

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

JUSTIN LANE FOUST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can the admissibility of expert testimony about the supposed author of a forged writing be upheld on a record that shows little (if anything) more than some evidence of general acceptance?

STATEMENT OF RELATED CASES

United States v. Foust, No. 18-cr-00011-F (W.D. Okla.)
(judgment entered October 30, 2019)

United States v. Foust, No. 19-6161 (10th Cir.)
(judgment entered March 2, 2021)

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PRAYER

Petitioner, Justin Lane Foust, respectfully prays that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Tenth Circuit that was handed down on March 2, 2021.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit, which is reported at United States v. Foust, 989 F.3d 842 (10th Cir. 2021), is found in the Appendix at A1. The oral decision of the United States District Court for the Western District of Oklahoma, admitting the expert testimony on handwriting authorship, is found in the Appendix at A8.

JURISDICTION

The United States District Court for the Western District of Oklahoma had jurisdiction over this criminal action pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Tenth Circuit had jurisdiction under 28 U.S.C. § 1291.

This Court's jurisdiction is premised upon 28 U.S.C. § 1254(1). By order of March 19, 2020, this Court extended the deadline for the filing of

petitions for writs of certiorari to 150 days from the underlying judgment.

One hundred fifty days from March 2 is July 30, so this petition is timely.

FEDERAL RULE INVOLVED

This petition implicates Federal Rule of Evidence 702, which concerns testimony by expert witnesses. The rule provides as follows:

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. P. 702.

STATEMENT OF THE CASE

Justin Foust worked for years for Chesapeake Energy Corporation (Chesapeake), an operator of oil and gas wells. After he left in September 2011, a company he and his wife had formed, Platinum Express, LLC, began doing substantial work for Chesapeake.

In August of 2014, Chesapeake officials conducting routine well reviews discovered invoices that had been submitted by Platinum Express that they thought were fraudulent. Chesapeake would eventually identify more than four and one-half million dollars that it had paid out on such fake invoices. The invoices were under the signature and employee-identification number of Chesapeake production foreman who had not in fact signed them.

The problems with the invoices were readily apparent. Some were for work that Platinum Express, which largely contracted to haul water, did not typically do for Chesapeake. Vol. 3 at 82, 88, 121, 163, 171, 190.¹ Some had exorbitant prices. Id. at 90-91, 93, 110, 121, 138-39, 192, 209, 248. Some were

¹ Citations to the record on appeal in the Tenth Circuit are provided for the Court's convenience, in the event this Court deems it necessary to review the record to resolve this petition. See Sup. Ct. R. 12.7.

for work on marginal wells that would not justify the cost of the work claimed. Id. at 82, 111, 121-22. And the failure to separate out jobs was another “obvious red flag.” Id. at 150.

From the beginning, Mr. Foust did not deny that the invoices were improper, and that Platinum Express had not performed the work billed. But he did deny being responsible for the invoices.

In 2018, Mr. Foust was charged in the United States District Court for the Western District of Oklahoma with eight counts of wire fraud, two counts of aggravated identity theft for using a signature and identification number of another, and one count of money laundering. Vol. 1 at 17-27. Six of the wire-fraud counts, and one identity-theft count, were associated with invoices that used the name of Bobby Gene Putman. The other two wire-fraud counts, and the remaining identity-theft count, were associated with invoices that used the name of Jeff Willis.

Mr. Foust was convicted of the counts based on the Putman invoices. But the jury was unable to reach a verdict on the counts based on the Willis invoices.

The distinguishing feature in the evidence of the two sets of counts came from Arthur Linville, who gave expert testimony on handwriting comparison. Mr. Linville told the jury that Mr. Foust had signed the name of Bobby Gene Putman and written his employee-identification number on the six invoices named in the indictment (as well as a great many others). Mr. Linville could not link Mr. Foust to the Willis invoices. Those forgeries did not involve false authorship, but rather the cutting and pasting of Mr. Willis's signature and employee-identification number.

