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MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI	AE 207 Government Motion <i>In Limine</i> For The Commission To Admit Evidence 4 February 2014
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1. Timeliness

This motion is filed timely pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.b(1).

2. Relief Sought

The government respectfully moves the Commission to admit the evidence collected from on or around USS COLE (DDG 67) after the government lays the foundation for that evidence. The evidence includes:

- a. physical evidence, including damaged remains of USS COLE (DDG 67);
- b. remnants of the attack boat, its motor, and the explosive device; and
- c. evidentiary items that tested positive for explosives residue.¹

The government identified the specific evidence that it requests the Commission to find admissible *infra* at 7-17. *See also* Attachment B. The government is prepared to lay the foundation for each piece of evidence during a pretrial hearing.

¹ Though the government requests that the Commission determine the admissibility of evidence found on or around USS COLE (DDG 67), some of which the FBI Forensic Laboratory tested and found to have explosives residue, the government is not requesting that the Commission determine the admissibility of the FBI Forensic Laboratory's test results and analysis at this time.

The government also requests that the Commission schedule a pretrial hearing solely for the purpose of allowing the government to lay the foundation for the evidence identified in this motion (and the government requests that the Commission not consider or hear any argument or other matters during that hearing). The government further requests that the Commission notify all parties of the dates for such a hearing as soon as possible, providing 60-days' notice, so that the government can coordinate witness travel (there will be at least 50 witnesses) and other logistics. The government requests that the pretrial hearing be set for a four-day period any time between 5-23 May 2014.

3. Overview

The Commission should find the evidence identified in this pleading admissible after a pretrial hearing where the government lays the foundation demonstrating—by a preponderance of the proof—that each piece of evidence is relevant and authentic, and that the evidence is either not hearsay or admissible hearsay. Such preliminary determinations are questions of law appropriate for the Commission, not the members. *See* M.C.R.E. 104 (“Preliminary questions concerning . . . the admissibility of evidence . . . shall be determined by the military judge.”).² *See also* R.M.C. 906(b)(11) (identifying “[p]reliminary rulings on admissibility of evidence” as an appropriate pretrial motion). Though the members ultimately decide whether evidence is relevant and authentic, and the appropriate weight to accord each piece of evidence, the Commission is required to make preliminary determinations concerning the admissibility of that evidence.

The government and the accused—as well as the members—benefit from the Commission making admissibility determinations prior to trial. The parties benefit from

² The Commission is not bound by the rules of evidence when considering the admissibility of evidence, except those rules regarding privileges. M.C.R.E. 104(a).

knowing what evidence may be admitted during trial, thus maximizing predictability and minimizing surprise. The defense also benefits by having notice of the potential evidence so that it can prepare sufficiently in advance of trial to meet that evidence. The members benefit by not being diverted from their other important military duties while the Commission considers matters that are solely within its discretion. The integrity of the process benefits from ensuring that the members are not exposed to inadmissible evidence. *See* R.M.C. 906(b)(11), Discussion (describing the purpose of motions for preliminary rulings on admissibility of evidence as “avoid[ing] the prejudice which may result from bringing inadmissible matters to the attention of court members.”).³ And, by making admissibility determinations before trial, the Commission will be able to ensure “that [the] proceedings are conducted . . . without unnecessary delay or waste of time or resources.” R.M.C. 801(a), Discussion.

The government will lay the foundation for each piece of evidence. To that end, the government intends to present testimony during a pretrial hearing that authenticates each piece of evidence, including testimony that establishes the chain of custody, and demonstrates the relevance of each piece of evidence. The defense will have the opportunity to cross-examine each witness and otherwise challenge the admissibility of the evidence during the pretrial hearing. And the defense may challenge the weight of the evidence with the members present during trial.

Federal district courts and military courts often admit evidence prior to trial, so long as the proponent overcomes the burden of authenticating the evidence and establishing its

³ “A request for a preliminary ruling on admissibility is a request that certain matters which are ordinarily decided during trial of the general issue be resolved before they arise, outside the presence of members. The purpose of such a motion is to avoid the prejudice which may result from bringing inadmissible matters to the attention of court members. Whether to rule on an evidentiary question before it arises during trial is a matter within the discretion of the military judge.” R.M.C. 906(b)(11), Discussion.

relevance. Federal district courts, for example, have granted government motions *in limine* to admit evidence seized from the location of an arrest, evidence of a defendant's prior convictions and other bad acts, coconspirator statements, and documentary evidence recovered from a defendant by foreign authorities at the time of arrest. The Commission should do the same here and admit the evidence identified in this pleading.

4. Burden of proof

As the moving party, the government must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2). The government must prove by a preponderance of the proof that each piece of evidence is relevant and authentic. *See Bourjaily v. United States*, 483 U.S. 171, 175 (1987) (“The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration.”).

5. Facts

Abd Al Rahim Hussayn Muhammad Al Nashiri (“the accused”) is charged with multiple offenses under the Military Commissions Act of 2009 (“M.C.A.”), 10 U.S.C. §§ 948a *et seq.*, relating to his participation in the attack on USS COLE (DDG 67) on 12 October 2000 and MV *Limburg* on 6 October 2002, and the attempted attack on USS THE SULLIVANS (DDG 68) on 3 January 2000. These attacks resulted in the deaths of 18 people, injury to dozens of others, and significant property damage.

At the time of the attack, USS COLE (DDG 67) was in the process of refueling and offloading garbage onto local civilian vessels. The crew was preparing for lunch in the ship's galley, and Gas Turbine Systems Technician (Mechanical) Fireman (“GSMFN”) Raymond A.

Mooney was standing watch. GSMFN Mooney observed a white boat operated by two men wearing civilian clothing approach the port side of USS COLE (DDG 67). One of the men in the boat waived to GSMFN Mooney in a friendly manner. As the boat pulled alongside USS COLE (DDG 67), GSMFN Mooney observed a large explosion.

The explosion caused a hole approximately 30-feet by 30-feet in the port side of USS COLE (DDG 67), damaging the General Workshop, the Crew Galley, the Mess Hall, the Chief's Mess, the Oil Laboratory, the Main Engine Room, and other locations. The crew immediately went to general quarters, which is a state-of-emergency readiness onboard United States Navy vessels. At general quarters, the crew is positioned and prepared, among other things, to control, contain, and repair damage to the ship and to locate and assist injured persons.

In the midst of extensive rescue, damage control, and first-aid operations, and despite the loss of power, Master-at-Arms First Class ("MA1") Justin R. Crowe began to investigate the cause of the explosion. As the Master-at-Arms onboard USS COLE (DDG 67), MA1 Crowe's responsibilities included performing all law-enforcement functions onboard the ship. MA1 Crowe secured locations where debris foreign to USS COLE (DDG 67) was located. The Federal Bureau of Investigation ("FBI") and MA1 Crowe later collected the debris, and the FBI tested the debris for evidentiary value. As the crew implemented measures to restore the physical safety and integrity of the ship, MA1 Crowe and other crewmembers secured the scene until the Marine Quick Reaction Team arrived to provide additional security. MA1 Crowe prevented persons from traveling in or around the damaged areas of the ship by cordoning off those areas to the maximum extent possible, given that the crew needed to use certain areas to conduct rescue and damage-control operations.

Following the attack, the FBI and the Naval Criminal Investigative Service (“NCIS”) conducted a joint investigation. When the FBI arrived with its Evidence Response Team and boarded USS COLE (DDG 67) for the first time after the attack, MA1 Crowe turned over custody of the evidence he had secured and collected to the FBI. During the course of the investigation, FBI and NCIS agents interviewed witnesses, examined and documented the damage to the ship, assisted in locating and recovering deceased Sailors, and transported evidence to the United States. The FBI also photographed both the ship and the evidence collected onboard USS COLE (DDG 67). The FBI arranged for U.S. Navy divers to search the underwater area and seabed in the vicinity of USS COLE (DDG 67) for additional evidence and the remains of deceased Sailors. The FBI and the NCIS, with the assistance of the Armed Forces Institute of Pathology (“AFIP”), examined approximately 30 tons of debris dredged from the crater below and around USS COLE (DDG 67), from which they identified suspected human remains and attack-boat components.

At the conclusion of the investigative activity onboard USS COLE (DDG 67), which spanned from 12 October 2000 through 2 November 2000, FBI and NCIS agents collected approximately 668 pieces of evidence from USS COLE (DDG 67), the area surrounding the ship, and the dredged material. The evidence included various pieces of metal, dirt, fiberglass, and other remnants, including human biological matter. The FBI and the NCIS agents also recovered clothing from deceased and wounded Sailors, which the agents retained for forensic analysis.

All of the evidence found onboard or near USS COLE (DDG 67) was collected by U.S. personnel. The U.S. law-enforcement agents on scene engaged in investigative activities and collected the evidence in accordance with each agent’s training and experience. The agents employed standard measures when handling the evidence, including wearing gloves,

photographing locations of recovery, and preparing and preserving a chain of custody. After the FBI processed the evidence found on and around USS COLE (DDG 67), various FBI agents took possession of the evidence, marked and secured each piece of evidence, and transported the evidence to the FBI Forensic Laboratory in Quantico, Virginia (“FBI Forensic Laboratory”). There, FBI Forensic Laboratory personnel accepted the evidence for processing and analysis.

The FBI Forensic Laboratory conducted a series of tests on the items found on or around USS COLE (DDG 67) and collected from the deceased and wounded Sailors. The FBI Forensic Laboratory analyzed items at the microscopic and molecular levels and, ultimately, identified 156 items as originating from the attack boat. These 156 items include 41 fiberglass specimens, 36 pieces of a boat motor, 27 pieces of an explosive device, 33 pieces of red and black carpeting and associated swatches and fibers (and 9 of the 33 carpet items contain pieces of the attack boat), and 19 other attack-boat pieces. The FBI Forensic Laboratory also identified specimens that are the remains of one of the suicide bombers and items that tested positive for explosives residue.⁴

I. Fiberglass Specimens from the Attack Boat

The government moves the Commission to admit into evidence the following fiberglass specimens identified by the FBI Forensic Laboratory as part of the attack boat. The government will lay the foundation for each of the 41 fiberglass specimens identified below.

Collection Number	FBI Lab Item No.	Photograph Bates No.	Lab Report Bates. No. & Date
DK02-113	Q157	10015-00085402	10015-00000875; July 6, 2004
DK01-108	Q315	10015-00085566	10015-00000875; July 6, 2004
DK02-102	Q382	10015-00085635	10015-00000875; July 6, 2004

⁴ The government will seek to admit the human remains found on or around USS COLE (DDG 67) in a separate motion.

