IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

DEPARTMENT NO. 54 BEFORE HON. WILLIAM H. KENNEDY, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. KEVIN COOPER, Defendant.	Case No. CR72787 Volume 3 of 3 Pages 313 to 386, Inclusive

Reporter's Transcript

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SAN DIEGO, CALIFORNIA, WEDNESDAY, JUNE 25, 2003, 9:34 A.M.

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THE COURT: Good morning, counsel.

Since you are the moving parties, I believe that it would be appropriate for you to have the first say, so to speak. Have you arranged between you who wishes to go first?

MR. McGUIGAN: We have.

THE COURT: All right.

MR. McGUIGAN: And then I assume we'd have the privilege that the district attorney usually has of rebuttal to his argument.

THE COURT: You mean to rebut anything that they might say?

MR. McGUIGAN: Yes.

THE COURT: Yes.

MR. McGUIGAN: Thank you.

THE COURT: Unless there's disagreement with that procedure, since they are the moving party.

MR. KOCHIS: There's no disagreement.

THE COURT: Thank you.

MR. McGUIGAN: Thank you, your Honor. Good morning. I believe we're here today to argue the issue of the mitochondrial -- the proposal by the defense for mitochondrial testing of the hair and whether we meet the standard set forth in 1405 for that testing. As a corollary to that, Mr. Bernstein is going to argue the tampering, the EDTA motion.

I don't understand, until we know what the Court's

ruling is, that the final argument on the outcome of this whole proceeding is -- I mean, I'm not -- I don't believe that I need to do that today.

THE COURT: I know what Penal Code section 1405 says that I should do if I grant your motion. What I don't know is specifically what is the relief requested on the contamination issue.

MR. McGUIGAN: Well, I think Mr. Bernstein --

THE COURT: Or is it just an adjunct of the 1405 motion?

MR. McGUIGAN: It is an adjunct of the 1405 motion.

THE COURT: Okay.

MR. McGUIGAN: However, because there was concern, I guess, over whether a habeas had been filed on that issue, a habeas has now been filed, and I'll let Mr. Bernstein talk about that.

THE COURT: Well, the section that Mr. Bernstein was relying on specifically says it's either in connection with a habeas corpus motion or a motion to vacate the judgment. Up until this very minute, I don't have either one of those before me.

MR. BERNSTEIN: Your Honor, as we argued in our papers, we think it's an incorrect interpretation of the statute to require that these motions be filed before there's any testing results. It would be analogous to filing a petition or a motion to vacate the judgment with no evidentiary basis.

THE COURT: Okay. I don't mean to raise it at this time. I'm just telling you what's on my mind. You can address it.

MR. McGUIGAN: Right. Thank you.

All right. So I believe we're at that point in the case, your Honor, where the -- obviously the testing or not of the mitochondrial DNA evidence that's all been discussed in evidence here by way of exhibits is the decision that the Court has to reach.

Now, the statute itself, of course, I know the Court has read it probably several times, as all of us have, and as far as I know today there's been no appellate clarification of the statute. The only post-enactment action, I guess, that one could say on the statute is the recent addition by the Legislature of 1405(b)(1) covering the area of how does the indigent convicted person get to this stage of addressing the Court. We're not -- this is not relevant to our situation today.

THE COURT: It seems what's relevant to your discussion with me this morning, if I can zero in on it, is Penal Code section 1405(f) and the items under (f), and particularly relevant to this case, it seems to me, are (f)(4) and (f)(5) and maybe even (f)(8).

MR. McGUIGAN: All right. Well, the Court will be glad to know that's the way I've structured my argument, and I've highlighted those very portions.

So -- but what I wanted to comment on in the additions by the Legislature to the motion is in the first place under (m), new (m), the right to file this motion is absolute and not waivable. This has been added, and the other provisions that I discussed affording the convicted accused a

right to access to counsel to get the motion before the Court.

Both of these sections, I don't see -- they don't directly bear on the case today, but they certainly show that the Legislature is not watering down or backing away from this motion. On the contrary, they're making it more powerful. They're making it a more significant part of our criminal jurisprudence, especially post-conviction jurisprudence, and even have gone so far as to add (m), which sets forth that this can't be waived.

As far as I know, that's the only -- one of the very few, if any, provisions in the Penal Code where the Legislature has seen fit to say that it can't be waived like a plea or something of that nature. The defense bar doesn't like attempts to waive it and the state court hasn't done much in that regard, but the feds have. But the point being that the Court can see that the motion is not an afterthought. It's not a parallel to existing habeas law, although it may borrow from existing habeas law.