A. The Daubert hearing as to the reliability of Mr. Linville's testimony.

Before trial, Mr. Foust filed a motion challenging the reliability of Mr. Linville's expected testimony and requesting a hearing pursuant to Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Vol. 1 at 28-32. The district court granted the request for a Daubert hearing, which it held before trial. See Vol. 2 at 5-71.

At the outset of the hearing, the district judge noted that the area of handwriting analysis was one he had not encountered in his lengthy career. The judge said he had "been at this about 47 years and this [was his] first

foray into the realm of questioned document examination and forensic document examination." Id. at 5.

Mr. Linville was the only witness at the hearing. He explained that handwriting comparison rests on two premises: that no two people write the same, and that no person writes exactly the same every time. Vol. 2 at 14-15; see Supp. Vol. 2 at 322. From there, the process is merely one of comparison. Mr. Linville said the endeavor was to find characteristics of writing common to a known writing and a questioned writing, in sufficient number, that they would not be the result of chance. Vol. 2 at 15. There also could not be any significant, unexplained differences. Id.

Mr. Linville did not put any finer point on it than that. The whole of his explanation is as follows:

So the process is simply to compare known exemplars of the person's writing or the writing -- known -- compare elements of the known writing with exemplars of the suspect's writing. And we identify handwriting as having been written by a particular person when a combination of individual characteristics are found in both that person's writing and the writing in question in sufficient number to effectively rule out coincidence as the cause.

There is no fixed number for positive identification. Logic tells us that the greater number of identifiers, the greater the

certainty of the opinion. But in addition, there can be no significant unexplained differences.

Where handwriting is concerned, a single significant unexplained difference could, in some instances, outweigh any number of similarities.

Id.; see also id. at 25 (“we’re looking for similarities and the absence of significant differences”).

Mr. Linville did not identify any meaningful standards that guided his comparison. He said he “follow[s] the protocol of ASTM standards,” id. at 57, which the prosecution did not bother to introduce. Mr. Linville himself called the standards “pretty basic” and offered that they did not supply and “hard-and-fast rules.” Id. at 59. Indeed, he recounted that some federal and state laboratories “disregard the guidelines because the guidelines are counter to their procedure and protocol.” Id. Mr. Linville offered no specifics about the ASTM standards. He did not testify to whether the guidelines say anything about how to determine whether a characteristic is significant; or what weight to assign to any characteristic; or give any insight into when a conclusion can be reached that identifies a person as the author of a questioned document.

Mr. Linville said he was aware of studies that he “assume[d] to be accurate” as to the error rates of handwriting comparison. Id. at 50. His “general understanding” of the studies, *id.* at 57, was that they involved the error rates for forensic document examiners versus the error rates for lay people. Id. Beyond that, he offered only that he could recall one study that put the error rate for the former at less than one percent, and the error rate for the latter at about six and one-half percent. Id. He did not state whether this concerned the matter at issue here -- identifying a person as the author of a forged writing -- or something else.

Mr. Linville did not testify to any testing of the principles of handwriting analysis and comparison. Nor did he explain what any peer review consisted of, or whether it extended to what similarities in writing can be considered significant. The extent of his testimony on peer review was that he had served as a “guest editorial advisory board member” of the *Forensic Examiner*, which publishes a peer-reviewed journal. Vol. 2 at 10-11.

B. The district court's ruling that Mr. Linville's testimony was reliable and admissible.

The district court held that the prosecution satisfied its burden to establish the admissibility of Mr. Linville's expert testimony. Vol. 2 at 63-71. The court described the methodology as "looking for similarities" and the "absence of significant differences." Id. at 67. To the court's "untrained eye" it appeared that it was "black magic" to be able to say the author of the known samples (Mr. Foust) was the author of the questioned, Putman writings. Id. at 70; see also id. at 71 (similar). But, the court said, it could at least see what Mr. Linville said he saw in the samples. As the court put it, "even though we might not be able to analyze [the samples] ourselves independently, we can at least see whether he's got facts that seem at least superficially to support the proffered opinions or not." Id. at 64.

