

ATTACHMENT C
RESPONDENT(S) ARGUMENT(S)

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7
8 **BOARD OF ADMINISTRATION**
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

9 In the Matter of the Application for)
10 Benefits Payable Upon the Death of)
11 MARK A. SOTO by)

) Case No. 2014-0370

) OAH No. 2014060606

12 ANNETTE SOTO,)

) **RESPONDENT ANNETTE SOTO'S**
) **ARGUMENT**

13 Respondent,)

) Hearing Date: November 16, 2015 and
) November 30, 2015

14 and)

15 Marina Soto Hernandez,)

16 Respondent.)
17)

18
19 **I. STATEMENT OF RELEVANT FACTS**

20 Mark Soto (hereinafter "Mark") and Annette Soto (hereinafter "Annette") were married on
21 December 27, 1986.

22 Although Mark and Annette loved each other dearly, they separated in November 2007 and
23 became legally separated on October 20, 2011.

24 Mark passed away on May 22, 2013. Thereafter, Annette contacted CalPERS to notify them of
25 his passing so she could remove him from her medical insurance plan. (CT, V2, P.58, 17-19). It was at
26 that time Annette was informed that Mark did not have a beneficiary on file and since they were still
27 married she would receive the benefits. (Id. at 19-22).
28

1 On July 25, 2013, Respondent Marina Soto Hernandez (hereinafter “Marina”) sent CalPERS
2 correspondence informing them of her belief that Mark and Annette were no longer married and that
3 Annette was not entitled to Mark’s benefits (See Ex. 5). Ms. Modin sent Marina correspondence
4 dated August 14, 2013 informing her that at the time of Mark’s death there was no record of him
5 ever filing a written Beneficiary Designation Form with CalPERS. (Id.). This letter further states
6 “during a telephone conversation nearly a month ago (July 16, 2013), our staff offered you the
7 opportunity to search through your son’s personal records to look for any signed and dated writing
8 such as a will or trust which shows your son’s intention to designate a beneficiary for the CalPERS
9 death benefits or that specifically disinherits Annette as his beneficiary.” (Id.). Ms. Modin then gives
10 Marina a hard deadline of two weeks to produce a document (Id.). At the conclusion of the letter Ms.
11 Modin instructs Marina to call her direct line if she locates anything and to please address any
12 documents she submits to her attention.

13 After receiving Ms. Modin’s August 14, 2013 letter, Marina searched through four (4) boxes that
14 Mark had in his room, at Marina’s house. Mark was going through a bankruptcy and he had placed his
15 personal papers in those four (4) boxes. (CT, V2, P.80, 6-14). Upon review of the boxes Marina located
16 the June 14, 2010 (See Ex. 15) letter. Rather than call Ms. Modin as requested in her August 14, 2013
17 letter, Marina took the June 14, 2010 letter directly to CalPERS office. (CT, V2, P. 104, 14-25). Marina
18 claims she handed CalPERS the original June 14, 2010 letter along with a copy of Ms. Modin’s
19 August 14, 2013 letter. (CT, VT, P. 107, 15-18). To this date, the original June 14, 2010 letter has never
20 been located (See p. 3, Judge Aspinwall’s Proposed Decision).

21 On August 23, 2013, Attorney Jennifer Mill-Moss sent Ms. Modin correspondence via facsimile
22 informing her that she represents Marina. This letter enclosed a copy of the June 14, 2010 letter and
23 asked that it be considered. (See Ex. 6). After review of the faxed letter Ms. Modin decided to award
24 Mark’s death benefits to Marina.

25 Immediately after receiving and reading the June 14, 2010 letter, Annette realized that Mark
26 did not write the letter. (CT, VT, P. 50, 8-17). Annette had been together with Mark for twenty-three
27 (23) years and knew his handwriting and was positive that he did not write the June 14, 2010 letter. (Id.).

1 **II. Both Forensic Document Experts Determined That Mark Soto**
2 **Did Not Author The Body Of The June 14, 2010 Letter**

3 Forensic Document Examiner Barto determined that Mark Soto did not write the June 14, 2010
4 letter; Rather, Marina did (See Ms. Barto’s Opinion Letter, Ex. 13). CalPERS own Forensic Document
5 Examiner, Mr. Merydith came to the same conclusion as Ms. Barto. Mr. Merydith determined that there
6 were indications Mark Soto did not execute the hand printing exhibited on the June 14, 2010 letter (See
7 Mr. Merydith’s Opinion Letter, Ex. 11). Mr. Merydith testified that that he leaned toward the June 14,
8 2010 letter as not being printed by Mark Soto (CT, V2, P.149, 8-10). He further testified that he found
9 that there were indications, ..., that [Mark Soto] did not execute the body of the June 14, 2010 letter.
10 (CT, V2, P. 162-163, 25 -2; CT, V2, P. 165, 1-3). Mr. Merydith stated “I ultimately determined that
11 there were indications that Mark Soto did not author [the June 14, 2010] note ... I found that there are
12 indications that Mark Soto did not author this ...” CT V1, P. 58, 9-15.

13 Judge Aspinwall concluded that “the expert testimony of Mr. Merydith and Ms. Barto and their
14 respective reports credibly demonstrate by at least a preponderance of evidence that Mr. Soto did not
15 write or sign Q1” (See Judge Aspinwall’s Proposed Decision Letter).

16 **III. Forensic Document Examiner Merydith Determined There Were Many Dissimilarities**
17 **Between The June 14, 2010 Letter And The Known Handwriting Of Mark Soto**

18 Marina testified at trial that Mark Soto hand printed the name Dr. Debose in the “For Section”
19 of check number 8403, dated May 3, 2010, approximately 35 days prior to June 14, 2010.(See Ex. 15)
20 (CT V2, P. 95, 13-19). That fact is undisputed. When Mr. Merydith was asked to compare the
21 known handwriting sample from check 8403 and the June 14, 2010 letter he found many
22 dissimilarities. Mr. Merydith testified that numerous “e’s” printed on the June 14, 2010 letter were
23 dissimilar to the “e” in Debose (the known handwriting of Mark Soto). Specifically, the “e” in Debose
24 was not similar to the way the June 14, 2010 “e’s” were written in the words, “request,” state,”
25 “Hernandez,” and “please.” It is dissimilarities like this that caused Mr. Merydith to opine that Mark
26 Soto did not author the hand written portion of the June 14, 2010 letter.

1 **IV. Forensic Document Examiner Merydith Determined There Were Many Similarities**
2 **Between The Known Handwritings Of Mark Soto**

3 When Mr. Merydith was asked to review two known handwritings of Mark Soto he determined
4 that his writing was consistent and had similarities. Mr. Merydith compared the K3 (See Exhibit 13)
5 letter known to be written by Mark Soto with check number 8403. Mr. Merydith determined that the
6 “e” written in Dr. Debose was similar to the numerous “e’s” printed on the K3 document. Specifically,
7 the “e” in Debose was similar to the way the K3’s “e’s” were written in the words, “make” and “blame.”
8 (CT, V2, P. 161, 3-18).

9 **V. Both Forensic Examiners Determined That The Mark Soto**
10 **Signature On The June 14, 2010 Letter Was Labored**

11 Mr. Merydith testified that the June 14, 2010 signature “... does appear very slow and very
12 labored, and I certainly cannot identify Mark Soto as the author of this signature because of the
13 dissimilarity noted and because of the nature of the signature being, appearing slow and appearing
14 labored.” (CT, V1, P. 57, 3-6). Ms. Barto concurred with Mr. Merydith’s analysis. Ms. Barto testified,
15 “it’s very awkward, slowly written.” (CT, V2, P. 8, 4-5). Which are attributes of a tracing. not
16 belonging to them.” (CT, V1, P.205, 8-12). “If you’re attempting to trace somebody else’s signature,
17 it’s going to be slow, and it’s going to be awkward....” (Id. at 23-24).

18 **VI. Both Forensic Document Examiners Agree There Are Multiple Dissimilarities Between**
19 **The June 10, 2014 Letter And The Known Handwritings Of Mark Soto**

20 Mr. Merydith testified that the letter “U” in the June 14, 2010 letter were constructed with a tail.
21 Whereas, the “U’s” in the known handwritings of Mark Soto did not have a tail. (CT, V1, P. 59, 10-12).
22 “You can see on the bottom in K3, on the bottom right, the word you and the last you there’s an example
23 there. And it does not have a tail on that U.” (Id. at 13-15). Ms. Barto agreed with Mr. Merydith. Ms.
24 Barto determined that the “U’s” in the June 14, 2010 letter drug below the baseline creating a tail. (CT,
25 V1, P. 157, 2-6). Whereas, the known handwritings of Mark Soto did not have this similar “U.”

26 Mr. Merydith stated that there were dissimilarities in the construction of the “A’s”. (CT, V1, P.
27 59, 19). “For the most part the A’s in the Q1 (June 14, 2010) document appear to be made in the, like a
28 number two....However, in the known writing of Mark Soto you can see that the “A’s” are not
 construed like a number two, rather they start over on the left-hand side and make the curl on the left-

1 hand side coming down. But when they get to about three or four o'clock, it stops, and then it moves
2 counter clockwise around and completes the bowl of the A. And these are differences compared to the
3 Q1 (June 14, 2010) document." (CT, V1, P59-60, 21-5). Ms. Barto concurred with Mr. Merydith. Ms.
4 Barto stated that the A's in the June 14, 2010 letter stop at the top with an overhang and then loops
5 around clockwise like a number two. (CT, V1, P130, 7-9).