So having said that, I'd like to turn, if I might, to the merits, and the Court has already indicated -- and I'm not going to spend a lot of time on those other subsections except to comment -- I'm looking at subsection (f), of course, your Honor. And (f)(1), I don't think there's any question that we have evidence which is available and which could be tested in a mitochondrial manner, and all the experts -- both the experts have said so.

We have the hair evidence, and if I might -- the Court can look at all of them, but there's a couple in

particular that I would like to emphasize, and that is in the Exhibit 38 through 48 areas and 55 through 57 areas, which are the -- the digital reproductions that were taken by Mr. Myers when the evidence was and still is at the DOJ lab. So that's certainly sufficient. We heard Mr. Plourd's testimony. It was uncontradicted that one centimeter, one hair, is sufficient to give us a viable mitochondrial DNA profile, and of course there's far more than that here.

Some of the hairs may be animal hairs. We heard Mr. Myers testify that he essentially had already screened out many of the animal hairs just visually and that a visual examination of the hairs by a qualified criminalist, who isn't even a hair expert but who has experience in that area, can screen out the vast majority of the animal hairs. So I don't think that the animal hairs in any way prevent the testing from going forward on the human hairs that are also identified as to each victim, each hand and so forth.

So that evidence is available. It's in a condition that would permit the testing. The fact that it's been washed of blood already doesn't prevent the testing. In fact, I believe everyone testified again that the hair -- before one tests a sample of hair for mitochondrial DNA, you wash and clean the shaft of the hair entirely from blood or anything else. And, of course, the fact that the blood in the hands, you know, is tied to the victims, victims who had, of course, their own blood all over their hands isn't in any way -- anything they had in their hands would have had their blood on it, and that would be washed off.

Okay. The identity of the perpetrator, (f)(3), was a significant issue. It is a significant issue. It is the only issue, really, in the case, in that this horrendous multiple killing is certainly murder. There's no question about any of that. There's been no question introduced in the case other than the identity of Mr. Cooper. That's been his defense from the beginning of this case.

Now, the language at (4) is can we make a prima facie showing that the evidence is material to ID as the perpetrator or accomplice to the crime, to the special circumstances or to the enhancement allegation that resulted in the conviction or sentence, and this is a death case. The enhancement allegations resulted in a death verdict from the jury.

It was a long deliberation, and the death verdict by the jury took a long time, considering that the defense penalty phase was less than an hour in length, your Honor, and then the jury went out and deliberated. Having already convicted, they deliberated for a long time. And they reported at one time that they were hung, and then they withdrew that before the trial attorneys could get down from San Bernardino.

THE COURT: Let me direct a question to you so that at least I can be more focused, if possible. (4) reads -- (f)(4) reads, under 1405 of the Penal Code:

"The convicted person has made a prima facie showing that the evidence sought to be tested is material to the issue of the convicted person's identity as the

perpetrator of, or accomplice to, the crime, special circumstance, or enhancement allegation that resulted in the conviction or sentence."

Now, are you contending by way of the hair evidence that it might show that there was somebody else at the scene other than the -- Mr. Cooper, and therefore Mr. Cooper -- though he's never indicated anything but, "I wasn't there and I never did it," that he's now a possible accomplice? Which is a big shift in position from the last 20 years.

MR. McGUIGAN: Well, what we believe the evidence may show -- in the first place, by looking at it we can see, for instance, Exhibit 44, Exhibit 41, these are not an African-American's hairs.

THE COURT: You haven't answered my question.

MR. McGUIGAN: I'm coming to it, your Honor.

THE COURT: Okay.

MR. McGUIGAN: So we believe, and I believe we've always contended -- the defense always contended that third parties actually committed the homicides in this case, and it was either the three Mexicans or there was even testimony introduced about three skinheads at the famous Corral Canyon Bar where the T-shirt was found behind.

The prosecutor's position at trial in that case was that the T-shirt was irrelevant, and of course they've shifted their position now after they saw the test results and say, "No, we withdraw that. It's really extremely relevant and it's Cooper's," whereas at the trial their position was it's not Cooper's, it has nothing to do with the case. So as time

goes by and more evidence is produced, your Honor, I think both sides are entitled to change their position.

