

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF CALIFORNIA  
3

4 KEVIN COOPER, ) Case No. 04CV0656-H(LSP)  
5 )  
6 Petitioner, ) San Diego, California  
7 )  
8 vs. ) Thursday,  
9 ) June 3, 2004  
10 JILL L. BROWN, ACTING WARDEN, ) 9:00 a.m.  
11 )  
12 SAN QUENTIN STATE PRISON, )  
13 )  
14 Respondent. )  
15 )  
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10 TRANSCRIPT OF EVIDENTIARY HEARING  
11 BEFORE THE HONORABLE MARILYN L. HUFF  
12 UNITED STATES DISTRICT JUDGE

13 APPEARANCES:

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24 Proceedings recorded by electronic sound recording;  
25 transcript produced by transcription service.

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Sandra Coke

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Steven Myers

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EXHIBITSIDENTIFIEDRECEIVEDPetitioner's2A Original of Exhibit 2, declaration  
of James Taylor

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Respondent's

(None.)

1 SAN DIEGO, CALIFORNIA THURSDAY, JUNE 3, 2004 9:00 A.M.

2 --oOo--

3 (Call to order of the Court.)

4 THE COURT: Thank you. You want to state your  
5 appearances for the record.

6 MR. ALEXANDER: Yes, your Honor, good morning,  
7 David Alexander on behalf of the Petitioner, Kevin Cooper.

8 MR. HILE: Good morning, your Honor, Norm Hile on  
9 behalf of the Petitioner.

10 MS. WILKENS: Good morning, your Honor, Holly  
11 Wilkens, Deputy Attorney General, on behalf of the  
12 Respondent.

13 MS. DENAULT: Good morning, your Honor, Deputy  
14 Attorney General Adrienne Denault on behalf of Respondent.

15 THE COURT: Good morning. And for witness  
16 scheduling were we able to get our witnesses ready for  
17 10:30?

18 MS. WILKENS: Yes, Detective Pacifico will be  
19 here for 10:30.

20 THE COURT: All right. So today we were going to  
21 argue at this time the Brady issue -- the Daubert issue.

22 MS. WILKENS: Yes, your Honor.

23 THE COURT: All right, you may proceed.

24 MR. ALEXANDER: Thank you, your Honor.

25 (Pause.)

1 THE COURT: And I'll give each side half an hour.  
2 You can reserve your time.

3 MR. ALEXANDER: Thank you, your Honor, I would  
4 like to reserve time. I don't think I'll need the entire  
5 period of time initially.

6 First, let me report to the Court with regard to  
7 the article that you asked us to check on the date on.  
8 Part of our checking is still going on by contacting AP,  
9 but we were able to determine last night by looking at the  
10 trial transcripts that Mr. Baird, who is mentioned in the  
11 article and whose testimony is the subject of the article,  
12 testified on December the 11th. Now that's not conclusive  
13 that it's the 12th.

14 THE COURT: Because I thought it might be -- all  
15 right, so you think it's December 12th, maybe.

16 MR. ALEXANDER: We think it's -- that's  
17 the -- that's the best likelihood, but we're still going to  
18 confirm that directly with AP. Obviously it's an old  
19 article.

20 THE COURT: AP or the --

21 MR. ALEXANDER: Or the paper.

22 THE COURT: -- microfiche.

23 MR. ALEXANDER: Yes.

24 THE COURT: Or -- was it Union-Tribune?

25 MR. HILE: We don't -- we can't identify, the way

1 it's copied, which newspaper it came from.

2 That's -- that's the problem. So we're trying to -- to go  
3 through. If somebody knows, that would be great, but we  
4 don't know.

5 MS. WILKENS: Your Honor, I requested the  
6 Department of Justice librarian do a search and confirm  
7 what paper, what date.

8 MR. ALEXANDER: Oh, wonderful.

9 MS. WILKENS: That should be done shortly.

10 THE COURT: All right, good, thank you. All  
11 right.

12 MR. ALEXANDER: That's good. Thank you, Ms.  
13 Wilkens.

14 Your Honor, in -- in addressing the -- the  
15 Daubert argument, I guess I should first inquire of the  
16 Court, my -- my remarks will address the anti-coagulant,  
17 whether EDTA or otherwise. I believe that there is  
18 agreement between both sides and I think also the Court  
19 that, with regard to the mitochondrial DNA testing, that  
20 that is sufficiently well established that there is no  
21 issue as to that. Unless your Honor wants any further  
22 comments on that, I will -- I will pass that.

23 THE COURT: You may.

24 MR. ALEXANDER: Thank you very much. As we know,  
25 in the Daubert matter -- I feel a little funny telling your

1 Honor what Daubert means, because I'm sure you've been  
2 quite experienced with it in many different contexts, but  
3 it clearly was a relaxation of the standard that had  
4 previously been in effect and applied in state courts,  
5 which was the Kelly Frye standard.

6 The test that the Supreme Court articulated  
7 in -- in 1993 is, first of all -- excuse me, your  
8 Honor -- that the trial judge faced with a proffer of  
9 expert scientific testimony must determine at the outset  
10 whether the expert is proposing to testify to scientific  
11 knowledge that will assist the trier of fact, in this case  
12 your Honor, to understand or determine a fact in issue.  
13 This entails a preliminary assessment of whether the  
14 reasoning or methodology underlying the testimony is  
15 scientifically valid.

16 Let me just address the methodology issue first,  
17 since that's the first prong of the -- of the test, as I  
18 understand it.

19 The methodology that is employed is one that I  
20 think has been accepted by every jurisdiction that has been  
21 confronted with the issue, even in those instances where  
22 perhaps the -- there were problems with the specific  
23 application.

24 So, for example, the government itself and the  
25 FBI itself and, even subject to an audit, accepted the

1 methodology of EDTA, in that particular instance, testing  
2 in the O.J. Simpson case. After the extensive audit that  
3 was done, they found -- and we've provided to your  
4 Honor -- the report that was done after the events in the  
5 O.J. Simpson case relating to EDTA that established the  
6 acceptability, although that's frankly more of a Kelly Frye  
7 word than it is a -- a Daubert word.

8           Secondly, even in the submission in this case,  
9 submitted by the Government when they cite to the very  
10 recent albeit unpublished opinion in the Pompeii case, the  
11 Court of Appeals accepted the reliability -- again, I'm  
12 using more Kelly Frye language, but certainly that's a  
13 tighter test -- with regard to the EDTA testing.

14           So, in terms of the -- of the methodology, in  
15 none of the instances -- and we go in various  
16 jurisdictions, obviously. We're not limited just to -- to  
17 California, because of the nature of -- of the kinds of  
18 issues we're involved in. I'll be candid to say, then, in  
19 the EDTA context it doesn't arise all that often, because  
20 its principal use, as it is here, is to deal with issues of  
21 perhaps tampering or the like. So, hopefully -- although  
22 we believe this case to be an exception -- you're not going  
23 to find this going on with a great deal of frequency, but  
24 that candidly, as in the O.J. case, as in the Pompeii case,  
25 is the context in which it most regularly arises.

1           We have found nothing -- and I don't think the  
2 Government has offered anything -- that challenges  
3 the -- the fact that this methodology will assist your  
4 Honor in making a factual determination with regard to the  
5 blood on the t-shirt and the blood on -- that's been  
6 referred to as A-41.

7           Now, the -- the second --

8           THE COURT: To the Court of Appeals you didn't  
9 ask for A-41 to be tested.

10          MR. ALEXANDER: I can't remember offhand if it  
11 was in our papers. I don't think it's in their order, but  
12 I can't remember.

13          We have an issue -- that raises a point I did  
14 want to make, and it's an issue that's related. We have an  
15 issue that -- that makes the EDTA testing all the more  
16 important and significant in this case and, frankly, it  
17 affects A-41 also, but -- but principally the t-shirt.

18          As we've seen by the -- the document that the  
19 Government presented in connection with the tutorial, in  
20 every instance, with the exception of perhaps one instance  
21 on the t-shirt, everywhere Kevin Cooper's blood appears,  
22 according to the DNA testing that was done, it is mixed  
23 with the blood of a victim. That includes in -- in -- I  
24 think it's E -- 6E, but I can't remember exactly -- what  
25 are really spatters or splatters or drops that are the size

1 of the head of the top of a straight pin, very small,  
2 minuscule blood types and --

3 THE COURT: Well, the Prosecution's theory is  
4 that Kevin Cooper is wielding the axe and other  
5 instruments, and so the Prosecution's theory is that there  
6 would, if anything, be a small mix on Kevin Cooper during  
7 the course of a horrendous situation as depicted by the  
8 autopsy photographs and the crime scene photographs. So it  
9 would not be surprising to the Court that -- especially  
10 given the quantity of victim blood and the slashing and  
11 brutality that occurred during the execution of the crime,  
12 that if there was some mix on Kevin Cooper, it would likely  
13 be mixed with the victim's blood.

14 MR. ALEXANDER: Well, and again this is --

15 THE COURT: You wouldn't go around dropping blood  
16 separately; you're right in the middle of a crime scene.  
17 At least that's their theory.

18 MR. ALEXANDER: Exactly. Exactly, your Honor.  
19 Obviously that's not the specific subject of -- of this  
20 Daubert, but it relates to the importance of the EDTA  
21 testing and the -- in this context, because the argument  
22 going the other way is, if this is -- turns out to be blood  
23 that splattered, what is the likelihood, the absolute  
24 improbability -- you talk about circumstantial evidence in  
25 the case -- the improbability that blood splattering during

1 the commission of a crime is going to land such that a  
2 victim's blood -- and these are very fine dots. I mean,  
3 this is -- we're not talking about big -- big spots -- is  
4 going to land on the same spot. We find that to be  
5 quite -- quite incredible, particularly how does blood  
6 splatter --

7 THE COURT: I think you'd have to look at the  
8 crime scene photos and the autopsy photos.

9 MR. ALEXANDER: I --

10 THE COURT: So let's -- let's move on.

11 MR. ALEXANDER: But anyway, let me move on.

12 THE COURT: Let's move on.

13 MR. ALEXANDER: My only point is to show -- and  
14 there's also a suggestion -- although it's not -- the  
15 evidence is unclear, that -- that there may have been  
16 additional blood on A-41. That's what got me onto this,  
17 not just Mr. Cooper's blood, which is the only blood in the  
18 house, that little drop in this incredibly bloody crime  
19 scene.

20 Now, the -- the second test or the second aspect  
21 of the test is whether or not the methodology can be  
22 applied to the facts in issue.

23 THE COURT: That's the bigger issue.

24 MR. ALEXANDER: And that is --

25 THE COURT: That's --

1 MR. ALEXANDER: Exactly.

2 THE COURT: That's the bigger issue.

3 MR. ALEXANDER: Exactly right, your Honor,  
4 and --

5 THE COURT: I think in reading the submissions,  
6 while the Government may disagree, at least with respect to  
7 Mr. Rabbow (phonetic), EDTA does appear to be a method  
8 used.

9 MR. ALEXANDER: Yes.

10 THE COURT: The question is, in the application  
11 of this case, is it scientific? Could it be scientific?  
12 If so, how? And if so, do you have a qualified expert to  
13 do it?

14 MR. ALEXANDER: Yes. Let me -- let me go to the  
15 first issues again. I don't think that there's any  
16 question -- indeed, the government in the O.J. Simpson case  
17 developed their methodology -- nobody quarrels with the  
18 methodology.

19 THE COURT: Nobody really did a Daubert --

20 MR. ALEXANDER: Well, subsequently when there was  
21 an independent audit, they probably did a more thorough  
22 Daubert analysis. Mr. Reuters, who --

23 THE COURT: The GAO doesn't do Daubert analysis.

24 MR. ALEXANDER: Well, I understand they don't,  
25 but they -- but they did --

1 THE COURT: The GAO does audits.

2 MR. ALEXANDER: Yes, fair enough. But they did  
3 do a very careful examination of the FBI procedures in that  
4 particular case. We've submitted to your Honor that  
5 information.

6 I don't think anybody questioned the methodology.  
7 I think they questioned -- and actually, what Dr. Ballard,  
8 even though he was not the one who testified -- Dr. Reiters  
9 was -- he did the work and he explained to us why their  
10 interpretation of the results was in error and that, when  
11 you interpreted the results looking at not the far end of  
12 the scale but more in the middle range, it determined there  
13 was EDTA there. That is not challenged anywhere, even in  
14 the audit that was subsequently done.

15 So, as to the methodology, I would submit  
16 that -- that -- although I understand the -- the Attorney  
17 General is now backing off of Mr. LeBeau as a -- as a  
18 competent expert based on comments apparently -- and I was  
19 not here, of course -- yesterday made in chambers, but we  
20 have both Dr. Ballard and Mr. --

21 THE COURT: It's -- it's -- Florida -- I believe  
22 it's the Florida case.

23 MR. ALEXANDER: Yes, I want to -- I'm going to  
24 address that in a moment also.

25 So we have both experts offered, who -- who have

1 given sworn declarations and, furthermore, in court Dr.  
2 Ballard -- that the methodology is proper and this can be  
3 done in this instance.

4 Now, the extent to which it can be done and the  
5 like is something, candidly, that they believe that there  
6 is enough blood to test it, to -- to do this testing, to  
7 apply it to the facts of the case, but that obviously is  
8 not going to be known with certainty, although Daubert does  
9 not require certainty because it's science. Science is, as  
10 some people often say, as much an art as it is a science.  
11 That's language from Daubert.

12 So I think we have agreement by both Dr. Ballard  
13 and by Mr. LeBeau that the methodology is proper and it can  
14 be applied in this case. I think, for that reason, we --

15 THE COURT: What do you mean about the "can be  
16 applied in this case"?

17 MR. ALEXANDER: That there is sufficient amount  
18 of blood so that you have enough quantity to be able to do  
19 the EDTA testing. Of course you're not going to know  
20 that -- you're going to know the status of the blood, in a  
21 sense, whether it's been diluted or the like until  
22 you -- you actually go ahead and do the test, but that's  
23 certainly not a reason not to do the test, particularly  
24 when both experts say that it can be done. I frankly was  
25 surprised to see them back off of -- of Mr. LeBeau, but

1 as -- as you saw, we embraced him. We don't -- we don't  
2 have any problem.

3 THE COURT: You don't have a problem with LeBeau?

4 MR. ALEXANDER: We do not have a problem with  
5 LeBeau. We would like LeBeau to monitor what Dr. Ballard  
6 does or perhaps --

7 THE COURT: Do you have --

8 MR. ALEXANDER: -- it's the other way round.

9 THE COURT: Do you have -- or the other way  
10 around?

11 MR. ALEXANDER: Well, I -- yeah, I'd have  
12 to -- you know, I think that's probably fine. To be  
13 candid, Dr. --

14 THE COURT: Is there anybody else that you can  
15 find --

16 MR. ALEXANDER: Well --

17 THE COURT: -- that doesn't have -- if EDTA is a  
18 recognized method --

19 MR. ALEXANDER: Yes.

20 THE COURT: -- then why would there only be two  
21 people that parties have identified -- Dr. Ballard  
22 testified that somebody with a qualified lab could do it.  
23 The methodology is not complicated.

24 MR. ALEXANDER: Right.

25 THE COURT: The science is not complicated.

1 Could we find somebody who doesn't have the issues with  
2 respect to Dr. Ballard where I am on notice, published or  
3 not published, that his testimony and methodology has been  
4 severely criticized by at least two courts? What we want  
5 is acceptance of the result.

6 MR. ALEXANDER: Yes, I'm going to address the  
7 criticism in the second.

8 The answer to your question, your Honor, is yes,  
9 although I will be candid to say that we have not talked to  
10 the individual yet, but I'm happy to tell you who  
11 that -- who the person is, but let me -- let me say first  
12 off that the reason that this is not done in more places is  
13 because it takes particular equipment, some sort of  
14 spectrography or the like, mass spectrometry, related  
15 equipment --

16 THE COURT: That's in every DEA lab.

17 MR. ALEXANDER: No, no, I understand that, but  
18 the one that's particularly used here is one that Dr.  
19 Ballard actually trained Mr. LeBeau on at the FBI lab.  
20 This is the -- you know, this is the FBI of the United  
21 States, Mr. Mueller and all -- and people there who do  
22 this -- are involved in this sort of thing.

23 So that -- you know, I think the answer is  
24 twofold. This doesn't come up all that often, because  
25 hopefully you don't have tampering all the time. You don't

1 necessarily have tampering where EDTA is the -- is the way  
2 to go at it. The equipment is limited. So I think -- you  
3 know, both Dr. Ballard and Dr. -- I don't know if it's  
4 doctor -- Mr. LeBeau are fine.

5           The other individual -- and I don't know his  
6 availability -- is Dr. Reuters, R-E-I-T-E-R-S. Dr. Reuters  
7 is located back in Pennsylvania. He's older. I don't -- I  
8 simply am not in a position to represent to the  
9 Court -- we've not talked to him, but when you asked the  
10 question, we thought about it. That's a name. Now, there  
11 are -- there are the two gentlemen who are up at Cornell,  
12 but they're no longer doing this. Remember we showed you  
13 that article. But I don't know that we need to -- I think  
14 there can be sufficient safeguards with Dr. Ballard  
15 and -- and Mr. LeBeau, possibly getting Mr. Reuters  
16 involved -- Dr. Reuters -- if necessary.

17           Now, let me -- let me try and put some things in  
18 perspective with regard to Dr. Ballard, because I'm  
19 appreciative -- and of course we were ware of the Pompeii  
20 case and then learned about the Florida case subsequently,  
21 but I do think -- and I'm not here to protect Dr. Ballard.

22           THE COURT: And the Court has had the opportunity  
23 to hear him in the tutorial --

24           MR. ALEXANDER: Yes.

25           THE COURT: -- talking about the eyeball method.

1 MR. ALEXANDER: I think it's more -- I mean, he  
2 did use that terminology, but let me bring into context the  
3 Pompeii and the Florida case and provide the Court some  
4 information that we can provide to you. I don't have the  
5 documentation.

6 First of all, in this area, in the area of  
7 forensic experts, there is virtually no one who has not  
8 been the subject, in a court opinion, to criticism, where  
9 their opinions are rejected. I exclude no one who -- who  
10 the parties have talked about. Dr. Blake, for example, has  
11 been. Dr. -- I think it's Mr. Raxel, who is the  
12 Government's -- the -- the District Attorney's expert at  
13 trial -- caused -- his testimony caused tens of cases in  
14 San Francisco to be reviewed because he misrepresented that  
15 (a) he was a doctor and (b) that he was the head of  
16 Scotland Yard. Seems rather incredible, but he did.

17 Now, that, to me, is a much more serious type of  
18 misrepresentation that somebody who is criticized because  
19 their application of the methodology, you know, one can  
20 take exception to it.

21 THE COURT: Well, let me -- it says,  
22 "Ballard acknowledged the ubiquity of  
23 EDTA in the environment. Yet he failed  
24 to scientifically explain how he ruled  
25 out environmental agents as

1 contributors to the amount of EDTA he  
2 found in the evidence. He 'reasoned'  
3 that if EDTA is not normally found in  
4 human blood and its numbers were high  
5 in comparison to controls, these facts  
6 justified his leap to the conclusion  
7 that the EDTA he found was probably  
8 from a purple top tube. This approach  
9 does not dispose of the possibility  
10 that the EDTA he found was attributable  
11 to hand cream or cleansing agents. The  
12 court was left with the impression that  
13 Ballard knew what he should have done  
14 but found an excuse, no proper  
15 controls, to ignore evidence that would  
16 undermine the tampering theory."

17 MR. ALEXANDER: Well, let me address that. I  
18 think what he can do and what he certainly can be monitored  
19 to do in this case with Mr. -- with Mr. LeBeau is the  
20 amount of EDTA in creams and the like, he will testify, is  
21 very low. We're looking for more significant, for lack of  
22 a better word, concentration levels.

23 THE COURT: But it goes further, and then we're  
24 on true notice,

25 "In sum, he used valid science, gas

1 chromatography and mass spectrometry,  
2 to obtain a product, glibly and  
3 unscientifically dismissed EDTA from  
4 sources other than purple top tube and  
5 took a gargantuan leap to a conclusion  
6 that is unsupported by science facts in  
7 the record or even common sense."

8 That's pretty strong language.

9 MR. ALEXANDER: Is -- fair enough. Is that the  
10 Pompeii case, your Honor? I don't have it in front of me.  
11 Or is that the Cirrus case?

12 THE COURT: Pompeii.

13 MR. ALEXANDER: Okay. Well --

14 THE COURT: And then I've got the other one too.

15 MR. ALEXANDER: I'm going to tell you -- I'm  
16 going to tell you about both. Okay? And we can present  
17 it.

18 With regard to the Pompeii case, we've seen  
19 the -- the unpublished opinion now of that court, which I'm  
20 informed is also going to be appealed.

21 Now, I say this rather gingerly -- and  
22 that's -- by the way, that unpublished opinion that they  
23 lodged is one that confirms the reliability of the  
24 methodology. So it's the specific application. As you've  
25 correctly point out, that's what we're really -- what we're

1 really focused on.

2 Now -- and certainly that error, if made by Dr.  
3 Ballard, is one that you can bet he's not going to -- he's  
4 not going to make again, nor will Dr. LeBeau or anybody  
5 else allow him to make that again.

6 But the Pompeii case, in the unpublished opinion,  
7 really says -- it just affirms the ruling of the trial  
8 judge and doesn't get into, in any detail, the problems  
9 with the so-called application. Now, that judge in the  
10 case -- and there's some controversy -- controversy about  
11 him -- has subsequently to that case, because of its  
12 notoriety, been removed from the criminal courts and put in  
13 a family court in New Jersey -- and secondly, himself was  
14 just publicly reproved for lying. That's not the polite  
15 word, but misrepresenting to the New Jersey Supreme Court  
16 about a drunk driving conviction.

17 THE COURT: But that's not the appellate court.

18 MR. ALEXANDER: No, that's certainly not the  
19 appellate court. Fair enough.

20 THE COURT: I mean, so, all right, the trial  
21 court has some issues.

22 MR. ALEXANDER: Fair enough, but --

23 THE COURT: But we've got three judges, reputable  
24 appellate judges that are reviewing it, and there's not a  
25 dissent. It's -- we need --

1 MR. ALEXANDER: Let me go to the Cirrus case,  
2 okay, and I'll just present you the facts and one can draw  
3 their own conclusions.

4 In the -- in the Cirrus case, the conviction was  
5 overturned not because of Dr. Ballard but because of  
6 prosecutorial misconduct. When the case was set for  
7 retrial, the defendant pled guilty. Now, I -- we intend to  
8 get that information, but at least there's a strong  
9 suggestion in that case that what Dr. Ballard did in that  
10 case was vindicated in what he came up with.

11 THE COURT: And LeBeau too?

12 MR. ALEXANDER: Now, I don't know. To be honest,  
13 your Honor, that's a very fair question, and I don't know  
14 the -- I don't know the answer to that. I think that's  
15 where the two gentlemen -- well, that was one case in which  
16 they -- in which they encountered one another.

17 THE COURT: So you would say it's more in passing  
18 than --

19 MR. ALEXANDER: No, I just think that the -- you  
20 know, it -- candidly, that the criticism of Dr.  
21 Ballard -- those are the only two cases that have come to  
22 mind. I guess my first point is you're going to -- you're  
23 going to encounter this no matter what experts we get,  
24 because sometimes experts' views are adopted, sometimes  
25 they're not adopted. Some of the opinions are written.

1 Obviously some are not. It's kind of the nature -- I mean,  
2 it's like a lot of experts and the like that one  
3 encounters. It's like in any profession. It's in the legal  
4 profession. It's in others. You're going to have these  
5 kinds of circumstances come up.

6 What we would offer with regard to -- to Dr.  
7 Ballard himself -- and being involved in -- in this, is we  
8 have Mr. LeBeau's -- I'm confident Mr. LeBeau will attest  
9 to Dr. Ballard's qualifications to do this. We have Dr.  
10 DeForest, who we've already spoken to and who's going to do  
11 the selection of the hairs, who will attest to that.

12 I don't know about Mr. Raxel, who practices up in  
13 Richmond, California. Now that's he no longer head of  
14 Scotland Yard, he can maybe help out. Then Mr. Reiters,  
15 who also worked with Dr. Ballard in the -- in the -- in the  
16 O.J. case.

17 But I do think that, given the strong direction  
18 of the -- of the Ninth Circuit, that this testing -- and  
19 not precluding the Daubert determination by your Honor, but  
20 the strong indication from the Ninth Circuit that this  
21 testing should be done, that --

22 THE COURT: Of course it was sold as a  
23 dispositive, easy-to-do test.

24 MR. ALEXANDER: Well, I don't know if it was sold  
25 that way. That's certainly the way they -- they -- it was

1 written up in one --

2 THE COURT: That it would be definitive one way  
3 or the other. In O.J. it was very ambiguous.

4 MR. ALEXANDER: And it may turn out to be  
5 ambiguous here. We may end up with a situation where it's  
6 uncertain. We just don't know. That's why, you know,  
7 there may be other factors. I don't know. I mean, you  
8 know, we're -- in some sense, we're both, I guess, rolling  
9 the dice to a certain extent.

