

1 MJ: Government, would you like to argue?

2 ATC: Yes, Your Honor.

3 Your Honor, the government request that you admit Mrs.
4 Sevigny's testimony because her testimony meets the requirements
5 under Military Rules of Evidence 702 and the Houser Factors and
6 the Daubert Factors. And----

7 MJ: One moment, counsel. Are you requesting that the
8 government-- that the court admit the testimony or that the
9 court deny----

10 ATC: The government request that----

11 MJ: --- the defense motion to prohibit it?

12 ATC: --- that you deny the defense motion to exclude----

13 MJ: Okay.

14 ATC: --- her testimony.

15 MJ: You're not seeking admission at this point in time?

16 ATC: I'm seeking her to be qualified as an expert and to
17 render-- permission for her to render her opinion at trial.

18 MJ: Okay.

19 ATC: Before the panel members.

20 MJ: All right. Go ahead. Proceed. So I got that.

21 ATC: Does that clarify, Your Honor?

22 MJ: It does.

23 ATC: Okay.

1 Well, first, the Military Rule of Evidence 702 requires
2 that if scientific, technical, or other specialized knowledge
3 will assist the trier of fact to understand the evidence or to
4 determine a fact in issue, a witness qualified as an expert by
5 knowledge, skill, experience, training, or education may testify
6 thereto in the form of opinion or otherwise if the testimony is
7 based upon sufficient facts or data; the testimony is a product
8 of reliable principles and methods; and, the witness has applied
9 the principles and methods reliably to the facts of this case.

10 And the government submits that Mrs. Sevigny's testimony
11 proves that; first off, she is highly qualified. She testified
12 that she had extensive education in science. She has received
13 specialized training and has been in internships and has
14 received multiple certifications to perform firearms and
15 toolmark examinations. Moreover, she has conducted close to
16 1000 examinations on her own.

17 Furthermore, she based her examination based on the
18 evidence that was submitted from CID to her office.

19 Additionally, her testimony shows that this methodology is
20 reliable, Your Honor. Every jurisdiction, as is cited in the
21 government's response, every jurisdiction that has addressed
22 this issue has permitted this type of testimony.

1 Additionally, this type of methodology has been tested and
2 has been in place for more than 50 years. Now, the defense
3 hangs its hat on the subjective component to the methodology.
4 But the fact of the matter is, as Mrs. Sevigny's testimony
5 shows, there are certain basic scientific principles which have
6 been proven again and again that toolmarks can impress; and that
7 tools can make unique impressed toolmarks, striated toolmarks on
8 individual items; and that this is proven by her statistics as a
9 practical impossibility.

10 Moreover, the protocols and the way that she applied her
11 methodology have received multiple peer-reviews. For example,
12 the lab is accredited, as she testified. Her specific
13 examination was verified not by one but by two different
14 examiners, Your Honor, by Jerry Miller and by the defense's own
15 expert.

16 Moreover, her testimony shows that the error rates-- the
17 type of error rates that apply to the type of examination that
18 she did are so low that it's 1 to 2 percent.

19 Now the defense's----

20 MJ: [Clearing throat.]

21 ATC: I'm sorry, Your Honor?

22 MJ: I'm sorry. I'm just clearing my throat.

1 ATC: The defense's witness discussed numerous articles.
2 And while her critiques are interesting, the fact of the matter
3 is is that she is not a qualified or trained firearms examiner.
4 It would be no different than a lawyer critiquing a medical
5 journal. Without the right requisite background, experience,
6 and training, she does not possess the knowledge to know how a
7 complex examination-- whether or not the proficiency tests that
8 firearms examiners take matches and mirrors the type of complex
9 examinations that they do on a daily basis. She doesn't know
10 that because she does not conduct firearms examinations on a
11 daily basis.

12 Also, Your Honor, the government submits that this
13 methodology is subject to rigorous peer-review by the AFTE
14 Journals; which, as Mrs. Sevigny explained on the stand, goes
15 through multiple-- an examiner has to go through multiple hoops
16 before that article can be published. And, additionally, in
17 her-- in all firearm examinations, her testimony is that the
18 examiner submits their work to a different examiner without
19 providing the conclusions, and then the separate examiner does
20 their own examination, not on notes or data, but on the actual
21 evidence. And that is what happened in this case, Your Honor.