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Collection Number	FBI Lab Item No.	Photograph Bates No.	Lab Report Bates. No. & Date
DK02-123	Q368	10015-00085619	10015-00000875; July 6, 2004
DK03-117	Q395	10015-00085648	10015-00000875; July 6, 2004
DK01-112	Q316	10015-00085567	10015-00000875; July 6, 2004
DK01-106	Q318	10015-00085569	10015-00000875; July 6, 2004
DK01-123	Q334	10015-00085585	10015-00000875; July 6, 2004
DK01-143	Q352	10015-00085603	10015-00000875; July 6, 2004
DK03-114	Q400	10015-00085652	10015-00000875; July 6, 2004
DK04-116	Q443	10015-00085696	10015-00000875; July 6, 2004
DK03-147	Q422	10015-00085674 to 10015-00085675	10015-00000875; July 6, 2004
DK04-117	Q441	10015-00085694	10015-00000875; July 6, 2004
DK02-120	Q367	10015-00085618	10015-00000875; July 6, 2004
DK05-135	Q476	10015-00085729	10015-00000875; July 6, 2004
DK05-136	Q486	10015-00085736	10015-00000875; July 6, 2004
DK02-128	Q373	10015-00085624	10015-00000875; July 6, 2004
DK02-118	Q381	10015-00085634	10015-00000875; July 6, 2004
DK03-136	Q406	10015-00085658	10015-00000875; July 6, 2004
W-113	Q571	10015-00085825	10015-00000875; July 6, 2004
W-121	Q545	10015-00085798	10015-00000875; July 6, 2004
W-102	Q556	10015-00085810	10015-00000875; July 6, 2004
DK05-101	Q497	10015-00085748	10015-00000875; July 6, 2004
DK05-112	Q169	10015-00085414	10015-00000875; July 6, 2004
RP-105	Q274	10015-00085525	10015-00000875; July 6, 2004
MDK-115	Q275	10015-00085526	10015-00000875; July 6, 2004
MDK-138	Q295	10015-00085545	10015-00000875; July 6, 2004

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Collection Number	FBI Lab Item No.	Photograph Bates No.	Lab Report Bates. No. & Date
MDK-129	Q298	10015-00085548	10015-00000875; July 6, 2004
MDK-131	Q301	10015-00085551	10015-00000875; July 6, 2004
MDK-123	Q304	10015-00085554	10015-00000875; July 6, 2004
MDK-132	Q313	10015-00085564	10015-00000875; July 6, 2004
DK01-118	Q329	10015-00085581	10015-00000875; July 6, 2004
DK01-142	Q353	10015-00085604	10015-00000875; July 6, 2004
DK02-103	Q383	10015-00085636	10015-00000875; July 6, 2004
DK02-130	Q385	10015-00085638	10015-00000875; July 6, 2004
DK02-122	Q387	10015-00085640	10015-00000875; July 6, 2004
DK03-138	Q407	10015-00085659	10015-00000875; July 6, 2004
DK03-162	Q439	10015-00085692	10015-00000875; July 6, 2004
DK04-134	Q455	10015-00085708	10015-00000875; July 6, 2004
DK04-135	Q472	10015-00085725	10015-00000875; July 6, 2004
W-119	Q563	10015-00085817	10015-00000875; July 6, 2004

II. Pieces of the Attack Boat's Motor

The government moves the Commission to admit into evidence the following items identified by the FBI Forensic Laboratory as part of the attack boat's motor. The government will lay the foundation for each of the 36 items identified below.

Collection Number	FBI Lab Item No.	Photograph Bates No.	Lab Report Bates. No. & Date
TOB-130	Q246	10015-00085495 10015-00085496 10015-00085497	10015-00000875; July 6, 2004
DK03-109	Q396	10015-00085649	10015-00000875; July 6, 2004
W-133	Q537	10015-00085788	10015-00000875; July 6, 2004

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Collection Number	FBI Lab Item No.	Photograph Bates No.	Lab Report Bates. No. & Date
W-117	Q557	10015-00085811	10015-00000875; July 6, 2004
D19	Q597	10015-00085857	10015-00000875; July 6, 2004 10015-00000876; July 6, 2004
DK04-105	Q471	10015-00085724	10015-00000875; July 6, 2004
W-132	Q540	10015-00085792 to 10015-00085793	10015-00000875; July 6, 2004
W-134	Q542	10015-00085795	10015-00000875; July 6, 2004
W-130	Q546	10015-00085799	10015-00000875; July 6, 2004
W-123	Q549	10015-00085802	10015-00000876; July 6, 2004
D8	Q586	10015-00085845	10015-00000876; July 6, 2004
D9	Q587	10015-00085846	10015-00000876; July 6, 2004
D10	Q588	10015-00085847	10015-00000876; July 6, 2004
D11	Q589	10015-00085848	10015-00000876; July 6, 2004
D12	Q590	10015-00085849	10015-00000876; July 6, 2004
D13	Q591	10015-00085850	10015-00000876; July 6, 2004
D14	Q592	10015-00085851	10015-00000876; July 6, 2004
D15	Q593	10015-00085852	10015-00000876; July 6, 2004
D16	Q594	10015-00085853	10015-00000876; July 6, 2004
D17	Q595	10015-00085854 to 10015-00085855	10015-00000876; July 6, 2004
MDK-109	Q281	10015-00085532	10015-00000876; July 6, 2004
MDK-100	Q288	10015-00085539	10015-00000876; July 6, 2004
DK01-107	Q314	10015-00085565	10015-00000876; July 6, 2004
DK02-121	Q386	10015-00085639	10015-00000876; July 6, 2004
DK03-135	Q410	10015-00085662	10015-00000876; July 6, 2004
DK04-133	Q444	10015-00085697	10015-00000876; July 6, 2004
DK04-123	Q445	10015-00085698	10015-00000876; July 6, 2004

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Collection Number	FBI Lab Item No.	Photograph Bates No.	Lab Report Bates. No. & Date
DK04-106	Q467	10015-00085720	10015-00000876; July 6, 2004
DK05-100	Q488	10015-00085739	10015-00000876; July 6, 2004
DK05-102	Q493	10015-00085744	10015-00000876; July 6, 2004
DK05-111	Q496	10015-00085747	10015-00000876; July 6, 2004
DK05-117	Q504	10015-00085755	10015-00000876; July 6, 2004
DK06-104	Q508	10015-00085759	10015-00000876; July 6, 2004
W-106	Q536	10015-00085787	10015-00000876; July 6, 2004
W-111	Q566	10015-00085820	10015-00000876; July 6, 2004
W-118	Q570	10015-00085824	10015-00000876; July 6, 2004

III. Pieces of the Explosive Device from the Attack Boat

The government moves the Commission to admit into evidence the following items identified by the FBI Forensic Laboratory as part of the fuzing system for the explosive device. The government will lay the foundation for each of the 27 items identified below.

Collection Number	FBI Lab Item No.	Photograph Bates No.	Lab Report Bates. No. & Date
DK01-115	Q320	10015-00085572	10015-00000878; July 6, 2004
DK01-116	Q327	10015-00085579	10015-00000878; July 6, 2004
DK01-117	Q328	10015-00085580	10015-00000878; July 6, 2004
DK01-119	Q330	10015-00085582	10015-00000878; July 6, 2004
DK02-118	Q381	10015-00085634	10015-00000878; July 6, 2004
DK03-109	Q396	10015-00085649	10015-00000878; July 6, 2004
DK03-135	Q410	10015-00085662	10015-00000878; July 6, 2004

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Collection Number	FBI Lab Item No.	Photograph Bates No.	Lab Report Bates. No. & Date
DK05-136	Q486	10015-00085736	10015-00000878; July 6, 2004
DK05-102	Q493	10015-00085744	10015-00000878; July 6, 2004
W-133	Q537	10015-00085788	10015-00000878; July 6, 2004
W-117	Q557	10015-00085811	10015-00000878; July 6, 2004
W-111	Q566	10015-00085820	10015-00000878; July 6, 2004
W-100	Q569	10015-00085823	10015-00000878; July 6, 2004
W-118	Q570	10015-00085824	10015-00000878; July 6, 2004
D20	Q598	10015-00085858	10015-00000878; July 6, 2004
MSDK4-107	Q627	10015-00085885	10015-00000878; July 6, 2004
DK02-109	Q360	10015-00085611	10015-00000878; July 6, 2004
DK02-111	Q362	10015-00085613	10015-00000878; July 6, 2004
DK02-135	Q378	10015-00085631	10015-00000878; July 6, 2004
DK03-125	Q397	10015-00086194	10015-00000878; July 6, 2004
DK03-137	Q412	10015-00085664	10015-00000878; July 6, 2004
DK03-152	Q421	10015-00085673	10015-00000878; July 6, 2004
DK03-155	Q424	10015-00085677	10015-00000878; July 6, 2004
DK03-141	Q429	10015-00085682	10015-00000878; July 6, 2004
DK04-112	Q457	10015-00085710	10015-00000878; July 6, 2004
W-124	Q543	10015-00085796	10015-00000878; July 6, 2004
W-125	Q548	10015-00085801	10015-00000878; July 6, 2004

IV. Pieces of Carpeting from the Attack Boat

The government moves the Commission to admit into evidence the following items identified by the FBI Forensic Laboratory as carpet. The government will lay the foundation for each of the 24 items identified below.

Collection Number	FBI Lab Item No.	Photograph Bates No.	Lab Report Bates. No. & Date
DK01-101	Q155	10015-00085400	10015-00000876; July 6, 2004
DK01-100	Q156	10015-00085401	10015-00000876; July 6, 2004
DK03-124	Q162	10015-00085407	10015-00000876; July 6, 2004
MDK-116	Q286	10015-00085537	10015-00000876; July 6, 2004
MDK-118	Q287	10015-00085538	10015-00000876; July 6, 2004
MDK-137	Q306	10015-00085557	10015-00000876; July 6, 2004
DK03-160	Q389	10015-00085642	10015-00000876; July 6, 2004
DK04-110	Q462	10015-00085715	10015-00000876; July 6, 2004
DK03-102	Q160	10015-00085405	10015-00000876; July 6, 2004
DK00-100	Q173	10015-00085418	10015-00000876; July 6, 2004
BH-113	Q261	10015-00085512	10015-00000876; July 6, 2004
RP-101	Q270	10015-00085521	10015-00000876; July 6, 2004
MDK-130	Q299	10015-00085549	10015-00000876; July 6, 2004
DK01-129	Q339	10015-00085590	10015-00000876; July 6, 2004
DK02-127	Q372	10015-00085623	10015-00000876; July 6, 2004
DK02-135	Q378	10015-00085631	10015-00000876; July 6, 2004
DK03-121	Q393	10015-00085646	10015-00000876; July 6, 2004
DK03-120	Q402	10015-00085654	10015-00000876; July 6, 2004
DK03-132	Q409	10015-00085661	10015-00000876; July 6, 2004

Collection Number	FBI Lab Item No.	Photograph Bates No.	Lab Report Bates. No. & Date
DK04-123	Q445	10015-00085698	10015-00000876; July 6, 2004
DK04-118	Q452	10015-00085705	10015-00000876; July 6, 2004
DK04-130	Q453	10015-00085706	10015-00000876; July 6, 2004
DK04-131	Q454	10015-00085707	10015-00000876; July 6, 2004
GA-109	Q533	10015-00085784	10015-00000876; July 6, 2004

V. Pieces of Carpeting and Pieces of Attack Boat

The government moves the Commission to admit into evidence the following items identified by the FBI Forensic Laboratory as both carpet and attack-boat components. The government will lay the foundation for each of the 9 items identified below.

