
APPENDIX

CASES INVOLVING THE RELIABILITY OF HANDWRITING IDENTIFICATION EXPERTISE SINCE THE DECISION IN *DAUBERT*

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I. INTRODUCTION

This appendix seeks to collect and separately describe and analyze every explicit decision by an American court on the reliability of handwriting identification expertise since the decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹ Some prefatory explanations of methodology and criteria of inclusion are in order. First, it should be understood that the cases listed here are by no means all of the cases since 1993 in which handwriting identification testimony by putative experts has been proffered or accepted. A search of the Westlaw “Allcases” database using an appropriate search string² will reveal a couple of thousand cases where claimed handwriting identification expertise has played a role,³ and that is just cases which generated opinions that showed up on

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1. 509 U.S. 579 (1993). As the text will make clear, what I mean by a case dealing with the reliability of expertise is one where there is some claim raised that the expertise either is globally unreliable, or is unreliable in the circumstances of the case, regardless of the qualifications of the expert involved. Some cases in the Appendix may not strictly meet this criterion, but they have been included for the sake of completeness because they involve reliability issues sufficiently that, in my judgment, it is better to include than to exclude them. The one case arguably meeting this criterion that has been omitted is *State v. Loza*, 641 N.E. 2d 1082 (Ohio 1994). In that case, Loza was convicted of the murder of four members of his girlfriend’s family. The evidence against him was truly overwhelming independent of the rather peripheral testimony by a handwriting expert tying him to letters he had written admitting guilt to his mother and girlfriend, which he had given to the authorities to mail. He never disputed writing the letters at trial, and his lawyer did not object to the testimony of the document examiner, Stephen Green (testimony which was an exercise in extreme lily gilding in any event). On appeal, the court noted that appellate counsel “contests the admissibility” of Green’s testimony, but gave no indication of the ground on which it was contested. *Id.* at 1101. (Thus *Loza* is not clearly a reliability decision within the meaning of this Appendix.) The court found no plain error, noting that handwriting identification testimony by experts had been admissible in Ohio since the 1887 case of *Bell v. Brewster*, 10 N.E. 678 (Ohio 1887). Though this case was decided after *Daubert*, there is no indication that *Daubert* or anything like it entered into the court’s approach to the case at all.

2. I have refined my search string over the years. The main one I currently use is: “Starzecpyzel ‘Document Examiner’ Handwriting /4 Expert Identification &* DA(Aft 1992)” supplemented by “Handwriting /2 analy! & Daubert.”

3. A search of the Westlaw AllCases database using the main search string in note 2 *supra*, done on

Westlaw. Most use of such expertise likely goes unremarked upon, or occurs in cases that never generate written opinions. In the vast majority of the reported cases involving such experts, the testimony is merely noted as part of a recitation of facts.⁴ These cases include substantial numbers of civil cases, often involving challenged signatures on wills or deeds, or insurance and other contract cases, but not uncommonly involving more complex issues.⁵ The volume should not be surprising. Estimates of the number of persons who offer such testimony in court, at least on occasion, ranges up to 5,000 or more, with some hundreds who do so regularly.⁶ The range of credentials and experience exhibited by these witnesses is also startling,⁷ and it is likely that most of the

February 24, 2008, pulled in 2,119 items since the date *Daubert* was decided (June 28, 1993).

4. Examination of 100 cases from mid-2003 on, generated by the main search string in note 2 *supra*, revealed that nearly 70% were such “testimony noted” cases, and this was at a time when awareness of potential weaknesses of handwriting identification expertise showed up most often in opinions. In addition, there were 5 or 6% “ringers” (cases the search string turned up but which did not involve handwriting at all). About 10% were criminal cases that involved post-conviction complaints that the defense attorney had failed to employ a handwriting expert. Even at that time only about 5% involved reliability challenges. The rest involved complaints about the qualifications of the individual witness, or other issues. I should note that I have not limited myself to judicial decisions found in Westlaw, but where the criteria for inclusion are otherwise met, I have included slip opinions that have been sent to me, or that I have found on the Web, which do not appear in Westlaw. I would also like to note that my confidence in the virtual completeness of this collection is reinforced by the discovery on the Web of a collection of cases by Marcel Matley, copyright 2004, entitled *Selected Handwriting Case Law Since Daubert Showing Complete Defeat for Foes of QDE* (www.jjhandwriting.com/papers/caselaw.pdf, last viewed Feb. 26, 2008). Mr. Matley is a well-known non-Osbornian document examiner. I do not agree with many of his characterizations of the cases he has collected. (For instance, he makes much more out of cases where handwriting testimony is merely noted in passing than I think is appropriate. He sees wise courts embracing obviously reliable testimony, where I see oblivious courts and lawyers thoughtlessly following habit.) However, our differing views help insure completeness when combined, and I found two cases on his list (*U.S. v. Gonzales*, 90 F.3d 1363 (8th Cir. 1996) (case 4 *infra*) and *U.S. v. Sanders*, 59 Fed. Appx. 765 (6th Cir. 2003) (unpublished) (case 32 *infra*)) that I had missed because of the obscurity of their comments on issues of reliability.

5. See e.g. *Est. of Acuff v. O'Linger*, 56 S.W.2d 527 (Tenn. App. 2001) (case 53 *infra*); *Taylor v. Abernethy*, 620 S.E.2d 242 (N.C. App. 2005) (case 54 *infra*). It is perhaps appropriate to say here that I have reviewed the great bulk of the 2,119 cases personally. Though the search string has changed marginally over time, my working habit since the mid to late 1990s has been to search the Westlaw AllCases database every year or two, print out the itemized results, then click through the cases one at a time, reading enough to identify any reliability challenge or other interesting handwriting issue, and then reading at least the facts for each such case, which I summarized on the printout sheet, then went on to the next case. Many cases took less than 15 seconds, since it was clear that the testimony of the expert was just part of the summary of the evidence. Many took far longer. There may be the very occasional case I missed (see *supra* note 4) but I am confident that the collection is for all practical purposes complete.

6. See Andre Moenssens, *Handwriting Identification Evidence in the Post-Daubert World*, 66 UMKC L. Rev. 251, 265 n. 43 (1998).

7. *Id.* at 332–41 (appendix collecting and describing dozens of handwriting identification organizations and “credentialing” bodies). Nothing in these footnotes should be construed as any general endorsement of most of the positions espoused by Professor Moenssens in this article, which is in general a rather mean-spirited attack upon me and my sometime co-authors Mark P. Denbeaux and Michael J. Saks. Indeed, the Moenssens article should be read in conjunction with our reply, D. Michael Risinger, Mark P. Denbeaux & Michael J. Saks, *Brave New “Post-Daubert World”—A Reply to Professor Moenssens*, 29 Seton Hall L. Rev. 405 (1998). That said, Professor Moenssens did a service by documenting the effulgence of handwriting identification organizations whose membership is taken to lend credibility to expert curricula vitae.

In response to this overgrowth of credentialing organizations for document examiners and other forensic specialties, the American Academy of Forensic Sciences (AAFS), in conjunction with the National Institute of Justice (NIJ) (the research arm of the Justice Department) and the National Forensic Science Technology Center (NFSTC) (a subsidiary of the NIJ) launched an effort to set up a certifying body for forensic science credentialing boards to play the role performed by the American Board of Medical Specialties for medical specialty certification. The result was the incorporation of the Forensic Specialties Accreditation Board (FSAB) in 2000. So far, the FSAB has certified two credentialing boards in forensic document

testimony that occurs in American courtrooms is by persons whose training and experience would be looked down upon by the accrediting body of the Osbornian establishment,⁸ the American Board of Forensic Document Examiners (ABFDE).⁹

In compiling this Appendix, I have excluded all cases where there was no reliability challenge of any sort, and all cases where document examiners were rejected merely because they failed to possess sufficient training or experience according to whatever standards that particular court applied that day (there is, of course, no “official” standard for that criterion in any jurisdiction, so far as I know).¹⁰ The 68 cases in the Appendix are numbered sequentially throughout. The case collection (Part III of this Appendix) is divided into three sections: 50 Federal Cases, 16 State Cases, and one Case of Interest not involving a reliability decision. Within each section, cases are set out chronologically regardless of whether the decisions were trial or appellate decisions, and in one case, without regard to the fact that one of the decisions was a trial court decision and the other was an appellate decision in that same case. Throughout this Appendix, whenever a cross-reference to a case discussed in the Appendix is necessary, it will be

examination, the American Board of Forensic Document Examiners (ABFDE), the oldest and most established such organization, and a new organization (which I am surprised the FSAB allowed to keep its easily confused designation) the Board of Forensic Document Examiners, which was approved in 2005 and which currently has certified very few examiners (twelve by my count, of whom seven are officers or directors). See Bd. Forensic Doc. Examrs., www.bfde.org (accessed Mar. 28, 2008). The specific claim of the BFDE seems to be that their testing regime is designed to be more objective and independent than the ABFDE, and they do not seem to require any specific kind of apprenticeship prior to taking the certifying test, although there are educational requirements. At any rate, none of the examiners currently certified by the BFDE have been involved in any of the cases in this Appendix, so we may safely disregard it for now. And finally, one must remember that FSAB certification of a certifying body is not in any way “official,” in the sense that being given a license by a state medical board is “official,” and in addition, it does not guarantee reliability of the specialty, nor does it necessarily establish that ABFDE (or BFDE) certified examiners are more reliable than those certified by less prestigious organizations, or not certified at all. Only comparative reliability testing could establish this.

8. The term “Osbornian” was originally coined in D. Michael Risinger & Michael J. Saks, *Science and Nonscience in the Courts: Daubert Meets Handwriting Identification Expertise*, 82 Iowa L. Rev. 21, 71 n. 10 (1996), and then adopted by Moenssens (Moenssens, *supra* n. 6, at 257) as an appropriate way to distinguish between, on the one hand, the establishment school of handwriting identification doctrine founded by Albert S. Osborn in the early 20th century, which rejects all claims of “graphologists” (persons who assert that personality traits are revealed by handwriting), and on the other hand, asserted identification experts who were led to an interest in handwriting by a belief in graphology (probably the numerical majority in the United States).

9. The American Board of Forensic Document Examiners (ABFDE) is the credentialing body of the Osbornian establishment, jointly sponsored by the American Society of Questioned Document Examiners (ASQDE, an organization that traces its history to Osborn himself), the American Academy of Forensic Sciences (AAFS) Document Section, and the Canadian Society of Forensic Science. Most other organizations, such as the World Association of Document Examiners (WADE), the National Association of Document Examiners (NADE), the Independent Association of Questioned Document Examiners (IAQDE) and many others, have origins in graphology. One of the problems in the whole area is that whatever data on reliability that exist have been collected using pools of test takers in government labs that are dominantly Osbornian. The graphology-based examiners may perform the same, or better, or worse (the Osbornians say worse, but they have no data to back this up).

10. Some courts have declared, when it fit their purpose, that ABFDE certification was required or at least strongly preferred. See *e.g. Wolfe v. Ramsey*, 23 F. Supp. 2d 1323 (N.D. Ga. 2003) (case 34 *infra*). However, probably unbeknownst to them, that would knock out a lot of prosecution-proffered experts in criminal cases, especially in state courts. It would also give the government a greater advantage that it already has, since most ABFDE-certified document examiners (there are only a couple of hundred of them active) work for government agencies, or are too expensive for the average criminal defendant to hire. In addition, for the routine work of the civil court (will contests, etc.) there would not be enough to go around. I have identified the experts in each case where possible, and noted whether or not they were ABFDE-certified, to the extent I have been able to determine this.

made by reference to that case's number in the Appendix.

The discussions of each case have in some instances been works in progress over many years, and the great majority of them have appeared in one form or another in previous published sources, and sometimes more than one.¹¹ Nevertheless, this form of compilation is new, and the new form is necessary to provide the material that will allow interested readers to check for themselves the basis for the assertions made in the main text.

Because the belief warrant in regard to various applications of claimed handwriting identification expertise depends in large part on the amount and quality of empirical research that has or has not been done on those issues, and because the evaluation of judicial performance can only be done in light of that research and the courts' treatment of it (including whether it is dealt with in the opinion under discussion or not), it is necessary to the purpose of this Appendix to set out a short summary of the currently available research on these matters. Obviously, no full exposition of the research and other data sources is possible here. Such a full exposition is undertaken in my Handwriting Chapter in *Modern Scientific Evidence*,¹² and those wishing to check the reasons for any of the summary assertions in what follows are directed to that source.

II. THE AVAILABLE SOURCES OF DATA

Listed here are sources arguably yielding empirical data on the performance of claimed handwriting identification experts doing handwriting identification-related tasks, with or without non-expert comparison groups.

*The 1939 Inbau Study*¹³

Fred Inbau of Northwestern Law School gave a kind of signature authenticity test to very small groups of everyday people ($n=8$), bank employees ($n=7$), and handwriting experts ($n=3$). All differences in performances between groups were statistically insignificant.¹⁴ Whatever their views on the strengths or weaknesses of handwriting identification, all sides agree that design flaws and the small number of subjects involved prevent the Inbau study from being a source of any usable data. The only thing of importance to emerge from that study was the difficulty Inbau had in obtaining agreement from handwriting experts to participate in the study, a concern that has

11. For instance, initial versions of the descriptions of *Starzecpyzel*, *Ruth*, and *Velasquez*, cases 1–3 *infra* Part III, can be found in Saks & Risinger, *supra* note 8, at 30–34; versions of the descriptions of *McVeigh*, *Jones*, *Paul*, *Hines*, *Battle*, *Santillan*, *Brown*, *Rutherford*, and *Fujii*, cases 5–12 and 14 *infra* Part III, can be found in D. Michael Risinger, *Defining the "Task at Hand": Non-Science Forensic Science after Kumho Tire Co. v. Carmichael*, 57 Wash. & Lee L. Rev. 767, 784–800 (2000) [hereinafter Risinger, *Task at Hand*], and most, but not all, of the rest have appeared in D. Michael Risinger, *Handwriting Identification*, in David L. Faigman et al., *Modern Scientific Evidence* ch. 33 (West 2008) [hereinafter Risinger, *Handwriting Identification*]. I have retained copyright authority to use all such writings in scholarly articles such as this.

12. Risinger, *Handwriting Identification*, *supra* n. 11.

13. Fred E. Inbau, *Lay Witness Identification of Handwriting*, 34 U. Ill. L. Rev. 433 (1939).

14. D. Michael Risinger, Mark P. Denbeaux & Michael J. Saks, *Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification "Expertise"*, 137 U. Pa. L. Rev. 731, 741 (1989).

distorted the design and the interpretation of both formal studies and proficiency tests.¹⁵

*The Conrad Study*¹⁶

This substantial 1975 study of German handwriting experts (published in a German journal) was not uncovered by us in our literature search conducted in 1987–88 and therefore not reflected in *Exorcism of Ignorance*.¹⁷ Like the Inbau study, it concentrated on what the standard literature of handwriting identification regards as the most confidently performed task,¹⁸ signature authentication, that is, determining whether a questioned signature was signed by the same person who signed known exemplars reflecting the same name which is their true name. In addition, the number of participants was relatively large: twenty-five professional handwriting experts, one hundred ordinary people, twenty-five additional ordinary people provided with special motivation through rewards for good performance, and six college students who had taken a course in handwriting psychology and identification. Each participant was given a set of ten authentic signatures and six questioned signatures, three authentic and three forged. The forgeries were apparently pretty skilled simulations, because all groups called forgeries “genuine” a significant percentage of the time: The highly motivated lay persons outperformed the experts on this, being wrong when they said “genuine” only 12% of the time, as opposed to the experts 17% (unmotivated lay persons erred 21.7%, and the six college students, who consistently had the best performances statistically, erred only 5.6% of the time). When they called a signature “forged” and it was actually genuine the error rates were: the six college students, 11.1%, experts 12%, motivated laypersons 28%, and unmotivated laypersons 41.6%. Laypersons did not call significantly more forged signatures “genuine” than experts, but they did call significantly more genuine signatures “forged” than experts. Finally, motivation seemed to significantly affect performance, with the unmotivated lay group always performing worst. (This result will be revisited in connection with Kam III, *infra*.)

*The Miller Study*¹⁹

This is the other study that we did not discover in 1987, and which I only became aware of recently. In this study twelve part-time college students, four of whom were court-qualified document examiners working for police agencies, and eight of whom had completed training but had not yet testified in court, were given materials from real cleared cases where ground truth was otherwise known, consisting of three checks signed

15. Inbau, *supra* n. 13, at 440 n. 11. This continues to be a severe problem to the present day.

16. Wolfgang Conrad, *Empirische Untersuchungen über die Urteilsgröße verschiedener Gruppen von Laien und Sachverständigen bei der Unterscheidung authentischer und gefälschter Unterschriften* [Empirical Studies Regarding the Quality of Assessments of Various Groups of Lay Persons and Experts in Differentiating Between Authentic and Forged Signatures], 156 *Archiv für Kriminologie* 169 (1975). (English translation procured by Professor Michael J. Saks on file with author. All details in the description are from that translation, copy on file with author. Pinpoint citations omitted as serving no purpose given the unavailability of the translated document.)

17. Risinger et al., *supra* n. 14.

18. See e.g. Albert S. Osborn, *Questioned Documents* 13 (Lawyers' Coop. Publ. Co. 1910).

19. Larry S. Miller, *Bias among Professional Document Examiners: A Need for Procedural Change*, 12 *J. Police Sci. & Admin.* 407 (1984).

with forged signatures and exemplars of handwriting from a suspect.²⁰ The task was to determine if the person who wrote the exemplars wrote the forged signatures (this is a very difficult task according to the standard handwriting expert literature²¹). Six of the test subjects, which included two court-qualified examiners and four of the not-yet-court-qualified examiners (Group I) were given “standard articles of evidence normally provided by a police agency.” In addition, they were given only the exemplars taken from the single suspect, and they were further told that there were two witnesses who had seen the defendant write the checks in question. The other six (also two court-qualified and four not) (Group II) were given exemplars from two other suspects, and no other information. Four examiners in Group I, including one of the court-qualified examiners, concluded that the suspect wrote the signatures on the three checks. The other court-qualified examiner declared the results of his examination to be “inconclusive,” asserting that the known exemplars of the suspect’s handwriting “bore disguised handwriting characteristics.” The last examiner (a trainee) correctly eliminated the suspect. All six examiners in Group II correctly eliminated all three of their suspects. This early study had a small *n*, but it supports the proposition derived from general research that handwriting identification, because of its highly subjective character, is very vulnerable to context effects such as expectation and suggestion.²²

*The Forensic Sciences Foundation (FSF)²³/Collaborative Testing Services (CTS)²⁴
Proficiency Tests*

The only other sources of actual data on document examiner performance available before the decision in *Daubert* were the results of proficiency test results produced (until 1992) by the Forensic Science Foundation (FSF) in collaboration with Collaborative Testing Services, Inc. (CTS), a program which has continued through the years all the way to the present.²⁵ The meaning of these proficiency test results is controversial. The

20. *Id.* at 409–10. The details given in the article were graciously supplemented by Dr. Miller, who teaches criminology at East Tennessee State University, in a series of e-mails and telephone calls in February 2008, during which period he checked his original test materials and documentation and answered various questions put to him. My thanks to Dr. Miller for his generous cooperation.

21. See e.g. Wilson R. Harrison, *Suspect Documents: Their Scientific Examination* 387 (Praeger 1958); Osborn, *supra* n. 18, at 13.

22. See generally D. Michael Risinger, Michael J. Saks, William C. Thompson & Robert Rosenthal, *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 Cal. L. Rev. 1, 6–27 (2002) (reviewing literature on observer effects, that is, errors that arise because of the expectations, emotions and desires of a human observer, evaluator, interpreter, or rater, often induced by exposure to information irrelevant to the observer’s explicit task).

23. The Forensic Sciences Foundation is the “educational, scientific, and research arm of the American Academy of Forensic Sciences. See Am. Acad. Forensic Sci., *Who We Are*, http://aafs.org/?section_id=fsf&page_id=who_we_are (accessed Mar. 28, 2008).

24. Collaborative Testing Services is a for-profit provider of interlaboratory proficiency tests for a number of industries. See Collaborative Testing Servs., *About Us*, http://www.collaborativetesting.com/cts_admin/about.html (accessed Mar. 28, 2008).

25. The forensic science proficiency testing program was originally sponsored by the Forensic Sciences Foundation, but FSF withdrew from co-sponsorship in 1992. At about that time, CTS formed some relationship with the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) to provide proficiency tests that met the requirements of ASCLD/LAB’s proficiency testing requirements for accredited laboratories. See Collaborative Testing Servs., *Forensics*, <http://www.collaborativetesting.com/forensics/index.html> (accessed Mar. 28, 2008).

program was originally designed to provide voluntary proficiency tests in a variety of fields (including document examination) for forensic laboratories, which are dominantly but not exclusively government laboratories associated with law enforcement.²⁶ Because participation was voluntary, certain guarantees were made in order to invite participation: No individual test taker, and no individual laboratory, would ever be identified. In addition, no effort was made to standardize who might take the tests, or the conditions under which they were taken, which was left to the discretion of the individual laboratory director. Finally, perhaps partly because of these policies, perhaps partly because of the difficulty in designing totally realistic tests, and perhaps partly to create deniability in court in the event of dramatically poor performance by labs in general on some tasks or tests, the FSF took the position prominently on all compilations of results that they were “not necessarily representative of the actual level of performance in the field.”²⁷

On the other hand, it seems untenable to dismiss the results as totally meaningless. For instance, in regard to the document examination tests, while it is possible that any given lab’s response represents a trainee response, or a group response, examination of the individual comments of responding labs that have accompanied the results over the years indicates, at least circumstantially, that the responses have been overwhelmingly by experienced document examiners who presumably testify in court. In addition, the data collected through the tests indicate no correlation between reported years of experience and accuracy of results.²⁸ Finally, while it is true that anyone could in theory assert laboratory status and send in the required fee and thus be allowed to take the test, there is absolutely no reason on the basis of the response comments or any other piece of information in the world to think that this implausible event has ever happened.²⁹

Historically labs have not been required to order or take the tests, and those who do are not required to return the results. This suggests that in the past it may have been the most confident labs which in fact ordered and responded (unless the most over-confident labs felt no need for proficiency testing). Since the mid-1990s, however, the American Society of Crime Laboratory Directors Laboratory Accreditation Board (ASCLD-LAB)

26. See ASCLD/LAB, *Laboratories Accredited by ASCLD/LAB*, www.asclld-lab.org/legacy/asclablegacy_laboratories.html (accessed Mar. 28, 2008) (listing the laboratories in the United States accredited by ASCLD/LAB). ASCLD/LAB refers to its U.S. accreditation program (in contrast to its overseas activities) as its “legacy” program, for reasons that are not entirely clear, at least to me.

27. It seems clear that CTS now has, and may always have had, access to more information on the demographics of the universe of test takers than it likes to let on. In an attempt to rationalize some poor results from the 1999 test, CTS said in its summary of results that the majority of test-takers who made errors were born in countries where English was not the first language, a detail that would not emerge from anything on the report form.

28. “As usual, there were no correlations between right/wrong answers and certification, experience, amount of time devoted to document examination, and length of time spent on this test.” Collaborative Testing Servs. Crime Laboratory Testing Program, *Rep. No. 87-5: Questioned Documents Analysis 2* (1987) (on file with author) [hereinafter 1987 FSF/CTS Test Report]. It is important to note that none of this information is derived from the information given in the report, establishing once again that CTS collects enough information to render their tests meaningful measures of document examiner performance, but it simply does not release it, apparently in order to maintain the tenability of their disclaimer.

29. At least until recently. Since 2007, a seminar at Seton Hall University School of Law has ordered and taken various of the FSF proficiency tests, but this was almost certainly the first time anyone has taken advantage of the announced policies of general availability.

has replaced the FSF as CTS's consulting partner in regard to the tests.³⁰ The ASCLD-LAB standards require proficiency testing as a condition of accreditation, and the CTS tests are an approved provider (possibly the only one for Document Examination) of such tests.³¹ This has resulted in a large increase in the number of tests ordered and returned.³² So certainly any results from the mid-1990s on, at any rate, should be dominated by a representative sample of practice in accredited labs. Because law enforcement labs are dominated by document examiners trained in the orthodox Osbornian method, and because the participants know they are taking a test that will be important to them professionally within their own lab, the FSF results are likely to represent the best aggregate performance the run-of-the-field Osbornian can muster, at least since the mid-1990s, and arguably before. At a minimum the results represent the performance of a sub-group of examiners who will no doubt be testifying in some court somewhere.

A full analysis of every such test given from 1975 through 2002 now appears in the MSE Handwriting Identification Chapter.³³ Based on a conservative interpretation of those tests in the aggregate, the following propositions seem well supported by the data:

First, there are easy tasks at which handwriting experts as a group do very well, but not perfectly (for instance, determining whether a signature is authentic).³⁴ Second, there are hard tasks at which handwriting experts do very poorly (with error rates ranging from 22% to 100%). (Among other tasks, assigning authorship of simulated forgeries and adolescent handwriting created real problems.³⁵) Third, none of these tests have dealt directly with the theoretically most problematical tasks commonly encountered in practice: eliminating persons who are not the real author when the real author is not present among the known writings, and most importantly (because it is in issue in so many real criminal cases) accurately assigning authorship of small amounts of writing such as forged signatures, especially when some amount of disguise or attempted simulation may be present.³⁶ Indeed, the data seem to reveal an anti-exclusion bias, where authorship is confidently declared when the true author is present in the known exemplars, but exclusions when the true author is absent being much less common (with lots of inconclusives or indications of "cannot be eliminated").³⁷ And while some of the

30. See Collaborative Testing Servs., *supra* n. 24.

31. *Id.*

32. Only 33 labs returned tests in 1987. See Risinger, *Handwriting Identification*, *supra* n. 11, at § 33:19. In 1992 the number was 84, and by 1996 it was 124. *Id.* at § 33:37.

33. See generally Risinger, *Handwriting Identification*, *supra* n. 11.

34. See e.g. *id.* at § 33:24 (analyzing the results of the 1988 test); *id.* at § 33:37 (analyzing the results of the 2002 test).

35. See *id.* at § 33:19 (analyzing results of 1984, 1985, and 1986 FSF tests, showing error rates of 100%, 22%, and 45% respectively on certain tasks); *id.* at § 33:25 (analyzing the results of the 1989 test analyzed and showing 44% false positive error rate in test involving adolescent handwriting).

36. The 1994 test might be said to bear on this issue somewhat, but the design insured that both the inauthentic signatures and the known samples contained more writing than what is usual in real cases; that they were all in a normal hand without imitation or disguise; and that they were all three actually written by two of the three persons in the target group of known handwriting. See Risinger, *Handwriting Identification*, *supra* n. 11, at § 33:37.

37. See e.g. *id.* (discussing the 2001 test).

results appear accidentally to be confirmatory of Miller's unsurprising finding of vulnerability to inappropriate context biasing,³⁸ in no case was that variable formally tested for, so we really do not know whether any skills that appear on the face of the data would survive the context biasing common to much normal practice. So perhaps the best (and worst) that can be said of these results is that they raise very serious questions without providing any completely definitive answers. At any rate, as I said above, while these results must be approached with caution, it hardly seems reasonable to dismiss them out of hand, as the handwriting community, prosecutors, and some courts have habitually done.³⁹

*The Galbraith Study*⁴⁰

This study was an attempt to refute what the authors took to be the conclusions of *Exorcism of Ignorance*,⁴¹ and much of the article that resulted is devoted to somewhat rhetorically strident critiques of it. The empirical part of the article utilizes the 1987 FSF/CTS test and its results, so that particular test must be described in some detail.

Because of document examiner complaints concerning the difficulty of prior tests, the FSF decided to make the 1987 test easy.⁴² In this test, participants were given a copy of a handwritten extortion note. Exemplars of four persons were also provided, one of whom had written the note (a fact that the test-takers were not told). The problem was to determine which, if any, of the "suspects" had actually written the note.⁴³ There were 33 responses, of which 15 were inconclusive.⁴⁴ If we include inconclusives as failures to identify, then only 52% of the test-takers ($n=17$) got affirmatively correct answers.⁴⁵ One was affirmatively wrong in eliminating the real writer, and none identified the wrong suspect as the writer (which is not surprising, given the likely gross differences between the handwriting on the note and the handwriting of three random persons). This was what our data table reflected (giving the percentages for "correctly identified the real writer": 17 (52%); "incorrectly eliminated the real writer": 1 (3%); "identified an innocent person as the author": zero (0%); "inconclusive": 15 (45%)).⁴⁶ Of course, another way to look at the data would be to say that all we care about is the universe of answers which are not inconclusive, because the inconclusives will never make it into a

38. See Miller, *supra* n. 19, at 410. See also Risinger, *Handwriting Identification*, *supra* n. 11, at § 33:24 n. 1 (discussing the apparent effect of the task-irrelevant facts given in the test scenario in regard to the 1988 CTS test); *id.* at § 33:37 (discussing the 2002 CTS test).

39. Judicial opinions that essentially take the CTS disclaimer at face value and so dismiss the results of the proficiency tests will be noted in Part III below. This clearly is taken from the government's brief in those cases, and as recently as last week (Feb. 22, 2008) I have heard the position invoked as a mantra with very little reflection from one participant in discussion during a session of the Criminalistics section of the AAFS.

40. Oliver Galbraith, Craig S. Galbraith & Nanette Galbraith, *The "Principle of the Drunkard's Search" as a Proxy for Scientific Analysis: The Misuse of Handwriting Test Data in a Law Journal Article*, 1 Intl. J. Forensic Doc. Examrs. 7 (1995).

41. Risinger et al., *supra* n. 14.

42. 1987 FSF/CTS Test Report, *supra* n. 28, at 1. A version of this summary originally appeared in Risinger et al., *supra* note 14, at 747-48.

43. 1987 FSF/CTS Test Report, *supra* n. 28, at app.

44. *Id.* at 4-5.

45. *Id.*

46. See *id.*

courtroom.⁴⁷ So we might throw out the inconclusives, which would result in only 18 affirmative responses. Of those 18, 17 (94%) correctly identified the writer, and 1 (6%) eliminated the correct suspect.⁴⁸

The Galbraiths took this a couple of steps further. Where the test-takers themselves had said their answers were “inconclusive,” the Galbraiths argued that if you looked at their written comments, you could move 13 of the 15 inconclusives into the “correct” column, yielding an overall accuracy rate on the 1987 test of 91%. For reasons that probably seem fairly obvious, but which I will not go into in detail here, the propriety of such an ad hoc, post hoc re-evaluation is questionable.⁴⁹

But the “new data” come next. The Galbraiths obtained the test materials from the 1987 test, and administered it to two groups of ordinary people totaling 65 people.⁵⁰ There are a few potential procedural criticisms that can be raised in regard to their test administration process, but taking the resulting data at face value, virtually the same percentage of regular folks affirmatively identified the right author (50.77% compared to 51.51%). But the non-experts had many fewer inconclusives (15% versus 45%) and many more false positives (33% versus 0%) and false negatives (7.7% versus .3%).⁵¹ This relative caution and willingness to say “inconclusive” on the part of the experts, and relative resistance to the “inconclusive” response on the part of ordinary people, shows up over and over in other parts of the available data from various studies.⁵² Whether that same caution is displayed by the experts in non-test, real-world-practice situations, especially in the face of expectation and suggestion found in ordinary practice, is debatable, but it often recurs in the testing data.

The Kam Studies

In the early 1990s, the FBI contracted with Dr. Moshe Kam, a computer scientist at Drexel University, to do research to establish the reliability of document examiner conclusions, to help determine that document examiners were better at source attribution of handwriting than ordinary people. This led Kam and his team at Drexel to a series of research projects which to date have resulted in five publications. The full titles of each publication are given in the footnotes, but for convenience we will refer to them as Kam I,⁵³ Kam II,⁵⁴ Kam III,⁵⁵ Kam IV,⁵⁶ and Kam V.⁵⁷ As the reader will see, except for

47. That, however, assumes that handwriting experts are as willing to say “inconclusive” in actual cases as they are on tests: a proposition for which there is some reason to be skeptical.

48. *See id.*

49. *See* Risinger & Saks, *supra* n. 8, at 50–51.

50. *See* Galbraith et al., *supra* n. 40, at 15.

51. *Id.* at 16 tbl. 4.

52. *See infra* n. 79 and accompanying text (discussing the results of Kam IV).

53. Moshe Kam, Joseph Wetstein & Robert Conn, *Proficiency of Professional Document Examiners in Writer Identification*, 39 J. Forensic Sci. 5 (1994) [hereinafter Kam I].

54. Moshe Kam, Gabriel Fielding & Robert Conn, *Writer Identification by Professional Document Examiners*, 42 J. Forensic Sci. 778 (1997) [hereinafter Kam II].

55. Moshe Kam, Gabriel Fielding & Robert Conn, *The Effects of Monetary Incentives on Performance of Nonprofessionals in Document Examination Proficiency Tests*, 43 J. Forensic Sci. 1000 (1998) [hereinafter Kam III].

56. Moshe Kam, Kishore Gummadidala, Gabriel Fielding & Robert Conn, *Signature Authentication by Forensic Document Examiners*, 46 J. Forensic Sci. 884 (2001) [hereinafter Kam IV].

Kam IV, these studies reflect a curious set of research designs, partly, perhaps, because of Dr. Kam's background in computer science rather than human subject research, and perhaps in larger part because of an effort to guarantee that individual document examiner performance would not be usable in cross-examination.

Kam I

This article reports Kam's initial study. A group of 45 students were asked to generate written documents in their normal handwriting by copying five texts, one each on five separate sheets of paper.⁵⁸ Thirteen of those students were asked to copy one or another of the five texts an extra time.⁵⁹ This resulted in 238 texts from 45 writers. Documents were then drawn at random until 20 different writers were represented in the mix, which resulted in a stack of 86 documents, with one writer represented only once, and the others represented from two to six times.⁶⁰ The test consisted of handing the 86 documents to a test subject in a room with a table and chair, and telling the test subject to sort the documents into separate piles, each pile consisting of all the writing by a single writer and only the writing of that writer.⁶¹ The test subjects were not told how many writers were represented, and no time limits were imposed.⁶² A perfect performance would consist of making exactly 20 piles containing from one to six documents each, each pile representing all and only the writing of a single author. An error of "underrefinement" would result if two documents by two different writers were assigned to the same pile; an error of "overrefinement" would result if a document that should be placed in the same pile as another document was placed in a new pile.⁶³

The test was administered to seven FBI laboratory document examiners and ten engineering graduate students.⁶⁴ Without reviewing the statistical results at length, suffice it to say that the document examiners performed very well, with five of the seven having perfect performances, and the other two making two errors each. The graduate student performance was less impressive, ranging from seven errors to 45 errors.⁶⁵

Drawing any conclusions from the Kam I study must be approached with great caution. First, the sorting task presented by this study was not representative of any task ordinarily encountered in a forensic setting. Second, globally, one would expect the test to be fundamentally easy, presenting mostly trivial discriminations, since the handwriting samples involved contained fairly extensive writing and were drawn from twenty randomly selected individuals with presumably widely varying basic writing styles. Given the number of pairwise comparisons involved, even the non-expert performance was far better than random. Third, the seven document examiners involved

57. Moshe Kam & Erwin Lee, *Writer Identification Using Hand-Printed and Non-Hand-Printed Questioned Documents*, 48 J. Forensic Sci. 1 (2003) [hereinafter Kam V].

58. Kam I, *supra* n. 53, at 7.

59. *Id.*

60. *Id.*

61. *Id.* at 8.

62. *Id.*

63. Kam I, *supra* n. 53, at 8.

64. *Id.*

65. *Id.* at 10.

may not, and in fact almost certainly did not, consist of a representative sample of document examiners who testify in American courts, or even of those who testify in criminal cases. Fourth, there were extremely different motivations in play between the document examiners, who knew they were taking a test upon which the very existence of their profession might in part turn, and the graduate students, who had virtually nothing at stake. Fifth, the non-expert performances were extremely bi-modal, with the top four performers of the graduate students approaching the performances of the bottom performers of the experts.⁶⁶ Whether this bimodality resulted from differences in natural talent or differences in felt motivation is difficult to say. Sixth, and most important, these results tell us virtually nothing about the reliability of document examiners' conclusions in regard to any given task encountered in actual practice, such as attribution of authorship based on a single signature reflecting another person's name, especially the reliability of such a conclusion in the normal circumstances of practice, where the precursors of substantial expectancy and suggestion effects are present.

Kam II

Responding in part to criticisms concerning the original test design, Kam et al. designed and administered a new test to larger groups of document examiners and ordinary people. However, the design of this test was even less straightforward and more problematical than the design reflected in Kam I. A new "database" set of available comparison documents was generated using 150 writers ages 20–27.⁶⁷ Each writer generated four copies of each of three texts in their normal hand, yielding twelve written documents per writer, or 1,800 total.⁶⁸ At this point, for reasons that remain not totally clear, a test packet selection procedure was used, apparently by random drawing and returning of documents to the 1,800 document database, which yielded 12 sets of 6 documents, which we will call Group 1.⁶⁹ Each document of a single set in Group 1 had a different author, but none of the 12 sets was itself exactly the same as any other set. The remaining database documents were then subjected to another drawing procedure that yielded 12 sets of 24 documents each (Group 2). Tests were administered to subjects as follows: A set was randomly drawn from Group 1 and another from Group 2, and the test subjects were asked whether any document or documents in Group 1 had the same author as any document or documents in Group 2.⁷⁰ The tests were administered to 35 practicing document examiners, 8 document examiner trainees, and 35 non-experts. In order to meet criticisms concerning motivation, the non-experts were given monetary rewards for good performance according an incentive and disincentive scheme that appears to have pushed the non-experts in the wrong direction. One extremely important aspect of this procedure must be noted upfront, however. Because of the way that the

66. *See id.* at tbl. 3.

67. Kam II, *supra* n. 54, at 779.

68. *See id.*

69. *See id.* This is by inference, since the exact procedure is not described in sufficient detail, but only the procedure in the text would seem likely to generate the described sets. Kam called these the "known" sets, perhaps to make it seem more like a real world case, but in reality, neither set represented a "known" writer.

70. *Id.* at 1180 tbl. 3.

test packets were generated, *each test taker may have taken a different test*.⁷¹ Some tests may have been trivially easy, and some tests very difficult, but there is no way of knowing on the face of the results.

The aggregated results of the performances on these multiple versions of the test were that the experts and the non-experts performed virtually identically when it came to identifying actual matches (87.1% to 87.5%),⁷² but the document examiners performed better at avoiding false positives (calling a “match” in regard to two documents written by different people). The experts did this 6.5% of the time, but the non-experts did this 38.3% of the time.⁷³ The 6.5% rate for document examiners is not insignificant, especially given the likely presence of many easy calls, and the difference in performance may actually have been the result of the differing incentives for the two groups, which would have made the document examiners much more risk averse than the non-experts.⁷⁴

Drawing any firm conclusions about an expert advantage over non-experts from these results is difficult. Again, like Kam I, this was a sorting exercise of the kind not encountered in practice. This was made worse by the odd design that made each participant likely to have taken a different test from most of the others. There is some reason to believe that non-expert performance was again bi-modal, with perhaps significant numbers of non-experts approaching the level of at least the bottom part of the expert performance, but this is unclear from the way the data were summarized in the published report, and clarification has been blocked by Kam’s persistent refusal to share his raw data (in violation of the usual norms of scientific research, I might add).⁷⁵ Finally, and once again most importantly, aside from a not-insignificant error rate for document examiners on whatever comparison tasks may have been represented in whatever test versions they took (12.5% missed true positives, 6.5% false positives), there is nothing in this study that gives any direct information on the reliability of document examiners on any given task, such as attribution of authorship from small amounts of questioned writing, especially in circumstances that suggest the likelihood of attempted simulation or disguise, the most questionable application of their claimed expertise and one that arises frequently in criminal cases.

71. Well, it is virtually certain that some test takers took the same test as another test taker, and even that some tests were taken by more than two takers. (This is a variant of the famous “Birthday problem,” a special application of what are called collision functions. See Wikipedia, *Birthday Problem*, http://en.wikipedia.org/wiki/Birthday_paradox (accessed Apr. 18, 2008). I used to think there was a high likelihood that all the tests were different, but upon reflection I disabused myself.) We just don’t know which tests were taken more than once, or by which test-takers, or what the characteristics of any given test might have been. However, Kam presumably does know the actual distributions between takers, but has never revealed them.

72. *Id.* at 781 tbl. 5.

73. Kam II, *supra* n. 54, at 781 tbl. 5.

74. The test design did not call for the test-takers to call affirmative exclusions from authorship, so the lower rate of false positives may simply reflect the document examiners’ higher comfort, at least in tests, with what were functionally “inconclusive” responses, as opposed to non-experts. This pattern is seen in other test results as well. For example, both the Conrad, *supra* note 16, and Galbraith, *supra* note 40, results are consistent with this. In addition, the monetary reward given to non-expert participants was likely to make them call a match whenever it was more likely than not, but the experts, given both what was at stake and the specific instructions, would have called matches only when highly confident. See Risinger et al., *supra* n. 7, at 424–26 (discussing this problem).

75. See *id.* at 431–32 n. 89 (discussing this issue at length).

Kam III

In response to the criticism of Kam II that the results may have been an artifact of the varying motivations of the experts and non-experts, the Kam III study administered the Kam II test(s) to 132 non-expert subjects (sophomores at Drexel University) divided into four groups.⁷⁶ Group I was given the test with the same incentive structure that was used in Kam II. The other three groups were given variant incentive structures. The results were that the incentive structures tested did not seem to lead to significant differences in results among groups. Unfortunately two errors were made in the design: First, no unincentivized group was included, which might have thrown light on the Kam I results, and on the effect size of the incentives collectively. More importantly, no incentive scheme of a kind necessary to approximate the incentive position of the expert group was included.⁷⁷ For the latter reason alone, the results of Kam III are of limited use, if any, in interpreting Kam II. In addition, the failures of the varying schemes to produce any statistically significant effect is very surprising, given the general results of incentive studies in other disciplines and settings.⁷⁸ Finally, one other almost shocking result emerged from the performance of the test-takers in Kam III: The performance was significantly better than the non-experts in Kam II. The identification of true positives was insignificantly lower, but the Kam III group showed a 41% better performance at avoiding false positives (22.7% as opposed to 38.3%). Kam attributed this to an aggregate tendency of the new test group to call fewer matches of any kind, but that is not an explanation, merely a restatement of the phenomenon. Two of the new reward schemes, though not of the kind called for by us, would seem to have been structured in a way that would induce some risk-averseness in the test subjects. So perhaps Kam III is as easily interpreted as showing an incentive effect relative to Kam II (or the aggregated performances of both Kam II subjects and the Kam III non-experts with the Kam II incentive scheme) as it is to show no incentive effects at all among the four schemes under examination. Kam III leaves the meaning of Kam II still up in the air, and once again, it should be noted that it provides absolutely no information on document examiner performance on any particular task encountered in practice.

Kam IV

Kam IV is by far the best study conducted by Kam. It is a straightforward test to determine both the accuracy of experts on a common litigation task (determining the authenticity of a signature) and of the experts' comparative performance relative to a group of non-experts. Its main weakness was once again an incentive structure for the non-experts that did not mimic the incentives present for the document examiners.

The test presented the subjects with a set of six genuine signatures on separate pieces of paper of a person writing their own signature in their normal signature hand.⁷⁹

76. Kam III, *supra* n. 55, at 1001.

77. Compare the incentives in Kam IV, *supra* note 56, at 886 table 4, with the required incentive matrix set out in Risinger, *Handwriting Identification*, *supra* note 11, section 33:29, and the discussion of Kam III incentives at section 33:30.

78. See e.g. Conrad, *supra* n. 16, at ff (study summarized).

79. Kam IV, *supra* n. 56, at 885.

The subjects were then given a set of “questioned” signatures containing a randomly generated combination of authentic signatures, and simulations generated by seven naïve simulators, that is, persons with no known experience or talent for simulation, who took original signatures as models and tried to copy them either freehand, or by tracing through transmitted light or by use of an overhead projector.⁸⁰ There were 64 “questioned” sets, from which each test subject received a random draw (each was free to choose their method).⁸¹ Each “questioned” set contained authentic signatures and forgeries in some combination (including some that were all forgeries and some that were all genuine) so that, while each questioned set presented a slightly different test, the general task was the same in regard to each—determine which if any signatures in the questioned set were genuine.⁸² The results were that both the experts and the non-experts caught most of the naïve forgeries. The forgeries were called “not genuine” 96% of the time by experts, and 92% of the time by non-experts.⁸³ And they were called “genuine” only .5% of the time by experts and 6.5% of the time by non-experts. This difference was (once again) the result of the experts being much more inclined to say “inconclusive” than the non-experts (3.45% versus 1.5%). However, experts had an advantage over non-experts in not making the mistake of calling genuine signatures false, even though both the experts and the non-experts made quite a few such errors—7% for experts, and 26% for non-experts. This, too, was partly the result of non-experts being much less inclined to respond “inconclusive” (7% for experts, 4% for non-experts), a phenomenon that we have seen above,⁸⁴ and on other tests. But as to the affirmatively accurate calls of “not genuine,” the experts had a distinct advantage (85% for experts, 70% for non-experts). While some unknown amount of this difference may be the result of the differing incentives under which the two groups operated, it seems reasonable to take these results as some evidence of a relatively mild advantage for document examiners on the task of evaluating whether a signature is genuine, and especially at not concluding wrongly that genuine signatures are simulations, at least under test conditions.

And, as noted above in regard to the Galbraith study,⁸⁵ whether this advantage springing from cautious risk-averseness would hold up in actual practice in the presence of domain-irrelevant suggestion is questionable. And once again, it must be kept in mind that these results give little if any evidence in regard to the reliability or error rates of document examiners in the performance of any other task.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at tbl. 1. All data in this paragraph are from that source.

84. See *supra* nn. 40–52 and accompanying text (regarding Galbraith study); *infra* nn. 89–91 and accompanying text (regarding Found & Rogers); *infra* nn. 92–94 and accompanying text (regarding Sita, Found & Rogers). See also the high rates of “inconclusives” generally seen in the results of the FSF/CTS proficiency tests, described in Risinger, *Handwriting Identification*, *supra* note 11, at sections 33:15–33:21, 33:24–33:25, and 33:37.

85. See *supra* n. 40 and accompanying text.

Kam V

One issue that arose in courts with fair frequency was signature attribution where the questioned documents were hand printed. Common Osbornian doctrine holds that handprinting is harder to attribute as to authorship accurately than cursive, at least under some circumstances.⁸⁶ As this question began to be raised in court, with the associated claim that all studies theretofore had been conducted on cursive samples, Professor Kam returned to the test materials in Kam II, and professed to discover that many of the test materials there were in reality properly classified as handprinting, not as cursive.⁸⁷ He then re-analyzed all of the results, and claimed to discover that, in general, the results for experts and non-experts were the same whether cursive and handprinting results were analyzed separately, or whether they were combined.⁸⁸ It is hard to check on these conclusions, since this is one of the data sets involved in Kam's refusal to share data or test materials. However, even taking these results at face value, they mean less than meets the eye. First, the subset of "handprinted" documents Kam discovered in his test materials was handprinting used as a person's normal handwriting, not block printing used for purposes of disguise, or for specialized purposes such as filling out a form requiring printing (a commonly encountered circumstance in forensic work). The phenomenon of an educated person writing in a non-connected script as their normal hand is apparently much more common now than in Osborn's day. At any rate, Kam's results have very little relevance to the issues involved when questioned handprinting is not known to be in a writer's everyday hand, but circumstantially appears to be adopted as a means of disguise. Post hoc demand exemplars of handprinting from that person do not cure that problem. In addition, it will be recalled that, because of various design flaws and oddities, there are serious problems with making very much out of the results of Kam II to begin with, and these problems do not disappear just because the results can be divided into written and cursive subsets.

*Found & Rogers*⁸⁹

In 2001, two Australian researchers, Bryan Found and Doug Rogers, published the results of a lengthy research program testing Australian document examiners on a test for

86. James V.P. Conway, *Evidential Documents* 61 (Thomas 1959).

There is a greater variation in the handprinting of the occasional or intermittent handprinter, as executed at different sittings, than is the case in respect to the more utilitarian cursive script. This is particularly true if several handprintings by the same individual are separated by extended intervals. Individualities do not become so unconscious, and therefore so repetitive and automatic, in handprinting unless one uses handprinting systematically and extensively.

Id.

87. Kam V, *supra* n. 57, at 1–2. Some were, inevitably, classified as "mixed." *Id.*

88. *Id.* at 3–4. The document examiner wrong association rate (false positive rate) for handprinting was nearly 60% more than for cursive, but given the sizes of the comparative groups, that wasn't statistically significant.

89. Bryan Found & Doug Rogers, *Revision and Corrective Action Package: Signature Trial* (2001). The study was distributed on CD-ROM by the Forensic Expertise Profiling Laboratory (FEPL), School of Human Biosciences, La Trobe University, Australia. The CD contains a text file and data files. Page references below are to the printed version of the test file. It is interesting to note that the stated goal of the FEPL program is to develop a series of tests that would ultimately provide individual accuracy and error rate information on individual experts as a matter of routine. *Id.* at 4–5.

determining signature authenticity which was broadly analogous to the test in Kam IV. The results represented judgments by 41 document examiners.⁹⁰ These results were again roughly consistent with Kam IV: There were many more inconclusives, perhaps partly because the simulations may have been better, and partly because the test materials included signatures by the real author of the known genuine signatures trying to disguise her own signature.⁹¹ When the questioned signature was genuine, the examiners said it was not genuine less than 2% of the time, compared to 7% in Kam IV. When the questioned signature was a simulation, the examiners said it was genuine 4% of the time, compared with .5% in Kam IV. So the Australian examiners made fewer errors of calling a genuine signature inauthentic, but more errors in calling a simulation genuine, but it must be remembered that the tests were not perfectly comparable as to sub-task or difficulty.

*Sita, Found & Rogers*⁹²

The original Found & Rogers study did not include any non-expert comparison group, so such a test was run and the results were published in 2002. Again, the results were broadly consistent with Kam IV, showing experts and non-experts performing almost equally in correct results, but the non-experts making many more errors and the experts resorting to many more responses of “inconclusive” (42% of responses by experts, 21% of responses by non-experts).⁹³ Finally, the study found no correlation between years of experience for the expert group and accuracy.⁹⁴

One important result in these two studies (Found & Rogers, and Sita, Found & Rogers), taken together, was that expert performance tended to be very uneven, with both very good and very bad performers in the expert group. So there is some reason to think that both expert and non-expert performance may be widely spread, or even bimodal.

*The Srihari et al. study*⁹⁵

Except for the Justice Department publicity hype that surrounded its publication,⁹⁶ and the embarrassing rhetoric employed inappropriately in its discussion and conclusion

90. *Id.* at 14. There were a total of 51 scored answer booklets, but 10 of them had been designated “experimental” and were not counted in the results. The other booklets represented 10 responses that had been “peer reviewed” (verified by a second examiner), 30 individual responses by qualified document examiners, and one by a trainee.

91. *Id.* at 45 (percentages derived from data in table).

92. Jodi Sita, Bryan Found & Douglas K. Rogers, *Forensic Handwriting Examiners’ Expertise for Signature Comparison*, 47 J. Forensic Sci. 1117 (2002).

93. *Id.* at 1119 tbl. 1.

94. *Id.* at 1123. This was consistent with results from the FSF/CTS tests. See 1987 FSF/CTS Test Report, *supra* n. 28.

95. Sargur N. Srihari, Sung-Hyuk Cha, Hina Arora & Sangjik Lee, *Individuality of Handwriting*, 47 J. Forensic Sci. 856 (2002).

96. See e.g. Adam Liptak, *Prosecutors Hope New Study of Handwriting Analysis Will Silence Skeptics*, N.Y. Times A14 (May 26, 2002). See also Andrew Brownstein, *Controversial Study Supports Admissibility of Handwriting*, 38 Trial 91 (2002). The Justice Department sponsored the research. See Srihari et al., *supra* n. 95, at 857.

sections,⁹⁷ this study, while a very interesting study of automated systems of handwriting classification and attribution, is fundamentally irrelevant to the issues in play when a challenge to human document examiner reliability is raised. The reasons for this, and there are many, are fully rehearsed in the sources referenced in the appended footnote,⁹⁸ and will not be set out here at length, except for two observations. Because of the well-known “problem of induction,” true uniqueness in regard to any phenomenon cannot be affirmatively established empirically. Second, even if some vanishingly low random match probability might establish “practical uniqueness,”⁹⁹ the Srihari study involved much too small a study to do even that.¹⁰⁰ Finally, no one has ever doubted that there was information in a handwriting trace that might be used for attribution of authorship under some circumstances. The problem is simply that we don’t know what those circumstances are, and when humans are or are not good at such attributions, regardless of their own claims at skill. Showing that computer algorithms can make computers good (but not perfect) at a machine-read sorting exercise answers exactly zero questions about human skills even for that kind of task, much less any of the tasks that arise commonly in forensic practice.

97. At various points in the Srihari et al. article, *supra* note 95, the authors characterize their work in the following terms: “[A] step toward providing scientific support for admitting handwriting evidence in court.” “Our study is an effort to establish the individuality of handwriting.” “A study was conducted for the purposes of establishing the individuality of handwriting.” This may sound to many readers more like the approach of advocates rather than scientists, that is, the authors apparently set out to obtain a certain result in order to gain admission into court for a field, rather than conducting a more disinterested inquiry into the truth or falsity of a hypothesis. Dr. Srihari is a fine computer scientist, and his work may someday lead to the replacement of document examiners by computers, but the speculative conclusions in the article, reaching far beyond what the data can support, appear to have been written by a co-author.

98. Michael J. Saks, *Commentary on Srihari SN, Cha S-H, Arora H, Lee S, Individuality of Handwriting*, 48 *J. Forensic Sci.* 916 (2003); see Risinger, *Handwriting Identification*, *supra* n. 11, at § 33:36.

99. This is the basis of the debate concerning whether a DNA match with a random match probability so low that its denominator is a multiple of the world’s population can justify telling a jury that the DNA is uniquely the defendant’s. See Simon A. Cole, *Where the Rubber Meets the Road: Thinking about Expert Evidence as Expert Testimony*, 52 *Vill. L. Rev.* 802, 822, 822 n. 76 (2007) (discussing this issue).

100. The computer compared 1,568 handwriting samples pairwise, and even with that small a universe was still not perfect at differentiation. Srihari et al., *supra* n. 95, at 868–69.

III. THE CASES¹⁰¹1. *United States v. Starzeczyzel*¹⁰² (S.D.N.Y., McKenna, J.)

United States v. Starzeczyzel is the original handwriting expertise reliability case of the modern era. In that case, Roberta and Eileen Starzeczyzel were charged with having stolen various works of art from Roberta's elderly (and now senile) aunt. They claimed that the paintings were a gift made prior to the aunt's impairment. Part of the evidence against them was the proposed testimony of a questioned document examiner, Gus Lesnovich (ABFDE), who, after examining numerous authentic signatures of the aunt on checks and other documents, concluded that the aunt's signatures on deeds of gift for the artwork were forgeries. He did not claim to be able to identify either defendant as the forger.

Judge Laurence McKenna of the United States District Court for the Southern District of New York held an extensive hearing on the state of knowledge concerning the reliability of such asserted expertise. Judge McKenna examined the claims of handwriting identification expertise to scientific status at length, and rejected them.¹⁰³ Having done this, however, he concluded that since such experts are not practicing a science within the meaning of *Daubert*, *Daubert*'s validation requirements did not apply. He then analogized such a proffered expert to a harbor pilot who learns to do something dependably by experience.¹⁰⁴ As to whether the prosecution's expert would be allowed

101. All cases except *U.S. v. Brown*, No. CR 99-184 ABC (C.D. Cal. Dec. 1, 1999) (case 11 *infra*) are accessible through commonly available sources (Westlaw, Lexis, Findlaw, or the Internet). As to trial level decisions, no distinction is made in the information given in the heading of the case between those published in the Federal Supplement and others, since this does not affect the decision's status as authority *vel non* (although individual judges may hold themselves to higher standards of judgecraft in the cases they choose to have published in the Federal Supplement). In the case of appellate opinions, those declared of limited authority under various local rules ("not to be cited," "not to be cited without advance notice," etc.) are all designated "unreported" even though all are at least semi-reported by virtue of publication in the Federal Appendix, or simply publication in one of the legal databases such as Westlaw, Lexis, or Findlaw. For a good summary of the debates concerning the status, propriety and rationale of issuing various kinds of "unreported" opinions, see Peter M. Tiersma, *The Textualization of Precedent*, 82 Notre Dame L. Rev. 1187, 1262-78 (2007). Finally, when an opinion is issued for a panel with no author given I have designated it "per curiam" although another designation may be used in that jurisdiction for such an opinion under some circumstances (memorandum, etc.).

102. 880 F. Supp. 1027 (S.D.N.Y. 1995). In keeping with the severest punctilio of disclosure, it should be noted that one defense expert at the *Daubert* hearing in this case was my friend and sometime co-author, Dr. Michael J. Saks, and that I was a consultant to the defense.

103. *Id.* at 1036.

Were the Court to apply *Daubert* to the proffered FDE [forensic document examiner] testimony, it would have to be excluded. This conclusion derives from a straightforward analysis of the suggested *Daubert* factors—testability and known error rate, peer review and publication, and general acceptance—in light of the evidence adduced at the *Daubert* hearing.

Id.

104. The harbor pilot analogy, and many other similar analogies that have been used by courts, are fundamentally and severely misplaced. Experience can provide a warrant for a conclusion concerning probable reliability only when everyday practice has a feedback loop where practitioners normally see their mistake in the outcome of the practice, and suffer some negative consequence as a result. This is true of harbor piloting and plumbing, but not of forensic identification specialties, where there are rarely clear external indices of mistaken practice because the ground truth of the case is not independently known or immediately apparent. So under certain conditions, experience may warrant a conclusion of reliability, but not under the conditions generally obtaining in ordinary handwriting identification practices. See Risinger & Saks, *supra* n. 8, at 33-34.

to testify to his conclusion that the signatures on the documents which were the subject of the prosecution were forgeries, based on his examination of the numerous genuine signatures of the putative victim, the court said that the defense had

presented no evidence, beyond the bald assertions [of its experts], that FDEs [forensic document examiners] cannot reliably perform this task. Defendants have simply challenged the FDE community to prove that this task can be done reliably. Such a demonstration of proof, which may be appropriate for a scientific expert witness, has never been imposed on “skilled” experts.¹⁰⁵

Judge McKenna then declared himself persuaded that the inferences as to genuineness of the signature at issue in the case before him “can be performed with sufficient reliability to merit admission.”

It should be clear that Judge McKenna’s bifurcated standard of reliability based on the classification of proffered expertise as “science or non-science” with higher standards applied to science, does not survive the Supreme Court’s decision in *Kumho Tire v. Carmichael*.¹⁰⁶

Finally, it should also be noted that Judge McKenna, anticipating the particularization focus of *Kumho Tire*, emphasized that the only claimed skill he was dealing with in his opinion was the skill of comparing a known signature with a questioned signature to determine whether the questioned signature was really signed by the person whose name was reflected, and not any other asserted skill or global claim of expertise. This point has generally been lost on later courts and commentators, who have tended to treat *Starzecpyzel* as if it dealt with global validity.

105. *Starzecpyzel*, 880 F. Supp. at 1046. The implication that the ultimate risk of non-persuasion as to reliability is ever on the opponent of a proffer of evidence is startling, in light of Federal Rule of Evidence 104 and the general notion that the party seeking admission must convince the court affirmatively of admissibility once admissibility is seriously put in issue. Actually, Judge McKenna seems to have been aware of the problems that would be created by formally placing the burden of persuasion on the opponent of a proffer. The actual position taken by his opinion on that issue is ambiguous and unclear, and, one must conclude, intentionally so. In the only explicit discussion of the issue, he concedes that Professor Berger takes the (standard) position that the burden is on the proponent of admissibility. *Id.* at 1031 (citing Margaret A. Berger, *Evidentiary Framework*, in *Reference Manual on Scientific Evidence 76* (U.S. Govt. Printing Off. 1995)). He then cites an unexamined single line claim to the contrary from the middle of an article by a products liability practitioner whose main position is that *Daubert*’s effect should be viewed as allowing more to be admitted, not less. *Id.* at 1031 (citing Arvin Maskin, *The Impact of Daubert on the Admissibility of Scientific Evidence: The Supreme Court Catches Up with a Decade of Jurisprudence*, 15 *Cardozo L. Rev.* 1929, 1936 (1994)). However, Judge McKenna attempts not to choose between these two positions, characterizing the question before him as “legal” rather than factual, as if that made the problem go away. *Id.* at 1031. His later language from the passage cited in the text of this Article seems to show his functional adoption of the problematical Maskin position; however, even though, as the text indicates, he goes on to say that he is affirmatively persuaded that handwriting identification testimony “can be performed” with “sufficient reliability to merit admission.” *Id.* at 1046. One of the effects of the Supreme Court’s opinion in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), was to clarify that, after the opponent of a proffer of expertise has shown that there is a tenable claim that the proffer is unreliable, the burden is on the proponent to establish sufficient reliability to satisfy the requirements of Federal Rule of Evidence 702. See *Kumho*, 526 U.S. at 149, 152. It should also be noted that Judge McKenna had before him the results of the Galbraith study and the first Kam et al. study, but indicated that he did not regard them as sufficient to draw any conclusions. *Starzecpyzel*, 880 F. Supp. at 1034, 1037.

106. 526 U.S. 137.

2. *United States v. Ruth*¹⁰⁷ (Army Crim. App., Gonzales, J., Edwards and Russell, JJ., concurring)

In *Ruth* (*Ruth I*), the Court of Military Appeals faced two issues, one dealing with the reliability of the proffered handwriting identification testimony of Special Agent Richard Horton¹⁰⁸ of the Army Criminal Investigation Division, and the other with a claim of denial of due process when the defense was not allowed to call its own expert to testify before the jury concerning the weaknesses of handwriting identification expertise.¹⁰⁹ As to the reliability challenge, the *Ruth I* court first noted that handwriting expertise had been accepted in the military courts “for at least the past forty-four years.”¹¹⁰ It then declared that *Daubert* did not apply to nonscientific expertise, cited *Starzeczyzel* to establish the nonscientific nature of questioned document examination, and then declared that

it has been generally understood that expert testimony on handwriting comparison can assist panel members by focusing their attention on minute similarities and dissimilarities between exemplars that panel members might otherwise miss when they perform their own visual comparison. . . . It is largely in the location of these similarities and differences that a professional documents examiner has an advantage over panel members.¹¹¹

As authority for this the court pointed to no data of any kind, but to an unpublished pre-*Daubert* opinion in *United States v. Buck*,¹¹² and concluded on this basis that the challenged handwriting identification testimony was admissible as helpful to the trier of fact under Federal Rule of Evidence 702. This unanalyzed global approach is now clearly inappropriate after *Kumho Tire*.¹¹³ What it reflects, as much by implication as explicitly, is a combination of what may be called the “sufficient experience” test,¹¹⁴

107. 42 M.J. 730 (Army Crim. App. 1995) [hereinafter *Ruth I*], *aff'd*, 46 M.J. 1 (Armed Forces App. 1997) [hereinafter *Ruth II*]. It should be noted that the U.S. Court of Appeals for the Armed Forces has discretionary review jurisdiction much like the certiorari jurisdiction of the Supreme Court, and that the only issue it certified for review was the trial court’s handling of the proffer of Professor Mark P. Denbeaux as an expert on the weaknesses of handwriting identification expertise. That makes the opinion in *Ruth II* a proper source for case facts, but not otherwise relevant to this Appendix.

108. Horton is now certified by the ABFDE. It is not clear if he was at the time. This opinion makes less of the document examiner’s credentials explicitly than many subsequent opinions.

109. The second issue has an interesting history of its own, a history which nicely corroborates many of the points about judicial attitudes and performances made in this Article through the examination of the reliability decisions. A full consideration of the implications of the “counter-expertise” decisions may be found in Risinger, *Handwriting Identification*, *supra* note 11, at section 33:8, but they will not be examined here.

110. *Ruth I*, 42 M.J. at 732.

111. *Id.*

112. 1987 WL 19300 (S.D.N.Y. Oct. 28, 1987).

113. See generally Risinger, *Task at Hand*, *supra* n. 11. In the original version of this text I said that the global approach was clearly “unavailable” after *Kumho Tire*. Such an approach is clearly inappropriate, but subsequent events have shown that lower courts continue to view it as available nonetheless.

114. The “sufficient experience” approach is first set out in Edward J. Imwinkelried, *The Next Step after Daubert: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Non-Scientific Testimony*, 15 Cardozo L. Rev. 2271–94 (1994). See also Lisa M. Agrimonte, *The Limitations of Daubert and Its Application to Quasi-Scientific Experts, A Two Year Case Review of Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 35 Washburn L.J. 134, 152–56 (1995); L. Timothy Perrin, *Expert Witness Testimony: Back to the Future*, 29 U. Rich. L. Rev. 1389, 1457–62 (1995).

To be fair to Professor Imwinkelried, the test was set out as a preliminary step in an article pointing out the difficulties of formulating reliability tests for nonscientific expertise, especially “clinical” or “experience-based” expertise. Professor Imwinkelried himself well understood that *Daubert* in its general aspects required

which emphasizes experience without testing to see if such experience has actually resulted in the claimed skill, and the “guild” test,¹¹⁵ in which the existence of an organized group which supervises accreditation (and an expert’s membership in it) is taken as a sufficient warrant to infer reliability for admissibility purposes. As we will see, elements of these two approaches, usually conflated,¹¹⁶ have commonly been invoked in an effort to justify admission of claimed handwriting identification expertise, and I will henceforth refer to this conflated rendition simply as the “guild test.”

It is important to note what application of expertise was being claimed reliable in *Ruth*. It was not the ability to determine if a signature was genuine, as was the case in *Starzecpyzel*. It was the much more questionable ability to attribute the authorship of a very small sample of writing (like a forged signature) to a particular person based on comparison to examples of the asserted forger’s true writing.¹¹⁷

gatekeeping vigilance as to all expertise. Unfortunately, the approach he set out was easily embraced by proponents of the *status quo ante Daubert*, since all that it required was the testimony of the witness that he had had lots of experience, and that much of that experience had arisen in circumstances substantially like those in the case at hand. See e.g. Transcr. of Test. of Grant R. Sperry, *U.S. v. Jones*, No. Cr. 3-95-24 (E.D. Tenn. June 29, 1995) (discussed *infra* in the text at notes 150–152). Practitioners of all sorts of questionable claimed skills can pass this test. It is not that the test is not sufficient for some kinds of expertise in some circumstances. It works fine for what I have called “everyday summarizational” experts, who testify to such things as industry practice from their years in an industry. See D. Michael Risinger, *A Functional Taxonomy of Expertise*, in David L. Faigman et. al., *Modern Scientific Evidence* ch. 2, § 2:4 (West 2008). The problem is that it supplies little in the way of validation for what I have called “translational” experts, such as handwriting identification experts, who claim that they can translate their experience into particular adjudicative inferences. Here we must worry about the reliability of not only the subjective data base, but also the subjective translational system applied to it. In short, merely showing up at the scene after auto accidents, even hundreds of times, is a weak warrant to believe a witness’s inferences about what happened in the accident itself.

115. The “guild” test goes beyond the “sufficient experience” test by focusing inquiry on the existence of a group that certifies training, experience, and methodology. Acceptance by such a group establishes reliability. Note this is not the “*Frye* test” applied to nonscientific expertise, since in the absence of such group acceptance an individual witness might be found reliable for other reasons, but, like the *Frye* test, acceptance by such a group guarantees admissibility. The problem, of course, is that astrology can pass this test. I do not say this tongue-in-cheek. Google the term “certified astrologer” and you will find an entire world of organizations, certifying bodies, testing regimes, publications, etc., with virtually the same structure as that found in regard to handwriting (and other forensic specialties). In fact, one absolutely necessary test for whether some claimed approach to expert reliability is tenable is the “Astrology Test of Proposed Reliability Tests” that is, would astrology pass the proposed test. If it would, the test is by definition insufficient. See Risinger, *Task at Hand*, *supra* n. 11, at 776–77. For the most extended and explicit assertion of the guild approach, see Moenssens, *supra* n. 6, at 291–92. See also Daniel J. Capra, *The Daubert Puzzle*, 32 Ga. L. Rev. 699, 741–46 (1998); J. Brook Latham, *The “Same Intellectual Rigor” Test Provides an Effective Method for Determining the Reliability of All Expert Testimony, Without Regard to Whether the Testimony Comprises “Scientific Knowledge” or “Technical or Other Specialized Knowledge”*, 28 U. Mem. L. Rev. 1053 (1998); Thomas M. Reavley & Daniel A. Petalas, *A Plea for Return to Evidence Rule 702*, 77 Tex. L. Rev. 493 (1998). See also (or perhaps *cf.*) Lisa M. Agrimonte, *supra* n. 114, at 155; Peter B. Oh, *Assessing Admissibility of Nonscientific Expert Evidence under Federal Rule of Evidence 702*, 64 Def. Counsel J. 556 (1997) (explicitly advocating the *Frye* test for nonscientific evidence). The practical (though often inexplicit) adoption of the guild test by courts is dealt with in connection with numerous cases discussed *infra*.

116. As will become apparent in the discussion of the cases *infra*, one often has to infer the test implicitly being used from the court’s recitation of training, experience, and guild membership, followed by a conclusory declaration of reliability.

117. Standard Osbornian theory of handwriting identification holds the former to be a much easier task than the latter. See D. Michael Risinger & Michael J. Saks, *supra* n. 8, at 73. In this regard, consider the following quotations from three of the most respected authorities in the standard document examination literature: “It is much easier to show that a fraudulent signature is not genuine than it is to show that such a writing is actually the work of a particular writer.” Albert S. Osborn, *Questioned Documents* 286–87 (2d ed., Nelson-Hall 1929). “[If the questioned document is not in the natural hand of the forger] . . . the entire problem is an extremely difficult one, and if not handled carefully and cautiously, can lead to serious errors.” Ordway Hilton, *Can the*

The facts in *Ruth* are these:¹¹⁸ Some person or persons had put together the following get-rich-quick scam. Someone opened a bank account in Lichtenstein in the fictitious name “William Cooper” using a falsified copy of a passport. They then gained access to the personnel and pay records of 30 to 35 American soldiers stationed at a base in Bamberg, Germany. Using the information on bank accounts in those records, they sent letters to the (American) banks of the soldiers directing wire transfers of the complete balance of their accounts to the “William Cooper” account at “one a.m. Eastern Time Zone on 01 May 1992.” The letters were apparently typed, with handwritten signatures. The scheme was uncovered when the banks were told by their depositors that the letters were fraudulent. (It is not completely clear whether this was before or after any transfers, but appears to have been before, as a result of bank inquiries concerning these unusual balance transfer directives.)

Suspicion fell upon Private Joseph M. Durocher and Specialist Jeffrey A. Ruth, who were personnel action clerks in Bamberg with access to the relevant bank information. Durocher was interrogated, and apparently cooperated with prosecutors, confessing to the scheme and implicating Ruth. Durocher’s testimony was the main evidence against Ruth. The only corroboration of Durocher’s story was a questioned document examiner’s testimony that Ruth signed one of the thirty-odd forged signatures on letters to banks, and that Ruth wrote one (but not all) of the signatures of William Cooper on the applications used to open the bank account in Lichtenstein.

By now the reader will see the problem. Under a proper *Kumho Tire* approach, the issue would have been:

[W]hat if anything establishes that questioned document examiners can reliably identify the writer of a small sample of writing comprised of only 14-16 letters, under circumstances where the writing might or might not represent an attempt to simulate the writing of the named signatory (since whoever created the scam had access to records containing their actual signatures), and where there is a high circumstantial likelihood of disguise of some sort being utilized in the writing in any event?

This question was clearly neither asked nor answered by the court in *Ruth*.

3. *United States v. Velasquez*¹¹⁹ (3d Cir., Roth, J., Becker and Nygaard, JJ., concurring)

United States v. Velasquez presented a similar problem to that in *Ruth*. Again, the case presents both a reliability challenge and a challenge to the exclusion of a counter-expert, and again, discussion of the latter issue will be set aside in this Appendix. As to the reliability issue, the case involved the conviction of Velasquez for a violation of 21 U.S.C.A. § 848, engaging in a continual criminal enterprise involving five people or

Forger Be Identified from His Handwriting? 43 J. Crim. L., Criminology & Police Sci. 547, 547-48, 555 (1953). And “[W]hile it is often possible to express and justify a definite opinion as to whether a signature is genuine or forged, it is rarely that the identity of the forger can be established by comparing the handwriting of the forgery and specimens of the handwriting of suspects.” Wilson R. Harrison, *Suspect Documents: Their Scientific Examination* 374 (Praeger 1966).

118. The true crime narrative here given is reconstructed from the statements of fact in both the *Ruth I* and *Ruth II* opinions. I have avoided burdening the text with specific notes to each sentence.

119. 64 F.3d 844 (3d Cir. 1995).

more,¹²⁰ which carries a very long sentence. The only evidence establishing that five people rather than three were involved in the alleged drug scheme was testimony by a government questioned documents examiner, Lynn Bonjour of the Postal Inspection Service, who testified that mailing labels used to ship drugs had been written at least partly by two alleged co-participants of defendant. Thus, under a proper *Kumho Tire* approach, the issue would be, “What establishes that questioned document examiners can reliably attribute authorship of individual parts of a document, the whole of which is extremely short, to particular individuals,” or something of that nature. This question was neither asked nor answered by the *Velasquez* court. Of course, *Kumho Tire* had not yet been decided, but the question was the proper reliability question to ask in any event. Instead, the court adopted without analysis and by default what was functionally the “guild” test. The *Velasquez* court’s “reliability” analysis consists of merely reciting the document examiner’s training and experience, and her assertion that she had performed her analysis properly, followed by a declaration that this established sufficient reliability.¹²¹ After the decision in *Kumho Tire*, the emphasis by the Supreme Court on the reliability of expertise in regard to the task to which the expertise is applied in the particular case would seem to dispose of such a “guild test” as a dispositive approach, especially when applied globally, as it was in *Velasquez*. Whether *Kumho Tire* has had this effect in practice or not is a different question.

4. *United States v. Gonzales*¹²² (8th Cir., Magill, J., Ross and Murphy, JJ., concurring)

Juan and Jose Valenzuela-Obeso were the targets of a drug smuggling investigation that finally led to search warrants resulting in the seizure of a pound of near-pure methamphetamine and fifty-eight pounds of marijuana, among other things. While executing the searches, officers also discovered a number of Western Union cash register receipts that suggested that Juan and Jose were transferring money in a money laundering scheme. Juan and Jose and their “common law wives,” Patricia Lopez and Martha Gonzales, were federally indicted on multiple counts including charges of money laundering.¹²³ A large part of the proof of the money laundering charges involved various Western Union “MTAs” (money transfer applications), and it was incumbent on the prosecution to tie one or another of the defendants to those MTAs.¹²⁴ Various witnesses testified on the issue, including Debra Springer, a handwriting expert who attributed the writing on various of the MTAs to various defendants.¹²⁵ In a footnote,

120. *Id.* at 847 n. 5.

121. The *Velasquez* court initially took the position that *Daubert* did not apply to handwriting because it was not science, *id.* at 850 (citing *Starzecpyzel*, 88 F. Supp. 1027), but then claimed that “in an exercise of caution” it would review the proffered expertise “for qualifications, reliability and fitness as those factors have been explicated in *Daubert*.” *Id.* It then proceeded never to mention any reliability criteria beyond the document examiner’s experience and her testimony as to the standard practice, which was the very subject of the reliability challenge. *Id.* at 850–51.

122. 90 F.3d 1363 (8th Cir. 1996).

123. *Id.* at 1366. Hence the name Gonzales in the caption.

124. *Id.*

125. *Id.* at 1366–67.

the court says: “Gonzales and Lopez challenge the admissibility of the handwriting evidence. Having reviewed their claims, we conclude that the district court did not abuse its discretion in admitting this evidence.”¹²⁶

5. *United States v. McVeigh*¹²⁷ (D. Colo., Matsch, J.)

Timothy McVeigh was charged with the 1992 bombing of the Alfred P. Murrah Federal Office Building in Oklahoma City, which took 168 lives. As part of its case against McVeigh, the prosecution wished to offer the testimony of a questioned document examiner who would testify that McVeigh had written various documents associated with the rental of the truck used in the bombing, among other things. The defense challenged the reliability of the proposed handwriting testimony. After a hearing, Judge Matsch ruled, without issuing a formal opinion, that while the government’s questioned document examiner would be allowed to point out to the jury similarities between the known exemplars and questioned documents, the document examiner would not be allowed to give a conclusion as to whether McVeigh did or did not write the questioned documents (the truck rental forms, etc.).¹²⁸ The colloquy that took place prior to Judge Matsch’s oral decision is extensive, but contains insufficient detail in regard to the characteristics of the various documents involved to determine exactly what specific expert task or tasks were at issue in the case, beyond the general circumstance that some authorship of some documents was going to be attributed to McVeigh by a document examiner after comparing them to known samples of McVeigh’s handwriting.¹²⁹ There may have been an issue of printing comparison, or printing to cursive comparison, but that is not clear. Clearly Judge Matsch, in this pre-*Kumho Tire* decision, does not formulate the specific task at hand with the particularity required by *Kumho Tire*. In addition, it is not clear how the rather Solomonic decision of restricting the document examiner to pointing out similarities really helps in practice, since the conclusion of common source will be clearly implied by the form of the testimony, although in fairness, such a restriction might reduce its impact and the weight given to it by the jury.¹³⁰ Nevertheless, the result in *McVeigh* later became very influential by virtue of the influence it had on Judge Gertner in *United States v. Hines*,¹³¹ and on subsequent cases, some involving handwriting identification,¹³² and some not.¹³³

126. *Id.* at 1370 n. 5. This case is one from the Matley list, *supra* note 4, and I include it only in an abundance of caution, for it is not clearly a reliability ruling. However, it was decided after *Starzecpyzel* called attention to handwriting reliability issues under *Daubert*, so that pushed me towards including it.

127. Pre-Trial Transcr., *U.S. v. McVeigh*, 1997 WL 47724 (D. Colo. Feb. 5, 1997). For a short sketch of the main points of the *McVeigh* case, see D. Michael Risinger, *John Henry Wigmore, Johnny Lynn Old Chief, and “Legitimate Moral Force”: Keeping the Courtroom Safe for Heartstrings and Gore*, 49 *Hastings L.J.* 403, 404 (1998).

128. The oral argument on the issue and Judge Matsch’s oral decision is reported at Pre-Trial Transcr., *McVeigh*, 1997 WL 47724.

129. *Id.*

130. This approach has some academic support. See Robert P. Mosteller, *Finding the Golden Mean with Daubert: An Elusive, Perhaps Impossible, Goal*, 52 *Vill. L. Rev.* 723, 760–62 (2007).

131. 55 F. Supp. 2d 62 (D. Mass. 1999). This case (case 8 *infra*) is discussed *infra* at notes 171–86 and accompanying text.

132. See e.g. *U.S. v. Hernandez*, 42 Fed. Appx. 173 (10th Cir. 2002) (unpublished).

133. See e.g. *U.S. v. Monteiro*, 407 F. Supp. 2d 351 (D. Mass. 2006) (refusing toolmark evidence re shell

6. *United States v. Jones*¹³⁴ (6th Cir., Moore, J., Daughtry and Krupansky, JJ., concurring¹³⁵)

In many ways the 6th Circuit opinion in *United States v. Jones* is the standard against which all other unsatisfactory treatments of reliability issues in any area must be judged. And it sets a very high standard of unsatisfactoriness indeed. In *Jones*, a thief obtained a credit card promotional mailing sent to Kathleen Jones's daughter's husband's aunt and uncle, on whose property the daughter and her husband lived in a house trailer.¹³⁶ The thief then rented a post office box in the name of a third party (who happened to be a co-worker of the defendant), and filled out the credit card application, requesting that the card be sent to the postbox.¹³⁷ When the card arrived, items were charged on it to the tune of \$3,748 over a two-week period.¹³⁸ When the credit card company came looking, somebody pointed a finger at Kathleen Jones. Part of the evidence against Jones¹³⁹ was testimony by a questioned document examiner.¹⁴⁰ The exact nature of that testimony is obscured a little by the court of appeals right from the beginning, since the opinion states in the third paragraph that the document examiner's testimony was that "Jones's signature was on: (1) the credit card application; (2) a post-office box registration form for the post-office box to which the card was sent; and (3) two Howard Johnson's motel registration forms, which contained the fraudulently procured Visa number at issue."¹⁴¹ However, Jones's signature was on none of these documents. What was on the documents was what purported to be the signature of the aunt, which the questioned document examiner attributed to Jones. So the core task-specific reliability issue was in *Jones* virtually the same as in *Ruth* and close to the one in *Velasquez*, and as in those cases, it was neither asked nor answered. However, the way in which it was not answered is what raises *Jones* to new heights of unsatisfactory judgecraft.

The opinion first appropriately spends a page disposing of a trivial challenge to the authentication of an exemplar. The court then spends over five pages discussing the

casings).

134. 107 F.3d 1147 (6th Cir. 1997). The facts of the true crime narrative that is to follow are taken from the court of appeals opinion in *Jones*, supplemented to resolve minor ambiguities by the briefs of the parties at trial and on appeal and the transcript of the trial, on file with the author. Exact footnotes to unpublished sources have been omitted to avoid burdening the text.

135. Krupansky dissented on another point. *Id.* at 1165 (Krupansky, J., concurring in part and dissenting in part).

136. *Id.* at 1149 (majority).

137. *Id.*

138. *Id.*

139. There was other evidence against Jones independent of the handwriting identification. In addition to the coincidence that the post office box was in the name of a co-worker whose purse had been rifled when Jones was around, there was an identification of Jones by a motel clerk at a motel where the fraudulently obtained number was used, and an identification of her (by her daughter) from a bank camera photo (at a bank where she had no account) showing her doing a transaction at the approximate time the credit card was used to obtain money from that bank. Indeed, one significant issue, had the courts bothered to go into the issues properly, would have been whether the document examiner was privy to such information, and its effect on his conclusion, consciously or unconsciously. See Risinger & Saks, *supra* n. 8, at 64; see generally Risinger et al., *supra* n. 22.

140. *Jones*, 107 F.3d at 1149.

141. *Id.*

standard of review to be applied (this was prior to the Supreme Court's opinion in *General Electric Co. v. Joiner*¹⁴²). It then spends two and a half pages deciding that *Starzecpyzel* was right, handwriting expertise is not science, so *Daubert* is irrelevant.¹⁴³ (This was prior to *Kumho Tire*, of course.) The court then says: "Without relying on *Daubert*, we now address whether handwriting analysis constitutes 'technical, or other specialized knowledge' under the Federal Rules of Evidence and whether the expert handwriting analysis offered in this case was sufficiently reliable."¹⁴⁴ On these core issues of the case the court spends less than two and a half pages. In this sparse treatment the court initially makes two points it appears to think are persuasive on issues of general reliability: (1) Other courts and commentators have uniformly found or assumed that handwriting identification expertise is (globally) a proper subject of court testimony, and that the appellant is therefore "asking us to do what no other court we have found has done," and (2) "The Federal Rules of Evidence themselves suggest that handwriting analysis is a field of expertise."¹⁴⁵ In trying to justify this latter statement, the court sets out an egregious version of what I call "the Rule 901(b)(3)¹⁴⁶ fallacy," and flagrantly misquotes the rule in order to do it.¹⁴⁷

As is well known, Federal Rule of Evidence 901(a) sets out the general standard for the authentication of any evidence whatsoever, and Federal Rule of Evidence 901(b) gives a non-exhaustive list of acceptable recurrent means of satisfying the general requirements of Federal Rule of Evidence 901(a) for "evidence sufficient to support a finding that the matter in question is what its proponent claims."¹⁴⁸ One way of doing this is set out in 901(b)(3): "Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated." This is the full text of the rule. It is neither limited to documents (much less handwriting), nor does it refer to them. In common practice it has been applied whenever an area of expertise, from fingerprints to DNA analysis, is shown or conceded to be reliable to make such comparisons under the standards of Rule 702.¹⁴⁹ However, Federal Rule of Evidence 901(b)(3) most certainly does not contain any suggestion that because there is a claim that an expert is comparing

142. 522 U.S. 136, 139 (1997) (establishing that a determination of sufficient reliability to meet the requirements of Federal Rule of Evidence 702 is to be reviewed on appeal as a normal admissibility decision subject to reversal only for "abuse of discretion"). This decision has been controversial, because it both deprives the circuit courts of the power, and relieves them of the responsibility, to develop any significant Rule 702 jurisprudence, and to norm the lower courts into respectable uniformity in regard to similar issues of expertise.

143. *Jones*, 107 F.3d at 1156–59.

144. *Id.* at 1159.

145. *Id.*

146. Fed. R. Evid. 901(b)(3).

147. This argument, untenable though it is, was presented to Judge McKenna in *Starzecpyzel*, and properly rejected by him. See 800 F. Supp at 1040 n. 14. Nevertheless, it apparently continues to be a feature of government briefs in response to Rule 702 reliability challenges concerning handwriting identification, with significant success, which ought to be surprising given the illogic of the argument, but I have ceased to be surprised at anything judges do in this area.

148. Fed. R. Evid. 901(b)(3) (Presumably the rule, which the Advisory Committee Note indicates is an analogue to Federal Rule of Evidence 104(b) (Relevancy Conditioned on Fact), intends by implication "is what its proponent claims that renders it relevant.").

149. See Wright & Gold, *Federal Practice and Procedure, Evidence*, vol. 31, § 7108, 63–65 nn. 2–15 (West 2000) (collecting cases applying Rule 901(b)(3)).

specimens, the existence of Rule 901(b)(3) automatically means that he or she meets the reliability requirements of Rule 702. This is flagrantly backward reasoning, whether applied to handwriting identification expertise or anything else. Pursuant to *Daubert* and *Kumho Tire*, the existence of reliable expertise must be determined under Federal Rule of Evidence 702. If reliable expertise involving comparison of exemplars is found to exist under the standards of Rule 702, then Rule 901(b)(3) may be invoked to establish its sufficiency for authentication purposes (assuming the expertise involves such a comparison).

The mistaken argument from Rule 901(b)(3) resorted to by *Jones* is the standard form of the fallacy often put forward in prosecution briefs.¹⁵⁰ The *Jones* court, however, takes it one step further (presumably as a result of an embarrassing failure to read the actual text of the rule) when it says that 901(b)(3) “provides for *authentication of a document* by ‘[c]omparison by . . . expert witnesses with specimens which have been authenticated,’”¹⁵¹ as if the rule specifically referred to or were limited to document authentication. It then compounds its error by claiming that if handwriting identification expertise were excluded, “there would be no place for expert witnesses to compare writing on one document with that on another in order to authenticate a document. In other words, appellant’s suggested approach *would render Rule 901(b)(3) meaningless.*”¹⁵² Perhaps this would be true if the rule said what the court apparently thinks it says, but plainly, it does not.

To its credit, the court does realize, in instinctive anticipation of *Kumho Tire*, that what it has written does not “guarantee the reliability or admissibility of this type of testimony in a particular case. Because this is nonscientific testimony its reliability largely depends on the facts of each case.”¹⁵³ However, it then sets out an approach to “reliability” that deals with actual reliability almost not at all. Perhaps not surprisingly, it adopts a global combination of the “experience” test and the “guild test.”

Jones was, of course, as already noted, not the first court to adopt the “guild” test. However, it is in the details that the *Jones* court seems to believe help justify an inference of reliability where the unintentional humor of the opinion shows forth most strongly. After describing a fairly normal training history for a government questioned document examiner, the court notes that his primary job responsibilities consist of the “examination and comparison of questioned handwriting.”¹⁵⁴ The court then notes that the witness, Grant Sperry of the Postal Inspection Service (ABDFE),

estimated that throughout his employment, he had conducted “well over a million comparative examinations.” In addition, he has published numerous articles in the field and testified approximately 240 times in various courts. To put it bluntly, the federal government pays him to analyze documents, the precise task he was called upon to do in

150. See e.g. Pre-trial Transcript, *McVeigh*, 1997 WL 47724 at **15–17 (rejecting government’s attempt to use argument based on this mistaken reading of Rule 901(b)(3)). Judge Matsch catches the fallacy. *Id.* at *16.

151. *Jones*, 107 F.3d at 1159.

152. *Id.* (emphasis added).

153. *Id.* at 1160.

154. *Id.*

the district court.¹⁵⁵

This may be the first case on record in which a person's government job description has been taken as evidence of the reliability of his or her asserted expertise. Even more starkly, the passage illustrates the credulity of the court, and the collision between the court's approach and any even mildly skeptical approach to the dependability of information. This witness testified to conducting "well over a million comparative examinations."¹⁵⁶ If he had been doing document examination eighteen hours a day every day for fifty years, he would still have to have done more than three comparative examinations per hour to reach a million.¹⁵⁷ Yet the court swallows the testimony without hesitation and cites it as substantiation for the reliability of the witness's expertise. The *Jones* court then continues as follows: "See Imwinkelried, 15 Cardozo L. Rev. at 2292-93 (stating that the reliability of non-scientific expert testimony increases with the more experience an expert has had and the similarity of those experiences to the expert's testimony)."¹⁵⁸ However, the cited article makes no such sweeping statement at the cited pages or anywhere else.¹⁵⁹

The court then continues its unaccountable course by asserting that "handwriting examiners themselves have recognized the importance of experience"¹⁶⁰ (no doubt true), but it supports this with a quote from an article in the *Journal of Forensic Document Examination*, which actually claims that the bulk of document examiner experience with handwriting forms is gotten outside the professional sphere and is common with the rest of the world. "For handwriting examiners, this experience comes mainly from the exposure we have to handwriting throughout the course of our life, the majority of which normally would occur before specializing in forensic handwriting examination."¹⁶¹

It is on these grounds, coupled with the fact that the document examiner described the process by which he arrived at his conclusions, that the court declared: "Given Sperry's various training experiences, his job responsibilities, his years of practical experience, and the detailed nature of his testimony in this case, we hold that the district court did not abuse its discretion by admitting his testimony."¹⁶²

155. *Id.* (internal citations to record omitted).

