APPENDIX

UNITED STATES of America, Plaintiff - Appellee,

v.

Justin Lane FOUST, Defendant - Appellant.

No. 19-6161

United States Court of Appeals, Tenth Circuit.

FILED March 2, 2021

Background: Defendant was convicted in the United States District Court for the Western District of Oklahoma, Stephen P. Friot, J., of wire fraud, aggravated identity theft, and money laundering, and he appealed.

Holdings: The Court of Appeals, Kelly, Senior Circuit Judge, held that:

(1) district court did not abuse its discretion in finding handwriting expert's methodology sufficiently reliable, and

(2) expert's reliance on exemplars created several months outside two-year period surrounding alleged forgeries did not render his methodology sufficiently unreliable to preclude its admission.

Affirmed.

1. Criminal Law ⚿1153.12(3)

Court of Appeals reviews district court's application of rule of evidence governing expert witnesses and *Daubert* for abuse of discretion, giving district court substantial deference, reversing only when its ruling was arbitrary, capricious, whimsical, or manifestly unreasonable or when it made clear error of judgment or exceeded bounds of permissible choice in circumstances. Fed. R. Evid. 702.

2. Criminal Law ⚿469.2

When deciding whether to admit expert testimony, district court's discretion extends to both how it assessed expert's reliability as well as its ultimate determination of reliability. Fed. R. Evid. 702.

3. Criminal Law ⚿478(1), 486(2)

When deciding whether to admit expert testimony, district court must determine whether witness has requisite knowledge, skill, experience, training, or education to provide expert opinion, and if so, whether expert's opinion is reliable by assessing underlying reasoning and methodology; if either of these steps renders expert's opinion unreliable, testimony is inadmissible. Fed. R. Evid. 702.

4. Criminal Law ⚿486(2)

In deciding whether expert's methodology is sufficiently reliable, factors that court may consider include: (1) whether theory can be tested; (2) whether it is subject to peer review and publication; (3) known or potential error rate; (4) existence and maintenance of standards; and (5) general acceptance in relevant scientific community. Fed. R. Evid. 702.

5. Criminal Law ⚿486(4)

District court did not abuse its discretion in finding handwriting expert's methodology sufficiently reliable to warrant admission of his testimony in defendant's prosecution for wire fraud, aggravated identity theft, and money laundering based on his alleged forgery of customer's employees' signatures on invoices, even though testing of handwriting comparison mostly fell short of rigors demanded by ideals of science, there was no evidence regarding peer review or error rates, and expert's analysis relied on his subjective judgment; expert had undergone years of training, been certified by organizations of forensic examiners, and rendered expert opinions in hundreds of cases, and expert used accepted methodologies. Fed. R. Evid. 702.

6. Criminal Law ⚿486(4)

Handwriting expert's reliance on exemplars created several months outside two-year period surrounding alleged forgeries did not render his methodology sufficiently unreliable to preclude its admission in defendant's prosecution for wire fraud, aggravated identity theft, and money laundering based on his alleged forgery of customer's employees' signatures on invoices, notwithstanding expert's testimony that "it would be nice if [exemplars] were written relatively contemporaneous in time with the questioned writing, and that can be within a year or two preceding or following the documents at issue"; issue went to weight, not admissibility of expert's testimony, and defendant used much of his cross-examination to discredit exemplars' reliability. Fed. R. Evid. 702.

Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. 5:18-CR-00011-F-1)

Howard A. Pincus, Assistant Federal Public Defender (and Virginia L. Grady, Federal Public Defender, with him on the briefs), Denver, Colorado, for Defendant - Appellant.

Jessica L. Perry, Assistant United States Attorney (and Timothy J. Downing, United States Attorney, with her on the brief), Oklahoma City, Oklahoma, for Plaintiff - Appellee.

Before McHUGH, KELLY, and EID, Circuit Judges.

KELLY, Circuit Judge.