Collection Number	FBI Lab Item No.	Photograph Bates No.	Lab Report Bates. No. & Date
RP-103	Q272	10015-00085523	10015-00000875; July 6, 2004 10015-00000876; July 6, 2004
MDK-119	Q294	10015-00085544	10015-00000875; July 6, 2004 10015-00000876; July 6, 2004
MDK-133	Q296	10015-00085546	10015-00000875; July 6, 2004 10015-00000876; July 6, 2004
MDK-125	Q303	10015-00085553	10015-00000875; July 6, 2004 10015-00000876; July 6, 2004
DK03-161	Q391	10015-00085644	10015-00000875; July 6, 2004 10015-00000876; July 6, 2004
DK02-131	Q384	10015-00085637	10015-00000875; July 6, 2004 10015-00000876; July 6, 2004
DK03-140	Q425	10015-00085678	10015-00000875; July 6, 2004 10015-00000876; July 6, 2004
DK05-133	Q484	10015-00085734	10015-00000875; July 6, 2004 10015-00000876; July 6, 2004
DK06-106	Q512	10015-00085763	10015-00000875; July 6, 2004 10015-00000876; July 6, 2004

VI. Additional Pieces of the Attack Boat

The government moves the Commission to admit into evidence the following items identified by the FBI Forensic Laboratory as part of the attack boat. The government will lay the foundation for each of the 19 items identified below.

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Collection Number	FBI Lab Item No.	Photograph Bates No.	Lab Report Bates. No. & Date
DK02-116	Q158	10015-00085403	10015-00000875; July 6, 2004
DK02-116	Q159	10015-00085404	10015-00000875; July 6, 2004
RP-102	Q271	10015-00085522	10015-00000875; July 6, 2004
MDK-122	Q297	10015-00085547	10015-00000875; July 6, 2004
MDK-127	Q308	10015-00085559	10015-00000875; July 6, 2004
MDK-128	Q309	10015-00085560	10015-00000875; July 6, 2004
DK01-124	Q326	10015-00085578	10015-00000875; July 6, 2004
DK01-130	Q340	10015-00085591	10015-00000875; July 6, 2004
DK01-133	Q343	10015-00085594	10015-00000875; July 6, 2004
DK01-139	Q349	10015-00085600	10015-00000875; July 6, 2004
DK02-108	Q359	10015-00085610	10015-00000875; July 6, 2004
DK02-114	Q364	10015-00085615	10015-00000875; July 6, 2004
DK02-104	Q380	10015-00085633	10015-00000875; July 6, 2004
DK04-101	Q450	10015-00085703	10015-00000875; July 6, 2004
DK06-100	Q513	10015-00085764	10015-00000875; July 6, 2004
GA-110	Q530	10015-00085781	10015-00000875; July 6, 2004
W-115	Q565	10015-00085819	10015-00000875; July 6, 2004
MDK-139	Q573	10015-00085827	10015-00000875; July 6, 2004
D21	Q599	10015-00085859	10015-00000875; July 6, 2004

VII. Items Containing Explosives Residue

The government moves the Commission to admit into evidence the following items that tested positive for explosives residue (*e.g.*, TNT, RDX, and HMX). The government will lay the foundation for each of the 22 items identified below.⁵

Collection Number	FBI Lab Item No.	Photograph Bates No.	Lab Report Bates. No. & Date
03 Level Radar Facing	Q14	10015-00120571	10015-00000877; July 6, 2004
04 Level Ledge Near Flags	Q15	10015-00120571	10015-00000877; July 6, 2004
02 Level Deck & Wall	Q17	10015-00120571	10015-00000877; July 6, 2004
DK05-131	Q475	10015-00085728	10015-00000877; July 6, 2004
DK05-129	Q482	10015-00120657	10015-00000877; July 6, 2004
DK03-129	Q163	10015-00085408	10015-00000878; July 6, 2004
RP-104	Q273	10015-00085524	10015-00000878; July 6, 2004
MDK-117	Q285	10015-00085536	10015-00000878; July 6, 2004
MDK-101	Q289	10015-00120460	10015-00000878; July 6, 2004
DK04-113	Q451	10015-00085704	10015-00000878; July 6, 2004
DK04-125	Q465	10015-00085718	10015-00000878; July 6, 2004
DK04-124	Q466	10015-00085719	10015-00000878; July 6, 2004
DK05-127	Q483	10015-00085733	10015-00000878; July 6, 2004
DK05-123	Q505	10015-00085756	10015-00000878; July 6, 2004
RM-18	Q111	10015-00120572	10015-00000877; July 6, 2004
RM-20	Q113	10015-00120574	10015-00000877; July 6, 2004
RM-25	Q118	10015-00120576	10015-00000877; July 6, 2004

⁵ The government is not asking the Commission to find the FBI Forensic Laboratory's testing and analysis relating to the items identified in this pleading to be admissible at this time. The Commission, however, should find the items identified in this pleading to be authentic and admissible.

Collection Number	FBI Lab Item No.	Photograph Bates No.	Lab Report Bates. No. & Date
RM-27	Q120	10015-00120578	10015-00000877; July 6, 2004
RM-28	Q121	10015-00120580 to 10015-00120581	10015-00000877; July 6, 2004
RM-47	Q140	10015-00120583 to 10015-00120584	10015-00000877; July 6, 2004
RM-77	Q143	10015-00120586 to 10015-00120587	10015-00000877; July 6, 2004
RM-78	Q144	10015-00120589 to 10015-00120590	10015-00000878; July 6, 2004

6. Law and Argument

The government will lay the foundation for each piece of evidence identified in this motion so that the Commission can find the evidence admissible. M.C.R.E. 402; M.C.R.E. 901. To that end, the government must prove—by a preponderance of the proof—that each piece of evidence offered for admission is relevant and authentic and that the evidence is either not hearsay or admissible hearsay. *Id.* The Commission should apply the “more probable than not” standard to resolve preliminary issues under M.C.R.E. 104(a). *See Bourjaily*, 483 U.S. at 175 (“The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration.”).⁶

Once the government lays a foundation, the Commission should find the evidence admissible—a matter completely within the Commission’s discretion and not appropriate for the members’ consideration. M.C.R.E. 104(a). Because such admissibility determinations must be decided by the Commission alone, it should, to the extent possible, determine whether the

⁶ *Bourjaily*, 483 U.S. at 175 (“We have traditionally required that these matters be established by a preponderance of proof. Evidence is placed before the jury when it satisfies the technical requirements of the evidentiary Rules, which embody certain legal and policy determinations.”).

evidence is admissible in advance of trial. By doing so, the Commission protects the integrity of these important proceedings by ensuring that members are exposed only to admissible evidence. And the defense benefits from the Commission performing its evidentiary gatekeeping functions before trial since the defense then will know what evidence it has to meet at trial, where the defense will have the opportunity to attack the weight of the evidence.

Making pretrial decisions concerning the admissibility of evidence is consistent with federal district court and military court-martial practice. *See, e.g., United States v. Kadir*, 718 F.3d 115, 121-22 (2d Cir. 2013) (affirming order granting the government's motion *in limine* to admit testimony from an expert on terrorism); *United States v. Washington*, 2013 WL 4437604 at * 1, 5-6 (3d Cir. 2013) (affirming order granting the government's motion *in limine* to admit physical evidence seized by the Drug Enforcement Agency during an arrest); *United States v. Siddiqui*, 699 F.3d 690, 697-98, 701-03 (2d Cir. 2012) (affirming order granting government's motion *in limine* to admit documents and other evidence recovered from defendant at the time of her arrest by foreign officials); *United States v. Douglas*, 482 F.3d 591, 593-94 (D.C. Cir. 2007) (affirming order granting the government's motion *in limine* to admit evidence of defendant's prior arrest); *United States v. Miller*, 227 Fed.Appx. 446, 457 (6th Cir. 2007) (affirming order granting the government's motion *in limine* to admit evidence of defendant's prior drug conviction); *United States v. LaFlora*, 146 Fed.Appx. 973, 974-75 (10th Cir. 2005) (affirming order granting the government's motion *in limine* to admit evidence of defendant's prior bank robbery convictions).

I. The Government Will Establish the Authenticity for Each Piece of Evidence Found on or Around USS COLE (DDG 67)

The government will lay the foundation for the evidence, including fiberglass specimens from the attack boat, pieces of the attack boat's motor, the explosive device and fuze used to

attack USS COLE (DDG 67), red carpeting from within the attack boat, and items that tested positive for explosive residue. The Commission should find the evidence admissible.

To be admissible, the evidence must be authentic. Military Commission Rule of Evidence 901 provides that “[e]vidence shall be admitted as authentic if: (a) the military judge determines that there is sufficient basis to find that the evidence is what it is claimed to be; and (b) the military judge instructs the members that they may consider any issue as to authentication or identification of evidence in determining the weight, if any, to be given to the evidence.”

M.C.R.E. 901. The Military Commission Rules of Evidence do not limit the type of proof that a party may present to authenticate evidence. The Federal Rules of Evidence, however, identify specific means by which a party may authenticate evidence, including direct testimony, circumstantial proof, and comparisons by expert witnesses or the trier of fact. *See* Federal Rule of Evidence 901(b); *see also United States v. Tin Yat Chin*, 371 F.3d 31, 37-38 (2d Cir. 2004) (“Rule 901 does not erect a particularly high hurdle, and that hurdle may be cleared by circumstantial evidence.”). The Federal Rules of Evidence allow parties to authenticate items by distinctive characteristics and the like, including “[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item.” Federal Rule of Evidence 901(b).