6 The two forensic experts also determined and agreed with each other that there were
7 dissimilarities in the construction of the letter "N" and "E."

8 **VII. Marina Hernandez Can Not Argue That A Decision About The June 14, 2010 Letter**
9 **Can Not Be Made Because The Original Letter Was Never Examined**

10 Marina's counsel, Ms. Jennifer Miller Moss (Hereinafter "Ms. Moss") attempted to persuade
11 this court at trial via her questioning of Mr. Merydith that a decisive decision about who wrote the June
12 14, 2010 letter could not be made due to the fact that it was a copy and not the original. However, both
13 forensic document examiners determined there were enough dissimilarities between the June 14, 2010
14 letter and the known handwritings of Mark Soto to conclude that he did not write the letter. More
15 importantly, Mr. Merydith determined that there were many dissimilarities between the check (#8403)
16 (which Mark wrote out within approximately 35 days of the June 14, 2010) and the June 14, 2010 letter.

17 In addition, Ms. Modin testified that she determined Mark signed the June 14, 2010 letter. Ms.
18 Modin only had a copy of the June 14, 2010 letter and not the original. Ms. Modin made her
19 determination by comparing Mark's signature on the June 14, 2010 letter to the known signature of
20 Mark on the copy of Marital Settlement Agreement.

21 Ms. Moss' argument is flawed as both forensic document examiners determined there were
22 enough writing samples to make their determination that Mark Soto did not write the body of the
23 June 14, 2010 letter. Moreover, Ms. Moss can't argue that the forensic document examiners can't reach
24 a determination on the June 14, 2010 letter because it was a copy. Specifically, if the forensic document
25 examiners are unable to make a determination then how can Ms. Modin (a person who testified that she
26 is not a handwriting expert or has taken any classes on the subject) make that decision that Mark did
27 in fact sign the June 14, 2010 letter. Ms. Modin testified that she accepted the letter and reversed her
28 decision to pay the death benefits to Annette based on the fact that she determined Mark signed the

1 copy of the June 14, 2010 letter.

2 **VIII. Conclusion**

3 It is undisputed that both forensic document examiners in this case determined that
4 Mark Soto did not write the hand writing portion of the June 14, 2010 letter. It is further undisputed
5 that both forensic document examiners found multiple dissimilarities between the known handwritings
6 of Mark Soto and the June 14, 2010 letter. In fact, Mr. Merydith testified that he found many
7 dissimilarities between the May 3, 2010 check known to be written by Mark Soto and the June 10, 2014
8 letter.

9 Given the many similarities that Mr. Merydith and Ms. Barto found between the known
10 handwritings of Marina and the June 14, 2010 letter, Ms. Barto concluded that Marina was the author of
11 the letter. Marina had approximately six (6) weeks to locate the June 14, 2010 letter. Marina testified
12 she went through the four (4) boxes in Mark's room, that were located in her house, and found the letter.
13 Only after Marina was given a hard deadline to submit documentation to CalPERS did she suddenly
14 locate the letter. Rather than follow Ms. Modin's instructions to contact her directly, Marina decided to
15 take the letter directly to CalPERS and hand them the original letter. Thereafter, Marina hired an
16 attorney and they sent a copy of the letter to Ms. Modin via facsimile. To this day, the original June 14,
17 2010 letter has never been found. Yet, Marina's attorney has argued that since the original letter has
18 not been examined that there can cannot be a conclusive decision about who authored and signed the
19 June 14, 2010 letter. If that is the case, then Ms. Modin erred by accepting the June 14, 2010 letter.
20 Simply, Ms. Modin testified on the stand that she determined the signature on the June 14, 2010
21 letter to be Mark Soto's only after she compared it to another photocopy of one of his known signatures.

22 For the foregoing reasons, Respondent Annette Soto asks this BOARD to uphold Judge
23 Aspinwall's decision to recognize her as the beneficiary of the death benefits payable on Mark Soto's
24 account.

25 Dated: March 28, 2016

Collins, Ritchie & Ervin, LLP

26 By: 

27 Matthew Ritchie
Attorneys for Respondent
28 Annette Soto



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7 BOARD OF ADMINISTRATION

8 CALIFORNIA PUBLIC EMPLOYEE'S RETIREMENT SYSTEM

9 In the Matter of the Application for)
Benefits Payable Upon the Death of)
10 MARK A. SOTO, by)
11 ANNETTE SOTO,)
12 Respondent.)
13 and)
14 MARINA SOTO HERNANDEZ,)
15 Respondent.)

CASE NO. 2014-0370
OAH. NO. 2014-060606
RESPONDENT HERNANDEZ'
ARGUMENT AGAINST
THE PROPOSED DECISION

17 Respondent HERNANDEZ makes her argument against the Proposed Decision in this
18 matter dated March 8, 2016, as follows:

19 1. The administrative law judge incorrectly interpreted the testimony of the CalPERS'
20 expert Mr. Merydith. The administrative law judge made a factual finding that Mr. Merydith
21 testified that a forensic document examiner's level of certainty is measured on a scale of one to
22 nine, with nine indicating the highest level of certainty. He went on to find that on a scale of one
23 to nine, Mr. Merydith's level of certainty is a six that Mr. Soto did not write the body of Q1, and
24 a five that Mr. Soto did not sign it.

25 This was not Mr. Merydith's testimony nor is the finding supported by the facts.

26 Mr. Merydith's testified that he could not determine with any degree of certainty as an
27 expert as to whether Mr. Soto's signature on the beneficiary designation identified as Q1 was
28

1 *genuine, a tracing or a simulation.*

2 He testified that he was not able to make a determination as to signature due to the lack of
3 contemporary known signatures of Mr. Soto and the fact that he only had a copy of the signature
4 to Q1. He testified that there were 5 similarities between the questioned Q1 signature and the
5 known signatures of Mr. Soto which he identified as overall style, height relationships, spacing,
6 and some apparent letter formations. He noted 2 dissimilarities between the known signatures of
7 Mr. Soto and the Q1 signature being the Q1 signature appeared to be very labored and at the
8 beginning stroke of the A contained a stroke that did not appear in the known signatures that he
9 examined.

10 Mr. Merydith testified on cross-examination that the health of Mr. Soto who was known
11 to be an alcoholic and suffering from diabetic neuropathy¹ could have an impact on his signature
12 and could offer an explanation for the Q1 signature being labored and the extra stroke when
13 forming the letter A.² Respondent Hernandez testified that Mr. Soto often needed assistance in
14 writing or even holding a writing instrument.

15 Mr. Merydith testified that after a forensic document examination an opinion is
16 sometimes expressed on a nine-point scale (although he did not base his expert report or
17 testimony on any scale): 1 being identification; 2 strong probability of identification; 3 probable;
18 4 indications did; 5 no conclusion; 6 indications did not; 7 probably did not; 8 strong probability
19 did not; and 9 elimination.

20 The administrative law judge in paragraph 16 of the proposed decision found that Mr.
21 Merydith leaned against the validity of signature to Q1 by assigning it a number 5. Mr. Merydith
22 did not lean against the validity of the Q1 signature. Mr. Merydith did not testify that he
23

24 ¹ Diabetic Neuropathy is defined as nerve damage caused by diabetes, See Mayoclinic.org for definition
25 and symptoms. Respondent Hernandez testified that Mr. Soto suffered from diabetic neuropathy in his hands and
26 legs and often needed assistance with holding a pen and writing.

27 ² See INFLUENCE OF AGE AND ILLNESS ON HANDWRITING: IDENTIFICATION PROBLEMS,
28 *FORENSIC SCIENCE*, 9 (1977) 161-172, Ordway Hilton.

1 assigned any numbers to his opinion but on being pressed by the administrative law judge
2 explained a scale that is used to express an opinion. A "5" is no conclusion so that Mr. Merydith
3 leaned in no direction regarding the signature on Q1. Clearly, according to Mr. Merydith, it very
4 well could be Mr. Soto's signature, or it could be a simulation or tracing (i.e. forgery). Mr.
5 Merydith's examination did not lead him to conclude that he leaned toward the signature not
6 being genuine. He clearly stated that it could be a genuine signature.

7 As to the body of the Q1, Mr. Merydith again stated that he was limited in the number of
8 known printings³ of Mr. Soto to compare to the hand printed portion of Q1. He also testified that
9 hand printing is more difficult to compare than a person's signatures because it can be more
10 varied. Mr. Merydith said that there were "indications" that Mr. Soto did not execute the hand
11 printing in Q1, however, the indications were limited to the letter formations of "a," "e," "u," and
12 "n" and those were not in all instances. For example, the "e" in the two hand printings that Mr.
13 Merydith compared to Q1 were very stylized and clearly not the way a person such as Mr. Soto
14 who attended grammar school in Sacramento, California would have learned to print an "e."
15 These were the only dissimilarities that Mr. Merydith noted between the two examples thought to
16 be hand printings of Mr. Soto and Q1. It was emphasized by Mr. Merydith in his testimony that
17 the samples of hand printing of Mr. Soto that were reviewed were extremely limited and there
18 was no indication as to when such samples were hand printed by Mr. Soto and his finding was
19 less than definitive. Mr. Merydith was specific that he did not use a scale in making his opinion
20 as to whether or not Mr. Soto hand printed Q1, he merely said that there were indications due to
21 some of the letter formation dissimilarities between Q1 and the two samples he reviewed that Mr.
22 Soto did not execute the hand printing contained in Q1. However, using his scale this surely is
23 not the level of certainty that would give rise to a preponderance of the evidence that Mr. Soto
24 did not hand print Q1 given the number of samples he had to compare with Q1 and the fact that
25 he did not have the original Q1.