Defendant-Appellant Justin Foust appeals from his conviction on six counts of wire fraud, and one count each of aggravated identity theft and money laundering. He was sentenced to 121 months' imprisonment and three years' supervised release. Briefly, Mr. Foust's company, Platinum Express, LLC, submitted false and fraudulent invoices to its customer, Chesapeake Energy Corporation ("Chesapeake"). Chesapeake identified more than $4.5 million that it had paid out on these invoices. Mr. Foust did not deny that the invoices were improper and that Platinum Express had not performed the work. But he denied that he had forged the signatures and employee identification numbers of Chesapeake employees. A handwriting expert testified otherwise regarding invoices associated with Chesapeake employee Bobby Gene Putman.[1] The jury convicted Mr. Foust on the wire-fraud and aggravated-identity-theft counts associated with these invoices.

On appeal, Mr. Foust argues that the district court abused its discretion by allowing the handwriting expert to testify at trial. He contends that (1) the government did not adequately show that the expert's methodology was reliable and (2) the handwriting expert used unreliable data in reaching his opinion. This court has jurisdiction under 28 U.S.C. § 1291, and we affirm.

Background

Mr. Foust was a production foreman at Chesapeake where he operated oil and gas wells. In 2011, he left Chesapeake to start Platinum Express, which performed water-hauling services for oil and gas companies. Not long after forming, Platinum Express entered into a contract with Chesapeake. A few years later, Chesapeake employees discovered the fraudulent invoices submitted by Platinum Express. Chesapeake began investigating the matter and told Mr.

1. Both the government and Mr. Foust use the spelling "Putnam" in their briefs, but at trial his name was spelled "Putman." 3 R. 85. We will use "Putman" in this opinion.

Foust that it was going to exercise its contractual right to examine Platinum Express' computers and business records. But while Chesapeake investigators were travelling to the Platinum Express office, Mr. Foust told them that someone had broken into the office and stolen two computers. The investigating sheriff's deputy believed the break-in was staged by Mr. Foust. Chesapeake decided to turn the investigation over to the FBI.

When the FBI initially talked to Mr. Foust, he blamed the fraudulent invoices on Mr. Lucas, Platinum Express' general manager, and Ms. Lucas, the office manager. However, the agents could not connect the Lucases to the fraudulent invoices, so they determined that Mr. Foust was likely involved. The FBI learned, among other things, that: Mr. Foust had access to and controlled the Platinum Express account; all of the checks from Chesapeake were traced into the Platinum Express account and the Fousts used that account for personal expenses; the Fousts received business profits; and Mr. Foust was knowledgeable of Chesapeake's practices due to his previous employment there.

Prior to trial, Mr. Foust requested a Daubert hearing to determine whether the government's handwriting expert, Arthur Linville, would be allowed to testify. Mr. Linville is an experienced, board-certified forensic document examiner and was initially retained by Chesapeake during its investigation. During the hearing he explained his methodology, which consists of comparing the known writing with "exemplars of the suspect's writing." 2 R. 15. He looks for common characteristics between the exemplars as well as any unexplained differences. When comparing exemplars, Mr. Linville considers their "[q]uantity, quality and comparability." Id. at 29. He first determines the number of exemplars needed for a comparison, which depends on the range of variation in an individual's handwriting. He considers whether an exemplar was written "in the normal course of business" and prefers "relatively contemporaneous" writings "within a year or two" of each other. Id. at 28–29. However, Mr. Linville explained that the necessary timing can vary noting that change in handwriting over time is "somewhat overstated." Id. at 43–44. Mr. Linville follows American Society for Testing and Materials ("ASTM") standards but conceded at the hearing that they are "pretty basic" and not "hard-and-fast rules." Id. at 57–59. Finally, he mentioned that studies have found that forensic document examiners had a less than 1% error rate, while lay people had a 6.5% error rate.