156. The trial transcript does indeed reveal this to have been Mr. Sperry's testimony.

157. The real circumstances would involve even more extreme numbers. Mr. Sperry began his training (a two-year course) in 1979. Transcr. of Test. of Grant R. Sperry at 121, *Jones*, No. CR 3-95-24 (on file with author). Thus, at the time of trial, June 1995, the witness, Mr. Sperry, had sixteen years of experience, fourteen of which were post-training. This more than triples his claimed hourly output, to over nine for every waking hour. Yet, besides his "well over a million comparative examinations," he also testified to having been assigned to "73 [or] 7,400 cases." *Id.* at 123. This works out to at least one and a quarter cases, every day including Sundays and holidays, without a break, for all sixteen years, including his training period.

158. *Jones*, 107 F.3d at 1160.

159. Which is not surprising, because this is the kind of unsophisticated universal statement which Professor Imwinkelried would generally not make. The article does take the position that some kinds of inferences must be based on much experience as a precondition to any claim to reliability, but never says that such experience alone guarantees or even necessarily increases accuracy in all cases. The most that can be said is that Imwinkelried says experience is sometimes a necessary condition for reliability, not that it is always a sufficient condition.

160. *Id.*

161. *Id.* (quoting Bryan Found & Doug Rogers, *Contemporary Issues in Forensic Handwriting Examination: A Discussion of Key Issues in the Wake of the Starzecpyzel Decision*, 8 J. Forensic Doc. Exam. 1, 26 (1995)).

162. *Id.* at 1161.

7. *United States v. Paul*¹⁶³ (11th Cir., Hatchett, J., joined by Hull and Moore, JJ.¹⁶⁴)

If *Jones*'s careless handling of both sources and reasoning is pretty breathtaking,¹⁶⁵ *United States v. Paul* is in some ways stranger still. In *Paul*, the court of appeals' statement of the facts and history of the case is precise and pertinent, and will be set out here in its entirety:

I. FACTS

In May 1996, an unidentified person who stated that he was a bank investigator telephoned Ed Spearman, branch manager of Wachovia National Bank (Wachovia) at Atlanta, Georgia, and warned him that someone intended to leave a note at the bank in an attempt to extort money from the bank. The "investigator" instructed Spearman to follow the directions in the note. Spearman contacted bank security and the Federal Bureau of Investigation (FBI), who advised him to contact the agency immediately if he received an extortion demand. On the following morning, a security camera outside the entrance to Wachovia Bank videotaped a man, wearing a scarf and sunglasses, place an envelope under the front door of the bank. Inside the envelope, addressed to Spearman, was an extortion note that directed Spearman to deliver \$100,000 to the men's restroom of a downtown Atlanta McDonald's restaurant. The note threatened violence if Spearman did not follow the instructions and make the payment. Spearman notified bank security and the FBI.

The investigating agents developed a plan to arrest the extortionist: an FBI agent, acting as Spearman, would drive Spearman's car to the McDonald's and place a briefcase in the men's restroom, while surveillance agents would watch the restroom and arrest the person who took the briefcase.

In executing the plan, FBI Agent Eric Bryant testified that upon his arrival at the McDonald's, he entered the men's restroom, observed appellant Sunonda Paul in a restroom stall, left a briefcase and exited the restroom. FBI surveillance agents testified that they later saw Paul sitting at a table near the restroom. As Bryant left the McDonald's, surveillance agents observed Paul enter the restroom again and then attempt to leave the establishment with the briefcase in his backpack. When confronted, Paul told the agents that he was in the area to visit a nearby gym and had stopped at the McDonald's for breakfast. He also told them that he decided to take the briefcase after he found it in the restroom. Paul, however, was dressed in casual street clothing and had no gym clothes or athletic equipment in his possession. The agents arrested him.

II. PROCEDURAL HISTORY

A grand jury indicted Paul on one count of bank extortion, in violation of 18 U.S.C. § 2113(a), and Paul pleaded not guilty. Prior to trial, Paul moved *in limine* to exclude FBI document examiner Larry Ziegler's testimony regarding handwriting analysis. The district court, however, denied Paul's motion at the pretrial hearing.

163. 175 F.3d 906 (11th Cir. 1999).

164. William T. Moore was a District Court Judge from the Southern District of Georgia, sitting by designation. *Id.* at 908.

165. When the first version of the *Jones* summary was published in 2000, I used the word "unusual" instead of "breathtaking." I am no longer convinced that "unusual" is an appropriate descriptor.

The demand note left at Wachovia was the key evidence in determining whether Paul was the extortionist. Although FBI agents examined the videotape to determine the identity of the person who delivered the note, they could not identify the person conclusively. Consequently, the FBI conducted fingerprint and handwriting analysis tests on the note to establish the identity of the extortionist. A fingerprint expert concluded that the latent prints on the note and envelope did not match Paul's fingerprints.

Ziegler, the FBI document examiner, compared the handwriting on the note and the envelope to Paul's handwriting samples and concluded that Paul was the author of both. Specifically, Ziegler asked Paul to write the word restaurant. In the presence of an FBI agent, Paul misspelled the word as follows: "resturant." In the extortion note the extortionist misspelled the word restaurant the same way. Ziegler also asked Paul to write out "Spearman." Paul spelled it "Sperman," the same way the extortionist had addressed the envelope.¹⁶⁶

What is odd about this is that the Court seems to have turned the case into one concerning the reliability of reasoning about the authorship of a document from misspellings in exemplars, without realizing that this is not necessarily an expertise issue. Its proper role in document examiner practice is somewhat controversial even in document examiner literature,¹⁶⁷ and it has little to do with the reliability of assignment of authorship based on comparison of form.

Suppose an investigator with no claimed skill in document examination notices what appears to him to be unusual misspellings in a typed robbery note. (The same misspelling, say, that was in the robbery note in Woody Allen's movie *Take the Money and Run*, which said (in part) "I am pointing a gub at you.") Acting on other information, he obtains a search warrant for the residence of a suspect and discovers numerous documents, typed or not, in which the suspect refers to "gubs" in contexts which clearly indicate he meant guns (e.g., "The NRA is right to oppose gub control legislation"). Virtually every court would receive such evidence authenticated by the investigator, though he claims no special knowledge about the uncommonness of this particular misspelling of "gun." Such a case raises interesting issues of jury notice and the accuracy of jury notice in regard to base rate occurrences of misspellings derived from common experience, but not of *Daubert/Kumho* reliability of expertise. Exactly how much a document examiner ought to rely or be influenced by misspellings is a subject of some controversy, and, as noted above, there have been warnings in document examiner literature against assuming uncommonness and making too much of misspellings.¹⁶⁸ All of this appears to have escaped the notice of the court of appeals, however, since these issues are never mentioned in the rest of the opinion.

Of course, though it is not explicitly noted by the court, the questioned document examiner in the case did perform a comparison-of-form analysis in addition to noting the misspellings, and it was that identification by comparison of form which was the subject of Paul's reliability objection. The court deals with that objection as follows:

166. *Id.* at 908–09.

167. See Risinger et al., *supra* n. 14, at 770–71 and authorities there cited.

168. See *id.*

Paul argues that Ziegler's testimony is not admissible under the *Daubert* guidelines because handwriting analysis does not qualify as reliable scientific evidence. His argument is without merit. In *Daubert*, the Supreme Court held that Federal Rule of Evidence 702 controls decisions regarding the admissibility of expert testimony. The Supreme Court declared that under rule 702, when "[f]aced with a proffer of expert scientific testimony . . . the trial judge must determine at the outset pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." The Supreme Court stated that "[t]he inquiry envisioned by Rule 702 is, we emphasize, a flexible one" and that "Rule 702 . . . assign[s] to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." The Court also listed several factors to assist in the determination of whether evidence is scientifically reliable.

Many circuits were split at the time of trial, however, on whether *Daubert* should apply to nonscientific expert testimony. Some held that the application of *Daubert* is limited to scientific testimony, while others used *Daubert*'s guidance to ensure the reliability of all expert testimony presented at trial.

Recently, however, in *Kumho Tire Company, Ltd. v. Carmichael*, the Supreme Court held that *Daubert*'s "gatekeeping" obligation, requiring the trial judge's inquiry into both the expert's relevance and reliability, applies not only to testimony based on "scientific" testimony, but to all expert testimony. The Court further noted that rules 702 and 703 give all expert witnesses testimonial leeway unavailable to other witnesses on the presumption that the expert's opinion "will have a reliable basis in the knowledge and experience of his discipline." Moreover, the Court held that a trial judge may consider one or more of the specific *Daubert* factors when doing so will help determine that expert's reliability. But, as the Court stated in *Daubert*, the test of reliability is a "flexible" one, and *Daubert*'s list of specific factors neither necessarily nor solely applies to all experts or in every case. Alternatively, *Kumho* declares that "the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination."¹⁶⁹

And that is the totality of the court's review of the district court's decision on the reliability issue. The careful (or even careless) reader will have noted that, beyond declaring in the second line of the passage that Paul's "argument is without merit," the court *never addresses the reliability issue*, nor addresses what if anything was before the district court which would have rendered its determination of reliability not an abuse of discretion.¹⁷⁰ There is no formulation of the "task at hand," no description of a reliability test, no reference to information before the district court or the district court's reasoning concerning reliability, nothing.

Having assumed the conclusion of sufficient reliability with no analysis of the issue whatsoever, the rest of the opinion on admissibility follows as a matter of course, finding after a recitation of the credentials of Mr. Ziegler (ABFDE), that the testimony of a qualified expert could assist the trier of fact, and that its prejudicial effect did not

169. *Paul*, 175 F.3d at 909–10 (footnotes and internal citations omitted).

170. At least one district court has apparently noticed this unusual state of affairs. See *U.S. v. Lewis*, 220 F. Supp. 2d 548, 552 (S.D.W. Va. 2002).

substantially outweigh its probative value. All of this is based on the assumed conclusion as to the reliability issue that was never explicitly addressed, but, given the recitation as to credentials, what emerges in the end is, functionally, the guild test.

8. *United States v. Hines*¹⁷¹ (D. Mass., Gertner, J.)

On January 27, 1997, someone robbed the Broadway National Bank in Chelsea, Massachusetts, using a demand or “stick up” note, and escaped.¹⁷² The teller who was robbed, Ms. Jeanne Dunne, described the perpetrator as a dark skinned black man with a wide nose and medium build.¹⁷³ Ms. Dunne is white, and the court characterized the description as “as close to a generic identification of an African American male as one can imagine.”¹⁷⁴ Later, Dunne failed to pick Hines out of a mugbook where his picture appeared, and failed to positively identify him from an eight-picture photo spread, though she said Hines “resembled” the robber. Months later, however, she picked Hines out of a lineup, and positively identified him at trial.¹⁷⁵

The main corroboration of this eyewitness identification came from an FBI questioned document examiner who compared the robbery note with exemplars of Hines’s handwriting and concluded that Hines had written the note.¹⁷⁶ A trial on this evidence ended in a hung jury.¹⁷⁷ Before the retrial, Hines moved to disallow the document examiner testimony based on lack of sufficient reason to find it reliable under *Daubert*.¹⁷⁸ The court granted the motion in part, and wrote the published opinion during and after the second trial, which also resulted in a hung jury, in order to explain its ruling and give guidance to the parties in the event of a third trial.¹⁷⁹ This opinion was finalized after the decision in *Kumho Tire v. Carmichael*.

In her opinion, Judge Gertner identified what she took to be a “mixed message” in both *Daubert* and *Kumho Tire*, with the emphasis on reliability pointing in the direction of more rigor in the evaluation of expertise under Federal Rule of Evidence 702 and the emphasis on “the uniqueness of the trial setting, the ‘assist the trier’ standard and flexibility” doing the opposite.¹⁸⁰ Nevertheless, the court concluded that the main emphasis is on insuring sufficient reliability, and that the Supreme Court “is plainly inviting a reexamination even of ‘generally accepted’ venerable, technical fields” such as handwriting identification.¹⁸¹

Judge Gertner accepted this invitation, but with a number of caveats. On what she had seen in writing, and at the hearing which she held, she seemed inclined to bar the questioned document examiner testimony in its entirety. However, “[t]his handwriting

171. 55 F. Supp. 2d 62.

172. *Id.* at 63.

173. *Id.* at 71.

174. *Id.*

175. *Id.*

176. *Hines*, 55 F. Supp. 2d at 64–65.

177. *Id.* at 65.

178. *Id.* at 64.

179. *Id.* at 63–64.

180. *Id.* at 66.

181. *Hines*, 55 F. Supp. 2d at 67.

challenge was raised at the eleventh hour. The hearing was necessarily constrained by the demands of the imminent trial and the schedules of the experts. The Court is unwilling on this record to throw out decades of ‘generally accepted’ testimony.”¹⁸²

In addition, the “compromise solution” Judge Gertner accepted was derived “largely from case law that pre-dated *Kumho*.”¹⁸³ In other words, the court could not confidently say that it had fully digested and applied the broader implications of *Kumho Tire* which might have been inconsistent with this compromise.

In any event, Judge Gertner proceeded to distinguish between a questioned document examiner’s testimony comparing the robbery note with the exemplars and identifying similarities and differences, and testimony concerning the document examiner’s inferences of authorship based on those similarities. In sum, she allows the former and bars the latter, essentially adopting the similar approach of Judge Matsch in *McVeigh*, which she quotes.¹⁸⁴

There is a certain commonsense appeal to this approach. The document examiner’s extensive experience looking at handwriting may have sensitized the expert to the perception and identification of similarities or differences which an ordinary person might not notice, and at any rate the document examiner will be free to spend more time isolating such similarities and differences than we could expect jurors to do pursuant to their own examination during deliberations. Viewed this way, document examiners appear to become summarizational witnesses, and the notion of “expertise” becomes much less central to their function.

However, there is a serious problem with this, especially if the document examiner is allowed to recite his or her credentials, titles, and job descriptions. By identifying a similarity or difference, the examiner is inevitably perceived as asserting the significance of those similarities or differences in regard to assigning authorship, so that the conclusions which are barred are easily inferred. In practice, this is profoundly true, since document examiners who believe they have identified the author of a writing by comparison will normally point out only similarities, and if differences are called to their attention they will dismiss them as not being significant or “real” differences, but merely manifestations of “individual variation.”¹⁸⁵ Nevertheless, the Solomonic compromise of Judges Matsch and Gertner is clearly an improvement over surrendering the gatekeeping function entirely to the guild, as most other courts have done.¹⁸⁶

182. *Id.*

183. *Id.* at 68. The case law she referred to was *Starzecpyzel* (case 1 *supra*), which imposed an explanatory instruction, and *McVeigh* (case 5 *supra*), which took the approach Judge Gertner ultimately took. She also claims, *id.* at 71, to find support on page 910 of the opinion in *Paul* (case 7 *supra*) but I cannot find it.

184. *Id.* at 70 (citing Pre-Trial Transcr., *McVeigh*, 1997 WL 47724 at **3–4 (case 5 *supra*)). It should be noted that my friend and sometime co-author Mark Denbeaux testified in the Rule 702 hearing in *McVeigh* and also in *Hines*. Judge Gertner also considered the Kam studies and found them not dispositive of the issue of reliability under Rule 702. *Hines*, 55 F. Supp. 2d at 68–69.

185. This was one of the main problems that led Judge McKenna to conclude that handwriting identification was not science. See the extended discussion in *Starzecpyzel* (case 1 *supra*).

186. Or perhaps not. If the law of unintended consequences holds, some court operating under the *Hines/McVeigh* approach is likely to disallow cross examination of a document examiner on known error rates, such as the 8% document examiner error rate shown on one task in Kam IV, on the ground that the witness is not giving an opinion, even though the implied opinion is clear to the whole courtroom. For a full discussion of Kam IV, see Risinger, *Handwriting Identification*, *supra* n. 11, at § 33:31.

9. *United States v. Battle*¹⁸⁷ (10th Cir., per curiam [unpublished], Anderson, Lucero and McWilliams, JJ.)

Battle was accused of coming from New York to Kansas to set up a drug distribution operation.¹⁸⁸ The evidence against him was voluminous, and involved many witnesses and many episodes.¹⁸⁹ The handwriting identification testimony figured in a single episode not particularly central to the case, but relevant nevertheless because, if believed, it would establish that Battle received money surreptitiously from an out-of-state source under suspicious circumstances.¹⁹⁰ Western Union had a record of a money transfer showing a “Tyler Evans” as the sender and an “Anthony Jenkins” as the receiver. The questioned document examiner was called to testify that he had examined exemplars of Battle’s signature given when Battle was booked and, in his opinion, Battle signed the name “Anthony Jenkins” to the money transfer.¹⁹¹

As usual, the court fails to realize that the document examiner is testifying to one of the subtasks in handwriting comparison most likely to be unreliable. There are eleven letters in “Shawn Battle” and fourteen in “Anthony Jenkins” (which was signed only once). They share no capital letters and only four small letters (e, h, n, and t), and no letter combinations. One sample (the known) is in a presumably normal signature hand and the other is not, unless someone named “Anthony Jenkins” in reality signed his own name. If the 10th Circuit had done what the Supreme Court did in *Kumho Tire*, it would have examined the reasons to believe or to doubt the accuracy of such a claimed identification. But though it cites *Kumho Tire* in a pro forma way, it does no such thing. It merely recites the credentials of Kansas Bureau of Investigation Document Examiner Dennis McPhail (the guild test again)¹⁹² and declares that “[o]ur study of the record on appeal convinces us that McPhail’s proffered testimony met the reliability and relevancy test of Daubert.”¹⁹³ The opinion manifests some discomfort about its own conclusion, however, as it goes on to say, “[b]e that as it may, in any event any error in this regard is, in our view, harmless error when the evidence is considered as a whole.”¹⁹⁴

10. *United States v. Santillan*¹⁹⁵ (N.D. Cal., unreported opinion of Jensen, J.)

In this case, Rogelio Santillan was charged with conspiracy to distribute false immigration documents.¹⁹⁶ According to the opinion of the court, the prosecution’s document examiner proposed to testify “that she has identified, using control samples of defendant’s handwriting, Santillan’s handwriting on numerous ‘questioned’

187. 188 F.3d 519 (table), 1999 WL 596966 (10th Cir. 1999) (unpublished opinion by Anderson, Lucero and McWilliams, JJ.).

188. *Id.* at *1.

189. *Id.*

190. *Id.* at **3–4.

191. *Id.* at *3.

192. *Battle*, 1999 WL 596966 at *3.

193. *Id.* at *4.

194. *Id.* The court then went on to recite some of what it considered to be the overwhelming evidence against Battle independent of the handwriting testimony.

195. 1999 WL 1201765 (N.D. Cal. Dec. 3, 1999).

196. *Id.* at *1.

documents.”¹⁹⁷ Note that, more than seven months after *Kumho Tire*, in an opinion referring to *Kumho Tire*,¹⁹⁸ this is as much information as we are given on the “task at hand” in the case before the court. Clearly, the requirements of *Kumho Tire* were not yet dependably appearing on the radar screens of the lower courts.¹⁹⁹ As we shall see, there is much reason to believe that this continues to be the general case.

In any event, Judge Jensen then goes on to deal with the reliability issue globally. After briefly reviewing (and criticizing) the extant research data,²⁰⁰ the court adopts the *Hines/McVeigh* approach.²⁰¹

11. *United States v. Brown*²⁰² (C.D. Cal., unreported decision of Collins, J.)

Additionally, in the unreported case of *United States v. Brown*, another check forgery case involving an attempted attribution of authorship of the forged signature, the court also adopted the *Hines/McVeigh* approach after holding a *Daubert/Kumho* hearing, permitting the proffered expert to testify without rendering “an ultimate conclusion on who penned the questioned writings.”²⁰³

12. *United States v. Rutherford*²⁰⁴ (D. Neb., Battaillon, J.)

In this case, defendant Kent Rutherford was charged with bank fraud involving a scheme dealing with a “sale barn” and a check.²⁰⁵ By reference to the opinion, this is all that one could tell. However, an inquiry to the defense attorney in the case reveals that someone registered at a cattle sale as one “George Hipke,” a real person of good repute. The imposter then purchased an expensive lot of cattle and paid for them with a check bearing the signature “George Hipke.” He then removed the cattle. As would be expected, the crime came to light when the real George Hipke learned of the check from his bank.

Rutherford was a retired banker. Exactly why he was charged is a bit unclear, since the people at the sale barn said he was not the person who tendered the check. However, the theory was that he was the mastermind, who sent somebody else to pay for the cattle with a pre-signed check. The proposed expert testimony was that Rutherford in fact signed a “buyer registration form” in Hipke’s name, that as to the check bearing George Hipke’s purported signature, Hipke did not sign it (a fact that was actually not disputed), that there was a strong probability that Rutherford did sign it, and that as to a “load out” sheet from Columbus Sale Barn, the inscription on the bottom of the sheet

197. *Id.*

198. *Id.*

199. The opinions in *Paul, Battle*, and *Hines* were all published after *Kumho Tire*, but so soon afterwards that their failure to properly digest and apply it is perhaps understandable.

200. *Id.* at **3–4. Judge Jensen seems especially troubled by the fact that Dr. Moshe Kam, the government’s chief researcher on handwriting expertise issues, refused to share his raw data.

201. *Santillan*, 1999 WL 120765 at *5.

202. No. CR 99-184 ABC (Dec. 1999).

203. *Id.* at 9 n. 6 (on file with author).

204. 104 F. Supp. 2d 1190 (D. Neb. 2000). In keeping with the highest demands of complete disclosure it is here noted that the defense expert in this case was my friend and sometime co-author, Dr. Michael J. Saks.

205. *Id.* at 1191. The details of the case are derived from the court’s opinion, supplemented by a 2/21/00 telephone conversation with Adam Sipple, Esq., of the Clarence E. Mock Law Firm, Rutherford’s attorneys.

was probably written by Rutherford.²⁰⁶

Once again, although *Kumho Tire* is cited, there is no further attempt to formulate the separate tasks involved in this scenario, or to examine them individually. This is perhaps a bit surprising, given the extensive nature of the *Daubert/Kumho* hearing that was undertaken. And once again, the main task at issue is the attribution of authorship of a forged signature based on the limited amount of writing involved in the signature, though in this case there were two signatures to work with.

In any event, after criticizing the highly suggestive way in which the problem was presented to the expert by the government in obtaining his original opinion,²⁰⁷ the court ultimately adopts the *Hines/McVeigh* approach, allowing the proffered expert to testify only by pointing out similarities and differences, and not allowing any explicit opinions concerning authorship or probability of authorship.

13. *United States v. Jolivet*²⁰⁸ (8th Cir., Heaney, J., joined by Arnold and Magnuson, JJ.)

Jolivet was a mail fraud case. This case has been cited in subsequent cases such as *United States v. Gricco*,²⁰⁹ (case 23 *infra*) as determining the acceptable reliability of handwriting identification expertise.²¹⁰ *Jolivet*, however, cannot be read to do this, at least not very clearly (yet more evidence, if any was needed, of the lack of care with which courts read and cite cases when deciding issues of the reliability of prosecution-proffered expertise). It is true that the government proffered a document examiner, Donald Lock (whom the court described as “particularly well qualified” without going much further²¹¹) to testify that *Jolivet* had written certain important documents.²¹² *Jolivet*’s attorney, however, neglected to object.²¹³ When the case reached the circuit court of appeals, this issue was thus governed by the plain error standard, and it is hardly surprising that the appellate court found that the district court had not committed plain error in admitting document examiner testimony to which there had been no objection.²¹⁴ Its further “guild test” observation that the document examiner’s qualifications would have rendered the admission no abuse of discretion even in the face of an objection²¹⁵ must be viewed as fairly weak dictum under the circumstances, since,

206. The only handwritten material besides signatures was the inscription “L & C Livestock” on the bottom of the load out sheet.

207. *Id.* at 1193. This is one of the few opinions in which a judge appears to recognize the potentially powerful distortions that can result from such procedures. See generally Risinger et al., *supra* n. 22.

208. 224 F.3d 902 (8th Cir. 2000).

209. 2002 WL 746037 (E.D. Pa. Apr. 26, 2002).

210. *Id.* at *4.

211. *Jolivet*, 224 F.3d at 906. The court said that Mr. Lock had “studied and taught internationally, written manuals, and practiced in the field for over two decades, performing several thousand comparisons.” *Id.* Mr. Lock appears to be in private practice in Missouri, does not appear to be ABFDE-certified, so far as I can tell, and I have been unable to discover anything more concerning his credentials on the Web. I am not a big believer in the correlation between credentials and reliability, but the court’s performance shows the “flexibility” with which courts will work in regard to what is in front of them, under the guild approach.

212. *Id.* at 905.

213. *Id.* at 906.

214. *Id.*

215. *Jolivet*, 224 F.3d at 906.

not surprisingly, no one bothered to define what exactly the document examiner was claiming to be able to do in the case.

14. *United States v. Fujii*²¹⁶ (N.D. Ill., Gottschall, J.)

In *Fujii*, Judge Gottschall of the Northern District of Illinois handed down the first decision in a handwriting identification case in modern times that excluded document examiner testimony completely. This is also the first opinion on asserted handwriting identification expertise to manifest a fully proper *Kumho Tire* “task at hand” approach.

Masao Fujii was charged with involvement in a scheme to obtain the fraudulent entry into the United States of foreign nationals.²¹⁷ Certain immigration forms filled out in hand printing had been tendered in connection with the attempted fraudulent entry of two Chinese nationals at John F. Kennedy airport in New York City in December of 1999.²¹⁸ As evidence of Fujii’s participation in the charged scheme, the prosecution sought to call an Immigration and Naturalization Service document examiner, who would testify that she had compared the printing on the forms with exemplars of printing by Fujii, and that in her opinion Fujii printed the fraudulent forms.²¹⁹ The defense objected on *Daubert/Kumho* grounds, and a hearing was held on the issue.

In her opinion, Judge Gottschall noted that in general “[h]andwriting analysis does not stand up well under the *Daubert* standards.”²²⁰ However, as to general issues of reliability, she concluded that “this court need not weigh in on this question, for whether handwriting analysis *per se* meets the *Daubert* standards, its application to this case poses more significant problems.”²²¹ This was for two reasons. First, said the court, virtually all data on document examiner dependability in identifying the author of handwriting has dealt with cursive and not printed writing. The single recorded proficiency test involving hand printing revealed a 45% error rate on that test.²²² Perhaps more importantly, however, Fujii was a native Japanese who learned to print in English as a second language in Japan.²²³ The defense called as a witness Mark Litwicki, Director of Loyola University’s English as a Second Language program, who had substantial experience with teaching English to Japanese students in both the United States and Japan. The essence of his testimony was that Japanese learn to print in English only after years of training in the exact copying of Japanese characters, where “uniformity of characters is an important and valued principle of Japanese handwriting,” that they “spend many years attempting to maximize the uniformity of their writing,” that this carried over into their learning to write in English, and that “it would be very difficult for an individual not familiar with the English handwriting of Japanese writers

216. 152 F. Supp. 2d 939 (N.D. Ill. 2000).

217. *Id.* at 939–40.

218. *Id.*

219. *Id.*

220. *Id.* at 940.

221. *Fujii*, 152 F. Supp. 2d at 941.

222. *Id.* The 1986 Forensic Sciences Foundation proficiency test, the results of which are reported in Risinger et al., *supra* note 14, at 746, and which were testified to in *Fujii* by Dr. Michael J. Saks as one of the expert witnesses for the defense.

223. *Fujii*, 152 F. Supp. 2d at 941.

to identify the subtle dissimilarities in the handwriting of individual writers.”²²⁴

Given all this, the court concluded:

Does Ms. Cox [the document examiner] have any expertise which would allow her to distinguish between unique characteristics of an individual Japanese handprinter and characteristics that might be common to many or all native Japanese handprinters? In an analysis that depends entirely on what is similar between writing specimens and what is different, it would seem to this court essential that an expert have some ability to screen out characteristics which might appear eccentric to the writer, compared with native English printers, but which might in fact be characteristic of most or all native Japanese writers, schooled in English printing in Japan, in printing English. There is no evidence on the record that Ms. Cox has such expertise or has even considered the problem Mr. Litwicki has pointed out.

Considering the questions about handwriting analysis generally under *Daubert*, the lack of any evidence that the identification of handprinting is an expertise that meets the *Daubert* standards and the questions that have been raised—which the government has not attempted to answer—about its expert’s ability to opine reliably on handprinting identification in dealing with native Japanese writers taught English printing in Japan, the court grants the defendant’s motion [to exclude].²²⁵

Judge Gottschall’s opinion is a masterful example of particularized “task at hand” analysis under the standards of *Kumho Tire*. It provides a model for other courts in how to approach the reliability of specific applications of claimed handwriting identification expertise, and all forms of non-science forensic science. Unfortunately, few other courts have followed her lead.

15. *United States v. Bates*²²⁶ (5th Cir., per curiam [unreported], Duhé, Parker and Lindsay,²²⁷ JJ.)

Defendant Bates was charged with multiple counts involving a scheme whereby he allegedly opened checking accounts in nine different banks, made small deposits, then bought airline tickets with checks exceeding the amount in the accounts, which he then used for travel or turned in for refunds.²²⁸ Part of the evidence against him (apparently a small part) was the testimony of a handwriting expert (unidentified).²²⁹ It is fairly obvious that the expert attributed some writing, including almost certainly the check signatures, to Bates, but it is not clear if Bates opened the accounts in his own name. If so, then the task presented was dominantly one of normal signature authentication. The court can be forgiven, perhaps, for not being more specific, since there was no objection to the expert raised at trial.²³⁰ Thus the case was reviewed solely for plain error, and not

224. *Id.* (quoting testimony of Mark Litwicki) (internal quotations omitted).

225. *Id.* at 942.

226. 240 F.3d 1073 (table), 2000 WL 1835092 (5th Cir. 2000).

227. District Judge, N.D. Texas, sitting by designation.

228. *Id.* at *1.

229. *Id.* at *3.

230. *Id.* It’s a bit more complicated than that. The defense attorney initially filed what was a fairly pro forma Rule 702 objection, then withdrew it. *Id.*

surprisingly, found none.²³¹ There is a citation to *Paul* for the proposition that such testimony “has long been received” (including *Paul*’s citation to *Jones* and *Velasquez* for that point), but the citations are for no other purpose than this, in order to buttress the “no plain error” conclusion.

16. *United States v. Saelee*²³² (D. Alaska, Holland, J.)

The next case decided, *United States v. Saelee*, is the second case to completely exclude proffered handwriting identification expertise, and it does so on grounds both broader and narrower than *Fujii*. In *Saelee*, the defendant was charged with mailing packages containing cocaine concealed in Butterfinger candy bars.²³³ The three packages each bore an address label with “to:” and “from:” information, which had been hand printed. The government sought the introduction of testimony by John W. Cawley, a document examiner from the U.S. Postal Service, who would testify that he had compared the printing on the labels to demand exemplars of Saelee’s hand printing, and had concluded that the labels had been printed by Saelee.²³⁴ The government originally asserted that Cawley’s testimony was admissible as lay opinion, mis-citing a line from *Santillan* for that proposition.²³⁵ Thereafter, the government itself sought to have Mr. Cawley’s testimony admitted under a *Hines/McVeigh* restriction to escape the necessity of a *Daubert/Kumho* hearing.²³⁶ The court insisted on the hearing.²³⁷ After an extensive hearing, the trial court ruled that the proposed testimony could not be admitted under Federal Rule of Evidence 701 as non-expert opinion,²³⁸ that the government bore the burden of establishing that the proffered testimony was sufficiently reliable to meet the requirements of Federal Rule of Evidence 702,²³⁹ and that both globally, and as to the particular issue of the identification of hand printing, the government had failed to prove that the identification was “the product of reliable methods” as required by Federal Rule of Evidence 702(2).²⁴⁰ In its latter aspect, it is one of only two proper “task at hand” analyses in the reference set.²⁴¹ It is also one of two handwriting identification cases where the judge fearlessly appears to understand (and to be willing to face) the

231. *Bates*, 2000 WL 1835092 at *4.

232. 162 F. Supp. 2d 1097 (D. Alaska 2001).

233. *Id.* at 1098.

234. *Id.*

235. *Id.* at 1099. The court in *Saelee* accepted the government’s characterization of *Santillan*, apparently not checking the government’s assertions about *Santillan*, which were inaccurate. Rule 701 is only mentioned once in the *Santillan* opinion, simply to make the indisputable point that even non-expert opinion about the genuineness of a particular handwriting is sometimes admissible, see *Santillan*, 1999 WL 1201765 at *5, but this observation had nothing to do with the ruling of the court, which was clearly a *Hines/McVeigh* ruling pursuant to the *Santillan* court’s understanding of Rule 702. *Saelee*, 162 F. Supp. 2d at 1099.

236. *Id.* at 1098.

237. *Id.* at 1099.

238. *Id.* at 1100.

239. *Id.* at 1101.

240. *Saelee*, 162 F. Supp. 2d at 1105.

241. The other of course being *U.S. v. Fujii* (case 14 *supra*). Ironically, like *Fujii*, the *Saelee* opinion does not cite *Kumho Tire* for the requirement of task-specific analysis, although it undertakes such an analysis in regard to handprinting. Judge Holland also gets high marks for rejecting, with analysis, both the 902(b) fallacy pushed by the prosecution on the authority of *Jones* (case 6 *supra*), and *Jones* itself. See *Saelee*, 162 F. Supp. 2d at 1105–06 (discussing *Jones*, 107 F.3d 1147).

implications of the normal burden rules under Federal Rule of Evidence 404 and 702, as explicated by the Supreme Court in *Kumho Tire*.²⁴² However, the prosecution's attempts at proof at the *Daubert/Kumho* hearing were truly abysmal.²⁴³ So while the court did exclude the proffered expert testimony, and was quite critical of what appeared to be the state of research regarding handwriting identification reliability,²⁴⁴ the decision remains one firmly placed on a failure of proof rationale.²⁴⁵

17. *United States v. Och*²⁴⁶ (9th Cir., per curiam, [unreported] Canby, Hawkins and Gould, JJ.)

Jeremiah Och was charged with the armed bank robbery of a Sausalito, California, bank.²⁴⁷ He had been arrested in connection with the bank robbery when local police detectives in Santa Cruz, California, executed a search warrant on Och's motel room in connection with a liquor store robbery, and found evidence connecting him to the bank robbery.²⁴⁸ In addition, Och had a very distinctive neck tattoo that had previously been described in significant detail by the teller whom he had robbed.²⁴⁹ The document examiner (Cunningham²⁵⁰) attributed the handwriting on the demand note that was handed to the teller to Och. There was a *Daubert/Kumho* objection at the trial level which was apparently global, but also apparently somewhat detailed, because the appellate opinion mentions that Cunningham was cross-examined concerning the Kam studies during his trial testimony.²⁵¹ At any rate, on appeal the defense asserted that the cross examination of Cunningham had been improperly restricted, and that the decision to admit his testimony was error. The circuit court ruled that the cross examination had not been improperly restricted, and bypassed ruling on the global propriety of admitting the handwriting testimony by invoking the doctrine of harmless error, explicitly declining to address the issue of error itself.²⁵²

242. The other is *U.S. v. Lewis* (case 26 *infra*).

243. *Saelee*, 162 F. Supp. 2d at 1103–05.

244. Perhaps this is not giving Judge Holland sufficient credit. He is much more detailed and more analytical in his examination of the empirical record as it was put before him than almost any other judge has been. *Id.* at 1102–05.

245. In particular, it is hard to be sure what Judge Holland would have done with Dr. Kam's newfound hand printing subset of the results in Kam II, which was subsequently the subject of Kam V. Kam V, *supra* n. 57. See the discussion in connection with *U.S. v. Prime*, 220 F. Supp. 2d 1203 (W.D. Wash. 2002) (case 27 *infra*), which is in the text at note 308, and *U.S. v. Hidalgo*, 229 F. Supp. 2d 961 (D. Ariz. 2002) (case 28 *infra*), which is in the text at note 340.

246. 16 Fed. Appx. 666 (9th Cir. 2001) (unpublished). Given the avoidance of the reliability issue, this case could arguably have been omitted as not actually dealing with the reliability issue, even as an alternative ground or in dictum, but given the fairly significant challenge raised at trial, it seemed best to include it.

247. *Id.* at 669.

248. *Id.*

249. *Id.* at 671.

250. *Id.* at 670. This was almost certainly Lloyd Cunningham, a well-known private document examiner. He was also involved in *Wolf v. Ramsey*. See 253 F. Supp. 2d 1323 (N.D. Ga. 2003) (case 34 *infra*). In that case, Gideon Epstein testified that he believed Cunningham was ABFDE-certified, but Cunningham is not listed in the list of document examiners on the ABFDE website. Not every ABFDE-certified examiner is necessarily listed there, but one would think that any document examiner in private practice who was ABFDE-certified would be so listed.

251. *Och*, 16 Fed. Appx. at 671.

252. *Id.*

18. *United States v. Richmond*²⁵³ (E.D. La., Clement, C.J.)

The next case, *United States v. Richmond*, is the polar opposite of *Saelee* in its approach. The case involved an alleged mail fraud scheme. The court does not explain what the unnamed document examiner is being called upon to do, in apparent derogation of the requirement of *Kumho Tire* that threshold reliability be judged in regard to the particular function the expert is actually seeking to perform in the case. The three-paragraph opinion does not discuss any evidence of reliability. Instead, it discusses recent cases calling handwriting identification expertise into question, and declines to follow them. The court ends by saying, “As a gatekeeper, the court will look to see if the expert’s methods are reliable in nature and application to the facts.”²⁵⁴ The court says it “will” do this, but it never does it. After another sentence observing that “cross-examination will help reveal whether the principles and methods used by the experts, as applied to the facts, are reliable,”²⁵⁵ the court makes no explicit ruling on this issue even though such a determination would seem required by Rule 702, but merely denies the motion in limine.

19. *United States v. Elmore*²⁵⁶ (Navy-Marine Crim. App., Price, J., Anderson and Villemez, JJ., joining)

Elmore was charged with abusing his position in the base post office at the Guantanamo Bay naval facility by stealing already-purchased money orders out of the envelopes used to mail them to their intended recipients, and forging the intended recipients’ signatures in order to cash them. At issue in this case was once again that most troubling subtask issue in the area of handwriting identification—the assignment of authorship based on the limited writing involved in a concededly inauthentic signature, though there was more writing here than usual because of the multiple forgeries involved. However, as in the previous military justice system case, *Ruth* (case 2 *supra*), the court was oblivious to the actual issue. In denying the defense motion to exclude the identifications under Federal Rule of Evidence 702, the court appears to treat this case as an exercise in *stare decisis* rather than a determination of threshold reliability (a portent of things to come in this area), relying on *Starzecpyzel* (case 1 *supra*) and *Ruth*.²⁵⁷ There is some trace of the guild test, however, because the court also invokes the sterling credentials of Naval Criminal Investigative Service Document Examiner Marc Jaskolka, ABFDE.²⁵⁸ The court also quotes Mr. Jaskolka’s general characterization of the result of the Kam studies.²⁵⁹ Beyond making the motion, however, it is not clear that the defense attorneys gave the court much more to work with, since the only witness at the Rule 702 hearing appears to have been the Mr. Jaskolka. This is another theme that will recur in these cases.

253. 2001 WL 1117235 (E.D. La. Sept. 21, 2001).

254. *Id.* at *3.

255. *Id.*

256. 56 M.J. 533 (Navy-Marine Crim. App. 2001).

257. *Id.* at 538.

258. *Id.* at 537, 539.

259. *Id.* at 537.

20. *United States v. Johnson*²⁶⁰ (9th Cir., per curiam [unreported], Hug, Graber and W. Fletcher, JJ.)

Even more troubling is the decision of a panel of the Ninth Circuit in *United States v. Johnson*. Johnson was accused of a conspiracy to smuggle three aliens into the United States.²⁶¹ Part of the evidence against him involved the testimony of a government document examiner (unnamed) that writing on certain forms was Johnson's.²⁶² The court cites *Kumho Tire*, but gives no sign of having read or understood it.²⁶³ In two paragraphs, the court rules that the district court's rejection of the defense motion to exclude such testimony was not an abuse of discretion because "it is undisputed that handwriting analysis is a science in which expert testimony assists a jury,"²⁶⁴ citing a 1982 Ninth Circuit case to that effect,²⁶⁵ and revealing itself ignorant of (or perhaps willfully blind to) a decade of controversy over this issue since the decisions of *Daubert* and *Starzecpyzel*. In the court's defense, this appears to be another of those cases in which a defense attorney makes a *pro forma* motion and then provides the court with little other material on the issues. Such performances by the criminal defense bar do their clients little good and end up setting the stage for uninformed rulings by courts, which impede the general progress of the development of the law in this area.

21. *Church v. Maryland*²⁶⁶ (D. Md., Davis, J.)

An interesting contrast to the use of case authority in *Johnson* is found in *Church v. State of Maryland*, an employment discrimination case where, as to one aspect of the case, the district court ruled one particular document irrelevant, thus avoiding the issue of the admissibility of a proffered document examiner on the issue of the identity of handwriting in the document. The court observes, however, that even if the documents were relevant, it would exclude the unnamed document examiner, citing *Saelee* (case 16 *supra*).²⁶⁷ While this invocation of case authority would be as questionable under *Kumho Tire* as those in *Johnson* or *Elmore*, it does show that in the federal courts the reliability of handwriting identification expertise has generated such divergent cases that both admission and exclusion can be undergirded by the inappropriate invocation of case authority.

22. *United States v. Brewer*²⁶⁸ (N.D. Ill., Lefkow, J.)

Another case involving the inappropriate use of case authority is *United States v. Brewer*. The defendant was charged with stealing from an elderly client of the bank for

260. 30 Fed. Appx. 685 (9th Cir. 2002) (unpublished).

261. *Id.* at 686.

262. *Id.* at 688.

263. *Id.* at 688–89.

264. *Id.* at 688.

265. *Johnson*, 30 Fed. Appx. at 688 (citing *U.S. v. Fleishman*, 684 F.2d 1329, 1337 (9th Cir. 1982)).

266. 180 F. Supp. 2d 708 (D. Md. 2002).

267. *Id.* at 721.

268. 2002 WL 596365 (N.D. Ill. Apr. 16, 2002).

which he worked by using an ATM card to make unauthorized withdrawals.²⁶⁹ The defendant Brewer claimed he was helping out the client, who was very ill, and had been authorized to make the withdrawals.²⁷⁰ The elderly client, Steve Kruzic, told the FBI that he had no ATM card and had not authorized Brewer to make any withdrawals, but then Kruzic died.²⁷¹ Brewer produced an authorization bearing what purported to be the signatures of Brewer, Kruzic, and Brewer's supervisor at the bank, Donna Johnson.²⁷² Johnson said she did not remember signing the form, but the signature looked like her signature.²⁷³ The prosecution proposed to call an FBI document examiner, Danielle Seiger, who would testify that the "D. Johnson" signature was a traced forgery, the source of which she claimed to have identified among various exemplars of Donna Johnson's true signature provided by Johnson.²⁷⁴ The reliability of a document examiner's methods in determining that a signature is not that of its putative author, but is, rather, traced from a determined source, had never been dealt with in any case under *Daubert* or *Kumho Tire*. Nevertheless, the district court denied the government a Rule 702 hearing, and ruled that the document examiner's testimony was inadmissible, based on its reading of *Hines*, *Fujii*, and *Saelee*, concluding that

[a]lthough a hearing might be useful if the court were writing on a clean slate, the court's review of these very recent handwriting analysis cases, and in light of the very similar type of testimony at issue here, leads it to conclude that unless some new studies have been conducted in the past six months, the government would be hard-pressed to establish that Seiger's testimony would be sufficient under *Daubert*. Thus the court grants defendant's motion to exclude Seiger's testimony.²⁷⁵

What the court overlooked is that the cited cases did not deal with the task at issue in *Brewer*. In addition, there were proficiency tests dealing with traced forgery identification,²⁷⁶ the results of which were not dealt with in *Hines*, *Fujii*, or *Saelee* because they were irrelevant to those cases. Whether the result would have been different after an appropriate hearing is difficult to say, but the reliance on precedent was totally misplaced.

23. *United States v. Gricco*²⁷⁷ (E.D. Pa., Padova, J.)

A different criticism might be made of *United States v. Gricco*. Gricco was charged with conspiracy to manufacture and distribute methamphetamine. In a search of his mother-in-law's residence, agents found two handwritten lists for ingredients and supplies used in making methamphetamine.²⁷⁸ The Government proposed to call a U.S. Postal Service document examiner, Gale Bolsover (ABFDE) who would testify that the

269. *Id.* at *1.

270. *Id.*

271. *Id.* at **1-2.

272. *Id.* at *2.

273. *Brewer*, 2002 WL 596365 at *2.

274. *Id.* at *6.

275. *Id.* at *8.

276. See Risinger, *Handwriting Identification*, *supra* n. 11, at § 28:2.3.4 n. 123.

277. 2002 WL 746037.

278. *Id.* at *1.

handwritten lists were written by Gricco.²⁷⁹ Gricco's lawyer moved to adopt the *Hines/McVeigh* approach and to exclude the document examiner's conclusion attributing authorship to Gricco, pursuant to Federal Rule of Evidence 702, but seems to have proffered little supporting information on reliability besides citations to cases and a copy of a fourteen-year-old law review article.²⁸⁰ This left the stage almost entirely to the government, which managed to have its way in characterizing the first three Kam studies²⁸¹ and the Srihari study,²⁸² and which characterizations were incorporated into the court's opinion under the banner of applying the "Paoli II factors" (a Third Circuit checklist incorporating and supplementing the "Daubert factors").²⁸³ Based on these plus an invocation of its own circuit's decision in *Velasquez*, plus *Paul, Jones*, and (inappositely) *Jolivet*,²⁸⁴ plus the general existence of a guild,²⁸⁵ the court admitted the evidence.²⁸⁶ No attempt was made to formulate the actual issue at stake in the case as required by *Kumho Tire*. This case seems to be another example of what can happen when defense attorneys make *pro forma* motions and then fail to do the thinking and the research necessary to back them up. It not only fails to help their client, it can make bad law for everybody.