22 And, then, finally, the government would like to also point
23 out the fact that this testimony is highly probative, which is

1 also another factor under Military Rule of Evidence and as
2 stated under the Houser Factors. Lay members cannot look at
3 this sort of evidence and make a determination on it without the
4 assistance of an expert to explain that evidence.

5 And, then finally, I would just like-- the government
6 would just reemphasize again that this-- these factors are to
7 be weighed. It's not a checklist, Your Honor. It is to be
8 weighed. And Mrs. Sevigny's qualifications, the fact that she
9 and her methodology has been proven again and again over the
10 past 50 years; and that that application was consistent with the
11 methodology that she testified. She testified that she
12 conducted that examination in consistency with the protocols of
13 the laboratory and the AFTE Theory.

14 The government submits that it is reliable; that it will
15 assist the panel members at trial; and that it should be-- that
16 Mrs. Sevigny should be permitted to give her expert opinion at
17 trial.

18 Thank you.

19 MJ: Mr. Court?

20 CDC: Thank you, Your Honor.

21 Your Honor, it's not easy to tell someone you don't know
22 what you're talking about. And, certainly, Mrs. Sevigny is
23 doing everything that she has been taught as what she should be

1 doing, and she's not to be criticized for doing what she was
2 taught. Since we're not dealing with the admissibility, I can
3 make that statement. We're dealing with whether she should be
4 allowed to testify. The issue is is the discipline-- And I
5 think that's a neutral word rather than science or technology.
6 We can say discipline to be as I say neutral. Is her discipline
7 such that her conclusions should be admitted in a court of law?
8 The government's argument basically as to the discipline starts
9 off with "Everybody else lets it in." That may be so but that
10 doesn't necessarily make it right. We also don't know what
11 evidence was presented to everybody else. What we have to rely
12 on is the evidence here.

13 The government also makes the argument that "We've been
14 doing this for 50 years." Well, with that kind of argument,
15 Brown versus Board of Education in 1954 would have never done
16 away with separate but equal because they had been doing that
17 for 100 years. The fact that we've done it for a long time
18 doesn't make it right. That was more or less a fundamental
19 fairness type of argument in Brown. Here we're dealing with
20 something that's a little bit different. What we're dealing
21 with here is the march of technology. What we're dealing with
22 here is the fact that we are learning more as we go on how to do
23 things right. We've seen numerous cases in the past dozen

1 years, 15 perhaps, where the new technology of DNA has freed
2 people from jail, even some on death row because of things we've
3 learned since they went to trial; that technology has said, wait
4 a minute that evidence was bad. We need to do it right. It was
5 testified to at some length by Professor Schwartz as to the how
6 of the DNA change coming about. The FBI did what they said they
7 couldn't do. They got the research. They got the database.
8 And low and behold now DNA is the-- I won't say law of the
9 land, but it is the standard. "If the glove don't fit, you
10 gotta acquit." All those kinds of cases are relying on DNA;
11 things which we didn't know 20 years ago, so we didn't rely on
12 them. We have the same kind of critique now because DNA
13 analysis has shown us we can do it right. Science can make it
14 better. Disciplines can get to a point where they're not
15 challengeable. They were before because the DNA wasn't being
16 evaluated correctly and we didn't have a database to make it
17 fair. We were just accepting people saying it's unique. Now
18 we've avoided having to do this with fingerprints pretty much
19 because of DNA. Because almost every place now where you've got
20 a fingerprint you're going to get DNA; so we don't have to worry
21 about the unique nature of fingerprints anymore. We have the
22 same problem and it's been identified as a problem for the past
23 decade or so with firearms and toolmarks. It is not based on

1 reliable methodology. Professor Schwartz told you about that in
2 much more precise detail than I can in argument. But the
3 fundamental issue is it is not reliable because their
4 foundational premise has never been tested, has never been
5 analyzed. They merely say, "Well, we are convinced that every
6 mark is unique or can be determined to be unique." They allege
7 to have done studies. But as you can read in the studies
8 presented by both sides, many of those studies deal with a very
9 finite number of weapons. Biasotti in 1959 dealt with 16 used
10 and 6-- and 8 new weapons, if I recall the facts correctly.
11 The point is it's an extremely small entity, and that dealt with
12 bullets which, as we know from Mrs. Sevigny, are different than
13 cartridges. Bullets have the advantage, if you will, of lands
14 and grooves, in most cases, by going down a rifle barrel. There
15 are going to be more marks there. In our particular case, all
16 we have is an injector port mark, according to Mrs. Sevigny.
17 Now, again, I'm not arguing here specifically for admissibility
18 or not because that's not what the government is going on. But
19 it must be addressed in the context of this motion, because if
20 it's determined-- even if it's determined that toolmark and
21 firearm is reliable enough to pass 702's muster and be allowed
22 for her to testify as she wishes to, the question then becomes

1 did what she do give a basis for that opinion? Is there enough
2 reliability in her methodology?