26
27 ³ Mr. Merydith had two known hand printings of Mr. Soto neither of which were dated.

1 Mr. Merydith's testimony did not establish by a preponderance of the evidence that Mr.
2 Soto did not sign Q1. Nor did his testimony establish by a preponderance of the evidence that
3 Mr. Soto did not hand print Q1, as he testified that there were some dissimilarities of certain
4 letter formations (but not all letter formations of the same letter were dissimilar) but emphasized
5 that his finding was not definitive.

6 2. The administrative law judge abused his discretion by allowing the testimony of
7 Respondent Soto's handwriting expert who did not have the proper credentials or training to
8 testify. Ms. Barto is not a certified forensic document examiner who is certified by the American
9 Board of Forensic Document Examiners, she has never worked for any state agency or
10 government in the area of document examinations. See *United States v. Michael Stefan Prime*
11 (2004) 220 F. Supp. 2d 1201, a Ninth Circuit Court of Appeals case outlining the use of expert
12 opinions by hand writing experts and credentials.

13 3. The administrative law judge abused his discretion as Ms. Barto's conclusions were
14 not supported by the evidence. Ms. Barto testified very little as to Mr. Soto's signature other
15 than it was labored and the additional stroke was on the letter "A" similar to the testimony of Mr.
16 Merydith. But, she nevertheless determined that this was enough to determine that Mr. Soto did
17 not sign Q1. Her level of certainty is questionable given the number of documents she had to
18 compare and the obvious blunders in the use of her laboratory admitted to in her testimony. She
19 clearly was neither qualified to testify nor reviewed this in a non basis manner. She was hired by
20 Respondent Soto and told what opinion she needed to give. Here the two experts were
21 completely at odds in their testimony but the administrative law judge incorrectly determined that
22 they were not at odds in his decision. Ms. Barto testified that illness would have no effect on
23 one's signature and she stated this based upon the biology classes she had taken and her own
24 anecdotal observations of a few ill or elderly persons' handwriting. She had no knowledge of any
25 peer reviewed articles on this subject despite having cited to the rules of document examination
26 the author of which is Ordway Hilton, who has written articles on the effect of illness on
27 handwriting and the difficulties it provides in document examination as identified in Footnote 2
28

1 herein.

2 For the above reasons, the determination of CalPERS that the June 14, 2010, beneficiary
3 designation determined by CalPERS to have been executed by Mr. Soto should be upheld and the
4 proposed decision of the administrative law judge should not be adopted as he completely
5 misconstrued the testimony of CalPERS' handwriting expert who never stated that Mr. Soto did
6 not sign the June 14, 2010, beneficiary designation or that he was even leaning in that direction;
7 allowed the testimony of Respondent Soto's expert who is not qualified and whose laboratory
8 and documents were by her own admission replete with mistakes in copying; and who was
9 willing to testify as a medical expert and did attempt to so testify.

10 Date: May 6, 2016

Respectfully submitted,

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12 JENNIFER MILLER MOSS, Attorney for
13 Respondent HERNANDEZ
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PROOF OF SERVICE

I am a citizen of the United States and am employed in the County of Sacramento, California. My business address is 701 University Avenue, Suite 100, Sacramento, CA 95825. I am over the age of 18 years and not a party to the above-entitled action.

I am familiar with MOSS & LOCKE's business practice whereby each document is placed in an envelope, the envelope is sealed, the appropriate postage is placed thereon and the sealed envelope is placed for mailing in the office. Each day's mail is collected and deposited in the U. S. Mail postbox at or before the close of each day's business.

On February 5, 2016, I served the within

RESPONDENT MARINA HERNANDEZ' POST HEARING CLOSING ARGUMENT

BY MAIL on the following:

ELIZABETH YELLAND
CalPERS - Legal Office
PO Box 942707
Sacramento, CA 94229-2707

MATTHEW RITCHIE
COLLINS RITCHIE & ERVIN, LLP
331 J Street, Ste. 200
Sacramento, CA 95815

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on February 5, 2016, at Sacramento, California.

JULIE E. HITT

INFLUENCE OF AGE AND ILLNESS ON HANDWRITING: IDENTIFICATION PROBLEMS*

ORDWAY HILTON

Examiner of Questioned Documents, 15 Park Row, New York, N.Y. 10038 (U.S.A.)

(Received January 1, 1977; accepted January 21, 1977)

Handwriting identification and the determination of authenticity of signatures is a complex subject. When the writing has been prepared by an elderly person or during a serious illness, the problem can become more difficult. Document examiners normally expect, in problems involving the writing of the elderly or of the seriously ill, to encounter a deteriorated writing. Many times this is the case. However, a number of elderly people continue to write a very fluent and vigorous handwriting, and their signature may not even suggest advanced age. By the same token, not all handwriting and signatures of ill persons reveal any decline, but in those instances in which there is deterioration, the examiner is confronted with special considerations. This paper will concern itself with writing of this latter class.

We must recall that handwriting is an acquired skill. It involves muscular action and the individual's reflexes. Writing is not entirely automatic, even with the most developed writing, and the writer must constantly think ahead as to what he is writing and, in some measure, how the writing is to be accomplished. Good writing involves good vision, extensive training to develop writing skill, and a certain ability which is not everyone's, to produce a really clear and legible and well designed writing. The writing instrument is moved by the hand, arm, and wrist muscles in cooperation, and these are coordinated by certain developed reflexes directed by the brain, and with the developed writer almost automatic brain messages, to form letters. Of course, not every writer reaches this plateau in his writing.

Once the finely developed or partially developed system of brain, nerve and muscle interaction involved in writing becomes weakened, the quality of writing will deteriorate. Aging involves a gradual decline of the body which, in time, may affect the writing control system and, consequently, may lead to an inferior form of writing. It must be recognized though that this deterioration is not a straight downward decline but rather is an irregular movement which gradually reaches a lower level of skill and writing ability. However, *en route* there will be examples of certain days of extremely poor writing, while on subsequent days there may be a return to or almost to an earlier skill of writing.

*Prepared for the 1975 Annual Meeting of the American Society of Questioned Document Examiners.

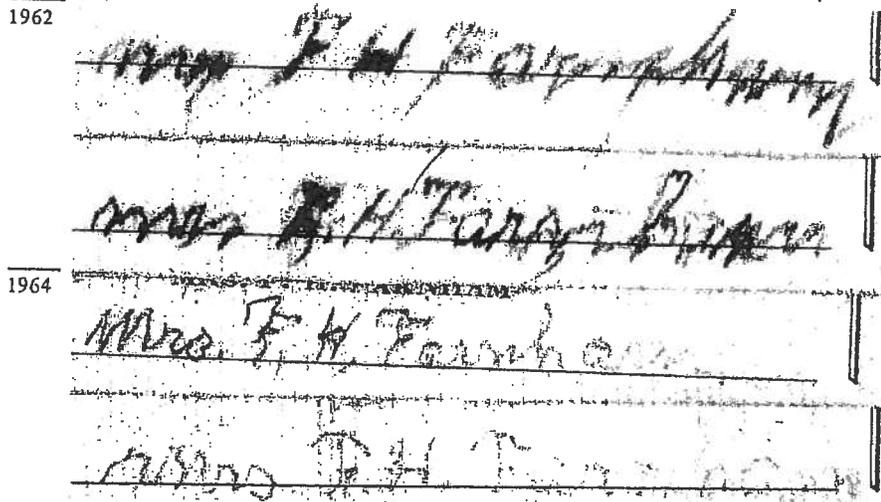


Fig. 1. The upper two Farnham signatures were written in 1962 while the lower two were written in 1964. Mrs. Farnham had suffered from palsy for a great number of years. In early 1964, her physician prescribed a tranquilizer (Valium) to relieve some of the tremors of palsy.

This medication had significant effects on her writing. In the earlier signatures, there were numerous uncontrolled, free strokes that show beneath the signature, and the irregular movement within letters forming the jagged outlines were typical. The medication did not completely smooth out the writing, but it did eliminate the lower projections and improved the writing a little. The influence of medication on writers suffering from illnesses may have a significant effect on the handwriting.

