NO. 94-1301

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

ALFRED W. TRENKLER,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC OF THE DEFENDANT-APPELLANT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

ISSUES PRESENTED FOR REHEARING AND REHEARING EN BANC iv

STATEMENT OF COUNSEL PURSUANT TO LOCAL RULE 35.1 iv

INTRODUCTION 1

ARGUMENT 5

THE DISTRICT COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE DERIVED FROM THE EXIS COMPUTER DATABASE AS IT WAS RANK HEARSAY VIOLATIVE OF THE DEFENDANT'S SIXTH AMENDMENT RIGHT OF CONFRONTATION, AND, CONTRARY TO THE MAJORITY OPINION, THE ADMISSION OF SUCH TAINTED EVIDENCE WAS NOT HARMLESS BEYOND A REASONABLE DOUBT 5

A. The District Court's Admission of the EXIS-Derived Evidence Violated the Defendant's Sixth Amendment Right of Confrontation 5

B. The District Court's Erroneous Admission of the EXIS-Derived Evidence Was Not Harmless Error Beyond Reasonable Doubt 7

1. The misleading "scientific" reliability of the tainted EXIS evidence inappropriately persuaded the jury to convict Trenkler 8

2. The admission of the EXIS-derived evidence was not harmless beyond a reasonable doubt because the untainted evidence standing alone did not provide "overwhelming evidence" of the Defendant's guilt 10

3. The district court erroneously relied on the tainted EXIS-derived evidence in its decision to allow the Government to present evidence of the Quincy incident to the jury to prove identity under Fed. R. Evid. 404(b) 13

CONCLUSION 15

TABLE OF AUTHORITIES

PAGE

CASES

Clark v. Moran, 942 F.2d 24 (1st Cir. 1991) 7,10

Coppola v. Powell, 878 F.2d 1562 (1st Cir. 1989) 13

Idaho v. Wright, 497 U.S. 805 (1990) 6

Lacy v. Gardino, 791 F.2d 980 (1st Cir.) cert. denied 497 U.S. 888 (1986) 8

Lee v. Illinois, 476 U.S. 530 (1986) 6

Manocchio v. Moran, 919 F.2d 770 (1st Cir. 1990) cert. denied 500 U.S. 910 (1991) 6

Milton v. Wainwright, 407 U.S. 371 (1972) 7

Ohio v. Roberts, 448 U.S. 56 (1980) 6

Polansky v. CNA Insurance Co., 852 F.2d 626 (1st Cir. 1988) 6

United States v. Argentine, 814 F.2d 783 (1st Cir. 1987) 7,11

United States v. Ellis, 935 F.2d 385 (1st Cir. 1991) 6

United States v. Maraj, 947 F.2d 520 (1st Cir. 1991) 7,10

United States v. Zannino, 895 F.2d 1 (1st Cir. 1990) cert. denied 494 U.S. 1082 (1990) 6

STATUTES

Sixth Amendment to the United States Constitution 5,6,8

18 U.S.C. §71 1

18 U.S.C. §844(d) 1

18 U.S.C. §844(i) 1

Fed. R. Evid. 404(b) 13

Fed. R. Evid. 803(6) 4

Fed. R. Evid. 803(24) 5

F.R.A.P. 35(a)(1) 5

ISSUES PRESENTED FOR REHEARING AND REHEARING EN BANC

Whether the district court abused its discretion in admitting under the residual hearsay exception evidence derived from the EXIS computer database as it was rank hearsay violative of the Defendant's Sixth Amendment Right of Confrontation, and whether the admission of such tainted evidence was not harmless beyond a reasonable doubt.

STATEMENT OF COUNSEL PURSUANT TO LOCAL RULE 35.1

I, Morris M. Goldings, Esquire, express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance:

As a matter of constitutional law, having regard for the Confrontation Clause of Sixth Amendment to the United States Constitution, may a Majority panel of this Court properly determine that the erroneous admission of evidence under the residual hearsay exception that fails to possess any of the requisite particularized guaranties of trustworthiness is nonetheless harmless error beyond a reasonable doubt where 1) such tainted evidence was powerfully misleading; 2) the district court relied on such tainted evidence in admitting other evidence under Rule 404(b); and 3) the untainted evidence standing alone did not provide overwhelming evidence of the Defendant's guilt.