24. *United States v. Nadurath*²⁸⁷ (N.D. Tex., McBryde, J.)

On one reading *Nadurath* is the most extreme possible example of inappropriate global disposition by unexplained invocation of selective precedent. Judge McBryde denied a hearing and disposed of a challenge in one paragraph by citing three cases.²⁸⁸ There is no way to know what was at stake in the case factually, since the opinion does not bother to define the task at hand at all. On the other hand, it may in fact be an example of defense attorney failure as extreme as the prosecution failure in *Saelee*, because the Court may be said to have invoked the finding it made in regard to the defense motion regarding fingerprint reliability, i.e., that the defense had not supplied

279. *Id.*

280. *Id.* at *3. The article was Risinger et al., *supra* note 14. A fine article it was, but a lot had happened since it was published in 1989.

281. *Gricco*, 2002 WL 746037 at *4. Most importantly, the court clearly had no idea of the limitations of the test design of Kam I and Kam II. See Risinger, *Handwriting Identification*, *supra* n. 11, at § 28:2.3.6 (discussing the studies by Kam and his colleagues).

282. Once again, the court manifests no understanding at all of the limitations of the test design in the Srihari study (which was a trial of a computer program designed to distinguish handwriting) and what it can and cannot tell us about the performance of human document examiners, but accepts the glib and insupportable statement by Srihari et al. that additional input by human examiners would significantly raise the accuracy of their computer results, when that conclusion does not follow from their data or anything else. See *id.* at § 33:36 (discussing this issue).

283. *Gricco*, 2002 WL 746037 at **2-6. See *id.* at *2 (discussing the "Paoli II" factors and citing *In Re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994)).

284. *Id.* at *4.

285. *Id.* at **5-6. The court seemed to be under the impression that the recently promulgated protocols of the Scientific Working Group for Forensic Document Examination (a Justice Department effort) were obligatory in document examination, and further that they provided guarantees of the reliability of document examiners in regard to every task they might undertake, neither of which is true.

286. *Id.* at *7.

287. 2002 WL 1000929 (N.D. Tex. May 14, 2002). *Nadurath* later pled guilty, and then appealed his sentence, which was affirmed. *U.S. v. Nadurath*, 66 Fed. Appx. 525 (5th Cir. 2003) (unpublished).

288. *Nadurath*, 2002 WL 1000929 at *1. The three cases are *Paul*, *Velasquez* and, inappositely, *Jolivet*.

sufficient information even to call into question the reliability of the challenged expertise.²⁸⁹ Either way, a sad case.

25. *United States v. Hernandez*²⁹⁰ (10th Cir., per curiam [unreported], Tacha C.J., McWilliams and Russell, JJ.)

Hernandez is a tax fraud case involving a tax preparer.²⁹¹ The government proposed to call IRS forensic document examiner Joseph Mongelluzzo to testify that the handwriting on many tax forms was the defendant's.²⁹² The defense moved to exclude the testimony as unreliable under Federal Rule of Evidence 702.²⁹³ The trial court, after a hearing, adopted the *Hines/McVeigh* approach, allowing the witness to testify to similarities but not to give an opinion regarding authorship.²⁹⁴ The defendant was convicted, and appealed the failure to exclude completely.²⁹⁵ The circuit court found the lower court's approach somewhat puzzling, but not an abuse of discretion.²⁹⁶

26. *United States v. Lewis*²⁹⁷ (S.D.W. Va., Goodwin, J.)

Two district court opinions within ten days of each other in September 2002, illustrate well how even judges attempting to be careful can arrive at opposite results. The first of these was *United States v. Lewis*. In *Lewis*, the defendant was charged with mailing threatening communications to the President and others, by mailing them envelopes containing white powder after the well-known anthrax powder mailings had killed several people and disrupted many federal agencies as well as Congress.²⁹⁸ Although there was apparently overwhelming evidence from multiple sources showing that defendant Lewis had sent the envelopes in question,²⁹⁹ the prosecution desired to gild this lily with the testimony of John W. Cawley, a "questioned documents analyst" trained by the U.S. Postal Service Crime Laboratory between 1977 and 1980.³⁰⁰ Mr. Cawley would have testified that he had compared the known writings of the defendant with the writing on the envelopes, and that the defendant had written the addresses on the

289. The court's reason for rejecting even a hearing in regard to the fingerprint challenge was the failure of the defense to provide information calling its reliability sufficiently into question to require a hearing. *Id.* (citing *Kumho Tire*, 526 U.S. at 149). Then, in the paragraph in which it disposes of the handwriting challenge it says that the defense "objects . . . for reasons similar to those raised in regard to fingerprint testimony." *Id.* So it is unclear if the basis for the court's rejection of the handwriting challenge is case authority, or a defense failure to draw the reliability of the proposed expertise sufficiently into question.

290. 42 Fed. Appx. 173.

291. *Id.* at 174.

292. *Id.* at 174-75.

293. *Id.* at 175.

294. *Id.*

295. *Hernandez*, 42 Fed. Appx. at 176.

296. *Id.* at 176-77.

297. 220 F. Supp. 2d 548 (S.D.W. Va. 2002).

298. *Id.* at 549.

299. *Id.* at 550. Among many other things, a search warrant executed at Lewis's home yielded "several photocopied notes identical to those found in the mailings; the original note from which the copies apparently had been made; an envelope bearing the handwritten addresses of two recipients of the threatening notes" and other incriminating items. *Id.*

300. *Id.* at 553.

envelopes.³⁰¹

The district court excluded Mr. Cawley's proposed testimony. In so doing, however, it did not base its decision on any affirmative conclusion of the limits of handwriting identification expertise (though it seemed at times fairly skeptical³⁰²), nor did it concentrate on the weaknesses of such expertise in regard to the task at hand (there was never any discussion of the amount of writing on the envelopes, whether it was cursive or printing, presence of disguise, etc.). Instead, having ruled that the defendant's challenge to the reliability of handwriting identification in general was sufficient to trigger a Rule 702 hearing and place the burden of production and persuasion during that hearing on the prosecution,³⁰³ the court concluded that the prosecution had failed to produce the required proof of reliability.³⁰⁴ The prosecution relied entirely on the testimony of Mr. Cawley, whose lack of knowledge demonstrated during cross examination concerning the research record on reliability and error rates doomed the proffer.³⁰⁵ In this regard, *Lewis* was much like *Saelee*.³⁰⁶ The court is to be lauded for coming to the conclusion demanded by the logic of the *Daubert/Kumho* procedural structure, and (unlike some other courts) placing the burden of persuasion on the proponent of the expert evidence even when that is the government.³⁰⁷ *Lewis* and *Saelee* show that it is not only the defense that sometimes fails to prepare properly for and marshal information in *Daubert/Kumho* challenges to handwriting identification.

27. *United States v. Prime (Prime I)*³⁰⁸ (W.D. Wash., Lasnik, J.)

A much more puzzling opinion than the one in *Lewis* was issued by Judge Lasnik in *United States v. Prime*, and it is puzzling for unusual reasons. This was not the usual offhand opinion which characterizes many of the decisions admitting handwriting identification testimony.

The charges against Michael Prime involved counterfeit U.S. postal money orders.³⁰⁹ The prosecution intended to call Kathleen Storer, an ABFDE-certified forensic document examiner for the U.S. Secret Service, to testify that Prime's handwriting "appeared on counterfeit money orders and other documents."³¹⁰ Later in

301. *Lewis*, 220 F. Supp. 2d at 550–51.

302. *Id.* at 552–53.

303. *Lewis*, 220 F. Supp. 2d at 553.

304. *Id.* at 554.

305. For instance, the court observed, "There were aspects of Mr. Cawley's testimony that undermined his credibility." *Id.* "Mr. Cawley testified that he achieved a 100% passage rate on the proficiency tests that he took and that all his peers always passed their proficiency tests. Mr. Cawley said that his peers always agreed with each others' results and always got it right. Peer review in such a 'Lake Wobegone' environment is not meaningful." *Id.* And the court went on to say, "Finally, while there may be general acceptance of the theories and techniques employed in handwriting analysis among the 'forensic document community' this acceptance does not demonstrate reliability. If courts allow the admission of long-relied-on but ultimately unproven analysis, they unwittingly perpetuate and legitimate junk science." *Id.*

306. Like *Saelee* in more ways than one: Cawley was also the document examiner who testified in *Saelee*.

307. It should be noted that the court did not appear to believe it likely that a better prepared witness would necessarily have been able to provide the needed evidence.

308. 220 F. Supp. 2d 1203 (W.D. Wash. 2002) [hereinafter *Prime I*], *aff'd*, 363 F.3d 1028 (9th Cir. 2004) [hereinafter *Prime II*]. For the opinion on appeal, see case number 38 *infra*.

309. *Prime I*, 220 F. Supp. 2d at 1204.

310. *Id.*

the opinion, the court indicates that what Ms. Storer was asked to evaluate for authorship was made up of writing on 78 different documents (76 covered by her first report and 2 by her second report), including envelopes, money orders, “post-it notes,” express mail labels and applications for postal boxes.³¹¹ Some of the writing was cursive and some handprinting.³¹² Ms. Storer was given extensive known writings of three persons (Prime and codefendants Hiestand and Hardy), and asked if any of them wrote any of the writing on the 78 documents.³¹³ She found that Hiestand wrote “portions of eight documents,” Hardy wrote “portions” of one document, and Prime wrote “portions” of 45 documents and “probably” wrote “portions” of 14 more.³¹⁴ The documents contained 38 signatures, the authorship of which Storer indicated “could not be determined.”³¹⁵ Given these facts, it is obvious that, even in the opinion of Storer, the questioned writings presented multiple tasks, and the record is unclear concerning the extent of the writing involved in each separable task. This is important, because, though the court is one of the few to manifest an awareness, at least formally, of its obligation under *Kumho Tire* to evaluate reliability in regard to the specifics of the expert task to be performed in the case before it,³¹⁶ the court later functionally lumps all of the tasks performed by Storer into a single task for purposes of its analysis.³¹⁷

The first three sections of the court’s opinion are (except perhaps for a few details) unexceptionable, even admirable. Section I analyzes *Daubert* and *Kumho Tire*, recognizing that, while they speak of “flexibility” and “discretion,” the focus of that flexibility and discretion (its “overarching subject”) is “evidentiary relevance and reliability,” and that a flexible standard “does not imply a lax one.”³¹⁸ Section II describes the conclusions of the proposed expert, Kathleen Storer.³¹⁹ Section III recounts the history of handwriting identification expertise in the federal courts, pre- and post-*Daubert*, including a very thoughtful examination of Judge McKenna’s opinion in *Starzecpyzel*.³²⁰ It quite fairly notes that the court of appeals decisions are generally simply affirmations of whatever the district courts have done pursuant to the abuse of discretion standard of *General Electric v. Joiner*³²¹ (and therefore are of limited use as pronouncements on actual reliability). It further notes that the results in the district courts have been “uneven,” with some admitting the proffers without restriction, some

311. *Id.* at 1206.

312. *Id.* The bulk appears to have been cursive, but the last two questioned documents, two brown envelopes, were hand printed.

313. *Id.*

314. *Prime I*, 220 F. Supp. 2d at 1206.

315. *Id.*

316. *Id.* at 1210–11.

317. *See e.g. id.* at 1214 n. 7 (where the court refuses to consider attribution of authorship in regard to handprinting and cursive to be separate tasks).

318. *Id.* at 1204–05 (internal citations omitted). One objection to the first part of the opinion is that, having said that the standard ought not to be lax, the court then implies that laxness is cured by the “equal intellectual rigor” test. *Prime I*, 220 F. Supp. 2d at 1205. Of course, that test tests nothing when it is the accuracy of the group practice itself that is being evaluated.

319. *Id.* at 1206.

320. *Id.* at 1206–08.

321. *Id.* at 1205.

excluding them, and some admitting them with restriction.³²² It then turns to the application of the *Daubert/Kumho* requirements to the facts of *Prime*.

The court's first decision was to properly reject the defense's rather feckless global argument that the 1998 Department of Justice formal solicitation of research proposals "to determine the scientific validity of handwriting identification" was a binding admission by the government that "in its present state, handwriting analysis cannot pass muster under *Daubert/Kumho Tire*."³²³ Directly after this ruling, the court proceeds to make "a few general observations" before it gets down to the business of applying "the *Daubert* factors to assess the admissibility of Storer's testimony."³²⁴ It is at this point that the opinion rolls off the table.

The court says that *Daubert* and *Kumho Tire* were directed at "novel theories in civil trials,"³²⁵ and not at "time-tested techniques used almost universally by law enforcement."³²⁶ Further, the court says, where

a novel theory is presented to a court, it makes sense to demand proof of statistically significant results and strict compliance with scientific methods. However, where a technique has been repeatedly applied and tested by law enforcement and by courts for over a century, the Court does not believe that the absence of scientific data, without more, should be the death knell for such testimony.³²⁷

In making these observations, the court comes as close to formally embracing the "civil plaintiff proffer vs. prosecution proffer" double standard of acceptable reliability as one can imagine a court explicitly doing, and does it without noting the difference between the use of a technique to generate investigatory leads (a use which would remain even if the products of the technique were not admissible at trial) and its use as evidence in a criminal trial.³²⁸ After these "preliminary observations" the result of the case seems a forgone conclusion.

Perhaps even more startling is the way in which the court then deals with the requirements of *Kumho Tire*, which in the first part of the opinion it rightly notes requires some appropriate standards of reliability applied to the actual task the expert is performing in the case before the court, and which requirement it repeats at length at

322. *Id.* at 1208–09.

323. *Prime I*, 220 F. Supp. 2d at 1209. Such a global statement reminds me of the government's similarly weak argument in regard to the effect of Rule 901(b), analyzed in connection with *United States v. Jones* (case 6 *supra*) and rejected by the courts in *Starzeczyzel* and *McVeigh*.

324. *Id.*

325. *Id.*

326. *Id.* at 1210.

327. *Id.* (citing Judge Pollak's second *Llera Plaza* opinion). See *U.S. v. Llera Plaza*, 188 F. Supp. 598 (E.D. Pa. 2002). The strange story which led to the two conflicting opinions of Judge Pollak (both of them unsatisfactory) in *Llera Plaza* is well known, even if the reasons for it remain unclear. See Mark P. Denbeaux & D. Michael Risinger, *Kumho Tire and Expert Reliability: How the Question You Ask Gives the Answer You Get*, 34 *Seton Hall L. Rev.* 15, 66–74 (2003).

328. But in the long run, this opinion may be entitled to an award for candor in respect what is really going on in the judicial mind, both in this case and in many others. While the Supreme Court's decisions in *Daubert*, *Joiner*, and *Kumho Tire* are officially trans-substantive, the suspicion has long been that at least some of the Justices were dominantly interested in an agenda of civil "tort reform" and did not really care about application of the declared standards to prosecution-proffered expertise. See D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?* 64 *Alb. L. Rev.* 99, 99–102 (2000). All that the court has done here is frankly operationalize the implications.

pages 1210–11. How does Judge Lasnik define that task (or more properly, those tasks, since we have already noted that even Ms. Storer treated her comparisons in this case as involving many discrete tasks applied to different parts of different writings with different amounts and types of writing)? He properly observes that in defining that task “the number and nature of samples of questioned and known documents become important.”³²⁹ But then he treats it, not as a case of many difficult subtasks applied to small pieces of writing and printing, on many different forms and documents, but apparently as a case involving extensive amounts of both questioned and known documents, as if it were dealing with a five-page ransom note or anonymous threat letter.³³⁰ Later, he refers only to the extensive amount of “known samples” available to the trained document examiner,³³¹ and yet later says that in cases of single signature comparisons the document examiner lacks “the depth and breadth of questioned and known documents as the one before the court,” when in fact the case before the court involved simply a series of such comparisons. By not defining the difficulty of the subtasks presented by the actual documents in the case, he slides away from doing what *Kumho Tire*, under his own accurate general analysis, required him to do.

Judge Lasnik also rejects the idea that he should determine the reliability of handprinting attribution separately as a separate task, relying on the testimony of Professor Kam discussed below.³³² Functionally, *Prime* defines the *Kumho Tire* task-specific issue as “identifying handwriting as to authorship when there is extensive known writing,” which is almost inevitably true in every criminal case, given the government’s power to compel the creation of exemplars. He then says that the Kam data establish (globally) that Questioned Document Examiners are generally more accurate than lay persons (ignoring the problems of the application of those data to handwriting identification practice in actual cases), invokes the all-but-irrelevant Srihari study,³³³ misconstrues the meaning of peer review and testing as involving case verification review and litigation practice respectively,³³⁴ and asserts that QDEs have a method and

329. *Prime I*, 220 F. Supp. 2d at 1210.

330. It is easy to see how the extent of the “known” documents in this case might be taken to enhance accuracy, but in reality the “questioned” documents were not “extensive” in the sense that the three-page ransom note in the JonBenet Ramsey case was extensive, that is, displaying lots of writing in a single document clearly by the same person. Instead, it is as if the document examiner had been given 78 or 150 or 300 different tests to do (depending on the separable sub-parts, which were clearly present given her actual results). How the extensive nature of Ms. Storer’s multiple tasks enhanced generally her accuracy is a mystery. The only document that actually appears to have been extensive was a three-page document which was hand printed, raising again the propriety of lumping printing and cursive together in making reliability judgments under the approach mandated by *Kumho Tire*. (Information on the nature of the individual documents in *Prime* is derived from the report of the prosecution’s expert, supplied by Michael J. Saks, who testified for the defense in the case).

331. *Id.* at 1211.

332. *Id.* at 1214 n. 7.

333. See Srihari et al., *supra* n. 95 and accompanying text (discussing the Srihari study).

334. *Prime I*, 220 F. Supp. 2d at 1214–15. These arguments, that review of individual work by another examiner is “peer review” within the meaning of *Daubert*, and that a long history of testimony in court subject to cross examination is the same as “testing” within the meaning of *Daubert*, untenable though they are upon any reflection, are staples of government briefs in this area. At this point it is as if a different person than the drafter of the first part of the opinion were writing, one who has decided on the desired result and is merely rather thoughtlessly cutting and pasting from the government brief to undergird it.

that they have “broad acceptance” among law enforcement.³³⁵ Hence handwriting identification expertise is sufficiently reliable and properly admitted. In the end, *Prime I* becomes a standard-issue near-global “guild test” opinion in rather thin *Kumho Tire* clothing. However, in the final paragraph and elsewhere in the opinion, Judge Lasnik does seem troubled. He calls on Kam to share his data,³³⁶ and he admits that formal data going to reliability are thin on the ground compared with other areas,³³⁷ but he can not bring himself to believe any of this calls for exclusion, and voices concern that exclusion might disadvantage some future innocent defendant from calling an expert as part of his defense.

Prime I is also the first case in which the government called Dr. Moshe Kam to testify explicitly on the issue of handprinting.³³⁸ The limitations of Kam’s first two studies are analyzed at length in Risinger, *Handwriting Identification*, *supra* note 11 at sections 33:27 to 35:31. Dr. Kam refuses to share the data from those studies in contravention of the usual norms of science. In spite of this, courts have neither ordered that he produce those data for re-analysis as part of criminal discovery, nor have they barred him from testifying as a result of the failure to produce the data for defense inspection. It seems unthinkable that a court would follow a similar course in regard to a proffered plaintiff’s expert who relied on such research in any competently litigated civil case. Be that as it may, however, in *Prime I* things reached a new low. As indicated above, the court in *Saelee* excluded document examiner testimony on handprinting, concluding that handprinting identification was a task which the document examiner literature indicated was more difficult than cursive identification, and which, whatever the status of the research record in regard to cursive, there were no data indicating that document examiners could assign authorship to handprinting reliably. In *Prime I*, the prosecution called Kam to fill that gap. He testified, apparently, that he had gone back to the original raw materials of those studies and discovered a subset of exemplars in the original materials that were (in his judgment) not in cursive script but handprinted, that he had broken out that subset and analyzed it, and concluded that document examiner performance in regard to the handprinting subset was not significantly different from performance in regard to cursive. The court allowed this testimony despite the fact that the data and raw materials still were not produced for inspection, and the newly discovered handprinting subset was never mentioned in the original publication of the study.³³⁹ In the end, despite formally recognizing the particularizing requirements of *Kumho Tire*, the court essentially treated handwriting identification, including handprinting, as a global skill to be globally evaluated.

28. *United States v. Hidalgo*³⁴⁰ (D. Ariz., Martone, J.)

In *United States v. Hidalgo*, the district court faced a challenge to the testimony of

335. *Id.* at 1215.

336. *Id.* at 1214.

337. *Id.* at 1214–15.

338. *Id.* at 1214 n. 7.

339. It has, of course, now been published. See Kam V, *supra* n. 57.

340. 229 F. Supp. 2d 961 (D. Ariz. 2002).

a prosecution-proffered document examiner (William J. Flynn) in regard to both handwriting and handprinting. The court's first decision in the opinion was to (properly) reject the contention of the government and Mr. Flynn that the Srihari study established that each person's handwriting is unique.³⁴¹ It then turned to an examination of the empirical record regarding reliability of handwriting identification expert testimony. In this section of the opinion, Judge Martone decides that nothing of value can be derived from the results of the FSF/CTS proficiency test results.³⁴² He considers the Kam and Found & Rogers studies, and concludes without much examination of the test designs that they establish a general skill at performing handwriting identification tasks in regard to handwriting experts as a group.³⁴³ He never formulates the specific tasks involved in the case, but his summary of Mr. Flynn's proposed testimony indicates that there were multiple questioned documents of varying extents, some printed forms, some cursive, and the known handwriting of at least two persons, Hidalgo Sr. and Hidalgo Jr.³⁴⁴

This was the second case in which Dr. Kam was called to testify as to the results of his newly discovered subset of handprinting tests from his earlier research. Early in the opinion Judge Martone seems to imply that handprinting and cursive writing present two separate tasks for evaluation,³⁴⁵ but in the end (without reference to the specificity requirements of *Kumho Tire*), like the court in *Prime I*, he rejects this distinction, citing the Kam testimony in a footnote.³⁴⁶ As a result, the expert would be allowed to testify to similarities and differences between documents and defendants for all documents in the case. However, in a somewhat surprising turn, the court also concludes that the theoretical basis upon which an actual declaration of authorship was made (the theory of uniqueness: "No two persons write exactly alike") was not established and therefore testimony of specific authorship would not be allowed.³⁴⁷ In short, with a slightly different rationale, the court adopted the *Hines/McVeigh* approach globally.

29. *United States v. Kehoe*³⁴⁸ (8th Cir., Wollman, J., joined by Arnold and Melloy, JJ.)

United States v. Kehoe is a case with truly horrific facts involving the prosecution of Chevie O'Brien Kehoe, a white supremacist, for (among other things) three capital counts of murder in aid of racketeering.³⁴⁹ The evidence against Kehoe was as overwhelming as the case was horrific. The Rule 702 challenge to the government's handwriting identification expert is dealt with in two paragraphs toward the end of the opinion.³⁵⁰ The nature of the handwriting identification testimony at trial is not

341. *Id.* at 962–63.

342. *Id.* at 964 n. 7.

343. *Id.* at 963–64.

344. *Id.* at 966–67.

345. *Hidalgo*, 229 F. Supp. 2d at 962.

346. *Id.* at 964 n. 4.

347. *Id.* at 968 (referring to the asserted skill of document examiners at seeing handwriting similarities and differences from experience to be a proposition the truth of which is "intuitive," but refusing to allow attribution of authorship on that basis).

348. 310 F.3d 579 (8th Cir. 2002), *cert. denied*, 538 U.S. 1048 (2003).

349. *Kehoe*, 310 F.3d at 583.

350. *Id.* at 593. The court spends part of those two paragraphs explaining that while the district court originally erred in placing the burden to establish inadmissibility on the defendant under Rule 702, it later

specifically described by the court of appeals, but it appears to have been cumulative, and a good candidate for a harmless error characterization if error had been found. Instead, the court found no abuse of discretion in its admission, citing only *Kumho Tire*'s "wide latitude" language regarding trial court discretion, *Jolivet* (inappositely as usual), and the expert's credentials (in effect, the guild test).³⁵¹ Once again, there is no way of knowing what specific claim of expertise was involved in this case, since the court does not even describe what kind of documents were the subject of the testimony.

30. *United States v. Mooney*³⁵² (1st Cir., Bownes, J., joined by Lynch and Lipez, JJ.)

United States v. Mooney is another case in which it is not possible to frame the expert task at hand with much specificity from the opinion. Dennis Mooney was prosecuted in federal court on charges arising out of the armed robbery of a motel in Waterville, Maine.³⁵³ Mooney and the other participants in the robbery were intercepted some distance away, after the motel clerk worked free from restraints and called police.³⁵⁴ They still had the items taken from the robbery, and the clothes and weapons used in the robbery, with them in the car when they were arrested.³⁵⁵ The other four participants pled out and testified against Mooney at trial.³⁵⁶ In addition, Mooney fit a detailed fresh-complaint description given by the clerk and was identified by the clerk both before and at trial.³⁵⁷ At some point, letters purportedly from Mooney were received by Mooney's (former?) girlfriend admitting participation, but the court does not tell us if the letters were signed (though it seems likely that they were).³⁵⁸ It also does not tell us how long the letters were, or whether they were cursive or handprinted. The prosecution wished to establish Mooney's authorship partly by circumstances, partly by testimony from the (at least by then former) girlfriend recognizing Mooney's handwriting, and partly by testimony from a document examiner (never identified by the court, but asserted to be ABFDE-certified³⁵⁹) based on his comparison of the letters to known writings of Mooney. The defense moved to bar the expert testimony pursuant to *Daubert/Kumho Tire*, or at least to limit it to the identification of similarities as was done in *Hines* and the cases that have followed it. The district court denied both requests, and the First Circuit found no abuse of discretion in these denials.³⁶⁰

In coming to this conclusion, the circuit court found that the district court properly relied globally on the credentials of the document examiner and on his testimony that "he and other forensic document examiners employ the same methodology," that "this methodology has been subject to general peer review through published journals in the

corrected itself and thus no error occurred.

351. *Id.*

352. 315 F.3d 54 (1st Cir. 2002).

353. *Id.* at 57.

354. *Id.* at 57–58.

355. *Id.*

356. *Id.*

357. *Mooney*, 315 F.3d at 57–58.

358. *Id.*

359. *Id.* at 62.

360. *Id.* at 63.

field” and that “its accuracy has been tested, with one study concluding that certified document examiners had a potential error rate of 6.5%.”³⁶¹ However, it would seem that the first two of these statements are of little value when, in the words of *Kumho Tire*, the question is whether “the discipline itself lacks reliability.” As to the statement that the accuracy of the method employed by document examiners “has been tested,” that certainly is not true in regard to the great majority of its subtasks. As to the proposition that “one study concluded that certified document examiners had a potential error rate of 6.5%,” this Appendix contains an exhaustive review of the studies evaluating document examiner skills and, as the reader can see, no such study exists. The only studies that have ever tested document examiner skills at all in regard to actual tasks encountered in forensic practice have all concentrated on signature authentication alone, and have not differentiated between “certified” and “uncertified” examiners (whatever that term may mean). No studies have found “potential” error rates of any kind (since individual studies can deal only in actual error rates revealed by the data in the study), and no study has found a global document examiner error rate of 6.5%. What the witness was probably referring to was Kam II, which found that document examiners doing a sorting task (not attributing authorship as in normal practice) had a 13% false negative error rate and a 6.5% false positive error rate under conditions much more favorable than those found in actual practice.

But perhaps we are overanalyzing. Perhaps this is another case where the defense failed to make an appropriately detailed record. Perhaps the circuit panel can be forgiven for just going through the motions, given the overwhelming evidence against Mooney. It even seems to adopt the problematical argument that the long history of handwriting identification admissibility establishes its reliability, as well as the fallacious reading of Federal Rule of Evidence 901(b)(3), discussed above.³⁶² In the end, the court finds no abuse of discretion in refusing a *Hines/McVeigh* limitation, and keeps open the issue of whether either result (imposing the *Hines/McVeigh* limitation or refusing to impose it) might be acceptable, and neither an abuse of discretion.³⁶³

31. *United States v. Thornton*³⁶⁴ (D. Kan.)

Someone stole five Demerol injectors (hypodermics preloaded with Demerol) from

361. *Id.* at 62.

362. See the discussion in connection with *U.S. v. Jones*, 107 F.3d 1147 (case 6 *supra*) and notes 145–52 and accompanying text.

363. *Mooney*, 315 F.3d at 63. In the version of this originally published in Risinger, *Handwriting Identification*, *supra* note 11, I took the position that the court had actually implied that it was the *Hines/McVeigh* approach that was an abuse of discretion. Upon many re-readings of the operative language in *Mooney* (“The *Hines* opinion, of course, has no binding effect. We are not faced here with the question of whether the district court abused its discretion by excluding, as in *Hines*, opinion testimony by a handwriting expert. Nor do we know if the ‘particular facts and circumstances of the particular case,’ *Kumho Tire*, 526 U.S. at 158, 119 S.Ct. 1167, distinguish *Hines*”) in its general context, I have decided that the current text characterization is more appropriate.

364. *U.S. v. Thornton*, http://www.forensic-evidence.com/site/ID/?handwriting_Thornton_ID.html (D. Kan. Jan. 24, 2003) (This was case number 02-M_9150_01.). In the spirit of full disclosure, it should be noted that my friend and regular co-author, Dr. Michael Saks, provided an affidavit for the use of the defense in the Rule 702 hearing in this case. The version on the Web, which is the only one I have, is not paginated, so no pinpoint citations are provided.

the Irwin Army Hospital in Fort Riley, Kansas. The hospital records indicated that the injectors had been signed out in the names of physicians who were not on shift at the time they were signed out, and that they were signed out for use on patients for whom Demerol was not prescribed. The government proffered the testimony of Derek Hammond, ABFDE-certified, a document examiner with the Army Criminal Investigation Laboratory, who examined the “narcotics log” from the hospital and compared the relevant entries to demand exemplars obtained from defendant Thornton and one other physician. Hammond used a 9-point scale in rendering his conclusions: Identification; Highly probable did write; Probably did write; No conclusion; Indications did not write; Probably did not write, and Elimination.³⁶⁵ As to certain entries Hammond said that there were indications that the defendant wrote them (the weakest positive result); as to other entries the court said that Hammond indicated that the defendant “did write” the entries but the court fails to tell us which level of confidence Hammond attached to these conclusions on the scale he used. As to other entries, Hammond could reach no conclusion. Hammond also opined that the exemplars did not reflect normal handwriting, and asked for better exemplars to be obtained.

This was how things stood when the court held its hearing and rendered its opinion. The court never enlightens the reader concerning the amount of writing involved in each entry, though each entry was likely to have been short. Thus the task is that most questionable of tasks, attribution of authorship from a small amount of questioned writing, though how small is not known. It does not appear that defining the task undertaken by the expert was of any importance to the court. The court first describes a version of the *Daubert* checklist, and the effect of *Kumho Tire* in requiring a determination of reliability for all proffers of expertise, not merely those founded on science. It then recites the expert’s credentials, and his conclusions. The court then indicates that it considered the testimony of Mr. Hammond and an affidavit of Michael Saks on the issue of reliability. The court then shows a less than sophisticated understanding of the research it cites. It relies on *Kam II* for a global conclusion that document examiners “possess writer identification skills absent in the general population” (a conclusion which, even if warranted, would not establish reliability even globally, much less in regard to the task involved in the case), and then cites Sita, Found, and Rogers without noticing that their study only deals with signature authentication. Most egregiously, the court cites the Srihari study without noticing that this computer simulation is totally irrelevant to the issue in front of it, the skill of the human expert. It cites the fact that there are standards promulgated by SWGDOC³⁶⁶ and the American Society for Testing and Materials (ASTM), which profess to control the process of handwriting identification, and concludes that “handwriting analysis enjoys general acceptance in the field of forensic science.” None of this tends to establish reliability when, as here, it is in part the reliability of the field itself which is in issue, at least in regard to its ability to distinguish between reliable and unreliable applications.³⁶⁷

365. This is the scale reflected in a standard of the American Society for Testing and Materials (ASTM).

366. Scientific Working Group for Forensic Document Examination.

367. See *Kumho Tire*, 526 U.S. at 151.

Nevertheless, while professing to be troubled by some of the points raised in the Saks affidavit, the Court concludes that the proffered testimony is “based on a reliable foundation and relevant to the task at hand” without ever having defined the task at hand specifically, or really evaluated the evidence for the existence of the claimed skill in regard to that task. This is a global opinion which is clearly in derogation of the task-at-hand requirements of *Kumho Tire*, of which the court shows no awareness whatsoever. At least the court did not rely on inappropriate citations to ground the opinion in an appeal to judicial authority.

32. *United States v. Sanders*³⁶⁸ (6th Cir., per curiam [unreported], Ryan, Batchelder and Lay, JJ.³⁶⁹)

Barbara Sanders and Paula Wilson were charged with bank fraud involving a scheme to obtain federal student loans by filing false papers claiming they were attending the Autonomous School of Medical Sciences in Central America, an approved institution for federally insured student loan programs.³⁷⁰ Part of the evidence against them came from a document examiner.³⁷¹ We are not told who the document examiner was. We are not told what the documents that were examined were. There is perhaps a reason for this. As in *Jolivet* and other cases, the defense lawyer at trial failed to make a proper objection, and so failed to preserve the issue for appeal.³⁷² The court notes this, but does not seem to rest its decision upon it. Rather, it says that

even if we allow Wilson and Sanders to challenge the admissibility of the handwriting examiner’s testimony, we find that the district court properly admitted the evidence In the present case, the trial judge insured that the testimony came from a highly experienced handwriting examiner who carefully explained the basis for his opinion. We thus find no error in admitting the testimony.³⁷³

The guild test, short if not particularly sweet.³⁷⁴

33. *United States v. Crisp*³⁷⁵ (4th Cir., King, J., joined by Wilkins, C.J., Michael, J., dissenting)

United States v. Crisp illustrates how bad facts and the best of a bad set of defense choices can help make bad law. In order to understand this, it is necessary to set out the facts in detail. On June 13, 1981, around 12:25 in the afternoon, a lone male, wearing a mask and surgical gloves and carrying a handgun, entered the Central Carolina Bank in

368. 59 Fed. Appx. 765 (6th Circuit 2003) (unpublished).

369. The Hon. Donald P. Lay of the 8th Circuit, sitting by designation.

370. *Id.* at 766.

371. *Id.* at 767.

372. *Id.*

373. *Id.*

374. I suppose that technically this must count only as dictum, given the failure to preserve any claim of error. This is the other case I got from Mr. Matley’s list that I had not discovered, probably because of the court’s use of the phrase “handwriting analyst” throughout, with the word “expert” not ever being used close enough to the word “handwriting” to come up in my search string. Oh well.

375. 324 F.3d 261 (4th Cir. 2003).

Durham, N.C.³⁷⁶ He approached a teller, threw a bag on the counter, and ordered her to fill the bag. The teller gave the gunman \$7,854.³⁷⁷ A car horn from the parking lot beeped twice, and the robber left the bank and was seen driving away in a purple Ford Probe.³⁷⁸ Police found a stolen purple Ford Probe abandoned on a local street later that day, which apparently contained no useful clues or evidence.³⁷⁹

The next day authorities received a call on the Crimestoppers tip line from a man claiming to have information about the robbery.³⁸⁰ The caller agreed to meet the police at a local restaurant later in the afternoon. The caller turned out to be one Michael Mitchell, who said that the bank robbers were Patrick Crisp and Lamont Torain. The reason Mitchell knew who robbed the bank, he said, was that Crisp and Torain had tried to recruit him for the robbery, and Crisp had detailed the entire plan to him at that time. Mitchell said he declined to participate. (The opinion does not give any account concerning Mitchell's reason for coming forward and volunteering this information.) As a result of Mitchell's information, the police obtained an arrest warrant for Crisp.³⁸¹

The following day (June 15), in what the opinion makes out to be a totally unexpected coincidence, Mitchell and Crisp were driving together in a rented Pontiac Grand Am with Crisp at the wheel when they happened upon a police license checkpoint.³⁸² Crisp had no driver's license, and gave his name as Jermaine Jackson. A search of the vehicle turned up a small amount of marijuana. While an officer or officers were interviewing Crisp, Mitchell informed another officer or officers of Crisp's real identity, which led them to discover the outstanding arrest warrant. Crisp was arrested.³⁸³

Another warrant was obtained for Torain, and he too was arrested.³⁸⁴ At some point between his arrest and Crisp's trial, Torain confessed and agreed to testify against Crisp.³⁸⁵ He admitted that Mitchell had begged off of participating in the robbery at the last minute, but he claimed that the original plan had been conceived by Crisp and Mitchell together. Initially, he had only agreed to drive the getaway car, but when Mitchell backed out, he agreed to be the one to go into the bank.³⁸⁶

Torain had been jailed in the same facility as Crisp.³⁸⁷ According to him, he passed Crisp's cell one day and a note was slid out under the door (which he then turned over to the authorities).³⁸⁸ The note read:

Lamont

376. *Id.* at 263.

377. *Id.*

378. *Id.*

379. *Id.*

380. *Crisp*, 324 F.3d at 263–64.

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.*

385. *Crisp*, 324 F.3d at 264.

386. *Id.* at 265.

387. *Id.* at 264.

388. *Id.*

You know if you don't help me I am going to get life in prison, and you ain't going to get nothing. Really it's over for me if you don't change what you told them.

Tell them I picked you up down the street in Kathy's car. Tell them that I don't drive the Probe. Tell them Mike drove the Probe. He is the one that told on us. Tell them the gun and all that shit was Mike's. That is what I am going to tell them tomorrow [sic].

~~Tell the Feds Mike drove you away from the bank.~~³⁸⁹

Patrick Crisp claimed that he had been with his cousin Cecilia Porter at the time of the robbery (and she so testified at trial). He also claimed that he was being framed by Mitchell and Torain. The viability of that claim (to the extent there was any³⁹⁰) was heavily dependent on inducing belief that the note Torain gave to police had not been slid out of Crisp's cell, but was an invention of Torain's with or without police connivance. If the note were found to be written by Crisp, all of his defenses would collapse. There were two pieces of evidence proffered by the prosecution to bolster Torain's testimony that the note originated with Crisp. First, it appears undisputed that there was a palmprint on the note. The prosecution obtained an authentic palmprint from Crisp, and it was compared with the palmprint on the note by Mary Katherine Brennan, a fingerprint examiner with the North Carolina State Bureau of Investigation, who concluded that the palmprint on the note was Crisp's.³⁹¹

In addition, the prosecution obtained handwriting exemplars from Crisp. These were compared to the handwriting on the note by Thomas Currin, a document examiner with the same State Bureau of Investigation, who concluded that Crisp wrote the note.³⁹²

Obviously, unless these witnesses were to be excluded (especially the fingerprint examiner), Crisp was unlikely to have a chance of acquittal. To that end, Crisp moved to exclude the proffered fingerprint and handwriting identifications on the ground that they did not meet the reliability standards of Federal Rules of Evidence 702. The motion was denied, without an (available) opinion, as to both proffers. It is clear from the opinion in the court of appeals that there was a hearing on the motions, but it seems that the only testimony taken was from the government's document examiner, the defense relying on cross examination and published sources.

In addition, it seems clear that the attack that was made on both areas of expertise was global, in derogation of the requirements of *Kumho Tire*. In this case that is not surprising, certainly as to the fingerprint aspects of the case. Unless we are misled by the implications of the word "palmprint," it is likely that the latent print was extensive, rendering unavailable the attack on the "boundary problem," that is, the reliability of comparisons to latent prints which contain little detail. As I (and a co-author) have argued elsewhere, while a global attack on fingerprint comparison reliability for lack of formal data is interesting, it is only the boundary problem that is likely to create a viable

389. *Id.*

390. In addition to the testimony of Mitchell and Torain, police had found surgical gloves in the back of Crisp's girlfriend Katherine Bell's car (she was apparently the "Kathy" referred to in the note), and a bulletproof vest and sawed-off shotgun in the bedroom of her residence, which Mitchell, at any rate, said had been shown to him as intended for use in the robbery. *Crisp*, 324 F.3d at 264.

391. *Id.* at 265.

392. *Id.* at 270.

issue under *Daubert/Kumho*.³⁹³ We further observe there that quixotic global attacks on fingerprint identification are likely to have bad consequences downstream by making it easier for courts to dismiss skeptics as irresponsible bomb-throwers. Something of that dynamic may have infected the majority's consideration of the handwriting identification issue in this case. Of course, the defense attorney really had no choice; assuming the palmprint was sufficiently extensive and clear, it was either a global attack on fingerprint identification or none at all, and he probably was obliged to take the one-in-a-million shot for his client even though it might foul up the way in which later decisions would be approached by this court, and others that might be influenced by its opinion. As was said above, what happened was the bad result of making the best of a bad set of available choices for his client.

The majority had little trouble dismissing the global attack on fingerprinting, in a rather slipshod opinion tacking together pieces of rationale without much analysis, including the "strong general acceptance, not only in the expert community, but in the courts as well," and widespread agreement on standards within the expert community (which happens not to be true in regard to the boundary problem, by the way), and most startlingly, acceptance of the testimony by examiners that the error rate was "essentially zero" or "negligible," without supporting data, as establishing a low error rate generally and apparently across all conditions.³⁹⁴ The court, like many others, seems unaware that none of this is very compelling when, in the words of *Kumho Tire*, the issue is whether "the discipline itself lacks reliability." Finally, the court concludes that, in the face of these factors, the defense had failed to bring forward sufficient information even to raise an issue concerning reliability.³⁹⁵

If the opinion of the majority on the fingerprinting issue was slipshod, there was a better opinion that could have been written reaching the same result in the case before the court. A long history of, among other things, successful identification of cadavers later confirmed by other evidence (combined with other fairly indisputable general propositions about the nature of ridged skin) perhaps provides an acceptable belief warrant for the reliability of the process when there is extensive questioned print material to work with (as appears to have been the case here), even though there is a lack of formal science concerning the randomization mechanism involved, and a lack of statistical work that could generate information on random match probabilities. The only caveat here is that the palm print may have been smudged in such a way that it did not provide sufficient detail to justify such an approach, especially considering the fact that the examiner's conclusions may have been contaminated by knowledge of other, fingerprint-domain-irrelevant, evidence in the case (a point apparently never raised by the defense).

If an acceptable opinion on the fingerprint aspects of the case could perhaps have been written, the same is not so clearly true concerning handwriting identification, as it lacks the characteristics of the fingerprint phenomenon that might provide the requisite

393. Denbeaux & Risinger, *supra* n. 327, at 68 n. 183.

394. *Crisp*, 324 F.3d at 266–70.

395. *Id.* at 269.

belief warrant. Nevertheless, on the handwriting issue, the majority went on to reach a result similar to the one it reached in regard to the palmprint identification (and on explicitly similar grounds).³⁹⁶ First, the court observes that no circuit has ever found the admission of handwriting identification testimony to be an abuse of discretion.³⁹⁷ Next, the court recites the qualifications of Agent Thomas Curran of the North Carolina State Bureau of Investigation, the government's witness.³⁹⁸ It then notes in a footnote that the witness testified to the results of what is apparently one of the Kam studies (but the actual study does not seem to have been produced by the parties or obtained by the court).³⁹⁹ Finally it says: "The fact that handwriting comparison analysis has achieved widespread and lasting acceptance in the expert community gives us the assurance of reliability that *Daubert* requires,"⁴⁰⁰ a breathtaking disregard of the requirements of *Daubert* and *Kumho Tire* and an explicit adoption of the "guild test."

Judge Michael's dissent opens thus:

The majority believes that expert testimony about fingerprint and handwriting identification is reliable because the techniques in these fields have been accepted and tested in our adversary system over time. This belief leads the majority to excuse fingerprint and handwriting analysis from the more careful scrutiny that scientific expert testimony must now withstand under *Daubert* before it can be admitted. In Patrick Leroy Crisp's case, the government did not prove that its expert identification evidence satisfied the *Daubert* factors or that it was otherwise reliable. I respectfully dissent for that reason. In dissenting, I am not suggesting that fingerprint and handwriting evidence cannot be shown to satisfy *Daubert*. I am only making the point that the government did not establish in Crisp's case that this evidence is reliable. The government has had 10 years to comply with *Daubert*. It should not be given a pass in this case.⁴⁰¹

This paragraph sets out the themes of the dissent, but it is harder than one might think to determine its exact focus. The rest of the opinion shows great familiarity with the literature concerning the global reliability arguments surrounding both fingerprint and handwriting identification, and it is very effective in eviscerating, as a general matter, the majority's reliance on "adversary testing." However, it is difficult to know whether the dissent is saying that the government failed to make an appropriate showing in Crisp's case because they merely called two examiners who were not themselves familiar enough with the extant disputes and data to make an proper record upon which to base a finding of reliability (which would mean that the dissent was arguing for a result like that in *Saelee* (case 16 *supra*) and *Lewis* (case 26 *supra*), or whether the dissent is arguing that the current state of the research record is inadequate to establish admissibility of either fingerprinting or handwriting identification globally. In addition, the dissent (like the majority) is too global in focus to comply with the mandate of *Kumho Tire* to judge reliability in regard to the particular proffer in the case. Finally, the

396. *Id.* at 271 ("Our analysis of *Daubert* in the context of fingerprint identification applies with equal force here").