By the same token, certain types of illness can lead to a similar decline in this finely developed writing system. They would include illnesses which affect the nervous system or cause a serious weakening of muscular control, such as Parkinson's disease or Palsy or strokes which affect the writer's writing hand arm. Debilitating diseases such as advanced stages of cancer cause serious decline in writing ability comparable to the overall physical weaknesses. Injuries to the writing hand or arm which in any way limit its movement may also influence handwriting. Minor arthritis may have little effect on handwriting, but in more serious attacks as the disease affects the movement of fingers and the hand, restriction in free writing movement should be expected. It is impossible to detail all of the physical illnesses and injuries which are reflected in writing deterioration, but one additional condition, advanced stages of blindness or near blindness, has a sharp influence on writing. The writing becomes larger, less accurately formed and baseline alignment becomes irregular with an inability to keep lines of writing carefully separated. With all physical handicaps there occurs a general deterioration in the writing, affecting the quality or smoothness of execution, the design of letters, baseline alignment, slant, and in fact all identifying characteristics in some degree or other especially in the most extreme cases. With

Questioned deed, 1961 *Lottie Brodginiski*

Known bond, Dec., 1958 *Lottie Brodginiski*

Mortgages Dec., 1958 *Lottie Brodginiski* (SI)

Bill of sale Aug., 1957 *Lottie Brodginiski*
AUTHORIZED SIGNATURE
Lottie Brodginiski
AUTHORIZED SIGNATURE
BUSINESS ADD. *Lottie Brodginiski* BUSINESS A
EVIDENCE *Lottie Brodginiski* RES

Bank cards Dec., 1946 *Lottie Brodginiski*

Fig. 2. The upper signature of Lottie Brodginiski was written during her final illness in 1961. The only known signatures were those written before this illness, four of which are shown below. The deterioration of the 1961 signature consists of less accurately formed letters, poor alignment to the ruled baseline, and irregularity in slant. Note, particularly, the slant of the staffs of the "d" and "k".

many types of illness the deterioration is temporary, and when the person recovers his health, his writing resumes its former level of skill, as opposed to aging in which deterioration can only be reversed in a degree for short periods of time.

During long, lingering illnesses as is true of aging, there can be both periods of decline followed by temporary recovery. Usually, documentation of these conditions is difficult since a person seldom writes a great deal during periods of illness. In fact, one of the greatest difficulties in handling many of these writing problems is the lack of comparable writing standards, that is, sufficient specimens executed during illness.

A significant contributing factor to the deterioration of writing is that it was executed while the writer was confined to bed. Under these circum-

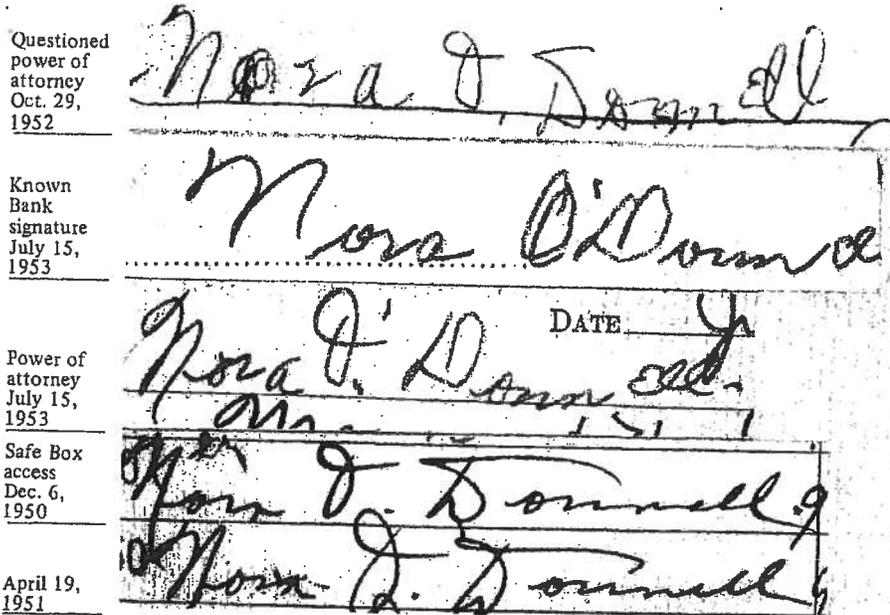


Fig. 3. The Power of Attorney signature of October 29, 1952 was written during the period of serious illness. The deterioration of the signature is typical of this class of writing. Note the not too accurate overwriting of the "o" of Nora, the interruptions between letters of the first name, the poor baseline alignment, and the insertion of the first "n" in Donnell. In correcting this omission both the beginning stroke on the left and the ending stroke on the right project beyond the original writing and fail to make an accurate joining.

No other signature was written during this period of illness. Nora O. Donnell's signatures written on a safe box access card prior to illness appear in the lower panel. Two 1953 signatures were written in July after illness and show some deterioration due to weakness of age. Nora O. Donnell died in the fall of 1953.

stances, the inability to write well is greatly influenced by the unusual writing conditions. However, this may be a highly personal and individual situation. If a person is propped up in a hospital bed, for example, with the document resting on a mobile hospital table or tray in front of him, some writers will produce an extremely poor signature while others may be able to write reasonably well. In part, this depends upon whether the individual writes almost exclusively with the finger movement, or whether he writes with a combination arm and wrist movement as well. With the former manner of writing, the poor position is less confining; while with the latter, it is a serious obstacle. Normally, deterioration is to be expected in these circumstances, but the less frequent case can be encountered in which it may only be slight.

How do age and illness affect handwriting? When there is deterioration, it may be very similar in both sets of circumstances. The writing becomes less coordinated, declining in skill, in legibility, in design and in smoothness

ion.

Questioned
Nov. 7, 1972

nedx Nat Green
SUITIME, INC.

Known
checks
Jan. 23, 1973

Nat Green
SUITIME, INC. AUTHORIZED

Jan. 25, 1973

Nat Green
AUTHORIZED

d in the computation of interest or discount,
on hereof.

Ed Se...

Notes
Nov. 13, 1972

Nat Green

1. If the time for payment of this note shall be
ed in the computation of interest or discount,
sion hereof.

Ed Se...

Dec. 11, 1972

Nat Green

Fig. 4. The upper Nat Green signature was written just before Mr. Green was transferred out of intensive care following a serious heart attack. Compared to the signatures written before and after the illness, there is little to suggest his poor physical condition. The two names intersect whereas this was an extremely rare condition among his known signatures. (The third signature is the only example among over 100 known specimens.) There is some slight distortion of the small "r" in Green. These conditions of the signature might well have been brought about by his writing position, propped up in bed, when he signed the document.

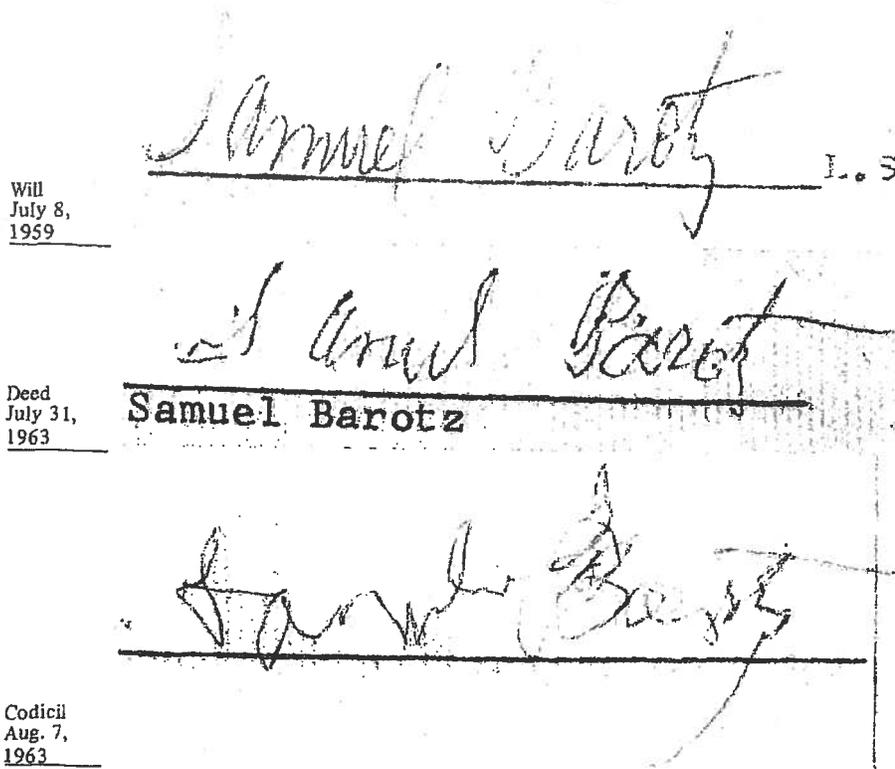


Fig. 5. The decline in Samuel Barotz's signature between 1957 and June 1963 can be observed by comparing the first and second signature. During his final illness in August 1973, he signed a codicil two days before death.

of execution. It develops uncertainties and lack of uniformity. With illness, this decline often occurs very rapidly. With aging it may be a gradual condition unless the fast development of it results from a form of illness which saps the strength of the individual from which he never regains his original vigor.

Regardless of the cause of deterioration, the document examiner is concerned with what can happen to a person's writing and how signatures and general writing of this kind may differ from forgeries. With the decline in muscular coordination and the introduction of physical weakness, it has been pointed out that writing skill is lost. The writing produced becomes less legible, less smoothly written, and rather erratic even in the case of a simple signature. If specimens are available which are written on more than one occasion, the range of variation is expanded. Parts of the writing may give the appearance of greater effort in execution, that is a less apparent automatic writing quality. It is important to understand that the decline in form and quality of execution are interrelated. To state this rule some-

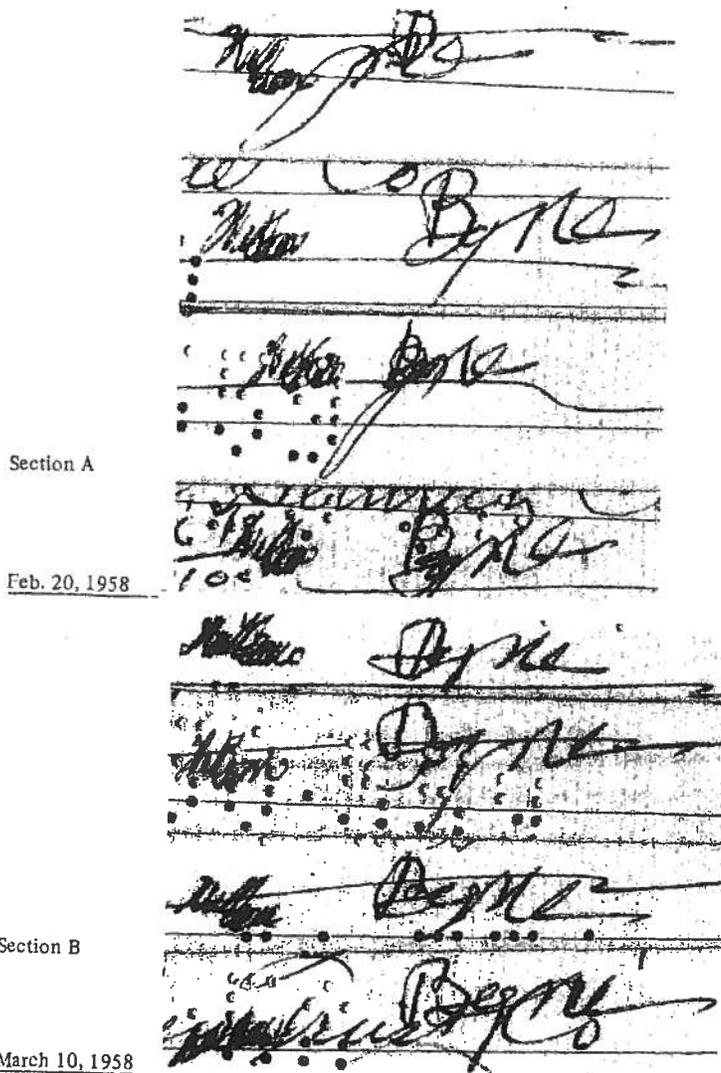


Fig. 6. William Boyne's signatures on checks of two different dates show sharp differences in variation between signatures written on one day as opposed to the variation between those of another day. The signatures in section A represent four checks written on February 20, 1958. Note the sharp variation in execution especially in the name Boyne between the first and second signatures.

In Section B all four signatures were written on March 10, 1958. Here there is greater consistency between the four signatures. These sets of signatures also illustrate the difference of writing ability on different dates. One can observe a slight improvement in March although three weeks earlier the quality of writing was poorer.

In all instances and with many of Boyne's checks, the signatures were not written in the designated area but were written a line above where the amount of the check was entered. This is the cause of the interfering writing in the last signature of each group and the wavy line running through the other signatures.

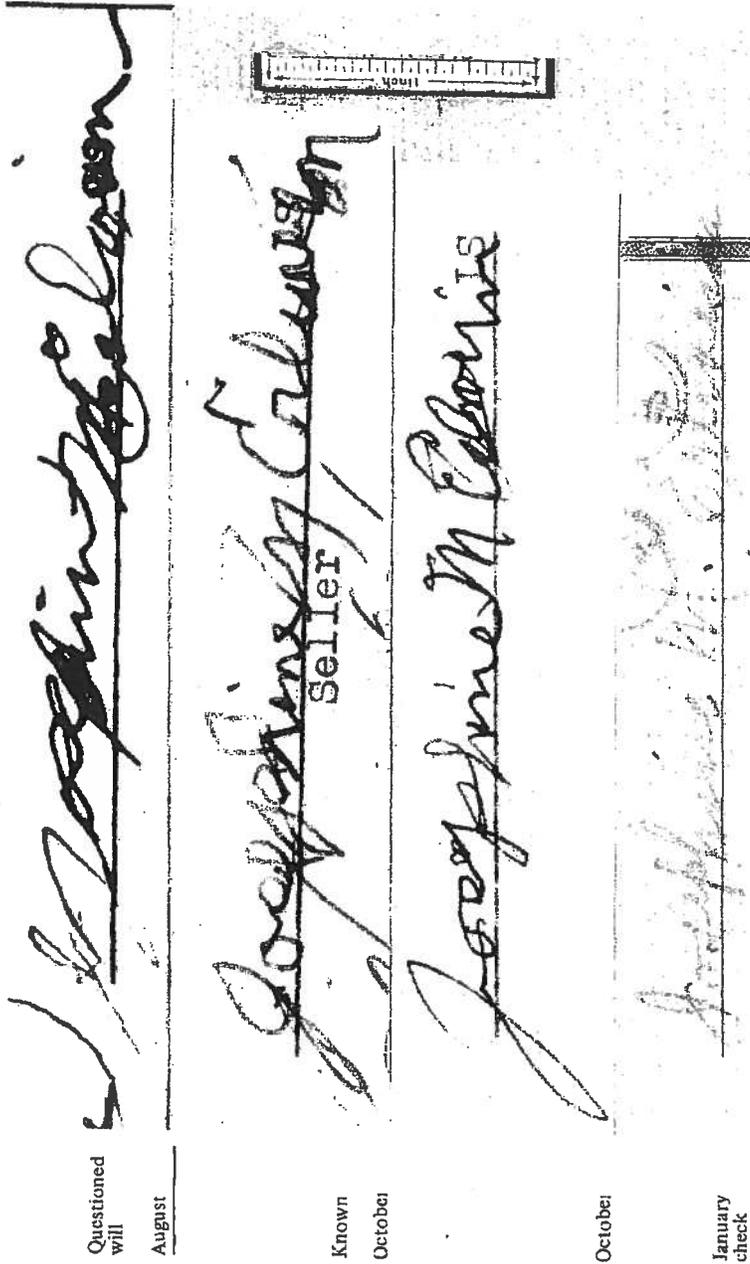


Fig. 7. The Josephine Erlwein will signature contains typical evidences of writing of an elderly person in poor health. There are two false starts at the beginning of this signature where the writer attempted to begin the "j". There is confusion of strokes in the "ph" of Josephine and of the middle initial "M" and the "E" of Erlwein. Further confusion of strokes involves the omission of part of the "w" and the other letters at the end of this signature. The will is dated in August. The following two signatures were written subsequently in October shortly before her death while the fourth signature represents her earlier signatures when the writer was in good health.

what differently, under the condition described, all aspects of the signature are less skillfully executed. If only form is affected, then the examiner must look for some other reason, and the same would hold true for the quality of writing.

In an attempt to better understand the defects of this class of writing, it is well to look at the faults of the more extreme examples. One of the more common faults of writing by the elderly and the seriously ill is the difficulty with which a writer starts his signature. One is quite apt to find among this class of signatures one or more false starts. A partial, often erratic stroke or two may accompany the final effort when the first letter of the name is finally completed. A second quality of these signatures is the uncontrolled impulses within the signature. These are characterized by a stroke moving off at an odd angle or direction that apparently is completely uncontrolled by the writer. At times, the pen will move a short distance to the left and back again to the right, and then continue the letter form. The direction can be up and down just as well as left to right or right to left. Writing of this nature is particularly common to individuals whose signatures or general writing display a pronounced tremor or a series of erratic writing impulses.

Writing of this nature, even the poorest, has its instances of free release, that, while the writer may write most of his name or other writing with heavy, slow and poorly controlled movement when, for example, he reaches the end of the word, there can be a more smoothly or freely and more rapidly written final letter or stroke. These releases are most apt to occur at the end of a segment of writing, but from time to time they may occur within one name of a signature.

Irregularity in pen control can be displayed either at points within the signature or throughout its entirety. In writing of this class, it is somewhat common to find the proportions of certain compound letters modified to a marked degree. Lower and upper projections can become erratic, whereas the writer in earlier specimens executed these portions of his writing with significant uniformity.

Of course, letter forms may go badly astray. Normally, this class of writer will make no effort to improve the form but, upon occasion, he may add a stroke in an attempt to correct a defect. However, with his low ability to control original forms, he has equally low ability to retouch or correct his writing with any degree of accuracy. If he is lucky enough to begin the correcting stroke in good register with the original line, it is quite unlikely that it will terminate exactly as it should in good register with another part of the letter. Carefully and neatly made corrections are beyond his reach, and if found in the writing, raise serious suspicions as to the authenticity. In many respects, writing of the class under consideration can suggest the writing of a learner or partially literate individual who never developed any real writing ability. However, if we are dealing with more extreme cases of deterioration, the general form of the writing will be so poor as to suggest that this certainly could not be the writing of an undeveloped hand.

Slant of deteriorated writing is apt to differ significantly from what had been the normal habit of the writer in previous years. It is not unusual to find the deteriorated writing with a more vertical slant than before, but other modifications are encountered in some cases. The vertical writing suggests that of a person learning to write which is in keeping with the similar observation made in relationship to form. With certain writers the slant, even within a signature, may vary again, showing the lack of control over the entire writing process.

With some writers, and particularly the elderly, one is apt to find repetition of letters, parts of letters, or several letters of a signature within a particular specimen. By the same token, part of the name may be omitted. The writer appears not to be particularly conscious of having produced this kind of signature, for they are not uncommon among both known and questioned decrepit signatures. For the most part, they are completely without evidence of any attempt to correct the defect.