The court went through similarities Mr. Linville saw in the signatures and the numbers of Mr. Foust, and in the questioned, Putman writings, and said Mr. Linville had "account[ed] for possible alternative explanations." Id. at 65. Mr. Linville, the court concluded, had shown a methodology and that "this is something other than picking his opinions out of the air." Id. at 71.

C. The Tenth Circuit's decision.

Mr. Foust's sole appellate challenges were to the district court's decision to admit Mr. Linville's expert testimony. As relevant here, he argued that the district court had abused its discretion in determining that the prosecution had shown Mr. Linville's methodology to be reliable. The Tenth Circuit rejected this argument and affirmed. A1-7.

The Tenth Circuit looked to the five factors this Court identified in Daubert as relevant to the reliability inquiry. A4. The Tenth Circuit noted that the factors are not exclusive, that some of the factors may be less relevant in a field like handwriting analysis that is primarily experience-based, and that "the test for reliability is flexible." Id. But the Tenth Circuit identified nothing presented by the prosecution in the Daubert hearing to justify admission on some factor other than those mentioned in Daubert.

A4-6.

On the five Daubert factors, the Tenth Circuit concluded that only two provided any support for admissibility. A5. The first was whether "Mr. Linville's method can be (and has been) tested." Id. There was no proof at the hearing of any testing that showed the method Mr. Linville used

produced accurate results. Instead, the Tenth Circuit reasoned that use of the method in criminal investigations and court proceedings could show testing. Id. It then determined there was testing here in the form of Mr. Linville’s “years of training,” his certification by organizations of forensic document examiners, and his rendering of expert opinions “in hundreds of cases.” Id.² This, the Tenth Circuit wrote, provided “some” support for the admission of his testimony. Id.

The Tenth Circuit also thought that the Daubert factor of general acceptance supported admissibility. Id. It referred in this regard to the district court’s reliance on Mr. Linville’s description of how handwriting analysis is practiced “and the way it has apparently been practiced for a good many years.” Id. (quotation omitted). As record support for this, the Tenth Circuit pointed only to Mr. Linville’s testimony that handwriting

² The Tenth Circuit’s quantity reference appear to be to any matter in which Mr. Linville was retained. Mr. Linville’s rendering of opinions where there was actual litigation was actually far more limited. His list of his experience shows fifty-eight such cases, Supp. Vol. 2 at 318-21 (Exhibit 2 from Daubert hearing), of which fifteen were described as depositions, id. There was nothing to show the nature of his expert testimony in the forty-three cases that remained, only five of which were in the federal system. Id.

analysis is a comparative process, and that it rests on the premises that no two people's handwriting is the same, and that nobody writes exactly the same way each time. Id. The Tenth Circuit did not explain (and neither did Mr. Linville at the Daubert hearing) how this translated into a methodology that allowed for accurate identification of the author of a forged writing.

The Tenth Circuit also looked to Mr. Linville's training, id., as it had on the testing factor. It then concluded that, in light of the "widespread acceptance of handwriting comparison through the years," the general acceptance factor "supports admissibility in this case." Id.

The other three Daubert factors, the Tenth Circuit continued, "do not necessarily support admissibility." Id. "Mr. Foust," the court stated, "was correct to point out that Mr. Linville's testimony regarding peer review and error rates was lacking." Id. The Tenth Circuit noted that there was no testimony that Mr. Linville's methodology had been peer reviewed. Id. And although Mr. Linville mentioned a study about error rates, it was "not clear that the study concerned the process of identifying the author," id., which was key to Mr. Linville's testimony.

As for standards, the Tenth Circuit noted Mr. Linville's recognition that the ASTM standards were not of much help. Id. And, it added, the fact that handwriting analysis is subjective "may cut against admissibility." Id. But it thought that as an experience-based field, handwriting analysis "lends itself to greater reliance on subjectivity when compared to science-based expertise." Id. In the end, the Tenth Circuit concluded that although the standards factor did not "necessarily support admission," this was "less relevan[t] in the specific context of handwriting comparison." Id.