While explaining his analysis of this case, Mr. Linville sorted the invoices by the type of forgery, which included "cut and paste" forgeries and "freehand" forgeries. Id. at 18. The fraudulent invoices associated with another Chesapeake employee (Jeff Willis) were cut-and-paste forgeries. Mr. Linville could not provide an opinion on these forgeries and the jury ultimately hung on the counts associated with them. On the other hand, the invoices with Bobby Gene Putman's signatures were freehand forgeries. Mr. Linville testified that the invoices with Mr. Putman's signature "absolutely were not Mr. Putman's signature" but were written in the natural hand of the writer — i.e., the author did not try to recreate the signature. Id. at 26–27. He was able to rule out the Lucases because of the different style of numbers and the quality of penmanship. As to Mr. Foust, Mr. Linville compared the invoices to exemplars of Mr. Foust's writing from 2002, 2011, and 2017. Mr. Linville opined that Mr. Foust forged Mr. Putman's signature because of similarities in pictorial appearance, skill, and other unique characteristics in the numbers.

Next, the district court laid out the standards it would apply under Rule 702 and summarized Mr. Linville's testimony. The court concluded that Mr. Linville was using an accepted methodology and reliably applied the methodology to the facts of the case. Although the court noted that handwriting comparison looks like "black magic" to the "untrained eye," it was still able to look at the samples and determine whether there were facts supporting Mr. Linville's opinion. Id. at 70–71. Therefore, the court concluded that Mr. Linville's testimony was admissible.

Discussion

[1, 2] We review the district court's application of Rule 702 and Daubert for abuse of discretion. Etherton v. Owners Ins. Co., 829 F.3d 1209, 1216 (10th Cir. 2016). We give the district court substantial deference, reversing only when its ruling was "arbitrary, capricious, whimsical or manifestly unreasonable" or when it made "a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." Id. (quoting Dodge v. Cotter Corp., 328 F.3d 1212, 1223 (10th Cir. 2003)). The district court's discretion extends to both how it assessed the expert's reliability as well as its "ultimate determination of reliability." Id. (quoting Goebel v. Denver & Rio Grande W. R.R. Co., 346 F.3d 987, 990 (10th Cir. 2003)).

[3] Federal Rule of Evidence 702 requires federal courts to ensure that expert testimony "is not only relevant, but reliable." Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). A district court first determines whether the witness has the requisite "knowledge, skill, experience, training, or education" to provide an expert opinion. Fed. R. Evid. 702; United States v. Nacchio, 555 F.3d 1234, 1241 (10th Cir. 2009). Next, it "determine[s] whether the expert's opinion is reliable by assessing the underlying reasoning and methodology." Nacchio, 555 F.3d at 1241. If either of these steps renders the expert's opinion unreliable, the testimony is inadmissible. Id.

On appeal, Mr. Foust does not challenge Mr. Linville's qualifications but instead raises two arguments aimed at the reliability of his methodology. First, he argues that the government did not meet its burden of establishing that Mr. Linville's methodology was reliable under the Daubert/Kumho Tire test. Second, he argues that Mr. Linville did not use reliable data — thus, making his method unreliable — because the exemplars were not sufficiently contemporaneous. We disagree and conclude the district court did not abuse its discretion in admitting the testimony.

A. Mr. Linville's Methodology

[4] Beginning with Mr. Foust's broader argument, he contends that the prosecution failed to establish that Mr. Linville's methodology was reliable. In Daubert, the Supreme Court highlighted a number of considerations relevant to this inquiry: (1) whether the theory can be tested; (2) whether it is subject to peer review and publication; (3) the known or potential error rate; (4) the existence and maintenance of standards; and (5) the general acceptance in the relevant scientific community. 509 U.S. at 593–94, 113 S.Ct. 2786. However, this list is not exclusive, and the test for reliability is flexible. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 150, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). Handwriting analysis is primarily an experience-based expertise, as opposed to science-based, which could make some Daubert factors less relevant than others. See id. Still, "some of Daubert's questions can help to evaluate the reliability even of

experience-based testimony." Id. at 151, 119 S.Ct. 1167.