3 I'm mixing, I understand, Your Honor, the Daubert and the
4 admissibility, but I think it needs to be addressed in this
5 context.

6 What studies have been shown, what evidence is there to
7 back up what she says? She has been taught this way because
8 that's what AFTE talks about. But they are, to put it bluntly,
9 a trade journal. They are for themselves, by themselves, and
10 present what they themselves want to do. It's as if the Los
11 Angeles Police Department did all the studies they wanted to
12 prove that Rodney King was a bad guy. That doesn't make it true
13 just because everybody agrees. As Professor Schwartz pointed
14 out, the fact that two or three or four people who believe in a
15 flat earth, are convinced the earth is flat doesn't make it so.
16 The government talks about scientific principles but doesn't
17 demonstrate them. They talk about observational. Everything
18 comes back down to the subjective observation with no concrete,
19 discrete, measurement capability. It's as if four people stood
20 where I'm standing right now and said the back of the room is
21 2.5 meters from here. No, it's 3.4 meters. No, it's 5.8
22 meters. But if nobody knows what a meter is, what difference
23 does it make?

1 We have the same problem here. We have Mrs. Sevigny saying
2 we have striations and we have impressions, but we don't have
3 any definitions of striations. We don't know if it must be a
4 minimum of 2 centimeters or a half a millimeter long to be
5 counted as a striation because you can see some that don't
6 matter, according to Mrs. Sevigny who said she saw some on other
7 areas of this cartridge case but they didn't matter. What were
8 they? They were marks but they were too small to count. Why
9 were they too small? What kind of definition do we have? We
10 don't have any of that in this field, and that's the fundamental
11 issue. And even if we knew that a barrel might make a unique
12 mark-- Well, let me do it this way.

13 Doctor-- Professor Schwartz talked about the analogy
14 between DNA and firearms. Because in DNA we know that-- And
15 I'm going to blow my numbers here. --- but 97 percent of
16 everybody's DNA is the same. It's the 3 percent that's
17 different that makes us different. That we know because of
18 statistics, because of studies that have been done. We've been
19 able to analyze that. But we don't know how it is with regard
20 to firearms. We don't know if 97 percent of all marks on an
21 injector port are the same and only 3 percent are different.
22 And we need to know that to know if the injector port marks
23 found by Mrs. Sevigny are a part of the 97 percent or part of

1 the 3 percent, and we don't have any basis to know that. We
2 know we can learn how to do that, all it takes is studies. If
3 you can do it with DNA, with a human genome, you sure as heck
4 can do it with pieces of metal. All it takes is a desire to do
5 it and an effort to do it. But although it's been criticized
6 for at least 15 years, for whatever reason the field has not
7 done anything about it. They won't do anything about it as long
8 as they are allowed to have this kind of testimony come into
9 court.

10 Now the defense would not be-- being candid with the court
11 in criticizing the government's argument if we didn't point out
12 a couple of things: One, this is not-- Although the defense
13 feels it should be. --- an all or nothing decision. The
14 defense's belief is this evidence should not be admissible,
15 period. We have knowledge that most of the other jurisdictions
16 in which this issue has been raised-- And here the government
17 is accurate. --- have not excluded firearm testimony. But what
18 it's done in many other jurisdictions is put linguistic blinders
19 on what can occur at trial. Some courts have said the expert
20 will only be allowed to say that it's more probable than not.
21 Some have said to a reasonable certainty, but no court-- most
22 courts have refused to allow the expert to say it is a match.
23 Your Honor, we don't even do that with DNA. We put numbers on

1 the DNA. Sure, it may one 1 and 48 quintillion, but there's a
2 statistical basis for the 1 and 48 quintillion.