“The bar for authentication of evidence is not particularly high.” *United States v. Gagliardi*, 506 F.3d 140, 151 (2d Cir. 2007).⁷ The proponent of the evidence is not required to “rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the

⁷ *See also United States v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006) (“The threshold for the Court’s determination of authenticity is not high.”); *United States v. Reilly*, 33 F.3d 1396, 1404 (3d Cir. 1994) (“[T]he burden of proof for authentication is slight[.]”); *United States v. Holmquist*, 36 F.3d 154, 168 (1st Cir.1994) (“[T]he standard for authentication, and hence for admissibility, is one of reasonable likelihood”); *United States v. Coohay*, 11 F.3d 97, 99 (8th Cir.1993) (“[T]he proponent need only demonstrate a rational basis for its claim that the evidence is what the proponent asserts it to be”).

evidence is what it purports to be.” *Gagliardi*, 506 F.3d at 151. Instead, Federal Rule of Evidence 901 “is satisfied if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification.” *United States v. Dhinsa*, 243 F.3d 635, 658 (2d Cir. 2001); *see also United States v. Fadayini*, 28 F.3d 1236, 1241 (D.C. Cir. 1994). “If in the court’s judgment it seems reasonably probable that the evidence is what it purports to be, the command of Rule 901(a) is satisfied, and the evidence’s persuasive force is left to the jury.” *Dhinsa*, 243 F.3d at 659; *see also United States v. Tropeano*, 252 F.3d 653, 661 (2d Cir. 2001) (“Authentication of course merely renders [evidence] admissible, leaving the issue of [its] ultimate reliability to the jury.”); *Ricketts v. City of Hartford*, 74 F.3d 1397, 1411 (2d Cir. 1996) (holding that the trial court erred in excluding a tape recording on authentication grounds where a rational juror could have concluded that the defendant had made the statements at issue).

The government will authenticate the evidence by presenting testimony during a pretrial hearing. That testimony will include government officials from within the chain of custody for each piece of evidence. Each agent that the government intends to call to establish authenticity is a United States agent, employee, or official who participated in the investigation into the attack on USS COLE (DDG 67). The Commission may presume “that the integrity of [the] evidence routinely handled by [the] governmental officials was suitably preserved (unless the accused makes) a minimal showing of ill will, bad faith, other evil motivation, or some evidence of tampering.” *United States v. Lane*, 591 F.2d 961, 962 (D.C. Cir. 1979) (internal citations and quotations omitted). Only where the accused provides evidence of tampering by the government agent, employee, or official must the government “establish that acceptable precautions were taken to maintain the evidence in its original state.” *Id.* at 962.

To the extent that any items identified in this motion are considered fungible (because they are lab-tested evidence, like the items that positive for explosives residue), the authentication requirements for such evidence are no different. The foundational predicate for fungible evidence is met by “showing that there is a reasonable probability the sample which was tested was in fact from the purported source and that it was not altered.” *United States v. Youngberg*, 43 M.J. 379, 387, n.11 (C.A.A.F. 1995) (quoting *United States v. Maxwell*, 38 M.J. 148, 150 (C.M.A. 1993), *cert. denied*, 510 U.S. 1112 (1994); see *United States v. Stewart*, 104 F.3d 1377, 1383 (D.C. Cir. 1997) (finding that lab-tested evidence is entitled to a presumption of integrity when collected by government officials and, where the accused overcomes that presumption, the government only needs to demonstrate, as a matter of reasonable probability, that there has been no misidentification or adulteration).

Here, the government will meet its burden by presenting testimony from (i) the persons that collected the lab-tested evidence and (ii) the agents that secured the lab-tested evidence during transport from Yemen to the FBI Forensic Laboratory. The agents collecting and transporting this evidence wore gloves when handling the evidence, prepared and preserved a chain of custody for the evidence, and secured the evidence during transport. Such testimony will establish a sufficient chain of custody demonstrating that there is a reasonable probability that the evidence was not tampered with—a burden that the government must meet only where the accused overcomes the presumption afforded to evidence collected and handled by government officials (which the accused cannot do).

Because the government will present testimony from the agents and officials that collected and processed the evidence, transported the evidence to the United States, and analyzed

the evidence at the FBI Forensic Laboratory, the government will meet its burden to demonstrate that reasonable members can conclude that the evidence is what it purports to be.

II. The Government Will Establish that Each Piece of Evidence Found On or Around USS COLE (DDG 67) Is Relevant

In addition to proving authenticity, the government must demonstrate that each piece of evidence is relevant. The Military Commission Rules of Evidence provide that “[a]ll evidence having probative value to a reasonable person is admissible” M.C.R.E. 402. “Evidence has ‘probative value to a reasonable person’ when a reasonable person would regard the evidence as making the existence of any fact that is of consequence to a determination of the commission action more probable or less probable than it would be without the evidence.” M.C.R.E. 401. Here, the government must demonstrate by a preponderance of the evidence (more probable than not) that the evidence is relevant to the charges. *See Bourjaily v. United States*, 483 U.S. at 175. The government will meet its burden to establish the relevance of the evidence found on or around USS COLE (DDG 67) when presenting testimony to authenticate the evidence.

To establish relevance, the government will present testimony from (i) the lead case agent and other investigators from the FBI and the NCIS and (ii) the FBI Forensic Laboratory personnel responsible for testing and analyzing the evidence. As identified *supra*, that evidence consists of fiberglass specimens, parts of the attack boat’s motor, items relating to the explosives device and fuze, red carpeting, and items that tested positive for explosives residue. All of that evidence has probative value to a reasonable person because it tends to prove that a boat made of fiberglass detonated explosives near USS COLE (DDG 67) and killed 17 United States Sailors (and seriously injured dozens of other United States Sailors).

The items that tested positive for explosives residue also are relevant because they establish that explosives were used in the attack, and they establish the type of explosives used in

the attack. A comparison of the explosives residue found on and around USS COLE (DDG 67) with samples obtained from other locations in Yemen, where the accused and his coconspirators prepared for the attack, are probative of the accused's connection to the charged offenses and the various locations used by the accused and his coconspirators. The items also corroborate witness testimony. Accordingly, the evidence is relevant, and the Commission should find the evidence admissible after the pretrial hearing. *See* M.C.R.E. 104(b).

7. Conclusion

The government will lay a foundation for the evidence identified in this motion so that the Commission can determine admissibility before trial, the defense can know what evidence it must meet at trial, and the members can be protected from exposure to inadmissible evidence or undue delay during trial.⁸

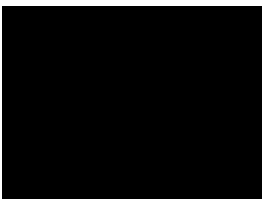
8. Oral Argument

The government does not request oral argument to address the merits of whether the Commission may admit evidence before trial. The Commission can decide that matter without oral argument. *See* Military Commissions Trial Judiciary Rule of Court 3.9(a). The government, however, requests an evidentiary hearing to lay the foundation for the evidence identified in this pleading.

9. Witnesses and Evidence

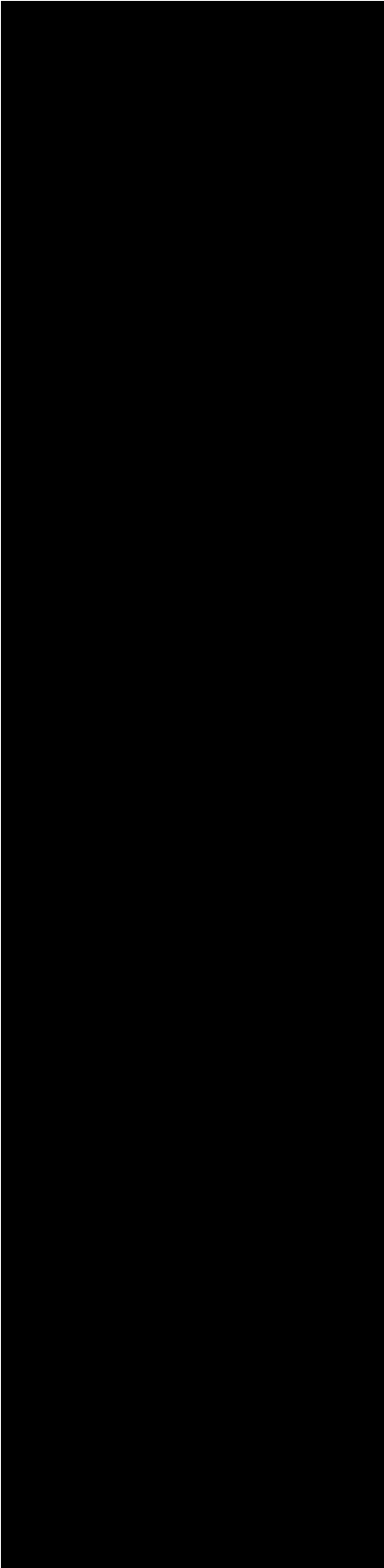
The government may call the following witnesses in support of its motion:

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⁸ The government reserves the right to seek the admission of additional evidence found on or around USS COLE (DDG 67) and not identified in this pleading.

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ATTACHMENT A

Filed with TJ
4 February 2014

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ATTACHMENT B

Index of Evidence Listed in AE 207

Prosecution Exhibit For Identification No.	Collection Number	FBI Lab Item Number	Bates Number
1	DK02-113	Q157	10015-00085402
2	DK01-108	Q315	10015-00085566
3	DK02-102	Q382	10015-00085635
4	DK02-123	Q368	10015-00085619
5	DK03-117	Q395	10015-00085648
6	DK01-112	Q316	10015-00085567
7	DK01-106	Q318	10015-00085569
8	DK01-123	Q334	10015-00085585
9	DK01-143	Q352	10015-00085603
10	DK03-114	Q400	10015-00085652
11	DK04-116	Q443	10015-00085696
12	DK03-147	Q422	10015-00085674 10015-00085675
13	DK04-117	Q441	10015-00085694
14	DK02-120	Q367	10015-00085618
15	DK05-135	Q476	10015-00085729
16	DK05-136	Q486	10015-00085736
17	DK02-128	Q373	10015-00085624
18	DK02-118	Q381	10015-00085634
19	DK03-136	Q406	10015-00085658
20	W-113	Q571	10015-00085825
21	W-121	Q545	10015-00085798
22	W-102	Q556	10015-00085810
23	DK05-101	Q497	10015-00085748
24	DK05-112	Q169	10015-00085414
25	RP-105	Q274	10015-00085525
26	MDK-115	Q275	10015-00085526
27	MDK-138	Q295	10015-00085545
28	MDK-129	Q298	10015-00085548
29	MDK-131	Q301	10015-00085551
30	MDK-123	Q304	10015-00085554
31	MDK-132	Q313	10015-00085564
32	DK01-118	Q329	10015-00085581
33	DK01-142	Q353	10015-00085604
34	DK02-103	Q383	10015-00085636
35	DK02-130	Q385	10015-00085638
36	DK02-122	Q387	10015-00085640
37	DK03-138	Q407	10015-00085659
38	DK03-162	Q439	10015-00085692