The Tenth Circuit wrote that "[o]n balance," the Daubert factors "provided mixed results." Id. It then invoked the notion that the factors were "'meant to be helpful, not definitive,'" id. (quoting Kumho Tire Co. Ltd. v. Carmicheal, 526 U.S. 137, 151 (1999)), and continued that they "do not always correspond perfectly" where the expert testimony was as to non-traditional sciences, like handwriting comparison, A6. The Tenth Circuit concluded that the district court did not abuse its discretion in finding Mr. Linville's methodology to be reliable. Id.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit’s approval of the reliability of expert testimony on handwriting comparison -- which it recognized was subject to judicial and scholarly criticism -- on effectively nothing more than general acceptance shows the need for this Court’s guidance on the application of the 1990’s decisions in Daubert and Kumho Tire.

Before allowing a jury to hear expert testimony under Federal Rule of Evidence 702, a federal district judge must ensure the testimony has an adequate basis. Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 589, 597 (1993). Regardless of whether the expert testimony is scientific in nature, or is based in technical or specialized knowledge, Fed. R. Evid. 702(a), the judge must determine that it “rests on a reliable foundation.” Daubert, 509 U.S. at 589 (scientific expert testimony); see Kuhmo Tire Co., Ltd v. Charmichael, 526 U.S. 137, 141 (1993) (Daubert’s gatekeeping role applies to all expert testimony); id. at 148-49 (similar). That is, the expert’s methodology must be a valid one. Daubert, 509 U.S. at 594-95.

Of course, what will suffice to allow for such a determination will not be the same in all cases, or for all types of expert testimony. This Court recognized this truism in in Daubert. Although this Court considered several particular factors there, id. at 593-94, it “emphasize[d]” that “[t]he

inquiry envisioned by Rule 702 is . . . a flexible one,” id. at 595. And in Kuhmo Tire, this Court noted that each of the factors identified in Daubert would not necessarily apply across the board, for “[t]oo much depends upon the particular circumstances of the particular case.” Kuhmo Tire, 526 U.S. at 150.

This case tests the bounds of that flexibility, and how minimal of a showing can suffice to allow for a determination that expert testimony is in fact reliable. The Tenth Circuit recognized that there has been “criticism of handwriting expertise in both the courts and academic literature.” A5 (citing, as examples, Almeciga v. Center for Investigative Reporting, Inc., 185 F. Supp.3d 401 (S.D.N.Y. 2016), and Jennifer L. Mnookin, Scripting Expertise: The History of Handwriting Identification Evidence and the Judicial Construction of Reliability, 87 Va. L. Rev. 1723 (2001)). But it nevertheless upheld the district court’s admission of Mr. Linville’s expert testimony that Mr. Foust authored the Putman invoices, as not an abuse of discretion, id., on the thinnest of grounds. The Tenth Circuit concluded that three of the five Daubert factors were not shown to support reliability. A5. One of the other factors, it wrote, only “provides some support for

admissibility.” Id. And the Tenth Circuit considered only one factor -- general acceptance -- to support admissibility without explicit qualification. Id.

Not only that, but what the Tenth Circuit identified as providing the qualified “some support” in the case of one of the Daubert factors, and “support[]” as to another, was itself problematic. It rested largely on the fact that Mr. Linville had been trained and certified. From this, along with the fact that Mr. Linville had given hundreds of opinions (of which only forty-three involved testimony, see supra at 11 n.2), the Tenth Circuit determined there had been testing that offered “some support” for admissibility. A5. And it likewise looked to his training as proof of “some consensus in the field,” id., which along with “widespread acceptance of handwriting comparison through the years,” supported admissibility, id.

