subject "Review of HO 15-00253" with two photographs attached. [Exhibit 26]
- Email from Michael Mulderig (DFS email account) to Firearms Examination Unit (FEU) Manager Jonathan Pope, dated 05/01/2020, with subject "NIBIN Comparison" with three photographs attached. [Exhibit 27]
- Email from Michael Mulderig (michaelmulderig@gmail.com) to Jonathan Pope, dated 05/01/2020, with subject "Case Review." [Exhibit 28]
- Email from Wayne Arendse to ANSI National Accreditation Board (ANAB) Compliance Investigator Anna Yoder, dated 05/06/2020, with subject "***CONFIDENTIAL** RE: 200127-DCDFS-Firearms Examiner-Inquiry". Attached to the email is a letter from Wayne Arendse to Anna Yoder dated 05/06/2020, a 15 page slide presentation titled "Potential False Identification Review", and copies of laboratory reports. [Exhibit 29]
- Slide presentation from 07/31/2020 Science Advisory Board Meeting. [Exhibit 30]
- Slide presentation from 10/16/2020 Science Advisory Board Meeting. [Exhibit 31]
- Summary of interview of Michael Mulderig by USAO Supervisory Special Agent Bryan Molnar on 12/07/2020. [Exhibit 32]
- Summary of interview of Elizabeth Bustamante by OIG Special Agents Eric Saunders and Victor Castro on 01/27/2021. [Exhibit 33]
- Email from Elizabeth Bustamante to FEU Manager Jonathan Pope, dated 05/01/2020, with subject "comparison results" with three photographs attached. [Exhibit 34]

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- Email from Elizabeth Bustamante to herself, dated 05/04/2020, with subject “Message from KM_C308” with one page of handwritten notes attached. [Exhibit 35]
- Summary of interview of Cody Elder by OIG Special Agents Eric Saunders and Victor Castro on 02/12/2021. [Exhibit 36]
- Summary of interview of Jonathan Fried by OIG Special Agents Eric Saunders and Derek Savoy on 12/01/2020. [Exhibit 37]
- Summary of interview of Jonathan Fried by OIG Special Agents Eric Saunders and Victor Castro on 03/09/2021. [Exhibit 38]
- Summary of interview of Ashley Rachael by OIG Deputy Assistant Inspector General Meredith Helm and Special Agent Russell Adams on 12/01/2020. [Exhibit 39]
- Summary of interview of Ashley Rachael by OIG Deputy Assistant Inspector General Meredith Helm and Special Agent Derek Savoy on 03/09/2021. [Exhibit 40]
- DFS Department Operations Manual 15 Closeout Report of Complaint/Inquiry Review Team Regarding January 17, 2020 Erroneous NIBIN Confirmation Complaint, signed on 03/05/2021. [Exhibit 41]
- Email chain between Jonathan Fried and Ashley Rachael, dated 05/01/2020, with subject “powerpoint”. [Exhibit 42]
- Summary of interview of Elizabeth Bustamante by OIG Special Agents Eric Saunders and Victor Castro on 01/28/2021. [Exhibit 43]