10 It's too bad -- what is so tragic here is this  
11 testing could have been done in 2001 at the same time the  
12 DNA testing was done, and it was not, but that's -- we  
13 can't do anything about that at the time. There's  
14 certainly no reason that it couldn't have been done at that  
15 time. Had --

16 THE COURT: But the DNA is clearly the preferable  
17 potentially exonerating test.

18 MR. ALEXANDER: And you're exactly right, Your  
19 Honor, because it was -- remember, it was the Defendant who  
20 put the t-shirt in evidence. It was the Defendant who  
21 sought the DNA testing, and it was the Government that  
22 fought it tooth and nail, as they're now fighting the EDTA.  
23 It's kind of a --

24 THE COURT: But the Government agreed to the DNA.

25 MR. ALEXANDER: Ultimately the Government agreed

1 to the DNA but only when they saw that the legislature was  
2 going to pass the statute that required DNA testing. So I  
3 think it's -- it's not a complete story to say that they  
4 ultimately agreed. They certainly fought the EDTA testing  
5 at the time.

6 THE COURT: Hindsight is always helpful.

7 MR. ALEXANDER: It is -- it is indeed. So --

8 THE COURT: But to get back to the --

9 MR. ALEXANDER: Yes.

10 THE COURT: -- point, what the Court is  
11 struggling with, as I expressed, is that what we would like  
12 is a test done by a person who has credentials such as your  
13 first -- such as your mitochondrial expert.

14 MR. ALEXANDER: Yes, Dr. Melton. Sure,  
15 she -- it's impeccable.

16 THE COURT: I mean, she's very impressive.

17 MR. ALEXANDER: Yes.

18 THE COURT: I had the opportunity to hear the two  
19 on the same day. The eyeball approach -- perhaps, you're  
20 saying, in passing, but at least the eyeball approach  
21 doesn't seem to be the kind of scientific test that we  
22 would all like --

23 MR. ALEXANDER: And we would not allow it.

24 THE COURT: -- or would the Court of Appeals like  
25 either.

1 MR. ALEXANDER: Of course, and we would not allow  
2 that. I mean, I'm not going to come before your Honor and  
3 present that sort of junk science or the word -- obviously,  
4 and particularly given the sensitivity of this issue. Dr.  
5 Ballard is on heightened notice, okay, as -- as to this,  
6 and he's agreeable to the blind testing. He's not, you  
7 know --

8 THE COURT: But their blind testing may not be  
9 truly blind if there's a presumptive way to figure out  
10 whether there -- whether this is blood or not blood.

11 MR. ALEXANDER: I'm missing that. Sorry, your  
12 Honor, it's my fault.

13 THE COURT: The Attorney General's office can  
14 better explain during their time, but yesterday there was  
15 some discussion that there -- even if blind, given the  
16 science involved -- I'm not a scientist; that's why we have  
17 the scientific experts -- that there may be a method to  
18 figure out what the results should be.

19 MR. ALEXANDER: I can't --

20 THE COURT: So that way the credentials of the  
21 person and whether the person comes with scientific  
22 validity to the methodology is really important to the  
23 Court.

24 MR. ALEXANDER: Yes, of course, and to all  
25 counsel. It's very, very important.

1 I'll come back to Dr. Ballard and -- I know there  
2 wasn't a Daubert done in -- in the O.J. case, but I think  
3 it's not insignificant that it was Dr. Ballard who  
4 discovered the error of the prosecution's test that  
5 Dr. -- that Mr. Martz did, that at least in part was the  
6 subject of a very extensive audit of the FBI lab and  
7 focused particularly, in one significant instance, on Dr.  
8 Martz. That was because of the work that Dr. Ballard did,  
9 presented by Dr. Reiters.

10 Now --

11 THE COURT: Now, from the Court's perspective,  
12 you're dealing with an application where the Court  
13 authorizes taxpayer money to be expended for a valid  
14 purpose, and if we then choose someone who is on record  
15 having significant problems for credibility and scientific  
16 analysis, then ultimately, no matter what happens,  
17 the -- the results are -- the results are not as accepted,  
18 because each side can then argue that the result was  
19 predetermined or there were lack of sufficient controls or  
20 whatever, as opposed to getting somebody who can do the  
21 recognized scientific method and then perhaps doesn't have  
22 the same problems.

23 MR. ALEXANDER: Well, let me say this. It will  
24 be interesting, after we do this testing, to see if both  
25 sides, you know, sort of agree. I suspect that whatever

1 the results are, there's going to be disagreement.

2 But more to the --

3 THE COURT: Wouldn't it be better if the  
4 disagreement takes out the credibility issues?

5 MR. ALEXANDER: Sure, of course. Of course, your  
6 Honor, but --

7 THE COURT: And we could deal with the science.

8 MR. ALEXANDER: Yes, but I think in this  
9 instance, where you have the FBI and Mr. LeBeau essentially  
10 involved, monitoring or the like, however -- however we  
11 work it out, that you've come about as close as one can  
12 come to a -- not to make a pun, but a non-contaminated  
13 application of the methodology. I don't know what more one  
14 could do. If the FBI were to do this in some other case,  
15 as they attempted to do with Dr. Martz, they would go to  
16 Mr. LeBeau. I -- I know Mr. Mueller personally, and I  
17 could ask Mr. Mueller, "Is this a good man?" He probably  
18 doesn't know him, but the FBI, I'm sure, has all the  
19 confidence in the world in Mr. LeBeau, as did the Attorney  
20 General's office in offering -- and we embraced it. We  
21 absolutely embraced it.

22 So I think --

23 THE COURT: Are you prepared to discuss now or is  
24 that for a later time, how you propose the test to be done?

25 MR. ALEXANDER: I think that Mr. Hile is --

1 MR. HILE: I can, your Honor --

2 MR. ALEXANDER: -- better qualified, your Honor,  
3 if you would --

4 THE COURT: Is this a good time for that?

5 MR. HILE: Sure, your Honor.

6 THE COURT: Okay.

7 MR. ALEXANDER: Thank you very much, your Honor.

8 THE COURT: Thank you. Was there anything else  
9 that you wanted to address?

10 MR. ALEXANDER: Other than to respond to --

11 THE COURT: All right, thank you.

12 MR. ALEXANDER: -- anything I may hear, I don't  
13 think so.

14 (Pause.)

15 MR. HILE: Your Honor, the proposal that I have  
16 submitted to the Attorney General with respect to the  
17 anticoagulant testing method would be as follows.

18 The t-shirt sampling would be done by Dr.  
19 DeForest. What he would be doing would be  
20 to -- determining what stains were left that could be test,  
21 as well as what control areas should be used on the shirt.  
22 The idea would be that we would get a lot of control areas  
23 so that we would not only be able to have a large number  
24 that there should be no specific result, but also we would  
25 see whether or not it varied over the controls, which would

1 also help with respect to making the comparison to the  
2 stained areas. We're talking here at least ten control  
3 areas.

4 THE COURT: On one shirt or more than one shirt?

5 MR. HILE: On the shirt. I suppose we could test  
6 other shirts, but I'm not sure that that would make  
7 a -- significance for purposes of the comparison, but if  
8 the Court would like to do that, I don't know why it  
9 couldn't be done.

10 Now, the process that would be -- and let me just  
11 talk very briefly about the stains themselves. What we  
12 have learned from looking at the photographs of the t-shirt  
13 is that there are still some areas of prior stains that  
14 were tested where there is some of the stain left that  
15 could -- so we could re-test some of the areas that -- or  
16 at least the stains, out of which a portion was cut  
17 previously. There are also one or two -- at least, I  
18 think, two areas that we've been able to determine where  
19 there are stains that were not tested previously. So we  
20 would at least have those two that could be tested.

21 So, if we assume that we can get maybe a total of  
22 five stains to be tested, both new stains that haven't been  
23 tested before and the remains of a previously tested stain,  
24 we would then have somewhere in the vicinity of 15 places  
25 where we're going to make a cut of the shirt, and then the

1 process from there on, again, would be done completely  
2 without the person who's going to do the testing with  
3 respect to the amount of anticoagulant.

4           What would happen then is that those sections of  
5 the shirt that Dr. DeForest, with the concurrence of the  
6 Attorney General's lab person -- we've said Gary  
7 Simms -- what Dr. DeForest would do with those samples  
8 would be put them into a -- a vial -- and I'll get the  
9 names of these particular lab things wrong, but into a  
10 vial, put in a bit of deionized water and then run those  
11 through a centrifuge for five minutes. Then --

12           THE COURT: Dr. DeForest would do that or the --

13           MR. HILE: With Gary Simms --

14           THE COURT: Okay.

15           MR. HILE: -- from -- watching. It would be done  
16 here. It would not be done at the -- at Dr. Ballard's lab.

17           The way I understand this works, then, the liquid  
18 that has been in the tube, after it has been put through  
19 the centrifuge, would be drawn off and put into a lab vial.  
20 That's what's going to be tested for EDTA.

21           I've talked to Dr. DeForest about this and also  
22 to Dr. Ballard to see if this is a proper way to do it.  
23 They agree that it is. I think that this -- this is the  
24 way to go so that we can develop --

25           THE COURT: Now, what -- oh, excuse me, I didn't

1 mean to interrupt you.

2 MR. HILE: -- so that we can develop a blind  
3 test.

4 Now, there's two elements to what we're talking  
5 about here. The first is the liquid, what's going to be  
6 tested. The second is what's left in the -- in the vial  
7 that has been through the centrifuge, and that is where the  
8 DNA remains.

9 As Mr. LeBeau testified in his declaration, it is  
10 possible, as Dr. Ballard testified in his tutorial, to do  
11 two things once you've done that centrifuge. The first is  
12 to test the liquid for EDTA, and the second is to test the  
13 DNA that is in the remaining test tube afterwards, in order  
14 to determine whose DNA was in the blood that was in the  
15 stain. Those steps are crucial.

16 Now, with respect to the liquid that's drawn off  
17 in the what we'll now say 15 vials, those will be coded by  
18 Dr. DeForest and Gary Simms to reflect which of the either  
19 control or stain samples they came from, just given random  
20 numbers but a code to it.

21 THE COURT: This is why I was saying, if you do  
22 that and then you also throw in other shirts that have been  
23 stained that --

24 MR. HILE: Fine. If that -- if that would  
25 give --

1 THE COURT: -- they don't know -- so that --

2 MR. HILE: Right. I think we could --

3 THE COURT: -- don't know which one you've got.

4 MR. HILE: Absolutely. We could do that. That  
5 would be no problem, because as long as we knew that that's  
6 what -- it was a different shirt -- again, it would be  
7 another way of testing whether or not -- and preventing, in  
8 effect, the lab that's going to test the vials, from  
9 knowing in advance what they're looking for with respect to  
10 any one of the 15 or 20 or 25 vials that they're going to  
11 test.

12 THE COURT: No, I asked about the -- reason I  
13 asked about the destructive -- and you said it wasn't  
14 destructive. It is destructive with respect that  
15 the -- the place where Mr. Cooper's blood is found will no  
16 longer be on a shirt that you can see.

17 MR. HILE: It -- yes, your Honor, and it was  
18 destructive when they did it back in 2001 and 2002 --

19 THE COURT: Correct, but it --

20 MR. HILE: -- and that's why --

21 THE COURT: -- for DNA, which is pretty --

22 MR. HILE: Yes.

23 THE COURT: -- which is specific.

24 MR. HILE: That is correct, and that's why --

25 THE COURT: The EDTA is more -- you can say

1 there's EDTA, you can say there's not EDTA. You can say  
2 that there's some EDTA, but it's not -- you can't say where  
3 it came from. DNA, you can say that that's person or you  
4 could say with reasonable -- you could say, "This is  
5 consistent to the billionth."

6 MR. HILE: Yes, and let me talk about that in  
7 both aspects.

8 With respect to the DNA testing that can be done  
9 of what the residue left over is, that will be similar to  
10 the DNA testing that was done in 2001, 2002. It will  
11 show --

12 THE COURT: Why would we redo that?

13 MR. HILE: There's -- well -- and I asked that  
14 question. I didn't think we needed to do that, but let  
15 me -- let me explain that.

16 Let's suppose that the EDTA or anticoagulant  
17 testing comes back and says on this particular sample we  
18 have 1,000 times what the rest of the samples have and,  
19 therefore, the inference is that there was purple top  
20 blood -- was EDTA that was on that stain. You want to then  
21 test that DNA sample to see whether or not it is Kevin  
22 Cooper's blood or whether somebody else's blood, because we  
23 need to know, especially if it is a stain that has not been  
24 previously tested, whose blood it was. Either way,  
25 for -- to help us or help the Prosecution, you need to know

1 that fact in order to determine whether or not --

2 THE COURT: If it's Kevin Cooper's blood and  
3 there's not EDTA, this was supposedly an exonerating test.  
4 That's -- that's not an exonerating test. You've already  
5 got enough.

6 MR. HILE: No, let me -- and I went through this  
7 logic myself when I -- when I tried to figure this out and  
8 was told this by some of the people we consulted.

9 The bottom line that we're trying to learn here  
10 is whether or not the blood that was on the t-shirt, if it  
11 was Kevin Cooper's, had EDTA in it. If we have a new  
12 sample that we've taken and we don't know whose blood that  
13 is and we find that there is a high level of EDTA, the  
14 Prosecution will hope that it's not Kevin Cooper's blood,  
15 because that will say, "So we didn't tamper with Kevin  
16 Cooper's blood." We will want to say, "Please test that  
17 blood to see whose DNA it was," to prove that it was Kevin  
18 Cooper's blood that was planted on him.

19 THE COURT: Well, we're not there yet. So we can  
20 deal with that at a later point in time.

21 MR. HILE: I agree.

22 THE COURT: And I think that the -- your time is  
23 up.

24 MR. HILE: Let me just add one thing, your Honor.  
25 With respect to the testing of those 15, 25 vials, with

1 that coding system, when they're sent back to Dr. Ballard's  
2 laboratory, he will have no way of knowing which those are,  
3 and he'll just have to tell what the results are with  
4 respect to each vial.

5 THE COURT: But he could tell which one is blood.  
6 That's where I say --

7 MR. HILE: No, because the way I understand the  
8 way this works is when they put this liquid into  
9 the -- into the test tube and run it through the  
10 centrifuge, it comes out clear, regardless of -- of -- of  
11 whether there was blood or not blood. Every one of those  
12 vials -- I'm told this -- will be clear liquid, and there's  
13 no way to tell whether it's -- has blood in it or not blood  
14 in it.

15 THE COURT: Get me a declaration as to that.

16 MR. HILE: All right. Thank you, your Honor.

17 THE COURT: All right, thank you.

18 MS. WILKENS: Good morning, your Honor. Now,  
19 it's very important to -- to --

20 THE COURT: Given the time, what we'll do is go  
21 to 10:30, take the witness, and then we can continue your  
22 time --

23 MS. WILKENS: Certainly, your Honor.

24 THE COURT: All right, thank you.

25 MS. WILKENS: I think it's very pivotal that we

1 focus on what the claim is that's being advanced. It is  
2 that the methodology to determine whether or not biological  
3 evidence has been tampered with. It is not the methodology  
4 to determine whether or not EDTA is present. This is an  
5 incredibly important distinction. Daubert applies equally  
6 to this claim as to the claim that would simply be answered  
7 "yes".

8           Of course we understand that EDTA can be  
9 detected. No one questions that, but if you were to draw  
10 the analogy of a lie detector test, I think everyone  
11 understands that the science is there from measuring heart  
12 rate, blood pressure and the various things that they do  
13 with a lie detector, but we all know that a lie detector  
14 test is not admissible because everyone questions the  
15 science underlying making the correlation between those  
16 measurements and telling the truth. That's exactly what  
17 we're looking at here.

18           What Kevin Cooper wants this Court to do is to  
19 essentially sanction a cottage industry for Dr. Ballard.  
20 Frankly, I am amazed that Mr. Alexander would stand here  
21 and tell the Court that tampering is a rare occurrence. I  
22 mean, we watched -- we watched Mr. Alexander malign a  
23 judicial officer in New Jersey. We watched him tell us of  
24 prosecutorial misconduct in Florida. I mean, quite  
25 frankly, if you can bring a tampering allegation under

1 these circumstances, then you can do it in every case,  
2 pretrial, trial, post-conviction. All you have to do is  
3 say there was tampering.

4 What happened was they said there was tampering  
5 because Mr. Goughnour took out evidence. So the court  
6 said, "Well, okay, that's an operative fact that I want  
7 explored," but they didn't do their homework. It turned  
8 out that the evidence they claimed was tampered with wasn't  
9 available to Mr. Goughnour, but somehow the tampering claim  
10 has continued on. The tampering claim doesn't exist.

11 So, if you have tampering in this case, under  
12 these circumstances, any blood evidence would require this  
13 test, a test that only Dr. Ballard can do, a methodology  
14 that Dr. Ballard has developed, a methodology that would  
15 make him very rich if a court of law were to endorse the  
16 science that underlies it.

17 With respect to the New Jersey judge who made the  
18 ruling that was affirmed by three justices in an appellate  
19 court, that court took seven days of testimony about Dr.  
20 Ballard and his methodology. Many respected experts came  
21 in and testified.

22 Unfortunately, the Ninth Circuit was faced with a  
23 circumstance of less than 12 hours to weigh all of the  
24 various matters that were put before it by Mr. Alexander.

25 THE COURT: Sadly that's why the court had

1 had -- two weeks before the execution date, had had a  
2 telephonic conference to see, rather than present a life-  
3 and-death matter of significant importance, where everybody  
4 wants to get it right, if there was going to be some claim  
5 made, couldn't we do it in a reasoned fashion ahead of time  
6 so that we would give the appellate court who has to then  
7 do whatever it has to do after the trial court, enough time  
8 to be able to digest the information?

9 Now, uniquely under a successive petition, the  
10 appellate court has to grant permission first. So the  
11 counsel appropriately said, "No, we're not coming to the  
12 trial court," but what did the appellate court do? Sent it  
13 back to the trial court. So, in retrospect, you'd think  
14 how nice if we could have had a better time frame to  
15 evaluate all of this in a more reasoned fashion so that the  
16 appellate court is not left with the Hobson's (phonetic)  
17 choice of 12 hours on a Sunday to assemble 11 judges to  
18 then review briefs at the last minute to then make these  
19 very significant determinations.

20 So now we're back here doing the evidentiary  
21 hearing and considering this information in a more reasoned  
22 process than at the last minute.

23 MS. WILKENS: Exactly, and -- and as it's quite  
24 clear from the Ninth Circuit, it was their expectation that  
25 there was a definitive, inexpensive quick test. It was

1 represented as that by Mr. Alexander, and the Prosecution  
2 was given between 9:00 p.m. on a Friday night and 9:00 a.m.  
3 on a Saturday morning to respond to over 1,000 pages of  
4 material. It would have been difficult to assemble experts  
5 to refute the representations of Dr. Ballard.

6           So, when we considered the directives of the  
7 Ninth Circuit, I think it very important to understand that  
8 they were misled. They did not have the benefit of  
9 Pompeii. They did not have the benefit of the science  
10 tutorial. Frankly, I don't believe that they would have  
11 encouraged this Court to undertake the folly that Cooper's  
12 counsel is asking be undertaken here.

13           With respect to science, they're saying this is  
14 going to assist this Court in making a factual  
15 determination. Well, the factual determination is was  
16 there tampering? If not, is there EDTA present in a  
17 particular location on the shirt, in 25 locations on the  
18 shirt? There's absolutely no explanation as to the  
19 threshold levels for correlating EDTA to tampering.  
20 Remarkably, Mr. Alexander is telling this Court that the  
21 presence of EDTA in blood is in such high concentrations  
22 that somehow that's how the distinction is made, but if you  
23 look at Mr. Phillips' declaration, he points out that  
24 common household products contain EDTA levels as high as 20  
25 percent. The EDTA in a purple top tube is 0.13 percent, in

1 other words, 1.3 milligrams per milliliter. A household  
2 product could be 200 milligrams per milliliter. So the  
3 concentrations are greater in these common items. So how  
4 are they scientifically eliminating other sources for the  
5 EDTA? Which is critical. I don't profess to be a  
6 scientist and I'm not going to testify to the Court, like  
7 Mr. Alexander and Mr. Hile, but I have enough sense to know  
8 that there must be some way to account for the presence of  
9 the EDTA being other than all of these other things. They  
10 don't explain it.

11 THE COURT: That's why could we do a test run  
12 with -- your person picks out -- and can muck up and get  
13 all these household products and -- that would be typically  
14 used, detergents, other things, on a used t-shirt, and then  
15 take control areas and do the procedure that they say and  
16 ship it off blind -- either blind with the subject shirt or  
17 beforehand to say -- to say whether or not there's EDTA.  
18 One of the things about the peer review and the scientific  
19 method is repeatability of results.

20 So what are our -- what is the norm, and what is  
21 the result that would say that there's been tampering or  
22 not? We don't have that. There hasn't been sufficient  
23 peer review to say that. You could say whether EDTA is  
24 there or not, but not your tampering issues.

25 So is there a test that you could construct that

1 could assist the Court, given the Ninth Circuit's  
2 directive?

3 MS. WILKENS: No, there really isn't.

4 THE COURT: I'm not free to disregard the Ninth  
5 Circuit's directive.

6 MS. WILKENS: No, and I don't --

7 THE COURT: I don't think that they were  
8 presented with the information about the scientific  
9 problems --

10 MS. WILKENS: Exactly, and I --

11 THE COURT: -- in this particular situation.

12 MS. WILKENS: -- don't disregard their -- their  
13 direction, and I think that, given the circumstances, they  
14 had concerns, but my point is those concerns rested with  
15 misrepresentations and half-truths. This Court should be  
16 taking all of that into consideration, knowing that the  
17 Ninth Circuit is not going to act on half-truths and  
18 misconceptions the next time around.

19 The problem that we're having is there's two  
20 fundamental flaws here. The first flaw is how do you  
21 account for other sources of the EDTA? They're suggesting  
22 you do it through controls, but that didn't work in  
23 Pompeii. I mean, you want to talk about known error rate!  
24 We have a known error rate of a thousand, as far as I'm  
25 concerned, because in Pompeii they could not do what

1 they're saying they could do with controls. They proved it  
2 in Pompeii.

3 The other issue is, even if you get past the  
4 source of the EDTA, how you correlate it to tampering?  
5 Where are all the studies and the science?

6 So what's happening here is they're not  
7 distinguishing between what's plausible and what's been  
8 proven, and I don't think that this is the case to go out  
9 and try to develop the science to do something that they  
10 represented as being the existing state of science. Some  
11 day there may be sufficient peer review and testing and  
12 performance by the scientific community that results in the  
13 ability to quantify the level of EDTA in a highly varied  
14 substrate with a minute quantity of blood and  
15 scientifically correlate it to the presence of EDTA-  
16 preserved blood. That state of science doesn't presently  
17 exist.

18 Here we are in a case that's run over two  
19 decades, and we're going to go out and create science.  
20 Daubert says, no, you don't go out and have them experiment  
21 and have the peer review and try to come up with a method.  
22 Mr. Alexander's attitude, "Well, let's go do the testing  
23 and see what we're left with," and wouldn't they like that?

24 Frankly, I'm just -- I'm just appalled when Mr.  
25 Alexander stands here and says that the State agreed to

1 testing because a bill was about to become law. In fact,  
2 it already was law. Mr. Cooper could have never satisfied  
3 the requirements of that law. We entered into a good faith  
4 agreement, and look where it's gotten us. Okay?

5 If they're such believers in science -- you know,  
6 they believe in science because look what it allowed them  
7 to do. They come in at the 11th hour of a capital case, 20  
8 years after the fact, and they undo -- they undo a  
9 conviction over a t-shirt that wasn't even used against the  
10 Defendant.

11 THE COURT: I don't think the Ninth Circuit was  
12 presented with that information.

13 MS. WILKENS: No, they weren't, because you know  
14 what they always say? When you look at it, you draw an  
15 inference. They always say the State used the t-  
16 shirt -- it's one of the pieces of evidence that the State  
17 used to tie Mr. Cooper to the crime. Post-conviction,  
18 sure. After we went through all the testing that he  
19 demanded, with his expert -- with his expert calling the  
20 shots and then they start to question it, sure. The State  
21 mentioned the t-shirt. Okay? He asked the t-shirt tested,  
22 and it inculpated him. But at trial, no, we didn't use the  
23 t-shirt.