In contrast to all of these considerations, we find things within this writing that are completely inconsistent with imitated forgery. The forger is attempting at least to make his writing product pictorially like its model, but writing of this deteriorated class does not closely duplicate earlier writing of the same individual, even that written a few hours or a few days earlier, and the more seriously defective reveals design variables which are completely inconsistent with imitation. The erratic speed factor in the writing is not a part of forged signatures. Deteriorated writing may still have change of pressures on upstrokes and downstrokes, whereas forgeries are often characterized by a slow, uniform, heavy stroke that varies little in its intensity, regardless of the pen direction. The uncontrolled, abrupt directional changes found in deteriorated writing are often unnaturally imitated with slower, less impulsive strokes, while the uncontrolled tremor of age may become a more measured, uniformly controlled "tremor" in the forger's hand. These latter differences are subtle and difficult to analyze, and even more difficult to demonstrate to the layman, judge, or jury. In some respects deteriorated writing may be more difficult to imitate than normal writing.

With a series of signatures, and this would be particularly true of elderly writers, the signatures may show overall gradual deterioration. However, with a large quantity arranged chronologically, one will find that the deterioration is far from a straight line. There will be periods when it progresses very rapidly, there will be periods in which there is little change, and there can be occasional small groups of signatures within the assembled whole which show improvement compared with those immediately before.

Apparent improvement may be found among one or two signatures on a particular day, with others of the same date more poorly written and consistent with those written a few days earlier or later. But, of course, those elderly persons whose physical strength is declining are known to have their "good days" and "good hours" during a particular day so it is not surprising that their writing reveals similar traits.

The whole problem of variation can be perplexing. With a quantity of writing, and in most cases this is lacking and known specimens are very limited, one can begin to construct a pattern of expected variation. But as writing deteriorates, abnormal variables become more likely. In other words, because of the greater normal variation and the general low quality of execution, non-genuineness cannot be established by minor divergencies, especially in form. Nevertheless, signatures of this class are forged, but they are detected by instances of inconsistent qualities of execution, letter forms which are completely foreign to the writer's present or earlier habits, or elements of the signature which are beyond the capacity of the writer in this point of life.

Can the document examiner make any estimate as to the extent of deterioration due to age which might be found in specific handwriting? Can he use this condition to estimate age of the writer? Probably not. Based upon experience, there seems to be no likely age at which one should expect deterioration in any large segment of the population. Deterioration is a very personal factor. It is interrelated with illness as well. Some people become old and weak in their 50's and 60's, others maintain their vigor into their late 80's and 90's. It was this writer's privilege to correspond with a very active individual over the last 10 or 12 years of his life. He died at the age of 101 and his handwriting, except for his style, never suggested his advanced age. Thus, if it is not possible to estimate when to expect deterioration to first appear, even with some knowledge of a writer's physical condition, it is certainly not likely that the examiner can forecast the extent of deterioration which should be expected in his writing.

In the case of an illness an examiner cannot arbitrarily say that because of a particular illness the person's writing will deteriorate in any particular way or to any particular extent. However, once he has some known specimens, he is able to judge whether other writings of the same period could have been written by the person about the date claimed. To handle problems of this class accurately, the document examiner needs actual writing during the illness upon which to base his judgments. In contrast, however, if a deteriorated signature is questioned and no standards of the period of illness or advanced age are available, the examiner may still be able to judge whether it could be consistent with the writer's physical condition.

This paper has considered the more extreme effects of illness and age on writing. There are a number of problems in which the decline in writing ability is less pronounced. Nevertheless, the same factors are at work, and all of the deterioration factors and manifestations do occur to some degree. The known writing of the period is a guide as to what to expect, but unless these specimens are extensive, an individual sample can contain some unaccounted for factors. Problems of this class involve special consideration and careful interpretation of the observed facts to reach accurate conclusions.

REFERENCES

- 1 Wilson R. Harrison, *Suspect Documents*, pp. 407-409.
- 2 Ordway Hilton, Influence of serious illness on handwriting identification, *Postgrad. Med.*, 19 (1956).
- 3 Ordway Hilton, Consideration of the writer's health in identifying signatures and detecting forgery, *J. Forensic Sci.*, 14 (1969) 157-166.

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MICHAEL STEFAN PRIME,
Defendant-Appellant.



No. 02-30375
D.C. No.
CR-01-00310-RSL
ORDER AND
AMENDED
OPINION

Appeal from the United States District Court
for the Western District of Washington
Robert S. Lasnik, District Judge, Presiding

Argued and Submitted
February 4, 2004—Seattle, Washington

Filed April 16, 2004
Amended December 14, 2005

Before: Stephen S. Trott, Richard A. Paez, and
Marsha S. Berzon, Circuit Judges.

Opinion by Judge Trott

COUNSEL

Anna M. Tolin, Siderius Lonergan & Martin, Seattle, Washington, for the defendant-appellant.

Michael T. Sennott, Siderius Lonergan & Martin, Seattle, Washington, for the defendant-appellant.

Bruce F. Miyake, Assistant United States Attorney, Seattle, Washington, for the plaintiff-appellee.

ORDER

Pursuant to the United States Supreme Court order vacating the judgment and remanding this case back to this Court for further consideration in light of *Booker v. United States*, 543 U.S. ___ (2005), the Opinion filed April 16, 2004, slip op. 4979, and appearing at 363 F.3d 1028 (9th Cir. 2004), is amended as follows:

On page 1038 of the Opinion, delete **AFFIRMED** and in its place insert the following terminal paragraphs:

Because the defendant was sentenced under the then-mandatory Sentencing Guidelines, and because we cannot reliably determine from the record whether the sentence imposed would have been materially different had the district court known that the Guidelines were advisory, we remand to the sentencing court to answer that question, and to proceed pursuant to *United States v. Ameline*, 409 F.3d 1073, 1084 (9th Cir. 2005) (en banc). See also *United States v. Moreno-Hernandez*, 419 F.3d 906, 916 (9th Cir. 2005) (“[D]efendants are entitled to limited remands in *all* pending direct criminal appeals involving unpreserved *Booker* error, whether constitutional or nonconstitutional”).

Conviction **AFFIRMED**; sentence **REMANDED**.

OPINION

TROTT, Circuit Judge:

I**OVERVIEW**

Michael Prime ("Prime") was charged with, and convicted of, one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 371; one count of conspiracy to manufacture counterfeit securities, in violation of 18 U.S.C. § 371; and three counts of possessing, manufacturing, and uttering counterfeit securities, in violation of 18 U.S.C. § 513(a). Prime raises four issues on appeal: 1) whether the district court properly denied his motion for a *Franks* hearing;¹ 2) whether the court abused its discretion in allowing the testimony of an expert handwriting analyst; 3) whether the court abused its discretion in not allowing Prime to substitute counsel; and 4) whether the jury's potential exposure to extrinsic evidence was grounds for a new trial. We have jurisdiction under 28 U.S.C. § 1291, and we affirm all of the district court's orders and decisions.

II**BACKGROUND**

Between April and June 2001, Prime, along with three co-conspirators, David Hiestand ("Hiestand"), Juan Ore-Lovera,

¹In order to receive a *Franks* hearing, the defendant must make a non-conclusory and "substantial preliminary showing" that the affidavit contained actual falsity, and that the falsity either was deliberate or resulted from reckless disregard for the truth." *United States v. Chesher*, 678 F.2d 1353, 1360 (9th Cir. 1982) (citing *Franks v. Delaware*, 438 U.S. 154, 171 (1978)). There is no evidence that the immaterial inaccuracies contained in the affidavit were either deliberate or made with reckless disregard for the truth, and thus this issue on appeal is without merit.

and Jeffrey Hardy, sold non-existent items on eBay, purchased items using counterfeit money orders created by the group, sold pirated computer software, and stole credit card numbers from software purchasers. To facilitate this operation, Prime and his cohorts used a credit card encoder to input the stolen data on their own credit cards, set up post office boxes under false names, manufactured false identifications, and used a filter bank account to hide proceeds of the crimes.

At trial, numerous victims testified as to the details surrounding how they had been defrauded by Prime's various scams. In addition, co-conspirators Hiestand and Hardy both extensively testified as to the details of the conspiracy, implicating Prime in all of the crimes charged. The prosecution also elicited the expert opinion of Kathleen Storer ("Storer"), a forensic document examiner with the Secret Service. She testified that Prime was the author of as many as thirty-eight incriminating exhibits, including envelopes, postal forms, money orders, Post-it notes, express mail labels and postal box applications. Prime took the stand in his own defense and claimed that despite all of the evidence linking him to the various scams, including admissions that his fingerprints were on several items linked to the crimes, he was simply attempting to engage in legal entrepreneurial ventures. Prime also confirmed that he had previously been convicted of first and second degree theft, two counts of possession of stolen property in the second degree, and forgery. The jury found Prime guilty on all counts.

Prime moved for a new trial based on the improper submission of extrinsic evidence to the jury. The district court denied the motion, and this appeal follows.

III

ADMISSIBILITY OF EXPERT TESTIMONY

Prime moved in limine to exclude Storer's expert testimony. The court held a *Daubert* hearing where both sides

were allowed to offer voluminous materials and expert testimony regarding the reliability of the proposed testimony. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). After careful consideration, the court denied the motion, see *United States v. Prime*, 220 F. Supp. 2d 1203 (W.D. Wash. 2002), and Storer testified that, in her opinion, Prime's handwriting appeared on counterfeit money orders and other incriminating documents. On appeal, Prime contends that the admission of expert testimony regarding handwriting analysis was unreliable under *Daubert*, and thus the court abused its discretion by allowing Storer to testify.