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45	W-117	Q557	10015-00085811
46	D19	Q597	10015-00085857
47	DK04-105	Q471	10015-00085724
48	W-132	Q540	10015-00085792 10015-00085793
49	W-134	Q542	10015-00085795
50	W-130	Q546	10015-00085799
51	W-123	Q549	10015-00085802
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53	D9	Q587	10015-00085846
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55	D11	Q589	10015-00085848
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57	D13	Q591	10015-00085850
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60	D16	Q594	10015-00085853
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66	DK03-135	Q410	10015-00085662
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69	DK04-106	Q467	10015-00085720
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See PE ID No. 18	DK02-118	Q381	10015-00085634
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See PE ID No. 66	DK03-135	Q410	10015-00085662
See PE ID No. 16	DK05-136	Q486	10015-00085736
See PE ID No. 71	DK05-102	Q493	10015-00085744
See PE ID No. 44	W-133	Q537	10015-00085788
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See PE ID No. 76	W-111	Q566	10015-00085820
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100	MDK-118	Q287	10015-00085538
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103	DK04-110	Q462	10015-00085715
104	DK03-102	Q160	10015-00085405
105	DK00-100	Q173	10015-00085418
106	BH-113	Q261	10015-00085512
107	RP-101	Q270	10015-00085521
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147	04 Level Ledge Near Flags	Q15	10015-00120571
148	02 Level Deck & Wall	Q17	10015-00120571
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166	RM-77	Q143	10015-00120586 10015-00120587
167	RM-78	Q144	10015-00120589 10015-00120590

ATTACHMENT C

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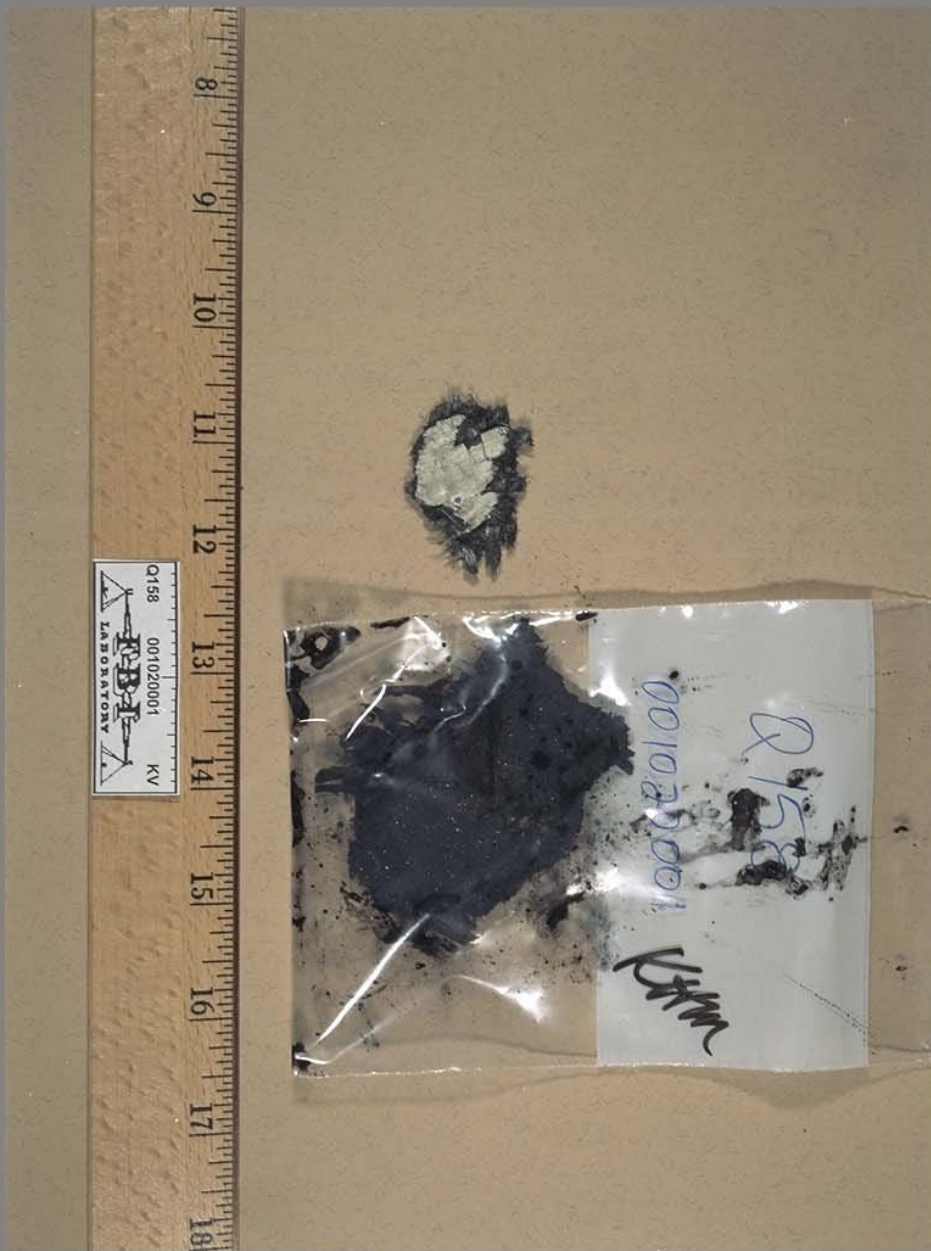


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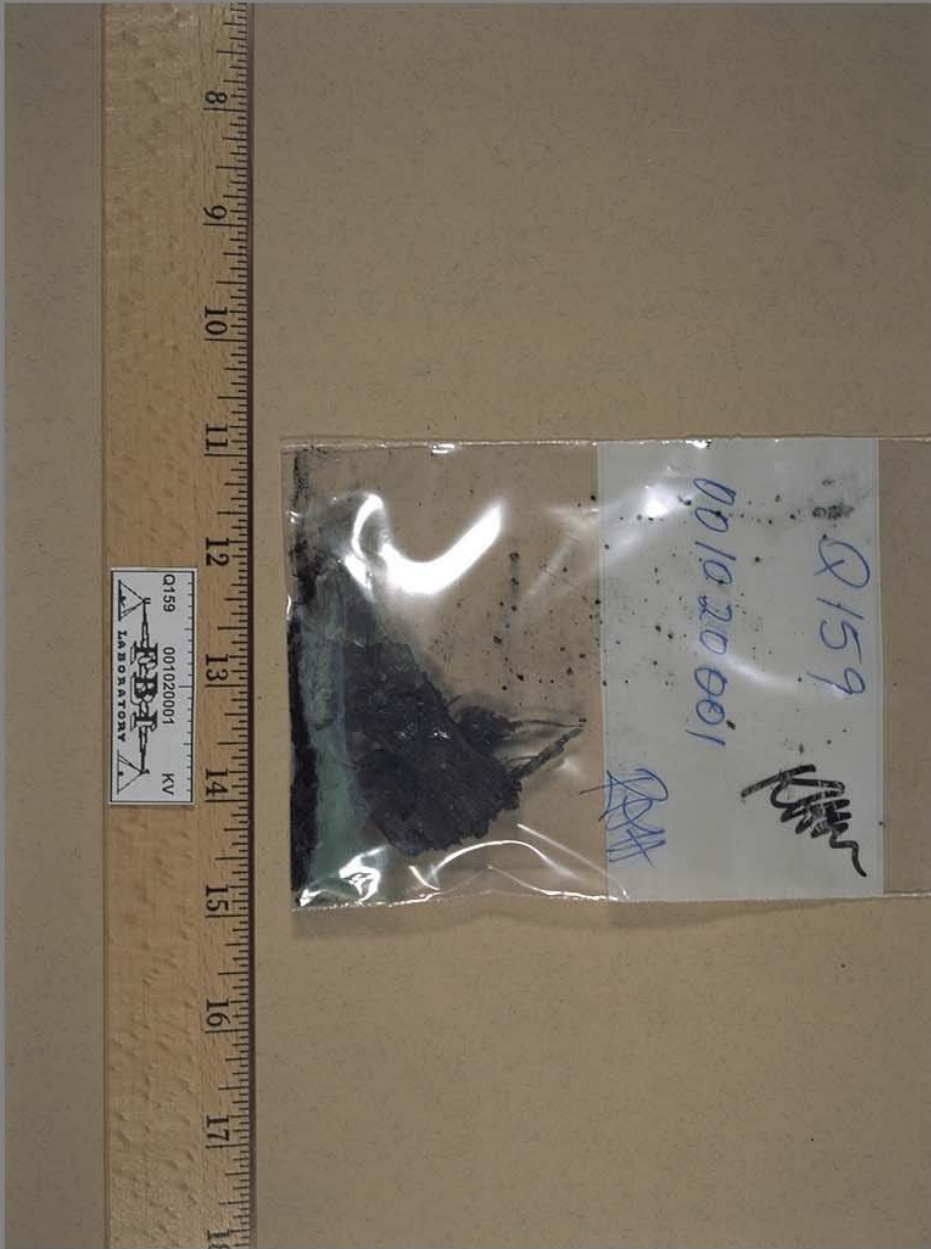
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~~LEGAL ATTORNEYS AT THE FBI~~