24 So here we are in a Federal Court on a collateral  
25 challenge, undoing a final conviction based on evidence

1 that was never used at trial. So of course they love  
2 science. Look what it's done for them.

3 But the science here is junk. The science  
4 itself -- and Dr. Ballard, frankly -- the analogy to Mr.  
5 Raxel, I find unconvincing, because misrepresenting your  
6 credentials, as egregious and unacceptable as that is, that  
7 is far away from a scientist who is criticized by a court  
8 for the very methodology he's attempting to sell to this  
9 Court. That is just not an apt analogy, frankly.

10 Not only has he had problems with this particular  
11 methodology, he goes off in to Florida and, even though Mr.  
12 Alexander says that Mr. LeBeau and Dr. Ballard were  
13 vindicated because there was a plea entered in the case,  
14 that's not vindication. What they did, either through  
15 scientific enthusiasm or arrogance, was they went off and  
16 announced that the only way a particular compound could be  
17 found in the embalmed body was through poison. Then they  
18 had to concede that that wasn't so, because it can  
19 naturally occur. There was other evidence in the case.  
20 Their science was not vindicated. Their scientific  
21 problems are the same that they're trying to get this Court  
22 involved in.

23 Frankly, with respect to the FBI, the report, as  
24 your Honor pointed out, was by the General Accounting  
25 Office. Also, the focal point was only on the measurement

1 of EDTA, in other words, using the machines -- and I  
2 understand now that Dr. Ballard has a special machine that  
3 no one else has -- he didn't tell the Court that when he  
4 was here. Okay? So now it's like not only is it just Dr.  
5 Ballard and his method, it's his machine. But that General  
6 Accounting report only went to measuring EDTA. So it would  
7 be like the General Accounting Office coming in and saying,  
8 "Oh, yes, a lie detector administered can measure  
9 blood..." -- I mean, "...can measure heart rate and pulse  
10 rate." That's all it looked at.

11 They're consistently confusing -- they're saying  
12 methodology application. No, it's not application of a  
13 methodology. It's a methodology itself. It's a  
14 methodology that goes to proving tampering. That's a  
15 serious allegation.

16 That's the other problem I have with the Cooper  
17 defense team. There's two standards. There's the  
18 impossible standard placed upon the State and the  
19 Prosecution, and then there's their standard, their  
20 standard of tampering -- I mean, the impugning of people's  
21 reputations that is so lightly done -- I didn't count how  
22 many people were impugned this morning by Mr. Alexander,  
23 but it's getting ridiculous.

24 The bottom line is we're supposed to accept Mr.  
25 LeBeau because he's with the FBI. I didn't see a footnote

1 in Daubert that said one scientist who's employed by the  
2 FBI is sufficient for Daubert. Frankly, Mr. LeBeau does  
3 not agree with everything about Dr. Ballard.

4 Also, Mr. Alexander keeps saying the State is  
5 backing off of Mr. LeBeau. I can understand why Mr.  
6 Alexander wouldn't understand why the State presented Mr.  
7 LeBeau's opinions to this Court. The State does not talk  
8 to people and decide what to show to this Court. The  
9 States makes full disclosure so that this Court has as much  
10 information as possible. So, when this Court asked Dr.  
11 Ballard, "Name a peer that you respect," we contacted him.  
12 We asked him to review Dr. Ballard's testimony, and we  
13 asked him for his opinion. We shared it with this Court,  
14 and we put a footnote in our papers that we had done that  
15 for that purpose. He's not our expert. We're not backing  
16 off of Mr. LeBeau. We brought Mr. LeBeau's information to  
17 this Court because we thought it would be of assistance.

18 Mr. LeBeau has had some of the same kinds of  
19 problems with Dr. Ballard. I think scientists are  
20 enthusiastic. I think they want to go off into new  
21 frontiers, but we have to differentiate legally when it can  
22 be used for a forensic purpose. That's the problem with  
23 Mr. LeBeau.

24 As far as the FBI laboratory, there is an  
25 executive summary from April 16th of 1997 where there's

1 criticism of the FBI laboratory based on a Department of  
2 Justice investigation for sloppy test protocol and  
3 overstated conclusions.

4           So this Court -- and unlike Mr. Alexander, this  
5 actually is a document. I'm not testifying about the  
6 problems with the FBI lab, but I don't think that this  
7 Court should enter off into this -- this foray simply  
8 because someone who is in the employ of the FBI has given a  
9 declaration confirming somewhat what Dr. Ballard intends to  
10 do.

11           Also, Mr. Alexander has indicated he knows the  
12 director of the FBI and he can get access to the FBI  
13 laboratory. I'm not saying that's how it works, but I  
14 would note that the FBI lab has not done this work since  
15 the O.J. Simpson case, and there's no indication that Mr.  
16 LeBeau would be chosen by the FBI if it were to undertake  
17 such work.

18           THE COURT: Well, why don't we -- it's  
19 10:30 -- after 10:30 now. Why don't we hold these thoughts  
20 and I'll -- then we'll take our witness and we'll continue  
21 this later. Thank you.

22           DEREK PACIFICO, RESPONDENT'S WITNESS, SWORN

23           THE CLERK: Please state your name and spell your  
24 first and last name for the record.

25           THE WITNESS: It's Derek Pacifico, D-E-R-E-K

1 P-A-C-I-F-I-C-O.

2 (Pause.)

3 THE COURT: Go ahead.

4 MS. WILKENS: Thank you, your Honor.

5 DIRECT EXAMINATION

6 BY MS. WILKENS:

7 Q Detective Pacifico, could you please tell me your  
8 occupation.

9 A I'm a detective with the San Bernardino County  
10 Sheriff's Department.

11 Q And what is your current assignment?

12 A Homicide.

13 Q And how long have you been with the San Bernardino  
14 Sheriff's Office?

15 A Since 1990.

16 Q And as -- in the course of your duties as a detective  
17 in the homicide division, were you assigned to the Kevin  
18 Cooper case recently?

19 A Recently, yes.

20 Q And when were you assigned to the case?

21 A In the fall of -- the winter of this year.

22 Q And were you instructed to review all of the files and  
23 materials in the custody of the Sheriff's Department  
24 relating to the Kevin Cooper case?

25 A Not specifically that order, but that's what I -- in

1 the end, did.

2 Q Okay, so you ended up reviewing the files that are  
3 maintained by the Sheriff's Office?

4 A Yes.

5 Q And what were you reviewing those files for?

6 A For a variety of issues. I was looking to make copies  
7 of reports and prepare for future interviews that were  
8 possibly going to happen.

9 Q So you were familiarizing yourself with the case?

10 A Yes.

11 Q And you weren't a homicide detective in 1983, were  
12 you, Detective Pacifico?

13 A No, I was in grade school.

14 Q You were in -- okay, I thought so.

15 A Sorry.

16 Q And in the course of reviewing the records, were you  
17 instructed to look for any indication of a contact to the  
18 San Bernardino Sheriff's Office by former warden, Midge  
19 Carroll?

20 A Yes.

21 Q And were you able to find any indication of any  
22 contact from Ms. Carroll?

23 A No, I was not.

24 Q Now, the lead investigator on the Cooper case, was  
25 that Billy Arthur?

1 A He was the sergeant in charge of the team, yes.

2 Q And is Sergeant Arthur deceased?

3 A Yes, I've been told that.

4 MS. WILKENS: I have no further questions, your  
5 Honor.

6 THE COURT: Thank you. Cross?

7 (Pause.)

8 CROSS EXAMINATION

9 BY MR. HILE:

10 Q Good morning, Mr. Pacifico.

11 A Good morning.

12 Q My name is Normal Hile. We haven't met, sir, have we?

13 A No, we haven't met.

14 Q You said that you were assigned this -- the winter of  
15 this last year to -- to work on the Kevin Cooper case in  
16 your office; is that correct?

17 A Yes.

18 Q And who -- who made that assignment?

19 A Lieutenant Neely (phonetic).

20 Q And what is his job?

21 A He is the commander of the homicide detail.

22 Q How long has he had that job?

23 A If I'm not mistaken, he got -- I think since '98. It  
24 was about the time that I got promoted to detective that he  
25 got promoted to lieutenant, I think in that same

1 administrative flow.

2 Q Do you know if he was at the San Bernardino County  
3 Sheriff's Office in 1983?

4 A I would only be guessing. I don't know how many years  
5 he has on. We're not -- I mean, I don't -- no, I don't.

6 Q Do you know when Billy Arthur left the office?

7 A No.

8 Q Did you try to find that out?

9 A No.

10 Q Do you know the names of any of the other detectives  
11 or officers in the San Bernardino County Sheriff's Office  
12 who worked with Billy Arthur on the Kevin Cooper case?

13 A There was O'campo. There was (sic) a lot of names in  
14 the case, and a lot of people worked on it here or there or  
15 at least submitted reports. Right -- for the life of me, I  
16 cannot remember some of the names right now, off the top of  
17 my head. I wasn't, by any means, expecting that question.

18 Q Okay. Did you talk to Detective O'campo about the  
19 Kevin Cooper case at any time?

20 A No.

21 Q So you haven't asked him whether or not Midge Carroll  
22 called the office, correct?

23 A No, I have not. Yes, that's correct, no, I have not.

24 Q Did you talk to any of the other people whose names  
25 you saw as people who had worked on the Kevin Cooper

1 investigation back in 1983-84?

2 A Have I talked to them specifically about the case?

3 Q Yes.

4 A I don't think any of those people that were assigned  
5 to that team are on the department anymore. I've never met  
6 them, that I -- that I know of.

7 Q So you didn't talk to any of those people about  
8 whether or not Midge Carroll had called, did you?

9 A No.

10 (Pause.)

11 Q Have you asked anybody who is currently in the office,  
12 who was in the office back in 1983, about what they did on  
13 the case?

14 A I don't actually know who was in the office back in  
15 1983.

16 Q So the answer is you haven't talked to anybody who was  
17 in the office in 1983 about whether or not Midge Carroll  
18 called the office?

19 A That's correct.

20 Q So the extent of your investigation to determine  
21 whether or not Midge Carroll called the office at any time  
22 after the Ryen-Hughes murders is your review of the files;  
23 is that correct?

24 A That's correct.

25 Q Now, the files themselves that you reviewed, how big

1 are they?

2 A Eleven file-size drawer boxes.

3 Q And where are they kept?

4 A In Sheriff's Homicide.

5 Q When you were -- received this assignment the winter

6 of this past year, were the files already gathered?

7 A Yes.

8 Q You had nothing to do with the collection of those

9 files, then; is that correct?

10 A Correct.

11 Q And you don't know how they were collected when they

12 were collected, do you, sir?

13 A No.

14 (Pause.)

15 Q So you don't know whether or not, when they were

16 collected, somebody attempted to collect notes of phone

17 conferences that might have been had between Midge Carroll

18 and the Sheriff's Department. That's true, is it not?

19 A I'm sorry, ask that again.

20 Q You don't know whether, when those files were

21 collected, someone asked people to collect any phone

22 messages or indications of phone calls that might have been

23 between Midge Carroll and the Sheriff's Office.

24 A Well, I will say that I don't know what orders were

25 given in collecting the items, but those items are there.

1 Q Let me get to that in a minute, but as far as the  
2 collection of the items, you don't know what was asked for,  
3 correct?

4 A Well, essentially -- well, I sort of do because I know  
5 that Don Kennedy, one of the clerks, is the one who  
6 reorganized the file room and got rid of the older cases  
7 that had all been adjudicated and reboxed things and  
8 organized them, but, I mean, it's not a really difficult  
9 process. You take the file folders out of the metal drawer  
10 and you put them in a cardboard box, in total.

11 Q Well, let's start with Billy Arthur for a second. Do  
12 you know whether Billy Arthur had put his files that he  
13 kept himself, when he wrote notes down, into those files at  
14 any time?

15 A Not -- no, not personally, but they're there. I've  
16 seen them.

17 Q You've seen some of them.

18 A I have seen notes from -- handwritten notes by Billy  
19 Arthur and other investigators in the case.

20 Q Okay. But you don't know whether he was asked at any  
21 time to put --

22 A I have no idea.

23 Q Did you see any -- any forms that are used by the  
24 Sheriff's Office for recording phone calls?

25 A Yes.

1 Q And what do those forms look like?

2 A Well, they're little pink -- the standard pink padded  
3 "missed your call, please call" printed thing you can get a  
4 Staples or whatever.

5 Q And did you see anything other than those little pink  
6 slips?

7 A Yes.

8 Q What else did you see?

9 A Then there were Sheriff's we-tip (phonetic), which are  
10 NCR forms about, I would say, half a sheet of 8½-by-11,  
11 probably two per that tear off. They had control numbers  
12 on them. Everybody that called in, apparently,  
13 was -- their information was written down. If they had --  
14 if they gave a name, the name was put down. If it wasn't,  
15 "anon" was put there in the name. Then there was a subject  
16 area of several lines where whatever it was that they were  
17 providing information on was summarized, and a phone  
18 number, if available, was given for contact.

19 Q Okay, now let me deal with the we-tips first. Is that  
20 a form that a telephone operator or dispatcher fills out  
21 when somebody calls into the office for somebody?

22 A Well, today we have computers. No.

23 Q Let's talk about the we-tip forms that would have been  
24 filled out in 1983. Were those forms that were filled out  
25 by a person who answered the phone?

1 A Pre-dates my time. I have no idea how they were done.

2 I just know what I saw.

3 Q Okay. Let's talk about the telephone slips, little  
4 pink slips that you can get at Staples. Those were things  
5 that would have been filled out by somebody who answered  
6 the phone, correct?

7 A That, I think, is obvious.

8 Q Okay. So, if, for instance, a phone call had come in  
9 from somebody like Midge Carroll to Billy Arthur and he  
10 took the phone call, it wouldn't be a pink slip, correct?

11 A I don't know what their procedure was, but I would  
12 guess that you wouldn't take a message, not if someone is  
13 live to answer the phone.

14 Q Same thing with the we-tip form. That wouldn't be  
15 filled out if Midge Carroll had called Billy Arthur,  
16 correct?

17 A I don't know about that. I wouldn't make that  
18 assumption. Again, I wasn't there -- I wasn't there for  
19 the procedures, but I -- I'm not sure that that may not  
20 have still been documented anyway.

21 Q So you --

22 A I don't know.

23 Q But you really don't know?

24 A I really don't know, but I think they were probably  
25 handled a little differently.

1 Q Now, did you find any indication in what you looked at  
2 in those files that Midge Carroll had ever called the San  
3 Bernardino County Sheriff's Office?

4 A No, I didn't see her name on any documents.

5 Q Now, you talked to Midge Carroll, correct?

6 A Yes.

7 Q And she told you how she had called the San Bernardino  
8 County Sheriff's Office within a day or two of the escape  
9 of Kevin Cooper. Do you remember her telling you that in  
10 the interview that you tape-recorded?

11 A Yes.

12 Q And you didn't find any file record in what you looked  
13 at of that phone call, did you, sir?

14 A Correct.

15 Q But you don't dispute that that phone call took place,  
16 sir, do you?

17 MS. WILKENS: Objection; speculation.

18 THE COURT: Sustained.

19 MR. HILE: All right.

20 BY MR. HILE:

21 Q The fact that you didn't find a we-tip or a phone slip  
22 or a record of Billy Arthur talking about that phone call a  
23 day or two after Kevin Cooper escaped doesn't make you  
24 conclude, does it, that that phone call didn't occur?

25 A I don't know if that phone call occurred or not. I

1 just wrote down what she said or it's recorded. I don't  
2 think I did a report; I think we did a transcript. What  
3 she said is what she said. I don't know if it's true or  
4 not.

5 Q All right. But she told you about that phone call,  
6 correct?

7 A Yes.

8 Q And you haven't seen any evidence of that phone call  
9 in the records you looked at, have you?

10 A Correct.

11 Q And you haven't found any records in what you've  
12 looked at of any other phone calls at any other time by  
13 Midge Carroll, have you?

14 A Correct.

15 Q Now, when you called Midge Carroll, did you tell her  
16 that you were tape-recording it?

17 A No.

18 Q Why not?

19 A I don't have to.

20 Q You understood that she was the former warden of the  
21 Chino Institution for Men, correct?

22 A Most certainly.

23 Q And she is a former member of law enforcement in that  
24 position, correct?

25 A Yes.

1 Q And you didn't feel it at least polite to tell her you  
2 were tape-recording the phone call?

3 A Nope.

4 Q And the second phone call, you taped that -- recorded  
5 that one as well?

6 A Yes.

7 Q You didn't tell her you were tape-recording that, did  
8 you?

9 A No.

10 Q Is that because she had given information that was  
11 contrary to what you were hoping to find?

12 A I tape-record all my phone calls during an  
13 investigation, no matter what their rank or job title.

14 Q You tape-record phone calls that you have during an  
15 investigation where the person on the other line is another  
16 member of law enforcement?

17 A Yes.

18 Q And you don't tell them about it?

19 A Not necessarily, no.

20 Q Now, I'd like to show you a copy of the transcript of  
21 the phone call with Midge Carroll.

22 MR. HILE: Why don't I mark that next, your  
23 Honor.

24 THE COURT: It's already marked?

25 MR. HILE: It's already marked as 10A, your

1 Honor.

2 MS. WILKENS: 10B.

3 THE COURT: 10A. 10B.

4 MR. HILE: 10B, I'm sorry. May I approach the  
5 witness?

6 THE COURT: You may.

7 (Pause.)

8 BY MR. HILE:

9 Q Do you recognize Exhibit 10B?

10 A Yes.

11 Q What was the process of getting this recording that  
12 you made of the phone calls with Midge Carroll transcribed?

13 A I gave a copy of the tapes to John Kochis and he had  
14 his staff type it up.

15 Q Did you then read it back against the tape to see if  
16 it was accurate?

17 A Yes, I did. I made some corrections and fixed some  
18 verbiage. Where there were "unintelligibles, ers and ums"  
19 that weren't understood, I was able to correct them. This  
20 is a good copy.

21 Q So you verified that what we have here in Exhibit 10B  
22 is accurate, as far as you can tell, to what was actually  
23 said in that phone call, correct?

24 A Yes.

25 Q Now, when you made this phone call to Midge Carroll on

1 March 30th of 2004, did you have in front of you her  
2 declaration?

3 A Yes.

4 Q Did you tell her when you started the phone call that  
5 you had in front of you her declaration?

6 A Not at the start of the phone call.

7 Q When you talked to her and asked her questions at the  
8 beginning of this phone call, did you tell her to get out  
9 her declaration and go through it because you wanted to ask  
10 her about it?

11 A No.

12 Q Did you read any sections of it to her?

13 A I think I may have. I know that I have done that  
14 somewhere with somebody.

15 Q All right, take a look, if you would, sir, at page 5.

16 A Okay.

17 Q The top of the page, does that MC stand for Midge  
18 Carroll?

19 A Yes.

20 Q And do you see where it says -- Midge Carroll says,

21 "I mean, I talked to -- and you know,

22 I -- I can't remember their names. It

23 seemed to me that one of the sheriff's

24 investigators -- it was a common name

25 like Smith or Jones or something, but

1           they were two different investigators  
2           that I talked to from the sheriff's  
3           office and, um, I probably have their  
4           names somewhere, because I kept  
5           meticulous records, and I still have  
6           them."

7   Do you see that testimony?

8   A     Not on page 5.

9   Q     I'm sorry, top of page 4. Apologize.

10   A     Okay. Yes.

11   Q     Now, that statement by Midge Carroll in that interview  
12   was -- was unsolicited by you, correct?

13   A     Am I free to read through this to get the context?

14   Q     You may.

15           THE COURT: Why don't we then, while he's reading  
16   through this to get it in context, we'll take a ten-minute  
17   recess break and then we'll resume. Is there anything else  
18   you want him to read during the break?

19           MR. HILE: No, your Honor.

20           THE COURT: Okay.

21           THE WITNESS: Your Honor, I wasn't going to read  
22   the whole thing. I just wanted to back up a couple lines,  
23   is all I was --

24           THE COURT: Okay. We'll just take a ten-minute  
25   recess break.

1 (Proceedings recessed briefly.)

2 THE COURT: We're back in session. You may  
3 continue.

4 MR. HILE: Thank you, your Honor.

5 THE WITNESS: The question was?

6 MR. HILE: Pardon?

7 THE WITNESS: The question was?

8 MR. HILE: I'll ask another one.

9 THE WITNESS: Okay.

10 BY MR. HILE:

11 Q If you look at page 5, toward the bottom there is a  
12 long paragraph with MC to the side of that. That's for  
13 Midge Carroll, correct?

14 A Yes.

15 Q And she says, beginning about the third line down,

16 "Anyway, when I got back to work, I  
17 called the Sheriff's Office and I was  
18 given the investigator, and I said,  
19 'Hey, we had a guy escape. You think  
20 it could have been him?' and he said,  
21 'There is nothing to indicate that your  
22 escapee had anything to do with these  
23 murders.' Well, about a week or so  
24 later, all hell broke loose. The media  
25 picked it up, and it became a media

1 circus."

2 That's what Midge Carroll told you in that phone call,  
3 correct?

4 A Yes.

5 Q And did you make any attempt to see whether there was  
6 any recording of that particular phone call within the  
7 records that exist at the Sheriff's Office?

8 A I looked for anything with her name on it, referencing  
9 a message or report. I didn't find anything. I did not  
10 break it down by conversation here, wordings there. It  
11 didn't change the task at hand, which was to look through  
12 the paperwork and find her name on a message note, we-tip  
13 or criminal report summary.

14 Q And you don't have any reason to believe that -- that,  
15 unprompted, when Midge Carroll told you this on March 30th,  
16 she wasn't telling the truth, do you?

17 A Well, it's not necessarily unprompted, going back to  
18 page 3, where I refer to the reason I'm speaking to her is  
19 about the declaration. Do I have a reason to believe that  
20 that's not entirely true? Yeah, I do.

21 Q Well, you haven't actually confronted her with the  
22 reason why that's not true, have you?

23 A No, because I have no point.

24 Q And you haven't talked to any member of the Sheriff's  
25 Office during the '83 period to find out whether this is

1 true, have you?

2 A Yes, I have.

3 Q Who have you talked to?

4 A I had a conversation with -- well, in speaking with  
5 Lieutenant Neely and with Sergeant Teslar (phonetic), who  
6 is a sergeant in homicide now who was a detective back  
7 then, their recollection of that statement is different  
8 than hers. The stories that I've heard, which I can't -- I  
9 don't -- they're he said/she said, but I know where I put  
10 my faith.

11 Q Well, all right, so you did find evidence in talking  
12 to those people that she did make a call, correct?

13 A No. That's not what I'm saying at all.

14 Q So they were disputing that -- the substance of this  
15 phone call?

16 A Yes.

17 Q But they were -- and by the "substance", I mean, what  
18 was said, not whether it occurred.

19 A You'd have to ask them, but I was under the impression  
20 that that's not the order of how things occurred and that's  
21 not -- her statement wasn't entirely precise.

22 Q Okay, but -- but let me differentiate between what the  
23 statement was and whether it -- there was a phone call in  
24 your mind?

25 A No one told me that she called.

1 Q Did anybody tell you that she didn't call?

2 A How do you do that?

3 Q Take a look, if you would, sir, at page 6, about the  
4 middle of the page. You see where it says "MC: He  
5 was -- he was a loser."

6 A Yes.

7 Q "And anyway, he -- there was nothing in  
8 his record that we could tell that he  
9 was some big bad hacker now. He may  
10 be. I don't know, but I did call and  
11 pass along the information about the  
12 shoes."

13 Do you see that?

14 A Yes.

15 Q So she told you unsolicited in that phone call about  
16 the call to the Sheriff's Office about the shoe issue,  
17 correct?

18 A Well, I wouldn't characterize it as unsolicited. We  
19 were talking about her declaration. It's obviously clear  
20 she knows what she wrote or what was written for her to  
21 sign. I don't think that this is unsolicited. She does  
22 repeat the fact that she said that she called. Whether  
23 that's true or not, I have no idea.

24 Q And she told you that without having her declaration  
25 in front of her, to your knowledge?

1 A I have no idea if she had it or not. I didn't ask  
2 her. She didn't tell me.

3 Q And the next line says, "And what information was  
4 that?" you asking her, and she says that, "We don't make  
5 tennis shoes." Do you see that?

6 A Yes.

7 Q She did make that statement to you in the phone call,  
8 correct?

9 A Yes.

10 Q And to the bottom of the page, the last entry for her,  
11 it says, the second line,

12 "When I talked to the business services  
13 people, where did we get these from,  
14 they traced it back and said, 'Well, we  
15 bought them Sears Roebuck. We bought  
16 by the thousands. They're the cheapest  
17 thing we could get.'"