Importantly, the Tenth Circuit did not note anything outside of the Daubert factors that bore on the reliability inquiry. That is, it identified nothing else that showed Mr. Linville’s expert testimony to be reliable. Nor did the government present anything at the Daubert hearing in this regard. So, although other factors can bear on the reliability inquiry, as a district

court “must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable,” Kumho Tire, 526 U.S. at 152, no such factor is present here. The reliability question rose and fell on the Daubert factors.

With the Daubert factors the ones most commonly used, a decision on whether the minimal showing on those factors in this case can support a reliability determination will have broader reach than a decision in a case involving other, specialized considerations. This Court has not given meaningful guidance in this area since its decision in Daubert, Kumho Tire and (with respect to the standard for appellate review of a decision on the admissibility of expert testimony) General Electric Co. v. Joiner, 522 U.S. 136 (1997). More than two decades have passed since the latest of those decisions, Kumho Tire in 1999. The decision of the Tenth Circuit in this case shows the need for this Court to provide guidance on determining the reliability of expert testimony.

Start with what the Tenth Circuit held the government did *not* show at the Daubert hearing. The court of appeals first concluded that peer review “was lacking,” as there was “no testimony whether [Mr. Linville’s]

own methodology had been peer reviewed.” A5. There was no indication of anything that would make natural a lack of peer review. There was no hint that his methodology was too particular, too new, or of too limited interest” to be peer reviewed. Daubert, 509 U.S. at 593.

The Tenth Circuit also found there was no proof of error rates that might support admissibility. This was so with respect to any method of handwriting analysis that might be used to try to identify the author of a forged document. The reliability of identification of such an author was the “pertinent inquiry” in this case, Daubert, 509 U.S. at 592, and it was a showing of this reliability that was “a precondition of admissibility,” id. That is, what mattered was a ““fit” between Mr. Linville’s proposed testimony as to the authorship of a forged writing and the reliability of such specific testimony. Id. at 591. But, as the Tenth Circuit recounted, it was “not clear” that the one study involving error rates that Mr. Linville mentioned -- and that he did not in the least describe -- “concerned the process of identifying the author” of a questioned writing. A5.

On both peer review and error rates, there was thus no proof that could support a reliability determination. As the Tenth Circuit put it:

“While there may be available evidence regarding peer review and error rates, it was not adequately presented at the Daubert hearing to support admission.” Id.

There was some testimony as to standards, but Mr. Linville himself played them down. The Tenth Circuit observed that Mr. Linville followed the ASTM standards, “but he testified that these guidelines were ‘pretty basic’ and not ‘hard-and-fast rules.’” A5 (quoting record). The court of appeals continued that because handwriting comparison depended on the “‘subjective judgment of the analyst,’” id. (quotation omitted), that might “cut against admissibility,” id. It concluded that this factor thus “does not necessarily support admissibility. Id. But reasoning that handwriting analysis, by its rooting in experience, “lends itself to greater reliance on subjectivity when compared to science-based expertise,” id., it did not think this had as much relevance here.

Still, none of these three Daubert factors supported reliability. And with the government offering nothing outside of Daubert to support the admission of Mr. Linville’s expert testimony, any reliability determination

would have to be based on the two remaining Daubert factors. But that was deeply problematic on the Tenth Circuit's reasoning.

Consider first the Daubert factor of "whether Mr. Linville's method can be (and has been) tested." Id. The Tenth Circuit thought there to be some support for admissibility in this. But it did not purport to find in this any proof of testing of the method itself. Instead, it believed that use of the method, and certification and proficiency testing, could serve in its stead. The court of appeals wrote that "[t]esting may be done through 'criminal investigation [and] court proceedings,' as well as certification and proficiency exams. Id. (quotation omitted) (first brackets added). It then looked to the training Mr. Linville had, his certification "by organizations of forensic examiners," and the many opinions he had rendered. Id. On this basis, the Tenth Circuit concluded that this factor "provides some support for admissibility." Id.