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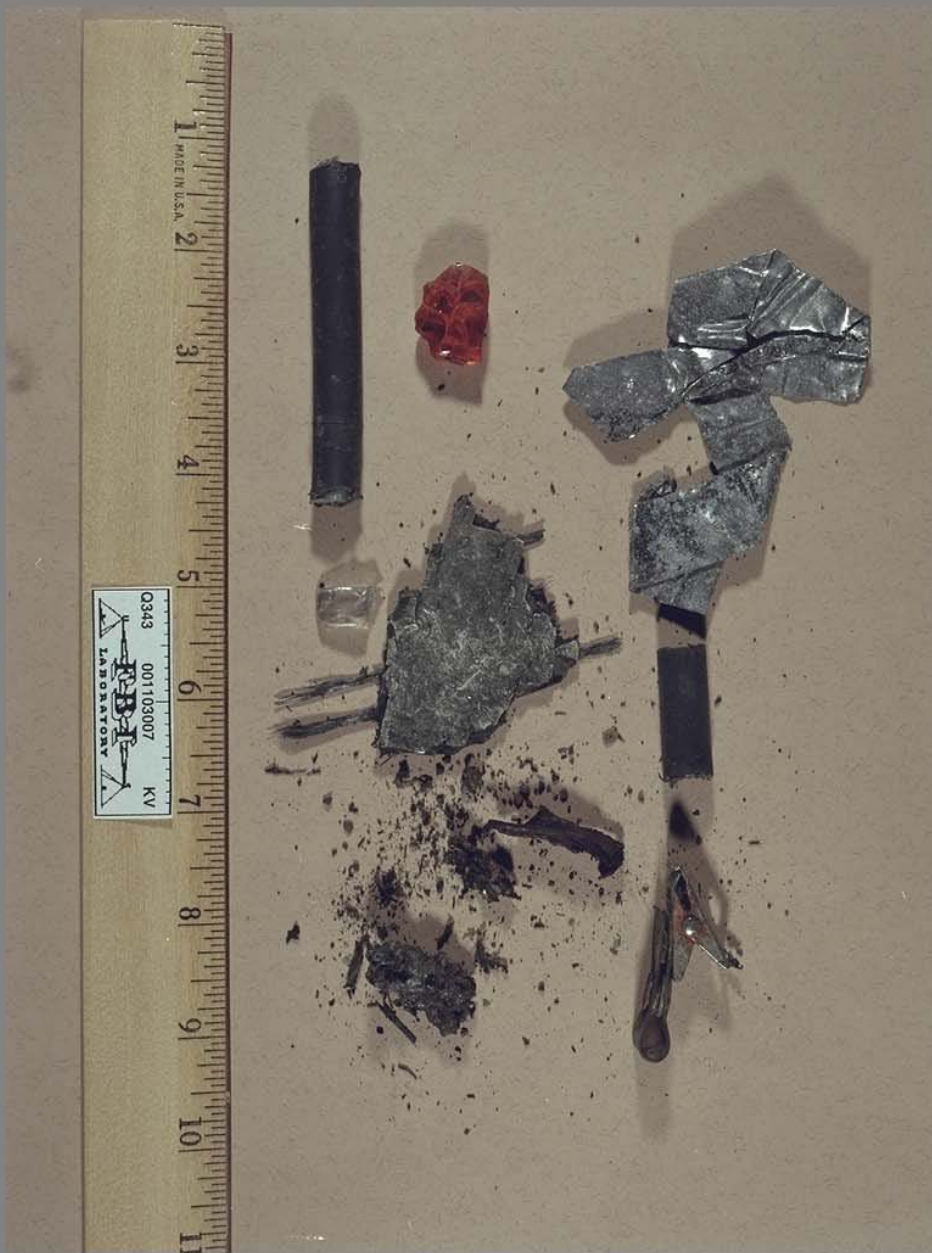
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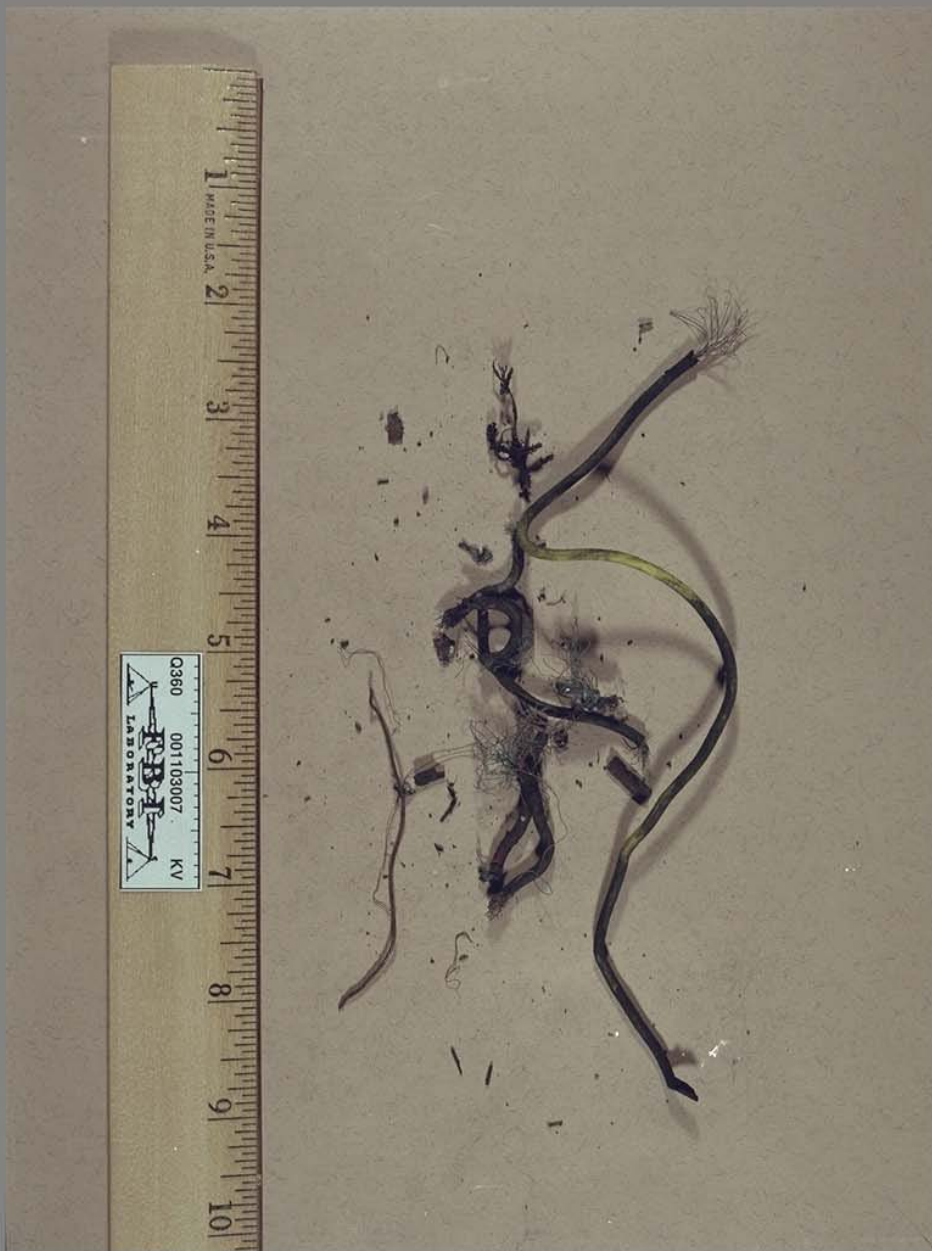
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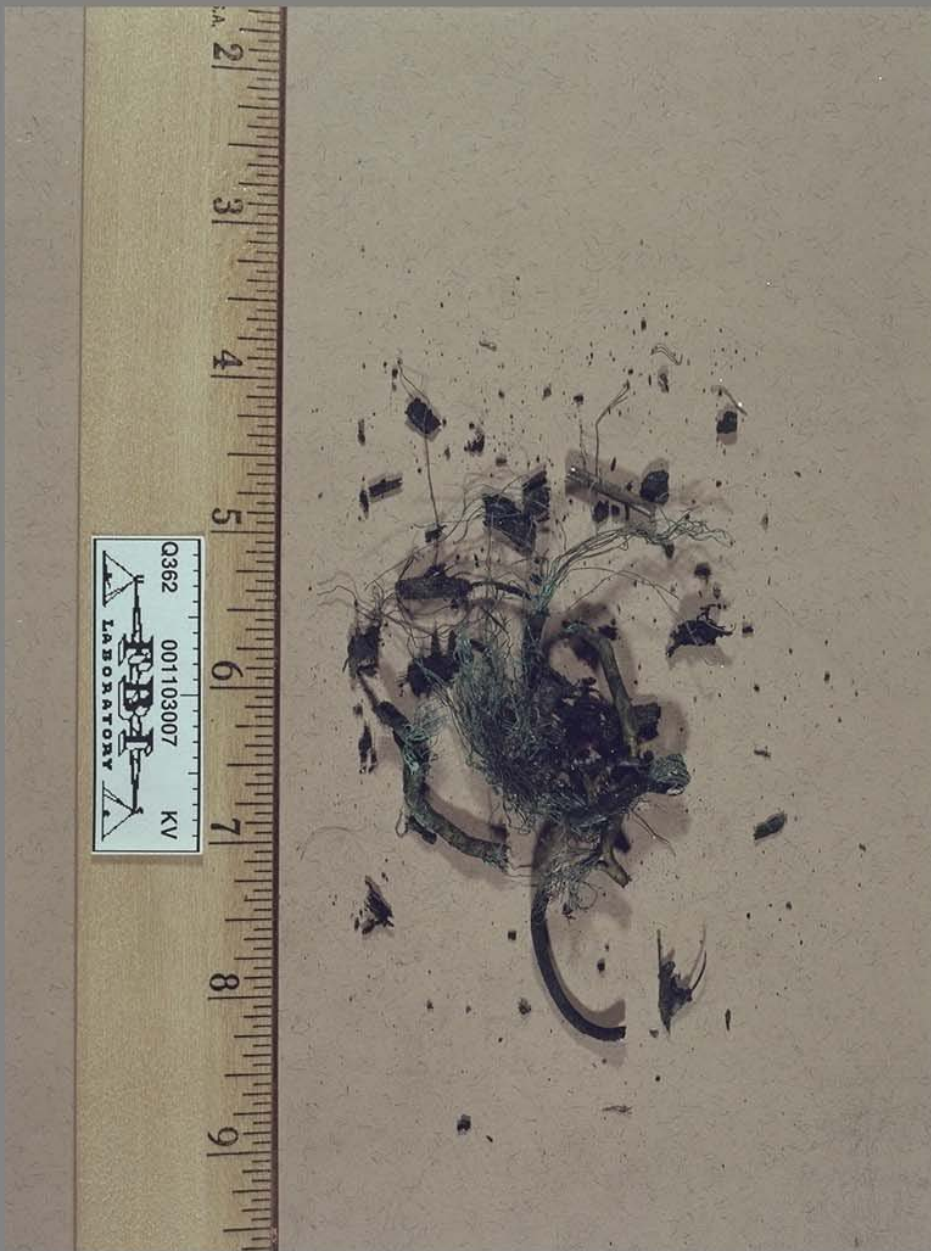
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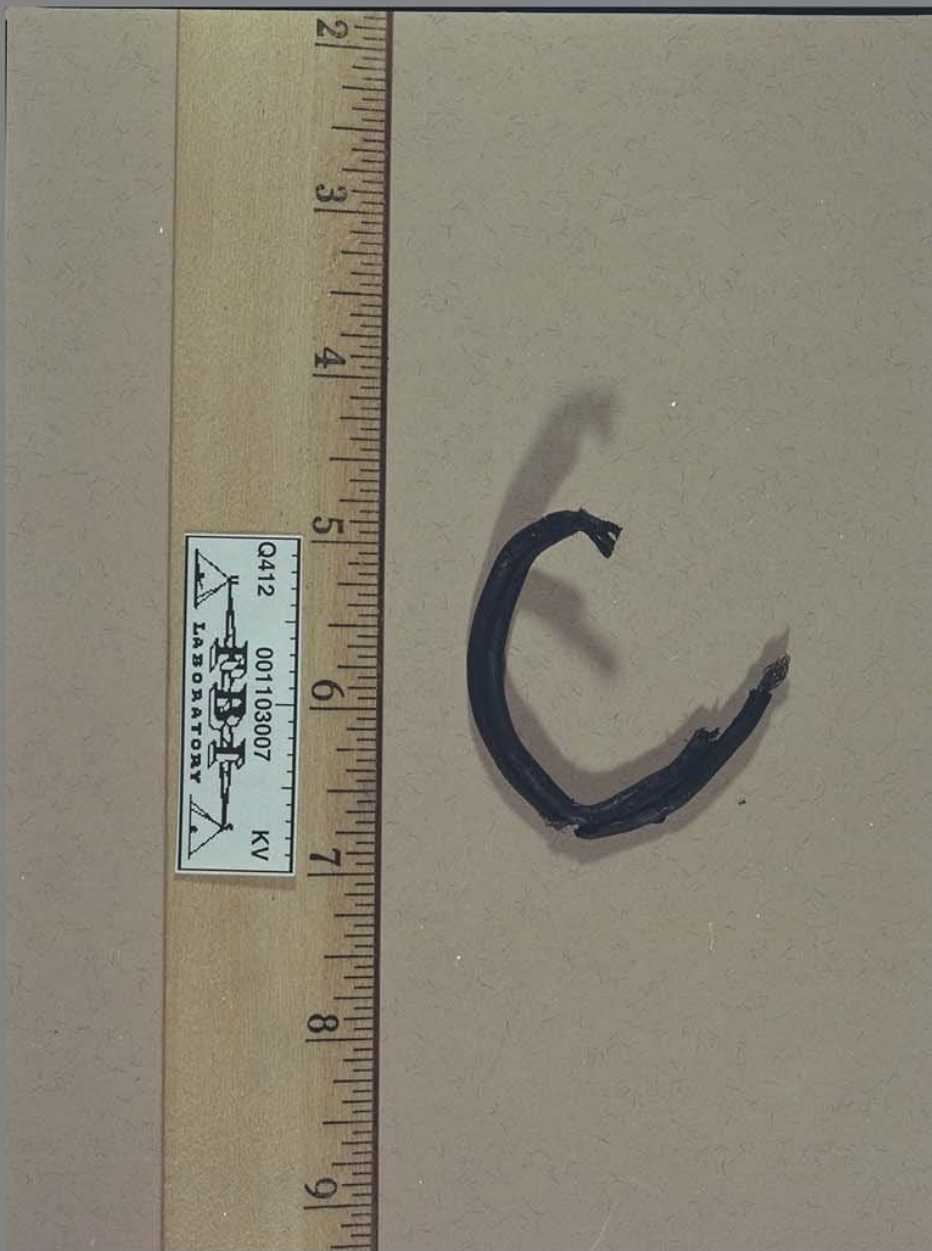