18 She told you that, correct?

19 A Yes.

20 Q Now, if you look at page 13, please, toward the bottom  
21 of the page. There's an MC and it says,

22 "I'm trying to tell you. You know it.  
23 Here's the way the situation was. We  
24 were under the gun. I was talking to  
25 probably 10, 15 people every day for

1           two years about Kevin Cooper.

2           That's --

3           Uh-huh..." --

4   Is that yours?

5   A     Yes.

6   Q     And then it says,

7           "So for me to pull out of the air, you  
8           know, 20 years later, who specifically  
9           told me that, I don't know, but it was  
10          a matter of concern to me, because I  
11          remember passing it on."

12   And you say,

13          "Okay, do you know..." --

14   And she says,

15          "I think what they did, they blew me  
16          off.

17   And you say,

18          "Who's that?"

19   And she says,

20          "Whoever I was talking to, the  
21          Sheriff's Office, blew me off."

22   And you say,

23          "Okay."

24   And she says,

25          "And from then on, when I gave them

1           apparently information they didn't want  
2           to hear, they got so they wouldn't even  
3           take my calls. So I thought, 'okay,  
4           screw it.'"

5   Now, she told you that in that phone call, correct?

6   A    Yes.

7   Q    And you didn't have any reason to believe that that  
8        was untrue, did you?

9   A    Yes, I do. I have reason to believe it's untrue.

10           MR. HILE: I have no more questions, your Honor.

11           THE COURT: Any redirect?

12           MS. WILKENS: No, your Honor.

13           THE COURT: Okay, thank you. You may step down.

14           THE WITNESS: Am I excused?

15           THE COURT: Yes. Your next witness?

16           MS. WILKENS: I thought we were going to finish  
17        my argument.

18           THE COURT: Okay, your next witness is set for  
19        1:00?

20           MS. WILKENS: Yes.

21           THE COURT: Okay, you may continue with your  
22        argument.

23           MS. WILKENS: Thank you, your Honor. Now, Mr.  
24        Alexander described the Daubert standard as a relaxation of  
25        the Kelly Frye standard. What Daubert says is it doesn't

1 make the Kelly Frye standards dispositive, but the factors  
2 are extremely familiar and, in fact, derived from the Kelly  
3 Frye factors.

4 Also, the judicial decision of the appellate  
5 court in New Jersey applied Daubert to Dr. Ballard's work.  
6 In so doing, they asked, does his proposed testimony make  
7 sense? They answered that no. They found that there was  
8 no valid scientifically acceptable specimens being used.  
9 They found that the scientific quantification of the EDTA  
10 was lacking. They pointed out that it's not merely an  
11 application of settled scientific procedures. Again, the  
12 analogy to lie detectors is -- is apt with respect to that  
13 particular category.

14 The court also found that Dr. Ballard failed to  
15 rule out, to a reasonable degree of scientific certainty,  
16 other possible explanations for the presence of EDTA in a  
17 sample. He failed to scientifically exclude the myriad of  
18 environmental sources of EDTA that might have contributed  
19 to his findings. They found that his evidence was not  
20 scientifically reliable, and indeed it's not.

21 What's required by Daubert is sound science based  
22 upon objective validation of an expert's methodology.  
23 There is no acceptance in the scientific community for what  
24 Dr. Ballard is proposing. There is no more acceptance for  
25 it than for a lie detector test.

1           The difficulty is -- is that what this Court is  
2 really being asked to do is to go out and pay for and wait  
3 for the science to be developed. There's no publications.  
4 There's no peer review. There's no nothing in terms of  
5 tampering.

6           So Mr. Alexander can toss out the name of a  
7 scientist that he has yet to contact that theoretically  
8 could come in and perform this, but I think it speaks  
9 volumes that no one is able to locate anyone other than Dr.  
10 Ballard who currently performs these tests.

11           One of my concerns is the continuing testimony by  
12 counsel. One thing this Court has not heard from is a  
13 criminalist on behalf of Mr. Cooper, explaining to this  
14 Court the validity of undertaking this task. They have  
15 offered up Dr. DeForest to cut out the samples. Well, any  
16 criminalist can cut out samples. Frankly, we would prefer  
17 that the selection and cutting of the samples be done by a  
18 DOJ scientist, because we have scientists all equally  
19 qualified to Dr. DeForest to do such a task.

20           The problem is we don't have a criminalist  
21 commenting on why this should be done. We're just talking  
22 about can it be done, is it plausible? Well, that's not  
23 what we should be talking about. We should be talking  
24 about whether or not it's proven.

25           When you look at Mr. LeBeau, he seems to be the

1 sort that would go out and try to do it, but we're not  
2 asking whether it's plausible. We're asking, has it been  
3 proven? When things are proven, you have authoritative,  
4 scientific publications on the topic. You have validation  
5 studies. You have peer review. Mr. LeBeau says there's  
6 been no peer review. He's looked at Dr. Ballard's  
7 testimony where he describes preventing papers at a  
8 conference. The problem is, when you present a paper at a  
9 conference, someone may or may not come up to you after the  
10 conference and make a comment. There's no way to document  
11 any input from the scientific community.

12           So what we have is the drumbeat that this was  
13 done in the O.J. Simpson case. Well, what we have from  
14 O.J. Simpson is a measure of EDTA levels. We don't have  
15 any correlation of it to anything. We don't have a  
16 threshold. We don't have scientific studies about what a  
17 particular level means. Frankly, if you look at the O.J.  
18 case, you can see that that kind of ambiguous test result,  
19 standing on its own, doesn't create any certainty.

20           With this case, in its posture, to simply take  
21 time and money to interject more confusion for the public  
22 and for the courts in terms of what is here -- and  
23 particularly when you look at the backdrop of absolutely no  
24 evidence of tampering.

25           So we've done science. We took a lot of money

1 and a lot of time to do it. It's been completely  
2 denigrated. They've changed scientists. We can be sure  
3 that whatever testing this Court orders, by the time we're  
4 in the 11th hour again, they'll have a new team of lawyers  
5 and a new team of scientists denigrating each other.

6 So the question is how far does this Court want  
7 to go in terms of authorizing further scientific testing  
8 against this backdrop?

9 The other thing, too, is with respect to the  
10 blind science. I am relying on representations from DOJ  
11 scientists that it's not blind, that there are ways where  
12 presumptive testing could give a -- give a clue. The other  
13 thing is, if you put in, items from another shirt, unless  
14 those items have blood on it, I don't think that would  
15 satisfy the concerns. If Dr. Ballard --

16 THE COURT: We -- put in fake blood -- I mean,  
17 put in blood --

18 MS. WILKENS: I think you'd have to do that,  
19 because if he's going to skew the results, he's going to  
20 have it coming back with lower results where there is no  
21 blood.

22 But you have to start to wonder if there's the  
23 necessity of expending all the time and energy for all the  
24 blind testing --

25 THE COURT: Of doing the -- of us developing the

1 repeatable results?

2 MS. WILKENS: Exactly, because why is this being  
3 offered up as attractive? Because there's such legitimate  
4 concern about Dr. Ballard. Again, it doesn't go just to  
5 his scientific enthusiasm, like -- like Mr. LeBeau. Mr.  
6 LeBeau, in Cirrus, thought something was plausible and  
7 unfortunately it hadn't been proven yet.

8 The problems with Dr. Ballard are far more  
9 extensive. As the Pompeii court points out, he is skewing  
10 science to reach an end. He is advertising a service to  
11 the defense community to determine tampering. I urge this  
12 Court not to make Dr. Ballard a very rich man and not to  
13 change the face of criminal justice by making such testing  
14 routine whenever blood evidence is being used.

15 If the Court has no questions, I would submit.

16 THE COURT: So you're saying that, at least based  
17 on your conversations with your expert, that the blind  
18 testing proposed by the Petitioner is not blind?

19 MS. WILKENS: We're concerned it's not blind, and  
20 it does not allay our concerns about the inability to  
21 account for other sources for the background, and it  
22 doesn't address the inability to make any correlation  
23 between levels and tampering. Those are two key things  
24 that are lacking. There is no science that has been proven  
25 that can bring that to this Court.

1           Why this Court would want to undertake testing  
2 when it's not going to facilitate drawing any reasonable  
3 inferences with respect to tampering -- we will simply be  
4 left with now we know whether or not there was EDTA and we  
5 don't know what it means. It interjects an ambiguity.

6           The Ninth Circuit looked at this as dispositive,  
7 definitive testing with respect to whether or not there was  
8 tampering, not definitive with respect to whether or not we  
9 can show the presence of EDTA, which is so common in the  
10 environment, and for which we cannot explain independent of  
11 other sources.

12           THE COURT: Okay. Mr. Alexander?

13           MR. ALEXANDER: Thank you, your Honor. Thank  
14 you, Ms. Wilkens.

15           Your Honor, after 30 years of doing this, I'm  
16 pretty thick-skinned. So -- I teach my children to take  
17 the high road, and I'm --

18           THE COURT: You're a devil's advocate. She's a  
19 devil's advocate.

20           MR. ALEXANDER: Very well.

21           THE COURT: We don't get anywhere by --

22           MR. ALEXANDER: Very well.

23           THE COURT: -- lowering the professionalism.

24           MR. ALEXANDER: I quite agree. Let's turn to the  
25 facts. No one pulled the eyes (sic) over the Ninth Circuit

1 by any means.

2 First of all, the initial panel agreed with the  
3 Attorney General. As you'll recall, it was an en banc  
4 panel that reversed, number one.

5 THE COURT: I know, but see the point there is  
6 it's the en banc panel got it at 11:00 on Sunday.

7 MR. ALEXANDER: I'm about to address that.

8 THE COURT: Okay.

9 MR. ALEXANDER: In Ms. -- never mind. The Ninth  
10 Circuit had been receiving papers from both sides since  
11 before the Supreme Court of California rejected the  
12 petition.

13 THE COURT: But the en banc panel didn't get it.

14 MR. ALEXANDER: They -- the entire panel -- we  
15 don't know -- we're all guessing here to suggest that the  
16 Ninth Circuit looked at this thing in a space of 12 hours.  
17 We were in constant -- I know you've been --

18 THE COURT: I -- I believe that.

19 MR. ALEXANDER: All right, well, all I can say is  
20 those papers were sent up all along, everywhere.  
21 That's -- to the Ninth Circuit at their request, "When you  
22 file something, please send all of those papers up." I  
23 think -- and --

24 THE COURT: But as a practical matter, being  
25 involved in the process, that the Attorney General was

1 given at 9:00 at night -- to file by 9:00. The en banc  
2 panel wouldn't even act until they know what the panel is  
3 going to do. The panel issued its decision, and then the  
4 en banc panel then acted, but to say that they would have  
5 reviewed all of the briefings, which hadn't even been filed  
6 until the Attorney General submitted theirs at 9:00 on  
7 Saturday. At most, the briefing wasn't complete until 9:00  
8 on Saturday.

9 MR. ALEXANDER: The only thing that really  
10 changed during the process, your Honor, was the petition  
11 that was -- the final petitions that were -- were filed.  
12 The briefing on all of these issues were briefed up to the  
13 California Supreme Court. It's --

14 THE COURT: You don't think that it bothers the  
15 Court a little bit that you find out from Midge Carroll  
16 that she was interviewed two years ago -- two years ago and  
17 a declaration was submitted January whatever the date was,  
18 when it could have been two years before? Is -- the  
19 documents are given to her -- that's --

20 MR. ALEXANDER: That's not our burden, your  
21 Honor. That's the burden -- that's the fault of the other  
22 side, that they -- that they totally ignored and kept from  
23 us this information. That's the precise indication  
24 in -- in -- in the Brady instance.

25 Let me go on to some other points that were

1 raised on this. We would have come here first, but that's  
2 the law. We have no choice. We have to go to the Ninth  
3 Circuit. For --

4 THE COURT: I did acknowledge that.

5 MR. ALEXANDER: Yes, you did and, of course,  
6 properly so.

7 Now, if you look at the cross section of the  
8 Ninth Circuit that ruled, to the extent we're going to  
9 engage in this, it was a broad cross section of the judges.  
10 We don't have any idea logs on the issue.

11 The two judges -- there were two out of the 11  
12 who made this comment about, you know, the EDTA is either  
13 there or it's not there and that's the ballgame, not the  
14 seven -- not the seven judges. So I think we're taking  
15 some liberties in speculating what the court did or did not  
16 do.

17 As, if not more, significantly, for the Attorney  
18 General to nod in agreement and say, "Yes, it would have  
19 been better had we come here first," which I couldn't agree  
20 more, it would have been better had we come here, but on  
21 four different occasions, four times, the night after the  
22 Ninth Circuit said there's sufficient questions here that  
23 we think this matter ought to be further investigated, they  
24 went to the United States Supreme Court and tried to kill  
25 Kevin Cooper before those questions could be answered. And

1 just --

2 THE COURT: But that's actually on -- I mean,  
3 there is a legitimate issue under the law --

4 MR. ALEXANDER: Not anymore.

5 THE COURT: -- about -- about whether the -- no,  
6 the denial of a -- doesn't mean that it's affirmative.

7 MR. ALEXANDER: Well, let's go through the  
8 history of this, and I think --

9 THE COURT: No, I -- I don't think -- one, I  
10 don't think this is a productive discussion about the  
11 Daubert analysis. So --

12 MR. ALEXANDER: All right, I just wanted to  
13 address the comment that they made that they would have  
14 liked to have come here first. I will only say that in  
15 four instances that your Honor is now aware of,  
16 they -- including after the -- the remand was issued to  
17 your Honor, they went to the Supreme Court -- the night of  
18 the proposed execution, they went to the Ninth Circuit and  
19 said, "Hold up so we can go to the Supreme Court." The  
20 Ninth Circuit said no, not surprisingly. They went to the  
21 Supreme Court on that and said, "Tell the Ninth Circuit not  
22 to issue its remand so it doesn't go down to -- to your  
23 Honor." And then --

24 THE COURT: They're -- they're legally --

25 MR. ALEXANDER: -- later after it was issued,

1 after the -- they said, "Well, recall it." They lost then.

2 THE COURT: They're legally permitted to do that  
3 because --

4 MR. ALEXANDER: Of course they are.

5 THE COURT: -- there is an issue under the  
6 law -- the panel is supposed to be the last word, not the  
7 en banc. So there's a legitimate issue there.

8 MR. ALEXANDER: Well, apparently the Supreme  
9 Court has decided -- now, I realize a denial --

10 THE COURT: They decided this isn't the right  
11 case to do that.

12 MR. ALEXANDER: Apparently -- all right.

13 THE COURT: That this isn't the right case. So  
14 now we're here.

15 MR. ALEXANDER: Fair enough. All I can -- my  
16 point goes to the issue, whether it's a legitimate issue or  
17 not, that -- that their notion that they would have liked  
18 to have come here first and that would have been better is  
19 a belied by all their efforts to stop this thing from  
20 coming here. That was simple response.

21 With regard to the Pompeii case, the methodology  
22 even in the unpublished opinion of the Court of Appeals, is  
23 that the methodology is acceptable. That's right in there.

24 THE COURT: For tampering?

25 MR. ALEXANDER: The methodology is acceptable for

1 testing to see whether there's EDTA.

2 THE COURT: Well, this is why the analogy to the  
3 polygraph is interesting. It comes back to the Court's  
4 comments before about can we test for EDTA? Yes, we can.  
5 Will the results of the test give us an up or down answer  
6 to whether there was tampering? Is that scientifically  
7 proven? Unknown.

8 MR. ALEXANDER: Well, I believe that -- that at  
9 least the first step of Daubert -- I mean, we can only take  
10 the analysis that's been offered by the Supreme Court.  
11 There is no evidence to contradict the fact that every  
12 court that has looked at the methodology of EDTA testing  
13 has accepted the methodology as -- as meeting the initial  
14 hook of Daubert. They have cited no authority, their  
15 own -- their own expert nor -- I don't know what they think  
16 of Mr. LeBeau at this time, but in any event, has adopted  
17 it. The court -- the appellate court in Pompeii has  
18 adopted it. The court in the Simpson adopted it. There's  
19 just nowhere where that element has not been established.

20 Now -- and -- and as I think your Honor would  
21 imagine, the Pompeii case is going up on appeal to the New  
22 Jersey Supreme Court. So we can all sit here and speculate  
23 as to what may or may not happen in that particular  
24 instance.

25 With regard to the personal relation of Mr.

1 Mueller, my point was a very simple one. The FBI relies on  
2 Mr. LeBeau. That was my simple point. He has the machine  
3 or knows how to operate the machine, as he was trained  
4 by -- by Dr. Ballard. In fact, if you go to the transcript  
5 of the tutorial before your Honor, Dr. Ballard said a  
6 couple of very interesting things. Number one, the FBI  
7 calls him. Now, we have heard on record today before this  
8 Court that the gentleman at the FBI who performs the EDTA  
9 testing or consults with somebody else on EDTA testing is  
10 somebody whose expertise they do not adopt. They offered  
11 his view, his opinion to your Honor for whatever limited  
12 purpose it was. They must think he's reliable, honest, has  
13 high integrity. Otherwise they never would have proposed  
14 it to your Honor. Now, in some way, they're trying to  
15 sidestep it.

16 Let's remember another thing that Dr. Ballard  
17 said during the tutorial. Not only he is contacted by the  
18 FBI, but there are only -- and hopefully this will give  
19 some comfort to the Court. Dr. Ballard testified, I  
20 believe, that he has either done the testing on ten  
21 different occasions or at least ten different occasions,  
22 and he has only found a positive EDTA on two occasions.  
23 One is the Pompeii case, and the other one is the case out  
24 of Texas. I think it's the Barnes case. He has been  
25 retained by the prosecution on most occasions. Now -- not

1 on those -- obviously not on those two occasions.

2 Let me address, if I might also -- first of all,  
3 I'm not going to -- I'm not going to dignify candidly the  
4 comment about the cottage industry for Mr. Ballard. I  
5 think he testified that this test costs \$650 or something.  
6 He's part of a very multi-million-dollar lab. I doubt  
7 anybody is going to get rich on that. Hopefully there's  
8 not enough tampering going on in this country that he's  
9 going to become a wealthy man off of it.

10 With regard to the opportunity for tampering,  
11 what counsel has not brought to your Court -- your Honor's  
12 attention is that there is a period of time from November  
13 1983 for approximately four months when that t-shirt is  
14 unaccounted for. This is not a full --

15 THE COURT: The t-shirt wasn't -- the t-shirt  
16 wasn't offered by the Prosecution.

17 MR. ALEXANDER: That's correct, it was not. And  
18 so --

19 THE COURT: That's a critical fact.

20 MR. ALEXANDER: Exactly, very important fact.  
21 Now, unless Mr. Cooper and his counsel -- Mr. Negus is not  
22 here -- are really stupid, why would they offer up a t-  
23 shirt if they believed there was any chance that any blood  
24 on that t-shirt could incriminate him? Even if they're  
25 stupid and did it, why would they pursue the DNA testing

1 later on?

2 THE COURT: I've had the benefit of  
3 hearing -- Mr. Amidon is here in the audience, and I've had  
4 the benefit of hearing the -- the defense lawyer -- he was  
5 very impressive.

6 MR. ALEXANDER: Yes.

7 THE COURT: He was -- he had a plan. He had a  
8 theory. He did an extensive pretrial hearing challenging  
9 the scientific evidence. And what are we doing now --

10 MR. ALEXANDER: Not this side.

11 THE COURT: -- the scientific evidence. So  
12 actually his lawyer was wonderful. I was extremely -- you  
13 hear lots of lawyers --

14 MR. ALEXANDER: Mr. Negus was very impressive.

15 THE COURT: I was extremely impressed with the  
16 quality. The Prosecution would probably say, "Why would  
17 Kevin Cooper do this?" Well, if you'd go back through the  
18 whole theory, why would Kevin Cooper say that he heard  
19 voices to get into another place to then escape? Why would  
20 he say he's David Trautman when he's really Kevin Cooper?  
21 What -- you could go through a laundry list -- why would he  
22 testify? You could go through a laundry list of saying  
23 that there's -- the Government would say that there's some  
24 credibility issues with things that Kevin Cooper has said  
25 or done.

1 MR. ALEXANDER: Well, but with the advice of  
2 superb counsel -- and I think -- and I've read this whole  
3 transcript more than one time -- did an outstanding job  
4 with regard to the -- the liability part of the case. But  
5 then -- presumably he advised Mr. Cooper, but then years  
6 later -- and whether or not the statute was actually passed  
7 before the agreement was signed or not, the request had  
8 been made to have this testing done well before the statute  
9 was actually passed. I don't care whether it was  
10 technically signed before or after. They resisted the EDTA  
11 testing at that time. That's --

12 THE COURT: The DNA testing.

13 MR. ALEXANDER: No -- well, they did that too,  
14 but then they resisted having any other kinds of testing  
15 done at the time.

16 Now, let me address, if I might also, because I  
17 think it's important for the record, the comment about  
18 the -- the eyeball comment that your Honor made -- I  
19 misplaced a note.

20 THE COURT: I made it, but it's in the context of  
21 the Attorney General's papers also making it.

22 MR. ALEXANDER: Yes.

23 THE COURT: I don't just come up with these  
24 issues on my own.

25 MR. ALEXANDER: No, no, I -- you're quite right.

1 I apologize, your Honor. More appropriately, what  
2 Mr. -- if you go back to the transcript, what Mr. -- what  
3 Dr. Ballard said is the eyeball is not his method.  
4 Regarding eyeball method, he stated that he could try to  
5 estimate the size or volume of blood that created a  
6 particular stain, but that he would never utilize that  
7 eyeball method when he's actually doing the testing. He  
8 described in detail in his declaration, submitted with our  
9 reply regarding the EDTA testing, that he would use normal  
10 scientific methods to measure blood volume. Again, he goes  
11 into great detail to describe the scientific method he  
12 would use to measure blood volume. Ballard wanted to  
13 clarify that by no means does he think eyeballing is  
14 sufficient. I think we can all rest assured he's not going  
15 to eyeball anything in the testing that goes on in this  
16 case.

17 Now, you've already asked of Mr. Hile for us to  
18 provide a declaration with regard to the blind testing and  
19 the liquid form, and we will do that. This --

20 THE COURT: It may not necessarily -- it doesn't  
21 have to be a declaration, but if there could be a formal  
22 description of it.

23 MR. ALEXANDER: Of course, your Honor.

24 MR. HILE: Yes, your Honor, we'll do that as soon  
25 as possible.

1 THE COURT: Thank you.

2 MR. ALEXANDER: Now --

3 THE COURT: That way we have it all -- none of us  
4 our scientists. We have it so that then the Government can  
5 then submit it to their scientists for comment and review.

6 MR. ALEXANDER: Much has been said about the  
7 Pompeii case. We can re-try the Pompeii case here if we  
8 want to. I don't think that's appropriate.

9 This will not be the first case where an expert  
10 has been criticized by another court for some prior  
11 testimony and that's been brought out. That happens.  
12 Frankly, if the people who you're contacting are -- are the  
13 real experts, mistakes are going to be made. Maybe they  
14 were made in that case, although we really don't know the  
15 end of the story at this point.

16 With regard to Mr. Phillips, again, I don't want  
17 to dignify that situation, but he's not -- he's not  
18 qualified to comment on anything in this context. There's  
19 no evidence he's done any EDTA testing. I'm not sure what  
20 testing he's ever done. He's got a bachelor in science, as  
21 I understand it. He's a manager -- was a manager of a lab  
22 for a period of time. So I don't think eh's helping us  
23 very much here. I think I'd much rather rely on Dr. LeBeau  
24 and Dr. -- Dr. Ballard.

25 Now, where is the evidence of peer review and the

1 like? It may not be in a writing. It may be in a paper.  
2 Maybe that's not peer review, but the peer review in the  
3 use of the methodology here is done empirically. It's been  
4 accepted by all of the courts. The methodology has been  
5 accepted by all the courts, and the Government has yet to  
6 come up and say -- produce any evidence that it's been  
7 rejected by any court. They've run from every situation.  
8 They've run from the O.J. case. They run from -- from Dr.  
9 LeBeau.

10 As for the final point that it's been 20  
11 years -- it was 20 years for Ruben "Hurricane" Carter and  
12 he was exonerated. It was long periods of time for the 67  
13 people that have been exonerated since the Innocence  
14 Project started through 1999. All you need to do -- and I  
15 recommend highly to all here, not only Mr. Scheck but Don  
16 Cabana (phonetic), the former warden, the prison system in  
17 Mississippi whose book, Death at Midnight, recounts the  
18 tales of his personally executing two men who it turned out  
19 were innocent. That's what we're involved with.