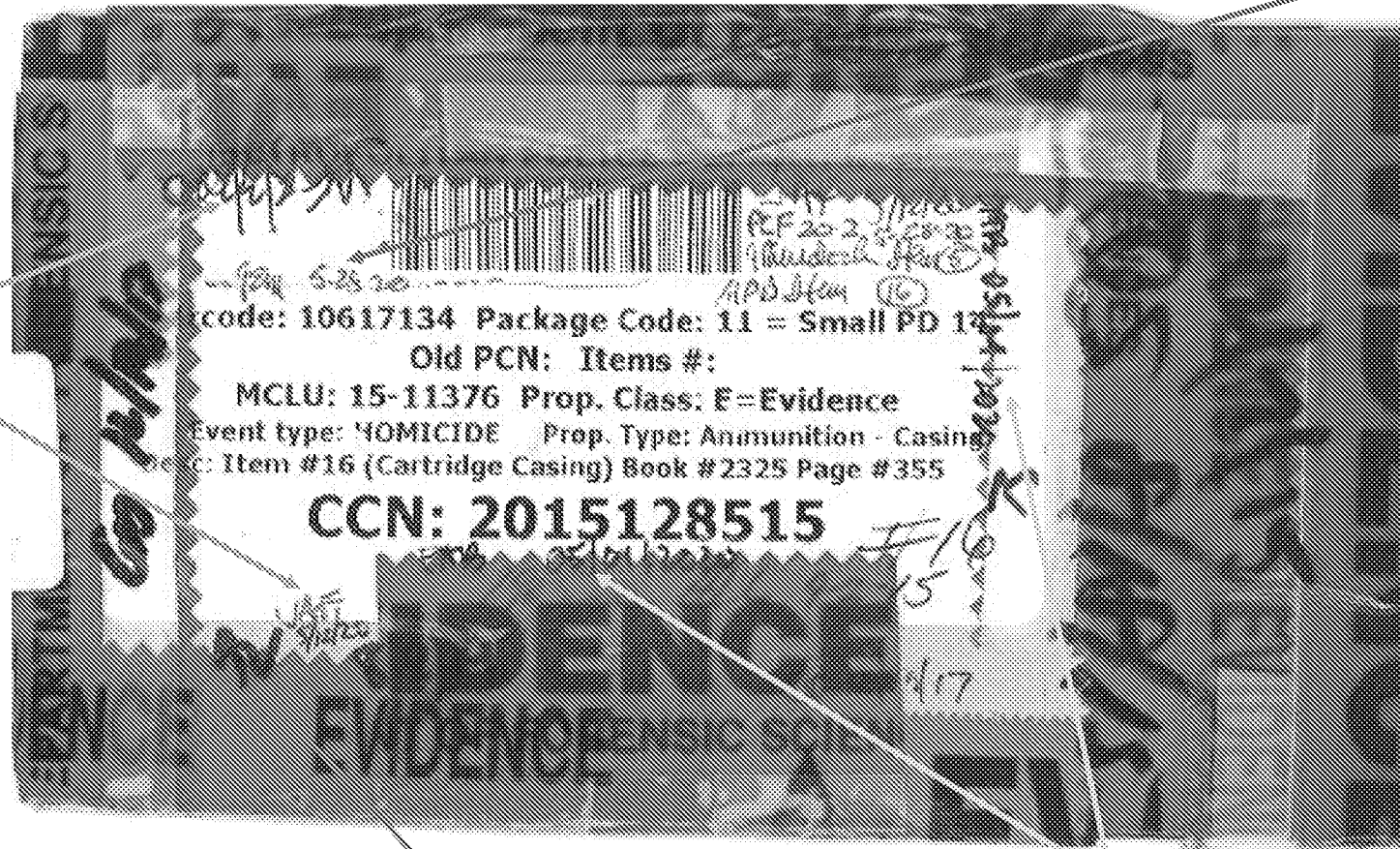
Attachment D: Figures for Final Report

Images of inner evidence envelopes showing initials and dates.

Packaging of Item 16-Side A

Murdock 5-28-20

Fried 5/?/20 &
5/12/20



Vallario
8/?/?