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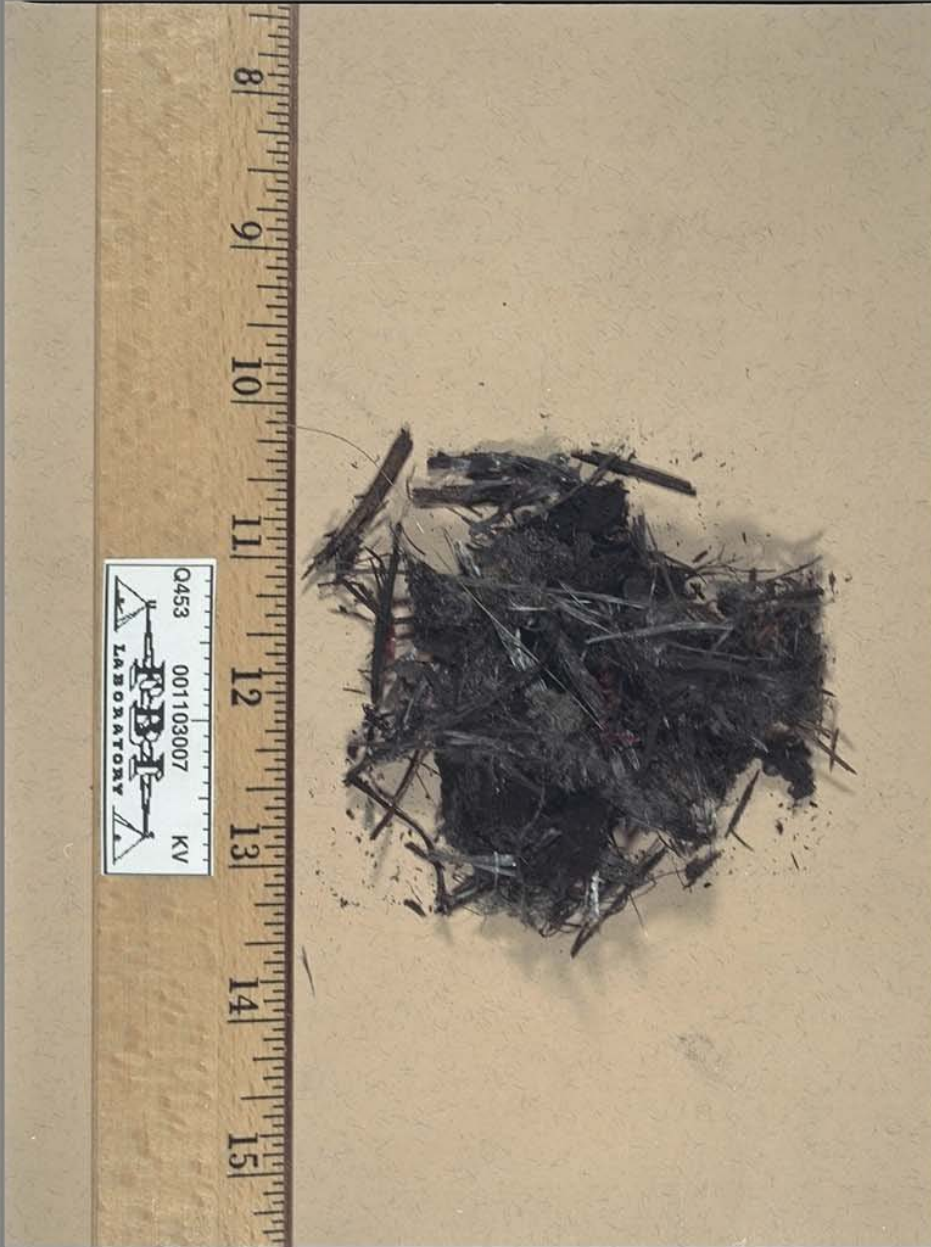
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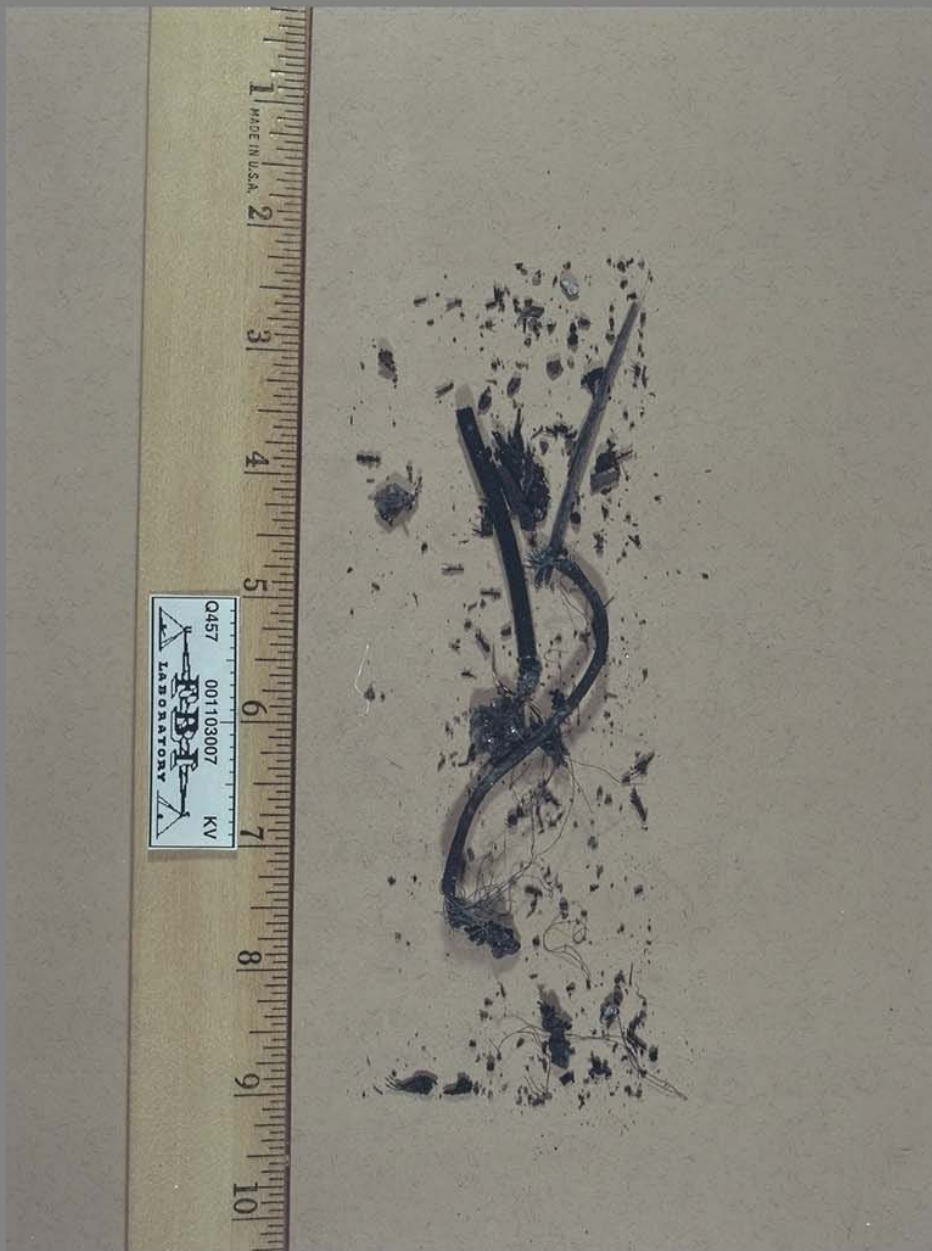
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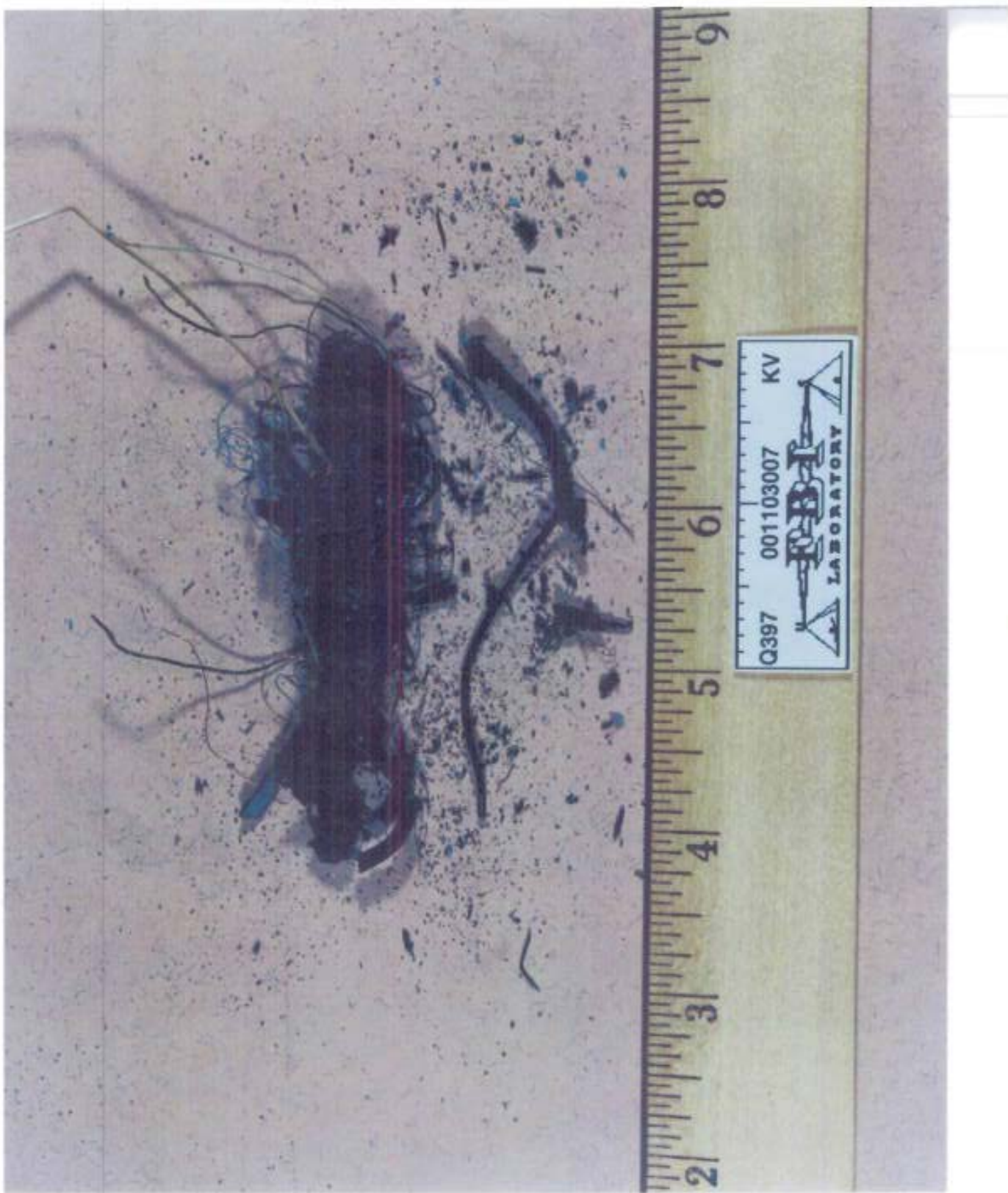
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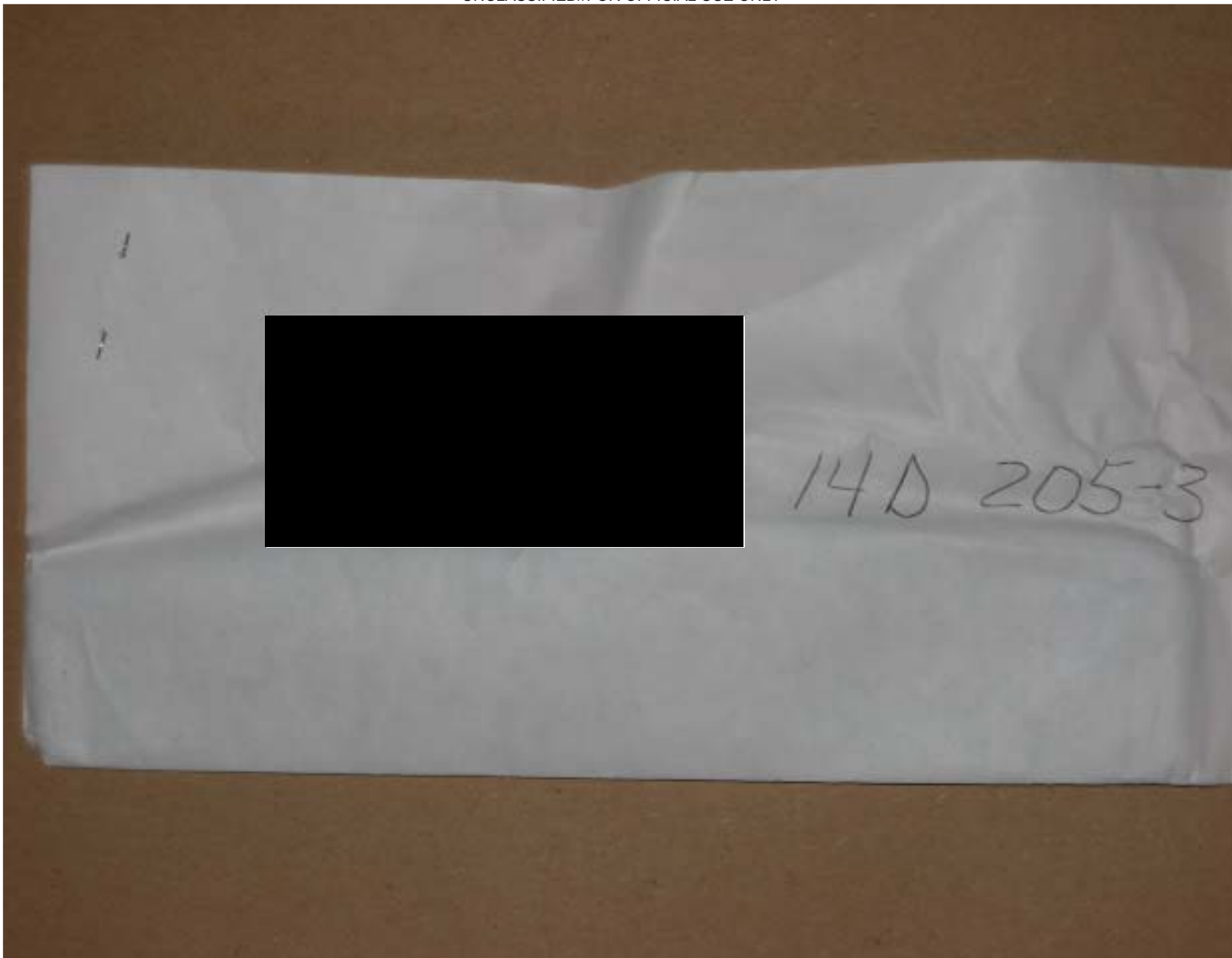