20 This is not a question of securing a conviction.  
21 This is a question of making sure we get to the truth.

22 THE COURT: Of course it's significant and of  
23 course it's important --

24 MR. ALEXANDER: And I'm not suggesting for a  
25 moment that your Honor thinks anything but that, but I do

1 take strong exception to any comment -- EDTA testing wasn't  
2 available until the late '90s. We're dealing with a much  
3 shorter period of time. We will do nobody any good, your  
4 Honor, if we put -- if we put to death the wrong person.  
5 We won't have helped the families of the victims, for whom  
6 nothing can be said. It's horrendous. I have children. We  
7 all have families. It's an awful situation, but it will do  
8 no good --

9 THE COURT: Thank you.

10 MR. ALEXANDER: -- if we don't pursue this.  
11 Thank you.

12 THE COURT: We'll take our lunch recess at this  
13 time, and then we'll be back at 1:00.

14 MR. HILE: Your Honor, I can report briefly, if  
15 this is the right time, about the questions you asked for  
16 Dr. Melton.

17 THE COURT: Yes.

18 MR. HILE: If that would be a help to the Court.

19 THE COURT: Al right, you may.

20 MR. HILE: There were two questions that the  
21 Court asked at the in-chambers conference yesterday. The  
22 first was will it cost more to do the reference samples  
23 second? My understanding -- I talked to Dr. Melton last  
24 night -- is that it will not -- it'll not significantly  
25 increase. It just changes the way she will do things, but

1 it won't cause that -- to be a problem.

2 The second question related to timing. Because  
3 of the fact that it is summer, she told us that the amount  
4 of time it would take for her to do her report after the  
5 testing would only be about three days but that the time  
6 that she would need to do the testing, if she has  
7 somewhere, you know -- ten or more hairs, would be six  
8 weeks.

9 THE COURT: Six weeks, okay.

10 MR. HILE: So we're talking a period of six weeks  
11 plus a couple of days once the material gets to her.

12 THE COURT: Okay.

13 MR. HILE: So, for purposes of the Court's  
14 scheduling, I thought you should be aware of that.

15 THE COURT: All right.

16 MS. WILKENS: Your Honor, could I inquire, what's  
17 the time difference between 10 and 30 hairs? Because it  
18 seems odd that it would be the same for 10 as 30.

19 MR. HILE: And I didn't mean to imply that. I  
20 think six weeks is probably the amount of time it will take  
21 for approximately ten hairs. It'll be a little longer if  
22 it's more than ten hairs.

23 THE COURT: All right, thank you. We'll be in  
24 recess. We'll see you at 1:00.

25 (Proceedings were recessed to 1:00 p.m.)

1                                    AFTERNOON SESSION

2                                    --oOo--

3                    (Call to order of the Court.)

4                    THE COURT: Good afternoon. We're ready for our  
5 next witness.

6                    MS. WILKENS: Thank you, your Honor.

7                    MR. YUHAS: Thank you, your Honor, the Petitioner  
8 would call Sandra Coke, please.

9                    SANDRA COKE, PETITIONER'S WITNESS, SWORN

10                  THE CLERK: State your name for the record and  
11 spell your last name, please.

12                  THE WITNESS: Sandra Coke, C-O-K-E.

13                  THE CLERK: Thank you.

14                                    DIRECT EXAMINATION

15 BY MR. YUHAS:

16 Q        Good afternoon, Ms. Coke.

17 A        Good afternoon.

18 Q        Are you a private investigator?

19 A        Yes.

20 Q        And are you licensed?

21 A        Yes.

22 Q        And how long have you worked as a private  
23 investigator?

24 A        I've worked as an investigator for 13 years. I've  
25 been licensed for eight.

1 Q And are you an employee of some company or are you an  
2 independent contractor?

3 A Independent. I'm self-employed.

4 Q Have you ever met a person by the name of James  
5 Taylor?

6 A Yes.

7 Q And can you describe the context in which you first  
8 came in contact with Mr. Taylor?

9 A In January of 2004 I interviewed him at Ironwood State  
10 Prison in Blythe, California.

11 Q And was this first time you had come in contact with  
12 Mr. Taylor?

13 A Yes.

14 Q And how did the -- this interview with Mr. Taylor come  
15 about? Was that your idea or was it somebody else's idea?

16 A I was asked to interview him by attorneys for Kevin  
17 Cooper.

18 Q And at that time were you one of the investigators  
19 working with the Cooper defense?

20 A Yes.

21 Q How long, at that time, had you been working in one  
22 capacity or the other in connection with the Cooper  
23 defense?

24 A I had -- I first worked on Mr. Cooper's case a long  
25 time ago, in perhaps 1992 or so. Again, I was asked to

1 work on the case by Mr. Cooper's attorneys in about  
2 December of 2003.

3 Q So sometime within a month or so before you  
4 interviewed Mr. Taylor for the first time?

5 A Yes.

6 Q And how long -- I think you said the interview  
7 occurred at -- was it Ironwood?

8 A Yes, in Blythe, California. I believe it was  
9 Ironwood, uh-huh.

10 Q And what process did you have to go through to get  
11 access to -- to Mr. Taylor?

12 A I called the prison and arranged for a legal visit.

13 Q And how long did the visit last?

14 A I'd guess about two and a half, three hours.

15 Q And when you called the prison, did you advise them as  
16 to the fact that you were associated with the Cooper  
17 defense team?

18 A I believe so. I -- I believe that it was an  
19 attorney -- one of Mr. Cooper's other attorneys who wrote  
20 the letter of introduction. I don't recall specifically,  
21 but I'm -- I do believe that I identified myself as such or  
22 that there was a letter that identified me as an  
23 investigator working on behalf of Mr. Cooper.

24 Q Now, did you tape-record the interview?

25 A No.

1 Q Why not?

2 A Not my standard practice.

3 Q And when you came to interview Mr. Cooper (sic) the  
4 first time, did you bring along any -- any documents or any  
5 other materials other than personal items like a purse or  
6 whatever?

7 A Yes, I had -- I had some materials related to  
8 Mr. -- Mr. Taylor's testimony.

9 Q His -- transcripts of his testimony?

10 A Transcripts, interview -- reports of interviews, et  
11 cetera.

12 Q Any pictures?

13 A No.

14 Q Now, would you just describe in general the -- the  
15 things that you discussed with Mr. Taylor over the course  
16 of this interview.

17 A Sure. It started just in general with asking Mr.  
18 Taylor about his background, how long he and Mr. Cooper  
19 were incarcerated together. We went over some of  
20 his -- some of the interview reports, some of the  
21 statements -- interviews that he did with the San  
22 Bernardino Sheriffs around that time. We also discussed  
23 his trial testimony.

24 Q Now, did you discuss with Mr. Taylor in the course of  
25 this interview matters other than the tennis shoes that Mr.

1 Taylor indicated that he had given to Mr. Cooper?

2 A Yes.

3 Q Can you describe at least just in general terms what  
4 type of things other than tennis shoes you discussed with  
5 Mr. Taylor.

6 A We discussed some of his -- some of the statements he  
7 gave concerning what statements Kevin Cooper purportedly  
8 made to him before -- before he was arrested on the murder  
9 charge. So -- so background -- statements that Mr. Taylor  
10 had given related to Kevin Cooper's background.

11 Q Now focusing for the moment on tennis shoes --

12 A Uh-huh.

13 Q -- did you also discuss with Mr. Taylor the issue of  
14 what tennis shoes he had previously said that he'd given to  
15 Mr. Cooper?

16 A Yes.

17 Q And his trial testimony in that regard?

18 A Yes.

19 Q And in the course of the interview, can you recount  
20 what Mr. Taylor indicated to you regarding the tennis  
21 shoes?

22 A Mr. Taylor told me that he was certain that he gave  
23 Kevin Cooper only one pair of tennis shoes, and those  
24 tennis shoes were P.F. Flyers.

25 Q Now, in the course of this interview, did you write

1 out a declaration for Mr. Taylor?

2 A Yes, I did.

3 MR. YUHAS: Your Honor -- I'm sorry --

4 THE COURT: You may approach. Is the original?

5 MR. YUHAS: This is the original declaration,  
6 your Honor. I -- I don't know -- I'm showing it to  
7 counsel.

8 THE COURT: Yes.

9 MR. YUHAS: I don't know if we should just mark  
10 it as Exhibit 2A or just a sequential exhibits, whatever  
11 the Court's preference is.

12 THE COURT: Pardon me?

13 MR. YUHAS: I don't -- mark it here as Exhibit  
14 2A, the original -- the copy of the declaration is Exhibit  
15 2.

16 THE COURT: Oh, 2A would be perfect. You could  
17 put it on the -- on the back page, so it's not going to  
18 mark words on the document.

19 (Pause.)

20 MR. YUHAS: I want you to witness this.

21 (Laughter.)

22 MR. YUHAS: May I approach, your Honor?

23 THE COURT: You may.

24 MR. YUHAS: Thank you.

25 (Pause.)

1 BY MR. YUHAS:

2 Q Ms. Coke, I've handed you what has been marked as  
3 Exhibit 2, which is a copy of a declaration, and Exhibit 2A  
4 on the back, which is what I believe to be an original of  
5 that. Can you take a look at Exhibit 2A, the one on the  
6 yellow paper.

7 A Uh-huh.

8 Q And if you could tell us what that is.

9 A This is the declaration that I wrote and reviewed with  
10 Mr. Taylor and that he signed and initialed.

11 Q And you were present -- did you write it out except  
12 for the portion where it's initialed and the signature?

13 A Yes, I did.

14 Q And did you observe him when he initialed it and when  
15 he signed it?

16 A Yes.

17 Q Now, stepping back for the moment, at what point in  
18 the interview did you start preparing the declaration?

19 A Towards the end.

20 Q Could you describe for the Court the process you went  
21 through in putting together the declaration.

22 A Sure. I -- I -- as I wrote the declaration, I  
23 reviewed it line by line. As I was composing the sentence,  
24 I informed him what I was writing to make sure that it was  
25 accurate.

1 Q Were there any drafts that were prepared that he did  
2 not sign?

3 A No.

4 Q So you went over it, essentially, on a sentence-by-  
5 sentence basis before you wrote it down to make sure it was  
6 accurate?

7 A Yes.

8 Q And after the declaration was -- was written out, you  
9 gave it to Mr. Taylor?

10 A Yes.

11 Q And did you observe him reading the entire  
12 declaration?

13 A I read it to him. I read the final declaration to  
14 him. He -- he may have also read it on his own.

15 Q And I see on the left-hand side it's initialed. Whose  
16 idea was that?

17 A That was my idea.

18 Q And did you observe Mr. Taylor initialing the  
19 declaration?

20 A Yes, I did.

21 Q And did you observe Mr. Taylor signing the  
22 declaration?

23 A Yes, I did.

24 Q And in preparing this declaration, did you coach Mr.  
25 Taylor in any way?

1 A No.

2 Q Did you offer him any type of inducements or indicate  
3 that you could get something for him in exchange for  
4 signing the declaration?

5 A No.

6 Q Now, in the course of the interview that you had with  
7 him, did Mr. Taylor tell you that rather than giving Mr.  
8 Cooper P.F. Flyers, as indicated in the declaration, he'd  
9 actually given Mr. Cooper Pro Keds?

10 A No.

11 Q Did he tell you at any point in time in this initial  
12 interview that he or others sometimes referred to Pro Keds  
13 as P.F. Flyers?

14 A No.

15 Q Did he ever tell you at this initial interview that he  
16 or other inmates sometimes referred -- or used the term  
17 "P.F. Flyers" to refer to a prison-made tennis shoe?

18 A No.

19 Q Did he tell you during this initial interview that one  
20 of the types of tennis shoes that he would sometimes give  
21 inmates were prison-made tennis shoes?

22 A Yes.

23 Q Now, after the declaration was signed, what did you do  
24 with it?

25 A I -- I faxed a copy to Mr. Cooper's attorneys and kept

1 the original.

2 Q Now, did you add any words to the declaration that Mr.  
3 Taylor signed?

4 A No.

5 Q Did you ever make any changes to the declaration after  
6 he had signed it and initialed it?

7 A No.

8 Q Is the exhibit you have in front of you, Exhibit 2A,  
9 the declaration, exactly as it was when it was signed by  
10 Mr. Taylor, initialed by Mr. Taylor and given to you?

11 A Yes.

12 Q After Mr. Taylor signed this declaration and after the  
13 first interview you had with him, did you have a subsequent  
14 time where you met with Mr. Taylor?

15 A Yes.

16 Q About how long was that after the initial interview?

17 A About two months.

18 Q Was that at the same place?

19 A Yes.

20 Q And what prompted this second interview?

21 A I visited him along with my associate, Scarlett Narad,  
22 who is -- who is also an investigator on Mr. Cooper's case,  
23 to inform Mr. Taylor that -- about the outcome of the case  
24 and also to let him know that his testimony would likely be  
25 needed at a hearing.

1 Q At the time of the second meeting, the stay had been  
2 granted?

3 A Yes.

4 Q And did you take with you to this second meeting a  
5 copy of the declaration?

6 A Yes, I believe we took the original.

7 Q And in the course of this second meeting, did you have  
8 any discussions with Mr. -- Mr. Taylor regarding the  
9 declaration?

10 A Yes.

11 Q Could you describe those, please.

12 A We showed him the declaration. We had him reread it.  
13 He indicated that -- that everything was accurate and that  
14 he had no changes, that he was satisfied with the  
15 declaration as it was written.

16 Q And so he did not, at that time, disagree with any of  
17 the statements made in the declaration?

18 A No.

19 MR. YUHAS: Nothing further, your Honor. We  
20 would offer Exhibit 2A into evidence.

21 THE COURT: It's received. Why don't we staple  
22 2A.

23 (Pause.)

24 MR. YUHAS: Your Honor, just in an abundance of  
25 caution, I do want to put on the record, somewhat

1 sheepishly, that as I was putting the sticker on the back  
2 page of the declaration, I accidentally put it on the front  
3 page. There's a small smudge on the front page of the  
4 original.

5 THE COURT: All right, thank you.

6 MR. YUHAS: Which I am responsible for. I'll  
7 take full blame for that.

8 THE COURT: Thank you. You may examine.

9 MS. WILKENS: Thank you, your Honor.

10 CROSS EXAMINATION

11 BY MS. WILKENS:

12 Q Ms. Coke, you indicated you're self-employed.

13 A Yes.

14 Q And what percentage of your clientele involves  
15 criminal cases?

16 A Most of it.

17 Q And by "most of it", can you give me a percentage?

18 A About maybe 90 percent.

19 Q And who are your major clients?

20 A It really -- it varies by -- by who -- can you --

21 Q Do you work for the Habeas Corpus Resource Center?

22 A No.

23 Q Do you work for the California Appellate Project?

24 A No.

25 Q So you're retained by private criminal defense

1 attorneys?

2 A Yes.

3 Q And you indicated that you were --

4 THE COURT: Did you ask -- what is the name of  
5 your organization?

6 THE WITNESS: Sandra Coke Investigations.

7 THE COURT: What's your billing rate?

8 THE WITNESS: It -- it's \$90 an hour.

9 BY MS. WILKENS:

10 Q And when you indicate that attorneys for Mr. Cooper  
11 retained you to work on the case recently, do you know the  
12 names of the attorneys that retained you?

13 A Yes.

14 Q And who would that be?

15 A The law firm of Orrick, Herrington & Sutcliffe. David  
16 Alexander, I believe, was the first attorney that I had a  
17 conversation with.

18 Q And when did Mr. Alexander retain you for the Cooper  
19 case?

20 A Sometime in -- sorry, December of 2003, to the best of  
21 my recollection.

22 Q And do you have any sense of the number of capital  
23 cases that your agency works on?

24 A Not --

25 MR. YUHAS: Objection, your Honor, ambiguous "her

1 agency".

2 BY MS. WILKENS:

3 Q I'm sorry, Sandra Coke & Associates.

4 A Not more than one at a time. Capital cases are in the  
5 minority. I don't work on very many.

6 Q Total number, how many capital cases have you worked  
7 on?

8 A As part of Sandra Coke Investigations?

9 Q No, as an experienced investigator, how many capital  
10 cases have you worked on total?

11 A Probably about a dozen.

12 Q And prior to forming Sandra Coke Investigations, were  
13 you employed by any agencies as an investigator?

14 A Yes.

15 Q And what would those agencies be?

16 A The California Appellate Project.

17 Q And what was the time frame that you were employed by  
18 the California Appellate Project?

19 A 1991 through 1995.

20 Q And in the course of your employment for the  
21 California Appellate Project, how many capital cases did  
22 you work on?

23 A Probably about six.

24 Q Now, you indicated that you made arrangements with the  
25 prison for what's called a legal visit.

1 A Uh-huh.

2 Q Do you consider it appropriate to conduct a legal  
3 visit when you are not working for the attorney  
4 representing the particular inmate you're visiting?

5 A Yes, I do it all the time.

6 Q And do you know whether or not it was made clear to  
7 the prison that you were working for Mr. Cooper?

8 A To the best of my recollection -- again, I didn't  
9 write the letter of introduction, but to the best of my  
10 recollection, it was stated in the letter.

11 Q Now, you've indicated it's not your standard practice  
12 to tape-record interviews; is that correct?

13 A Yes.

14 Q Was that the standard practice when you worked for the  
15 California Appellate Project?

16 A Yes, that's always been my standard practice. I can't  
17 speak for other investigators there.

18 Q Now, why is it your standard practice?

19 A I find a tape recorder makes the subject that I'm  
20 interviewing nervous.

21 Q And when do you deviate from your standard practice?

22 A I've never deviated from that standard practice.

23 Q So you've never had a defense attorney ask you to  
24 tape-record a conversation of an interview?

25 A No.

1 Q Now, you visited Mr. Taylor a total of two times; is  
2 that correct?

3 A Yes.

4 Q And on the first visit you were alone?

5 A Yes.

6 Q And on the second visit you were accompanied by your  
7 associate?

8 A Yes.

9 Q Why did you take your associate to the second visit?

10 A She was working also on an issue related to shoes,  
11 related to the question of which shoes Mr. Cooper received,  
12 which shoes were -- what imprint was found at the crime  
13 scene. So it was relevant to her area of investigation as  
14 well.

15 Q So her area of the investigation was the same as  
16 yours?

17 A There was some overlap.

18 Q What was -- what was the focus of her investigation?

19 A She -- we -- she did quite a number of things. I  
20 wouldn't be able to list them specifically.

21 THE COURT: Are we talking about Scarlett?

22 MS. WILKENS: Yes.

23 BY MS. WILKENS:

24 Q And --

25 THE COURT: She worked with you?

1 MS. DENAULT: I think we're going to clarify  
2 that.

3 BY MS. WILKENS:

4 Q I believe Ms. Narad is an associate of yours?

5 A Yes, we -- we share office space and sometimes work on  
6 cases collaboratively, although she's not employed by me  
7 and I'm not employed by her. We're both independent.

8 Q So, when you say an associate, you mean a colleague?

9 A Yeah.

10 Q All right, so she's also self-employed?

11 A No.

12 Q Whom does she work for?

13 A She works for the Center for Capital Assistance.

14 Q I'm sorry, what?

15 A The Center for Capital Assistance.

16 Q And where is that located?

17 A In San Francisco.

18 Q And what is that organization? I'm not familiar with  
19 it.

20 A It's an organization that does primarily capital case  
21 mitigation.

22 Q What does that mean?

23 A It works out -- it works -- it works up the mitigation  
24 portion of death penalty cases.

25 Q So they concentrate on --

- 1 A The penalty phase.
- 2 Q -- penalty phase evidence?
- 3 A Yes, uh-huh.
- 4 Q Okay. So it would be similar to the HCRC or
- 5 California Appellate Project?
- 6 A No. I -- I don't know -- Center for Capital
- 7 Assistance is a non-profit, and they only do -- there are
- 8 no lawyers who are affiliated with that organization.
- 9 They're mitigation specialists who work there.
- 10 Q But obviously they're retained by attorneys?
- 11 A Yes.
- 12 Q Okay. And do you know if they have any affiliation
- 13 with HCRC or CAP?
- 14 A No, other than knowing lawyers who work at the agency.
- 15 Q But to your knowledge, Ms. Narad is retained by
- 16 Cooper's counsel to work on his case?
- 17 A Yes.
- 18 Q And how did it come to pass that she accompanied you?
- 19 Did the attorneys indicate to you it would be appropriate
- 20 or were you working closely with her?
- 21 A Both. We share office space. So we work closely
- 22 together, and the -- the attorneys thought it would be
- 23 appropriate for her to accompany me.
- 24 Q So, if Ms. Narad works for this particular
- 25 organization and you share office space --

1 A We share a building. We're in the same -- we're in  
2 the same building.

3 Q All right, so you're not working out of the office of  
4 the entity that employs Ms. Narad?

5 A Yes, I am.

6 Q You are?

7 A Uh-huh.

8 Q What's the arrangement with respect to that?

9 A I rent space.

10 Q You rent space from them?

11 A Uh-huh.

12 Q Now, did you take notes when you talked to Mr. Taylor  
13 the first time?

14 A Yes.

15 Q Okay, and how many pages of notes did you take?

16 A I don't recall.

17 Q One page, two page --

18 A Two or three, perhaps.

19 Q Three pages maximum?

20 A Hard to say. Probably about three pages, I would say.

21 Q Did you keep your notes?

22 A No.

23 Q Is that part of your standard practice too?

24 A Yes. If I do -- generally, if I write up a  
25 declaration, I -- I no longer have a use for the notes.

1 Q And how many hours were you with Mr. Taylor the first  
2 time?

3 A As I said, approximately two and a half to three, I  
4 would estimate.

5 Q And you spoke to him about his interaction with Mr.  
6 Cooper, correct?

7 A Yes.

8 Q When he met him?

9 A Uh-huh.

10 Q What he talked to him about?

11 A Yes.

12 Q Did you take notes about that?

13 A I don't recall. I think -- I think probably in  
14 general terms, not specifically, because -- not  
15 specifically.

16 Q So you didn't need specific notes?

17 A Not concerning that conversation. What Mr. Taylor  
18 told me was just -- was easily summarized.

19 Q Okay. Was there anything that you talked about with  
20 Mr. Taylor --

21 THE COURT: What was the date? Can you remind  
22 me, what was the date?

23 THE WITNESS: Of the first -- let's see, that  
24 would be January 8th, 2004.

25 //

1 BY MS. WILKENS:

2 Q Now, was there anything in your conversation with Mr.  
3 Taylor that you did feel a need to take specific notes  
4 about?

5 A I don't recall what that might have been or what the  
6 substance of the notes were.

7 Q Did you take detailed notes about the shoes?

8 A Most likely. Yes, most likely the -- something about  
9 the shoes was in there. I knew coming in that I would be  
10 producing a declaration. That -- so that may -- again, I  
11 don't remember specifically what was in the notes.

12 Q Okay, so before you spoke to Mr. Taylor, you knew that  
13 you were going to be writing a declaration for Mr. Taylor?

14 A I didn't know that. I knew, if there was any  
15 information that was useful, I'd be writing a declaration.

16 Q So the declaration you wrote for Mr. Taylor, in your  
17 opinion, that contained all the useful information from  
18 your two-and-a-half, three-hour discussion?

19 A Yes.

20 Q Okay. So none of the information about his  
21 interaction with Mr. Cooper was useful?

22 A No.

23 Q And -- and what did you use as the criteria for  
24 useful?

25 A It -- it wasn't relevant. It wasn't relevant to Mr.

1 Taylor's testimony at trial.

2 Q Okay, Mr. Taylor testified at trial about his  
3 interactions, correct?

4 A I don't -- I don't recall. A lot of what we went over  
5 at the beginning of the interview, some of the -- some of  
6 what Mr. Taylor told the San Bernardino County Sheriff  
7 about Mr. Taylor (sic) never made it into -- was never  
8 asked at trial, never made it into Mr. -- into the trial  
9 transcript. Those questions weren't asked. I  
10 believe -- and it's been a few months since I've read Mr.  
11 Taylor's testimony -- that it concerned basically the shoes  
12 that Mr. Taylor gave him and none of the really kind of  
13 detailed information that he gave the San Bernardino County  
14 Sheriffs when they interviewed him.

15 Q Well, for purposes of a declaration, were you defining  
16 relevance as only things that were contradicting Mr.  
17 Taylor's testimony?

18 A No, things that basically illuminated -- shed light  
19 on -- or changed what the testimony was at trial, only  
20 things germane to what the testimony -- what his testimony  
21 was at trial.

22 Q So, if something changed, his testimony at trial, it  
23 would go into the declaration, correct?

24 A Yes.

25 Q If something expounded upon his testimony at trial,

1 you're telling me it would go in the declaration?

2 A Yes, I believe -- you know, to -- without -- without  
3 hearing something specific, it's hard to say, but --

4 Q Now, you've testified that when you went to see Mr.  
5 Taylor that first time, you had transcripts of his  
6 testimony at trial; is that correct?