3 The defense believes that based upon the evidence in this
4 court and the status of the law and the status of science, that
5 the testimony Mrs. Sevigny wishes to offer should not be offered
6 because it does not qualify under 702. It does not qualify
7 under Houser. It does not qualify under Daubert.

8 The defense believes that the court should prohibit the
9 testimony of Mrs. Sevigny as to her one mark finding. But if
10 the court believes that based upon the relatively low threshold
11 of 702 that she-- or even 701, that she is qualified by her
12 observations, because the defense would point out that M.R.E.
13 701 does permit an opinion rationally based upon the perception
14 of the witness. That opinion may be given. Now whether it's
15 rationally based on a one mark match is a matter to be debated,
16 but it theoretically could be. But in that case, in no way
17 should the witness be able to qualify the percentage of
18 likelihood. I'm 100 percent. I'm 80 percent. The defense,
19 again, does not believe it should be permitted at all under the
20 facts of this case, as testified by Mrs. Sevigny and as the
21 status of the law as laid out by Professor Schwartz. But if so,
22 if it is permitted in some way, the defense believes there must

1 be a significant reigning in of the degree of certainty allowed
2 by the witness.

3 Thank you, Your Honor.

4 MJ: There's a significant amount of evidence in this
5 motion. Captain Walker, you're reaching-- standing as if you
6 have something else you'd like to say. If you----

7 ATC: I did, Your Honor, but----

8 MJ: If you would like to address, briefly, rebuttal points
9 and not make new points, the court is willing to entertain that.

10 Go ahead.

11 ATC: Thank you, Your Honor.

12 First, Your Honor, the government would like to submit to
13 you that 701 does not apply in this context given Mrs. Sevigny's
14 specialized training and the technical nature of the evidence.
15 Her testimony will assist the trier of fact in understanding
16 that evidence and therefore M.R.E. 702 is the appropriate ground
17 for admitting her expert opinion testimony.

18 Second, Your Honor, the defense asserted that this field--
19 this methodology is not reliable because it has not been tested.
20 But, however, Your Honor, this methodology has been tested for
21 over 50 years. Every time a firearms examiner practiced this
22 methodology, it has been tested. It has been tested out in the
23 field and it has been tested in publications, again and again.

1 Third, Your Honor, all of the articles that have been
2 presented before the court, none of those studies invalidate
3 this methodology. They might provide critiques to it, but none
4 of them have invalidated the underlying methodology.

5 And then, finally, Your Honor, the government would like to
6 reiterate again how well accepted this methodology is within the
7 firearms and toolmark community. It is well accepted and
8 grounded within the scientific community, and that is also
9 another factor that is listed under Daubert and Houser, that
10 it's very relevant in determining whether or not she-- Mrs.
11 Sevigny should be allowed to give her expert opinion testimony.

12 Thank you, Your Honor.

13 MJ: Defense, as I allowed government rebuttal, I'll allow
14 you surrebuttal.

15 CDC: If the government doesn't want 701 to be considered,
16 I'll withdraw my offer, but that might be in middle ground, Your
17 Honor, one.

18 Two, been tested by every firearm examiner. No. Each
19 firearm examiner makes his or her own conclusion that what he or
20 say [sic] sees-- he or she sees, he or she believes to be a
21 match.

1 Three, the fact that it's accepted within the firearm and
2 toolmark community is like saying that astrologers believe that
3 astrologers are accurate therefore it's valid.

4 Thank you, Your Honor.

5 MJ: Anything further?

6 ATC: Nothing further, Your Honor.

7 MJ: All right. Well, as I was getting ready to say,
8 there's a significant amount of evidence in this case. The
9 court needs to review that. This is not the time to do that.
10 So there will be a ruling forthcoming. I intend to defer that.
11 I'm not going to be making it today.

12 All right. The next motion to address is the government
13 motion to pre-admit evidence. There is a significant amount of
14 evidence in this case. I certainly have concerns that we're
15 going to be able to address the remaining motions today.

16 Do you have any estimate, government, of the amount of time
17 it's going to take to address the evidence in this case?

18 ATC: Well, Your Honor, the government only planned to call
19 three witnesses in support of this motion. So the estimated
20 time, depending on the direct examination and the cross-
21 examination, I would estimate would be maybe an hour and a half,
22 and the rest is documentary evidence, Your Honor.