Bustamante
5/1/20 & 5/4/20

Images of packaging from Murdock notes, PCF-20-2-2, report dated June 15, 2020

Attachment D, pg 2 of 5

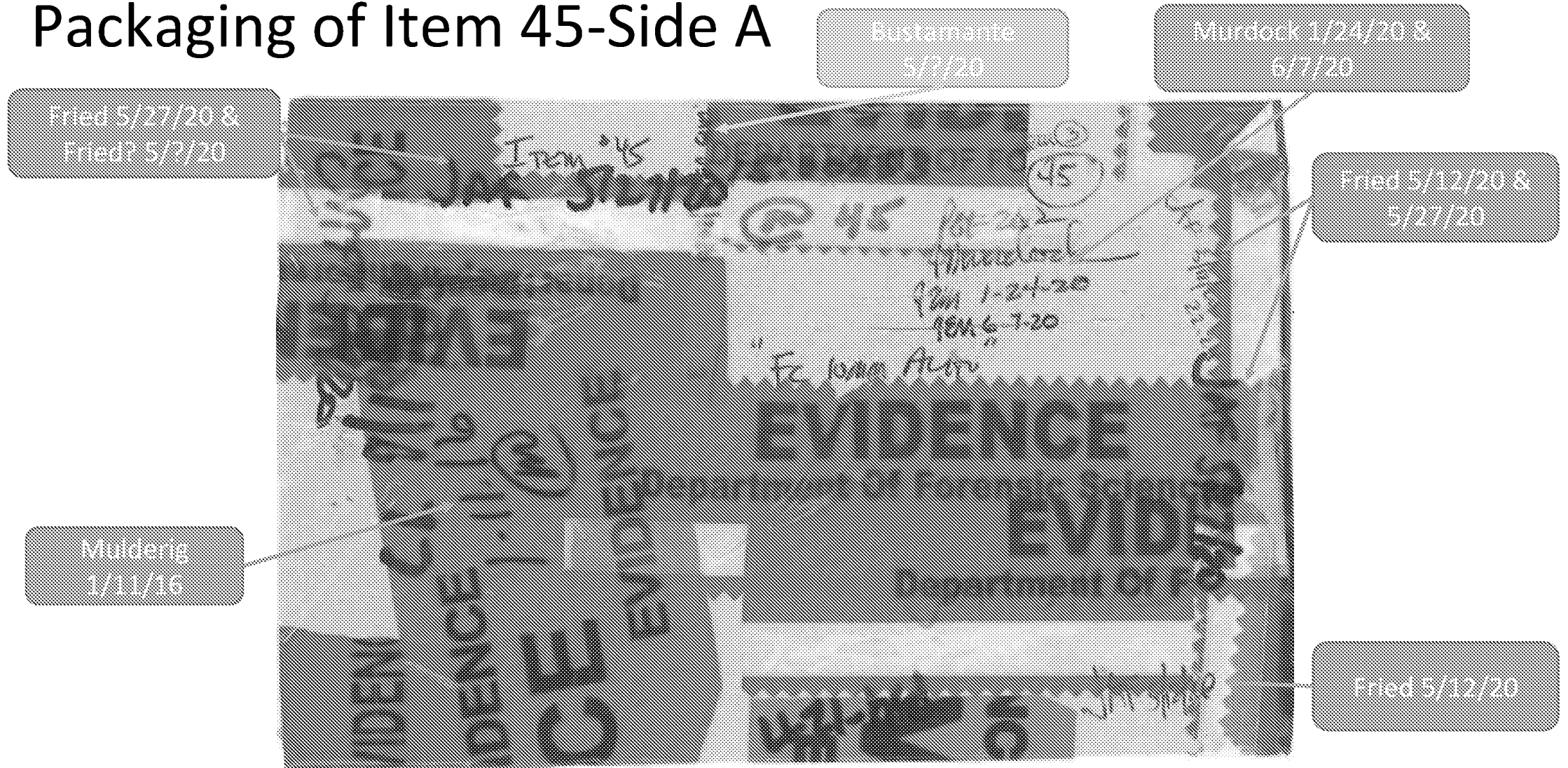
USAO-009085

Packaging of Item 16-Side B



Images of packaging from Murdock notes, PCF-20-2-2, report dated June 15, 2020

Packaging of Item 45-Side A

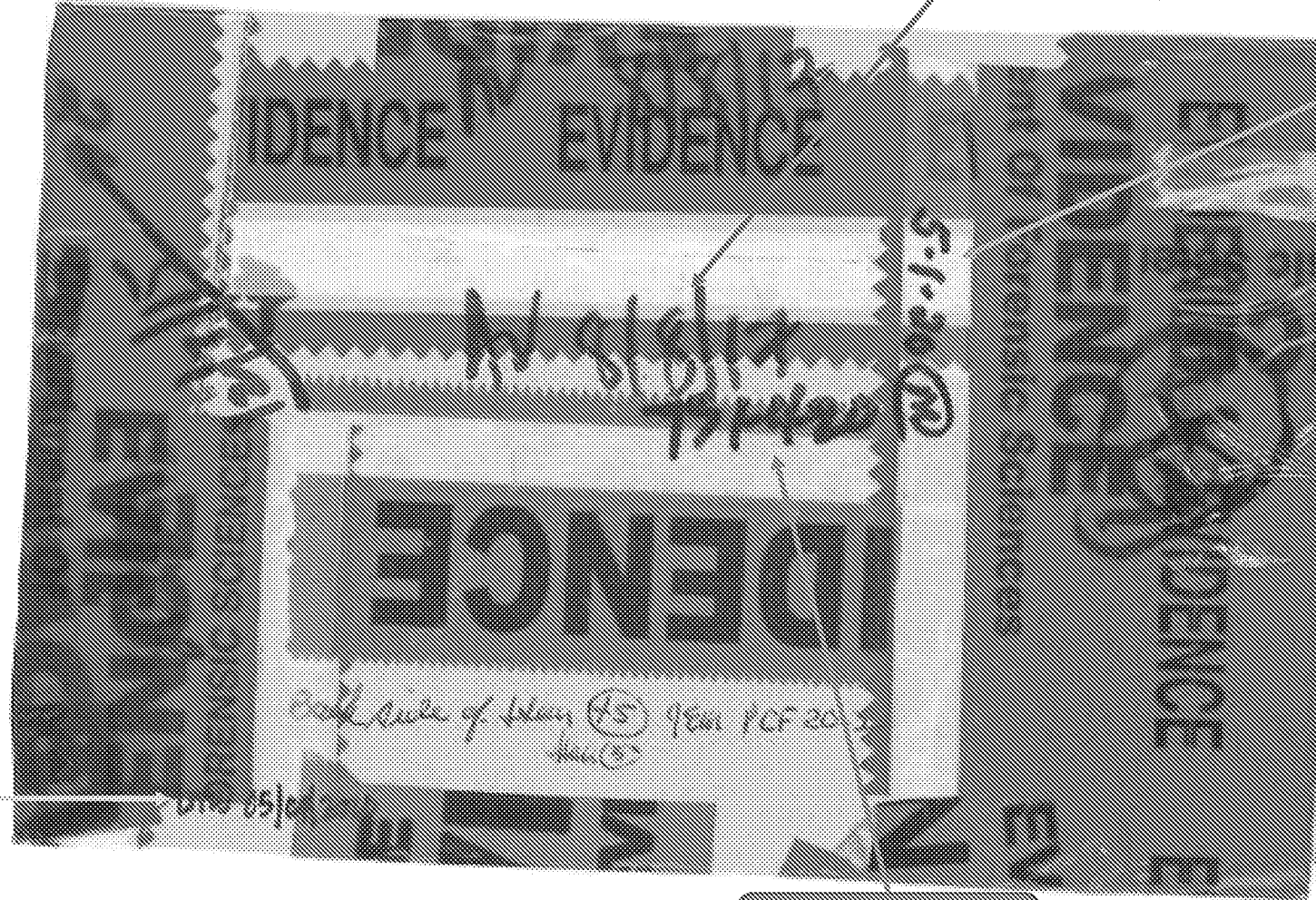


Images of packaging from Murdock notes, PCF-20-2-2, report dated June 15, 2020

Packaging of Item 45-Side B

Vallario
8/8/17

Mulderig
5/1/20



Bustamante
5/4/20

Spinder 1-4-20

Images of packaging from Murdock notes, PCF-20-2-2, report dated June 15, 2020

Attachment D, pg 5 of 5

Exhibit 3

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Inspector General

Inspector General



OIG

INVESTIGATIONS UNIT

Memorandum of Activity/Interview

CASE #	CASE AGENT(s)	TYPE OF ACTIVITY (<i>Insert, Interview, Surveillance, etc.</i>)	DATE (<i>Date Activity Occurred</i>)
21-00134	Eric Saunders Victor Castro	Interview	March 11, 2020

Interviewee/Involved Person (If Applicable)		
Name Confidential Source 2	Date of Birth	Title/Grade
Type of Involvement (<i>Subject, Witness, Subject Matter Expert, etc.</i>)	SSN	Agency
Address	DL#/State	
Interview Location Telephonic		Time: Begin: 7:50 p.m. End: 8:15 p.m.

On March 11, 2021, Senior Special Agent (SSA) Eric Saunders and Special Agent (SA) Victor Castro, District of Columbia Office of the Inspector General (OIG), conducted a telephonic interview of Confidential Source 2 (CS2) regarding an allegation that Dr. Jenifer Smith, Director, DC Department of Forensic Sciences (DFS), and Todd Smith (T. Smith), General Counsel, DFS, may have pressured Jonathan Fried, Firearms Examination Unit (FEU) Supervisor, DFS, and Ashley Rachael, Firearms Examiner (FE), DFS, to reach a particular conclusion on their firearms examination. According to the information provided, the cartridge casings related to DFS cases (case numbers DFS-15-00253 and DFS-15-00673) were not fired from the same weapon, which deemed it an exclusion. However, Fried and Rachael conducted a second examination of the cartridge casings and concluded that the cartridge casings could not be identified or eliminated as having been fired from the same weapon. As a result, their examination was deemed inconclusive.

SSA Saunders contacted CS2 in response to Fried's statement that T. Smith met with FEU employees and informed the employees that any OIG requests for documents must be vetted through him. CS2

Memorandum by: Eric Saunders Approved by: Derek Savoy

was interviewed to determine CS2's knowledge of the statements T. Smith made during the FEU meeting.

CS2 stated that on March 10, 2021, Jonathan Pope, FEU Manager, DFS, emailed FEU employees and informed them that T. Smith wanted to meet with FEU regarding an urgent matter. At approximately 2:00 p.m., Pope, T. Smith, and Wayne Arendse, Assistant Director, DFS, met with FEU employees. CS2 stated that T. Smith was the only one to speak during the meeting. T. Smith informed the FEU employees that they should not feel bullied by the OIG. CS2 further stated that T. Smith told employees to notify him if the OIG contacts them, and if the OIG requests documents, FEU employees should respond, via email, copy T. Smith on the email and refer any OIG officials to T. Smith. CS2 said that T. Smith informed the FEU employees that the OIG investigation was unlawful, and if the OIG visits any of the FEU employees' home for an interview, the FEU employee should decline the interview, and request that the interview be conducted at DFS during normal DFS business hours.

According to CS2, T. Smith stated that if FEU employees met with OIG officials and the National Association of Government Employees did not want to represent them, DFS would obtain representation for the FEU employee from the Mayor's Office of Legal Counsel. CS2 also said that DFS would fight the OIG if the OIG tried to have any FEU employees terminated for failure to cooperate with an OIG investigation.

T. Smith further informed the FEU employees that they should not be bullied into changing their opinion. T. Smith added that he was speaking on behalf of Dr. Smith because she could not attend the meeting. CS2 stated that Dr. Smith was meeting with Fried during the time the FEU meeting occurred. CS2 said that Dr. Smith met with Fried because Fried informed DFS management of his intent to resign from DFS and that Fried met with OIG officials. CS2 told the OIG investigators that Fried stated that he was "chewed out" for meeting with the OIG. CS2 did not know the specifics of Fried's conversation with Dr. Smith.