

and Merrell on charges stemming from three bombings and two bank robberies in Spokane, Washington, and an apparent attempt at a third bank robbery in Portland, Oregon. The three were eventually convicted of all charges against them.

Ten years later, Berry filed a motion under 28 U.S.C. § 2255, seeking to have his conviction overturned based on new information he learned about the forensic evidence the government used against him. The district court denied the motion, and we issued a certificate of appealability on the question whether the new evidence entitled Berry to a new trial.

A. *The Bank Robberies*

At approximately 2:30 p.m. on April 1, 1996, a pipe bomb went off outside the office of *The Spokesman Review* newspaper in Spokane. Shortly after the bombing, two masked men entered a U.S. Bank branch located a few blocks away. The men stole approximately \$72,000 and detonated a second pipe bomb inside the bank before fleeing the scene.

At both *The Spokesman Review* and the U.S. Bank, the men left identical letters. The letters, written in a distinctive and archaic style, contained numerous religious references and were marked at the end with the symbol of the Phineas Priesthood.¹ The police later found a stolen van that they believed to have been used in both the bombing and the robbery, but were unable to determine who had committed the crimes.

Just over three months later, on July 12, 1996, another pipe

¹According to testimony at Berry's trial, the Phineas Priesthood is not an organization *per se*, but is a term used by individuals who are committed to an extreme view of "God's Law." Those who self-identify as members of the Phineas Priesthood advocate the separation of people of different races and religions and believe in a ban on usury. The symbol of the Phineas Priesthood consists of a capital "P" merged with a cross.

at the time they were arrested, two of which were stolen. Inside these vehicles the FBI found a number of firearms, grenades, and ammunition. The FBI also found copies of a letter addressed to “the USurer Bank,” written in the same style as the letters left behind in the other robberies. It was later learned that the defendants had mailed copies of this letter to *The Spokesman Review*, the *Oregonian*, and others.

Searches of the three defendants’ residences revealed numerous other items that were potentially connected to the robberies. For example, Barbee’s home contained Coleman propane canisters. Identical canisters had been found in a failed incendiary device left behind in the van used for the July 12 robbery. The FBI also found jeans in Barbee’s bedroom that appeared to match jeans worn by one of the robbers in the April 1 robbery. And, in the headboard to Barbee’s bed, they found a book entitled *Vigilantes of Christendom: The Story of the Phineas Priesthood*.

In Merrell’s home, the FBI found a stun gun that matched one carried by one of the robbers in the July 12 robbery, as shown by a security video. They also found fuses in Merrell’s van that were consistent with the fuses used in the pipe bombs. In addition, witnesses identified Merrell as the driver of the van in both the April 1 and July 12 robberies. Finally, files found on Merrell’s home computer held contents substantially similar to the contents of letters left at U.S. Bank and outside *The Spokesman Review* office.

The FBI did not find any physical evidence in Berry’s home that linked him to the robbery. They were, however, able to link him to the weapons used in the robberies. Photos from the robbery showed the robbers using what appeared to be a Benelli shotgun, a Winchester shotgun, and a Ruger Vaquero. Berry admitting to owning all three of these guns prior to the robberies, although he claimed to have sold them before the robberies occurred.

or actual innocence and affirm the district court's dismissal of his § 2255 motion.

I. BACKGROUND

On April 1, 1996, masked men bombed the Spokesman-Review office building and robbed the U.S. Bank on East Sprague Avenue in Spokane, Washington and then blew up the bank with a pipe bomb. On July 12, 1996, masked men bombed the Planned Parenthood office building and robbed the same U.S. Bank on East Sprague Avenue. In September, 1997, a jury convicted Ratigan of the Destruction of a Planned Parenthood clinic in violation of 18 U.S.C. § 844(i); Use and Carrying of a Firearm in relation to the Destruction of the Planned Parenthood Clinic in violation of 18 U.S.C. § 924(c)(1); the July 12, 1996 armed robbery of U.S. Bank in violation of 18 U.S.C. § 2114(a) and (d); Use and Carrying of a Firearm in Relation to the Bank Robbery in violation of 18 U.S.C. § 924(c)(1); and Conspiracy in violation of 18 U.S.C. § 371. Ratigan was sentenced to 55 years and 3 months of incarceration and over \$100,000 in restitution.

The indictment charging Ratigan with these crimes alleged that U.S. Bank was insured by the FDIC on July 12, 1996. At trial, the government presented unchallenged evidence relevant to the federally-insured status of U.S. Bank as alleged in the indictment. This evidence included testimony by Mr. Beyl, the Vice-President and Regional Security Manager of U.S. Bank, explaining that U.S. Bank "is insured" by the FDIC, including the U.S. Bank branches in Washington. The government introduced also as evidence two FDIC certificates, which were identified by Mr. Beyl as the type of certificate that hung on the wall of each branch of U.S. Bank. The certificate for the U.S. Bank of Washington was dated February 8, 1988; the certificate for the U.S. Bank of Oregon was dated June 13, 1996.

FDIC insurance was not a contested issue during Ratigan's trial. In closing argument, the prosecutor said, "There is no

turing processes. *Cf.* Nat'l Res. Council, *supra*, at 112 (cautioning against use of generalization in bullet manufacturing process). Further, the fact that the pipe bomb contained buckshot allowed Lundy to test multiple samples and to compare their chemical consistency; Lundy testified that she tested 26 pellets from the pipe bomb and 15 from Berry's autoshop. Finally, Lundy's determination that the pipe bomb buckshot was 3 percent antimony — a feature unique to Hornaday buckshot — linked Berry to the pipe bomb regardless of the CABL tests.

The reliability of Lundy's testimony was also buttressed by Hanson, who confirmed Lundy's major conclusions. Hanson, for example, testified that Hornaday was to his knowledge the only manufacturer that used lead with 3 percent antimony. And it was Hanson's testimony that Hornaday shipped only thirty-two bags of buckshot to the Spokane area that provided the strongest connection between Berry and the Planned Parenthood pipe bomb.

Thus, the CABL evidence used against Berry does not appear to suffer from the flaws to which the science may otherwise be susceptible. Simply put, given the circumstances of this case, Lundy's conclusions were not overstated and appear to be quite reliable.

[11] Based on the above, the criticisms of Lundy's CABL analysis concern the proper weight of the evidence, not its admissibility. It can hardly be said, therefore, that the adversary system was not "competent to uncover, recognize, and take due account of its shortcomings." *Barefoot*, 463 U.S. at 899. Accordingly, we reject Berry's due process claim.

B. *Berry's New Trial Claim*

[12] The remainder of Berry's § 2255 motion concerns the effect that the new evidence would have had on his trial, and therefore falls into the realm occupied by new trial motions

DEFENDANT: VERNE JAY MERRELL
Case Number: 2:96-CR-00257-WFN-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **517 Total Months**

Following Counts all to be served **CONCURRENT** to one another: **60 Months** as to Count 1; **97 Months** each as to Counts 2s; 4s, 6s, 8s, 10, 11 and 12

Following Counts to be served **CONSECUTIVE** to each other and all other Counts: **360 Months** as to Count 5s; and **60 Months** as to Count 9s

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL