

# WHO LET THE DOGS OUT? THE HOUNDS OF HATFILL AND THE FEDERAL RULES OF EVIDENCE

On Marcy's most recent Hatfill post, I made a mostly flippant comment on the dogs in the Hatfill case:

What if Hatfill is just a pig and leaves pizza crusts around everywhere he goes and the dogs are smelling that? What are the customary industry standards for certification of anthrax sniffing dogs anyway; and who sets and regulates them? Or is this just some "wonder mammal" like Lassie or Flipper or something? Was there video of the searches with the wonder dogs? Because there sure should have been. Or are these yet more video items of evidence that have been "misplaced"? What was the nature of the dog's response? Did it emit a "plaintiff wail" like Nicole Simpson's Akita? (Great trivia: Nicole's Akita was named "Kato" too). I don't see how the dog(s) here meet any evidentiary standards for admissibility or reliance by a court.

Despite it being mostly in jest, that comment had what I consider to be a critical, *if not the critical*, point in it. From what it appears, the only bit of "evidence" (and I use that descriptor loosely here, and in the generic sense, because I don't think there was any proper evidence at all) against Hatfill that served as the basis for identifying him was that the dogs had alerted.

We all saw, in the tragic case of the late Richard Jewell, the horrendous and deleterious effects of a defective identification on an

individual for an infamous crime. It is simply unconscionable to hang such a collar on someone without substantial credible hard evidence. And, quite frankly, the aura and implications of the anthrax case were, and are, far worse than the Atlanta Olympic park bombing. An entire nation was brought to a standstill and was trembling from a terrorist act that was capable of being repeated anywhere, at any time, in the country via the mail. So the United States government better have a pretty strong case before it implicates someone such as Hatfill in such a crime.

What substantial and credible hard evidence was the identification of Hatfill based on? Well, as has been previously discussed, he had worked in the bio-agent/anthrax field, had the technical expertise and, according to profilers, the personality to do the anthrax deed. The government indicates that he may be one of 50 or fewer people who had the skills to do it and had access to the strain. Then you add in allegations of violence in his past and ties to South African apartheid militias, and you can certainly understand why he was being looked at. While such information is not all entirely innocuous background, it is certainly nothing more than circumstantial and does not inculcate Hatfill; the only alleged link of Hatfill to the actual crime with the anthrax letters, at least that we are aware of to date, was the dogs. That's it; there is nothing else. What are the standards for admissibility of dog scent (bloodhound) evidence? Well, it is controlled by Rule 702 of the Federal Rules of Evidence, which is a codification of what is colloquially known as the Daubert rule. Rule 702 of the Federal Rules of Evidence, which governs the admissibility of all scientific and technical knowledge/information in Federal trial courts, provides:

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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Anytime that you hear attorneys, or others, whether here or anywhere else, talking about the admissibility of scientific evidence, tests and standards, forensic evidence and tests, details of computer programs and hardware, or anything else scientific and/or technical, they are talking about getting evidence in under Rule 702. It is of critical importance to many of the legal issues that we tackle here. Now, although the language is not explicitly included in the rule, Rule 702 is held to rely and incorporate the factors delineated by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). In fact, the formal annotation to Rule 702 provides the operative language:

Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the Daubert Court are (1) whether the expert's technique or theory can be or has been tested – that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the

technique or theory has been generally accepted in the scientific community.

Alright; now that we have a lay of the land, let's see what occurred with the Hounds of Hatfill. First off, and I don't know if it was already a misperception, or was fueled by the goof off portions of my earlier comment, but the dogs at issue in Hatfill were NOT "anthrax sniffers". Indeed, as several readers correctly mused, the dogs would be harmed by the anthrax just as humans are, and arguably faster and more seriously because their olfactory membranes would lend to greater exposure.

Although the facts are a bit sketchy, it appears fairly clear that the three dogs used in Hatfill, Lucy, Knight and TinkerBelle, either directly, or, more likely, through the use of an experimental, untested and unapproved device known as a "Scent Transfer Unit", were "given the scent" of the envelopes/letters that had, at one point, contained the anthrax and, allegedly, alerted in the presence of Hatfill. I found a reprint of a Baltimore Sun article in the UCLA Epidemiology Journal, that is outstanding on all of the background on the use of scent dogs in the Hatfill case. Although several key quotes will be relayed below, the entire article is well worth a read.

Whatever the FBI's ultimate conclusion, the controversy over the bureau's use of bloodhounds reveals a surprisingly haphazard approach to enlisting outside forensic help in one of the largest investigations in U.S. history. If charges are ultimately brought against anyone, the debate over how the dogs were used could be a hurdle in proving the case.

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In this crucial case, the 15-year FBI veteran who selected the handlers and dogs is an explosives expert who says he has no experience using bloodhounds himself. Agent Rex Stockham acknowledges

that the California handlers and their methods are viewed skeptically in the field, though he says the critics base their opinions on prejudice, not evidence.

"The guys in Southern California are social outcasts in the bloodhound handling community," said Stockham, a forensic examiner in the explosives unit at the FBI Laboratory in Washington.

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The two major associations, the Law Enforcement Bloodhound Association and the National Police Bloodhound Association, "are out there talking trash about us," Stockham said. In fact, he said, he was virtually "laughed out" of one training seminar at which he tried to present results of the California handlers' work.

Well that doesn't sound very good does it? I wonder what a scientist would say about the use of the three ~~stooges~~ dogs in the Hatfill case and I wonder if the improper use of these dogs could ever lead to a lawsuit against the government for the use of bat shit crazy techniques? Lo and behold, the article answers those questions:

"As a scientist, what they're supposed to have done [in the anthrax case] sounds like a miracle," said Brisbin, a bloodhound handler himself. "Every time I ask a dog to identify a suspect under controlled conditions, the dog can't do it."

**Indeed, a federal jury awarded \$1.7 million last year to a man wrongly accused of rape after police identified him in part based on the use of Slavin's bloodhound, TinkerBelle.** DNA evidence later proved the man, Jeffrey Allen Grant, had not committed the rape. (Emphasis added)

The dogs in this case were traditional bloodhounds by breed, but with unconventional training, no certification and both their handlers and use have been widely criticized, roundly discredited and basically taken as a joke by both most courts (though at least one did accept their use) and by pretty much everybody expert in the forensic bloodhound field. There is pretty much zero chance that any competent court would find the dog scent evidence in Hatfill to be credible, reliable or admissible for anything under Rule 702; and it is both malicious and inconceivable that this "evidence" was used to implicate him.