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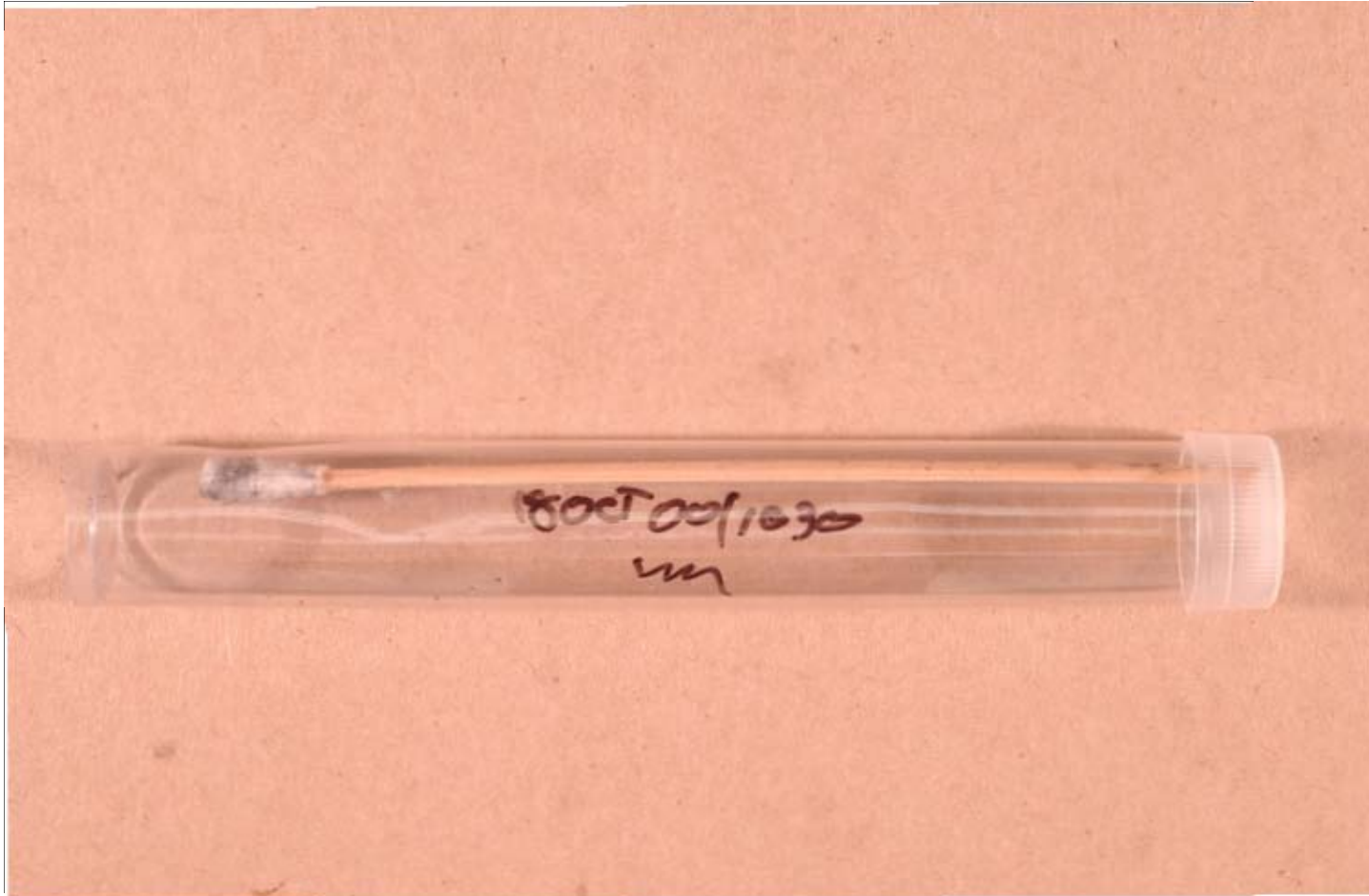






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