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Memo:

To: Section Chief Ken Nimmich

From: SA William A. Tobin

Subj: Exceptions to Testimony of SA Michael P. Malone in the Matter of U.S. District Judge ALCEE S. HASTINGS

Purpose: To advise of exceptions taken to testimony of SA Malone in 11th Circuit judicial inquiry, Atlanta, Georgia.

Details: In preparation for anticipated congressional testimony on August 3, 1989, SA Tobin reviewed the transcript of the 11th Judicial Circuit testimony in Atlanta, Georgia, of SA Malone. Because of the potential for serious conflict and substantial embarrassment to the Bureau, an audience was requested with you late in the day of August 3, 1989, wherein you requested the specific details of my objections, my exceptions to SA Malone's testimony, and technical analysis as to the effect of the testimony.

Attached hereto are the requested exceptions and analysis, as well as two photographs of test breaks.

Recommendations: None. For information only.

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Exceptions to Testimony of SA Malone Re U.S.District Judge ALCEE L. HASTINGS

1/ p.113,line 2: Metallurgical testing procedures utilized were not "winging it". I did not have to "design a test". The apparatus is, in fact, designed to test any solid material (including hairs).

This statement, repeated in various forms several additional times, undermines the legal value of the metallurgical testing as not in compliance with the Frye and "generally accepted guidelines" rules.

2/ p.116,line 23: False statement. SA Malone had no participation in the tensile testing, and had only requested to watch because he had "...never seen such a test..." and wanted to see how they were conducted.

3/ p.117,line 11: False statement. Either the writing is that of SA Tobin or the evidence has been altered subsequent to the tensile testing. On <u>every</u> nonmetallic item in which I have induced tensile failure on behalf of the FBI Laboratory, I have placed evidence or plain white tape at the fracture in order to identify Laboratory-induced failures, with Sharpie Marking Pen writing "test tear" and an arrow pointing to the failure. If my recollection serves me correctly, I believe I noticed when I saw the purse some time later that my own markings had been removed and those of SA Malone had replaced them.

4/ p.117,line 21-23: False statement. Photos were made outside the presence of SA Malone by SA Tobin during the course of metallurgical examinations.

5/ p.118,lines 17,18: False statement. Neither the test tears nor the photographs were made by SA Malone

6/ p.120, line 22: Not true. I did not have to "jury rig it"...I used standard test fixtures for this type material and specimen. The equipment was designed for <u>any</u> solid material of suitable configuration. The testing was in conformance with the Frye and "generally accepted guidelines" rules, contrary to the manner in which the testimony is presented.

7/ p.123,line 23: False statement, particularly following the specific words "actually" and "yourself".

8/ p.124,lines 3-5: Incorrect. In fact, designers and users abhor sudden breaks because of the potential for catastrophic loss of life. Designers, therefore, attempt to insure gradual failures so that it is <u>not</u> instantaneous. The terms "gradual" and "slowly" are deceptive and relate only to the strain rate selected by SA Tobin for the testing: almost any strain rate could have been selected for the test.

9/ p.124, lines 6,7 and 15: The tears did not proceed (propagate) on a "...diagonal line across the entire strap until finally the entire strap went." The effect of this "observation" is to enhance differences between the questioned tear and the test tears. In addition, characterization of the test tears as "diagonal across the entire strap" puts the failure mode in a different category (when reviewed by a metallurgist or materials scientist), not supported by either expectations or actual test behavior.

10/ p.124,line 24: Use of the term "pressures" is not appropriate and is not interchangeable with "force", posing a potential technical review problem. On a strap approximately 3/4" wide and 1/8" thick, a force of 29 lbs. results in approximately 309 lbs/in^2 of pressure, whereas a pressure of 29 lbs/in^2 on the same cross sectional area results in a force of 2.7 lbs exerted on the strap, a significant difference on technical review

11/ p.126,lines 1-3: same comments as #9 above.

12/ p.127,lines13-15: same comments as #5 above

13/ p.126,line 9:

14/ p.129,line 9: Direct contradiction to laboratory (AE) findings supported by data. Presents apparently and potentially exculpatory information as incriminating.

15/ p.129,line 11: Contrived/fabricated response and false. Renders metallurgical test data very likely inadmissable because such data can be deemed to fail the Frye test and the "generally accepted guidelines".

16/ p.130,line 14,15: Deceptive, if not outright false

17/ p.130,line 24: Not true. The figure is not meaningless with regard to the strap.

18/ p.131,line 14: Contradicts #17 above, and not accurate. "Pressures" likely vary along the entire length of strap

19/ p.132,line 2: Unfounded and in direct contradiction to laboratory test data. In fact, test data indicates the strap would not be capable of supporting or hanging 30 pounds. Aggravates incriminating nature of evidence/data and omits assumptions, premises or qualifying stipulations which might be viewed as potentially exculpatory

20/ p.133,line 15: Inaccurate and deceptive.

21/ p.133,line 19: Failure initiation and propagation assessment is completely fabricated

22/ p.134,lines 3-8

23/ p.135,lines 6-10: Completely fabricated failure propagation assessment

24/ p.135,line 21: ditto

25/ p.136,line 4: ??? as to where cut started. Unfounded and not supported by data.

26/ p.143,line 17: Unfounded. There is no data or indication that the cut was made by a person.

27/ p.144,line 24 and p. 145,lines7,8: Inaccurate observations and contrary to expected and actual test data.

Again suppresses apparent exculpatory material behavior and presents test specimens as incriminating data.