Morris M. Goldings, Esquire

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**PETITION FOR REHEARING
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OF THE DEFENDANT-APPELLANT**

INTRODUCTION

The Defendant Alfred W. Trenkler ["Trenkler"] respectfully requests that this Court reconsider its decision affirming the Defendant's conviction for conspiracy (18 U.S.C. §71), receipt of explosive materials (18 U.S.C. §844(d)) and attempted malicious destruction of property by means of explosives (18 U.S.C. §844(i)) stemming from an explosion in Roslindale,

Massachusetts, on October 28, 1991, that killed a Boston police officer and seriously injured another Boston police officer ["the 1991 incident"].[1]

The identity of the creator of the 1991 bomb was the central issue in the case against Trenkler.[2] Because there was no direct physical evidence linking Trenkler to the 1991 bomb (R.A. 910, 944-945),[3] the Government sought to admit evidence relating to Trenkler's participation five years earlier in an explosive incident in Quincy ["the 1986 incident"][4] to prove that the Quincy device and the Roslindale bomb were so similar that Trenkler must have built the Roslindale bomb.

Before trial, the district court held an evidentiary hearing to determine whether sufficient evidence, a "signature", existed to prove that the same person built the

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1 Trenkler is currently serving concurrent terms of imprisonment for life for receipt of explosive materials and attempted malicious destruction of property by means of explosives and sixty months for conspiracy.

2 According to the Government, the "hallmark question" was "identity." R.A. 229, 162.

3 References to the Record Appendix filed with the original brief for the Defendant-Appellant on August 1, 1994, are referred to throughout as "R.A. ____."

4 The 1986 incident involved an artillery flash simulator that had been placed underneath a commercial truck. R.A. 897, 939, 1145-1146, 1549, 1552. Trenkler had been charged in the 1986 incident by the Commonwealth of Massachusetts, but the charges were dismissed. R.A. 1553-1556.

1986 device and the 1991 bomb. R.A. 435-440. The Government introduced evidence from Stephen Scheid, an intelligence research specialist from the Bureau of Alcohol, Tobacco and Firearms ["ATF"], and Thomas Wascom, an explosive enforcement officer with the Explosive Technology Branch of the ATF. R.A. 235, 274. Relying on the testimony regarding the structure and components of the two devices and "the statistical evidence from the EXIS system, [the district court was] persuaded that the two devices [were] sufficiently similar to prove that the same person built them[.]" R.A. 439.[5]

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5 EXIS is the computerized explosives incident database used by the ATF for investigating leads. R.A. 1000. The entire database derives from information about explosive incidents that are investigated by ATF or are reported to ATF by other federal, state and local law enforcement agencies. R.A. 990-994, 1021. Aside from ATF, no other law enforcement agency is required by law to report bombing incidents to ATF. R.A. 1021-1027. The information received by ATF is encoded by, inter alia, device components, target, manufacturer of components, and entered into the database. R.A. 994-1000.

Information for investigatory leads is retrieved from the database by forming particular queries with specified features. As many as twelve different features can be placed into one query and used to search the database for incidents that share specified features. R.A. 1000.

The Government approached Scheid to formulate and enter certain queries for the period from January 1, 1979, the inception of the EXIS system, to December 31, 1991. R.A. 1001. Scheid, however, did not formulate the queries until he had received the investigative report of the 1986 incident, encoded information from that report and entered it into the EXIS database. Scheid admitted that the information relating to the 1986 incident was not entered into the database until after the Roslindale incident, more than five years after the 1986 incident itself. He also admitted that the 1986 incident "did not come to [his] attention in the normal course." R.A. 1010-1011, 1057.

At trial the Government sought to introduce evidence derived from ATF's EXIS computer database that purported to point to the identity of the 1991 bomb maker by allegedly establishing that, of the 14,252 bombing and attempting bombing incidents contained in the database, only two, the 1986 device and the 1991 Roslindale, shared similar characteristics.