397. *Id.* at 270.

398. *Id.*

399. *Crisp*, 324 F.3d at 271 n. 6.

400. *Id.* at 271.

401. *Id.* at 272 (citations omitted).

dissent (like the majority) does not distinguish between fingerprint identification and handwriting identification when it comes to evaluating the reasons one might in many applications accept the reliability of one and not the other.

34. *Wolf v. Ramsey*⁴⁰² (N.D. Ga., Carnes, J.)

Wolf v. Ramsey was decided the same day as *Crisp*. This defamation case grew out of the unsolved 1996 murder of JonBenet Ramsey in Boulder, Colorado. The opinion is worth reading just for its scrupulous and clear summary of the facts of the case and its investigation. To this date, as most of America knows, the case has not been solved, but various speculations about the perpetrator's identity have circulated. The speculations directly concerned in this case involve the notion that there is reason to believe that JonBenet's mother Patricia (Patsy) Ramsey might have been the killer, and the notion that there is reason to believe that Robert Christian Wolf might have been the killer. The circumstances pointing toward Patsy Ramsey center around claims that it is unlikely that an intruder into the Ramsey home at night could have found JonBenet's room, abducted her into the basement, killed her, and then had the time to draft a three-page "ransom" note using materials found in the home and make his escape without awakening somebody else in the house. The identification of Patsy Ramsey (as opposed to other members of the household such as her husband or son) is based on claimed identification of the handwriting on the ransom note as belonging to Patsy Ramsey.

On the other hand, if one accepts that the evidence establishes that JonBenet was killed by an intruder,⁴⁰³ then the speculation about the identity of the intruder has tended to focus on a handful of named individuals, although almost everyone agrees that the perpetrator is at least as likely to be someone whose name has not yet surfaced to prominence. One of those named individuals was plaintiff Wolf.

Suspicion in regard to Wolf resulted from the statement made by his girlfriend Jacqueline Dilson that she suspected him, based on the following facts, which she claimed were true: The murder occurred either near midnight on Christmas day or in the early morning of December 26, 1996. Wolf had spent Christmas day with Dilson, but then begged off from staying to have supper with her and her family. Dilson had gone to bed around 10:00 p.m. thinking Wolf had gone off on some sort of spree. Dilson was awakened around 5:30 a.m. by sounds coming from the bathroom. She realized that Wolf was just finishing a shower. Leaving dirty clothes all over the floor, Wolf climbed into bed and went to sleep. The next day Dilson and Wolf saw television news reports about the JonBenet Ramsey murder, and, to Dilson's surprise, Wolf became quite agitated. Wolf cursed and said that he believed JonBenet had been sexually abused by her father, and he brooded over the case for the rest of the night. Dilson also asserted that Wolf was fascinated with world political disputes and political violence, and hated big business. Finally, Dilson said that Wolf owned a sweatshirt with the initials SBTC (for Santa Barbara Tennis Club), which were the same initials as those used to sign the

402. 253 F. Supp. 2d. 1323 (N.D. Ga. Mar. 31, 2003).

403. The court makes clear that the overwhelming weight of evidence points in this direction. *Id.* at 1353-57.

ransom note.⁴⁰⁴

This information was communicated by Dilson initially to Pam Paugh, Patsy Ramsey's sister.⁴⁰⁵ Later it was given to the police, and they interviewed and investigated Mr. Wolf, who was never charged. In a book written by them, Patsy Ramsey and her husband John Ramsey recounted the above in arguing that there were various people who were more likely to have been the murderer than Patsy Ramsey.⁴⁰⁶ As a result, Mr. Wolf sued.

To make a long story as short as possible, the court determined that the Ramseys' statements about Wolf suggested that he was a viable candidate to be JonBenet's murderer, and were thus presumptively defamatory, subject to two defenses: truth (which covered many of the statements) and good faith statements of opinion.⁴⁰⁷ To get around the "opinion" defense, the plaintiff asserted that the implications were knowingly false and malicious because the Ramseys knew for a fact that Wolf was not the killer, because they knew for a fact that Patsy Ramsey was the killer.⁴⁰⁸ This is where the handwriting identification experts come in.

The ransom note had been examined by six questioned document examiners during the police investigation. Four of those were commissioned by the police and two by the Ramseys.⁴⁰⁹ They were Chet Ubowski of the Colorado Bureau of Investigation, (ABFDE); Richard Dusak (spelled "Dusick" in the opinion) of the U.S. Secret Service (ABFDE); and Leonard Speckin, Edwin Alford, Lloyd Cunningham, and Howard Rile (ABFDE), all in private practice. All six agreed that John Ramsey could not be identified as author of the note.⁴¹⁰ While none of the examiners eliminated Patsy Ramsey completely, all six agreed that the likelihood of her being the author of the note was very low. As the court said, "on a scale of one to five, with five being elimination, the experts placed Mrs. Ramsey at a 4.5 or a 4.0."⁴¹¹ However, Wolf claimed to have evidence that would satisfy the requirement of clear and convincing evidence (which was the applicable standard of proof) that Patsy Ramsey had written the note. This evidence was the testimony of two witnesses claimed by the plaintiff to be handwriting identification experts, who had concluded that Patsy Ramsey had undoubtedly written the ransom note: Cina Wong and Gideon Epstein (ABFDE).⁴¹² In addition, apparently as part of the "peer review" of his work, Mr. Epstein had obtained affidavits from former FBI document examiners Larry Ziegler (ABFDE) and Richard Williams, and private practitioners David Lieberman and Donald L. Lacey, approving his analysis and concurring in his results.

404. This paragraph is a summary of the court's excerpt of the information in the book, John and Patsy Ramsey, *The Death of Innocence: The Untold Story of JonBenet's Murder and How Its Exploitation Compromised the Pursuit of Truth* (Thomas Nelson 2002). *Wolf*, 253 F. Supp. 2d. at 1350-51.

405. *Id.* at 1350.

406. Ramsey, *supra* n. 404.

407. *Wolf*, 253 F. Supp. 2d. at 1351-52.

408. *Id.* at 1352.

409. *Id.* at 1334.

410. *Id.* at 1334 n. 14.

411. *Id.* at 1334.

412. *Wolf*, 253 F. Supp. 2d. at 1335.

The Ramseys moved to strike the testimony of these two witnesses pursuant to *Daubert*, and for summary judgment. Judge Carnes first ruled globally (using what is functionally a variant of the guild test) that handwriting identification techniques used by trained forensic document examiners are sufficiently reliable in general to allow them to testify to similarities and differences to “aid the jury.”⁴¹³ She then ruled that Cina Wong was unqualified.⁴¹⁴ Cina Wong was largely self-taught, claimed ten years of experience, and had been vice president of the National Association of Document Examiners. The court noted, however, that this organization has no membership requirements beyond payment of a fee.⁴¹⁵ The court perhaps goes too far in anointing the American Board of Forensic Document Examiners (ABFDE) as the “sole recognized organization for accreditation of qualified forensic document examiners.”⁴¹⁶ However, the conclusion concerning Ms. Wong, especially given her initial approach to defendant’s attorneys offering to “analyze the Ransom Note and point out the weaknesses in analysis by ‘Government handwriting experts’” seems unexceptionable.

Judge Carnes contrasts favorably the qualifications of Mr. Epstein with those of Ms. Wong.⁴¹⁷ They are indeed, from the perspective of the guild, impeccable. He is a past president of the American Society of Questioned Document Examiners and a member of the aforementioned ABFDE. He was trained at the United States Army Crime Laboratory and the Post Office Identification Laboratory, and has 30 years of experience. She ruled that he was qualified to testify in order to point out similarities and differences between the ransom note and the handwriting of Patsy Ramsey.⁴¹⁸

However, she then turns (without citation) to the *Kumho Tire* part of the opinion, saying that she must “still determine the parameters of his expertise with regard to the opinions he seeks to offer.”⁴¹⁹ It is here that Mr. Epstein strikes out. Judge Carnes notes that Epstein worked under what document examiner lore and his own previous writings hold are undesirable conditions, dealing with a note written with a broad fiber-tip pen,⁴²⁰ and using photocopies instead of originals of both Patsy Ramsey’s known writing and the ransom note.⁴²¹ Still, he came to the conclusion “to a ‘100 percent’ degree of certain[y]” that Patsy Ramsey wrote the note.⁴²² Judge Carnes finds, in spite of the fact that his conclusion was joined by four other document examiners (who were not going to testify), that Epstein’s methodological explanation for how he could be so sure failed to meet the required level of reliability,⁴²³ and on this basis she adopts a “*Hines/McVeigh*” result and bars him from testifying to his conclusions.⁴²⁴ Without the benefit of the

413. *Id.* at 1344. The Ramseys did not seem to put up much of an opposition, as Judge Carnes characterized most of the information on which this ruling was based as “undisputed.”

414. *Id.*

415. *Id.* at 1345.

416. *Id.*

417. *Wolf*, 253 F. Supp. 2d. at 1344–45.

418. *Id.* at 1345.

419. *Id.*

420. *Id.* at 1334.

421. *Id.* at 1346.

422. *Wolf*, 253 F. Supp. 2d. at 1346.

423. *Id.* at 1347.

424. *Id.* at 1347–48.

handwriting expert's conclusion, plaintiffs could not prevail, and therefore she granted summary judgment.⁴²⁵

There are many interesting aspects of this opinion, among them: the two-stage global then particularized approach, the willingness to examine the actual conditions of practice in judging reliability, and the willingness to be properly skeptical in the face of obvious overreaching. Judge Carnes's careful treatment of why it is sometimes required to treat reliability of conclusions separately from reliability of observations is in stark contrast to the First Circuit's summary declaration to the contrary in *Mooney*. Would that more judges would follow her lead in criminal cases.

And one cannot leave this circus without observing that the spectacle of so many dueling document examiners, including five ABFDE-certified document examiners, and the shocking overclaiming by Mr. Epstein, seconded by Mr. Ziegler, should give even the most hardened proponent of the reliability of handwriting identification expertise pause. It should, but it probably won't.

35. *United States v. Jabali*⁴²⁶ (E.D.N.Y., Johnson, J.)

United States v. Jabali is an unreported decision by Senior Judge Johnson of the Eastern District of New York, which deals in part with a motion in limine by the defendant to "limit the testimony of the Government's handwriting expert to simply pointing out patterns of similarity between proffered examples of documents alleged to have been signed by Defendant and documents that were in-fact written and submitted by Defendant to the Government," based on "several cases where other district courts have limited handwriting expert testimony, citing the unavailability of testing of this type of expertise, as well as the lack of general standards in this field."⁴²⁷

In giving short shrift to defendant's claim (and the *Hines/McVeigh* approach), the court fails to define the specific task facing the document examiner. Indeed, the court sets out very few facts from which the "task at hand" can be inferred with any confidence. The defendant was charged with "participating in a credit card bust-out scheme which, it is proposed, is responsible for losses . . . of approximately 8.5 million dollars."⁴²⁸ Generally in such a scheme multiple credit cards are obtained with false identities, purchases of merchandise may be made and paid for to expand the available credit line for each card, at which point large purchases of merchandise are made, the cards are charged to the limit and beyond (busted out), and the merchandise is sold to receivers (who may or may not know that the merchandise was obtained fraudulently). The cards, their balances, and the identities which they reflect, are then simply abandoned.

In this context, it is impossible without more to know what task the prosecution

425. *Id.* at 1348. Though Judge Carnes does not deal with it directly, it seems right to say that, although jurors are authorized to compare handwriting directly without expert testimony (see *U.S. v. Alvarez-Farfan*, 338 F.3d 1043 (9th Cir. 2003)), it would be too much to say that in a case like this, they could base a finding satisfying the clear and convincing evidence standard on such direct examination.

426. 2003 WL 22170595 (E.D.N.Y. Sept. 12, 2003).

427. *Id.* at *2 (citing as examples *Hines*, 55 F. Supp. 2d at 68 (noting that there is no peer review by a "competitive, unbiased community of practitioners and academics"); *Rutherford*, 104 F. Supp. 2d at 1193).

428. *Id.* at *1.

document examiner is being asked to perform. It might be attributing authorship for non-natural signatures written in false names. In that case, it is the same task that various courts beginning with *Ruth* have avoided analyzing, and have yet to come to grips with under the standards of *Kumho Tire*. Or the government might have seized more extensive writings pursuant to their investigation, in which case the task would be different. At any rate, Judge Johnson never undertakes the analysis required by *Kumho Tire*. In fact, he never even mentions the case (one can infer here that the defense attorney is at least partly responsible for failing to present the motion in terms of *Kumho Tire*'s requirements). At any rate, the court merely says conclusorily (without citation) that the Second Circuit has interpreted *Daubert* to reflect a pro-admissibility approach reflecting the "liberal thrust" of the Federal Rules of Evidence. He then states that "[b]lanket exclusion is not favored, as any questions concerning reliability should be directed to weight given to testimony, not its admissibility."⁴²⁹ This is a typical opinion, high on slogans, some of which are off the mark of the Supreme Court's requirements, and low on analysis.

36. *Deputy v. Lehman Brothers, Inc.*⁴³⁰ (7th Cir., Manion, J., joined by Bauer and Evans, JJ.)

The next federal civil case of interest is *Deputy v. Lehman Bros., Inc.*, a securities fraud action arising from the conduct of a Lehman Brothers investment advisor named Frank Gruttadauria, who had already pleaded guilty to fraud charges in regard to "one of the 'largest scams of retail investors ever [committed] by an individual broker.'"⁴³¹ Lehman Brothers moved to stay proceedings pending arbitration pursuant to an arbitration agreement purportedly signed by Ms. Deputy.⁴³² Ms. Deputy denied signing any arbitration agreement. Lehman Brothers produced an option approval form dated February 20, 1993, and three client agreements from 2001, all bearing what purported to be Ms. Deputy's signature, and all of which apparently contained arbitration clauses applying to transactions Ms. Deputy complained of. Ms. Deputy denied signing these (the implication being that Gruttadauria forged them).⁴³³ Lehman then produced a document examiner, Dianne Marsh, who testified that she had compared the four signatures on the documents to genuine signatures of Ms. Deputy and, in her opinion, Deputy signed two of the four documents containing arbitration clauses.⁴³⁴ She was unable to reach a conclusion as to the other two.

The plaintiff attacked the tenability of this opinion in a variety of ways. First, she denied that one of the signatures that was used as a "known" by Marsh was genuine (it was on a letter purporting to be from Deputy to Lehman Brothers).⁴³⁵ Second, plaintiff

429. *Id.* at *2. Note that it does not seem that "blanket exclusion" was being requested either, merely a limitation on the form of the testimony, but the court seems oblivious to this distinction.

430. 345 F.3d 494 (7th Cir. 2003).

431. *Id.* at 496.

432. *Id.*

433. *Id.*

434. *Id.*

435. *Deputy*, 345 F.3d at 498–99 n. 2.

pointed out that Marsh originally had been given only the single disputed “known” signature, and had on that basis declared that she was unable to form an opinion at all, but that when Marsh was supplied with a photocopy of a second “known” signature (from an affidavit filed in the case) she had then concluded that two of the questioned signatures were made by Deputy. Plaintiff contended that the number of “known” signatures was insufficient for the task and that working from a photocopy was not proper.⁴³⁶ Marsh herself in her original report said: “Before a conclusion can be reached, additional samples of the genuine signature of Doris A. Deputy need to be submitted for examination. Since the questioned documents span a time period of February 20, 1993, through July 26, 2001, it would be advisable to have known standards covering this time frame.”⁴³⁷

The plaintiff also asserted that Marsh should not be believed because her findings had once been rejected by a court. When the judge in this case had asked her generally whether “any court refused to accept you as an expert witness on this subject matter,” she had said “no,” but later when probed about a particular case, said that she did not remember. Here is where the trial court had gotten into trouble. The judge had rejected Marsh’s testimony based partially on its unreliability as a matter of technique under Federal Rule of Evidence 702, and partially on his evaluation of Marsh’s lack of frankness.⁴³⁸ By basing his rejection of the handwriting expert on a mixture of reliability and credibility, he erred. The circuit reversed, indicating that it was not concluding that Marsh’s testimony was in fact sufficiently reliable to meet the requirements of Federal Rule of Evidence 702, but that the court had to evaluate it by proper standards under that rule.

37. *United States v. Oskowitz*⁴³⁹ (E.D.N.Y. Garaufis, J.)

This case involves the prosecution of a tax return preparer for “knowingly and willfully aiding and assisting in procuring, counseling, and advising the preparation and presentation of false tax returns.”⁴⁴⁰ The charged crime was in essence a scheme to obtain “Earned Income Credit” refund checks fraudulently. The “Earned Income Credit” is a program of the federal government intended to aid the working poor by in effect

436. *Id.* at 499–500.

437. *Id.* at 499. In her testimony, Marsh asserted that originals were preferable, but that in the absence of an original a “good” photocopy could be used. She also doggedly insisted that handwriting identification was a “science,” though not an “exact science.” *Id.* at 500–01. It is interesting to note that the plaintiff does not appear to have attacked Ms. Marsh on the ground of her qualifications, though her qualifications appear to be not much better than those of Ms. Wong, whom Judge Carnes rejected in *Wolf v. Ramsey* (case 34 *supra*). Ms. Marsh was a member of the World Association of Document Examiners instead of the National Association of Document Examiners, but neither one is recognized by the Osbornian establishment. Note that Ms. Marsh was a “diplomat of the American Board of Forensic Examiners,” not the American Board of Forensic Document Examiners anointed by Judge Carnes, or the other FSAB approved certifying board, the Board of Forensic Document Examiners. *See supra* n. 7. The standards of the “American Board of Forensic Examiners” appear to be decidedly lax.

438. *Deputy*, 345 F.3d at 502. It appears that the case was twenty years old and that Ms. Marsh had not in fact testified, but that her expert report had been proffered and rejected. When that was pointed out, Marsh replied, “I’m not familiar with that.” *Id.* at 498. It is unclear whether she would have known of this rejection even twenty years earlier.

439. 294 F. Supp. 2d 379 (E.D.N.Y. 2003)

440. *Id.*

giving them a kind of negative income tax subsidy (a “refund” check larger than the amount of tax paid through withholding or otherwise) based on their low income and family obligations. The allegations against the defendant were that she advertised through fliers for people with children who had never before filed federal income tax returns, then worked with them to create a phony income profile that would qualify them to receive an “Earned Income Credit” check, which she would then split with them.⁴⁴¹ The opinion by Judge Garaufis deals in part with a motion in limine to “exclude, or in the alternative to limit, the testimony of the government’s handwriting expert, John Paul Osborn.”⁴⁴²

This “reported” opinion, filed less than three months after the *Jabali* “unreported” opinion from the same federal district, shows the remarkable variability that can mark trial court decisional practice under *Daubert* and *Kumho Tire*. Once again, there is no effort to identify the task that the expert will be asked to perform at trial, in derogation of *Kumho Tire*. (And there is even less basis for speculating what the document examiner was being asked to do than in the *Jabali* case.) In this case the court’s failure to identify the “task at hand” is clearly due to the defense attorney’s having framed the attack globally, though in theory this should not alter the court’s obligations. At any rate the judge is persuaded to adopt the *Hines/McVeigh* approach, ruling that “proper scope of Mr. Osborn’s testimony (as well as the testimony of any opposing handwriting expert the defense may choose to produce) extends to explaining to the jury the similarities and differences between a known example of Oskowitz’s handwriting and a disputed tax return,”⁴⁴³ on the authority of *Hines*, *Rutherford*, *McVeigh*, *Santillan*, *Van Wyk*,⁴⁴⁴ and *Hidalgo* (limiting testimony) as well *Fujii*, *Saelee*, and *Brewer* (excluding all testimony). The Court concludes: “Jurors may then make a decision on the ultimate question of authorship with the benefit of that expert testimony, as well as the benefit of their cumulative experience distinguishing the penmanship of different writers.”⁴⁴⁵ While the decision is less committed to the status quo than *Jabali*, it is too much driven by reference to precedent and not enough by reference to reason and analysis.

38. *United States v. Prime (Prime II)*⁴⁴⁶ (9th Cir., Trott, J., joined by Paez and Berzon, JJ.)

The district court’s decision regarding handwriting in *Prime I*,⁴⁴⁷ analyzed above, was affirmed on appeal.⁴⁴⁸ As the district court itself had noted, generally such confirmation is virtually a given no matter what decision the district court makes, given

441. *Id.* at 381.

442. *Id.* at 383. Osborn is ABFDE-certified.

443. *Id.* at 384.

444. The inclusion of *United States v. Van Wyk*, 83 F. Supp. 2d 515 (D.N.J. 2000), is interesting and instructive, because *Van Wyk* had nothing to do with handwriting identification, although it has more than once been erroneously cited as if it did. The case deals with “forensic stylistics,” which involves the claim that one can attribute authorship of a document by analyzing its style of writing—i.e., diction, grammar, etc.

445. *Oskowitz*, 294 F. Supp. 2d at 384.

446. 363 F. 3d 1028.

447. 220 F. Supp. 2d 1203 (case 27 *supra*).

448. *Prime II*, 363 F.3d at 1034.

the abuse of discretion standard mandated by the Supreme Court in *General Electric v. Joiner* for review of Federal Rule of Evidence 702 decisions.⁴⁴⁹ That being said, it should be obvious to the reader that, just as some district court opinions are more thoughtful than others, and more in tune with the language and requirements of *Daubert* and *Kumho Tire*, so the same is true of court of appeals opinions. The district court opinion in *Prime I* is one of those opinions (like *Starzecpyzel*, or like the two *Llera Plaza* opinions dealing with fingerprints taken together) where the court is clearly trying to understand the requirements of the Supreme Court's directives, and troubled by the surprising weakness (given its traditional unquestioned admissibility) of the prosecution-proffered forensic identification expertise, but in the end just can not bring itself to reject or limit this time-honored form of prosecution evidence. Many of the same characteristics are carried over into the opinion of the court of appeals in *Prime II*.

The court of appeals opinion on the handwriting issues begins with an extended paragraph of stock phrases summarizing the *Daubert/Kumho/Joiner* line of cases, with an emphasis, perhaps rather too global,⁴⁵⁰ on the discretion of the trial court.⁴⁵¹ The opinion then goes on to formally recognize the task-at-hand requirements of *Kumho Tire*.⁴⁵² In a footnote, the court notes that defendant Prime "has not raised as an issue, and we have no reason to believe, that the questioned writing samples were of insufficient length to support a valid analysis."⁴⁵³ With this footnote, any real possibility of a true task-at-hand analysis goes out the window. Thereafter, the court essentially adopts (in some detail) the district court's approach, although it is clearly troubled at the outset that there may be a different and more serious issue raised in a later case involving the attribution of authorship based on a small amount of unknown writing (initials or a signature for instance), and it is at pains to say, echoing the Supreme Court, that it can "neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case."⁴⁵⁴ Finally, the court takes what, given the near inevitability of the outcome on appeal under *General Electric v. Joiner*, is a kind of misplaced comfort in the fact that it has arrived at a conclusion consistent with the other six circuits that have considered proffers of handwriting expertise (even though many of those cases were decided before *Kumho Tire*, or did not even recognize the task-at-hand requirements of *Kumho Tire* or the text of amended Rule 702, and were weakly reasoned at best).⁴⁵⁵

449. *Prime I*, 220 F. Supp. 2d at 1208.

450. As noted above, the district court was admirably aware that the "discretion" invoked in *Kumho Tire* was discretion to intelligently define and apply criteria of reliability properly referable to the application of the expertise in question to the task at hand in the case before the court. The court of appeals is less clear on this. Compare *Prime I*, 220 F. Supp. 2d at 1205 (district court) with *Prime II*, 363 F.3d at 1033 (court of appeals).

451. The fact that an opinion is made up in whole or in part of stock phrases is not per se a criticism of its judgecraft. Properly used, such stock phrases set out the analytic framework established by precedent, and lay the justifying foundation for the opinion. While they may provide legal justification, however, they should not become, as they often do, substitutes for legal reasoning.

452. *Prime II*, 363 F. 3d at 1033.

453. *Id.*

454. *Id.*

455. *Id.* at 1034.

A final note on *Prime II*. One of the overlooked issues (as usual) was the extent to which the writings were submitted to the expert in a non-blind fashion. The responsibility both for this omission and for failure to develop a proper description of the subtasks involved in the case must fall at least in part upon the defense attorney. Finally, it appears likely that the district court, and perhaps the court of appeals as well, was influenced both by what it took to be the large volume of known and questioned writing available,⁴⁵⁶ and by the relatively modest claims regarding levels of certainty manifested by the expert, Kathleen Storer, in rendering her various opinions as to authorship.⁴⁵⁷ *Prime* was a case in which the problem of over-claiming the certainty of one's expertise, while perhaps still present, was much less dramatically present than in many other cases. The amount of over-claiming by an expert is properly one factor to be taken into account in determining the reliability of that expert's testimony.

39. *United States v. Rutland*⁴⁵⁸ (3d Cir., Fisher, J., joined by Alito and Aldisert, JJ.)

The next federal case chronologically is *United States v. Rutland*, a case involving an interesting and almost amusing variation on the kind of claims heretofore made in regard to handwriting identification expertise. The statement of facts in Judge Fisher's opinion makes it clear that the case against defendant Rutland was pretty overwhelming. Rutland had been a financial advisor employed by Citicorp Financial Services. In that capacity, he became the financial advisor to Helen Constans, an elderly widow, in 1990, and had access to all of her financial information, including various account numbers and her social security number. Constans declined physically, and apparently mentally, being placed in a long-term care facility in 1995. Her niece, Dorothy McCosh, attempted to sort through her documents and put some order in her finances. During this process Ms. McCosh found a mysterious annuity statement that listed one Barbara Grams as the annuitant. Ms. McCosh also knew that Rutland had been her aunt's financial advisor, and contacted him twice. At that time, Rutland said he did not know a Barbara Grams, and that the annuity statement must have been generated in that name as the result of a clerical error by the company. At this point, Ms. McCosh apparently contacted the U.S. Attorney, and an investigation was instituted. The investigation revealed that Barbara Grams was Rutland's girlfriend. There turned out to be multiple financial forms and checks made out to the benefit of either Rutland or Grams, bearing the apparent signature "Helen Constans."⁴⁵⁹

As part of the government's case the prosecution intended to offer proof (beyond the obvious strong circumstantial inference that Constans had no apparent reason to

456. In fact, the court was wrong to believe the questioned writing should count as a large volume, rather than many very small amounts presenting separate tasks. See *supra* nn. 329–31 and accompanying text.

457. See *Prime I*, 220 F. Supp. 2d at 1206; see also *Prime II*, 363 F.3d at 1033. One should be careful not to overvalue this apparent modesty. An effective tactic of persuasion when there are many writings to be attributed is to give qualified opinions on the peripheral writings in such a way as to add weight to the unqualified identifications of the truly inculpatory writings. The prospect of this would be reduced by a presentation of the materials for analysis in a truly masked procedure. By making these observations I intend no implication that this is necessarily what happened in regard to Ms. Storer's testimony in *Prime*.

458. 372 F.3d 543 (3d Cir. 2004).

459. *Id.* at 543–44.

make over \$600,000 in gifts to Rutland and Grams) that the signatures were not genuine signatures of Helen Constans. To that end the government called Gus Lesnevich (ABFDE), who, it must be said, has sterling credentials as an Osbornian document examiner (putting aside for the moment the question of whether such credentials are strong indicators of the existence of claimed expertise).⁴⁶⁰ The objection raised by Rutland's lawyer at the trial was neither a challenge to the reliability of handwriting expertise in general, nor to its reliability in regard to the task at issue in Rutland's case. (This would have been a very hard sell, considering the fact that declaring signatures authentic or inauthentic is the only task commonly encountered in court where there is actual research supporting a claim of expertise by document examiners.)⁴⁶¹ Nor was the objection a general claim like the ones in *Jabali* and *Oskowitz*, based on *Hines* and similar cases, that handwriting experts should be limited to pointing out similarities and differences, and should not be allowed to opine on the final conclusion (in this case, genuineness of the signature). Rather, the objection was that, while a lesser qualified expert might be allowed to so opine because his or her credentials would not necessarily induce the jury to rely on those conclusions, a really well credentialed expert should be restricted to pointing out similarities and differences because of the danger that the jury would overvalue his conclusion based on his credentials.⁴⁶²

It is true that there is some reason to believe that document examiner years of experience, at any rate, are not good predictors of enhanced accuracy.⁴⁶³ Whether that is necessarily the case with other indices of training and experience is an open question, but it is such a counterintuitive claim that courts are likely to find it just too much to swallow without providing strong affirmative data, and maybe not even then. And so it transpired in this case, with the court not unexpectedly declaring, in affirming the trial court's decision,

Rutland's suggestion of limiting an expert from testifying to the ultimate issue if the expert has stellar qualifications leads to an absurd result. Parties would be forced to determine if their proposed experts were overly qualified, and find less qualified experts. Expert opinions, valuable to the trier of fact because they are opinions of highly skilled and qualified experts, would be provided by less qualified experts.⁴⁶⁴

40. *United States v. Ferguson*⁴⁶⁵ (S.D. Ohio, Rice J.)

In *United States v. Ferguson*, Judge Rice of the Southern District of Ohio writes at length, but the result must be counted as severely disappointing on a number of fronts.

460. *Id.* at 544–45.

461. Kam IV, *supra* n. 56; *see supra* nn. 79–85 and accompanying text.

462. *Rutland*, 372 F.3d at 545.

463. *See* Risinger et al., *supra* n. 14, at 749 (quoting the 1987 Comments of the Proficiency Advisory Committee of the Forensic Sciences Foundation in regard to the results of that year's handwriting identification proficiency tests (and those of earlier years): "As usual, there were no correlations between right/wrong answers and certification, experience, amount of time devoted to document examination, and length of time spent on this test"). *See also* Sita et al., *supra* n. 92 (similar result of the data collected by Sita, Found & Rogers).

464. *Rutland*, 372 F.3d at 546.

465. 2004 WL 5345480 (S.D. Ohio July 30, 2004).

The defendant, Scott Ferguson, was charged with interstate transport of a stolen motor vehicle and the sale of same, in violation of 18 U.S.C. §§ 2312 and 2313. The vehicle in question was an armored car. When the vehicle was sold, the seller presented the buyer with a bill of sale signed “Elen Poloroman.”⁴⁶⁶ The main subject of defendant’s motion in limine was the prosecution-proffered testimony of Allen Southmayd (ABFDE), a document examiner at the U.S Army Criminal Investigation Laboratory (USACIL).⁴⁶⁷ Southmayd was to testify that he had compared exemplars of defendant’s known writing with the signature “Elen Poloroman” on the bill of sale, and that the signature “was actually authored by the defendant.”⁴⁶⁸ Here again we see the most questionable “task at hand” to which handwriting identification expertise can be applied—attributing authorship of an exceptionally limited amount of handwriting to a particular individual by comparison of hands.⁴⁶⁹ It is an issue for which there are absolutely no data that indicate that it can be done reliably, and that has been unaddressed or unsatisfactorily treated in varying degrees of poor analysis or lack of analysis in *Ruth*, *Velasquez*, *Jones*, *Battle*, and *Elmore*, and only dealt with in any way approaching the requirements of *Kumho Tire* in *Rutherford*. Judge Rice’s opinion adds to the list of cases that totally fail to deal with the issue in the manner required by *Kumho Tire*.

The court begins by noting that “every appellate court, including the Sixth Circuit, which has addressed the question in the ‘post-*Daubert* world,’ has concluded that such testimony is sufficiently reliable to be admissible,”⁴⁷⁰ citing *Prime*, *Crisp*, *Hernandez*, *Paul*, *Jones*, and *Velasquez*, and mis-citing *Jolivet* as usual, and failing to take into account the actual tasks at issue in any of those cases,⁴⁷¹ and also failing to note that

466. *Id.* at *1.

467. The prosecution also proposed to call Derek Hammond, another questioned document examiner at USACIL, who checked Southmayd’s work (presumably according to some form of the ACE-V “methodology”). The defendant objected to Hammond’s testimony as “irrelevant.” It is hard to see how the testimony could be irrelevant if the “verification” step of ACE-V (often passed off as “peer review” in an attempt to fulfill the *Daubert* criteria) is an important step in ensuring the reliability of the product. However, Judge Rice ruled it irrelevant and excluded Hammond’s testimony from the government’s case in chief. *Id.* at *6. Unnecessary cumulation, and a non-independent result likely to be overvalued in bolstering the testimony of Southmayd, which would justify exclusion pursuant to Federal Rule of Evidence 403, would probably have been a more satisfactory account for the result.

468. Southmayd graded his attribution of authorship as a 9 on the ASTM 9-point scale used by some document examiners. Nine is “identity”—the highest level of certainty, which seems a bit much, to put it mildly, given the amount of questioned material there was to work with (two words, thirteen total letter forms, seven individual letters). Even the graded ASTM scale is no guarantee against overclaiming. These cases always raise the question of how much other evidence relating to the defendant’s guilt was communicated to the document examiner that might have raised his confidence inordinately. *See*, as always, *Risinger et al.*, *supra* n. 22.

469. The attribution seems to have been especially difficult, and questionable, in this case since the questioned signature was a combination of cursive and printed letters, and it required multiple sessions of demand exemplars to obtain samples of both cursive and printed forms that satisfied Southmayd as sufficient. *Ferguson*, 2004 WL 5345480 at *4.

470. *Id.* at *7.

471. This is especially egregious in regard to the *Ferguson* opinion’s treatment of the circuit opinion in *Prime II* (case 38 *supra*). Judge Rice spends a paragraph on the *Prime II* opinion, declaring that it “finds the reasoning of the Ninth Circuit to be persuasive and adopts the same,” *Ferguson*, 2004 WL 5345480 at *9, without noting (or noticing) that the *Prime II* opinion is very careful to limit itself only to the very different task in front of it. *See Prime II*, 363 F.3d at 1033 (embracing “a case-by-case review rather than a general pronouncement that in this Circuit handwriting analysis is reliable”).

Hernandez affirmed the propriety of a *Hines/McVeigh* limitation imposed on document examiner testimony. The opinion then goes on to concentrate on *Jones*, which is perhaps not surprising for an Ohio district court judge, since *Jones* is a Sixth Circuit case, but unfortunate, both because *Jones* was decided before *Kumho Tire*, and because by any analysis, as we have already seen in connection with the discussion of *Jones* above, the *Jones* opinion reached “new heights of unsatisfactory judgecraft.” In its reliance on *Jones*, the *Ferguson* court swallows uncritically the Rule 901(b)(3) fallacy fully examined in connection with *Jones*.⁴⁷² In addition, it makes more out of the citation to *Jones* in the 2000 Advisory Committee Note than that citation can bear. The most that the citation can be used to illustrate is that, as it says, “in certain fields experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.”⁴⁷³ It cannot be read as blessing the global and completely guild-based approach of a pre-*Kumho Tire* case as a proper approach to the reliability determination required by *Kumho Tire*’s “task at hand” reliability evaluation. Yet this is exactly how the *Ferguson* opinion deals with the case, concluding explicitly, as *Jones* did implicitly, that (without any task-specific analysis of any kind, in derogation of *Kumho Tire*’s requirements) the only criterion by which to judge the reliability of proffered experience-based expertise is “experience”: “[T]he reliability of a document examiner’s testimony is best ascertained by examining his or her training and experience.”⁴⁷⁴ The court then examines Southmayd’s training and experience, and (despite some deficiencies) predictably (given what has gone before) finds that his years as a document examiner, most of it with USACIL, are enough by themselves to allow him to testify to whatever conclusions he reaches, apparently whatever the task at hand, or however difficult it might be.⁴⁷⁵

41. *United States v. Ojeikere*⁴⁷⁶ (S.D.N.Y., Koeltl, J.)

Judge Koeltl’s opinion in *Ojeikere* is more sparse than Judge Rice’s in *Ferguson*, but employs, at least by implication, the same methodology, and reaches much the same result. Daniel Ojeikere and his wife Idongesit Ojeikere were charged with a variety of crimes arising primarily out of their alleged running of a version of what appears to be generically known as a “Nigerian advance fee fraud.” Virtually every reader of this will

472. *Ferguson*, 2004 WL 5345480 at *7. *Jones* is case number 6 *supra*. See *supra* nn. 145–52 and accompanying text.

473. *Id.* at *8 (quoting 2000 Advisory Committee Note to Amended Federal Rule of Evidence 702). It might be helpful in the future if the Advisory Committee were more thoughtful about the general quality of the opinions they cite for specific propositions in the Notes.

474. *Id.*

475. There seems to be some reason to doubt the care with which Mr. Southmayd makes factual evaluations of at least some kinds, though perhaps not quite to the degree of exaggeration of Mr. Sperry, the proffered expert in *Jones* itself. Southmayd testified to having done document examinations in 6,000 cases in 28 years, or 214 cases per year (a little more than four cases a week, year in and year out). That certainly seems remarkably productive, though not so much so as Sperry’s claim of 7,300 cases in 14 years, which was more than a case a day without a break. However, Southmayd also testified to having “reviewed approximately 600,000 documents” in those 28 years (presumably for purposes of making handwriting comparisons). If he “reviewed” such a document every ten minutes 9 hours a day every day without a break for 28 years, he still wouldn’t reach 600,000. Courts so inclined will swallow anything, but such indications of exaggeration and over-claiming should rather count against a witness’s reliability than for it.

476. 2005 WL 425492 (S.D.N.Y. Feb. 18, 2005).

be familiar with the typical e-mails often associated with such a scheme, though in the version the Ojeikeres were charged with, the communications were by phone and fax. In the charged scheme, the communications alleged that the sender was a Nigerian citizen who was entitled to an inheritance worth approximately \$17 million. These communications induced individuals to wire money from Boston, Massachusetts, to bank accounts at banks in New York, by promising that they would receive in return 20% of the purported \$17 million inheritance.⁴⁷⁷

In proof of the Ojeikeres' role in the scheme, the government intended to introduce, inter alia, testimony by questioned document examiner Gus Lesnevich (ABFDE) that Mr. Ojeikere probably authored the text of certain (presumably handwritten) documents; that Mrs. Ojeikere probably signed the name "Barbara Smith" on one document; and that Mr. Ojeikere failed to use his true handwriting when he provided the government with exemplars after his indictment.⁴⁷⁸ The defendants moved to exclude Mr. Lesnovich's testimony as unreliable. In addition, Mr. Ojeikere moved, failing exclusion, to limit Mr. Lesnovich to describing purported similarities and differences between the questioned documents and the exemplars.⁴⁷⁹

The court seems totally oblivious to the fact that Mr. Lesnevich's three proposed conclusions involve three very different tasks and claims of expertise—attribution of authorship for documents containing significant amounts of writing,⁴⁸⁰ attribution of authorship for a single signature, and the inference that someone has not written in their "normal" hand when giving demand exemplars.⁴⁸¹ As discussed at length in connection with *Ruth* (case 2 *supra*) and further in connection with *Velasquez, Jones, Battle, Elmore, Rutherford, and Rutland*, the second is the most questionable task undertaken by document examiners. Further, there is absolutely no empirical evidence to support the skill claim in regard to distinguishing between disguised exemplars and normal hand exemplars independent of comparison to some authenticated specimen of "course of business" or everyday writing pre-existing the obtaining of the demand exemplars.⁴⁸² The court appears unaware of any of this, and the responsibility for that lack of awareness probably should rest in great part with the defense attorneys whose job it is to

477. *Id.* at *1.

478. *Id.* at *3.

479. *Id.* at **2–3.

480. It is actually unclear how much writing was contained in the "text of certain questioned documents" referred to by the court, *id.* at *3, in connection with Mr. Lesnevich's first conclusion. I have assumed that it was reasonably extensive. Otherwise the first and second Conclusions present variations on the same task— attribution of authorship from extremely limited amounts of "unknown" writing.

481. The fundamentally testimonial nature of the provision of demand exemplars is well illustrated by the fact that writing one way rather than another will be taken as evidence of consciousness of guilt. See *Ojeikere*, 2005 WL 425492 at *3 n. 1. How compulsion to "write honestly" does not violate the privilege against self-incrimination is very hard to understand. The courts have analogized the provision of demand exemplars to the seizure of pre-existing specimens of writing under the Fourth Amendment, and their compelled production pursuant to Federal Rule of Criminal Procedure 17(c), see *id.* at *4 n. 2 and authorities there cited, but the analogy is profoundly unpersuasive. For a thorough (though ultimately mistaken, in my view) opinion on the issue in the context of a defendant who persists in refusing to cooperate in providing such exemplars, arriving at the conclusion that there is no Fifth Amendment violation, see *U.S. v. Lentz*, 419 F. Supp. 2d 837, 840–43 (E.D. Va. 2006).

482. The claim that the expert can accurately evaluate signs of disguise is an old one in the field, but it is a claim that has never been subject to empirical testing of any kind.

make these issues clear, in the way that civil defense attorneys (with lots of resources) inevitably do in analogous situations in, for example, toxic tort cases.

In any event, with such an approach, it is not surprising that the court invokes the uniformity of courts of appeals opinions (without noting the problems of inferring much from their affirmances pursuant to an abuse of discretion standard, or the fact that criminal appeals almost inevitably deal only with cases where the handwriting evidence was admitted below, not cases, if any, where it was excluded), and invokes the citation to *Jones* in the Advisory Committee Note to the 2000 Amendment to Federal Rule of Evidence 702.⁴⁸³ But then, in a rather startling turn, the court does not simply declare the proposed testimony admissible, but rather says as follows:

The Government conceded at oral argument that there are good reasons to hold a pre-trial hearing in this case pursuant to Federal Rules of Evidence 104(a) and 702, at least with respect to Mr. Lesnevich's final opinions. (See Tr. of Oral Argument dated Dec. 10, 2004 at 37-40.) A pre-trial evidentiary hearing will allow the parties to present expert evidence and conduct cross-examination of the proposed expert. See *Borawick v. Shay*, 68 F.3d 597, 608 (2d Cir.1995). Accordingly, the Court will conduct a pre-trial hearing to allow Mr. Lesnevich to explain his methodology and the bases for his specific opinions, particularly the basis for his conclusions that the defendants were probably the authors of certain questioned documents and his opinion that Mr. Ojeikere purposely concealed his handwriting when furnishing handwriting exemplars to the Government.⁴⁸⁴

So, instead of simply declaring the proposed testimony admissible, the court held a *Daubert* hearing at the prosecution's cautious insistence. The result of that hearing is not reported anywhere, though it seems obvious what it was overwhelmingly likely to be. Daniel Ojeikere, at least, was convicted, and the sentencing phase was not completed until July 9, 2007.⁴⁸⁵ Hence the issues have not yet been considered on appeal as of this writing. But the general outlines of this poor opinion, with its unthinking globalness in derogation of *Kumho Tire*, its reliance on the guild test, and most importantly its wooden and uncritical invocation of case authority, were the shape of things to come.

42. *United States v. Mornan*⁴⁸⁶ (3d Cir., Van Antwerpen, J., joined by Ambro and Tashima, JJ.)

United States v. Mornan, like the often mis-cited *Jolivet*⁴⁸⁷ (case 13 *supra*), deals in pertinent part with the admission of handwriting identification testimony that was not objected to at trial. Defendant Mornan was accused of being a co-conspirator in a fraud scheme operating between Canada and the United States, whereby uncreditworthy persons were solicited, and promised loans if they would obtain "loan insurance." Checks and money orders made out to fictitious insurance companies were cashed, and

483. *Ojeikere*, 2005 WL 425492 at *3. The wording of this invocation is similar to that in *Ferguson*, and makes it appear likely that it was drawn from a standard government brief.

484. *Id.* at *4.

485. See *U.S. v. Ojeikere*, 2007 WL 2076695 (S.D.N.Y. July 9, 2007).

486. 413 F.3d 372 (3d Cir. 2005). Judge A. Wallace Tashima, Senior United States Circuit Judge for the Ninth Circuit, sat by designation.

487. 224 F.3d 902.

neither loans nor insurance were forthcoming.⁴⁸⁸ Because the handwriting identification testimony was not objected to at trial, the court expends little effort in explaining exactly what the proffered handwriting expert testified to, and what claim of expertise was entailed, before it concludes that allowing her testimony in the absence of objection was not plain error.⁴⁸⁹ The sole issue discussed beyond that is the propriety of the lower court's having allowed the document examiner to testify in terms less than absolute certainty, which the court finds to be perfectly acceptable, citing *United States v. Rosario*.⁴⁹⁰ This of course is the absolutely correct ruling. It would be a tragic irony if the legal system punished experts for being conservative in their estimation of their own certainty and rewarded only those prepared to over-claim.

43. *United States v. Judson Brown*⁴⁹¹ (2d Cir., per curiam [unpublished], Meskill, Newman and Raggi, JJ.)