This is not what is meant by the testing of a methodology. When this Court in Daubert spoke of the ability to test a theory, and whether the theory has actually been tested, it was referring to subjecting the theory to a determination of whether it was valid. Daubert, 509 U.S. at 593. The mere

fact that a theory or methodology is used does not provide that assurance.

At best, it indicates a *belief* in validity. Still less does training in a theory or method, or certification by organizations that use it, or the rendering of opinions based on it. A5. This is entirely self-referential and does not function, as real testing does, to show that the theory or methodology can be trusted.

At best, what the Tenth Circuit invoked on testing was a reflection of the acceptance of the theory and basic methodology of handwriting analysis. Of course, general acceptance is itself a Daubert consideration, and may be an “important factor in ruling particular evidence admissible,” Daubert, 509 U.S. at 594; see also id. at 592 n.11 (noting “theories that are so firmly established as to have attained the status of scientific law”), and, conversely, the absence of general acceptance may prompt skepticism, id. at 594. But what may be true in the world of pure science, where ideas constantly compete for currency, may not at all be the case in the world of practitioners of something like handwriting analysis. As this Court put it in Kumho Tire, general acceptance does not help show reliability “where the discipline itself lacks reliability, as, for example, do theories grounded in

any so-call generally accepted principles of astrology or necromancy.”

Kumho Tire, 526 U.S. at 151.

In any event, the acceptance to which the Tenth Circuit pointed was a factor it separately and independently considered as general acceptance.

A5. The Tenth Circuit thus double-counted this factor. So, what it saw as two factors that favored admissibility at least to some degree -- the “some support” it drew from testing, and the greater “support” it thought came from general acceptance in its own right -- was in fact only the support of one Daubert factor. The only support was that of general acceptance.

Daubert, 509 U.S. at 595.

This is potentially problematic in its own right. Daubert rejected the proposition that the general-acceptance test of Frye v. United States, 293 F. 1013 (D.C. Cir. 1924), survived the enactment of Federal Rule of Evidence 702. Daubert, 509 U.S. at 584. Although Daubert does recognize that general acceptance “can yet have a bearing on the [reliability] inquiry,” id., the effective reliance on *only* general acceptance to uphold the admission of Mr. Linville’s expert testimony is tantamount to permitting admission under Frye.

Even if there were cases in which general acceptance alone could suffice to permit the admission of expert testimony, this surely would not be such a case. One need not equate handwriting analysis with astrology or necromancy, whose general acceptance does not convert an unreliable discipline into a reliable one, Kumho Tire, 526 U.S. at 151, to see this. The Tenth Circuit itself recognized that the reliability of handwriting analysis has been questioned by courts and scholars. A5. So has the National Academy of Sciences. In 2009, it issued a report that concluded that “[t]he scientific basis for handwriting comparisons needs to be strengthened.” Comm. on Identifying the Needs of the Forensic Science Community, Nat’l Research Council, Strengthening Forensic Sciences in the Scientific Community: A Path Forward, 166-67 (Aug. 2009). Nothing of record suggests this had been done at the time of trial (nor does anything in the Tenth Circuit’s opinion suggests it has been done to date).

There is another reason, which this Court has stressed, that makes reliance -- much less exclusive, or near-exclusive, reliance -- on general acceptance even more problematic. As noted, the expert testimony must “fit” with what is at issue in the case. Daubert, 509 U.S. at 591; see also

Kumho Tire, 526 U.S. at 154 (relevant issue not the cause of tire separations as a general matter, but “whether the expert could reliably determine the cause of *this* tire’s separation”) (emphasis in original). So here, what was relevant was a particular subset of handwriting analysis, namely the ability to determine who was the author of a forged document (and not, for example, other matters, like whether a writing was a forgery). What mattered was the reliability of Mr. Linville’s methodology as to his claim that Mr. Foust was the author of the forged, Putman invoices.