The Government based its argument to use the EXIS computer evidence on the hearsay exception for business records, Fed. R. Evid. 803(6) and, alternatively, on the residual hearsay

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Scheid testified that he made different queries of the EXIS database, and, at trial, the Government introduced an exhibit depicting the different queries. R.A. 1536. First, he entered "bombings and attempted bombings" involving "cars and trucks" with a result of 2,504 incidents. Scheid then added "devices placed underneath the vehicle" to his query and obtained 428 incidents. He enlarged his query to include "remote control," resulting in 19 incidents bearing all of these features. Finally, when Scheid added the last feature, "magnets," to his query, he received 7 bombing incidents with all of those attributes. R.A. 1537-1538, 1003-1007.

Apparently not having received the precise result he wanted, Scheid went beyond the computerized EXIS query system and undertook what he described as a "manual analysis." R.A. 1018. Scheid reviewed the seven bombing incidents that remained from his computerized search of the EXIS database by identifying and specifying five additional features - duct tape, soldering, AA batteries, toggle switch and round magnets. He reached the conclusion that only two incidents in the entire computerized database, the 1986 incident involving Trenkler and the 1991 Roslindale bombing for which Trenkler was on trial, shared all of those specified features. Id.

exception, Fed. R. Evid. 803(24). Over the Defendant's objections, the district court admitted testimonial and documentary evidence derived from the EXIS database under Fed. R. Evid. 803(24). R.A. 977-984.

It is the admission of that pernicious evidence and the Majority's subsequent decision that such admission was error but nonetheless harmless that raise questions of exceptional importance necessary for review by this Court. F.R.A.P. 35(a)(1).

ARGUMENT

THE DISTRICT COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE DERIVED FROM THE EXIS COMPUTER DATABASE AS IT WAS RANK HEARSAY VIOLATIVE OF THE DEFENDANT'S SIXTH AMENDMENT RIGHT OF CONFRONTATION, AND, CONTRARY TO THE MAJORITY OPINION, THE ADMISSION OF SUCH TAINTED EVIDENCE WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

A. The District Court's Admission of the EXIS-Derived Evidence Violated the Defendant's Sixth Amendment Right of Confrontation.

Finding that "the government clearly failed to establish that the EXIS-derived evidence possessed sufficient 'circumstantial guarantees of trustworthiness" (Opinion at p. 33), that "the government failed to establish that the reports underlying the database possessed any guarantees of trustworthiness similar to those found in the enumerated hearsay exceptions" (Opinion at p. 33), that "the totality of circumstances surrounding the reports [do not] adequately assure their reliability where no standardized procedures were employed in creating the reports and the sources of the reported information are unknown" (Opinion at p. 37), and that "the government points [the Court] to no case in which it has

successfully (or unsuccessfully) sought to admit EXIS-derived evidence to prove the identity of a bomb maker" (Opinion at p. 37), the Majority held that the district court abused its discretion in admitting the EXIS-derived evidence under the residual exception to the hearsay rule to prove the identity of the builder of the Roslindale bomb. Opinion at p. 37.

Despite the plethora of errors in the district court's admission of the computerized EXIS-derived evidence, the Majority nonetheless found the error harmless beyond a reasonable doubt, ignoring the very attributes of the tainted evidence that led it to find an error of constitutional dimension in the first instance.[6] As the Dissent notes, the Majority's conclusion that the admission of the EXIS-derived

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[6] As the Dissent notes, "The majority assumes, without deciding, that Trenkler's Sixth Amendment right to confront witnesses against him was violated by introduction of the EXIS-derived evidence." Dissent at p. 46. _See also_ _Lee v. Illinois_, 476 U.S. 530, 543 (1986) (quoting _Ohio v. Roberts_, 448 U.S. 56, 66 (1980)) (hearsay not falling within one of "firmly rooted" hearsay exceptions is "presumptively unreliable and inadmissible for Confrontation Clause purposes, [but] may nonetheless meet Confrontation Clause reliability standards if it is supported by a '_showing of particularized guarantees of trustworthiness_.'"); _Idaho v. Wright_, 497 U.S. 805 (1990); _Manocchio v. Moran_, 919 F.2d 770, 776 (1st Cir. 1990) _cert_. _denied_ 500 U.S. 910 (1991); _United States v. Zannino_, 895 F.2d 1 (1st Cir. 1990) _cert_. _denied_ 494 U.S. 1082 (1990); _United States v. Ellis_, 935 F.2d 385, 394 n. 7 (1st Cir. 1990) (district court must determine, _inter alia_, whether the proffered evidence possesses "circumstantial guarantees of trustworthiness equivalent to the twenty-three specified exceptions listed in Rule 803); _Polansky v. CNA Insurance Co._, 852 F.2d 626, 631 (1st Cir. 1988).