In this case, the panel of the Second Circuit that issued the non-precedential Summary Order affirming defendant's conviction kept its consideration of the handwriting issue short and ambiguous in affirming the admission of the prosecution's expert handwriting testimony at trial. The facts appear to be as follows:⁴⁹² Judson Brown flew in from Colombia to a New York area airport, and was subject to a customs search which revealed a counterfeit \$100 bill and a postal mailing receipt for a package sent from Colombia to an address in Connecticut. The package was later intercepted and contained in excess of 500 grams of cocaine. The exact nature of the handwriting testimony at issue in the case is not made clear by the opinion, except to say that it dealt with attributing to Brown "authorship of certain documents."⁴⁹³ We are not told what documents, or how many, or how much writing was involved in each. The defense moved for exclusion, or in the alternative, for a *Hines/McVeigh* restriction.⁴⁹⁴ One suspects these motions were fairly cursory. The trial court denied both.⁴⁹⁵ The court of appeals notes the controversy surrounding handwriting expertise, and that the Second Circuit has yet to rule definitively (as if there could be a globally definitive ruling under the requirements of *Kumho Tire's* "task at hand" approach), but further notes that "similar attacks on handwriting analysis have been rejected by our sister circuits," citing *Prime, Crisp, Mooney, and Jones*, and as usual failing to note the difficulties in characterizing such precedents given the "abuse of discretion" standard they apply and the "task at hand" requirements of *Kumho Tire*.⁴⁹⁶ Having said this, the court states that it will only reverse for "manifest error" (which presumably is the same as *Joiner's* "abuse of discretion") and that "[h]aving reviewed the record of proceedings relevant to

488. *Mornan*, 413 F.3d at 374-75.

489. *Id.* at 381.

490. *Id.* at 381-82 (citing *U.S. v. Rosario*, 118 F.3d 160, 163 (3d Cir. 1997)).

491. 152 Fed. Appx. 59 (2d Cir. 2005) (unpublished). The defendant's first name is used in order to prevent confusion with *U.S. v. Brown*, NO CR 99-184 ABC (case 11 *supra*).

492. *Judson Brown*, 152 Fed. Appx. at 61.

493. *Id.*

494. *Id.* at 62.

495. *Id.* at 61.

496. *Id.* at 62.

the district court's decision to allow the challenged expert testimony in this case, we find no such manifest error."⁴⁹⁷ However, the court then goes on to state that even if there had been error it was harmless beyond a reasonable doubt both because the authorship of the documents was peripheral to guilt in the charged offenses, and because the other evidence was so overwhelming that there was no reasonable probability of the result having been different if the handwriting testimony had been excluded.⁴⁹⁸ In short, this opinion is a standard-issue routine affirmance by a federal court of appeals which does not address the actual issues of handwriting identification reliability as applied to the task in the case before it at all.

44. *United States v. Smith*⁴⁹⁹ (4th Cir., per curiam [unpublished] Luttig, Michael and Traxler, JJ.)

United States v. Smith is another "unpublished" per curiam court of appeals opinion (this time from the Fourth Circuit) giving short shrift to defense objections to handwriting expertise on appeal.

The facts appear to be these: Al Smith was a convicted felon prohibited from possessing firearms that had traveled in interstate commerce under federal law. He was charged with, inter alia, purchasing such firearms from the Cumberland Pawn Shop in North Carolina, taking them to New York, and then selling them in New York. The purchase of the firearms (which constituted the actus reus of the felon-in-possession count and an important evidentiary fact in regard to the unlicensed trafficking counts upon which he was indicted) was the subject of overwhelming evidence. Smith purchased the guns using phony driver's licenses with another name but his picture on them. When his home was searched, the driver's licenses were found and seized. Various pawnshop employees testified to recognizing him as a person to whom they had sold and delivered guns under the names on the licenses. A co-conspirator in the selling operation, Reginald Currie, testified against him (it is not specifically stated, but seems reasonably clear, that Smith was targeted after Currie was arrested for something and cut a deal to give Smith up). The names on the firearms register book at the pawnshop matched the names on the phony licenses with Smith's picture on them.⁵⁰⁰

To gild the lily, the prosecution called a forensic document examiner, Agent Carl McClary (ABFDE-certified) of the Bureau of Alcohol, Tobacco and Firearms, to testify that the signatures on the register were in Smith's handwriting.⁵⁰¹ Once again, the formal task for which expertise was being claimed was the attribution of authorship from a very limited amount of "questioned" writing. The court never notices this, perhaps understandably, given the inevitable conclusion of harmless error if error was found, but from such analytic sloppiness is bad jurisprudence forged. Instead of analyzing the case pursuant to the requirements of *Kumho Tire*, the court treats the previous Fourth Circuit opinion in *United States v. Crisp* as an applicable precedent for the global acceptability

497. *Judson Brown*, 152 Fed. Appx. at 63.

498. *Id.*

499. 153 Fed. Appx. 187 (4th Cir. 2005) (unpublished).

500. The facts are pieced together from information given at *Smith*, 153 Fed. Appx. at 187, 189, 191.

501. *Id.* at 189.

of handwriting identification expertise, even though the task at issue in *Crisp* was vastly different from the one formally at issue in *Smith*, and even though the *Crisp* decision was two to one with a dissent.⁵⁰² The panel should have known this. Judge Michael was the dissenter in *Crisp*.⁵⁰³ Apparent precedent is a powerful force among judges in our legal system, even if the precedent deals with empirical issues that cannot properly be resolved globally by precedent, either rationally or pursuant to the requirements of *Kumho Tire*.

45. *United States v. Adeyi*⁵⁰⁴ (2d Cir., per curiam [unpublished], Calabresi, Straub and Wesley, JJ.)

United States v. Adeyi is another Second Circuit Summary Order dealing with a challenge to the admissibility of prosecution-proffered handwriting identification expertise. Defendant Adeyi was arrested at Kennedy Airport upon his arrival from Nigeria when a screening of his luggage revealed 30 kilograms of heroin.⁵⁰⁵ In another exercise in lily gilding (perhaps to head off the argument that Adeyi really didn't know there were 65 pounds of heroin in his luggage) the government "called a handwriting expert to opine as to the authorship of certain slips of paper found among the packages of heroin contained in Adeyi's bags."⁵⁰⁶ The expert "testified to his belief that, based on the handwriting in Adeyi's address book, two of the handwritten slips of paper found in the heroin packages appeared to be authored by Adeyi." We are not told how much writing was on the two slips of paper attributed to Adeyi. It may be that this case presents another example of the most questionable task avoided and not faced. But this time the blame for its not being faced is entirely on the defense attorney, since the testimony of the expert was not objected to at trial. Hence, the Circuit reviewed it only for plain error, and by that standard, quite properly affirmed, leaving issues of ineffective assistance and harmlessness to post-conviction proceedings.⁵⁰⁷ Hence this case is in fact like both *Jolivet* and *Mornan*,⁵⁰⁸ which also involved unpreserved claims. For this reason neither *Jolivet* nor *Mornan* nor *Adeyi* establish anything except that it is not plain error to admit proffered handwriting identification testimony which is not objected to, hardly a surprising proposition. In a subsequent opinion by the district court in the same case, in response to Adeyi's motion for post-conviction relief for ineffective assistance of counsel based on counsel's failure to object to the prosecution's handwriting identification expert testimony, Judge Ross ruled that the failure to object did not constitute ineffective assistance of counsel because "such an objection would have been meritless." Although he recognizes that the admissibility issue was technically unsettled in the Second Circuit, Judge Ross says that "this court concludes that the great weight of authority favors admitting such . . . testimony and thus, the objection Adeyi contends

502. *Id.* at 190. To be fair to the *Smith* panel, the *Crisp* majority did characterize their adoption of the "guild" test as global. See *Crisp*, 324 F.3d at 271 (case 33 *supra*).

503. *Id.* at 272.

504. 165 Fed. Appx. 944 (2d Cir. 2006) (unpublished).

505. *Id.* at 945.

506. *Id.*

507. *Id.* at 945-46.

508. See the discussions of *Jolivet*, 224 F.3d 902 (case 13 *supra*), and *Mornan*, 413 F.3d 372 (case 42 *supra*).

Marino should have made would have been overruled.”⁵⁰⁹ Note that the Judge Ross never addresses the “task at hand,” and makes a conclusion of global admissibility based entirely on precedent interpreted globally, in derogation of the requirements of *Kumho Tire*. Whether this is in part the result of post-conviction counsel’s failure to frame the task-at-hand issue is not ascertainable on the face of the opinion, but this seems likely.

46. *United States v. Campbell*⁵¹⁰ (N.D. Ga., Story, J.)

Judge Story’s opinion rejecting a motion in limine to exclude the testimony of David S. Moore (ABFDE) in *United States v. Campbell* is another global opinion, but it must be said that it appears to have been generated, at least from what can be discerned from the opinion itself, in response to a fairly global pro se objection, relying mostly on piling up citations to *Lewis*, *Saelee*, *Fujii*, *Hidalgo*, *Rutherford*, and *Hines* with little case-specific analysis.⁵¹¹ The court responded with a string cite of its own to *Paul*, *Crisp*, *Mooney*, *Jones*, *Velasquez*, and the usual mis-citation to *Jolivet*, with the added mis-citation to *Mornan*, and decided that the Eleventh Circuit opinion in *Paul* disposed of the issue globally for the court’s own Circuit, obviating the necessity of any *Daubert* hearing.⁵¹² The requirements of *Kumho Tire* are ignored (beyond citing it for the proposition that the court’s gatekeeping function extends to non-science expertise), and it is impossible to determine what expert task the document examiner was being asked to perform. Unfortunately, there is reason to fear that the *Campbell*-type opinion is becoming the common standard in the majority of district courts.

47. *United States v. Garza*⁵¹³ (5th Cir., Dennis, J., joined by Jones and King, JJ.)

In a reversal of the usual roles, the Fifth Circuit case *United States v. Garza* deals with a defense-proffered handwriting expert. Unlike the usual case of prosecution-proffered handwriting expertise, the defense’s asserted expert in *Garza* was excluded from testifying by the trial judge.

Francisco Garza was charged in one count of a multi-count indictment alleging a conspiracy to distribute the drug known as Ecstasy and other drugs.⁵¹⁴ Garza was tried,

509. *Adeyi v. U.S.*, 2007 WL 203962 at *5 (E.D.N.Y. Jan. 24, 2007). I have elected to include the post-conviction decision here rather than include it as a separate decision on reliability, for reasons that should be apparent from the text.

510. 2006 WL 346446 (N.D. Ga. Feb. 13, 2006).

511. *Id.* at *2. At least the court chose to treat the case as if that were the defense claim, although it is obvious from the opinion that the document examiner, David S. Moore, was being asked to merely to authenticate the defendant’s signature on certain documents. *Id.* It should be noted that although Campbell made this motion pro se, *id.* at *1, he was supported by lawyers from three law firms, including the large national firm Blank, Rome. (Defendant was a mayor of Atlanta charged with bribery and tax fraud, and convicted of tax fraud. See *U.S. v. Campbell*, 491 F.3d 1306, 1309 (11th Cir. 2007) (affirming his conviction). Another interesting detail is that Judge Story refers to a similar case with a similar result in the same district which generated no published or semi-published opinion or order. *Campbell*, 2006 WL 346446 at *3 n. 1. This illustrates the difficulties of being sure of what goes on in actual practice, given the existence of so much “dark matter” in the disposition of objections in the everyday handling of thousands of cases, but the trends revealed from the published cases seem likely to be typical. Finally, I note that Mark P. Denbeaux filed an affidavit in support of Campbell’s motion. *Id.* at *3.

512. *Id.*

513. 448 F.3d 294 (5th Cir. 2006).

514. *Id.*

convicted, and sentenced to 36 years in prison, and on appeal raised only two substantive challenges to the central evidence against him, which was a confession obtained by Dallas Police Officer Barry Ragsdale.⁵¹⁵ The main attack was that Ragsdale had been investigated by Michael Grimes of the U.S. Department of Justice Inspector General's office when an Assistant United States Attorney prosecuting a case in which Ragsdale was a witness expressed concerns that Ragsdale had not told the truth in regard to the actual voluntariness of the cooperation of one of the defendants in that case. Grimes had investigated and interviewed Ragsdale, and concluded that Ragsdale was being deceptive during the investigation (based a lot on body language, according to the Court) but no prosecution was undertaken. Garza wanted to call Grimes as an opinion witness regarding Garza's lack of veracity pursuant to Federal Rule of Evidence 608(a). The trial court ruled that the investigation had not provided sufficient knowledge to form a reliable opinion for the purposes of Rule 608, conceding that it was "a close question." The circuit court ruled that the trial court did not "abuse its discretion" and rejected this ground of appeal.⁵¹⁶

The handwriting dimension of the case also deals with the circumstances of the alleged confession. Kim Sanders (presumably another Dallas police officer or employee) signed two documents attesting to having witnessed Garza's confession (one of which presumably being signed close in time to the alleged confession itself).⁵¹⁷ Sanders testified in the prosecution's case-in-chief to having witnessed the confession and to signing the attestations. Garza alleged that this did not happen, and wished to call a handwriting expert, Linda James,⁵¹⁸ to say that the signature on the attestation did not match known signatures of Kim Sanders. There were two objection made to Ms. James's testimony: first, that she had not been identified as a witness and had provided no report until the day she was called to testify by the defense, in violation of the judge's pretrial reciprocal discovery order; second, that the methodology she employed, relying solely on four photocopied "known" signatures and two photocopied signatures from the challenged documents, was not sufficiently reliable to satisfy Federal Rule of Evidence 702. At a *Daubert/Kumho Tire* hearing, "James admitted that she did not know how many times the documents had been photocopied, but she testified that she believed the quality of the copies were [sic] clear enough for her to use them as the basis of her opinion," although she agreed that "to look at the original signatures is the best

515. *Id.* at 296. Garza also claimed that his sentence had been impermissibly enhanced by the district court in contravention of *U.S. v. Booker*, 543 U.S. 220 (2005). On this claim he prevailed and the case was on that basis remanded for re-sentencing.

516. *Garza*, 448 F.3d at 297-98. The court also affirmed the district court's rejection of the defense's attempt to get the same opinion in through a hearsay backdoor by characterizing Grimes's course-of-business report of his investigation and conclusions concerning Ragsdale as an admission of a party under Federal Rule of Evidence 801(d)(2)(b) or (d) because Grimes was an agent of the Justice Department and the Justice Department was conducting the prosecution. *Id.* at 298-99. Consideration of the merits of that issue is beyond the scope of this appendix.

517. *Id.* at 299-300. The court does not make clear whether the confession was written or oral. If it was written it is surprising that there appears to be no controversy concerning Garza's signature or writing, but this question does not change the admissibility issues in regard to the defense handwriting expert.

518. The credentials of Ms. James, a NADE member, would probably not have impressed Judge Carnes. *See Wolf*, 253 F. Supp. 2d at 1345 (case 34 *supra*).

practice.”⁵¹⁹ She also said that “she [had] requested original exemplars of Sanders’ signature from defense counsel, but that originals were not provided.”⁵²⁰ Based on this testimony, the district court ruled as follows:

I find that her testimony, based on the examination of copies, comparing them, copies, Xerox copies, without any knowledge about how often they had been copied, whether that’s a second, third, fourth, fifth or tenth copy that had been made, in other words, a copy of a copy, I find that her testimony would not be reliable under Rule 702.⁵²¹

The court also ruled that James’s testimony should be excluded for violation of the pretrial order.

The circuit court declined to determine whether exclusion was a justified sanction for the violation of the pre-trial order, deeming that issue moot since it affirmed the exclusion based on Federal Rule of Evidence 702 because “it cannot be said that the district court’s ruling was an abuse of discretion.”⁵²² In reaching that conclusion, the court conceded that there were numerous cases that have held that the use of photocopies instead of originals by a document examiner goes to weight and not admissibility.⁵²³ In addition, the circuit did not address the district court’s apparent confusion of the issue concerning whether one can determine how many generations of photocopying a copy represents, with the issue of whether the photocopy is clear enough for use.⁵²⁴

Finally, the circuit court held that any error was harmless because the district court allowed the jury to see the photocopies James would have relied upon, and to argue that the attestation signatures were forgeries based on this. This was supposedly sufficient to satisfy the defense’s desire to impeach Sanders,⁵²⁵ though it is difficult to see, if one believes in the existence of such expertise, how the direct juror evaluation would render the improper exclusion of the expertise automatically “harmless.”

519. *Garza*, 448 F.3d at 300.

520. *Id.*

521. *Id.*

522. *Id.*

523. A typical such opinion accepting the use of photocopies (by a prosecution expert) is *People v. Nawi*, 2004 WL 2944016 at *19 (Cal. App. 1st Dist. Dec. 21, 2004) (case 63 *infra*). More importantly, so far as I know, there has never been another case where the sole basis for the exclusion of the testimony of a handwriting expert was the use of copies for comparison purposes. The closest case I have ever seen is *Todd v. State*, 806 So. 2d 1086 (Miss. 2001), which affirmed a trial court’s decision not to give any weight to the testimony of a criminal defendant’s handwriting expert in the context of a hearing on the authentication of a purported witness recantation letter, based both on the expert’s very thin credentials and the use of photocopies. *Id.* at 1095. While it is perhaps suggestive that in *Todd*, as in *Garza*, it was a defense proffer that was rejected, the basis in *Todd* was at least more than merely the use of photocopies. Finally, there is *Bourne v. Town of Madison*, 2007 WL 1447672 (D.N.H. May 9, 2007), a federal civil rights case in which the plaintiff’s expert (whom the court almost found unqualified as a handwriting expert of any kind) not only used photocopies but also used a non-standard process of multiple photocopy blowups to obtain comparison specimens, which the defendant’s document examiner claimed would lead to distortion. While I must say that I find some weaknesses in the testimony of the defendant’s expert on these grounds, the court’s rejection of the plaintiff’s expert in *Bourne* is certainly not a bare rejection based on using photocopies per se.

524. A fourth generation photocopy made on high quality machines may be clearer than a third generation copy on machines of less high quality. The real issue is the clarity and quality of the photocopy in front of the examiner, not whether there are intervening generations. Of course, lurking in the background is the issue of how the authenticity of the “known” signatures was established in the first place.

525. “This court has repeatedly held that juries are capable of comparing signatures to determine authenticity. Therefore *Garza* was able to impeach Sanders even without the expert testimony of Ms. James.” *Garza*, 448 F.3d at 300 (internal footnote omitted).

One cannot but conclude that this case is another case that reflects the systemic differences in judicial treatment of prosecution and defense proffers when it comes to proffered expertise which other studies have discovered.⁵²⁶ In addition, it may again illustrate the difference in resources between prosecution and defense. Most defendants in most cases simply cannot afford to hire one of the limited number of ABFDE-certified document examiners, the bulk of whom already work for law enforcement agencies. Finally, it is not exactly clear how the defense could obtain the original known samples from Mr. Sanders the court seems to require, and certainly it could not have been done without considerable foresight and extended discovery litigation. All in all, this opinion does not represent a shining example of judicial analysis or performance.

48. *A.V. by Versace, Inc. v. Gianni Versace S.p.A.*⁵²⁷ (S.D.N.Y., Leisure, J.)

This civil case involved a complicated struggle over the authority to use the Versace trademark among a number of corporate entities and two prominent Versaces, Gianni and Alfredo. The opinion deals with contempt proceedings against Alfredo for, inter alia, authorizing use of the mark by his son, failing to take steps ordered by the court to eliminate unauthorized Internet trade, production of financial records, and a variety of other things, including signing a distribution agreement with John Pappettas.⁵²⁸

Alfredo claimed his signature on the agreement was a forgery. In support of this claim, Alfredo called Julia Bevaqua, an asserted handwriting expert who testified that she had compared the signature on the agreement with sixteen known exemplars of Alfredo's signature, and that the signature on the Pappettas agreement was not an authentic signature of Alfredo.⁵²⁹ Gianni objected to this testimony. He did not attack the qualifications of Bevaqua,⁵³⁰ but rather globally attacked the reliability of handwriting expertise in general. The court disposed of this Rule 702 attack in a footnote⁵³¹ in which Judge Leisure recognizes some controversy in the district courts about the reliability of handwriting identification, and about allowing handwriting experts to testify to attributions of authorship conclusorily, but concludes that "every

526. See D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?* 64 Alb. L. Rev. 99, 110 (2000).

527. 446 F. Supp. 2d 252 (S.D.N.Y. 2006).

528. *Id.* at 253–55. There are lots of details in the opinion concerning contumacious behavior and alleged behavior by Alfredo, which are not necessary to understand the handwriting issues.

529. *Id.* at 267.

530. Ms. Bevaqua's website asserts that she has "been in the profession of handwriting expertise since 1981," that she is "court qualified" (this common claim simply means that some judge let her testify) and that she has "met and passed the Daubert challenge" but it is surprisingly unforthcoming about the details of her qualifications. See Julie Bevacqua, *Expert Testimony*, www.juliabevacqua.com/experttestimony/ (accessed Mar. 31, 2008). She is clearly not ABFDE-certified. I do not raise this to impugn Ms. Bevacqua's accuracy. So far as I know, she may well be more reliable in actual cases than ABFDE diplomates like Gideon Epstein, Larry Ziegler, Grant Sperry, or Allen Southmayd, whose performances have been discussed in connection with *Wolf, Jones*, and *Ferguson*—case numbers 34, 6, and 40 *supra* respectively. However, the fact that she, rather than someone with ABFDE certification, was hired by a party to a civil case involving lots of money, says something either about cost-benefit considerations or some other factor in the system. And what could we or should we expect of the hiring decision in the average will contest? Or by the average criminal defense attorney?

531. *Versace*, 446 F. Supp. 2d at 267–68 n. 14.

circuit that has considered this question has concluded that a properly admitted handwriting expert may offer an opinion regarding the authorship of a handwriting sample if the factors enumerated in *Daubert* are satisfied,” citing *Prime, Crisp, Mooney, Paul, Jones, and Velasquez*, and mis-citing *Jolivet* as usual.⁵³² This passage is curious by virtue of the preemptory and dismissive lack of analysis that precedes the string cite. Of course “a properly admitted handwriting expert” can properly testify. The issue is, when is such an expert properly admitted. “If the factors enumerated in *Daubert* are satisfied” says Judge Leisure. But he never says what those factors are, or why they are satisfied in this case, and has apparently never heard of *Kumho Tire* and its task-at-hand requirements. Under the circumstances, it is somewhat ironic that the task involved in the case was signature authentication, the only specific task for which there is some data suggesting support for the claims of handwriting expertise. It appears that the misplaced global string cite has become the general “methodology” of courts faced with challenges to the reliability of handwriting expertise. The federal courts have by and large arrived at the place where they are most comfortable, where they can substitute slogans and string cites for data and analysis, while turning a blind eye to the inconvenient requirements of *Kumho Tire*.

49. *Truman Arnold Cos. v. Green*⁵³³ (E.D. Tex., Ward, J.)

I here reproduce the entire opinion of the court:

The defendants move this Court, pursuant to Fed. R. Evid. 702, for an order excluding the opinions of Linda James, the handwriting expert designated by Plaintiff Truman Arnold Companies (# 142). Despite the criticisms of the expert, her training, and her methodology, the court is persuaded that James’ testimony is admissible in this case. The defendants’ challenges go to weight and may be developed through cross examination and/or the presentation of contrary evidence. The motion to exclude the expert (# 142) is accordingly denied.

Likewise, the court has considered the motion to strike the expert testimony of James R. Daniels, the defendants’ handwriting expert (# 143). The court is persuaded, after reviewing the motion, response, supplemental declaration, and the applicable case law, that the challenges to Daniels’ methodology go to weight. His testimony is therefore admissible. The plaintiff is free to cross-examine Daniels and present contrary testimony. The motion to strike (# 143) is therefore denied.⁵³⁴

It has come to this. A few observations are in order. This may represent the common level of consideration in most cases when such objections are raised, at least now. Second, this is a civil case, and I am sympathetic to Judge Ward’s apparent instinct that, in civil cases, some such testimony may be necessary. It is perhaps better than simply handing the documents to the jury for their own perusal, at least in regard to signature authenticity, and any imposition of apparent high standards of paper qualification would inevitably favor the side with the most money. I am on record as

532. *Id.*

533. 2006 WL 5153151 (E.D. Tex. Sept. 28, 2006).

534. *Id.* at *1.

favoring context-inflected standards of required reliability under Federal Rule of Evidence 702, with the highest standards being imposed on the prosecution in criminal cases.⁵³⁵ But whatever one's position on these issues, this opinion/order hardly comports with the requirements of *Daubert* and *Kumho Tire*.

50. *United States v. Yagman*⁵³⁶ (C.D. Cal., Wilson, J.)

It is emblematic that the federal cases in this Appendix end with Judge Wilson's opinion in *Yagman*, the only handwriting identification reliability decision in the reference set made in 2007. It well illustrates what has become of the jurisprudence in regard to these issues. This is because, though the opinion appears to contain a good deal of analytical text, virtually all of it is taken directly from decided cases and accepted on the authority of those cases, not on the basis of any independent analysis done by the court.

The facts in *Yagman* are a bit hard to determine by reference to the three opinions and memoranda in the case available on Westlaw.⁵³⁷ However, the Internet has provided much background.⁵³⁸ Mr. Yagman is a high-profile and very controversial Los Angeles attorney specializing in police abuse litigation. The charges against him involved an alleged scheme to hide firm income and other money from the IRS and creditors by channeling it through bank and brokerage accounts in the name "KD Mattox," while simultaneously declaring bankruptcy. K.D.⁵³⁹ Mattox was Yagman's girlfriend.⁵⁴⁰ Part of the theory of the case against Yagman was that he actually signed the signature cards for one "KD Mattox" account, and was responsible for many deposits to and withdrawals from that and other "KD Mattox" accounts. In order to prove this, the prosecution wanted to produce, inter alia, the testimony of Bonnie Beal (ABFDE), a document examiner with the U.S. Postal Inspector's Laboratory. She would testify that she had compared samples of Yagman's known handwriting with the records of the account, and that Yagman had signed the original bank signature cards "KD Mattox," that he was the author of many if not all of the "Karen Mattox" signatures on various checks, and that he also probably had written the spelled-out dollar amounts and some of the signatures on checks from the accounts of some of his own elderly relatives.⁵⁴¹

The case was extremely complicated, but this rendition is sufficient for dealing

535. See e.g. D. Michael Risinger, *The Irrelevance, and Central Relevance, of the Boundary Between Science and Non-Science in the Evaluation of Expert Witness Reliability*, 52 Vill. L. Rev. 679, 719–22 (2007); Risinger, *Functional Taxonomy*, supra n. 114, at 532–37.

536. 2007 WL 4409618 (C.D. Cal. May 22, 2007).

537. In addition to the opinion referenced *id.*, see *U.S. v. Yagman*, 2007 WL 2231253 (C.D. Cal. July 30, 2007) and *U.S. v. Yagman*, 502 F. Supp. 2d 1084 (C.D. Cal. 2007).

538. See e.g. Patrick Range McDonald, *Time Does Steve Yagman*, LA Weekly News, www.laweekly.com/news/news/time-does-steve-yagman/17771/ (Nov. 27, 2007).

539. The court gives the name on the account as "KD Mattox" without periods, but Ms. Mattox is styled "K.D. Mattox" in *K.D. Mattox v. Watson*, 2007 WL 4200213 (C.D. Cal. Nov. 15, 2007).

540. *Id.* at *1. Yagman and Mattox apparently lived together in a house given to Mattox by Yagman. Mattox filed a civil rights action (in which she was represented by Yagman's firm) against her next door neighbors for allowing federal agents to photograph areas of her property that could not be seen from public spaces. See *K.D. Mattox*, 2007 WL 4200213. It emerged after trial that Yagman and Mattox may actually have been married in Aspen, Colorado in 2005. See McDonald, supra n. 538.

541. *Yagman*, 2007 WL 4409618 at *1.

with the handwriting issues. What is not sufficient, as usual, is the way the court approaches the definition of the task undertaken by the document examiner, because what has just been set out here is all that is ever said about the “task at hand.” From this, we may infer that this was a case like *Prime*, where there was plenty of known handwriting, and the questioned writing was characterized by the court as “extensive” but was really 79 different items presenting multiple tasks of attribution from small samples (with a possible argument about the propriety of aggregating questioned samples because they might be independently determined to be the product of a single author, etc.). The reader will recall that one main criticism in this Appendix of both the district court opinion in *Prime I* and the court of appeals opinion in *Prime II* (cases 27 and 38 *supra*) was that the judges failed to see this, and treated the case as if it involved a five-page ransom note à la the JonBenet Ramsey case. Well, *Prime*, for good or ill, dominates the opinion in *Yagman*. Since the court of appeals decision in *Prime II* was from a panel of the Ninth Circuit, Judge Wilson feels it proper, and perhaps even obligatory, to import most of his opinion from that opinion. When not simply repeating or paraphrasing text from one or the other of the *Prime* decisions,⁵⁴² the court is cutting and pasting from other sources. For instance, there is a long excerpt from *Hidalgo* giving Judge Martone’s evaluation of the meaning of the Kam studies.⁵⁴³ Like the *Prime I* and *Prime II* opinions, the court never really defines the particular identification subtasks that Ms. Beal has performed, and in its general conclusion on admissibility the court merely says as follows: “For reasons discussed above, the court finds that Beal’s testimony is admissible based on the application of the five *Prime* factors to the specific facts of this case. This is consistent with the determinations of all seven circuits that have addressed the admissibility of handwriting expert testimony.”⁵⁴⁴ This is followed by a string cite to *Prime*, *Crisp*, *Mooney*, *Jolivet*, *Paul*, *Jones*, and *Velasquez*, overlooking the fact that *Jolivet* was an unpreserved error case, and that (as other courts have recognized), court of appeals affirmances in an “abuse of discretion” regime cannot properly be read in that manner.

In response to the defendant’s argument that *Hines/McVeigh* restrictions should be imposed, the court says thus: “The court finds the approach of these district courts unpersuasive because every circuit court to have considered the issue of handwriting testimony has held that the expert’s ultimate opinion was admissible,”⁵⁴⁵ followed by the same string cite as above, and failing to cite the decision of the Tenth Circuit panel in *Hernandez* affirming a *Hines/McVeigh* restriction as not being an abuse of discretion (yes, I know it is an opinion “not selected for publication,” but that doesn’t make it not exist, and it certainly undermines the “every circuit court to have considered the issue”

542. The structure of the opinion is to set out a subject, like “testing” under the *Daubert* factors (themselves rather woodenly invoked in a case of non-science expert claims), and then to set out what *Prime I* and/or *Prime II* said about it in the context of handwriting. See *id.* at **1–3 (“A. Whether the Theory or Technique Can or Has Been Tested”); *id.* at **3–4 (“B. Whether the Technique Has Been Subject to Peer Review and Publication”); *id.* at **3–7 (“C. The Known or Potential Error Rate”); *id.* at *7 (“D. The Existence and Maintenance of Standards Controlling the Technique’s Operation”); and *Yagman*, 2007 WL 4409618 at **7–8 (“E. General Acceptance”) all following this general approach, with occasional supplementation.

543. *Id.* at **4–5. See *Hidalgo*, 229 F. Supp. 2d 961, 963–65 (case 28 *supra*).

544. *Yagman*, 2007 WL 4409618 at *8.

545. *Id.* at *9.

assertion).

It is not my intent to beat up on Judge Wilson personally. He is a jurist capable of finely wrought work when he puts his mind to it. His opinion on the issues of tracing in money laundering cases (the only formally published opinion in the *Yagman* case) is an excellently crafted and thoughtful opinion.⁵⁴⁶ But that is just the point. Most judges want to resolve issues in front of them by the tools of the judicial role, by authority and case citations, and they want those issues defined broadly enough to be put broadly to rest by decisional law. They are not psychologically equipped by predilection or by training to deal with the fine-grained analysis of non-legal technical issues called for by a proper *Kumho Tire* analysis. So they have striven to turn an empirical issue about specific tasks, the definition of which is not part of the skill set of most lawyers (or judges), into a more broadly defined issue that can be put to rest generally by *stare decisis*.⁵⁴⁷ This is even more to be expected when such an approach lines up with their general tendency to celebrate and protect the way things have historically been done. In the federal courts, for better or worse, the game seems to be pretty much over, unless the Supreme Court steps in to deal a new hand.⁵⁴⁸

STATE CASES

51. *State v. Cochran*⁵⁴⁹ (Ohio App. 4th Dist. [unreported], Kline, J., joined by Stephenson, J.; Harsha, J., filed a separate concurring opinion)

Defendant Willis Cochran was convicted of four counts of complicity in regard to bank robberies.⁵⁵⁰ Part of the evidence against him was the testimony of a document examiner, David M. Hall, asserting that Cochran “probably” wrote four of the robbery notes used in various robberies.⁵⁵¹ Hall appears to have been a fairly new document examiner, having begun as an apprentice with the Ohio Bureau of Criminal Identification and Investigation four years before trial, completing a one year apprenticeship there, and receiving some training in Secret Service and FBI sponsored courses.⁵⁵² The defense asserted that Hall was not qualified, and that his testimony was not based on reliable methods. Both of these contentions were rejected, mainly on a combination of Hall’s testimony about his credentials and methods, and by reference to previous Ohio case authority.⁵⁵³ Though Ohio had a version of Rule 702, *Daubert* is not mentioned, and the court generally seems unaware of any controversy concerning the empirical warrant for a belief in the reliability of document examiner attribution of authorship under such circumstances. The concurrence also relies on Ohio case authority, and though he seems a bit troubled by the absence of any official protocol for controlling the attribution of

546. *Yagman*, 502 F. Supp. 2d 1084.

547. See Denbeaux & Risinger, *supra* n. 327, at 30.

548. *Yagman*, 2007 WL 4409618 at *5.

549. 1997 WL 399835 (Ohio App. 4th Dist. July 8, 1997).

550. *Id.* at *1.

551. *Id.* at *5.

552. *Id.* It seems clear that Mr. Hall was not ABFDE-certified.

553. *Id.*

authorship, Judge Harsha said that Hall “specifically identified the methods and criteria he used in analyzing the state’s exhibits. His methodology was consistent with the theoretical bases underlying this ‘science.’”⁵⁵⁴ The empirical question of reliability is disposed of by precedential reference to cases that never considered the issue, and by what is essentially the guild test.

52. *Basinger v. Commonwealth*⁵⁵⁵ (Va. App., Fitzpatrick, C.J., joined by Annunziata and Duff, JJ.)

This second state case involves charges of check forgery involving four checks apparently made out by a single person who was not the payor named on the checks. It is not clear whether the forger had access to real examples of the writing of the named payor (and therefore whether the writing might represent some attempt at naïve simulation) or whether it was in a hand clearly not that of the payor. In addition, it is not clear whether some attempted disguise was at issue, or whether the four checks could be properly treated as being in the undisguised hand of the forger. The document examiner, Luther M. Senter, a thirty-year veteran of the FBI then working for the Virginia Division of Forensic Science, compared the writing on the four checks with known exemplars of the defendant’s writing and attributed authorship to the defendant.⁵⁵⁶ Given the amount of writing on a check (date, amount in numerals and written out, signature) and the number of checks, the task of attribution is potentially less questionable than the attributions in a case like *Ruth I* (case 2 *supra*), but still one about which no specific empirical data exists concerning document examiner reliability to perform such a task.⁵⁵⁷ The defense attorney objected to Mr. Senter’s testimony, asserting that the “science” upon which Mr. Senter proposed to testify was not reliable, and therefore in violation of the requirements of Virginia law established by the case of *Farley v. Commonwealth*.⁵⁵⁸ How much further the objecting lawyer went in presenting information to back up his objection is not discernible from the opinion. The lower court rejected the objection, observing that “many courts have recognized this expertise.”⁵⁵⁹ On appeal, the defense claimed this was not a sufficient basis upon which to make a required determination of reliability. The Virginia Court of Appeals disagreed, saying: “We have previously held that ‘side by side comparison of genuine samples and alleged samples, by a party unfamiliar with the alleged writer’s handwriting, is the sole province of the expert witness.’ This has been the law in the Commonwealth for over one hundred years.”⁵⁶⁰ The court then quoted with approval the following from Charles E. Friend, *The Law of Evidence in Virginia* § 15-11 (5th ed., Michie 1999): “Today, however, it is firmly established that proof by comparison is proper. It is, in fact, error to refuse to allow an

554. *Cochran*, 1997 WL 399835 at *6 (Harsha, J., concurring).

555. 2000 WL 724037 (Va. App. June 6, 2000).

556. Mr. Senter is apparently another veteran of that period at the FBI Laboratory when no certifications beyond FBI training were thought necessary. He does not appear to have been ABFDE-certified.

557. See Charles E. Friend, *The Law of Evidence in Virginia* § 15-11 (Michie 1977).

558. 458 S.E.2d 310, 312 (Va. App. 1995).

559. *Basinger*, 2000 WL 724037 at *1.

560. *Id.* (citations omitted).

expert witness to state an opinion based on such a comparison.”⁵⁶¹

The court in *Basinger* appeared to be blissfully unaware of any of the controversies that had swirled around the issues of handwriting identification reliability in the years immediately preceding, preferring to refer to a hundred years of usage and to cite a passage from a treatise which was unchanged from its first appearance in 1977,⁵⁶² well before the issues had risen to anyone’s consciousness. But in its unthinking provision of a precedent-based answer to an empirical question, the court prefigured the final stage in the evolution of the way these issues are handled by judges.

53. *Estate of Acuff v. O’Linger*⁵⁶³ (Tenn. App., Cain, J., joined by Cantrell and Cotrell, JJ.)

This is the second state case with a recorded decision on a challenge to the reliability of handwriting expertise. The facts are well and efficiently set out by the appellate court:

John E. Acuff, Sr., late of Marion County, Tennessee, married Jewel Acuff by whom he had four children prior to their divorce in 1970. These children, John E. Acuff, Jr, Ella Joy Engdahl, Royce Basil Acuff and Joyce Faye Burkhalter, were appointed co-administrators of the Estate of John E. Acuff, Sr. following his death intestate on November 10, 1966. These four children, individually and as co-administrators of his estate, are the plaintiffs in this case.

In 1972, following the divorce of John E. Acuff, Sr. and Jewel Acuff, a long term relationship started between John E. Acuff, Sr. and Doris Brown. They were never married but cohabited as mates from 1972 until Mr. Acuff died, holding themselves out in the community as husband and wife and also as business partners. Mr. Acuff and Ms. Brown were very successful business partners.

Mr. Acuff was an astute businessman and accumulated extensive real property holdings. In 1995, he began both a business and a personal relationship with Brenda O’Linger. Mr. Acuff started a mobile home sales lot in Jasper, Tennessee in 1995, but almost immediately thereafter leased this facility to Brenda O’Linger for \$3500 per month. The business was quite successful and in August and September of 1996, two deeds were purportedly executed by John E. Acuff, Sr. conveying to Brenda O’Linger the mobile home sales lot, including adjacent property, and property referred to as the “railroad property.” Before these deeds were recorded, Mr. Acuff suffered a stroke and died on November 10, 1996. Ms. O’Linger then recorded the deeds, and the plaintiffs . . . brought suit.⁵⁶⁴

A few more facts gathered from other places in the opinion must be set out to give a full picture of the situation before discussing the handwriting aspects of the case. Until

561. *Id.*

562. *Id.*

563. 56 S.W.3d 527 (Tenn. App. 2001).

564. *Id.* at 528–29. The deeds did not purport to be gifts. There was a stated sale price of \$250,000 to be paid at \$3,500 per month (the same amount as the rental under the lease), but there was also a right of survivorship which cancelled any amount due on the death of either party. *Id.* at 538. In addition, Ms. O’Linger accounted for the delay in recordation by asserting that Acuff had asked her to hold off recording the deeds for a year. *Id.* at 540. There was also evidence that Acuff had discussed selling part of the land to third parties after the date of the deeds. *Id.* at 541.

the day of his stroke, Mr. Acuff was a headstrong and astute businessman who did things his own way or no way at all.⁵⁶⁵ He also operated very secretly at times.⁵⁶⁶ Ms. O'Linger was a widow who had been involved in the mobile home business for eleven years prior to Mr. Acuff's death, with mobile home lots in Scottsboro, Alabama, and Trenton, Georgia.⁵⁶⁷ She had been introduced to Mr. Acuff by Joyce Wayne, a longtime friend of Mr. Acuff, when Mr. Acuff and Larry Simcox were undertaking to open the mobile home lot in Jasper, Tennessee. Mr. Acuff had asked Ms. Wayne to introduce them so that he might look over her operation and discuss the business of mobile home sales with her.⁵⁶⁸ After lengthy discussions, they agreed that instead of the original plan, Ms. O'Linger would lease the lot and make improvements upon it, for a rental of \$3,500 per month. Ms. O'Linger spent \$80,000 on the required improvements.⁵⁶⁹ There is also little doubt that Mr. Acuff was infatuated with Brenda O'Linger, whom he nicknamed "Dolly."⁵⁷⁰

Ms. Brown, Mr. Acuff's partner, did remember discussions with him concerning Ms. O'Linger's wanting to acquire an option on part of the land involved, but not on the mobile home lot itself. Finally, the deeds purported to be prepared by Acuff personally. They were word processed. One witness who worked for Acuff testified that she had never seen Acuff type anything himself or use a computer, and Ms. Brown, his partner, testified that she had never known him to prepare his own deeds, or use a word processor.⁵⁷¹ On the other hand, lawyers who had represented Acuff testified that he was knowledgeable enough to have drawn the deeds,⁵⁷² and the deeds were witnessed by Larry Simcox, and notarized in front of a local notary, Roy Brackett, both of whom testified that they remembered the transaction well, that they knew Acuff, and that Acuff had actually signed the deeds on the dates in question.⁵⁷³ In addition, two other witnesses, Beverly Cain and Joyce Wayne, mutual friends of Acuff and O'Linger, testified to knowledge of the transaction.⁵⁷⁴

The theory of the suit brought by the estate and Acuff's children individually was that the recorded deeds were forgeries and should be set aside. The suit thus sounded in equity and was filed in Marion County Chancery Court.⁵⁷⁵ In order to prove that the signatures on the deeds were not authentic signatures of Mr. Acuff, the plaintiffs engaged the services of Thomas Vastrick and Brian Carney, both ABFDE-certified forensic document examiners,⁵⁷⁶ who both concluded that the signatures were traced forgeries,

565. *Est. of Acuff*, 56 S.W.3d at 537.

566. *Id.* at 540 (testimony of Doris T. Brown). Ms. Brown had settled with the estate in regard to her claims of a partnership interest in the various assets of the estate for 1.5 million dollars. *Id.* at 540-41.

567. *Id.* at 541.

568. *Id.*

569. *Est. of Acuff*, 56 S.W.3d at 546.

570. *Id.* (testimony of Joyce Wayne).

571. *Id.* at 539 (testimony of Kay Miser Ethridge); *id.* at 539-40 (testimony of Doris T. Brown).

572. *Id.* at 538 (testimony of Kevin Lee Featherstone and William Gallagher).

573. *Est. of Acuff*, 56 S.W.3d at 544-45.

574. *Id.* at 543 (testimony of Beverly Mitchell Cain); *id.* at 545-46 (testimony of Joyce Wayne).

575. *Id.* at 527.

576. The property involved in this case was worth over \$350,000, which would explain why the plaintiffs thought the expense of ABFDE-certified examiners was justified.

which had been traced from a particular document, a “landlord waiver” document that Ms. O’Linger apparently had access to.⁵⁷⁷ The defense challenged the admissibility of such testimony on reliability grounds, and, after “a very extensive ‘gatekeeping’ hearing” pursuant to the principles established by the Tennessee Supreme Court in *McDaniel v. CSX Transportation, Inc.*,⁵⁷⁸ the trial court allowed the testimony.⁵⁷⁹

Although this was an action in equity, and thus there was no right to a jury trial, given the nature of the colliding evidence, the trial court (still styled a Chancellor in Tennessee⁵⁸⁰) empanelled an advisory jury and submitted the issue of the authenticity of the signature to them, placing on the plaintiffs the burden of showing that the signatures were forgeries by a preponderance of the evidence. The jury found for the plaintiffs and the trial judge adopted their verdict.⁵⁸¹

On appeal, the Tennessee Court of Appeals, Middle Section (Tennessee’s intermediate appellate court), affirmed the decision of the trial judge on the resolution of the handwriting issue as follows: “We see no abuse of discretion in the admission of the testimony of Vastrick and Carney.”⁵⁸² That was the extent of the explicit review of the trial court’s disposition of the reliability issue. However, the appeals court had already determined that the trial court had been correct in placing the burden of persuasion on the plaintiffs, but, since this was properly characterized as a fraud claim, had erred in using a preponderance standard of proof instead of the standard “clear, cogent and convincing evidence” (which the appeals court identified with the phrase “highly probable”).⁵⁸³ In the end, the court viewed the collision between the opinions of the two handwriting experts and the fact testimony of Ms. O’Linger, of the witness to the signature (Simcox), and the notary (Brackett) as irresolvable, and held that, in the face of such fact witness testimony, the testimony of the experts was insufficient to meet the required standard of “clear, cogent and convincing evidence.”⁵⁸⁴ So Ms. O’Linger got to keep the property.

What is most interesting here is not the explicit disposition of the reliability issue. Indeed, as the reader can see, the appellate treatment was sparse in the extreme, and it is impossible to know from the appellate decision (as it usually is in appellate decisions involving this subject) what the basis or rationale of the trial court was. But the court’s decision that document examiner testimony that collided with the testimony of witnesses,

577. *Id.* at 541. There is a small amount of data dealing with document examiner abilities to determine traced forgeries. There was a traced forgery component in Kam IV, *supra* note 56, but the results were not reported separately. In addition, there was one CTS proficiency test involving traced signatures (1992) in which the tested document examiners performed well. See Risinger, *Handwriting Identification*, *supra* n. 11, at § 33:37. Finally, identification of traced forgery of signatures was the task involved in *Brewer*, 2002 WL 596365 at *8 (case 22 *supra*), a case where the testimony was rejected, but upon a very questionable ground involving little more than the selective invocation of case law which, among other things, involved other tasks entirely.

578. 955 S.W.2d 257 (Tenn. 1997).