The general acceptance of handwriting analysis on other issues was thus beside the point in this case. What the Tenth Circuit said to begin its discussion about general acceptance of handwriting analysis was that the field was based on two fundamental precepts. They are (1) that no two people’s handwriting is the same, and (2) that no one person’s handwriting is the same each time. A5. These precepts do nothing to establish that there is a reliable methodology for identifying the author of a forged document. Nor did the fact that Mr. Linville was trained by forensic organizations and federal agencies. Id. The training was not shown to be in the specific area relevant here (and, indeed, there was no real showing of what it entailed).

And without a showing of training in the specific area relevant in this case, any “consensus” the training might reflect, id., would not be germane to the core of Mr. Linville’s expert testimony.

The closest the Tenth Circuit got to the general acceptance of the specific testimony here was not anything presented at the Daubert hearing in the district court. Instead, it came from a citation the Tenth Circuit appended to its statement that there has been “widespread acceptance of handwriting comparison over the years.” Id. The citation was to the 2003 decision of the Fourth Circuit in United States v. Crisp, 324 F.3d 261, 271 (4th Cir. 2003), see A5, a case involving the authorship of a given document.

The opinion in Crisp issued over a vigorous dissent which noted that (as here) “[t]he government utterly failed to meet its burden” of showing the reliability of this evidence. Crisp, 324 F.3d at 273 (Michael, J., dissenting). Viewing handwriting comparison as a form of scientific expertise, the dissent explained how the government had not shown that the Daubert factors supported the admission of the expert’s testimony, and how the expert’s testimony was not otherwise shown to be reliable. Id. at 278-82.

Pointing to a half dozen district court cases, the dissent began by observing that handwriting identification evidence “has been greeted with more skepticism in the wake of Daubert,” id. at 278, with some of those district courts precluding an opinion as to the author of a forged document, id. The dissent proceeded to explain that there was an apparent lack of objective testing, id. at 279; that there had been no proof of peer review, id. at 279-80; that the field apparently lacked for “critical review,” id. at 280; and that the government had not offered proof of error rates, id.; and that what had been reported as to error rates was “disquieting to say the least,” id. at 280-81. It continued that there “does not seem to be any list of universal, objective requirements for identifying an author.” Id. at 281.

Turning to general acceptance, the dissent considered it to come only from those within the field, and who “have not challenged or questioned [the field’s] basic premises.” Id. And the dissent then explained why admission of the testimony by courts over the years counted for little, as courts “initially . . . saw [such expert testimony] as no less reliable than that of lay witnesses who claimed to be able to identify the writers of documents.” Id. (citing two law review articles). This is further reason why

drawing on the admission of handwriting analysis evidence in the past, as the Tenth Circuit seemed to do here, does not show general acceptance in a meaningful way, and is not good proof of the reliability of the evidence.

All of this led the dissent in Crisp to make the point made in this petition, namely that reliance on general acceptance alone subverts the approach that should be used under Daubert and Kumho Tire. As the dissent explained:

To say that expert testimony is reliable because it is generally accepted is to say that it is admissible under Daubert because it was admissible under the old rule articulated in Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 192) (allowing expert evidence that had “gained general acceptance in the particular field in which it belongs”). . . . Nothing in the Supreme Court’s opinion in Daubert suggests that evidence that was admitted under Frye is grandfathered in or is free of the more exacting analysis now required.

Crisp, 324 F.3d at 272 (Michael, J., dissenting).

In sum, the Tenth Circuit’s approach seriously misapplies Daubert. It gives far too much weight to general acceptance and to the admissibility of questionable “expertise” over the years, much of it prior to Daubert. As the dissent in Crisp shows, the Tenth Circuit is not alone in this regard. That such a misguided application persists so long after Daubert and Kumho

Tire, when the courts should be well-versed in how to test the admissibility of proposed expert testimony, shows the need for this Court's guidance in an area it has not addressed in more than two decades. This case provides an excellent vehicle for it to do so.

CONCLUSION

This Court should grant Mr. Foust a writ of certiorari.

Respectfully submitted,

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