evidence was "harmless beyond reasonable doubt" is seriously flawed as a matter of fact and law. Indeed, as this Petition demonstrates, the Majority highlights the multitude of qualities about the EXIS evidence, including its lack of particularized guarantees of trustworthiness, its inherent unreliability and its capacity to affect and mislead the jury, that draw into sharp relief precisely why the admission of the EXIS-derived evidence was harmful and deprived Trenkler of a fair trial.

B. The District Court's Erroneous Admission Of The EXIS-Derived Evidence Was Not Harmless Error Beyond Reasonable Doubt.

As the Dissent correctly notes, the law is clear that this Court must vacate the conviction if there is "some reasonable possibility that error of constitutional dimension influenced the jury in reaching [its] verdict." United States v. Maraj, 947 F.2d 520, 526 n.8 (1st Cir. 1991); United States v. Argentine, 814 F.2d 783, 789 (1st Cir. 1987). As this Court has noted in Argentine, "a reasonable possibility as opposed to one that is fanciful, chimerical, or purely speculative demands that a conviction be vacated." Id. at 789 (for the error to be harmless, the untainted evidence standing alone must provide "overwhelming evidence" of the defendant's guilt); Clark v. Moran, 942 F.2d 24 (1st Cir. 1991); Milton v. Wainwright, 407 U.S. 371, 377 (1972) (there must be "no reasonable doubt" that the jury would have reached the same verdict without having received the tainted evidence). In conducting its inquiry as

to the impact of the district court's error on the jury, the Majority failed to weigh the prejudice to Trenkler caused by the erroneous admission of the tainted evidence against the weight of the remaining evidence against Trenkler. See Lacy v. Gardino, 791 F.2d 980, 986 (1st Cir.) cert. denied 497 U.S. 888 (1986). Had the Majority engaged in that crucial weighing, it would have seen that the jury could not have reached its decision to convict Trenkler in the absence of the EXIS evidence admitted in violation of Trenkler's Sixth Amendment right of confrontation.

1. The misleading "scientific" reliability of the tainted EXIS evidence inappropriately persuaded the jury to convict Trenkler.

The tainted EXIS-derived evidence is dangerously beguiling and misleading evidence that purports to be objective, "scientific" evidence. Because the central issue for the Government in the case against Trenkler was to establish the identity of the bomb maker (R.A. 162), the sole purpose of the EXIS evidence was to purportedly establish that, after conducting a computerized query of a database containing the 14,252 bombing and attempting bombing, only two, the 1986 device and the 1991 Roslindale bomb, possessed similar characteristics.

The Majority concludes that it is "somewhat troubled by the government's use of the evidence," and describes as a "fairly powerful statement, but a somewhat misleading one" the Government's assertion that "out of more than 14,000 bombing

and attempted bombing incidents in the EXIS database only the Roslindale and Quincy incidents share the eight specific quarry characteristics." Opinion at p. 21. However, the Majority fails to analyze the effect that such pseudo-scientific statistics have on the jury. After engaging in such an analysis, the Dissent correctly concludes that the EXIS evidence cannot be considered harmless because "this type of 'scientific' evidence is too misleading, too powerful, and has too great a potential impact on lay jurors, to be disregarded as harmless." Dissent at p. 56. Clearly, there is a reasonable possibility, and <u>no</u> reasonable doubt, that tainted EXIS-derived evidence seduced the jury into accepting seemingly trustworthy and objective computer-derived statistical results to bolster the remaining evidence and convict Trenkler.