579. *Est. of Acuff*, 56 S.W.3d at 541. Mark P. Denbeaux testified at that “gatekeeping” hearing.

580. *See id.* at 530.

581. *Id.* at 529–30.

582. *Id.* at 541.

583. *See id.* at 530–38.

584. *Est. of Acuff*, 56 S.W.3d at 556. There is also an interesting application of the Rule in the Queen’s Case to a prior inconsistent statement not shown to a potentially unavailable witness during a deposition *de bene esse*, *id.* at 549–53, but that is beyond the scope of this Appendix.

two of whom were presumptively disinterested, could not amount to clear and convincing evidence, is pregnant with potential applications in the criminal setting.⁵⁸⁵

54. *Taylor v. Abernethy*⁵⁸⁶ (N.C. App., Hunter, J., joined by Greene and Tyson, JJ.)

Taylor v. Abernethy is a civil case involving the estate of Romer Gray Taylor. Romer appears to have been for much of his life been a ne'er-do-well, failing repeatedly at farming and other ventures and generally always being taken in and bailed out by his brother, Harvey Taylor.⁵⁸⁷ In 1978, Harvey bankrolled (to the tune of \$38,000) yet another fresh start for Romer, in connection with which Harvey would later claim that Romer had signed a contract to make a will naming Harvey the sole beneficiary. Sometime thereafter, Romer had apparently been looked after by a nephew, Don Abernethy, child of another sibling of Romer and Harvey. Apparently Romer also made a will naming, not Harvey but the nephew, Don Abernethy, as sole beneficiary. Romer also managed to accumulate a sizable estate by the time of his death. He died in 1998. The will naming Abernethy as sole beneficiary was admitted to probate, and Harvey sued. The controlling issue was the authenticity of Romer's signature on the contract dated in 1978. Harvey said that the 1978 signature was genuine, and called a document examiner, Charles Perrotta,⁵⁸⁸ who proposed also to say that it was genuine.⁵⁸⁹ Abernethy's lawyer moved to exclude the document examiner.⁵⁹⁰

Apparently influenced by the federal cases, especially *United States v. Hines*, the trial court said the document examiner could point out similarities but could not offer a conclusion of authenticity.⁵⁹¹ The jury found the signature not to be Romer's.⁵⁹² The North Carolina Court of Appeals (the intermediate appellate court) reversed.⁵⁹³ In its opinion it asserted that the lower court had erred by holding the methods of handwriting expertise (globally) to the standards of science when all that was required was that it be shown to be reliable.⁵⁹⁴ However, instead of remanding for a new reliability determination, the court declared handwriting identification expertise to be globally admissible, based on precedents from the 1980s, thereby adopting what is essentially the guild test as a matter of law for all purported handwriting expert testimony.⁵⁹⁵ By so doing, the court of appeals has apparently insulated even the most questionable exercises of handwriting identification expertise from any threshold reliability examination in

585. It is unclear whether the appeals court did not remand to the lower court for the weighing of the evidence because they ruled that such evidence under the circumstances was insufficient as a matter of law, or simply because, since this case sounded in equity, they were free to exercise their own factfinding authority on appeal.

586. 560 S.E.2d 233 (N.C. App. 2002).

587. *Id.* at 234–35.

588. Mr. Perrotta is another of those ex-FBI document examiners otherwise without certification. *See id.* at 270–71.

589. *Id.* at 238.

590. *Id.*

591. *Taylor*, 560 S.E.2d at 238–39.

592. *Id.* at 235.

593. *Id.* at 241.

594. *Id.* at 239.

595. *Id.* at 240.

North Carolina courts.⁵⁹⁶

55. *Williams v. State*⁵⁹⁷ (Wyo., Lehman, J., joined by Hill, C.J. and Golden, Lehman and Kite, JJ.)

A similar result to that in *Taylor v. Abernethy* was reached in a criminal context by the Supreme Court of Wyoming in *Williams v. State*. In or around early March 2000, Victim (his name is never given) was a cab driver who met defendant Betty Jean Williams while she was riding in his cab. In conversation, he said he needed some work performed at his house, including some painting, and she said she would be interested in working for him. Some sort of arrangement was arrived at, because a day or so later the defendant came to Victim's house and provided painting services. Williams claimed she was to be paid hourly up to a maximum of \$400, and about \$200 for supplies. It is not clear from the opinion if Victim paid Williams, how he paid her, or how much he paid her.⁵⁹⁸

Toward the end of March, Victim went to New Mexico for a week. When he returned he got his bank statement, and sat down to reconcile it.⁵⁹⁹ According to Victim, he discovered that five checks which he was sure he had not written had been cashed,⁶⁰⁰ totaling \$950. The checks were made payable to Williams, endorsed with his name, and signed with Victim's name.⁶⁰¹ Victim called the police, who discovered that on March 23, 2000, Williams had taken the first check (which was for \$150) to a local bank and initially tried to cash it, but the bank refused to handle the check unless she opened a savings account, which she did. She deposited the check into the savings account, and was allowed to take out \$100 in cash. The next day she withdrew another \$10. Then on March 27 and 28 she deposited four checks, one for \$225, two for \$275 and one for \$200, and in a series of withdrawals interspersed with these deposits managed to leave the savings account with a balance of only one dollar at the close of business on March 28.⁶⁰² When she was picked up she admitted to the officer who interviewed her that she had signed the endorsements on the back of the checks, but claimed Victim had given them to her.⁶⁰³ The checks were dated between March 24 and 28, when Victim was out of town.⁶⁰⁴

It is important to note that Victim's testimony, coupled with that of the bank employees and the bank records and defendant's admission to the police concerning the endorsements, was sufficient evidence to support a conviction. Ever risk averse,

596. The case was retried and the second jury found the signature to be authentic. However, the case was again reversed on appeal because of an error in allowing plaintiff's wife to testify when she was barred by North Carolina's dead man's statute. *Taylor v. Abernethy*, 620 S.E.2d 242, 245-47 (N.C. App. 2005). The case was reversed and remanded for yet another trial. *Id.* at 251.

597. 60 P.3d 151 (Wyo. 2002).

598. *Id.* at 153.

599. *Id.*

600. *Id.*

601. *Id.* at 162-63.

602. *Williams*, 60 P.3d at 162-63.

603. *Id.* at 164.

604. *Id.* at 162-63.

however, the prosecution proceeded to supplement this evidence with the testimony of Richard Crivello, a document examiner with the Wyoming State Crime Laboratory. Mr. Crivello's examination and conclusions were unusual in their restraint. He did not claim to attribute either the signature on the front of the check or the rest of the entries on the front to defendant Williams. He said he had "no opinion" concerning that.⁶⁰⁵ He merely proposed to testify that the signature with the Victim's name on the front of the check "was not consistent with Victim's known signature, and that Victim "probabl[y] or very probabl[y]" did not write those signatures.⁶⁰⁶ He further testified that defendant Williams did write the endorsements in her name on the back of the checks. Thus, he proposed only to testify to the authenticity of the two apparent signatures on the checks, a subtask of handwriting identification about which, as we have seen, some data exist. If that had been the focus of the defendant's attack, and therefore the focus of the decisions of both the trial and appellate courts, that would have been one thing. What happened was quite something else.

Wyoming has explicitly adopted the United States Supreme Court's approach in *Daubert* and *Kumho Tire*.⁶⁰⁷ The Rule 702 motion in *Williams* was made by the defense the day before trial was to begin.⁶⁰⁸ Initially, the trial court was of the opinion that Wyoming's version of *Daubert* doctrine did not require a hearing in regard to handwriting identification, citing *Starzeczyzel* (no one at the trial level seemed to be familiar with *Kumho Tire*).⁶⁰⁹ Finally, however, something of a hearing was held. The focus was completely global, addressing handwriting identification generally.⁶¹⁰ The only witness was the state's document examiner, Mr. Crivello, although the prosecution also apparently produced the Kam studies (the opinion refers to the prosecutor's argument at the hearing that "the peer-reviewed articles that we produced to the court from the Journal of Forensic Sciences also demonstrates [sic] that they come up with the right answer . . .").⁶¹¹ We are not told what, if anything, the defense produced. The document examiner testified to his credentials,⁶¹² and to never having failed a proficiency test in 16 years,⁶¹³ though what regime of individual proficiency testing he is referring to is not clear, since I am not familiar with a regime of tests which issues passing and failing grades. At any rate, on this record, the trial court found handwriting identification testimony globally admissible, and the Supreme Court of Wyoming affirmed, saying that the record before the trial court was sufficient to find that "forensic document techniques have been and are tested and that forensic document examination

605. *Id.* at 163.

606. *Id.*

607. *Williams*, 60 P.3d at 155.

608. *Id.*

609. *Id.*

610. *See id.* at 155-57.

611. *Id.* at 157.

612. Mr. Crivello had been a document examiner with the Wyoming State Crime Lab for over 16 years. *Williams*, 60 P.3d at 155. On cross examination, he admitted he was not "certified," presumably referring to ABFDE certification, *id.* at 156, which became part of the defense basis for challenging his testimony.

613. *Id.* This seems to be a common set-piece of document examiner testimony. *See e.g. Lewis*, 220 F. Supp. 2d at 553-54 (testimony of Mr. Cawley, discussion beginning at note 297 *supra*) (case 26 *supra*); *Crisp*, 324 F.3d at 261, 281 (observations of Judge Michaels in regards to such claims in his dissent) (case 33 *supra*).

has been the subject of considerable peer review and publication.”⁶¹⁴ In addition, the court found that there was “adequate proof . . . that there existed appropriate testing procedures to assure and maintain the standards of the profession and that such profession had been accepted within the relevant scientific community for many years.”⁶¹⁵ The court did indicate that its *Daubert*-like jurisprudence adopted the *Kumho Tire* requirement that all proffered expertise is subject to review for reliability. In addition, technically, the Supreme Court opinion was only a finding that admitting the testimony in this case was not an abuse of discretion.⁶¹⁶ However, it seems clear that it will be the rare judge in Wyoming who does not take this opinion to be a global mandate to admit such evidence across the board, independent of the claims of expertise which were actually involved in the *Williams* case itself.⁶¹⁷

56. *Spann v. State*⁶¹⁸ (Fla., per curiam)

At least the next case, *Spann v. State*, has the virtue of reaching a similar result to that in *Williams* in a more straightforward (if no less questionable) way. The case involved a capital murder charge against Spann and others arising out of the murder of Kazue Perron, who was carjacked in order to get her car for use in a robbery, and then murdered execution-style so she could not identify the carjackers.⁶¹⁹ The evidence against Spann was overwhelming, and will not be rehearsed here. Handwriting comes in, again, only peripherally. While in jail, Spann wrote to a co-defendant in an attempt to coach him on how to testify.⁶²⁰ Authorities were given the note. Initially, Spann denied writing it, but when told that a handwriting expert (unidentified in the opinion) was going to examine it, Spann admitted writing the note.⁶²¹ However, the prosecution still wanted the questioned document examiner to testify. Specifically, the prosecution wanted the document examiner to testify that the writing on the note showed an attempt to disguise Spann’s ordinary hand. The relevance of this was assertedly “consciousness of guilt.”⁶²² The defense challenged the reliability of the document examiner to conclude that a writing was “intentionally disguised,” and the trial court decided that this issue was both “novel” and “scientific” enough to raise an issue under Florida’s version of the *Frye* test.⁶²³ After a hearing, the trial court concluded that the proffered testimony “is indeed based on scientific principle, which has gained acceptance in the field of

614. *Williams*, 60 P.3d at 157.

615. *Id.* The court has an odd notion of a “scientific” community. These statements appear to be based on the guild test supplemented by the existence of the Kam studies, for all their weaknesses, and the assumed existence of yearly graded proficiency tests.

616. *Id.* at 158.

617. This appears to be another example of a slapdash defense challenge leading to a poorly considered opinion that might place a whole jurisdiction’s jurisprudence on the subject in a bad posture for the foreseeable future.

618. 857 So. 2d 845 (Fla. 2003).

619. *Id.* at 849.

620. *Id.* at 851.

621. *Id.*

622. *Id.*

623. *Spann*, 857 So. 2d at 851–52. This issue has been encountered previously in connection with *Ojeikere*, 2005 WL 425492 (case 41 *supra*), which is discussed at note 476 *supra*.

Forensic Document Examination” and admitted the testimony.⁶²⁴ But in an exercise of caution, the trial court imposed a *Hines/McVeigh* limitation on the testimony, allowing the document examiner to point out differences between the demand exemplars and Spann’s normal writing, thereby preventing the examiner from offering his opinion that the exemplars were intentionally disguised.

Here is where the case becomes procedurally unusual. The Supreme Court of Florida ruled that the defense had only preserved error on the issue of the ability of questioned document examiners to determine disguise, but that on appeal the defense had only raised the issue of the general reliability of handwriting analysis testimony (apparently because that issue was mooted by the *Hines/McVeigh* limitation). Because the only issue argued on appeal was not preserved at trial, and because the only issue preserved was not raised on appeal, the defendant was without legal standing to challenge anything.⁶²⁵

If the court had stopped there, the case would be of limited interest. However, the court goes on to say (in what must technically count as dictum, a distinction unlikely to have much practical effect on practice in Florida in the near future) that “[e]ven if the alleged error had been properly preserved, this claim would fail.”⁶²⁶ It then goes on to declare that the trial court was right on both issues, that the general reliability of handwriting identification testimony is not novel and therefore not subject to Florida’s version of *Frye*,⁶²⁷ and that the lower court’s handling of the disguise issue, after a *Frye* hearing, was proper.⁶²⁸

A radical optimist might see the potential seeds of a *Kumho Tire* approach in the way this case was handled, with general issues being subject to no challenge for lack of novelty, but each specific issue being regard as “novel” because it had never been the subject of a particularized *Frye* hearing before. A realist, however, would have to admit that the Florida Supreme Court’s approval of the trial court’s use of the document examiner guild as the reference group for general acceptance under its *Frye* test makes a successful challenge to even the most unreliable of this and other questionable techniques of forensic identification “science” very unlikely in Florida for the foreseeable future.⁶²⁹

624. *Spann*, 857 So. 2d at 851.

625. *Id.* at 851–52.

626. *Id.* at 852.

627. “Forensic handwriting identification is not a new or novel science.” *Id.* “Because expert forensic handwriting identification is not new or novel, *Frye* has no application.” *Id.* at 853.

628. “The *Frye* hearing in the case was limited to the issue of whether the expert could testify that Spann distorted or disguised his handwriting. . . . [T]he trial court’s consideration of the admissibility of expert testimony on the limited issue of distorted or disguised handwriting was properly considered and resolved.” *Spann*, 857 So. 2d at 853. The court cites no specific evidence or testimony dealing with the reliability of document examiners in performing this particular task.

629. One irony here is that this is the same court that showed itself so capable of rational evaluation of the weaknesses of proffered forensic expertise (tool mark evidence) in *Ramirez v. State*, 810 So. 2d 836 (Fla. 2001). There is in particular a stark and startling contrast between *Spann* and *Ramirez* in regard to what counts as an appropriate reference community under *Frye*, the need for actual information on error rates, and the caution with which partisan experts should be approached. *See id.* at 847–52.

57. *State v. Bradford Jones*⁶³⁰ (Del. Super., Gebelein, J.)

State v. Bradford Jones is a case showing remarkable prosecutorial restraint. It involves yet another jailhouse note, this time an anonymous threatening note someone posted over a coffee station on “F” Tier in the Delaware Correctional Center.⁶³¹ The note read:

To: All Prisoners of War on Friday, April 19, 02 we as prisoners will start the elimination of all pigs, co’s, cops or whatever you want to call them. On top of our list is co Hall, co Allen and co Jones. United we stand divided we fall.⁶³²

Suspicion fell upon prisoner Bradford Jones. His fingerprints apparently were found on the note.⁶³³ In addition, the note was sent for comparison to exemplars of Jones’s known writing by Georgia Anna Carter, a 30-year veteran of the Delaware State Police who had been a document examiner for 17 years.⁶³⁴ Originally the state wanted Officer Carter to testify to and point out to the jury the similarities between Jones’s writing and the writing on the note, and also to her conclusion that Jones had written the note. When the defense moved for exclusion and demanded a Rule 702 hearing, the prosecution voluntarily limited the document examiner’s testimony to pointing out similarities, thus voluntarily limiting her to the functions of a *Hines/McVeigh* witness.⁶³⁵ After a hearing, the trial judge, Judge Gebelein, ruled globally that the document examiner could testify in the limited manner proposed. In so doing, his analysis was limited to the invocation of the results of other cases in which judges had accepted such testimony, and to Ms. Carter’s credentials.⁶³⁶ There was no attempt at an independent evaluation of the reliability issue, and no attempt to frame the task before the court, even though Delaware claims to be a *Daubert* jurisdiction. (This should not be too surprising, since the defense attack appears to have been global and appears to have been supported mainly by citation to federal cases excluding handwriting identification expertise in other contexts.) *Kumho Tire* is cited only for its flexibility and discretion language, and for the “same intellectual rigor” test.⁶³⁷ The judge seems to have been most persuaded by an unreported bench opinion of another Delaware judge, Richard F. Stokes, which, having apparently skirted *Kumho Tire* by invoking its flexibility language, issued a ruling that was in essence a carbon copy of *Starzecpyzel* down to the limiting instruction.⁶³⁸ So while the result is a *Hines/McVeigh* result, the judge clearly seems disappointed that, because of the limited nature of the prosecution’s proffer, he could not admit the document examiner’s conclusion as to authorship also.

630. 2003 WL 21519842 (Del. Super. July 2, 2003). The defendant’s first name is used to avoid confusion with the federal case *United States v. Jones* (case 6 *supra*).

631. *Id.* at *1.

632. *Id.* at *1 n. 1.

633. *Id.*

634. Officer Carter’s credentials are somewhat comparable to those of Detective White in *Florence* (case 58 *infra*), although she has more years of experience and has attended more short-courses. See *id.* at *3. For more on Carter’s credentials, see the discussion in connection with *State v. Cooke* (case 65 *infra*), at note 769.

635. *Bradford Jones*, 2003 WL 21519842 at *1.

636. *Id.* at **3–4.

637. *Id.* at *2.

638. *Id.* at *3.

58. *Florence v. Commonwealth*⁶³⁹ (Ky., Lambert, C.J.)

The opinion in the next state case, *Florence v. Commonwealth*, is in many ways among the most sophisticated written on this subject. It deals with the general issue of what may be called the “price of admission” burden (as opposed to the ultimate burden of persuasion on the issue of reliability once it is reached, which doctrinally is always on the proponent of the evidence), which was alluded to by the U.S. Supreme Court in *Kumho Tire*.⁶⁴⁰ The issue arises when a particular process or technique is one which has a long history of admission. In such a case, the obligations of Federal Rule of Evidence 702 to determine sufficient reliability of the proffer still obtain, but it is reasonable to require that the challenger bring forth more than just a pro forma motion. Instead, the challenger must support the motion with some basis establishing a good reason to believe that lack of reliability is a real and tenable issue, not merely a formal one, in the context of the case before the court.

The facts in *Florence* were these: On March 3, 1999, someone (apparently using a State of Kentucky identification card) opened an account in the name “William C. Vance” at the Whitaker Bank in Lexington by depositing \$50 in cash. On March 4, he returned to the same bank branch and cashed a counter check on the account for \$35. On March 5, he deposited a check for \$3,740 made payable to William C. Vance drawn on the account of a business called Rooftek at the Fifth Third Bank. For whatever reason, the check was deposited to cash instead of being accepted subject to collection. The next day the perpetrator showed up at a different branch of the Whitaker Bank and cashed another counter check for \$3,540. On March 7, the perpetrator wrote a \$903 check on the “Vance” account for the purchase of an airline ticket. Shortly thereafter, Whitaker Bank was notified by the Fifth Third Bank that the Rooftek account had been closed some time before, and the \$3,740 check was dishonored. The police were notified. A check of records determined that there was no “William C. Vance” with a real State of Kentucky identification card.⁶⁴¹

Defendant was apprehended by a combination of good police work and luck. When police in Hamilton County, Ohio, searched the home of defendant’s half brother pursuant to an unrelated investigation, they found a State of Kentucky identification card in the name of William C. Vance. The picture on the card was defendant. When they saw a bulletin regarding the Kentucky case, they notified the Kentucky authorities. Defendant was arrested and later identified by various bank employees as the person who had opened the account, negotiated the checks, and made the withdrawals.⁶⁴²

The State wanted to call Detective Chris White, a document examiner with the Lexington, Kentucky, police department,⁶⁴³ to testify that he had compared authentic

639. 120 S.W.3d 699 (Ky. 2003).

640. The issue concerns the question of when the reliability of a proffer has been “called sufficiently into question,” *Kumho Tire*, 526 U.S. at 149, and therefore does not fall within that set of cases “where the reliability of an expert’s methods is properly taken for granted.” *Id.* at 152.

641. *Florence*, 120 S.W.3d at 700–01.

642. *Id.*

643. It must be observed that Detective White’s credentials might not have impressed Judge Carnes. *See Wolf*, 253 F. Supp. 2d at 1345 (case 34 *supra*). He attended a Secret Service course of undisclosed length and served “a two year internship in the field,” which appears to mean that he went back and worked with a more

exemplars of defendant's handwriting to the handwriting on the checks, and that defendant had written the checks. White's testimony was remarkable on three counts. First, he did not obtain any new exemplars of defendant Florence's handwriting. For "known" exemplars he relied on two documents: The Kentucky ID card and the application filled out to open the bank account.⁶⁴⁴ The first of these bore little if any writing besides a signature. The second may have had a few more blanks to fill in besides the signature, but it was not a "known" writing in the usual sense of the word, since its authentication depended on the testimony of witnesses that the defense, a fortiori, challenged as being mistaken in their eyewitness identification of Florence.⁶⁴⁵ The ID card is a little better as a "known," since it appears to bear Florence's picture, but even this is an irregular way to establish the authenticity of a known exemplar, and it contained only a single signature.

Second, the "questioned" documents were four checks bearing four signatures, three of which were in the same name, "William C. Vance."⁶⁴⁶ So, as to those, the examiner claimed to be comparing two signatures to each of three other signatures in the same name and determining that whoever wrote the first two wrote each of the others, based on very little material. In essence, what he was saying (and all he was saying) was that, based on comparing these five signatures alone, the same person wrote all five. The really important testimony, however (if any of it was) was the testimony about the Rooftek check, which bore a signature in a name other than "William C. Vance." The claim that one can attribute authorship of a signature based on "known" exemplars comprising little more than two other signatures in a different name, and whose status as "known" documents is unclear, is highly problematical. However, this was the testimony which undermined the argument at trial (weak as it was) that defendant really believed that the Rooftek check was good when he deposited it. One suspects that the departure from standard procedures in this case resulted from the fact that the examiner knew of the strong evidence in the case independent of handwriting comparison, and simply operated as much on that basis as on the exercise of any expertise (the familiar problem of observer effects contaminating forensic science practice which has been documented elsewhere).

Finally, at trial, Detective White testified that "handwriting is even more precise than DNA for identification purposes."⁶⁴⁷

All of the above circumstances were known to the defense prior to trial (except perhaps the claim of superiority to DNA identification). However, instead of doing any

experienced document examiner on the Lexington police force. According to the opinion, he also indicated that he was a member of "the association of questioned document examiners." *Florence*, 120 S.W.3d at 701. This may be a reference to the IAQDE. But he does not appear to be certified by the ABFDE.

644. *Id.*

645. There was, perhaps, another line of defense: That Florence had in fact opened the "Vance" account, but someone else who looked like him had by coincidence written all the checks and stolen the money, which he failed to complain about when he found the money gone, but this would have been so pitiful as to not be worth arguing to a jury. As indicated in the text, Florence's real argument in front of the jury seems to have been not that he didn't sign all the "Vance" checks, but rather that the jury should not conclude beyond a reasonable doubt that he knew the Rooftek check was bad. *See id.* at 704.

646. *Id.* at 701.

647. *Id.*

homework and making a proffer which would have shown the judge, in a practical way, that this testimony had serious reliability problems when evaluated either by exterior standards of empirical justification or by the field's own claims about good practice, the defense relied on a formal motion apparently proffering little in the way of specific information. While it is fair to say that the Supreme Court of Kentucky seemed suspicious of the reliability of the proffered testimony, it ruled that plaintiff's mere formal motion without more was insufficient to trigger a full-scale Rule 702 hearing in regard to testimony in an area with long judicial acceptance.⁶⁴⁸ The court was careful to say that a more serious effort might properly trigger an obligation to hold such a hearing.⁶⁴⁹ The court was clearly trying to strike a balance between requiring the proper consideration of serious reliability issues, and not allowing litigants to require the expenditure of substantial resources in every case involving experts merely for the price of a few pieces of paper.

Finally, as to the statement about handwriting identification testimony being "even more precise than DNA for identification purposes," the court was clearly troubled, but the defense had failed to object to the testimony at trial, and on that basis (perhaps also influenced by the large amount of other evidence against defendant) the court declined to rule on the issue.⁶⁵⁰

59. *Commonwealth v. Murphy*⁶⁵¹ (Mass. App., Gelinis, J., joined by Doerfer and Green, JJ.)

Commonwealth v. Murphy involves an appeal from a conviction for various charges springing from a series of incidents involving stolen identities of real people, which were used to open bank accounts and obtain credit cards which were then used to purchase goods, etc.⁶⁵² All six people whose identifying characteristics (driver's license number, social security numbers, etc.) were used in the scheme were named either "John Murphy" or "Michael Sullivan." Whoever committed the scams had left behind numerous documents (charge slips, etc.) bearing the signatures "John Murphy" or "Michael Sullivan," apparently after presenting identification in those names bearing a picture that matched the presenter,⁶⁵³ and a signature that the presenter's signature at the store appeared to match. When the defendant John Murphy was arrested, various documents (credit card charge receipts, etc.) connected with the various charged crimes were recovered pursuant to a search warrant from the rented car he was driving.

During the pendency of his case, defendant had submitted seven documents to the

648. *Florence*, 120 S.W.3d at 703.

649. "[A] preliminary hearing was not required without a proffer of evidence challenging the reliability of the discipline at issue." *Id.*

650. *Id.*

651. 797 N.E.2d 394 (Mass. App. 2003).

652. Factual details are drawn from *id.* at 396 unless otherwise noted. The total retail value of the merchandise charged pursuant to the scheme (televisions, video recorders, computers, furniture, etc.) was in excess of \$17,000. *Id.*

653. The defendant John Murphy apparently stole the identities (that is, used the social security and driver's license numbers, etc.) of other John Murphys, getting up documents with their identifying information but his picture.

court in connection with his case signed “John Murphy.”⁶⁵⁴ In addition, eight of the documents seized from his car bore the signature “Michael Sullivan” (two of which were picture ID’s with defendant’s picture on them).⁶⁵⁵ In a not uncommon act of overkill, the prosecution called a questioned document examiner, Nancy McCann,⁶⁵⁶ to testify that she had compared the “John Murphy” signatures and the “Michael Sullivan” signatures on the various charge slips and concluded that it was highly probable that all of the Murphy and Sullivan signatures on the charge slips were signed by the same person, and further, that she had compared the charge slips with the “John Murphy” signatures on the court documents and the “Michael Sullivan” signatures from the car, and concluded that it was more probable than not that they were all written by the same person.⁶⁵⁷

The whole point of the scam structure seems to have been to generate identification documents with signatures actually written by the defendant, so that defendant could sign charge slips with matching signatures done fluidly in front of salespersons. The task before the document examiner was not really an attribution of authorship task in the normal sense, but in fact closer to the easier task of “authentication” of signatures. In addition, unless extreme care was taken to mask the expertise-irrelevant facts surrounding the case from the document examiner (which it rarely if ever is), her conclusion was virtually foregone, because any rational person would come to that conclusion, given the rest of the evidence without the handwriting expert’s testimony. So the expert’s testimony was in many ways a dramaturgic exercise adding little reliable information to what was already before the jury. In addition, it was not objected to until the objection had already been waived, so, as in *Jolivet* (case 13 *supra*), *Mornan* (case 42 *supra*), and *Spann* (case 56 *supra*), the handwriting issue was reviewed for plain error only (the Massachusetts formula is error “that created a substantial risk of miscarriage of justice”).⁶⁵⁸ So it is hardly surprising that the defendant’s claim that he was entitled to a *Hines/McVeigh* limitation on the document examiner’s testimony, limiting her to pointing out similarities and differences, was rejected.⁶⁵⁹ However, as in *Jolivet*, *Mornan*, and *Spann*, the court did in fact go beyond this (in what must presumably count as dictum) to opine that such a limitation is globally never required, given the long acceptance of handwriting identification expertise in Massachusetts.⁶⁶⁰

654. *Id.* at 397.

655. *Id.*

656. Ms. McCann’s credentials were not given. A Google search reveals that she appears to be a document examiner in private practice in Boston, doing business as McCann Associates. She is referred to in two other cases as a “certified” document examiner, but we are not told by whom she is certified. *See E. Dentists Ins. Co. v. Lindsey*, 2004 WL 2004778 at *2 (Mass. Super. Aug. 16, 2004); *Bennett v. St.-Golaine Corp.*, 453 F. Supp. 314, 323 (D. Del. 2004). She is not ABFDE-certified, nor BFDE certified, so far as can be determined, but appears to be connected to the “Association of Forensic Document Examiners” (AFDE). *See Assn. Forensic Doc. Examrs., Continuing Education Symposium*, www.afde.org/afdeprogram2006.pdf (Oct. 25–28, 2006). As I have repeatedly said in regard to other examiners, none of this is necessarily to suggest that Ms. McCann is either more or less reliable in fact than a document examiner with more establishment certification.

657. *Murphy*, 797 N.E.2d at 397.

658. *Id.* at 397–98.

659. *Id.* at 398.

660. *Id.* at 398–99.

60. *State v. Matthews*⁶⁶¹ (La. App., Gorbaty, J., joined by Jones and Bagneris, JJ.)

Matthews was charged with presenting a forged check to a supermarket employee, and then endorsing that check in the employee's presence with a fictitious name.⁶⁶² This act was recorded on a "Regiscope" camera system which showed the check presenter's face along with an image of the check and the fake driver's license that had also been presented at the time of the transaction.⁶⁶³ After investigation pointed toward Matthews, a police photograph of Matthews was obtained which appeared pretty clearly to be the check presenter. The clerk at the supermarket apparently did not remember that particular transaction among all the others that she had handled. Although the Regiscope photograph might seem sufficient, the prosecution apparently felt more would be better. A demand exemplar was obtained from the defendant, and turned over to Officer Chana Pichon, who was the New Orleans Police Department's document examiner. She opined that Matthews had written the endorsement.⁶⁶⁴

Matthews was convicted on two counts of the indictment, one alleging "forging" and one alleging "issuing" the check. Since these are not separate crimes, the court entered judgment of conviction on only one, picking "forging" by asking the defense attorney which one he preferred.⁶⁶⁵ Unfortunately for the trial judge, there was not sufficient evidence of "forging" under Louisiana law, since signing a false endorsement in person in a fictitious name could not qualify as "forging."⁶⁶⁶ This circumstance precipitated a trip up and down the Louisiana appellate ladder. First, the Court of Appeal of Louisiana (the intermediate appellate court), Fourth Circuit, held that the dismissal of the "forging" count created double jeopardy as to that count, and the "issuing" count could not stand because of insufficient evidence, and hence, Matthews had to be discharged.⁶⁶⁷ Then the Louisiana Supreme Court granted certiorari and held that in such a situation, the charge was to be treated as a single charge, so that the erroneous selection of the wrong alternate theory for entry of judgment by the trial court was in essence to be treated as a clerical error.⁶⁶⁸ The case was then remanded to deal with the remaining appellate issues. On remand, one of those issues, "pro se supplemental assignment of error No. 8" (raised under a procedure that apparently allows the convicted defendant to supplement counsel's assignments of error "pro se"), was that "the trial court erred in qualifying Officer Chana Pichon as an expert in handwriting analysis . . . [because] handwriting analysis failed to meet the criteria . . . set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*"⁶⁶⁹

In disposing of this issue, the Louisiana Court of Appeals first indicates that

661. *State v. Matthews (Matthews III)*, 859 So. 2d 863 (La. App. 2003).

662. All facts are taken from the initial opinion, *State v. Matthews (Matthews I)*, 814 So. 2d 619, 620–21 (La. App. 2002).

663. *Id.* at 620.

664. *Id.* at 621. I have discovered nothing further concerning Officer Pichon's credentials. She does not appear to be ABFDE-certified.

665. *Id.* at 622–23 (Bagneris, J., dissenting).

666. *Id.* at 621–22 (majority).

667. *Matthews I*, 814 So. 2d at 621–22.

668. *State v. Matthews (Matthews II)*, 855 So. 2d 740 (La. 2003).

669. *Matthews III*, 859 So. 2d at 871–72.

Article 702 of the Louisiana Code of Evidence is “based on” the Federal Rule.⁶⁷⁰ The court further observes that the Louisiana Supreme Court previously adopted *Daubert*, and then rather casually declares that it is now adopting *Kumho Tire*.⁶⁷¹ However, it then goes on to emphasize the “discretion” component of *Kumho Tire* without much discussion,⁶⁷² failing to tie it to discretion to select and apply proper standards of reliability for the task at hand, and finally ends by concluding that the trial court did not abuse its discretion in determining proper criteria of reliability under Article 702, quoting, apparently with approval, the following performance by the trial judge in discharging that obligation:

I do recognize, based on my experience as a lawyer—practicing lawyer—and as a judge, that there are people who receive training, knowledge, and certain experience in the filed [sic; field] of an analysis of handwriting.

I also understand through readings that each person has a different handwriting, a different style whereby he or she makes letters and/or numbers. And that style is peculiar or typical to the individual involved who is the author of a particular document.

It’s not general knowledge. In fact, it requires someone with some special training to get up and explain to a jury how the formation of the letters and/or numbers is peculiar to individuals and their style of writing.⁶⁷³

Based on this “evaluation,” the court declared there was no abuse of discretion, citing *Velasquez*.⁶⁷⁴ The low quality of the performance that the appellate tribunal was willing to accept as discharging the trial court’s gatekeeping responsibility is sufficiently obvious to require no further comment.⁶⁷⁵

61. *Commonwealth v. Glyman*⁶⁷⁶ (Mass. Sup. Ct., Worcester Co., Fabricant, J.)

Two months after the decision in *Commonwealth v. Murphy* (case 59, *supra*), a Massachusetts trial court reached an even more global conclusion in *Commonwealth v. Glyman*. The case involved a criminal prosecution charging falsification of a will. As usual, it is impossible to tell from the opinion (so it must not have mattered to the judge) exactly what claim of expertise is at stake in the case. It appears that it is either the genuineness of the signatures on the will (a task taken by the document examiner community to be an easy task, and a task for which there is at least some empirical evidence of skill), or it is attribution of authorship from a signature that is an attempt at forgery made by simulating an actual signature of the deceased, which is counted as either the hardest possible task or virtually impossible by standard document examiner lore, depending on who you ask.⁶⁷⁷

670. *Id.* at 872.

671. *Id.*

672. *Id.* at 872–73.

673. *Id.* at 873 (quoting trial court).

674. *Matthews III*, 859 So. 2d at 873. *Velasquez* is case number 3, *supra*.

675. This may be a little harsh, since there is no way of knowing what the defense had put in front of the trial judge to provide the raw material upon which to base a better performance.

676. 17 Mass. L. Rptr. 146 (Mass. Super. 2003).

677. See e.g. *Conway*, *supra* n. 86, at 24. “The drawing process of copying from a visible model by its very

The defense made a motion in limine to exclude the handwriting identification testimony as unreliable under *Commonwealth v. Lanigan*,⁶⁷⁸ the Massachusetts case that generally adopted the *Daubert* approach to reliability for purposes of admissibility,⁶⁷⁹ and requested a hearing to establish the facts underlying the claim that handwriting identification expertise lacked the required reliability. To establish the required “price-of-admission” plausibility of its claim concerning the lack of reliability of this historically admissible claim of expertise, the defense submitted an affidavit from Michael J. Saks, and the prosecution responded with, inter alia, an affidavit of Dr. Moshe Kam. The court decided to deny the motion in limine without a hearing.⁶⁸⁰

It is clear that the attack of the defense was unfortunately global. It is also clear that Judge Fabricant misunderstood Dr. Saks’s credentials, since she does not seem to be aware that he actually has a Ph.D. (she says merely that “Professor Saks” has “doctoral training in experimental social psychology”).⁶⁸¹ She also says that “[i]t does not appear that he has published any empirical research of his own on any subject, or that he has published anything in the area of research design or methodology.”⁶⁸² Both of these assertions are grossly inaccurate.⁶⁸³

Judge Fabricant begins her consideration by noting that handwriting expertise has long been admitted in Massachusetts and elsewhere.⁶⁸⁴ She then notes that the opinion of the Massachusetts intermediate appellate court in *Commonwealth v. Murphy*⁶⁸⁵ (case 59, *supra*), decided only two months earlier, also indicated (in dictum but of understandably heavy influence to Judge Fabricant nevertheless) that “as the courts in Massachusetts have long accepted as reliable expert testimony about the authorship of handwriting, a *Lanigan* hearing was not necessary even had one been properly requested.”⁶⁸⁶ She then notes that every federal appellate court that has considered a

nature disallows writing individuality, and excludes personal writing inclinations of the forger. A hundred simulations from visible model signatures of John Smith by a hundred different forgers would rarely be distinguishable, let alone identifiable with their authors.” One of the complaints document examiners raised about the 1984 FSF proficiency test, wherein all who took it failed to properly attribute the author of the note involved to the true author, was that it presented an analogue to this task extended over a short note (not merely a signature). See Risinger, *Handwriting Identification*, *supra* n. 11, at § 33:16.

678. 641 N.E.2d 1342 (Mass. 1994).

679. *Lanigan* was a DNA admissibility case that ultimately found the DNA identification at issue in the case reliable enough for admission by the prosecution. *Id.* at 1350.

680. *Glyman*, 17 Mass. L. Rptr. 146, at *4. To be fair to Judge Fabricant, she did consider the extraneous preliminary proofs provided by the parties, but some of the misconceptions she derived from those proofs that are indicated in the text would have been dispelled had she held a hearing. However, given the tenor of the rest of the opinion, it probably would have made no difference.

681. *Id.* at *3 n. 3.

682. *Id.*

683. In the record before Judge Fabricant were Dr. Saks’s curriculum vitae as well as the affidavit, which described some of his relevant research and scholarship. From those, had she read them, Judge Fabricant would have learned, contrary to what she claimed in her opinion, that Dr. Saks had conducted dozens of empirical studies and written a number of noteworthy methodological papers—including the methodology chapter in this treatise: *Scientific Method: The Logic of Drawing Inferences from Empirical Evidence*. It is troubling that Judge Fabricant or any judge could be so wrong about facts properly before her that are utterly obvious and beyond dispute. Her erroneous statements would lead an informed reader of her opinion to wonder what else in the opinion may not be as Judge Fabricant says it is.

684. *Id.* at *1.

685. 797 N.E.2d 394.

686. *Glyman*, 17 Mass. L. Rptr. 146, at *1 (quoting *Murphy*, 797 N.E.2d 394).

trial court admission of such testimony in the face of a reliability challenge has upheld the admission, citing *Crisp, Mooney, Paul, Jones, and Velasquez*, with the usual questionable citation to *Jolivet*.⁶⁸⁷ She then compares the affidavits from Professor Saks and Professor Kam, and concludes that the points raised by Professor Saks are insufficient even to give rise to the necessity of a hearing.⁶⁸⁸

Judge Fabricant's ultimate decision, that the disputes concerning the reliability of handwriting identification expertise are not even of sufficient weight and tenability to justify a full-scale hearing when first raised within a jurisdiction, but are best dealt with by giving global *stare decisis* effect to dicta from her own jurisdiction and often poorly reasoned decisions from other jurisdictions, is increasingly typical of the judicial response, even if they do not comport with an appropriate evaluation of the empirical record.⁶⁸⁹

62. *Griggs v. Commonwealth*⁶⁹⁰ (Ky. Ct. App., Johnson, J., joined by Dyche and Paisley, JJ.)

The next case is *Commonwealth v. Griggs*. If the Supreme Court of Kentucky issued a fairly cautious and sophisticated treatment of both reliability jurisprudence and handwriting-related issues in *Florence v. Commonwealth* (case 58, *supra*), the same cannot be said of the Kentucky Court of Appeals in *Griggs*.

Derric Griggs was employed to work with the inmates of the Jefferson County Youth Center (a juvenile detention facility in Louisville, Kentucky) as a "youth program worker."⁶⁹¹ In a scandal that apparently hit the newspapers, Griggs was fired in September of 1999 based on allegations of sexual improprieties with one T.J., a 17-year-old who had some months earlier been an inmate at the detention center, but had been

687. *Id.* At this point Judge Fabricant involves herself in one of those odd flights of questionable rhetoric that sometimes mark these cases. She asserts:

These decisions rely on two principal points. First, the import of *Daubert* was not to compel "wholesale exclusion of a long-accepted form of expert evidence." Rather, *Daubert* provides a framework for courts "to entertain new and less conventional forms of expertise," admitting what is reliable, even if not yet generally accepted, among such new fields, but screening out the unreliable. Second, handwriting comparison, unlike some other areas of expert evidence, is accessible to jurors. . . . For that reason there is little risk of "undue prejudice from the mystique attached to experts."

Id. at *2 (internal citations omitted). The quotations for the first point are from the majority in *Crisp*, and for the second point from *Paul*, but it is more than a little exaggeration to claim that all the cited opinions rely on those two points as principal points, as a glance at the opinions or their treatment *supra* would show. In addition, the propositions quoted from *Crisp* are simply untenable interpretations of *Kumho Tire*, but apparently nobody cares.

688. *Id.* at **3-4.

689. A final Massachusetts case should be noted here. In *Commonwealth v. Mayemba*, 862 N.E.2d 47 (Mass. App. 2007) the defendant was charged with a conspiracy involving the use of thirty-two checks on the defendant's closed bank account to create false balances in other accounts which were then drawn down before the fact that the first account was closed was discovered. Defendant made a motion in limine challenging the testimony of the prosecution's handwriting expert, and demanding a hearing. This was denied on the authority of *Murphy*. However, when the case was tried, the objection was not renewed during trial, which under Massachusetts law fails to preserve a claim of error in regard to the denial of motion in limine. Thus, the appellate court reviewed only for plain error, and predictably found none.

690. 2003 WL 22745707 (Ky. App. Nov. 21, 2003).

691. *Id.* at *1.

transferred to another facility (the Morehead Center) in July of 1999.⁶⁹² Griggs denied all wrongdoing and hired an attorney to represent him in regard to the matter. At that point, he had not been charged with any criminal offense. In October 1999, Griggs's attorney held a press conference at which she produced what she said was a letter from T.J. exonerating Griggs of any wrongdoing.⁶⁹³

At about the same time, Cheryl Caudill, a supervisor at the Morehead Center, discovered that T.J. had been visited on September 22 by someone identifying himself as Randy Barnett, an investigator with the Jefferson County Crimes Against Children Unit.⁶⁹⁴ Investigation revealed that there was no Randy Barnett with the Crimes Against Children Unit.⁶⁹⁵ In addition, another inmate claimed that T.J. had been visited recently by Griggs.⁶⁹⁶ Caudill confronted T.J. with these facts. T.J. at first claimed that her visitor had been Randy Barnett, but then admitted that it had been Griggs, and that Griggs had given her a letter with suggestions on how to write her "exoneration" letter.⁶⁹⁷ She admitted that she had not mailed the letter to Griggs's lawyer, as the envelope displayed at the press conference seemed to suggest, but instead had handed it to Griggs directly.⁶⁹⁸

Griggs was indicted for impersonating a peace officer.⁶⁹⁹ As it turned out, an investigator for the Crimes Against Children Unit did not qualify as a "peace officer" under Kentucky law because such an investigator has no power of arrest.⁷⁰⁰ After a hung jury resulted in a mistrial in a first trial, Griggs was convicted of the lesser included offense of impersonating a public servant (a misdemeanor).

As might be expected, the handwriting aspects of the trial revolved around the issue of who wrote the signature "Randy Barnett" in the visitor's log at the Morehead Center on September 22, 1999, but in an unexpected way. The guard on duty identified Griggs as the person who identified himself as "Randy Barnett" and signed the log.⁷⁰¹ In preparation for the first trial, Teddy Gordon, a lawyer who shared space with Griggs's then-defense attorney (but who testified that he had never represented Griggs),⁷⁰² had elicited handwriting exemplars from Griggs and submitted them to a handwriting expert,

692. *Id.* at *1 nn. 3, 5. The general age of consent in Kentucky was 16 at the time. T.J. was awaiting disposition of underlying charges of armed robbery. *Id.* at *2 n. 11.

693. *Id.*

694. *Griggs*, 2003 WL 22745707 at *1.

695. *Id.*

696. *Id.*

697. *Id.* at **1-3.

698. *Id.* at *3. The envelope was of the wrong type to have come from the facility, and no outgoing letter from T.J. had been logged under the routine practice of the facility. *Griggs*, 2003 WL 22745707 at **1, 3.

699. *Id.* at *1.

700. *Id.* at *8 n. 40. This was an issue on appeal because the trial court submitted that charge to the jury instead of dismissing it. This error was found to be harmless in the face of the overwhelming evidence on the lesser included offense of impersonating a public servant, of which Griggs was convicted. *Id.* at *8.

701. *Id.* at *3. The guard, Lewis Rose, was referred to as a "treatment coordinator" who was the "administrative officer" on duty on the night of the visit.