Turning to the factors, we begin with whether Mr. Linville's method can be (and has been) tested. Although it appears that testing of handwriting comparison "mostly falls short of the rigors demanded by the ideals of science," it is still subject to less rigorous forms of testing. See United States v. Baines, 573 F.3d 979, 990 (10th Cir. 2009) (discussing Daubert factors in the context of fingerprint analysis). Testing may be done through "criminal investigation[and] court proceedings," as well as certification and proficiency exams. Id. Here, Mr. Linville has undergone years of training, has been certified by organizations of forensic examiners, and has rendered expert opinions in hundreds of cases. Therefore, this factor provides some support for admissibility.

Furthermore, the general-acceptance factor weighs in favor of admissibility. As the district court noted, "based on his description of how his science is practiced and the way it has apparently been practiced for a good many years, my conclusion is [ ] he is using accepted methodologies." 2 R. 70. Mr. Linville testified that handwriting analysis is a comparative process and two fundamental principles underlie the process: (1) no two individuals' handwriting is the same and (2) an individual's own handwriting is never exactly the same. He has also received training through forensic organizations and federal agencies, which demonstrates some consensus in the field. Although, as Mr. Foust argues, acceptance by unbiased experts is always better, that does not mean this factor cannot support admission. See Baines, 573 F.3d at 991. And given the widespread acceptance of handwriting comparison through the years, we think this factor supports admissibility in this case. See, e.g., United States v. Crisp, 324 F.3d 261, 271 (4th Cir. 2003).

On the other hand, the standards, peer-review, and error-rate factors do not necessarily support admission. Mr. Foust was correct to point out that Mr. Linville's testimony regarding peer review and error rates was lacking. Mr. Linville stated that he participated as a guest editorial board member on a peer-reviewed forensic journal; however, there was no testimony regarding whether his own methodology had been peer reviewed. Mr. Linville also testified generically that forensic examiners have a less than 1% error rate while lay people have a 6.5% error rate, but it is not clear that the study concerned the process of identifying the author. While there may be available evidence regarding peer review and error rates, it was not adequately presented at the Daubert hearing to support admission.

Finally, Mr. Linville follows the ASTM standards for his analysis, but he testified that these guidelines were "pretty basic" and not "hard-and-fast rules." 2 R. 59. Much like fingerprint analysis, handwriting comparison relies a lot "on the subjective judgment of the analyst," which may cut against admissibility. Baines, 573 F.3d at 991. With that said, the nature of handwriting comparison as an experience-based expertise lends itself to greater reliance on subjectivity when compared to science-based expertise. So while this factor does not necessarily support admission, we think it has less relevance in the specific context of handwriting comparison. See Kumho Tire, 526 U.S. at 150, 119 S.Ct. 1167.

[5] On balance, our review of the Daubert factors provided mixed results, however we recognize that they are "meant to be helpful, not definitive." Id. at 151, 119 S.Ct. 1167. This understanding is particularly important because handwriting com-

parison is not a traditional science, and the Daubert factors do not always correspond perfectly. See id. at 150, 119 S.Ct. 1167. During the hearing, the district court heard extensive testimony about Mr. Linville's methodology and analysis in this case and observed that whether the expert used accepted methodologies really had not been questioned. 2 R. 70. We recognize that there has been criticism of handwriting expertise in both the courts and academic literature. See, e.g., Almeciga v. Ctr. for Investigative Reporting, Inc., 185 F. Supp. 3d 401 (S.D.N.Y. 2016); Jennifer L. Mnookin, Scripting Expertise: The History of Handwriting Identification Evidence and the Judicial Construction of Reliability, 87 Va. L. Rev. 1723 (2001). However, given our standard of review, the district court did not abuse its discretion in finding Mr. Linville's methodology reliable.