The Majority completely disregards the source of the EXIS-derived evidence and the fact that tangible documentary evidence of the computer-generated results were in the jury room during deliberations. After begrudgingly "underscore[ing] the caution a district court should employ in allowing evidence couched in terms of numerical probabilities" (Opinion at p. 38 n. 21) and recognizing the powerfully misleading nature of the EXIS-derived evidence (Opinion at p. 37 n. 21), the Majority nonetheless ignores the obvious impact the EXIS-derived evidence would have had on the jury. With hardly any analysis of the potential impact of such powerful computer evidence, the Majority summarily concludes that "no rational jury could have

entertained a reasonable doubt of Trenkler's guilt even in the absence of EXIS-derived evidence." Opinion at p. 41.

As Chief Justice Torruella correctly notes in his Dissent:

> A computer declar[es] that the two devices were built by the same person. Computers deal in facts, not opinions. Computers are not paid by one side to testify. Computers do not have prejudices. And computers are not subject to cross-examination.

Dissent at p. 58. Given the great value attributed by society to computer-derived information which carries with it an enticing aura of scientific objectivity, authenticity and infallibility, there is a reasonable possibility that the erroneously admitted EXIS-derived evidence influenced the jury. As such, the district court's error cannot be considered harmless beyond a reasonable doubt. Maraj, 947 F.2d at 526 n. 8.

2. The admission of the EXIS-derived evidence was not harmless beyond a reasonable doubt because the untainted evidence standing alone did not provide "overwhelming evidence" of the Defendant's guilt.

The Majority applied the incorrect legal standard in reaching its determination that the admission of the EXIS-derived evidence was harmless error beyond a reasonable doubt. This Court has made clear that a reviewing court must determine whether the untainted evidence standing alone provided overwhelming evidence of the defendant's guilt. Clark, 947 F.2d at 27 (emphasis added). The Majority, however, supported its conclusion by noting that "substantial evidence,

beyond Trenkler's participation in the Quincy bombing, supported a finding that he had built the Roslindale bomb." Opinion at pp. 38-39 (emphasis added). It simply is not enough that there was evidence before the jury from which Trenkler's guilt could reasonably be deduced. See Argentine, 814 F.2d at 789. Nor is it enough that this evidence seemed strong enough to the Majority. Id. If the untainted evidence, standing alone, does not provide overwhelming evidence of guilt, as it did not in Trenkler's case, then the admission of the EXIS evidence was harmful. See Id.

Incredibly, given the obvious force of the tainted EXIS evidence and the unpersuasiveness of the remaining "non-tainted" evidence, the Majority overlooked the reasonable possibility that the unconstitutional admission of the EXIS evidence influenced the jury in reaching its verdict. See Argentine, 814 F.2d at 789. The Majority concedes, as it must, that

> The admission of the EXIS-derived evidence would not have been harmless error if the only other evidence consisted of the expert's testimony of signature and the evidence establishing Trenkler's relationship with Shay Jr. and his electrical and explosive skills.

Opinion at p. 41. In reaching the conclusion that in the absence of the EXIS-derived evidence the jury could not have a reasonable doubt of Trenkler's guilt, the Majority then relies solely upon the "additional presence of several different

strong sources of testimony relating to Trenkler's admissions." Opinion at p. 41 (emphasis added).

The record before this Court belies that finding by the Majority. The purported "strong sources of testimony" are the following:

1) The "inherently unreliable" testimony of David Lindholm that Trenkler allegedly confessed to making the 1991 Roslindale bomb. Lindholm was a convicted felon serving a sentence for marijuana and tax evasion in Texas, who had been brought to Massachusetts and "coincidentally" placed in Trenkler's orientation unit at the Plymouth House of Correction. R.A. 1151, 1154-1168, 1174; Dissent at p. 67.

2) The testimony of ATF Agent Thomas D'Ambrosio that he asked Trenkler to draw a diagram of the device used in the 1986 incident, and, after telling Trenkler that the Roslindale bomb had employed dynamite, asked him to draw a diagram of such a device. R.A. 903, 906, 918, 946. The Majority found it significant that Trenkler's drawing of the Roslindale bomb contained two blasting caps, a fact that had not been disclosed publicly.

