

4. An opinion from the U.S. District Court for the District of New Mexico denying motions to exclude the testimony of two experts proposed by the government: a forensic examiner knowledgeable about extracting digital files and a special agent knowledgeable about identification and attribution of internet identities.

In *United States v. Pena*, No. 20-CR-01903 MV, 2022 WL 1175184 (D.N.M. April 20, 2022), U.S. District Judge Martha Vázquez denied Defendant’s *Daubert* motion to exclude the testimony of two experts proposed by the government: a forensic examiner knowledgeable about extracting digital files and a special agent knowledgeable about identification and attribution of internet identities.

In connection with a criminal indictment of the defendant, the government filed a notice of intent to offer expert testimony (Notice) identifying six experts the government sought to offer, including Byron French, a forensic examiner, and Jacob Joel vanBrandwijk, a special agent. *Id.* at *1. Defendant opposed the Notice under *Daubert v. Merrell Down Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Id.* at *2.

Judge Vázquez first addressed the timeliness and specificity of the Notice before turning to the admissibility of the proposed expert testimony. Defendant argued that the government provided only a minimal basis for evaluating the proposed testimony of experts French and vanBrandwijk and asked the court to “exercise its gatekeeping function by holding a *Daubert* hearing” and to deny the government’s motion for admission of the testimony of these experts. *Id.* at *5. The government argued that the proposed expert testimony and evidence should be allowed and was admissible because it “has a reliable basis in the knowledge and experience in each of their specialized fields.” *Id.* at *6.

Judge Vázquez presented the requirements for admissibility of expert testimony under Rule 702 of the Federal Rules of Evidence and *Daubert*, citing also to *Kunho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999), which “extended the holding in *Daubert* such that the trial judge’s gatekeeping function applies not only to testimony based on scientific knowledge but also to testimony based on technical and other specialized knowledge.”

Judge Vázquez then addressed the government’s proposed testimony from French in the area of computer forensics and forensic data acquisition and analysis, in particular the extraction of media files from cellphones for examination and analysis. *Id.* at *7. Judge Vázquez stated that French was qualified to serve as an expert witness in this regard. Citing French’s resume, Judge Vázquez stated that French had worked as a computer forensic examiner for eight years, had a significant number of certifications, and had participated in an extensive list of forensics trainings. Further, French had analyzed over 107 terabytes of computer media, DVR, and cellphone data in support of

over 141 cases since 2014. Judge Vázquez found this “more than sufficient to demonstrate that he has the requisite qualifications to serve as an expert witness.”

Judge Vázquez found that French’s proposed testimony, about the forensic extraction and examination process generally, was relevant. *Id.* at *8. Judge Vázquez agreed with the government’s argument that the use of “extraction tools is not generally within the purview of average jurors.” Judge Vázquez described this as “go[ing] to the heart of the relevancy inquiry” and stated that French’s proposed testimony was directly relevant to the basis of the charges against Defendant. Judge Vázquez highlighted French’s proposed testimony that video files found on an LG cellphone and an Apple iPod Touch were separate files rather than a longer, single video file that was broken into separate files.

Judge Vázquez also found French’s proposed testimony reliable. Defendant argued that the government’s Notice contained insufficient information to explain how French’s examination of hash values led him to opine that videos were created separately rather than being a single video file. Defendant also cited a statement by French suggesting he “could not say whether or not there was a single ... original file from which all the others were derivative.” The government responded that whether the videos could be one large file that was broken into smaller files was ultimately an issue for the jury to weigh.

Judge Vázquez listed relevant statements at the *Daubert* hearing to support her reasoning. First, French stated he did not believe the videos at issue were subparts of a larger file. Then, on cross-examination, French conceded that it was *possible* the videos were subparts of a longer file but that it was not likely. French also stated that a subset of images were unique files, based on the create time, naming convention, and MD5 hash. On redirect, French stated that he saw no indication from the video’s metadata that the existing videos had been subdivided from a larger video.

Judge Vázquez concluded that “while Mr. French cannot opine with absolute certainty that the videos at issue were not subparts of a larger single video file, he should not be barred from opining that it is his expert opinion that each video file is a separate creation.” *Id.* (internal quotations omitted). Judge Vázquez stated that the “law does not require experts to testify with absolute certainty” and “gaps in an expert witness’s qualifications or knowledge generally go to the weight of the witness’s testimony, not its admissibility.” *Id.* (internal citations and quotations omitted). Therefore, Judge Vázquez stated that the challenges regarding the creation of the video went to the weight of the evidence rather than its admissibility. Judge Vázquez accordingly held that French’s proposed testimony was admissible.

Judge Vázquez then turned to her analysis of the admissibility of vanBrandwijk’s testimony regarding the attribution of internet identities (i.e., whether a particular internet identity belonged to Defendant). *Id.* at *9. Judge Vázquez found vanBrandwijk’s qualifications “more than sufficient,” noting his bachelor’s degrees in computer science and mathematics and master’s degree in information assurance. In addition, vanBrandwijk had worked in cybersecurity since 2004 and worked as an FBI special agent investigating cybercrimes since 2017. Judge Vázquez further stated that vanBrandwijk’s testimony at the *Daubert* hearing “demonstrated a deep knowledge of the practice of the attribution of internet identities.”

Judge Vázquez continued that vanBrandwijk’s proposed testimony was relevant. She stated that “his testimony on the use of IP addresses as an investigative tool is beyond the ken of the average juror.” *Id.* (internal quotations omitted). Judge Vázquez added that his opinion that the same device was behind two relevant Facebook accounts was “highly relevant to and probative of [Defendant]’s possible guilt.” Judge Vázquez also stated that Defendant’s argument that reliable principles and methods to attribute internet identities are not widely known “only serves to underscore the importance and relevance of expert testimony in such a specialized field of knowledge.”

Judge Vázquez also found vanBrandwijk’s proposed testimony reliable. Defendant argued at the *Daubert* hearing that vanBrandwijk had insufficient data to conclude that the two relevant Facebook profiles came from the same device and that he had reviewed data from only three Facebook profiles to reach his expert opinion. Defendant added that there were potentially additional profiles that would be linked to the same device that were never requested. Judge Vázquez agreed with the government’s counter that these questions were “fair points of inquiry for cross-examination, but go more to weight as opposed to the admissibility of the special agent’s proposed expert testimony.” *Id.* (internal quotations omitted). While vanBrandwijk would not be able to opine on whether other profiles were also linked to the device in question, Judge Vázquez stated there was no reason he could not form expert opinions on the data he did analyze.

Judge Vázquez stated that vanBrandwijk testified that he used Facebook business records to identify instances where the IP addresses used by three Facebook accounts overlapped. *Id.* at *10. He “correlated this data using Excel, used the American Registry of Internet Number[s] to determine that multiple devices were not associated with the same IP address, and then identified 53 separate instances of overlap between the IP addresses accessed by the” two relevant Facebook accounts. VanBrandwijk found no indication that the IP addresses had not been hijacked and concluded that the repeated overlap of the IP address for over a year indicated that the same device was being used to access both accounts. Judge Vázquez found this testimony to be based on sufficient facts or data and the product of reliable principles and methods.

Judge Vázquez provided a constraint to vanBrandwijk's proposed testimony with respect to the opinion that the same *user* was behind the two Facebook accounts. The government conceded at the *Daubert* hearing that he could only opine that the same *device* was behind the two accounts, and so Judge Vázquez limited the testimony accordingly. She then held that vanBrandwijk's proposed testimony was admissible subject to the one constraint.