B. Mr. Linville's Underlying Data

[6] Mr. Foust next argues that Mr. Linville's opinion is based on faulty data that renders his methodology unreliable. Specifically, he highlights Mr. Linville's use of exemplars outside his one-to-two-year range for contemporaneousness, thus violating his own methodology. We disagree.

To start, Mr. Foust overstates Mr. Linville's testimony. When discussing the timing of exemplars, Mr. Linville said, "it would be nice if they were written relatively contemporaneous in time with the questioned writing, and that can be within a year or two preceding or following the documents at issue." 2 R. 29. He noted that this was his "personal preference" and it was a view "expressed in text that [he] own[s]." 2 R. 43. He elaborated further that the need for contemporaneous exemplars varies, explaining that change in handwriting is "somewhat overstated" but there can be circumstances where very recent exemplars are needed. 2 R. 43–44. Mr. Foust's suggestion that the two-year cutoff is a strict rule under Mr. Linville's methodology is not supported by the record.

Furthermore, Mr. Linville relied primarily on the 2011 and 2017 exemplars that were two-and-a-half months and eight-months outside the two-year range. Mr. Foust's quarrel about the two-year cutoff goes to the weight, not the admissibility of Mr. Linville's testimony. It is "for the jury to evaluate the reliability of the underlying data, assumptions, and conclusions." In re Urethane Antitrust Litig., 768 F.3d 1245, 1263 (10th Cir. 2014). Not every issue raised about an expert's opinion requires the testimony to be excluded. Instead, many of those concerns can be addressed through "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." Daubert, 509 U.S. at 596, 113 S.Ct. 2786. Indeed, Mr. Foust used much of his cross-examination to discredit the exemplars' reliability. The district court also instructed the jury that it is not required to accept opinion testimony and that it is free to give the testimony as much weight as the jury thinks it deserves. 1 R. 320.

Because we believe this issue concerns the data's reliability — as opposed to the methodology's reliability as a whole — Mr. Foust's reliance on a nonprecedential case, Crew Tile, is inapt. See Crew Tile Distrib., Inc. v. Porcelanosa L.A., Inc., 763 F. App'x 787 (10th Cir. 2019) (unpublished). In that case, we concluded that the district court erred by admitting a handwriting expert's testimony where the expert failed to complete the verification step of her methodology. Id. at 797–98. We reasoned that by skipping that step the expert had "completely changed a reliable methodology" or "misapplied that methodology." Id. at 797 (alteration and citation omitted). Impor-

tantly, we noted that the district court did not conduct a Daubert hearing and the party failed to show that the methodology was still reliable without the missing step. Id. at 797. Here, the district court conducted a Daubert hearing where Mr. Linville testified precisely about how the importance of contemporaneous exemplars can vary. Mr. Linville did not skip a step or change his methodology.

AFFIRMED.

ESTATE OF Madison Jody JENSEN, BY her personal representative Jared JENSEN, Plaintiff - Appellee,

v.

Jana CLYDE, Defendant - Appellant,

and

Duchesne County, a Utah governmental entity; David Boren; Jason Curry; Logan Clark; Kennon Tubbs; Elizabeth Richens; Caleb Bird; Hollie Purdy; Gerald J. Ross, Jr.; John Does, Defendants.

The Estate of Madison Jody Jensen, by her personal representative Jared Jensen, Plaintiff - Appellee,

v.

Kennon Tubbs, an individual, Defendant - Appellant,

and

Duchesne County, a Utah governmental entity; David Boren, an individual; Jason Curry, an individual; Jana Clyde, an individual; Logan Clark, an individual; Elizabeth Richens, an individual; Caleb Bird, an individual; Hollie Purdy, an individual; Gerald J. Ross, Jr., an individual; John Does 1-20, Defendants.

No. 20-4024, No. 20-4025

United States Court of Appeals, Tenth Circuit.

FILED March 2, 2021

Background: Probate estate of deceased pretrial detainee brought civil rights action, inter alia, against licensed practical nurse (LPN) who worked at jail and doctor who worked there part-time. The United States District Court for the District of Utah, No. 2:17-CV-01031, Dale A. Kimball, Senior District Judge, denied the doctor's and the LPN's motions for summary judgment, and they appealed.