7 A Yes.

8 Q Did you make those available to Mr. Taylor to read and  
9 review?

10 A Yes.

11 Q Okay, so you allowed him to refresh his recollection?

12 A Yes.

13 Q And did he read his trial transcript?

14 A I believe he read -- he read some of the transcripts.  
15 I -- I don't -- I don't recall how thoroughly he read that  
16 transcript, but he was well aware of the fact that the  
17 information in the declaration was contrary to his trial  
18 testimony.

19 Q How do you --

20 A Because we discussed that.

21 Q Okay, so you had a discussion with him wherein you  
22 explained that his declaration was going to be different  
23 than his trial testimony, and he acknowledged that his  
24 declaration was going to be different?

25 A Absolutely, yes.

- 1 Q Okay. And did you show him any photographs of the  
2 shoes?
- 3 A No, I didn't have any with me.
- 4 Q You didn't bring any?
- 5 A No.
- 6 Q And when you went to go interview Mr. Taylor, was  
7 your -- the purpose of your interview to talk to him about  
8 what kind of shoes he gave Mr. Cooper?
- 9 A Yes.
- 10 Q And you didn't perceive any need to -- to bring  
11 photographs of shoes?
- 12 A No.
- 13 Q What did you tell Mr. Taylor about the Cooper case  
14 during your first visit?
- 15 A Not much that he didn't already know. Mr. Cooper's  
16 pending execution was in the news, and we discussed that.  
17 He knew that.
- 18 Q And when you say you discussed his impending  
19 execution, what did that discussion consist of?
- 20 A It wasn't a very detailed discussion. I -- I -- when  
21 I introduced myself, I said that I was an investigator  
22 working on behalf of Mr. Cooper and that he had an  
23 execution date set for February 10th.
- 24 Q And did you tell him that you were trying to develop  
25 information that would stop that execution?

1 A Yes, I think that was quite obvious from the beginning  
2 of the interview -- my purpose being there was  
3 to -- was -- that I was working on behalf of Mr. Cooper.

4 Q Well --

5 A I told -- I explained that -- over and over again to  
6 Mr. Taylor that all I wanted was the truth, and that the  
7 truth -- getting to the truth was very important.

8 Q Well, there's a difference between telling Mr. Taylor  
9 that Mr. Cooper's execution has been scheduled and  
10 asking --

11 A He already knew that. I didn't have to tell him that,  
12 actually.

13 Q Okay. Well, did you tell him that you were working to  
14 find something to stop that execution?

15 A No, not in those words.

16 Q Did you convey that to Mr. Taylor in any way?

17 A I don't recall specifically. I may have.

18 Q But you don't know?

19 A I don't recall any specific words I may have used  
20 to -- to -- to -- to convey that.

21 Q Now, you've indicated the purpose of your visit was to  
22 discuss the shoes, correct?

23 A Yes.

24 Q And what were the instructions that were given to you  
25 in terms of the interview of Mr. Taylor? What were you

1 instructed to do?

2 A I was given no specific instructions. It was just to  
3 speak with Mr. Taylor, go over his testimony and to -- to  
4 basically ask him questions about how he came to testify  
5 and, again, to ask him to go over what he recalls about his  
6 interactions with Mr. Cooper.

7 Q And to talk to him about the shoes?

8 A Yes.

9 Q Now, when you -- when you wrote out the declaration,  
10 did you do it from memory or did you work from your notes?

11 A I didn't need -- no, I did it from -- I did it from  
12 memory. I mean, what -- the issue was very clear and  
13 succinct and uncomplicated.

14 Q I'm curious, because if it was so uncomplicated, why  
15 did you talk to Mr. Taylor for two and a half to three  
16 hours?

17 A Well, a good portion of that was warm-up. We were  
18 talking about things not particularly -- we were talking  
19 about things that maybe didn't relate directly to the  
20 shoes, such as his prior statements to the police. We  
21 spoke about who else might have known about -- about the  
22 shoe issue, who else was in the prison at the time. So  
23 that -- that -- that's -- that all took a while.

24 Q I'm curious, you used the word "warm-up". Is that  
25 just basically --

1 A That's just, you know, "Hi, I'm Sandra. Where you  
2 from?" you know, just -- your basic chit-chat to  
3 get -- just make -- make a person feel at ease.

4 Q How long does it take to make someone feel at ease?

5 A It all depends. Some guys, they know you're an  
6 investigator. They have questions about -- you know, about  
7 this and that or they want to talk about their case, about  
8 what they're in for, how long they're in. It varies -- it  
9 varies greatly with each person.

10 Q How long did you talk to Mr. Taylor before you got  
11 onto the subject of the type of shoe that he gave to Mr.  
12 Cooper?

13 A Probably -- you know, I don't remember specifically.  
14 I would say that was probably within the first -- within  
15 the first hour, certainly, first maybe 45 minutes or so.

16 Q So it took you 45 minutes to an hour to get to what  
17 kind of shoe did you give Mr. Cooper, right?

18 A Yes.

19 Q And that was the purpose of your visit, correct?

20 A Uh-huh.

21 Q And when you asked him what kind of shoe he gave, he  
22 said P.F. Flyer, is that correct?

23 A Yes.

24 Q Okay. How many times did you ask him what kind of  
25 shoe he gave Mr. Cooper?

1 A Once. It was -- he -- as he recalled the shoe -- as  
2 he recalled the issue of the shoe, he recalled clearly that  
3 he only gave Mr. Cooper one pair of shoes, and he gave him  
4 P.F. Flyers, as those were the -- the -- the best shoes.  
5 He gave -- the ones that he gave the basketball players.  
6 He was clear on that.

7 Q Okay. So did you ask him a second time or did you  
8 just ask him once?

9 A We certainly went over that when we were discussing  
10 why his trial testimony differed. That's something that we  
11 went over and through. So, you know, the issue of P.F.  
12 Flyers versus Keds were -- were (sic) discussed. I mean,  
13 it wasn't a passing reference.

14 Q So, when you asked Mr. Cooper what kind of shoes -- I  
15 mean, when you asked Mr. Taylor, "What kind of shoes did  
16 you give Mr. Cooper?" he said, "I gave him P.F. Flyers.  
17 Those were the best shoes we had, and those were for the  
18 basketball team." Is that correct?

19 A Yes, he made reference -- I don't know if he used  
20 those exact words, but he made reference to the fact  
21 that -- that he was certain that they were P.F. Flyers that  
22 he gave Mr. Cooper.

23 Q Okay, but he did tell you that they were the best  
24 shoes for playing basketball, correct?

25 A Yes.

- 1 Q Okay. Because that was in his declaration, correct,  
2 the talk about basketball shoes?
- 3 A Right.
- 4 Q And how the basketball team got certain shoes?
- 5 A Uh-huh.
- 6 Q Okay. And I'm sure that's Mr. --
- 7 A Right.
- 8 Q -- Taylor's words, right? So it would be --
- 9 A Right.
- 10 Q Okay. And -- and after he gave you that information,  
11 you pointed out to him, "Well, at trial you said Pro Keds."  
12 Is that what you did?
- 13 A Yes.
- 14 Q Okay. And you discussed that with him, and he  
15 understood that he was saying something different?
- 16 A Yes.
- 17 Q How long did that conversation take?
- 18 A I don't know. I don't recall.
- 19 Q Well, you know, you got into this topic 45 minutes to  
20 an hour into the interview, and you wrote his declaration,  
21 I believe, two to two and a half hours into the interview,  
22 correct?
- 23 A Right, uh-huh.
- 24 Q Okay. So did you discuss that for an hour or did you  
25 move on to something else?

1 A I doubt we discussed it for an hour.

2 Q Okay. Now, why did you write out the declaration  
3 instead of Mr. Taylor?

4 A It just -- again, it's my standard practice. I mean,  
5 we're talking about it as we do it. This -- it's my  
6 standard practice for all declarants I write or take the  
7 interview of. I've never had the declarant write -- I  
8 should not say never, but at least not in memory. This is,  
9 again, my standard practice.

10 Q Well, if you -- if you type the declaration, that  
11 would mean you'd go somewhere and come back at a later  
12 time, correct?

13 A Uh-huh.

14 Q Why didn't you go and type the declaration and come  
15 back at a later time? Why did you handwrite a declaration  
16 right then?

17 A I thought about that. I had lots -- lots and lots of  
18 tasks to do in the Cooper case in relatively little time.  
19 I made the decision that it would be a better use of time  
20 to -- to leave the prison and to go on investigating other  
21 issues.

22 Q You weren't worried about him changing his mind, were  
23 you?

24 A No.

25 Q Because he was just adamant that -- that was correct?

1 A He was -- he was clear. We had gone over it enough  
2 times. He was clear that he had, in fact, given Mr. Cooper  
3 P.F. Flyers.

4 Q I'm sorry, you said you went over it enough times. I  
5 had understood --

6 A We went over --

7 A -- that you went over it --

8 A -- the declaration enough times.

9 Q How many times did you go over the declaration?

10 A Well, it was while I was writing it. Then I let him  
11 read it. The point -- what I'm saying is the point was  
12 made enough times for him to be clear that he was saying,  
13 "I gave Kevin P.F. Flyers. I did not give him Pro Keds."  
14 We also -- it also came up when we were discussing the fact  
15 that this varied from his testimony at trial.

16 Q Okay, so you asked him once, he said P.F. Flyers.  
17 Then you discussed, "That's not what you said at trial."

18 A Yes.

19 Q Okay. And you don't know how long that discussion  
20 took, right?

21 A No.

22 Q And that was the end of it. Then you went over the  
23 declaration, and you say that you went over it as you wrote  
24 it. Does that mean that, as you would write out a  
25 sentence, then you would read it to him?

- 1 A Pretty much, yes. I would -- in fact, I think I  
2 was -- as I was writing it, I was reading aloud.
- 3 Q So you didn't have Mr. Taylor dictate to you --
- 4 A No.
- 5 Q -- what his statement would be?
- 6 A No.
- 7 Q Okay. So they were your words, not Mr. Taylor's?
- 8 A Yes. Generally, unless there are quotes around a  
9 particular piece of -- particular words,  
10 it's -- it's -- it's my statement -- it's my -- it's -- it  
11 is -- I am writing down what the client has stated. I'm  
12 not quoting him directly.
- 13 Q Well, it's not --
- 14 A It's like a police report, when the --
- 15 Q Okay.
- 16 A Okay.
- 17 Q So it's not a declaration consisting of his words.  
18 It's essentially your report and his signing it.
- 19 A No, it's his -- it's what he said in clear and  
20 distinct language.
- 21 Q So you did use his words?
- 22 A I don't -- I can't tell you in particular which ones  
23 are his words, but this is what -- this is -- this is the  
24 substance of what he told me.
- 25 Q Now, I notice that it -- if you look at Exhibit 2A, I

1 notice that his last name was left out.

2 A Uh-huh.

3 Q When was that added?

4 A As I read the declaration back. My brain was moving  
5 faster than my hand. I realized that I'd left Taylor out.  
6 So I wrote it out and --

7 Q So you realized it; Mr. Taylor didn't point it out to  
8 you?

9 A Well, I read it -- because I read the declaration to  
10 him, yes.

11 Q Okay. Now, I notice there's lines under each initial  
12 that tracks on the left-hand side of the pages.

13 A Uh-huh.

14 Q Did you put those lines there?

15 A I believe I did. I can't say for certainty. I -- I  
16 don't really recall.

17 Q Do you remember Mr. Taylor making a line and then  
18 initialing on top of the line?

19 A I remember him initialing it. I'm trying to -- yeah,  
20 I -- I think I may have done the lines. I can't remember  
21 for sure.

22 Q Now, when you'd read a line back to him and then  
23 continue to write, did you have him initial the line after  
24 you read it, or was the initialing done all at once?

25 A The initialing was done all at once.

1 Q Okay. Now, earlier you said that you -- you went over  
2 it with him as you wrote it and then you read it to him and  
3 he may have read it. Now, did you present it to him to  
4 read before he signed it?

5 A Yes, I always do.

6 Q Did he look at it?

7 A Yes, he did.

8 Q How long did he spend reading over his declaration?

9 A About two minutes, perhaps.

10 Q Now, how long did it take you to write out that  
11 declaration?

12 A Oh -- oh boy, 20 minutes, maybe.

13 Q Okay. Now, looking at Exhibit 2A, I notice on the  
14 second page there is (sic) two words that are crossed out.  
15 Do you see that?

16 A Uh-huh, yeah.

17 Q Can you read the sentence up to where the words are  
18 crossed out.

19 A "I issued him a pair of P.F. Flyers."

20 Q Okay, and then there's two words that are crossed out.  
21 Do you know what those words are?

22 A "Which was".

23 A What did you start to write?

24 A Probably "which was the best brand of shoes for  
25 basketball that the prison stocked". I think I just

1 decided to make that a separate sentence.

2 Q Okay. Now, did Mr. Taylor talk to you about the  
3 various different types of tennis shoes that he would issue  
4 out of the gym?

5 A Yes.

6 Q And did he mention brand names?

7 A Yes.

8 Q And what brand names did he tell you that they had at  
9 the gym?

10 A He mentioned P.F. Flyers. He mentioned Pro Keds, and  
11 he mentioned the prison-issue shoes, PIA or something like  
12 that.

13 Q And did Mr. Taylor tell you which was the best shoe  
14 for basketball purposes that he had?

15 A Yes.

16 Q And which shoe was that?

17 A P.F. Flyers.

18 Q And he told you that once, correct?

19 A At least once.

20 (Pause.)

21 Q Now, why did you go back a second time?

22 A Again, to let him know the outcome of the case and to  
23 let him know that his testimony would likely be needed at a  
24 hearing.

25 THE COURT: Did you fly or drive?

1           THE WITNESS: Flew to Palm Springs, drove to the  
2 prison.

3 BY MS. WILKENS:

4 Q     And you took Ms. Narad with you, correct?

5 A     Yes.

6 Q     And you said that you brought his declaration along;  
7 is that correct?

8 A     Yes.

9 Q     To go over it with him?

10 A    Yes.

11 Q    Why?

12 A    To make sure that -- to -- I hadn't left a copy with  
13 him. I generally like to leave a copy of declarations with  
14 declarants. To let him read it again and to make -- and to  
15 see if he had need -- if he wanted any changes, to make  
16 sure that this declaration was (sic) still his words,  
17 his -- his recollection.

18 Q    Well, why would that change?

19 A    I don't know.

20 Q    I mean, you --

21 A    The --

22 Q    -- met with him before, correct, and you were sure  
23 that that was what he wanted and it was (sic) his words?  
24 So why would that change?

25 A    Right, exactly. I always, as a courtesy, like to

1 leave copies of the declaration with declarants. I didn't  
2 with Mr. Taylor. It was, again, to let him read it and to  
3 let him know that he would likely be called at a hearing to  
4 talk about this issue again.

5 Q Now, why did you think he'd likely be called at a  
6 hearing?

7 A This was information that I got from Mr. Cooper's  
8 attorneys.

9 Q Okay, so Mr. Cooper's attorneys asked you to go see  
10 him a second time?

11 A Yes.

12 Q Did you ask him for a release for his CDC file?

13 A Yes.

14 Q Why did you do that?

15 A That -- that's standard -- standard background  
16 investigation on witnesses that we -- that we produce.

17 Q I'm curious, if it's standard, why didn't you do it in  
18 your first visit?

19 A I didn't think of it.

20 Q Why not?

21 A I didn't. It was Ms. Narad's idea, and I thought it  
22 was a good one.

23 Q Okay, so it's not really your standard practice.

24 A We often do it. Again, this was an investigation that  
25 needed to be completed in a very -- didn't have much time

1 at all. I had a lot on my plate. I simply got to the  
2 prison and didn't -- didn't think about it. Yeah. Not  
3 only to get background information but also to verify  
4 prisoner placement, to make sure that they were in the same  
5 place at the same time. It's standard.

6 Q So you wanted to confirm that Mr. Taylor had been at  
7 CIM at the same time as Mr. Cooper?

8 A We want to be, when we present witnesses -- at least  
9 when I work on behalf of attorneys, I want to make sure  
10 that -- if there's any information about the person that  
11 might be useful, that I get it. It's just -- it's just a  
12 part of doing a thorough investigation.

13 Q That makes sense, and that's why I don't understand  
14 why you didn't do it the first time.

15 A I didn't remember. I was very rushed, and it didn't  
16 occur to me.

17 Q Why were you rushed?

18 A I had a lot to do. I had a lot on my plate.

19 Q So we gave up thoroughness the first time?

20 A Well, I think I was very thorough when I -- when I  
21 went over the issues with Mr. Taylor. As I was flying  
22 down -- as I made plans for the interview, I forgot the  
23 release.

24 Q Now, when you had the second visit with Mr. Taylor,  
25 did you show him a declaration from Warden Carroll?

1 A No.

2 Q Did you have one with you?

3 A No.

4 Q What documents did you show him during his second  
5 interview?

6 A I don't recall.

7 Q Did you show him any decision of the Ninth Circuit?

8 A Not that I recall, no.

9 Q Did you discuss with him anything that had been  
10 obtained from Warden Carroll?

11 A I did not personally. Ms. Narad may have. I don't  
12 recall the substance of that particular discussion.

13 Q Okay, let me --

14 A I know that --

15 Q -- be clear. When I ask you if something was shown to  
16 Mr. Taylor --

17 MR. YUHAS: Your Honor -- your Honor, I would ask  
18 that --

19 BY MS. WILKENS:

20 Q -- it includes --

21 THE COURT: Just a minute.

22 BY MS. WILKENS:

23 Q -- Ms. Narad, okay?

24 MR. YUHAS: I would just ask that counsel let the  
25 witness finish her answer before she asks the next

1 question. I'm sure it's been inadvertent.

2 THE COURT: Why don't you go ahead and answer the  
3 question.

4 THE WITNESS: Ok. I don't recall if Ms. Narad  
5 brought anything related to Midge Carroll into the  
6 interview.

7 BY MS. WILKENS:

8 Q Okay. Do you recall if Ms. Narad talked about Midge  
9 Carroll during the interview?

10 A No.

11 Q Did you?

12 A No.

13 Q Would you recall what Ms Narad talked about?

14 A I recall some of it. There -- yeah.

15 Q Did you take notes during the second visit?

16 A No.

17 Q Did Ms. Narad take notes?

18 A I believe she took some.

19 Q Do you know where those notes are?

20 A No, I don't.

21 Q Do you maintain investigative files -- I mean, I know  
22 you're working on it, Ms. Narad's working in it. How do  
23 you know what each other has?

24 A We talk. We see each other almost every day.

25 Q Okay, so you don't provide each other with copies of

1 notes or materials?

2 A Occasionally, if it's necessary and relevant.

3 Q Okay, and you didn't tape-record your second visit?

4 A No.

5 Q Okay. Did you undertake to see Mr. Taylor a third

6 time?

7 A Yes.

8 Q And when was that?

9 A That was -- that was recently. It was -- that was

10 recently. Let's see, probably sometime in -- sometime in

11 April or May, I believe.

12 Q And what was the purpose for attempting to see Mr.

13 Taylor a third time?

14 A To bring photographs of the shoes and to have him look

15 at the photographs and identify the shoes.

16 Q And you didn't do that the first time?

17 A No.

18 Q And you didn't do that the second time?

19 A No.

20 Q Whose idea was it to do it in a third visit?

21 A I believe Ms. -- Ms. Narad thought that it would be a

22 good thing to come back -- we -- we spoke about

23 the -- the -- what the sole of the shoe looked like and we

24 decided we should come back with -- with photos.

25 Q Okay. And did you get to see Mr. Taylor a third time?

- 1 A No.
- 2 Q Why not?
- 3 A He refused the visit.
- 4 Q All right, did you attempt to visit Mr. Taylor after
- 5 that?
- 6 A No.
- 7 (Pause.)
- 8 Q Now, did counsel ever ask you to prepare a report
- 9 relating to any of your meetings with Mr. Taylor?
- 10 A No.
- 11 Q And is it your standard practice to not prepare
- 12 reports?
- 13 A I prepare reports when I'm asked to.
- 14 Q Okay, only upon request?
- 15 A Yes.
- 16 Q And there was no request here?
- 17 A Yes.
- 18 Q Did you give Mr. Taylor any police reports to review?
- 19 A During my first visit, I believe we reviewed police
- 20 reports relating to his interviews with the San Bernardino
- 21 County Sheriff.
- 22 Q But you're not sure?
- 23 A I am sure, yes.
- 24 Q That you showed it to him and allowed him to read it?
- 25 A Yes.

1 MS. WILKENS: I have no further questions, your  
2 Honor.

3 THE COURT: Redirect?

4 MR. YUHAS: Just very briefly, your Honor.

5 REDIRECT EXAMINATION

6 BY MR. YUHAS:

7 Q You were asked some questions about the release form  
8 for the CDC file. Do you recall that?

9 A Yes.

10 Q Now, the first time that you interviewed Mr. Taylor,  
11 that was about a month before Mr. Cooper's scheduled  
12 execution date?

13 A Yes.

14 Q Now, at that time, before you walked into the  
15 interview room, did you know whether Mr. Taylor would be  
16 cooperative or uncooperative?

17 A No.

18 Q And at that time, did you anticipate that there would  
19 be any type of proceeding in the near future where Mr.  
20 Taylor's testimony might be permitted or required?

21 A No.

22 Q In your experience, about how long normally does it  
23 take to get a CDC file once you have a release?

24 A A few weeks, perhaps, maybe -- let's see, maybe less  
25 than, maybe -- I would say about at least a week, several

1 weeks, perhaps.

2 Q Okay. And during the time from January 8th, when you  
3 had the first interview, and let's say into early February,  
4 was there a lot going on in connection with Mr. Cooper's  
5 defense at that time?

6 A Yes.

7 Q And were you interviewing a number of people and doing  
8 a number of things?

9 A I was doing a number of things, yes.

10 MR. YUHAS: Thank you. Nothing further, your  
11 Honor.

12 THE COURT: Anything else?

13 MS. WILKENS: No, your Honor.

14 THE COURT: Have you ever billed under the  
15 Criminal Justice Act, Federal Court?

16 THE WITNESS: Yes.

17 THE COURT: And what's your rate there?

18 THE WITNESS: I've gotten -- okay, I'm trying to  
19 remember, 75 and up, depending on the case.

20 THE COURT: Thank you. Anything else?

21 (No audible response.)

22 THE COURT: You're excused, and hopefully you can  
23 make it back for your child care obligation.

24 THE WITNESS: Thank you.

25 THE COURT: You're welcome. With respect to the

1 original declaration, it's been marked. So this would be  
2 retained by the attorneys. Is that all right?

3 MR. YUHAS: Whatever the Court's preference.

4 THE COURT: Normally the exhibits are then  
5 returned to the attorneys and, pursuant to our local rule,  
6 they then have the obligation to maintain them in case an  
7 appellate court wishes to see them. All right? Thank you.  
8 Do you need a copy of the declaration for your files or  
9 not? We'll get you one.

10 MS. WILKENS: No.

11 THE COURT: No? Okay. Our next witness?

12 MS. WILKENS: Thank you, your Honor. We would  
13 call Steven Myers.

14 STEVEN MYERS, RESPONDENT'S WITNESS, SWORN

15 THE CLERK: State your name and spell your first  
16 and last name for the record.

17 THE WITNESS: My name is Steven Myers,  
18 S-T-E-V-E-N M-Y-E-R-S.

19 THE COURT: As to the original declaration, what  
20 we'll do -- Exhibit 2A, we'll give it to counsel now so  
21 that you may maintain the original.

22 (Pause.)

23 THE COURT: You may proceed.

24 MS. WILKENS: Thank you, your Honor.

25 //

## 1 DIRECT EXAMINATION

2 BY MS. WILKENS:

3 Q Mr. Myers, what is your occupation, please?

4 A I'm a senior criminalist with the California  
5 Department of Justice DNA laboratory in Richmond,  
6 California.7 Q And how long have you been a senior criminalist with  
8 that lab?9 A I've been a senior criminalist since, I believe, 1997  
10 or '98.11 Q And how long have you been affiliated with the DOJ  
12 lab?

13 A Since January of 1991.

14 Q And did you participate in the post-conviction testing  
15 in the Kevin Cooper case?

16 A Yes, I did.

17 Q And in connection with the post-conviction testing,  
18 did you examine hairs recovered from the hands of the four  
19 fingers in the Cooper case?

20 A Yes, I have.

21 Q And was that examination of the hair evidence pursuant  
22 to the joint DNA testing agreement entered into between the  
23 State and Kevin Cooper?

24 A That's correct.

25 Q And what type of scientific testing did the joint

1 agreement provide for?

2 A It was specifically involving DNA testing for nuclear  
3 DNA using short-tandem repeat genetic identifying markers.  
4 So this is commonly termed STR testing. It even specified  
5 a particular type of kit that was used.