Handwriting Analysis

[1] In *Daubert*, the Supreme Court set forth the guiding principle that "under [Federal Rule of Evidence 702]² the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589. In order to assist the trial courts with this task, the Court suggested a flexible, factor-based approach to analyzing the reliability of expert testimony. *Id.* at 593-95. Although not an exclusive list, these factors include: 1) whether a method can or has been tested; 2) the known or potential rate of error; 3) whether the methods have been subjected to peer review; 4) whether there are standards controlling the technique's operation; and 5) the general acceptance of the method within the relevant community. *Id.* at 593-94.

[2] *Kumho Tire Co. v. Carmichael* resolved any post-*Daubert* uncertainty that the trial judge's responsibility to keep unreliable expert testimony from the jury applies not only to "scientific" testimony, but to all expert testimony. 526

²"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise . . ." FED. R. EVID. 702.

U.S. 137, 148 (1999). As a result, this “basic gatekeeping obligation” applies with equal force in cases, such as this one, where “non-scientific” experts wish to relate specialized observations derived from knowledge and experience that is foreign to most jurors. *Id. Kumho Tire* also makes it clear that “the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable,” as well as the ultimate determination of whether the proposed expert testimony is reliable. *Id.* at 152. Accordingly, we review the district court’s decision to admit or deny expert testimony for abuse of discretion. *Id.*

In accordance with *Kumho Tire*, the broad discretion and flexibility given to trial judges to determine how and to what degree these factors should be used to evaluate the reliability of expert testimony dictate a case-by-case review rather than a general pronouncement that in this Circuit handwriting analysis is reliable. As the Supreme Court concluded,

we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.

Id. at 150; see also *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000) (quoting *Skidmore v. Precision Printing and Packaging, Inc.*, 188 F.3d 606, 618 (5th Cir. 1999) (“Whether *Daubert*’s suggested indicia of reliability apply to any given testimony depends on the nature of the issue at hand, the witness’s particular expertise, and the subject of the testimony. It is a fact-specific inquiry.”) (internal citations omitted)).

In this case, Storer was given 112 pages of writing known to be Prime’s, 114 pages of Hiestand’s, and 14 pages of

Hardy's. She was then asked whether the handwriting on 76 documents associated with the alleged conspiracy, such as envelopes, postal forms, money orders, Post-it notes, express mail labels and postal box applications, belonged to any of the co-conspirators.³ Storer "identified" Prime's handwriting on 45 of the documents.

Following the *Daubert* hearing, the district court issued a brief order concluding that the proposed forensic document examination testimony was reliable. After the conclusion of the trial, the district court issued a more detailed Order Regarding Defendant's Motion in Limine, which thoroughly and specifically analyzed the reliability of Storer's testimony with respect to each of the *Daubert* factors. *See Prime*, 220 F. Supp. 2d 1203.

1. *Whether the theory or technique can be or has been tested*

Handwriting analysis is performed by comparing a known sample of handwriting to the document in question to determine if they were written by the same person. The government and Storer provided the court with ample support for the proposition that an individual's handwriting is so rarely identical that expert handwriting analysis can reliably gauge the likelihood that the same individual wrote two samples. The most significant support came from Professor Sargur N. Srihari of the Center of Excellence for Document Analysis and Recognition at the State University of New York at Buffalo, who testified that the result of his published research was that "handwriting is individualistic." With respect to this case in particular, the court noted that Storer's training credentials in the Secret Service as well as her certification by the American Board of Forensic Document Examiners were "impeccable."

³Prime has not raised as an issue, and we have no reason to believe, that the questioned writing samples were of insufficient length to support a valid analysis.

The court also believed that Storer's analysis in this case was reliable given the "extensive" 112 pages containing Prime's known handwriting.

2. *Whether the technique has been subject to peer review and publication*

The court cited to numerous journals where articles in this area subject handwriting analysis to peer review by not only handwriting experts, but others in the forensic science community. Additionally, the Kam study, *see infra*, which evaluated the reliability of the technique employed by Storer of using known writing samples to determine who drafted a document of unknown authorship, was both published and subjected to peer review. The court also noted that the Secret Service has instituted a system of internal peer review whereby each document reviewed is subject to a second, independent examination.

3. *The known or potential rate of error*

In concluding that the type of handwriting analysis Storer was asked to perform had an acceptable rate of error, the court relied on studies conducted by Professor Moshe Kam of the Electrical and Computer Engineering Department at Drexel University. Professor Kam's studies demonstrated that expert handwriting analysts tend to be quite accurate at the specific task Storer was asked to perform — determining whether the author of a known writing sample is also the author of a questioned writing sample. When the two samples were in fact written by the same person, professional handwriting analysts correctly arrived at that conclusion 87% of the time. On the other hand when the samples were written by different people, handwriting analysts erroneously associated them no more than 6.5% of the time. While Kam's study demonstrates some degree of error, handwriting analysis need not be flawless in order to be admissible. Rather, the Court had in mind a flexible inquiry focused "solely on principles and methodology,

not on the conclusions that they generate.” *Daubert*, 509 U.S. at 595. As long as the process is generally reliable, any potential error can be brought to the attention of the jury through cross-examination and the testimony of other experts.

4. *The existence and maintenance of standards controlling the technique’s operation*

The court recognized that although this area has not been completely standardized, it is moving in the right direction. The Secret Service laboratory where Storer works has maintained its accreditation with the American Society of Crime Laboratory Directors since 1998, based on an external proficiency test. Furthermore, the standard nine-point scale used to express the degree to which the examiner believes the handwriting samples match was established under the auspices of the American Society for Testing and Materials (“ASTM”). The court reasonably concluded that any lack of standardization is not in and of itself a bar to admissibility in court.

5. *General acceptance*

The court recognized the broad acceptance of handwriting analysis and specifically its use by such law enforcement agencies as the CIA, FBI, and the United States Postal Inspection Service.

[3] Given the comprehensive inquiry into Storer’s proffered testimony, we cannot say that the district court abused its discretion in admitting the expert handwriting analysis testimony. The district court’s thorough and careful application of the *Daubert* factors was consistent with all six circuits that have addressed the admissibility of handwriting expert testimony, and determined that it can satisfy the reliability threshold. See *United States v. Crisp*, 324 F.3d 261, 269-70 (4th Cir. 2003); *United States v. Mooney*, 315 F.3d 54, 63 (1st Cir. 2002); *United States v. Jolivet*, 224 F.3d 902, 906 (8th Cir. 2000); *United States v. Paul*, 175 F.3d 906, 911 (11th Cir.

1999); *United States v. Jones*, 107 F.3d 1147, 1161 (6th Cir. 1997); *United States v. Velasquez*, 64 F.3d 844, 850-52 (3d Cir. 1995).

IV

SUBSTITUTION OF COUNSEL

On November 29, 2001, four days before trial was set to begin, Prime filed a motion to substitute counsel, which the district court granted. The trial was continued to accommodate the newly-appointed counsel, Lee Covell ("Covell"), and after an additional stipulated continuance, was set for May 20, 2002. On May 9, 2002, at Prime's request, Covell filed an ex parte motion to withdraw and substitute counsel. The following day the court held a closed-court inquiry without the prosecution to address this request. After hearing from both Prime and Covell, the court denied the motion.

Four days before trial, Prime filed yet another motion for substitution of counsel. On the morning of trial, just before the proceedings were set to begin, John Rosellini ("Rosellini"), Prime's privately retained attorney, appeared before the court requesting, pursuant to this motion, that he be substituted as counsel on the condition that a 120-day continuance be granted. The court denied this motion as well. Prime appeals the denial of both motions to substitute counsel.

A. Standard of Review

A district court's refusal to substitute counsel is reviewed for abuse of discretion. *United States v. Castro*, 972 F.2d 1107, 1109 (9th Cir. 1992). The district court's ruling on a motion for a continuance is also reviewed for abuse of discretion. *United States v. Garrett*, 179 F.3d 1143, 1444-45 (9th Cir. 1999) (en banc).

B. Attempt to Remove Covell

[4] We must examine three elements when reviewing a district court's denial of a substitution motion: 1) the timeliness of the motion; 2) the adequacy of the district court's inquiry into the defendant's complaint; and 3) whether the asserted conflict was so great as to result in a complete breakdown in communication and a consequent inability to present a defense. *Castro*, 972 F.2d at 1109. Given the judge's recognition and proper assessment of each of these factors, we conclude that he did not abuse his discretion in denying the motion to remove Covell and substitute new counsel.

1. Timeliness

[5] In *United States v. Garcia*, we held that a motion made six days before the trial was scheduled to begin was not timely because the quantity and complexity of the discovery materials would have required a continuance. 924 F.2d 925, 926 (9th Cir. 1991). In this case, the substitution motion was made ten days before trial, which given the quantity and complexity of the evidence and issues is not significantly different from the situation in *Garcia*. As the district judge noted, "it would be extremely unlikely that any new counsel could be appointed and be in a position to be prepared to go to trial in a mere 10 days from now." We are not suggesting that any particular time period prior to trial is dispositive regarding this factor. Rather, timeliness may depend on the reason for substitution, and its strength. If, for example, counsel was indeed unprepared, the defendant might not have cause to raise unpreparedness until shortly before trial, when preparedness would be expected.