Holdings: The Court of Appeals, Kelly, Senior Circuit Judge, held that:

(1) private doctor who was employed by county on part-time basis, in providing medical services to inmates at county jail where he worked alongside the jail's officers and full-time staff, had ability to raise qualified immunity defense;

(2) while protocols established and training provided by doctor may not have been the most robust, probate estate could not establish requisite degree of personal involvement, causation, and state of mind;

(3) doctor did not violate any right of detainee that was clearly established at time, and thus was protected by qualified immunity from suit under § 1983; but

(4) licensed practical nurse (LPN) ignored a risk of harm that would have been obvious to reasonable person.

Affirmed in part, reversed in part, and remanded.

MR. SNYDER: No, Your Honor.

THE COURT: Very well.

I'm not going to repeat at any great length the standards that apply here. There are some aspects of it that I think deserve mention and I'm going to try to keep that mention brief.

Obviously, the basic standard of Rule 702 and Daubert and Kumho and the Tenth Circuit's progeny of those opinions from the Supreme Court and Rule 702 are stated in slightly different ways in slightly different places.

Rule 702 says what it says, and I'm not going to burden the record by repeating it here.

The Tenth Circuit had a couple of decisions in the case of Goebel vs. Denver and Rio Grande Western Railway, which is the -- I call them the Goebel I decision and the Goebel II decision.

The Goebel I decision is at 215 F.3d 1083, with the relevant discussion at page 1087. And it says simply that the gatekeeper function "requires the judge to assess the reasoning and methodology underlying the expert's opinion and determine whether it is scientifically valid and applicable to a particular set of facts."

The test is not one of ultimate persuasiveness. The test is whether it's sufficient to clear the Daubert and Rule 702 bar. Ultimate persuasiveness is for the jury to decide if it

clears the Daubert and Rule 702 bar. So that requires me to look at the expert's, first of all, qualifications if they're challenged, which they're not in this instance, and then at the methodology and the reliability of the methodology. And there's all sorts of avenues of attack on that, which I'll mention briefly, but basically it's a question as condensed into the language of Rule 702, is whether the expert applied reliable methodologies, reliable methods and principles to facts that are reasonably ascertainable so that the opinion proffered by the expert does not amount simply to the ipse dixit of the expert.

Let there be no doubt, as I mentioned at the outset, that the burden is on the proponent of the proposed expert testimony under Rule 104 to establish the admissibility of the testimony, so all an opposing party has to do is what the defendant did in this case and that is file a motion asking me to perform my gatekeeper function, and I will do so.

The burden is also cast upon the government not only by Rule 104, but by footnote 10 to the Daubert decision at page 592. And that's echoed also by footnote 4 to the Tenth Circuit's decision in Ralston vs. Smith & Nephew Richards, 275 F.3d 965.

Again, it's important to understand that I am not sitting here to pass on the ultimate persuasiveness. As the Daubert court said at page 595, my focus "must be solely on principles

and methodology, not on the conclusions that they generate."

However, there's one little exception to that and that's in the Supreme Court's decision from 1997 in GE vs. Joiner, and that is if the expert seems to be pulling facts that make a difference out of the air, then the expert's opinion may be determined to be inadmissible because I conclude "that there is simply too great an analytical gap between the data and the opinion proffered." That's from page 146 of the GE vs. Joiner decision.

And in a case like this one, I think that tends to be an especially informative source of guidance, because most of the facts that the expert purports to rely on are facts that, even though we might not be able to analyze them ourselves independently, we can at least see whether he's got facts that seem at least superficially to support the proffered opinions or not.

It is not necessary to address Mr. Linville's qualifications and I certainly don't intend at 4:30 in the afternoon to do so. His qualifications are not questioned and I think that's for very good reason.