   The Majority, however, disregards D'Ambrosio's failure to retain Trenkler's drawing and that his testimony, then, was strictly from memory. The Majority also ignores the evidence before the jury of Trenkler's extensive electronics background which made it highly likely that he would draw blasting caps in connection with dynamite.

3) The testimony of ATF Agent Dennis Leahy that, after Trenkler had come to the ATF office to pick up records seized from his parents' garage and spent some two and one-half hours talking with Leahy, that as he left, Trenkler said

> "If we did it, then only we know about it. How will you ever find out...if neither one of us talked?"
> R.A. 961-969. The Majority apparently takes this obscure statement out of context and characterizes it as an admission.

The Majority ignores the fact that there is absolutely no physical evidence tying Trenkler to the bombing for which he is charged. As the Dissent correctly notes:

> Absent the EXIS-derived evidence, the government's case against Trenkler consists of a <u>smorgasbord of inclusive circumstantial evidence and an inherently unreliable alleged jailhouse confession</u>. Faced with this sort of evidence, a reasonable jury would probably look for some sort of tangible evidence upon which to hang its hat. The EXIS-derived evidence was just that. Because it was the only ostensibly conclusive evidence tying Trenkler to the crime, it may have been the clincher for the jury. <u>See</u> <u>Coppola</u>, 878 F.2d at 1571. It was therefore not harmless beyond a reasonable doubt."

Dissent at p. 67 (emphasis added).

3. <u>The district court erroneously relied on the tainted EXIS-derived evidence in its decision to allow the Government to present evidence of the Quincy incident to the jury to prove identity under Fed. R. Evid. 404(b).</u>

Contrary to the finding of the Majority, which finds no support in the record, the EXIS evidence played a significant role in the district court's decision to admit the evidence of the 1986 device.

At the pre-trial evidentiary hearing on the issue of "signature," the district court heard extensive testimony from Agent Scheid on his queries of the EXIS database and his

purported finding that, of over 14,000 bombings and attempted bombings, only the 1986 incident and the 1991 incidents possessed similar characteristics. R.A. 235-273. In addition to the EXIS evidence, the district court heard testimony from the government's signature expert, Wascom, and Trenkler's expert, Denny Kline, an independent consultant in post-blast investigation to the State Department's Antiterrorist Assistance Program and a former Supervisory Special Agent in the Explosives Unit of the F.B.I. Laboratory. R.A. 383-384.

Contrary to the conclusion of the Majority that the EXIS-derived evidence was "merely corroborative" (Opinion at p. 40), the Record demonstrates that the district court significantly relied on the EXIS evidence in finding the 1986 incident admissible under Rule 404(b). Specifically, the district court found the components of the two devices similar, as Wascom testified, and reached its conclusion that "the two devices are sufficiently similar to prove that the same person built them" only after it "add[ed] to this evidence, the statistical evidence from the EXIS system[.]" R.A. 439. Incredibly, the Majority simply ignores the fact it was the sum of the two pieces of evidence -- Wascom's testimony and the EXIS evidence -- that formed the basis of the district court's conclusion. The Majority then, even more incongruously, contends that the EXIS evidence was not "necessary" to the district court's decision and only provided "additional support for it" (Opinion at p. 40 n. 24), after it has already made

much of the existence of substantial evidence on both sides (on the issue of similarities in design, component selection, construction and overall *modus operandi*) and conflicting expert opinion. Opinion at pp. 25-26.

Based on the Record, then, it is obvious, as the Dissent concludes, that the district court judge relied on the EXIS evidence to "form the critical link between the two devices." Dissent at p. 55. Thus, but for the admission of the tainted EXIS evidence, which formed the basis for the admission at trial of Wascom's testimony, the jury would not have heard any evidence of the 1986 incident. In that light, with no physical evidence linking Trenkler to the crime, it cannot be said that the admission of the EXIS-derived evidence was harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons and authorities, the Court should (1) grant an *en banc* rehearing; (2) vacate the Majority Opinion and Judgment; (3) order a response by the United States; and (4) order a new oral argument on the issues to be reheard and such additional briefing as the Court should deem

helpful in rehearing the issues of exceptional importance raised by this Petition and Suggestion.

Respectfully Submitted,

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