2. Adequacy of the Inquiry

[6] Prime was given a full and fair opportunity to explain why he felt substitution was necessary. After the court allowed Prime an opportunity to voice his concerns, the court

responded “[s]o it’s basically Mr. Covell met with your parents, they told you that they didn’t feel that he was prepared, that he was not - - didn’t have a defense plan, and you’re going with their advice?” Prime agreed with the court’s summary of his position. The court then asked Prime “Is there anything else you want to bring to my attention?” At this point, Prime expressed his concern that Covell had given up, and was working on sentencing issues rather than his defense. Covell then testified that he was well prepared for the trial and he had no difficulties communicating with Prime. Because Prime was given the opportunity to express whatever concerns he had, and the court inquired as to Covell’s commitment to the case and his perspective on the degree of communication, we find that the hearing was adequate.

3. *Degree of communication breakdown*

Based on Covell’s representation that he had no difficulties communicating with Prime and that he and Prime enjoyed a good rapport and working relationship, in addition to the lack of any indication by Prime that communication was a problem, the court properly determined that Prime failed to demonstrate any breakdown in the attorney-client relationship.

[7] In light of the district court’s reasoned determination with regard to each of the three factors, the court did not abuse its discretion in denying Prime’s motion to remove his appointed attorney days before trial.

C. **Attempt to Substitute Rossellini**

[8] The district court did not abuse its discretion in denying this motion.⁴ As the district court expressed “Mr. Prime has

⁴The three factors considered above do not comprise an exclusive list. See, e.g., *Hudson v. Rushen*, 686 F.2d 826, 829 (9th Cir. 1982) (“In evaluating trial court’s denial of a motion for new counsel, we consider a number of factors, including [timeliness, adequacy of inquiry, and degree of

already gone through two attorneys at public expense and did not choose to try to retain counsel until the very, very eve of trial." In addition, the court noted that the government witnesses had already been brought from great distances at a considerable expense. The court also reminded counsel that the trial had been set for this time because, due to the court's busy schedule, this was the only time available to try the case in a timely manner. Finally, as the court suggested, a strong inference could be drawn that this motion was brought for purposes of delay, as it was the second such eve-of-trial motions, accompanied, as before, by a request for a continuance. The district court's decision was not, therefore, an abuse of discretion.

V

JURY EXPOSURE TO EXTRINSIC EVIDENCE

As jury deliberations commenced, a problem arose when the jury was mistakenly provided access to 24 exhibits that had not been admitted into evidence. The extrinsic evidence included money orders and e-mail correspondence with aliases used to conduct fraudulent transactions, written reports by both the fingerprint and handwriting expert, and certified copies of prior convictions for both Prime and his friend Shawn Cahill.

The court became aware of this mistake when the jury made a request to see Storer's handwriting report, and shortly thereafter informed the court that they had found it. At this point, the court recognized that the jury had been given exhib-

communication breakdown].") (emphasis added); *United States v. Mills*, 597 F.2d 693, 700 (9th Cir. 1979) ("In applying the rule developed in [*Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970) (concerning counsel substitution)], we consider a number of factors, including [timeliness, adequacy of inquiry, and degree of communication breakdown].") (emphasis added).

its that had not been admitted into evidence and that it had to make a decision as to the impact of the evidence. After a brief review, the court concluded that Storer's written report did not include anything that had not been testified to at trial, and that there was no harm given the brief period it was available to the jury.

During this time, the prosecution also brought to the court's attention that there may be other exhibits in the jury room that had not been admitted into evidence. The court then called the jury into the courtroom and informed them that "the report from Kathleen Storer . . . was never offered into evidence, and was never admitted into evidence. It should not have gone to the jury room. We have withdrawn the report and you should only consider the testimony of Kathleen Storer as you remember it at trial." The court also requested that the jury refrain from reviewing any exhibits that were not on the master exhibit list, and inform the court if they came across such exhibits. The judge asked the jury foreperson if she had "come across any other exhibits so far that were not identified on the master list," to which she responded "no." The judge then stated "I'm going to ask this question of the entire jury, and if in [sic] anybody says, yes, please raise your hand." The judge asked "[h]as anyone else come across an exhibit that was not on the master exhibit list." The court noted that there was no response. All extrinsic evidence was then pulled from the exhibit boxes before the exhibits admitted into evidence were returned to the jury. Once more, the judge called the jury into the courtroom and admonished them that "[y]ou should not hold this mistake against Mr. Prime at all. Neither he nor Mr. Covell had anything to do with this, but it is so important that you decide this case strictly on those exhibits that have been admitted into evidence So, if you have any questions or doubts about anything, and you want to look back and make sure that it is an exhibit that has been admitted, I would urge you to be very, very careful in that regard."

Based on the availability of this extrinsic evidence to the jury, Prime filed a motion for mistrial, which was denied.

A. Standard of Review

Ordinarily, we review the denial of a motion for mistrial for abuse of discretion. *United States v. Mills*, 280 F.3d 915, 921 (9th Cir. 2002). Where jurors are exposed to extrinsic evidence, however, we are to engage in an independent review of the entire record. *United States v. Keating*, 147 F.3d 895, 899 (9th Cir. 1998).

B. Improperly Admitted Exhibits

[9] “A defendant is entitled to a new trial when the jury obtains or uses evidence that has not been introduced during trial if there is ‘a reasonable possibility that the extrinsic material *could* have affected the verdict.’” *Dickson v. Sullivan*, 849 F.2d 403, 405 (9th Cir. 1988) (quoting *United States v. Vasquez*, 597 F.2d 192, 193 (9th Cir. 1979)). The prosecution bears the burden of proving beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict. *Id.* at 405-06.

[10] In *Dickson*, we developed a five factor approach to determine whether the prosecution met this burden. Those factors are:

- 1) whether the material was actually received, and if so, how;
- 2) the length of time it was available to the jury;
- 3) the extent to which the jury discussed and considered it;
- 4) whether the material was introduced before a verdict was reached, and if so at what point in the deliberations; and
- 5) any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict.

Id. at 406. The fifth factor includes consideration of the nature of the extrinsic evidence. *Keating*, 147 F.3d at 902.

In *Jeffries v. Wood*, we expanded upon the *Dickson* factors, and introduced several other factors that should impact our consideration of the extrinsic evidence in this case, including:

whether the extraneous information was otherwise admissible or merely cumulative of other evidence adduced at trial; whether a curative instruction was given or some other step taken to ameliorate the prejudice; the trial context [including consideration of the *Dickson* factors]; and whether the statement was insufficiently prejudicial given the issues and evidence in the case.

Jeffries v. Wood, 114 F.3d 1484, 1491-92 (9th Cir. 1997).

[11] In this case, application of the *Dickson* and *Jeffries* factors suggests that the extrinsic evidence did not affect the verdict. Although the jury had access to the evidence for approximately three hours, jury review of the Storer report was not prejudicial, as it did not include anything that had not already been testified to at trial. The fingerprint exhibits were also cumulative of what had been testified to and admitted at trial. Likewise, the money order, checks, and e-mail correspondence were cumulative of evidence introduced at trial, and would have been admissible had the prosecution chosen to lay the proper foundation. As the judge stated during his attempt to resolve this problem, “if [money orders, or other items] had been incriminating, I’m sure the Government would have offered it”

[12] Prime’s main concern relates to his and Cahill’s prior conviction reports. The court, however, after specifically inquiring of the jury, found that the jury had not reviewed the certified copies of convictions of either Cahill or Prime. Moreover, the court determined that even if the jury had seen the reports, they would not have affected the verdict. The only evidence in addition to the five felonies Prime admitted to during his testimony was a conviction for possession of an

incendiary device. If the jury *had* discovered this evidence, it would not have affected the verdict because evidence introduced at trial already established that Prime had in the past armed himself with weapons and had obtained stun guns. With regard to Cahill's prior convictions, there is no possibility that that information would have affected the verdict because as the judge commented, "I'm not sure the jury would be surprised to find that Mr. Cahill had some prior convictions, since everyone else in the apartment seemed to" In addition to the lack of prejudice, the judge also issued two separate curative instructions, which under *Jeffries*, weighs in favor of finding that the government established, beyond a reasonable doubt, that the extrinsic evidence did not affect the verdict. *Jeffries*, 114 F.3d at 1491.

[13] The extrinsic evidence given to the jury was cumulative and non-prejudicial, and the court gave proper curative instructions. Therefore, in light of the entire record, we conclude that the extrinsic evidence had no impact on the verdict. We affirm the denial of the motion for mistrial.

[14] Because the defendant was sentenced under the then-mandatory Sentencing Guidelines, and because we cannot reliably determine from the record whether the sentence imposed would have been materially different had the district court known that the Guidelines were advisory, we remand to the sentencing court to answer that question, and to proceed pursuant to *United States v. Ameline*, 409 F.3d 1073, 1084 (9th Cir. 2005) (en banc). See also *United States v. Moreno-Hernandez*, 419 F.3d 906, 916 (9th Cir. 2005) ("[D]efendants are entitled to limited remands in *all* pending direct criminal appeals involving unpreserved *Booker* error, whether constitutional or nonconstitutional").

Conviction AFFIRMED; sentence REMANDED.