But the defense contention from the very beginning and throughout the trial is it was more than one man who did the crime, and the man was not Mr. Cooper who did the actual killing. It's true that he always contended he wasn't in the house, and he tells us that to this day and insists that he wasn't. And the only DNA evidence still that puts him in the house that I'm aware of is 841, and that was not taken from the actual room where the murders occurred.

THE COURT: That isn't what the Supreme Court said in their opinion. There was no DNA at that time, 841 or otherwise. There was nothing.

MR. McGUIGAN: Well, your Honor, it's not for me to denigrate the Supreme Court. Had they been before the Supreme Court four years earlier, I seriously question whether we'd have had language like emerged from this opinion. And there were two dissenters on that case on the Supreme Court, in Cooper's case.

Furthermore, there's been a great deal of talk by Mr. Millar especially about what the California Supreme Court found. I'm not aware that the California Supreme Court ever finds anything in the sense that a trial court finds a fact. No facts are supposed to be found at the appellate level. I believe that the California Supreme Court is supposed to review the evidence and discuss it, and findings of fact are made at a lower level. The Supreme Court doesn't make findings of fact.

So if that had been the criteria, none of these post-conviction motions, I would submit, your Honor, would ever be brought if the criteria is whether the state Supreme Court has already affirmed the verdict, because it has, and they never affirm a verdict without saying that the evidence is strongly supporting it.

Over a hundred people have been released from death rows throughout the country from post-conviction DNA evidence. And I have not surveyed every one of those hundred cases, but I would be really surprised if in every one of them the appellate courts didn't say that the evidence was very strong and convincing and, in fact, probably overwhelming.

So I don't think that this Court in this proceeding -- obviously, the Cooper case is part of the entire record of -- the Supreme Court's opinion is part of the entire record of the Cooper case, but I don't think that the Court -- we have discussed at great length, and in fact if the Court wants to review our voluminous pleadings where we discuss the various findings that the California Supreme Court has relied on, so-called findings at the trial level, what was the motive?

Mr. Kottmeier, then the district attorney, argued to the jury that there is no motive, that there can be no motive for such an outrageous, violent offense. And then later on the Supreme Court found that the motive was theft of the car, and the evidence since then has seemed to support that theft of the car was certainly involved.

But your Honor knows that however many car thefts we have, especially in San Diego, thousands of them every year,

if the people all went and murdered the owners when they stole the cars, we would have thousands of murder trials every year. And I would submit that the logical inference to draw, if the person's motive was to steal the car and he's an escaped convict, the last thing in the world he would want to do would be to go up and murder a whole family. He wants to get away. He doesn't want to draw attention to himself.

Of course, the sure -- if a person goes up and murders four people and nearly murders a fifth, he knows that there's going to be enormous interest focused on him, his whereabouts, his movements and everything. He might as well, if that was his intention, have set off flashing lights and sirens on top of the car. So I don't think that that's a rational explanation.

Another item is a piece of bloody rope, not the same as the rope at the Ryens' house, but a piece of bloody rope nonetheless. Well, if we were arguing this matter to a trial court and the prosecutor said, "Look, here's a piece of bloody rope from the hideout house, the Lease house," which is not any of the rope from the Ryen house, but it's bloody and it's different from that other rope, of what significance is that? And so forth.

Every one of these items has been discussed at length in various pleadings, your Honor. And the crime is actually -- when one first comes to view it, is a very strange crime, very incomprehensible crime, as to why a person, and a single person, would engage in this extremely violent behavior in the manner that was done, and all the weapons that were

used.

So there's strong evidence, and the pathologist has said -- and they said this at the trial and withdrew it and said it at the habeas proceedings -- that the evidence is very strongly indicative that there was more than one person present to do all these -- inflict all these wounds in a very short period of time against four people.

So I think the evidence that this hair was found in the hands of the victims -- I'll talk about whether it was clutched in their hands in a minute, if I may, or now if the Court wants me to. We had evidence about the habeas -- I mean about the rigor mortis introduced, I guess it was, by Mr. Stockwell, and I don't dispute his evidence.

We simply don't know -- my co-counsel has made a point of discussing many times that the hair was clutched tightly in the hands, similar to Mr. Millar's cite to the California Supreme Court's overwhelming evidence. But we simply don't know if it was clutched in their hands. But I think the evidence -- because they end up in a semi-closed position, but it's laying in the palms of all their hands. How could it just be laying?

It isn't random collections of hairs, your Honor. If you look at 44 and 41, these are chunks or swatches of hair. They didn't drift through the air. And did every one of the people fall down face first, put their hands on a mound of hair, scoop it up, and then turn around and be found with the hair in their hands?