6 Q And what are you looking for in examining hair for  
7 suitability for the nuclear DNA testing that was the  
8 subject of the agreement?

9 A Specifically what we were looking for were hairs that  
10 were in the actively growing phase. These are typically  
11 called antigen hairs. They are the hairs that would have  
12 the greatest likelihood of providing sufficient nuclear DNA  
13 in order to give us an actual result that we can compare to  
14 references.

15 Q And with respect to antigen hairs, when you are  
16 looking for hairs that have been plucked from someone's  
17 head, what would you be looking for?

18 A So hairs that have been plucked from the head, most  
19 typically are of an antigen root. They have an extended  
20 root, as opposed to a bulbous root. When they're actually  
21 plucked out, most often have biological material, tissue  
22 essentially, still adhering to the outside of the root.  
23 This is often called sheath material. The amount of sheath  
24 material can relate to how quickly the hair was pulled.  
25 For example, if something is more rapidly pulled, it

1 generally has a greater amount of sheath material than if a  
2 hair is very slowly pulled from the head.

3 Q Now, a slowly pulled hair is different than a shed  
4 hair; is that correct?

5 A Correct, and you can, you know, pull a hair that's at  
6 the terminal phase of its life, otherwise known as the  
7 telogen phase. Those have very bulbous roots. They have  
8 no longer -- they've ceased to continue growing. So shed  
9 hairs or telogen hairs typically fall out of the head at a  
10 certain rate per day. You have a certain number of hairs  
11 that will just fall off your head.

12 Q Would it be fair to say that all pulled hairs would be  
13 antigen hairs?

14 A No, because you could theoretically pull out a hair  
15 that was at that dying stage, but when you find -- most of  
16 the time, when people pull a hair out and they look at the  
17 root, usually what they're seeing is an antigen hair, this  
18 actively growing phase of hair. It usually will have the  
19 sheath material, but you can -- you know, just by chance if  
20 you grabbed a hair that was dying or dead, then that would  
21 be at a different phase.

22 Q Now, in the course of the joint agreement and the  
23 examination of the hair pursuant to the joint agreement,  
24 did you do that by yourself or was someone with you?

25 A No, that was all in conjunction with Dr. Edward Blake

1 of Forensic Science Associates, who was there as a  
2 representative for Mr. Cooper. Very often -- or I should  
3 say more popping in and out occasionally and to give a  
4 third opinion, our laboratory director, Gary Simms, would  
5 also come and view certain of the hairs. On at least one  
6 occasion, we even had a fourth criminalist come in and view  
7 some hairs.

8 Q And who would that be?

9 A That would be Keith Inman.

10 Q And he is with the DOJ lab?

11 A He was with the DOJ lab. He is currently working for  
12 a private forensic science firm.

13 Q Now, when you and Dr. Blake were examining the hair,  
14 it was always done in the presence of each other; is that  
15 correct?

16 A That's correct.

17 Q And did you take notes as you were examining the hair?

18 A Yes, I did.

19 Q And was Dr. Blake also taking notes?

20 A Yes, he was.

21 Q And have you had an opportunity to review Dr. Blake's  
22 notes?

23 A No, I haven't.

24 Q And if I could hand you notebook 10, I'm going to  
25 direct you to Exhibit WW. Inviting your attention to

1 Exhibit WW, do you recognize the letter dated September 26?

2 A Yes. This is a copy of the second letter for  
3 discovery that we sent to Dr. Blake.

4 Q And if I could invite your attention to Exhibit VV and  
5 the letter dated July 17th, 2002, do you recognize that?

6 A One second, please.

7 (Pause.)

8 THE WITNESS: Yes, this is a copy of the first  
9 letter for the discovery that we submitted to Dr. Blake.

10 BY MS. WILKENS:

11 Q And these were transmittal letters for the  
12 documentation from the DOJ lab with respect to the joint  
13 agreement testing; is that correct?

14 A That's correct. Per the agreement, copies of all of  
15 our laboratory notes, photographs and electronic data were  
16 to be supplied to Dr. Blake upon the completion of each  
17 phase of testing.

18 Q And it included copies for Mr. Cooper's counsel; is  
19 that correct?

20 A No, the report was sent to all counsel. The actual  
21 notes were submitted to Dr. Blake as the representative for  
22 Mr. Cooper.

23 Q Okay.

24 A And it was his responsibility to evaluate them and  
25 provide copies to counsel, should they request it.

1 Q And did the joint agreement provide for Dr. Blake to  
2 do the same?

3 A Yes, it did.

4 Q And did you ever receive Dr. Blake's materials?

5 A I received photographs from Dr. Blake that were taken  
6 at the time of the evaluation of the evidence items, but I  
7 have never received any bench notes. I did receive a  
8 letter that he had written at one point that I believe was  
9 also supplied to all counsel, but as I've stated, I've  
10 never received any bench notes, nor have I ever received  
11 any of his notes regarding the analysis of the DNA results  
12 that I provided him.

13 Q Now, when you say "bench notes", those would be the  
14 notes that you were taking as you examined the hair?

15 A That's correct.

16 Q And you did observe that Dr. Blake was, in fact,  
17 taking notes during that process?

18 A That's correct.

19 Q Now, why was the testing done in two different phases?  
20 I see two different packages here with two different dates.  
21 Can you explain that?

22 A Yes, the way the agreement had been set up was to do  
23 the analysis of all evidence items prior to even our  
24 receipt in the laboratory of reference blood standards for  
25 the various people. So all of the evidence items were

1 examined. The DNA profiles were determined. Reports were  
2 written and distributed to all personnel listed in the  
3 agreement prior to the submission of reference blood  
4 standards to our laboratory.

5 Q Now, in this process, at what point did you and Dr.  
6 Blake examine the hair evidence? Was that in the first  
7 phase?

8 A Yes, it was during the evidence -- the evidentiary or  
9 unknown phase of the testing. This was prior to receipt of  
10 the reference standards in our laboratory.

11 Q Now, when you examined the hairs with Dr. Blake,  
12 looking for antigen hairs, was it a visual examination?

13 A It was visual on three counts. It was using just our  
14 naked eye. It also involved using what we call stereo  
15 microscopes, which amplify what you're seeing up to a  
16 certain level. They're very good for screening evidence,  
17 especially for small material. Then for certain of the  
18 hairs, we had to mount them onto microscope slides and we  
19 use what's called a compound microscope. For truly looking  
20 at the internal characteristics, especially of a hair, as  
21 well as to just getting a larger perspective on what you're  
22 seeing, that is what you have to resort to. It's a more  
23 laborious process. In general the screening was mostly  
24 done with the stereo microscope.

25 Q Now, the -- the hair that you were examining, was it

1 matted?

2 A Yes, a lot of it was matted and -- and bound by matter  
3 that was visually consistent with blood. It tested with a  
4 presumptive test to be positive for blood and ultimately  
5 gave nuclear DNA results that were consistent with human  
6 matter. So all of the results are consistent with there  
7 being abundant blood on much of the hair.

8 Q Now, how did you decide which hairs to put under a  
9 compound microscope?

10 A Some were to get an idea whether some were hairs or  
11 actually just fibers. Some of this is we were trying to  
12 determine whether certain of the hairs with roots were  
13 human versus non-human. In the end, the key ones we  
14 focused on were hairs that we thought stood a good chance  
15 of containing unclear DNA in the roots -- so focusing on  
16 possible antigen hair roots. So, over the course of all of  
17 the hairs that we examined, we had selected a certain  
18 number, basically all the hairs, that we thought might have  
19 antigen hair roots, that might be in this actively growing  
20 stage, and we mounted those and looked at them. In the  
21 end, only two or three of the hairs actually ended up  
22 having what we thought were actually antigen roots.  
23 Others, once looked at under the compound microscope,  
24 turned out to either be non-human hairs or to have broken  
25 ends or cut ends.

1 Q Now, you were looking for antigen hairs for  
2 suitability for nuclear DNA. If you're looking for  
3 suitability for mitochondrial DNA testing, are you looking  
4 for the same thing?

5 A No, because mitochondrial testing can be accomplished  
6 even using the shaft of a hair. So just about any hair is  
7 a potential candidate for mitochondrial testing, as opposed  
8 to nuclear DNA testing.

9 Q Now, did you examine the hair recovered for the hands  
10 of Peggy Ryan? That would be evidence items B-9 and B-10.

11 A Yes, I did.

12 Q And in examining that hair, did you find hairs with  
13 blood on it?

14 A At this point, I'm going to reference my notes. I  
15 will also reference the exhibits concurrently, because  
16 I -- on mine I was able to use a highlighter pen to kind of  
17 tell me what I'm -- to bring certain points out.

18 Q So you have your own copy of your bench notes?

19 A Exactly. I have my own copy, and I can correlate with  
20 the copy that the Court's been provided with. So with  
21 Peggy Ryan's hair, in B-9-A the initial question was did we  
22 see matter consistent with blood? In B-9-A, yes, we did  
23 detect material consistent with blood.

24 Q And where --

25 MR. HILE: Your Honor, excuse me.

1 THE WITNESS: I will point out the --

2 MR. HILE: Can I have a reference to what page  
3 we're looking at?

4 MS. WILKENS: We're getting to that, counsel.  
5 Thank you.

6 THE COURT: It would be helpful.

7 THE WITNESS: No, it's -- this is why I had to  
8 highlight it. I plan on trying to coordinate everything.  
9 So we're looking at Exhibit VV, first off, and the notes  
10 related to the hair analysis are in Roman numeral II. So  
11 you have to go through all the initial 51 pages of the  
12 first analysis. Then you're getting into the section for  
13 the hairs.

14 For item B-9-A --

15 THE COURT: We're still not there yet.

16 THE WITNESS: Oh, sorry.

17 THE COURT: Roman numeral II.

18 THE WITNESS: Roman numeral II.

19 THE COURT: I found that.

20 THE WITNESS: B-9-A is actually mentioned in at  
21 least two points, but the reference to the blood is on page  
22 2 of Roman numeral II.

23 BY MS. WILKENS:

24 Q So it has -- does it have number 54 in the upper  
25 right-hand corner?

1 A Correct. So what that -- what you're seeing in the  
2 upper right-hand --

3 THE COURT: Do you have it, Mr. Hile?

4 MR. HILE: I'm not sure yet. What were you going  
5 to say?

6 THE WITNESS: In the upper right-hand you'll see  
7 Roman numeral II, then the number 2 and the number 54.  
8 Now, 54 is the total number of pages in that grouping for  
9 Roman numeral II, if that makes -- if everyone's clear on  
10 that. Okay.

11 So, in -- about in the middle of the page you'll  
12 see a notation, a KM(+)POS. KM is a presumptive test for  
13 blood. So this was positive for a presumptive test for  
14 blood. We don't have to go into that much detail for every  
15 item, obviously but, yes, there was an indication that the  
16 matter was consistent with having blood on this hair.

17 BY MS. WILKENS:

18 Q Now, did you take any of the blood and remove it and  
19 do DNA testing?

20 A Yes, I did.

21 Q And what did you find out from that test?

22 A And at this point, just so we can all see where we're  
23 talking about -- the order got changed a little, it looks  
24 like. I'm not sure actually if this is a complete copy,  
25 because I'm not seeing in here a copy of my report.

1 THE COURT: So --

2 BY MS. WILKENS:

3 Q Oh, you're relying on your report? Yeah, your report  
4 may not be in there.

5 A Oh, okay.

6 Q Do you have a copy?

7 A I do have a copy --

8 Q Okay.

9 A -- with me.

10 Q Yeah, the Court has been provided with that before.

11 A Oh, okay.

12 Q But it's probably not in here with your bench notes.

13 A Well, in the report --

14 THE COURT: The written report?

15 MS. WILKENS: Yes.

16 THE COURT: The written report, isn't that in WW?

17 MS. WILKENS: That's the second written report.

18 There was a first written report. There's two DNA reports.

19 THE WITNESS: Well -- so basically the -- the

20 blood from Peggy Ryen's hands, I can say from memory,

21 is -- well, one of the two samples -- because two were

22 taken, one from each hand -- one was completely consistent

23 with just being from Peggy Ryen. The other one, the

24 majority of it was consistent with being from Peggy Ryen.

25 From memory, I believe the minority portion of the DNA that

1 I got from that sample was consistent with being from  
2 Jessica Ryen.

3 BY MS. WILKENS:

4 Q Now, in examining the hair from the hands of Peggy  
5 Ryen, did you find hairs that did not have roots?

6 A Again, I'm going to reference the notes. Looking at  
7 the notes -- looking at, for example -- now, are we saying  
8 all of the hairs from her hands or just B-9-A?

9 Q B-9 and B-10.

10 A Or B-9 and B-10.

11 Q You can go one by one if you'd like.

12 A Okay. No, that's -- that's fine. Looking at, for  
13 example -- just seeing what pages I would have been looking  
14 at, Roman numeral II, page 5, as well as Roman numeral II,  
15 page 7. For those particular samples, I don't make any  
16 notations specifically saying that there are hairs without  
17 roots.

18 Q Now, in examining the hairs from Peggy Ryen's hands,  
19 did you find non-human hairs?

20 A Yes, I did. Again, looking at pages Roman numeral II,  
21 page 5 and Roman numeral II, page 7, I do have indications  
22 of hairs that visually have characteristics consistent with  
23 both dog and cat.

24 Q And in examining the hairs from Peggy Ryen's  
25 hands -- that would be items B-9 and B-10 -- did you find

1 any antigen hairs?

2 A In the end, no, we didn't.

3 Q Now, did you also examine the hairs recovered from the  
4 hands of Doug Ryen? That would be evidence items D-3 and  
5 D-3.

6 A Yes, I did.

7 Q And did you detect blood on those hairs?

8 A Yes, looking at page Roman numeral II, page 10, in  
9 item D-3, there is blood that was detected. Then on the  
10 next page, Roman numeral II, page 11, D-4 also had blood  
11 detected.

12 Q And did you do DNA testing on the blood on the hair on  
13 Doug Ryen's hands?

14 A Yes, I did.

15 Q And did you develop a profile for that?

16 A Yes. Again, I believe in one of the samples this time  
17 it came back consistent with just Doug Ryen. In the other  
18 sample, there was a mixture detected. The majority  
19 contributor of the DNA was consistent with being Doug Ryen.  
20 The minority contributor was consistent with being Peggy  
21 Ryen.

22 Q And did you examine the hair recovered from the hands  
23 of Doug Ryen for hairs without roots?

24 A Yes, and there, in both instances, in D-3 and D-4,  
25 looking at the same two pages, I did find hairs without

1 roots. In fact -- I'm looking at, again, Roman numeral II,  
2 page 10, no roots were detected at all in D-3. In D-4  
3 there were samples that actually -- well, one hair actually  
4 did have what appeared to be an antigen root. Then there's  
5 a second hair that was possibly an antigen root. It is  
6 something we ultimately attempted nuclear DNA testing on,  
7 but I'm actually not convinced it truly had an antigen root  
8 and wasn't just a broken end.

9 Q Okay, so when you took it out, you understood it to be  
10 a possible antigen hair, and you went ahead and did the DNA  
11 testing on it?

12 A Yes, from my recollection, Dr. Blake wished to have  
13 that hair tested. So it was included.

14 Q Okay. And so two hairs from item D-4 were the subject  
15 of nuclear DNA testing; is that correct?

16 A That's correct.

17 Q And that testing was unsuccessful, correct?

18 A No DNA was detected in the extracts, and if no DNA is  
19 detected, I don't proceed on to the typing.

20 Q Now, were those two hairs consumed in the nuclear DNA  
21 testing?

22 A One of the two was. Let me just see if I can -- one  
23 second, please.

24 (Pause.)

25 THE WITNESS: D-4-B, which is actually the hair

1 that I'm not convinced truly was -- oh, I'm sorry, D-4-B,  
2 which does appear to have an antigen root, was one  
3 of -- was consumed in analysis. It was so small that  
4 essentially I cut the hair in half, used half of it as the  
5 root sample and half of it as a shaft control. Now, with  
6 nuclear DNA testing, you're generally not going to get any  
7 result from hair shafts. So, for the purposes of that  
8 testing we use it as a control sample. You ideally expect  
9 to see nothing in that and something in the root, which  
10 gives you a good indication that there's not something on  
11 the outside of the hair surface that could be giving you  
12 your DNA result.

13           So what remains of those two samples -- and I'm  
14 looking at page -- pages Roman numeral II, 14 and 15 -- is  
15 that there is shaft remaining for one of the two hairs, the  
16 one that I don't really actually think was even an antigen  
17 root, and nothing remaining of the other hair, which does  
18 appear to have had an antigen root.

19 BY MS. WILKENS:

20 Q     Okay, so item D-4-B has been completely consumed and  
21 would not be available for mitochondrial DNA testing?

22 A     That's correct.

23 Q     Now, the other hair from Doug Ryen's hand is one that  
24 you didn't feel was, in fact, an antigen hair?

25 A     That's correct.

1 Q Okay.

2 A And I will just throw a bit of a qualifier in there  
3 that I did not consume all of the extract for D-4-B. So  
4 potentially my extract would be available should another  
5 lab choose to want to use extractions that I performed.

6 Q Would that extract be usable for purposes of  
7 mitochondrial DNA testing?

8 A Possibly.

9 Q Okay. Now, what is the -- what is the identification  
10 that was given to the second hair removed from Doug Ryen's  
11 hand, the one that was not entirely consumed?

12 A D-4-A.

13 Q D-4-A. And there is sufficient quantity of D-4-A  
14 currently in existence that it could be subject to  
15 mitochondrial DNA testing?

16 A I believe so. I don't know any lab's particular  
17 protocol, but there is hair shaft remaining.

18 Q Now, with respect to your examination of the hair  
19 removed from Doug Ryen's hands, did you find non-human  
20 hairs in those materials?

21 A One second, please.

22 (Pause.)

23 THE WITNESS: No -- or at least I made  
24 no notations about non-human hairs.

25 BY MS. WILKENS:

1 Q Now, did you also examine the hair recovered from the  
2 hands of Jessica Ryen?

3 A Yes, I did.

4 Q That would be evidence items C-2 and C-3?

5 A Yes, I did.

6 Q And in examining the hair, did you detect blood on the  
7 hair recovered from her hands?

8 A Yes, and for Jessica Ryen's samples -- be referencing  
9 pages Roman numeral II, pages 7, 8 and 9. Yeah, 7, 8 and  
10 9.

11 Q And did you subject the blood on those hairs to DNA  
12 testing?

13 A Yes, we did.

14 Q And what was the result?

15 A The blood was all consistent with Jessica Ryen.

16 Q And did you examine the hair removed -- recovered from  
17 the hands of Jessica Ryen for hairs without roots?

18 A Yes, we did.

19 Q And what did you find?

20 A What we saw there was that -- and there are actually  
21 three items we received as part of Jessica Ryen's samples.  
22 There's C-2, C-3 and then there's a petri dish with a  
23 number of hairs that appear to have been selected from  
24 those two items and separated. So, in C-2 I note on page  
25 Roman numeral II-8, that the hairs appear to be cut, saw no

1 roots to sample. So the entirety of C-2, which I  
2 believe -- if I could just look one second,  
3 please -- that's from the right hand of Jessica Ryen. All  
4 of the hairs that were observed appeared to be cut. For C-  
5 3, I note that no human roots were observed. All hairs  
6 with roots were consistent with animal hair. That's on  
7 page Roman numeral II-9. As far as C-2/3, the petri dish,  
8 looking on page 7 of Roman numeral II, there were several  
9 long hairs in that item and a few shorter hairs. That we  
10 originally had thought that one of the hairs might actually  
11 be a potential antigen hair root. We sampled that, but  
12 when we further looked at it under the compound microscope,  
13 it turns out that what we thought actually was a root was  
14 not. It appeared to be a broken end. That note was on  
15 page 14 of Roman numeral II.

16 Q Now, this hair that you removed from the -- from  
17 amongst the hairs in the petri dish, you mounted that on a  
18 slide and looked at that under a compound microscope?

19 A That's correct.

20 Q Is it -- is it still mounted?

21 A It was temporarily mounted on the slide, then -- with  
22 an oil-like substance. Then ultimately it was remounted  
23 using a more permanent mounting medium. So that hair  
24 exists mounted back in my laboratory.

25 Q Now, when you received the evidence, the hair was in

1 the petri dish, correct?

2 A That's correct.

3 Q And were you aware of whether that came from her left  
4 hand or her right hand, the contents of the petri dish?

5 A Well, the contents of the petri dish appears to be an  
6 amalgam of hairs that were selected from both the left and  
7 the right hand. In general, a number of these samples had  
8 these petri dishes associated with a given individual.

9 From the notations on them, it appears someone had gone and  
10 tried to select representative hairs from the hands of the  
11 individuals. So that appears to have been the purpose of  
12 those selected hairs.

13 Q And was there any indication or markings that would  
14 tell you who did that?

15 A I'll look. One second.

16 (Pause.)

17 THE WITNESS: I'm looking on page 7 of Roman  
18 numeral II and there are the initials GRL.

19 BY MS. WILKENS:

20 Q And do you recognize those initials?

21 A That particular set of initials doesn't mean anything  
22 to me, although I think someone at the lab, Gary Simms, may  
23 have recognized who that might be.

24 Q Did he indicate who he thought it might be?

25 A I'm trying to remember. The name Gordon Lightfoot

1 comes into my head, but I know that's not it.

2 (Laughter.)

3 THE WITNESS: Beyond that, I can't remember.

4 MS. WILKENS: Okay.

5 BY MS. WILKENS:

6 Q So, with respect to Jessica's hands, there were non-  
7 human hairs, correct?

8 A That's correct.

9 Q There were no antigen hairs.

10 A Ultimately, no. We didn't identify any antigen hairs.

11 Q But you were looking for them?

12 A That's correct.

13 Q Okay. Now, did you also examine hair --

14 A Actually, hold on. I'm sorry -- no, no continue on.  
15 That's correct.

16 Q Okay. Did you also examine hair recovered from the  
17 hands of Christopher Hughes and from the arm of Christopher  
18 Hughes? These would be items E-1, E-2 and E-3.

19 A That's correct, yes, I did.

20 Q And in examining that hair, did you find blood?

21 A Yes, I did. The reference to these hair items are on  
22 pages 11 through -- really, 11 through 15 of Roman numeral  
23 II, ultimately.

24 Q And did you do DNA testing on the blood removed from  
25 the hairs recovered from Christopher Hughes' arm and hands?

1 A Yes, I did.

2 Q And what -- what was the result?

3 A All of that blood was consistent with Christopher  
4 Hughes.

5 Q And did you examine the hair removed from  
6 Christopher's arms and hands for hairs without roots?

7 A Yes. One second, please. Let me see the notations.

8 (Pause.)

9 THE WITNESS: Yes, and certainly that -- I'm  
10 looking at page 12. There was a dark hair that was  
11 originally sampled that ultimately did not have a root.

12 THE COURT: And the Christopher Hughes reference  
13 numbers are what letters?

14 MS. WILKENS: It's items E-1, which is from the  
15 arm, E-2 and E-3, which are the hands.

16 BY MS. WILKENS:

17 Q Now, in examining --

18 A So -- actually I was still looking for -- let's see,  
19 in E-2 I have a notation that there's a tangle of  
20 hairs/fibers with gritty dark matter adhering to it. Under  
21 the stereoscope, any human hairs appear to have cut or  
22 broken ends. In E-3 no roots were seen in any of the  
23 hairs. Then in E-1 I actually did sample one hair that  
24 appears to be an antigen root hair. So that is off the  
25 arm. There is no indication whether that's the right or

1 the left arm of Christopher Hughes.

2 Q Now, was -- was that hair from the arm -- was that  
3 subject to nuclear DNA testing?

4 A Yes, and ultimately no DNA was detected. So no  
5 testing was done beyond that.

6 Q Now, does that hair still exist?

7 A The shaft of it does, yes.

8 Q And it would be suitable, theoretically, for  
9 mitochondrial DNA testing?

10 A Theoretically.

11 Q Okay, and what is the -- what is the item number for  
12 that specific hair?

13 A That's E-1-A.

14 (Pause.)

15 Q So, from examining the hair recovered from the hands  
16 of all four victims and the arms of the Christopher Hughes,  
17 there were three hairs that were identified as possible  
18 antigen roots; is that correct?

19 A That is correct, ultimately only two of which I truly  
20 think were antigen roots.

21 Q Okay, and --

22 A Or good candidates for that.

23 Q -- of those, one of the three was completely consumed  
24 by the nuclear testing?

25 A That's correct.

1 Q Now, could you estimate the total number of hairs that  
2 were recovered from the four victims' hands?

3 A The closest estimate I have was really -- there was a  
4 time after one of the many days of sampling evidence, Dr.  
5 Blake and I were in the lobby of our laboratory, trying to  
6 figure out how many hairs we had just looked at over the  
7 course of all of this. At that time, our estimate was that  
8 it could have been approximately a thousand hairs.  
9 This -- there was no actual count done. The purpose of our  
10 testing had been to look for hairs suitable for nuclear DNA  
11 testing. So things like counting the actual numbers of  
12 hairs in any given item was not a priority for us.