702. *Griggs*, 2003 WL 22745707 at *4. This same lawyer, Gerry Ellis, apparently testified at the first trial as a witness for the defense, and was apparently central to Griggs's alibi claim at the first trial, which involved tickets to a charity event on the evening of the "Barnett" visit to the youth facility. These tickets were shown fairly conclusively in the second trial to have been forgeries. Ellis's testimony at the second trial seems to have been calculated to dispel any suspicion that he might have knowingly aided in the "alibi ticket" fraud.

Paul Kramer, apparently in hopes of obtaining an opinion excluding Griggs as the author. Kramer was called at the second trial by the prosecution to testify that he had concluded that the exemplars were attempts at disguise because they were “very deliberately written” and were written with such pressure that he “could feel the indentations very strongly at the bottom of the paper,” and that normally that indicates “an attempt at disguise.”⁷⁰³ The defendant objected to this as “scientifically unreliable.” As noted in relation to *Spann v. State*⁷⁰⁴ (case 56, *supra*), the ability to determine disguise is a task concerning which there is a complete absence of research to evaluate the claims of the guild.⁷⁰⁵ However, the court does not bother to give any thought to the task being performed, saying only:

Griggs next argues that the testimony provided by the Commonwealth’s handwriting expert, Kramer, was “scientifically unreliable” and therefore inadmissible. We reject this argument. “[H]andwriting analysis [has] long been recognized by the courts as [a] sound method[] for making reliable identifications.”⁷⁰⁶ Kramer testified that he was employed as an “examiner of questioned documents,” and that he had approximately 35 years of experience in this field. Kramer further testified that he has performed over 400 examinations.⁷⁰⁷ Consequently, we cannot conclude that the trial court abused its discretion by permitting Kramer to testify on direct examination that, in his opinion, the handwriting samples provided to him were “very deliberately written,” and that writing hard is normally “an attempt to disguise” on the part of writer.⁷⁰⁸

Again, nothing but the guild test, and a very unsophisticated version of the guild test at that.⁷⁰⁹

63. *People v. Nawi*⁷¹⁰ (Cal. App., Stevens, J., joined by Jones, P.J., and Simmons, J.)

People v. Nawi is a case involving murder and the heroin trade—but it is not exactly the kind of story this might at first blush conjure up. In the fall of 1987, Virginia Lowery was a woman of wealth. She lived in a house on Brussels Street in San Francisco. She owned curios and collectibles and jewelry worth hundreds of thousands of dollars. She kept the bulk of the jewelry in a safe in her home. She was employed

703. *Id.* at *5. In response to a question on cross-examination by Griggs’s own attorney, Kramer further said that “it was very obvious that . . . Mr. Griggs continued to disguise his normal writing habits” and that he had concluded that Griggs was “either guilty, or . . . nervous about giving his specimen writing.” *Id.* The latter inferences seem clearly beyond his expertise, but given the way they were elicited, were not part of the court’s analysis.

704. 857 So. 2d 845.

705. Or at least none I am aware of, or that the *Spann* opinion cited.

706. For the quoted passage, the *Griggs* court cites the majority opinion in *Crisp*, 324 F.3d 261, 266.

707. The opinion does not even tell us the nature of Kramer’s training, employment, or experience. That is pretty thin detail for an opinion that adopts a guild test. There does not even seem to have to be much of a demonstration of guild membership. I have been able to discover nothing further about Mr. Kramer’s credentials online, aside from the fact that he does not appear to be ABFDE-certified.

708. *Griggs*, 2003 WL 22745707 at *7 (brackets in original).

709. *Griggs* might properly have been disposed of on the authority of *Florence* (case 53, *supra*), in that it did not appear that the challenge of the defense was based on anything weightier than the general conclusory objection of counsel, and thus the “price of admission” burden for triggering a full-scale reliability determination in regard to traditionally admissible expertise was not carried. That would have been a more defensible option, but one not taken by the court, which unaccountably did not even cite *Florence*.

710. 2004 WL 2944016 (Cal. App. Dec. 21, 2004).

and two years from retirement. She intended to retire to Mexico with her husband.⁷¹¹

Now for the first twist. Her husband, William Lowery, was a convicted robber and major wholesale heroin dealer who had moved to Mexico in 1984 to, in the words of the court, “avoid drug enforcement authorities,”⁷¹² although he was not under indictment for his activities in either 1984 or 1987, and could apparently travel between Mexico and the United States if he wished.⁷¹³

On Thursday, October 29, 1987, the police got an anonymous telephone call from “an older male with an undistinguished voice” reporting a robbery and possible homicide at 966 Brussels Street. At that location, they found the body of Virginia Lowery on the floor of the garage. She had been stabbed 34 times with an ice pick in the head, neck, and upper body, and had been dead for anywhere from one to four days. There were no signs of a struggle anywhere in the house. There was an ironing board set up in the garage near the body, along with some clothes. An iron was on the floor. The cord had been cut from the iron and wrapped around her throat. The medical examiner also found a blunt force trauma to the head. She had apparently been ironing clothes in the garage when she was knocked on the head, then strangled and stabbed to death. There was no indication of forced entry. The front door was locked, but the sliding glass door was partly ajar. Lowery habitually left it ajar to let in fresh air. There was some evidence that someone had come over the back fence. There was no indication of robbery. There was nothing that was turned over or obviously gone through. The collectibles were still in place. The jewelry was still in the safe.⁷¹⁴ Her purse was on a sofa with wallet and money still inside.⁷¹⁵

Virginia Lowery was an immaculate housekeeper. Her Cadillac and the other items in her garage were all apparently recently washed. However, on the rear bumper of the Cadillac, near the body, the police found latent fingerprints, which they collected. The prints did not match any suspects developed at the time, and they were stored in a computer database of unsolved crimes for possible future use.⁷¹⁶

Ten years later they matched the fingerprints to defendant Robert Nawi, who had been arrested that month after an altercation in a bar and fingerprinted as a result of that arrest.⁷¹⁷ Investigation turned up some very interesting things about Mr. Nawi. He had been arrested in 1988 under the name Robert Wells, a/k/a Sam Zanca, and charged with federal drug trafficking violations. He was convicted and sent to federal prison, where

711. *Id.* at *1.

712. *Id.*

713. William Lowery had apparently been in California shortly before the murder for a wedding, see *id.* at *4 n. 2, though he appears clearly to have been in Mexico when his wife was murdered. He returned to California shortly after the murder to be interviewed by police, *id.* at *1, and was in California when first interviewed by police in 1998. *Nawi*, 2004 WL 2944016 at *3. Thereafter he apparently refused to return to California for Nawi’s trial, and his testimony was taken by means of a “conditional examination,” which appears to be a deposition in Mexico obtained by means of letters rogatory or otherwise. *Id.* at *4.

714. In his 1987 interview with police, William Lowery told police that he believed the motive for his wife’s murder was robbery, and asserted that his wife had another jewelry case that was missing. Apparently no other relative recalled such a jewelry case. *Id.* at *1.

715. *Id.*

716. *Id.* at *2.

717. *Nawi*, 2004 WL 2944016 at *2.

he stayed until being released in 1997, shortly before the bar altercation.⁷¹⁸ When the police then looked further into the details of his drug arrest, they discovered that it stemmed from a traffic stop of Wendy Dietzel, a/k/a Rosanna Gironda, who was Nawi/Wells/Zanca's wife. She was driving a Cadillac shown in motor vehicle records as registered to the deceased Virginia Lowery, but she was able to produce a California "pink slip" showing that it had been transferred, apparently from the estate of Virginia Lowery⁷¹⁹ to Rosanna Gironda and Sam Zanca. The car was impounded and inventoried. It had a variety of passports and other identification papers for what appeared to be one man photographically, but in a variety of names, including Sam Zanca, Timothy Vahanian, John Ronck, and others.⁷²⁰ There were also keys to three safety deposit boxes. For undisclosed reasons, the federal Drug Enforcement Administration was notified. Two days later, "with Dietzel's consent,"⁷²¹ a DEA agent opened one of the safe deposit boxes and found 650 grams of pure heroin. In September of 1988, Nawi was stopped by a customs official in the Vancouver airport because he was in possession of two airline tickets in two different names, David Johnson and S. Zanca. After further investigation, he was turned over to the DEA, who prosecuted him on the trafficking charges that resulted in his imprisonment.⁷²² When San Francisco police examined the evidence collected in the 1988 prosecution, they found an address book that had been seized from Nawi, which contained a telephone number for David Lowery, William Lowery's son by a previous marriage, and also a telephone number for "Bill" in Mexico.⁷²³

The police then submitted the fingernail scrapings from Virginia Lowery's hands for DNA analysis. They discovered that Nawi had been arrested in Florida, and arranged to obtain a sample from him for testing. DNA was recovered from the fingernail scrapings, which turned out to be a mixed sample from which Nawi could not be excluded; further, the profile of the major contributor, as determined by the analysts, matched Nawi.⁷²⁴

Investigators also obtained from Florida authorities another address book of Nawi's, apparently dating from after his release from prison. In that book were addresses for Jack Colevris, at 966 Brussels Street, Virginia's old address.⁷²⁵ Colevris was a caretaker apparently hired by William Lowery, who maintained the Brussels Street house.⁷²⁶ Investigators also obtained phone records from Nawi's mother's house in Massachusetts, which showed recent calls to David Lowery and to William Lowery in Mexico.⁷²⁷ William Lowery gave a deposition in Mexico (called a conditional

718. *Id.*

719. *Id.* In a large irony, this appears to have been the same Cadillac that Nawi's fingerprints were taken from originally.

720. *Id.*

721. *Id.*

722. *Nawi*, 2004 WL 2944016 at *2.

723. *Id.* at **2-3.

724. *Id.* at *3. There were many issues concerning the propriety of the DNA mixed sample interpretation, which the court spent a great deal of time on, and which need not concern us here.

725. *Id.*

726. *Id.* at *1.

727. *Nawi*, 2004 WL 2944016 at *1.

examination in California) at which he provided an alibi for Nawi, but other Mexican witnesses undermined that alibi.⁷²⁸ William Lowery had maintained a private office in Virginia's house that he used from time to time to meet with associates in 1987, before her murder.⁷²⁹ There was conflicting testimony concerning whether, when, and how often Nawi had been in the house before the murder.⁷³⁰

Defendant was tried and convicted for the murder of Virginia Lowery. As one might suppose, the main issue on appeal dealt with the propriety of the DNA evidence in various dimensions.⁷³¹ However, handwriting came in for examination also, albeit somewhat peripherally. The prosecution wanted to show that Nawi had been present in San Francisco around the time of the murder (which occurred sometime after the evening of Sunday, October 25, 1987).⁷³² Somebody had signed into the safe deposit area of the San Francisco Branch of the Bank of America on Monday, October 26, 1987, as "Sam Zanca."⁷³³ The circumstantial inference that Nawi was the one who signed the entry ticket is pretty overwhelming, given the other evidence concerning Nawi's use of the alias, and various documents in that name found in his possession (and with his picture on them) to the 1987 drug arrest. But this was not good enough for the prosecution. Instead, they called a document examiner (unnamed in the opinion) who compared the signature "Sam Zanca" on the entry ticket to the signature "Sam Zanca" on those documents found in the defendant's possession or otherwise associated with him (such as passport applications with his photograph accompanying them), and concluded that they were with "a high degree of probability" signed by the same person.⁷³⁴ The defense attacked this testimony, saying that "the prosecution's handwriting expert should not have been allowed to testify without preliminary proof of the scientific reliability of handwriting comparisons."⁷³⁵ The court rejected this challenge in the following terms:

We recognize that some federal trial courts have questioned the reliability of handwriting comparisons and the admissibility of such evidence under the federal rules of evidence. (E.g., *U.S. v. Hines* (D. Mass.1999) 55 F. Supp.2d 62, 68-71; *U.S. v. Saelee* (D. Alaska 2001) 162 F.Supp.2d 1097.) However, all federal appellate courts to consider the issue after *Daubert* have found handwriting evidence admissible. (*U.S. v. Crisp* (4th Cir.2003) 324 F.3d 261, 270 and cases cited therein.)

Handwriting comparisons have been routinely used in California courts for decades (e.g., *People v. Storke* (1900) 128 Cal. 486, 488), and the Legislature has given its imprimatur to the use of handwriting comparisons to authenticate a writing. (Evid.Code, §§ 1415, 1418.) The Evidence Code expressly allows expert testimony and further allows the jurors to make their own determination of handwriting comparison without expert testimony.

728. *Id.* at *4.

729. *Id.*

730. *Id.*

731. *Id.* at **4-16.

732. The early evening of Sunday, October 25, was the last time anyone was known to have spoken with Virginia Lowery. *Nawi*, 2004 WL 2944016 at *1. In addition, she failed to show up at her grandniece's school on Monday, October 26, to do volunteer work. *Id.*

733. *Id.* at *19.

734. *Id.* at *20.

735. The defense also attacked the use of photocopies, an attack which was rejected, for reasons more specifically considered in connection with *U.S. v. Garza*, 448 F.3d 294 (case 47, *supra*).

(Evid.Code, §§ 1417, 1418.)⁷³⁶ Our Supreme Court has held that the rule of *Kelly*⁷³⁷ does not apply to a procedure that isolates physical evidence whose appearance, nature, and meaning are obvious to the senses of a layperson. (*People v. Webb* (1993) 6 Cal.4th 494, 524 [laser reading of fingerprint]; *People v. Ayala* (2000) 24 Cal.4th 243, 281 [X-ray of bullet size].) [The court here observes in a footnote: “The *Kelly* rule is also limited to *new* scientific methods of proof. The reliability of a long-established procedure need not be proven. (*People v. Clark* (1993) 5 Cal.4th 950, 1018 (blood splatter evidence); *People v. Municipal Court (Sansone)* (1986) 184 Cal.App.3d 199, 201 (urine test for blood alcohol).”]

In any event, any error in admitting the testimony of the handwriting expert without a prong one *Kelly* hearing was harmless. First, the jurors were capable of discerning handwriting similarities even without an expert. Furthermore, even aside from the comparison of signatures, there was strong evidence to suggest that defendant was the person who signed the entry ticket for the safe deposit box. Defendant had used the alias Sam Zanca on other occasions, and in fact documents in the name of Sam Zanca were found in the brown Cadillac driven by defendant’s wife. Defendant had another safe deposit box at the Bank of America (though at a different branch) in which the heroin had been found in 1988—the heroin that formed the basis of the drug charges to which defendant pled guilty in 1988.⁷³⁸

A proper examination of the expert task in *Nawi* might have arguably characterized it as signature authentication, and might have defensibly found it sufficiently supported by the empirical record for admission on that basis, but there is not much hope for such a rational approach in the future, given what the court actually said.⁷³⁹

64. *State v. Clifford*⁷⁴⁰ (Mont., Leaphart, J., delivered court’s opinion; Nelson, J., concurred in a separate opinion in which Kotter, J., joined)

The next case to be noted is the Montana case of *State v. Clifford*, not because it contains a ruling on a reliability challenge, but because it is easy to mistake it for a case involving such a ruling. Cheryl Clifford was convicted of one count of fabricating

736. It is true that, unlike Federal Rule of Evidence 901(b), for instance, § 1418 of the California Evidence Code does appear to authorize handwriting identification expert testimony, and to authorize it globally regardless of the empirical evidence for any given claim of the expert. What this illustrates more than anything is the problems that can be created by legislatively mandated rules of expert reliability. How should we respond if we encounter a legislatively mandated rule of admission for phrenology?

737. “*Kelly*” is *People v. Kelly*, 549 P.2d 1240 (Cal. 1976), California’s wellspring case on expert admissibility. Originally a fairly straightforward adoption of the *Frye* approach, it has become an idiosyncratic doctrine best characterized as a combination of *Frye* and *Daubert*-like subdoctrines.

738. *Nawi*, 2004 WL 2944016 at *20.

739. It is probably advisable to note here the recent California case of *People v. Scott*, 2007 WL 404782 (Cal. App. Feb. 7, 2007), a case in which the defense objected to the expert testimony explicitly because it was not over-claimed. The document examiner utilized the ASTM 9-point scale and testified to conclusions of level 3 (probably authored) and level 4 (indications of authorship). The defense moved to exclude such non-positive conclusions as “irrelevant” or “without foundation.” These grounds were properly rejected. Assuming the existence of the claimed expertise, the most serious problem for its forensic use is the temptation to over-claim its certainty or meaning, and the legal system could never hope to get control of that problem if a claim of perfect certainty were required as a condition precedent to any admissibility. See discussion of similar issue in regard to *U.S. v. Mornan* (case 42, *supra*), text at n. 490 *supra*.

740. 121 P.3d 489 (Mont. 2005).

evidence and one count of making threats in official matters.⁷⁴¹ The underlying facts concern an episode of bizarre mischief through anonymous letters, dozens and dozens of them, referred to by the court as “vicious and lascivious, gory and disturbed, and twisted and disgusting,”⁷⁴² sent to a variety of people in East Helena, and related to an episode that occurred in 1994, when one Michael Scott, the son of a person with whom a woman named Cynthia Hurst had occasionally left her children, was convicted of molesting them.⁷⁴³ Some in the community, notably defendant Cheryl Clifford’s husband, Officer Larry Clifford of the East Helena Police Department, thought Hurst herself should have been charged with reckless endangerment for leaving the children as she did where she did. He filed a citizen complaint, but Hurst, aided by a lawyer obtained for her by the LDS (Mormon) Church (of which both she and the Cliffords were members), had the charge dismissed. A few months later, in October 1996, the letters began.

The first letter was sent to Bradley Peterson, a local church elder.⁷⁴⁴ The letters continued regularly over the next four years to arrive at the homes of various church members, the police department, the highway patrol, the newspapers, and the Cliffords.⁷⁴⁵ The police initially suspected the oldest Hurst boy, Daniel, but a search of the Hurst residence pursuant to a warrant turned up nothing.⁷⁴⁶ They then focused on the Cliffords.⁷⁴⁷ In 1998, they hired James Blanco, an ABFDE-certified document examiner, to examine the anonymous notes and various handwriting of the Cliffords.⁷⁴⁸ In the first of his reports, he could neither identify nor rule out Larry Clifford, Cheryl Clifford, or Daniel Hurst as the author of the anonymous letters. At that point, however, the police had obtained a warrant for the Clifford house, and they executed it. In the house they discovered a rubber stamp kit with all the letters in the kit still intact except the exact upper and lower case letters contained in a rubber stamped inscription on one of the anonymous letter envelopes. Thereafter (supplied with more material and almost certainly the foregoing information) Blanco attributed the letters to Cheryl Clifford.⁷⁴⁹

This could have been a great “task at hand” reliability challenge, except for one thing. Neither a task-specific reliability challenge, nor one involving the non-blind aspect of the examination, was raised by the defense. Instead, the defense (at least in the eyes of Justice Leaphart, who wrote the opinion) conceded that the field was reliable, but

741. *Id.* at 491.

742. *Id.* at 492. The facts in this paragraph are all derived from the same page.

743. In these details it is remarkably similar to the famous English case of George Edalji, which resulted in a similar result later determined through the intercession of Arthur Conan Doyle, among others, to have been a miscarriage of justice. See generally D. Michael Risinger, *Boxes in Boxes: Julian Barnes, Conan Doyle, Sherlock Holmes and the Edalji Case*, 4 *Intl. Commentary Evid.* 3 (2006), <http://www.bepress.com/ice/vol4/iss2/art3>.

744. *Clifford*, 121 P.3d at 492.

745. *Id.*

746. *Id.*

747. *Id.* at 492–93.

748. *Id.* at 493.

749. Compare this to the story told by Ludovic Kennedy (which he attributes to FBI Agent Thomas Zisk and others) concerning the substantial effect on the opinion of Albert S. Osborn caused by the discovery of the Lindbergh ransom money in Bruno Hauptmann’s garage. See L. Kennedy, *The Airman and the Carpenter* 178–83 (Viking Penguin 1985). For an earlier case illustrating the problems of suggestion, see *R. v. Silverlock*, 2 Q.B. 766, 767 (1894).

attacked only the inability of the expert to explain specifically the exact basis of his conclusion. This the court characterizes as a complaint about the application of the methods of a reliable field by a qualified expert, which, according to the opinion, is “immaterial in determining the reliability of that expert field” under *Daubert* (as understood in Montana, at any rate).⁷⁵⁰ “Cheryl misapprehends the force behind Rule 702, M.R.Evid. To restate this rule, *if* a reliable field helps the trier of fact, *and* the court deems the witness qualified as an expert, *then* he may testify.”⁷⁵¹ All other considerations apparently go to weight. The court clearly conceives the process as global. It cites *Kumho Tire*, but gives no evidence of actually having read it.⁷⁵² Whether this unfortunate opinion is to be attributed more to the court or the defense attorney is an open question. However, the reader should note that this is a case in which virtually the only evidence against the defendant specifically (as opposed to her and her husband indistinguishably) was the handwriting identification evidence.

There is a concurrence by Justice Nelson, joined by Justice Cotter (two members of the five-person court), lamenting the fact that a proper reliability challenge was neither raised nor reached, due mostly to the way in which Montana decisions have “jurisprudentially and improperly limited *Daubert*.”⁷⁵³ The concurrence goes on to point out that *Kumho Tire* (and perhaps *Daubert* also) reaches the validity of methods employed in a broad field much more specifically than the Montana construction of *Daubert* allows,⁷⁵⁴ describes in eloquent detail some of the weaknesses in regard to handwriting identification that might be raised in a challenge properly brought, and calls on the court to specifically adopt both *Kumho Tire* and the revised version of Federal Rule of Evidence 702, in order to “undo the mess we have collectively created.”⁷⁵⁵

65. *State v. Cooke*⁷⁵⁶ (Del. Super., Herlihy, J.)

State v. Cooke is the opinion of a Delaware trial judge, Judge Herlihy, on a complex motion in limine directed to numerous issues raised in regard to a variety of areas of forensic science. The case arose out of multiple charges leveled against the defendant, James Cooke, in regard to a series of crimes: The rape-murder of Lindsey Bonistall, the burglary of the apartment of Amalia Caudra, and the burglary of the apartment of Cheryl Harmon.⁷⁵⁷ In an interesting twist, many of the analyses (inter alia,

750. *Clifford*, 121 P.3d at 495. The concurrence claims, without citation, that Montana has adopted *Daubert* but “rejected *Kumho Tire*.” Neither the majority nor the concurrence cites any authority for such a proposition, and perhaps the concurrence was referring to what it took to be the implications of this case itself.

751. *Id.* (emphasis in original). The Court conceded that the trial judge never explicitly ruled that Blanco was an expert, but noted that the defendant’s attorney never objected to this. *Id.* The court also rejects the notion that the *Hines/McVeigh* approach ought to be required, which was the only actual Rule 702 challenge the court recognized as having been properly raised. *Id.*

752. *Id.*

753. *Clifford*, 121 P.3d at 504 (James C. Nelson, J., joined by Patricia O. Cotter, J., concurring).

754. *Id.* at 504–05. The concurrence earlier asserts that previous Montana decisions limit a *Daubert* reliability challenge to “novel” “scientific” evidence, giving multiple citations, *id.* at 501, although there is no reference to any such limitation in the majority opinion.

755. *Id.* at 502 n. 2.

756. 914 A.2d 1078 (Del. Super. 2007).

757. *Id.* at 1080.

fingerprint comparison, fiber comparison, tool mark comparison, and visual hair comparison) had been negative, but the prosecution wanted to admit them anyway to show their diligence to anticipatorily overcome what they feared might be jury expectations resulting from the “CSI Effect,” and the defendant wanted to keep them out.⁷⁵⁸ The only challenged technique that had yielded a clearly incriminatory result was handwriting identification.

The handwriting identification testimony grew out of the fact that in the Bonistall murder and in the Harmon burglary the perpetrator left hand-printing on the walls.⁷⁵⁹ In the Bonistall murder the printing was “KKK,” which also had “White power” printed near it, with “More bodies are going to be turnin up dead” and “We want are weed back. Give us are weed back” farther away. In the Harmon burglary, the printing was “We’ll be back,” “Don’t mess with my men,” and “I want my drug money” (the court notes that there may be other misspellings or grammatical errors not noted in the court’s account).⁷⁶⁰ After Cooke was arrested based on other evidence, samples of his handwriting were obtained from various sources, such as employment applications and other documents.⁷⁶¹ It is not clear if any of these exemplars were hand-printed, but in any event they were apparently insufficient in the opinion of the expert, Georgia Carter of the Delaware State Police Crime Lab, and she obtained demand exemplars from Cooke on June 13, 2005, at the Gander Hill Prison where he was incarcerated.⁷⁶² The hand-printing sample was “practically illegible” and Carter opined in regard to it that “Mr. Cooke attempted to disguise and distort his natural hand printing style.”⁷⁶³ Nevertheless, Carter felt she had enough to conclude that “there are strong indications that Mr. Cooke probably prepared” the writings found at the Bonistall site, based on “several individual hand printing characteristics” and “the presence of the same significant grammar error” in both the known and the questioned writing.⁷⁶⁴ However, in regard to the printing at the Harmon site, all Carter concluded was that it “is not possible to determine with any degree of certainty if Mr. Cooke did or did not prepare” the Harmon site printing. However, she went on, “because there are some general features in agreement, Mr. Cooke cannot totally be ruled out.”⁷⁶⁵

The task undertaken by the prosecution-proffered handwriting witness in this case is the attribution of authorship of hand-printing done on an unusual surface at an unusual scale under unusual conditions, made by reference to exemplars that were characterized by the asserted expert herself to be disguised and near-illegible, under conditions that

758. *Id.* at 1082. The court spends considerable time on this issue, concluding that the prosecution should be allowed to show its diligence, except that he rejected the admission of any reference to less reliable tests or less “expected” tests, like voice identification and “fiber impression” evidence, merely on the “diligence” rationale. *Id.* at 1082–88, 1096, 1099.

759. *Id.* at 1099.

760. *Cooke*, 914 A.2d at 1099 n. 71.

761. *Id.*

762. *Id.* at 1099–1100, 1103.

763. *Id.* at 1100.

764. *Id.* at 1099–1100. The problematical meaning to be assigned to grammar and spelling, and whether any such meaning is within a document examiner’s expertise, is dealt with in connection with *U.S. v. Paul*, 175 F.3d 906 (case 7, *supra*).

765. *Cooke*, 914 A.2d at 1100.

were almost certainly not blind in regard to the other case evidence. The existence of a proper belief warrant for the claimed accuracy of such an exercise would have been an interesting issue to see fully litigated. And the court, earlier in its opinion, indicated its understanding that Delaware follows *Daubert* and *Kumho Tire*⁷⁶⁶ (though the judge's understanding of *Kumho Tire* was superficial at best). However, when the court takes up the defendant's objections, it summarizes them as follows: "One, he challenged her qualifications. Two, he questioned her methods and whether those methods could reliably form the basis of her conclusions."⁷⁶⁷ The court then addresses the question of expert qualifications before looking at the reliability of the expertise itself. Having decided (albeit with some reservations⁷⁶⁸) that Carter was an acceptable expert, the court had somewhat put the rabbit in the hat regarding the (global) existence of the expertise. As to that, this is what the court says:

Handwriting comparison is beyond a lay person's general knowledge. As the Court in *Jones* said, echoing the earlier bench ruling in the other case, handwriting analysis is a special skill not a science. It, therefore, does not fit neatly into all the *Daubert/Kumho* holes of:

1. Whether a theory or technique has been tested;
2. Whether it has been subjected to peer review and publication.
3. Whether a technique had a high known or potential rate of error and whether there are standards controlling its operation; and
4. Whether the theory or technique enjoys general acceptance within relevant scientific community.⁷⁶⁹

And that is the complete extent of what the court has to say on issues of handwriting identification expertise reliability, global or specific (independent of issues of the particular expert's qualifications), under Delaware's interpretation of *Daubert* and *Kumho Tire*.⁷⁷⁰ Enough said.

766. *Id.* at 1089.

767. *Id.* at 1100.

768. The court observes that

Carter testified and explained her background. It includes being a forensic document examiner for 20 years, attending a Secret Service school on document examination, taking several forensic document courses, being qualified in the United States District Court in 1989 and, in the last 18 years, having testified 27 times in her expert capacity in various courts, including this one.

On *voir dire* from Cooke, she testified that she is the State Police's only document examiner, has no supervision from another examiner, neither she nor the State Police lab are accredited, that she has no manual or other documentation for her methodology. The *voir dire* also revealed there is a large element of subjectivity in her field.

Id. The court also later reported: "Carter testified that she is unaware if theories of handwriting comparison have been tested or subjected to peer review, that she has no knowledge of the potential error rate of examiners and that there are no standards for making comparisons." *Id.* at 1101. This is, incidentally, the same Georgia Anne Carter who was the expert in the *Bradford Jones* case. 2003 WL 21519842 (case 57, *supra*).

769. *Cooke*, 914 A.2d at 1101.

770. The court then goes on to a lengthy consideration of defendant's claim that giving the demand exemplars violated his privilege against self-incrimination. The court must receive an A+ for effort on this vexing question, which has precious little in the way of thoughtful authority on it from anywhere after the Supreme Court's hugely questionable analogy equating the compulsion of handwriting exemplars to the

66. *People v. Graham*⁷⁷¹ (Mich. App., per curiam, Fort Hood, P.J., Talbot and Servitto, JJ.)

The penultimate reliability case as of this writing is *People v. Graham*. This Michigan case is another case that appears to have something to do with a reliability decision, but which actually does not, at least not in any direct sense. Like the others, however (such as, most notoriously, *Jolivet* (case 13, *supra*)), *Graham* is almost certain to be cited by other courts as if it had decided something important about reliability.

One of the reasons the handwriting aspects of the case may have been more skirted than faced is that the facts of the case establish the defendant's guilt so overwhelmingly that virtually any issue raised was likely to be dealt with as a mere formality. The court's statement of these facts was succinct and to the point:

Defendant's convictions arise from robberies at two banks in the city of Birmingham. The first robbery occurred on a rainy morning on December 7, 2004, at a Charter One Bank where Bradley Grekonich worked as a teller. According to Grekonich, a man wearing a black puffy coat and a baseball hat walked up to the counter and handed him a deposit slip that stated, "I have a gun. Give me the money or I'll kill you." Grekonich gave the man \$1,700. The man walked out of the bank, leaving the deposit slip behind at the counter. Grekonich identified a man depicted in still photographs produced from the bank's video surveillance system as the robber, but failed to identify defendant in a pretrial lineup conducted by the police.

The second robbery occurred on the morning of December 8, 2004, at a Fidelity Bank where Shareen Coles worked as a teller. Coles identified defendant as the robber at trial and in a pretrial lineup. Coles testified that defendant wore a black puffy coat and a baseball cap when he entered the bank. He wrote something on a withdrawal slip and then approached the teller station next to Coles. Because that teller was busy, Coles offered to help defendant. Defendant gave Coles the withdrawal slip, which stated, "I have a gun. Give me all the money now." Coles handed cash from her drawer to defendant. She reported the robbery to bank managers after defendant departed toward a back exit. The withdrawal slip used to commit the robbery was left at the bank.

The person whom Coles identified as the robber drove off in a red Chrysler Sebring. A bank customer followed the vehicle to Webster Street and then showed Birmingham Police Officer Matthew Baldwin the driveway where the vehicle pulled in. After Officer Baldwin determined that the vehicle was inside a detached garage at 1462 Webster Street, he and other police officers secured the area around the house. The police received information that defendant was a renter at the house. Officer Baldwin made phone contact with a female occupant to request that defendant come out. After approximately five hours, defendant exited the house. Police officers subsequently executed a search warrant of the

drawing of blood seemed to settle all issues (poorly) forty years ago in *Gilbert v. California*, 388 U.S. 263, 266 (1967). Judge Herlihy collects the extant cases and gives his own analysis. *Cooke*, 914 A.2d at 1102-10. The result he comes to, that dictation of things to write which leaves the defendant to choose how to spell and punctuate violates the self-incrimination privilege, while other parts of the process of producing demand exemplars do not, is difficult to understand, and seems unlikely to garner much agreement elsewhere. Speaking of difficult to understand, it is perhaps not inappropriate to observe that the entire opinion suffers from a certain lack of expository clarity.

771. 2007 WL 861173 (Mich. App. Mar. 22, 2007).

house and garage. Parked inside the garage were a red Chrysler Sebring and a dusty black Mercury Topaz. Among the items in the Mercury Topaz were a wet, black puffy coat and a baseball cap. A wet handwritten note in the coat pocket stated, "I have a gun. Give me the money or I will kill you."⁷⁷²

On this record, it would appear that unless something was suppressed as illegally seized (which it was not⁷⁷³), virtually any other evidentiary error was likely to be deemed harmless. About the only worry even the most neurotic prosecutor might have is that somehow a juror might think that the video from the first robbery was not clear enough to recognize defendant, and be led to overvalue the inability of the clerk to identify the defendant (thus undervaluing all of the rest of the strong circumstantial evidence in the case, including the black puffy coat and the fact that the cap, with "MSU" (for Michigan State University) on the front, which was recovered from the car in the garage, was indistinguishable from the cap shown in the video of the first robbery⁷⁷⁴). However, just to dispel any possibility of such a juror brain freeze, the prosecution hired a putative handwriting identification expert, Ruth Holmes,⁷⁷⁵ obviously hoping to have the writing on the demand notes attributed to the defendant. This they predictably got (assuming that the expert was informed of the other evidence in the case as usual, a circumstance apparently neither explored nor raised by the defense attorney at trial, again as usual).

However, the defense did object to the admission of Holmes's testimony "because of the nature of the 'science,'" which, it claimed "was not helpful to the trier of fact."⁷⁷⁶ This, apparently, was just about all the defense said in challenging the admissibility of the handwriting testimony, and the trial court summarily overruled the objection without exposition.⁷⁷⁷ On appeal, the appellate court recognized that Michigan law generally required a careful reliability examination by the trial judge under its version of amended Federal Rule 702:

The admissibility of expert testimony is governed by *MRE 702*, which provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education

772. *Id.* at *1.

773. This is the first issue disposed of by the court. *Id.* at **1-3.

774. I grant that MSU baseball caps may be relatively common in Michigan, but the cap, in combination with the black puffy coat, the general resemblance (at least) of the perpetrator in the video of the first robbery to the defendant, the practice demand note in the car with the same general wording as the demand notes in both robberies, the general similarities in robbery method, the fact that the robberies were on succeeding days, and the fact that the defendant was followed to his girlfriend's house from the second robbery, should have been enough to convince virtually any juror of defendant's guilt in regard to the first robbery.

775. Ruth Holmes is a well known handwriting expert in Michigan who gives opinions both in regard to authorship, and to "graphology," or personality attribution from the examination of handwriting. Whether Ms. Holmes would be regarded as a qualified expert by members of orthodox Osbornian groups like the American Society of Questioned Document Examiners or the American Board of Forensic Document Examiners is an open question. The extent to which a court should care is also an open question, but it cannot properly be answered by a court that is not informed and does not inform itself on these issues. Neither the defense attorneys nor the trial court (and certainly not the appellate court) seem to have addressed even this global issue, much less any more specific issues in regard to the particular attribution exercise undertaken in this case.

776. *Id.* at *6.

777. *Id.*

may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

An essential condition for admitting expert testimony is that the testimony be reliable. *Gilbert v. DaimlerChrysler Corp.*, 470 Mich. 749, 780; 685 NW2d 391 (2004). “While a party may waive any claim of error by failing to call this gatekeeping function to the court’s attention, the court *must* evaluate expert testimony under MRE 702 once that issue is raised.” *Craig v. Oakwood Hosp.*, 471 Mich. 67, 82; 684 NW2d 296 (2004) (emphasis in original).⁷⁷⁸

However, the court points out that in order to trigger this requirement the objecting party has some “price of admission” burden of alerting the court to the nature of the grounds for objection:

Review of the record reveals that defense counsel objected to the testimony because of the nature of the “science” and asserted that it was not helpful to the trier of fact. Because MRE 702 is not limited to “exact science” testimony, we conclude that the trial court did not abuse its discretion in denying defense counsel’s objection to Holmes’s testimony on the ground asserted, without further inquiry.⁷⁷⁹

One can perhaps understand the temptation to seize on the first idea that occurs in order to dispose of this ground given the inevitable irritation with *any* ground in light of the facts of the case. But it would seem that the court here went both too far and not far enough. It seems that the court has concluded that objecting to the “science” of a “forensic science” that is not really based on science automatically puts one out of court. This seems to elevate form over substance. It would have been better to have said that the objecting party is obliged to formulate specifically the task presented (attributing authorship of a relatively short note,⁷⁸⁰ especially after being exposed to domain-irrelevant information⁷⁸¹) and to present some explanation for why there is reason to be skeptical of the expert’s own claims of expertise, or those of the expert’s guild. Failure by the defense to frame a significant reason to be skeptical of the proffered expertise may have been what lay behind the court’s reference to the longstanding unquestioned admission of claimed handwriting identification expertise globally, citing *Crisp*.⁷⁸² At any rate, the court held that the objection was unpreserved, and that it was not plain error to admit the testimony. It also held that any error was harmless. However, it must be noted that, unlike the court in *Jolivet*, the Michigan Court of Appeals did not issue any dicta on what it predicted the proper result would have been had the objection been made properly and had a hearing been held. So the reliability issue in regard to various aspects of claimed handwriting identification expertise appears to remain an open issue in

778. *Graham*, 2007 WL 861173 at **5–6 (footnote omitted).

779. *Id.* at *6 (citations omitted).

780. It is not clear whether the note was printed or cursive. It is also unclear what sources were used as exemplars of the defendant’s normal writing.

781. Assuming this to be the case, as it normally is in practice. The issue is rarely addressed explicitly by defense attorneys or courts.

782. *Id.*

Michigan, unless lower Michigan courts do what many other courts have done in similar circumstances in this area, and take this appellate decision to mean something it does not.

67. *People v. Leiterman*⁷⁸³ (Mich. App., per curiam, Davis, P.J., Hoekstra and Donofrio, JJ.)

The state of affairs in Michigan after *People v. Graham* is not changed by the last case in our examination, another Michigan case, *People v. Leiterman*. This case is disturbing on a number of levels. First, it is disturbing because it deals with the brutal rape-murder of a young University of Michigan law student, Jane Mixer, in 1969.⁷⁸⁴ Second, it is disturbing because it is a DNA cold hit case involving the Michigan State Police Crime Lab, which, at the time it typed the DNA from stains on Mixer's pantyhose in 2001, was clearly suffering from failure to control cross-contamination between samples in the lab. In addition to Leiterman's profile, they also generated a profile from a drop of blood taken from Mixer's hand in 1969. That profile matched John Ruelas, who was four years old in 1969, but who had biological samples in the lab in an unrelated case at the time the testing on the Ruelas materials was done in 2001.⁷⁸⁵ The Michigan Court of Appeals treated this issue rather cavalierly, saying that "*Daubert*" is a more relaxed standard than its previous *Davis-Frye*⁷⁸⁶ test, and that "*Daubert*" left issues of "application" to the evaluation of the jury. The court never mentions the blurring of that supposed line in *General Electric v. Joiner* and *Kumho Tire*, nor did it bother to deal with the operative language of its own evidence rule (beyond a sterile quotation of the rule itself), section 3 of which makes reliable application of the principles and methods of the expertise to the facts of the case an issue of admissibility, not weight.⁷⁸⁷

Besides the DNA cold hit, there was very little evidence against Leiterman beyond the fact that he had actually lived in the community where the crime occurred (Ann Arbor) at the time of the crime, and had also owned a .22 cal. handgun at the time (Mixer had been shot with a .22).⁷⁸⁸ In order to attempt to supplement the cold hit from the shaky lab, the prosecution submitted a photograph of the cover of a phone book found in the basement of the Michigan Law School in 1969.⁷⁸⁹ Someone had written the victim's

783. 2007 WL 2120514 (Mich. App. July 24, 2007).

784. *Id.* at *1.

785. *Id.*

786. The "Davis" in Michigan's previous "*Davis-Frye*" test is *People v. Davis*, 343 Mich. 348, 72 N.W.2d 269 (1955); the *Frye* is of course *Frye v. U.S.*, 293 F. 1013 (D.C. App. 1923).

787. The Michigan rule is set out immediately above in the discussion of *Graham*, 2007 WL 2120514 (case 66, *supra*) (discussion in text beginning at note 772).

788. Leiterman owned a registered .22 caliber Ruger six-shot revolver from 1967 until he reported it stolen in 1987. The state police firearms expert testified that "bullet fragments removed from Mixer's brain during her 1969 autopsy were similar to several found in defendant's Van Buren County home in 2004 and could have been fired from a .22 caliber six-shot Ruger revolver." *Leiterman*, 2007 WL 2120514 at *2. The way the court quotes this testimony the reader would think it was fraught with significance. But unless the state police expert was testifying to the results of now-discredited bullet lead analysis test (which seems unlikely, considering that Leiterman was unlikely to have 35-year-old rounds in his home), then the statement could be made about every .22 caliber bullet in Michigan, or indeed, the world, and a very great range of guns (the expert conceded three dozen makes and models).

789. *Id.* at *10.

last name (Mixer) and her hometown (Muskegon) on the cover. (Ms. Mixer was supposed to be meeting someone she had contacted through a campus bulletin board in order to get a ride home when she disappeared.)⁷⁹⁰ The state asked its expert, Thomas Riley (ABFDE) to compare these two words (13 letters, 11 letter forms) to exemplars of Leiterman's handwriting. This is of course the "hard task" concerning which there is absolutely no evidence supporting any expert's claim to be able to perform it accurately. But in this case it was worse, even under standard guild theory, since the writing on the phone book (which might not have actually had anything to do with the disappearance, incidentally) was 33 years old. Standard handwriting identification theory emphasizes that writing changes with time, and mandates the use of exemplars written near in time to the generation of the "questioned" handwriting.⁷⁹¹ It is unclear where and how exemplars were obtained, and of what date they were, but if they were recent the testimony is in violation of the area's own principles, not merely their application. Second, Riley claimed to be able to discern diagnostic patterns of pen pressure from the writing on the phone book, when pen pressure is thought generally to be undeterminable from photographs. Third, it is not clear, but is to be expected, that Riley generated his conclusions in the shadow of knowledge of the DNA "match" variable which undermines reliability quite dramatically.⁷⁹² Finally, Riley conceded that there were two significant differences between the phone book writing and the way Leiterman normally made the letters under examination, but attributed this to the postural difficulties of writing in a phone booth. Admission of this handwriting identification testimony bears out the observation of Michael Saks and Jane Campbell Moriarty, that in the context of prosecution-proffered forensic identification expertise, "[t]here is almost no expert testimony so threadbare that it will not be admitted if it comes to a criminal proceeding under the banner of forensic science."⁷⁹³ Nevertheless, the defense attorney *chose not to challenge the admissibility* of the prosecution handwriting testimony, and instead merely sought to counter it with the testimony of his own putative expert witness, Robert Kullman.⁷⁹⁴ So, as in *Graham*, the issue was whether admission of the handwriting identification testimony was plain error, which the court quite predictably found that it was not.⁷⁹⁵ In addition, it found that the election to proceed in this manner was not an example of ineffective assistance of counsel.⁷⁹⁶ Although after this, one can still say that no Michigan court has ruled on a properly made challenge to handwriting expertise

790. *Id.* at *1.

791. See e.g. Conway, *supra* n. 86, at 90 (prescribing exemplars "prior to or of the same date" as the questioned documents); Osborn, *supra* n. 117, at 26 (expressing chagrin at cases using exemplars "thirty years or more before or after the date of the disputed writing" [emphasis in original] and prescribing exemplars "as nearly as possible of the same date").

792. See, as always, Risinger et al., *supra* n. 22.

793. Jane Campbell Moriarty & Michael J. Saks, *Forensic Science: Grand Goals, Tragic Flaws and Judicial Gatekeeping*, 4 Judges' J. 16, 29 (2005).

794. *Leiterman*, 2007 WL 2120514 at **8, 10 n. 7. Mr. Kullman, who works for Speckin Forensic Laboratories, has paper credentials that are, from the orthodox Osbornian perspective, less impressive than Mr. Riley's, whatever the realities of their actual accuracy in practice may be.

795. *Id.* at *10.

796. *Id.* at *10 n. 7. Michigan is apparently one of those jurisdictions that allow certain issues which are normally raised by various post-conviction relief mechanisms, such as ineffective assistance of counsel, to be consolidated with the issues raised on direct appeal.

in regard to hard tasks such as this one, the court's willingness to tolerate such questionable performances by prosecution witnesses does not bode well for such a challenge when and if one is ever made in Michigan.

A FINAL CASE

68. *In Re Estate of Presutti*⁷⁹⁷ (Pa. Super., Popovich J.)

While it does not deal with handwriting identification reliability issues directly, we could not close without noting the Pennsylvania case of *In Re Estate of Presutti*, a will contest in which those relying on a will did not attack the reliability of handwriting identification expertise, but instead claimed that the will challengers' expert (who was called to testify that the decedent's signature was not genuine) was unqualified. In regard to qualifications, the court announced the following test: "The test to be applied when qualifying an expert witness is whether the witness has any reasonable pretension to special knowledge on the subject under investigation. If he does, he may testify."⁷⁹⁸

It seems that the "any reasonable pretension test" may capture the general attitude of most courts toward prosecution-proffered expertise in criminal cases more than those same courts are willing to admit quite so bluntly.

797. 783 A.2d 803 (Pa. Super. 2001).

798. *Id.* at 807.