So under Rule 702, I do examine whether the defendant -- whether the expert's witnesses (sic) are based on sufficient facts or data, whether his testimony is the product of reliable principles and methods and whether he has applied those principles and methods reliably to the facts of the case.

The Daubert decision itself gave us some guidance as to exactly how we do that, gave us some factors to be considered. We got some further guidance and I think reliable guidance from Kumho because Kumho took the analysis out of the realm of pure science. Daubert, being an epidemiology case, pure science, which sometimes involves different considerations than disciplines that are not pure science, like the tire product liability case before the Court in the Kumho decision, so we got further guidance from the Kumho decision.

And then along came the Advisory Committee in 2000 and amended Rule 702 to conform to Daubert and Kumho, to basically codify them in very broad strokes, and the Advisory Committee in the year 2000 gave us some more considerations to take into account. And those are in the Advisory Committee's notes.

The ones I think that are perhaps most salient here in enabling me to call either balls or strikes in terms of the admissibility of Mr. Linville's opinions are whether he has unjustifiably extrapolated from an accepted premise to an unfounded conclusion or whether he has adequately accounted for obvious alternative explanations.

That comes to mind, for instance, in the way that he analyzed some differences in the 7s, which I'll talk about here in just a few minutes.

Also, another factor in the 2000 Advisory Committee notes that I think is helpful here is whether the field of expertise

claimed by the expert is a field known to reap reliable results for the type of opinion that the expert proposes to give.

And in summary, as to the standards that I apply, the Daubert assessment is a determination of whether the conclusions to be expressed by the expert, having the necessary qualifications in the relevant field, are the product of the application of that expertise using recognized and supportable methodologies; secondly, on the basis of adequate data; thirdly, rationally tied the opinions which purport to be based on that data.

Any step in that sequence, if you will, that falls short renders the analysis unreliable and renders the expert's testimony inadmissible. That's true whether the step in the analysis completely changes a reliable methodology or simply misapplies that reliable methodology, as was made clear by the Tenth Circuit in the Goebel II decision, 346 F.3d at 992. That was also echoed in the Tenth Circuit's later decision in Mitchell -- I'm sorry -- earlier decision in Mitchell vs. Gencorp, 165 F.3d 778, with the relevant discussion at page 782.

That, in a nutshell, is the standards that I apply.

So I have before me Mr. Linville, a witness who first of all told me about some of the -- some aspects of his methodology. He talked about looking for the size of the signature, the slant of the letters in the cursive writing, the

alignment of the letters, what he called "letter design," what he called "connecting strokes." And he certainly had a substantial factual base from which to extrapolate. That in and of itself doesn't mean necessarily that his opinion becomes any more reliable than it would otherwise be, but given the numbers that are set forth in his letter, he certainly had a very substantial set of signatures to compare for the purposes that he told us.

In Exhibit 5, as we're all aware, he focused on six known Putman signatures and then he focused on six questioned Putman signatures and then he had six known signatures by the Defendant Justin Foust, and in my view, perhaps most notably, six sets of numbers written by Mr. Foust.

And his methodology consisted of looking for similarities, which he described as basically the absence of significant differences.

Secondly, he sought to determine whether the questioned Putman signatures were actually his. 633 were not by Mr. Putman, but were written in the natural hand of a person.

And as Mr. Linville, I think, fairly, to me, at least, interestingly described, that's -- sometimes the analysis stops there. Was the questioned one at least written in somebody's natural hand, even if it was not written in the natural hand of the person whose signature it purports to be.

His next step was to determine whether in the case of a

signature written by a natural hand, whether a person can be identified as the source of the questioned signatures that were not genuine, but were written in a natural hand, and that eliminated Mr. and Mrs. Lucas.

I think there's grist for cross-examination there, in that he apparently did not have an opportunity to eliminate the other two people, but he did eliminate Mr. and Mrs. Lucas at that third step because he had []quite the signatures that he concluded were demonstrably not those of Mr. Putman, but were written in a natural hand. And in so doing, he had in some instances collected exemplars which were, I think, naturally to be preferred, as well as requested exemplars.