13 Q It would have just caused you to spend more time?

14 A A lot more time.

15 Q Now, could you estimate the total amount of time that  
16 you and Dr. Blake spent examining the hair for antigen  
17 roots?

18 A The best way I can do that is just looking at the  
19 dates on the notes. We started looking at this -- I'm  
20 looking at page 1 of the Roman numeral II note. We started  
21 looking at it on October 30th of 2001. Generally these  
22 were all-day affairs. We put in a pretty full day. No, we  
23 started that day actually looking at a different item, but  
24 the second item was the hairs, and the rest of the work  
25 that day was the hair. Then proceeding through, on page 5,

1 you see that we're looking on the 31st of October, not in  
2 costume. Then on page 7 I see we're working on the 2nd of  
3 November. On page 10 we're looking -- we're working on the  
4 5th of November. Page 11, we're working on the 8th of  
5 November. Then finally the last time Dr. Blake and I were  
6 actually working together on this was on the 13th of  
7 November. Now, I wasn't keeping track of how many days  
8 that was, I apologize. I can go back and add it up again  
9 if anyone else --

10 Q I believe that's six days and a partial day.

11 A Okay, that sounds --

12 Q Is that correct?

13 A Sounds about right.

14 Q Okay, so six full days examining hair and a partial  
15 day.

16 A Possibly five and two partial days.

17 Q Now, mitochondrial DNA, is that inherited maternally?

18 A Yes, that is strictly a maternal inheritance.

19 Q So, all of Peggy Ryen's children would have the same  
20 mitochondrial sequence per cell; is that correct?

21 A Essentially, that's correct.

22 Q And it would be the same as hers?

23 A Barring mutations.

24 Q Okay. Now, a DNA profile that is detected from  
25 mitochondrial DNA testing, is that unique to the

1 individual?

2 A Well, as we just said, it's not unique to an  
3 individual because of maternal inheritance. So, again,  
4 barring mutations, as you follow family trees back up and  
5 down, anyone who shares common maternal ancestry would  
6 ultimately theoretically have the same mitochondrial type.  
7 So this is reflected in some of the population database  
8 information that you can get. For example, in Caucasians,  
9 for the area of the mitochondrial sequence that we're  
10 looking at, about seven percent of the population has the  
11 most common DNA sequence at that stretch. So that's  
12 clearly not something that can be used to identify someone.  
13 Now, many people have sequences that have not been seen in  
14 those databases, but there's certainly -- you can't get the  
15 kind of information from mitochondrial sequencing as far as  
16 truly trying to identify one person versus all others, that  
17 you can get with nuclear testing.

18 Q Now, with respect to databases, are there data banks  
19 out there for mitochondrial DNA comparable to the nuclear  
20 DNA data banks that are used for searching for -- to  
21 identify someone?

22 A There are no convicted felon data banks for  
23 mitochondrial. The only data bank that I'm aware of that's  
24 being formed -- I don't even know if it's online yet -- is  
25 for missing persons, to match references from either the

1 missing person through items that they left at their house,  
2 for example, or in the case of maternal inheritance, from a  
3 maternally related relative. That is being developed. I  
4 confirmed this yesterday actually talking to a woman in our  
5 lab who was just at the FBI's mitochondria class for two  
6 weeks, but from everything I've talked to and everyone I've  
7 talked to, there is no convicted felon data bank. The  
8 reasoning for this, of course, is because if you have a  
9 profile that could be as common as seven percent of the  
10 population and you test a million people in a data bank,  
11 you're going to get a very large number of hits in the data  
12 bank. It won't truly serve the purpose of trying to narrow  
13 down your potential suspect population.

14 Q Now, would a criminalist criteria for selecting hairs  
15 from the hands of a victim for purposes of mitochondrial  
16 DNA testing be different than the criteria that you would  
17 use for nuclear DNA testing?

18 MR. HILE: Objection, your Honor, no foundation  
19 that this witness has the expertise or experience to answer  
20 that question.

21 THE COURT: Overruled. If you know.

22 THE WITNESS: Well, there -- it really depends on  
23 the question that is being considered. If the question is  
24 here is a large clump of hair who could be donors, are  
25 these all from the same person or could they be from

1 different people? Then they mitochondrial person would be  
2 able to focus on hairs with roots, hairs without roots.  
3 They'd be going and looking at the class characteristics of  
4 the hair itself, trying to identify differences and  
5 selecting hairs based on those differences. For a nuclear  
6 DNA person, we really are restricted to hairs that have the  
7 potential to give a nuclear DNA result. By and large, that  
8 is an antigen root and especially one with sheath material,  
9 although you can occasionally get DNA results from  
10 certainly antigen hairs without roots and, on very rare  
11 occasions, other kinds of hairs.

12 BY MS. WILKENS:

13 Q Now, in -- in selecting hairs for purposes of testing,  
14 does a criminalist take into account the environment in  
15 which the hairs were found? For example, if you have hairs  
16 found inside a home and the environment within in the home  
17 is -- is less than pristine, is -- is that something that  
18 affects the decision how to select hairs?

19 A Just in the general concept of the case and thinking  
20 as a criminalist, what would be a potential relevant source  
21 of information, certainly if a house is generally messy,  
22 you wouldn't want to, for example, go to the vacuum  
23 sweepings and select hairs from there, because hairs are  
24 very persistent. We shed up to 30 to 100 hairs a day,  
25 depending on how quickly we're going bald. Hairs get

1 carried from location to location. I won't actually make  
2 an analogy I've made once before, because it tends to get  
3 laughed at, but I've found stray hairs on my own clothing,  
4 for example, that clearly didn't have -- that didn't come  
5 from me and didn't come from people that I knew I had been  
6 in contact with. So you have to try and determine will a  
7 given hair that you're testing actually help to answer a  
8 question of a -- you know, who is a perpetrator of a crime?  
9 If, in general, the environment is so full of just stray  
10 hairs, then stray hairs, especially shed hairs, may not be  
11 appropriate to answer that question. If you had, for  
12 example, a clump of plucked hair and then, you know -- I've  
13 seen clumps of plucked hairs before in forensic case work.  
14 In fact, we don't even have to use sensitive means of DNA  
15 testing to get a result from a clump of plucked hairs.  
16 There's a lot of DNA there. If you really see that, then  
17 that may be an indication that that is a meaningful hair to  
18 look for, but in -- certainly in this case, from what I  
19 know and I've seen of the vacuum sweepings and heard about  
20 the environment at the Ryens' house, the number of just  
21 shed hairs in the environment is rather large. So they  
22 don't seem like they would be necessarily able to answer  
23 the question, because to not see a hair that is foreign to  
24 these victims would really actually surprise me. To not  
25 see that -- just by chance alone, I would actually expect

1 to see hairs that don't belong to these people.

2 MR. HILE: Your Honor, I'm going to move to  
3 strike the answer as being non-responsive, everything after  
4 about the first sentence, and no foundation and an  
5 incomplete hypothetical.

6 THE COURT: Overruled.

7 BY MS. WILKENS:

8 Q Now, Mr. Myers, as a criminalist, when you go about  
9 selecting evidence to test, do you work from a hypothesis  
10 that is related to the case in question?

11 A Well, you're certainly trying to answer questions in  
12 general and you're trying to see -- guide your testing by  
13 what might give you an answer to your question. So what  
14 your question is will clearly guide what tests you run.

15 Q Now, the presence of a foreign hair in the hands of a  
16 victim, is that something that you believe in your  
17 experience as a criminalist, would be probative of an  
18 assailant?

19 MR. HILE: Objection, your Honor, incomplete  
20 hypothetical, no foundation.

21 THE COURT: Overruled.

22 THE WITNESS: It could be. In -- especially in  
23 this instance, if there were pulled hairs, that might be  
24 something that's more probative, but if -- for example,  
25 let's just look at shed hairs that were in the hands. Then

1 given the state of it, I wouldn't feel it could answer a  
2 question, because if it was foreign to the people, that  
3 could just be there innocently. So it wouldn't actually be  
4 going towards answering the ultimate question of this is  
5 identifying a perpetrator or not.

6 MS. WILKENS: Thank you, Mr. Myers. Your Honor,  
7 I have no further questions.

8 THE COURT: Cross?

9 (Pause.)

10 CROSS EXAMINATION

11 BY MR. HILE:

12 Q Good afternoon, Mr. Myers.

13 A Good afternoon.

14 Q Let me ask you a little bit about your credentials.  
15 My understanding from looking at the resumé that you used  
16 at the hearing in 2003 about this subject was that the  
17 focus of your activities over the last several years have  
18 been doing nuclear DNA testing; is that fair to say?

19 A That's correct.

20 Q And you, yourself, have not done mitochondrial DNA  
21 testing; is that correct?

22 A That's correct. I've done some nuclear sequencing,  
23 but I haven't actually done mitochondrial DNA testing.

24 Q And I take it that, because the focus of your work is  
25 nuclear DNA testing, that you have not been asked in the

1 past to screen hair for mitochondrial testing; is that fair  
2 to say?

3 A I believe that's fair to say.

4 Q And it's true, is it not, that there is a different  
5 analysis involved in screening hairs for mitochondrial  
6 testing than there is for nuclear DNA testing, correct?

7 A Well, certainly they're less concerned about the state  
8 of the root, for example, which is of primary importance to  
9 the testing that I perform.

10 Q Now, with your focus on nuclear DNA testing, I take it  
11 that you are not a hair examiner?

12 A No, I'm not.

13 Q And have you heard of Dr. Peter DeForest?

14 A Yes, I have.

15 Q And do you understand that he is a recognized name in  
16 the field of criminalists?

17 A I certainly recognize his name.

18 Q And are you aware that he is somebody who has been  
19 retained to do hair examination?

20 A You know, I don't actually know his credentials.

21 Q Now, I want to ask you some questions about your  
22 activities with Dr. Blake during the testing that you've  
23 testified about here this afternoon. You testified that  
24 you were looking for actively growing hairs, the antigen  
25 hairs; is that -- that fair to say?

1 A That was the primary focus, yes.

2 Q And so that was what you and Dr. Blake focused on as  
3 you went through the approximately 1,000 hairs that you say  
4 you looked at, correct?

5 A That's correct.

6 Q And you were looking, therefore, specifically to find  
7 hairs with the indications of roots and sheath material,  
8 correct?

9 A Sheath material would essentially end up being a  
10 bonus, in a way, but we were focusing first off on do the  
11 hairs have roots, because we were interested in what kinds  
12 of roots there were. So, while in the end we probably we  
13 wouldn't go for even a catagen phase hair, which is in the  
14 transition stage, the key focus really was to -- you know,  
15 in order to maximize the chance of getting a result, to  
16 look for these antigen hairs.

17 Q Okay. I assume that that was also the focus when Mr.  
18 Simms and Mr. Hinman (sic) were looking at the hairs,  
19 correct?

20 A Correct, and it's actually Inman, I-N-M-A-N.

21 Q Thank you. Do you know where he is now?

22 A Yes, he's with Forensic Analytical, which is in  
23 Hayward, California.

24 Q Thank you.

25 A It's otherwise known as FASI (phonetic) sometimes, I

1 believe. Really they were brought in to look at specific  
2 hairs, especially when we were trying to identify some of  
3 the non-human results.

4 Q Now, as I understand what was done from looking at  
5 the -- the -- the notes that -- bench notes that you were  
6 referring to earlier, what you would do with -- when you  
7 would take a group of hairs, let's say, from the left hand  
8 of one of the victims, you would open up the evidence case,  
9 whatever it was held in, and then you would spread them out  
10 and visually examine to see if there were some that looked  
11 like they might have the root material, antigen-type hairs  
12 that you might then put under the microscope. Is that  
13 fair?

14 A That's correct.

15 Q And then if you -- if you found some that might  
16 be -- have that type of material, you would take those into  
17 one pile and the rest would be put aside and never looked  
18 at again, correct?

19 A Yeah, I believe that's correct. Once we've pulled out  
20 any that appeared to have antigen roots and had documented  
21 the rest of the hairs in some photographs, then, yes, they  
22 were put away.

23 Q Now, I want to ask you about the group of hairs that  
24 you were asked at that time to analyze. There was a page  
25 that has a list of those groupings, letter and numbers,

1 that -- I think in your report. Do you have that in front  
2 of you?

3 A I believe you're talking about the first report.

4 Q Yes.

5 A And -- on the evidence receipt on page R-2 of 8, you  
6 can see that on -- the evidence listed as having been  
7 received on June 22nd, 2001 lists the hairs, which were all  
8 received from the San Bernardino Sheriff's Office. It  
9 looks like the --

10 Q Okay. Yes, I think I have a copy of it then.

11 MR. HILE: Does the Court have that in front --

12 THE COURT: I don't have it in front of me.

13 MR. HILE: Okay. Let me -- if I may, I'll hand  
14 up a copy to the Court.

15 (Pause.)

16 THE WITNESS: This is from the report dated July  
17 7th, 2002.

18 BY MR. HILE:

19 Q And we're looking at page 2 of 8?

20 A That's correct.

21 Q Okay.

22 A At least I'm assuming that's the page you want to look  
23 at.

24 Q Yes, that's the one I'm looking at.

25 MR. HILE: If the Court has, then we can go

1 forward.

2 BY MR. HILE:

3 Q Now, let me just see if I can understand the -- the  
4 group of hair -- hairs that is (sic) on this list that was  
5 (sic) examined by you and Dr. Blake for the purposes of  
6 trying to determine if there were nuclear DNA usable hairs,  
7 if we start -- if I get it correctly, if we start at C-2,  
8 is that one of the groupings of hair?

9 A Correct.

10 Q And that would be the hair from the right hand of  
11 Jessica Ryen?

12 A Correct.

13 Q So -- so you did look at the right hand -- the hairs  
14 that were in Jessica Ryen's right hand; is that correct?

15 A That would be this one, yes.

16 Q Right. And you had a -- you took a photograph of  
17 that?

18 A That's correct.

19 Q And some of those hairs, then, were grouped into the  
20 group that you would look at under the microscope and some  
21 were discarded as far as potential --

22 A Well, since "microscope" is a very general term, I  
23 will say all hairs were looked at under the compound  
24 microscope.

25 Q Okay, and then below that --

- 1 A I'm sorry, under the stereo, not the compound.
- 2 Q Okay. Then below that, the next one, C-3 was hair
- 3 from the left hand of Jessica Ryen, correct?
- 4 A That's correct.
- 5 Q And then below that, C-2 and 3 is (sic) an additional
- 6 group of hairs. That's from the petri dish, as I
- 7 understand it, from both the right and left hands of
- 8 Jessica Ryen.
- 9 A That's correct.
- 10 (Pause.)
- 11 Q And the D-3 is the left hand -- the hairs from the
- 12 left hand of Doug Ryen; is that correct?
- 13 A Correct.
- 14 Q And you did both the left and the right hand, the
- 15 right hand being D-4, correct?
- 16 A Correct.
- 17 Q And then there was D-3/4, again hairs from both the
- 18 right and left hands of Doug Ryen?
- 19 A Correct.
- 20 Q And then E-1, 2 and 3 and 1/2-3 is all hairs from the
- 21 right and left hands and arms of Chris Hughes, correct?
- 22 A Correct.
- 23 Q So you were -- you were looking for appropriate hairs
- 24 to test from both limbs of each of the four victims,
- 25 correct?

1 A You actually skipped B-9-A, B-9-B and B-10, which are  
2 the hairs from Peggy Ryen.

3 Q Thank you, okay. All right, so -- thank you for that  
4 correction. So we had all four victims, both limbs, you  
5 looked at the hairs from all of those?

6 A Correct, removed from the victims who didn't survive.

7 Q All right. And as I understand it, the purpose of  
8 this testing was to try to determine if you could find  
9 hairs that might have been not belonging to any of the  
10 victims?

11 A Well, really, given the paucity of -- of hairs that  
12 had antigen roots, it ended up being any hair with an  
13 antigen root, period, we would attempt. So we weren't  
14 specifically doing hair comparisons. We weren't using  
15 reference hairs from the victims and comparing them to the  
16 evidence hairs under a microscope to see if they could or  
17 could not have come from anyone and then only selecting out  
18 hairs that appeared to be inconsistent with the victims.  
19 That was, in the end, especially not what happened. The  
20 way that we went about this was to just simply look for  
21 hairs that would be capable -- our original intent was to  
22 make representative selections, had there been a large  
23 number of them, but there weren't.

24 Q All right. Now, as I understand it, the focus for  
25 purposes of hair selection for mitochondrial testing is

1 somewhat different than what you and Dr. Blake did; is that  
2 fair to say?

3 A Well, there I could see that having someone who is a  
4 hair examiner actually focusing on looking at different  
5 groupings of hairs would be more appropriate or would be  
6 more amenable in this instance, because -- well, there  
7 simply weren't a large number of hairs with antigen roots,  
8 but there are large numbers of hairs that could be  
9 separated, should that be the desire.

10 Q Okay. So it's somewhat of a different analysis that  
11 would be done by a hair examiner as a precursor to the  
12 mitochondrial DNA testing?

13 A I think that would be the wise way to go if you were  
14 to do it.

15 Q Okay. One other question, then, going back to the  
16 testing that you did on the hairs that we talked about for  
17 the last few minutes, you testified that Dr. Blake was with  
18 you to do the analysis, looking for the antigen roots. You  
19 said virtually all of the time. Is that fair to say?

20 A As far as any time we actually had the evidence out  
21 and were looking at the evidence, Dr. Blake was present,  
22 and I believe the agreement was written that he actually  
23 kind of had veto power even.

24 Q Okay. However, when you actually did the nuclear DNA  
25 testing, Dr. Blake was not present, was he?

1 A That's correct.

2 Q That was done without supervision from the defense  
3 side, correct?

4 A That's correct, per the agreement.

5 Q And so Dr. Blake did not have anything to do with the  
6 way you went about taking the hairs that were identified  
7 into the lab to undertake the nuclear DNA testing, correct?

8 A Well, we certainly discussed what I was going to do,  
9 and he was fine with my analytical method, but in the end,  
10 was he present during the entire nuclear testing? No, I  
11 think that would have bored him to tears.

12 Q Now, the proposal in this case for the mitochondrial  
13 DNA testing is to have the actual analysis --

14 (Cellular phone ringing.)

15 THE COURT: Someone's in contempt.

16 BY MR. HILE:

17 Q -- the actual analysis --

18 THE COURT: And I know it's from somebody who  
19 should know better.

20 MR. HILE: I'll start again --

21 THE WITNESS: Thank you.

22 MR. HILE: -- Mr. Myers.

23 BY MR. HILE:

24 Q My understanding is that, for purposes of the  
25 mitochondrial DNA testing that's been proposed here, we're

1 talking about using Dr. Terry Melton from Mitotyping  
2 (phonetic) Technologies LLC. Is she someone that you're  
3 familiar with?

4 A Vaguely. I've certainly never heard anything bad  
5 about her, and I've heard generally, I believe, positive  
6 things.

7 Q Okay.

8 A I may have had contact with her once previously on  
9 another post-conviction case.

10 Q Okay. Let me switch gears for a second. In the  
11 course of your looking through the hairs back in 2001,  
12 2002, when you were looking for antigen hairs, did you see  
13 any hairs in the group that you analyzed that would be  
14 consistent with those of Kevin Cooper, who is an African-  
15 American?

16 A Well, again, I'm not a hair examiner. I'm trying to  
17 remember -- one second, please. Let me just see if there  
18 was one notation.

19 (Pause.)

20 THE WITNESS: For lack of being able to find what  
21 I vaguely had in my head, no, I don't recall specifically  
22 seeing any hairs that jumped out as saying they appeared to  
23 be African-American.

24 MR. HILE: All right. Thank you, I have no more  
25 questions. Thank you.

1 THE COURT: Thank you. Redirect?

2 (Pause.)

3 REDIRECT EXAMINATION

4 BY MS. WILKENS:

5 Q Now, to clarify, Mr. Myers, when you and Dr. Blake  
6 examined the approximate 1,000 hairs recovered from the  
7 hands of the victims and from Christopher Hughes' arms, did  
8 you document whether or not there were hairs with roots?

9 A Did not necessarily document all hairs with roots,  
10 again, because our focus was hairs with antigen roots or  
11 hairs that appeared capable of nuclear DNA testing. At  
12 least in a number of instances I did document where there  
13 were absolutely no roots seen or where all hairs appeared  
14 to be cut. Then there were other times when -- especially  
15 if there were fewer hairs, I may have described certain of  
16 the roots.

17 Q Now, what is the difference in terms of an antigen  
18 root and a pulled hair?

19 A Well, a pulled -- it's almost a square/rectangle kind  
20 of thing. A square is a rectangle but a rectangle is not  
21 necessarily a square. You can pull out a hair that is  
22 growing or dead, so basically a hair that is at any stage,  
23 but from personal experience of getting my hair caught in  
24 things, as well as professional experience, most hairs that  
25 are pulled -- this includes ones that we've done for

1 experiments in the laboratory on DNA typing some hairs,  
2 when you pull that hair out, especially pull it rapidly,  
3 you're going to see mostly antigen roots. You're going to  
4 see mostly hairs with sheath material, hairs with this  
5 tissue around the root. There have been studies trying to  
6 look at the speed with which the hair was pulled. I would  
7 not want to be the subject of that study, but they pulled  
8 hairs at different rates and found that the faster they  
9 pulled it out, the more they got. So, to reiterate, you  
10 can have a pulled hair at any stage, but when -- the  
11 majority of times, when hair is pulled out, what you will  
12 find you have are antigen hairs with sheath material.

13 Q And you did document antigen hairs?

14 A Anything we thought even was an antigen hair, even if  
15 it turned out not to be, we documented it.

16 MS. WILKENS: Thank you. Nothing further, your  
17 Honor.

18 THE COURT: Anything further?

19 MR. HILE: One, your Honor.

20 RECROSS EXAMINATION

21 BY MR. HILE:

22 Q Mr. Myers, you talked about how hairs could be pulled  
23 out and what type of material that would have. I take it  
24 that, if a hair has stopped growing --

25 A Uh-huh.

1 Q -- so it has not all of that sheath material, et  
2 cetera, and a person either, for whatever reason, makes a  
3 violent shake of the head or pushes hard or pushes down on  
4 something very hard where their -- where the head is  
5 shaken, that those types of hairs that have, in effect,  
6 stopped growing and that have actually almost fallen out  
7 could fall out at that time; is that fair to say?

8 A That's correct. That's why your hair brush is mostly  
9 full of dead hairs.

10 Q I --

11 A Hairs in that final stage of growing.

12 MR. HILE: Okay. Thank you.

13 THE COURT: All right, anything further?

14 MS. WILKENS: No, your Honor.

15 THE COURT: Okay, you're excused. We'll take our  
16 afternoon recess. At this time, do we have another  
17 witness?

18 MS. WILKENS: No, your Honor, we have. Dr.  
19 Thornton (phonetic) scheduled for tomorrow morning,  
20 followed by Dr. Blake.

21 THE COURT: Oh, okay. So why don't we then be in  
22 recess until tomorrow at --

23 MS. WILKENS: 9:00?

24 THE COURT: -- 9:00.

25 MR. HILE: Yes, your Honor. I will ask, just

1 because of the question of whether there's a need for it,  
2 whether we need to have Dr. Thornton and Dr. Blake  
3 tomorrow.

4 THE COURT: I think it's been very helpful for  
5 the Court. So I'd appreciate their -- they're on call?  
6 Unless the parties want to cancel that, but it's actually  
7 been helpful for the Court. We're trying to come out with  
8 a reasonable way of ordering this testing. The Court, at  
9 least, has a much better idea about the scope of the issues  
10 involved, having heard the totality of the testimony.  
11 So --

12 MR. HILE: Well --

13 THE COURT: -- unless the two of you both  
14 agree --

15 MS. WILKENS: No, your Honor, based on the  
16 discussion of the petri dishes and the selection of hairs,  
17 I'm very interested in talking to Dr. Thornton, and also  
18 we've never received Dr. Blake's notes, and also in light  
19 of the accusations against Mr. Myers based on his testimony  
20 before Judge Kennedy, I would very much like to hear from  
21 Dr. Blake, because he could shed light on that.

22 THE COURT: So we'll see you tomorrow at 9:00.

23 MR. ALEXANDER: Thank you, your Honor.

24 THE COURT: Thank you.

25 (Proceedings recessed.)

1  
2  
3 I certify that the foregoing is a correct transcript  
4 from the electronic sound recording of the proceedings in  
5 the above-entitled matter.

6  
7 Mary Doherty 6-17-04  
8

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