So he looked at the size, he looked at the strokes, and he seemed to pay most attention to terminating strokes. He looked at the pictorial appearance, which he described in response to my question as kind of an overall global look at the comparability of the two pictures; the skill of the writer, which is kind of an interesting concept that I'm not sure I totally understand; and the spacing. And that there's apparently in some respects horizontal spacing to be looked at and vertical spacing to be looked at. For instance, when he looks at the space between the numbers and the line.

Having done that and having looked at those aspects of the signatures in question, then he went to the numerals. He identified -- and this, to me, carries some weight. He

identified a combination of common elements.

He looked at the 9s with a consistent left-hand []slot. He looked at the 7s with a consistent right-hand []slot. And he testified that it's really pretty unusual -- he was fairly emphatic about that -- to have those numbers next to each other, one slanting in one direction, the other one slanting in the other direction.

And he found it to be generally consistent from the questioned signatures to the -- or the numbers in questioned signatures or the questioned numbers shown to have been written by Mr. Foust.

An example of accounting for possible alternative explanations, and that is one of the original Daubert factors, is Mr. Linville's explanation of why some of the known 7s written by Mr. Foust looked like the questioned 7s and some do not look like the boomerang 7s that were typical of the questioned handwriting. Some of the 7s were more squared off, but it turns out the squared-off 7s were written several years earlier than the more curved 7s, as he described as boomerang 7. That, to me, is an example of accounting for possible alternative explanations.

So my basic question, after I heard what he had to say, after I had read the briefs, was: Is Mr. Linville drawing conclusions based on a factual finding that appears to be so scant that what I'm getting from him and what the government

proposes to give to the jury is simply the ipse dixit of the expert?

My answer to that question is, no, he's not simply trying to give the jury the ipse dixit of the expert.

My next question, and perhaps it's related, is: Is he using accepted methodologies?

That really has not been questioned here, and perhaps with good reason, but to the extent that there is room for any suggestion that his methodologies are not accepted, I find that, yes, based on his description of how his science is practiced and the way it has apparently been practiced for a good many years, my conclusion is, yes, he is using accepted methodologies.

Is he relying -- is he reliably applying those principles and methodologies to the facts of the case? In my view, he is. Again, that's not a matter of the ultimate persuasive value of his proposed expert testimony, that is a question of whether he clears the Daubert bar, which is one of sufficiency, not ultimate persuasiveness.

He walked me through his analysis of K-1 through K-6, Q-1 through Q-6, K-7 through K-12, and K-13 through K-18. And so, first of all, you look at Q-1 through Q-6 and compare them to K-1 through K-6 and the first thing you ask yourself is, well, is this black magic or what. To my untrained eye, we're looking at black magic when you try to say that the Qs are

written by the same guy who wrote K-7 through K-11 than they are likely to be from the guy who wrote K-1 through K-6.

Since it appears to a lay person to be an exercise in black magic, then I ask myself: Has he shown me a methodology, has he described a methodology, has he shown me that this is something other than picking his opinions out of the air to satisfy the people who wrote the checks to him to pay his fee?

And my answer is, yes, he has shown me a reliable methodology.

And I conclude, consequently, that he is reliably applying the principles and methodologies of his science and his craft to the facts of the case.

For those reasons, I do conclude that the proposed expert testimony of Arthur Linville does clear the Daubert and Rule 702 hurdle and is admissible.

Now, we're here at 20 till 5:00, I'll be happy to resume tomorrow morning, but if either side has any particular reason for us to get started on the Jackson vs. Denno hearing, I'll be happy to hear your suggestion.

What says the government?

MS. PERRY: Your Honor, we don't have a preference. I don't anticipate that I would have Special Agent Jaworski on the stand for too long, but it might be beneficial for the Court to hear direct examination and cross-examination together.