Again, I think that that's an extremely unlikely

hypothesis, whether it was taken from the heads of the -- and we'll know the answer if we do the mitochondrial testing, as to whose hair it is. At least we'll know if it matches the victims' hair. We'll know if it matches to itself.

So I think that that's -- and that's why the evidence would be material, your Honor. It would be material if it showed, one, that amongst the hairs in different victims' hands are the same maternal DNA, which is not consistent with any of the maternal DNA, mitochondrial, that is, of course, in any of the other victims or Mr. Cooper. We'll know that, if there is such a match.

I'm not disputing any of the things Mr. Myers said about the use of mitochondrial results by law enforcement to go out and identify an unknown perpetrator. That's very difficult, and most of what Mr. Kochis was asking him dealt with that problem, I think, if you get a mitochondrial profile and you don't know who it is. But if it's just random hairs and they don't match any of the victims, but they do match one another, Mr. Myers, I believe, specifically said that -- after a long time he was able to articulate, yes, that would be a significant finding and would be the kind of thing that any criminalist would want.

So that's why I believe -- and I believe the Court has correctly identified (4) and (5) as being the problems, and I've thought those were the problems for many months. So -- and that's where the motion is weakest. In every other aspect I believe it's very strongly supported, and in fact I don't believe the other segments are really -- can be

seriously contested.

When I'm done with this I'll talk about the Court's concern over Item (8), because I think when I'm done the Court will see our position as to Item 8.

I'm not really going -- I would submit that the -- if we go to (5) now, (f)(5), raising a reasonable probability that the verdict or sentence would have been more favorable, I think in that area --

THE COURT: Let me interrupt you just for a moment.

MR. McGUIGAN: Yes.

THE COURT: Is there any disagreement that the plain language of the statute prevails here, that to satisfy (4) the test is a prima facie showing and to satisfy (5) would be to raise a reasonable probability? Is there any --

MR. McGUIGAN: That's what the statute says. Now, what those words mean I don't think is entirely clear, your Honor, and we argued something about that earlier.

THE COURT: I understand there's no precedent for that, but that's what the language says.

MR. McGUIGAN: That's what it says.

THE COURT: All right.

MR. McGUIGAN: And I would submit as to the prima facie showing that the evidence that's sought to be tested is material, namely, (4), that that as much -- that was essentially conceded, I thought, by Mr. Myers when I cross-examined him and he said, yes, if those results were as discussed they would be significant about the identity of the perpetrators or perpetrator.

Now, the reasonable probability question I think deals somewhat with the type of hair to be tested and the evidence gathering, whether the hair would be -- results would be able to be separated from all these other hairs, and some of the things that Mr. Kochis was talking about.

I don't think there's any real likelihood, your Honor -- I don't know what Mr. Kochis is going to say, so I shouldn't say this because -- so I don't know what he's going to argue about the chain of custody. I think it's more than adequate for this hearing on the hairs. It's interesting that I think both sides are going to argue, well, the chain of custody of evidence we like is great, there's nothing wrong with it, but the chain of custody of the evidence we don't like is bad. It's a problem. So we can at least agree on that.

So the evidence gathering and handling, for purposes of this issue -- I mean, first it was the state or the sheriff's deputies who were doing the gathering and handling; and secondly, as Mr. Ogino admitted, the items that they seized, they seized them because they thought they were material. They thought that they would possibly yield evidence that they could use in prosecuting the case.

They didn't go out there and say, "Oh, gee, look at this dirty carpet. It's so dirty, there's no point in collecting any hair evidence." In fact, they collected all this hair evidence and they collected it because they thought it was significant and material. So I don't see how they can now say, "Well, it really is insignificant and immaterial, and

we just collected it because we needed the practice" or something. If they thought then that it was useful, now we know it's even more useful because of mitochondrial DNA.

So I think as to (f)(7) there is no question, again, that the method is commonly accepted. All of the experts were fully aware of it, and it's reliable.

Now, there's some concern that the motion is made solely for delay. Any death penalty case takes a long time to go forward, your Honor. If the prosecution wanted this case to go forward and resolve this DNA issue expeditiously, we started writing letters requesting that the DNA testing be agreed to by them over three years ago. It wasn't until the passage of this statute that they agreed to any DNA testing, and I would submit under the compulsion of this statute they agreed to it.

Then we negotiated the procedure, not part of this hearing, but I believe the agreement is on file, and it took four months to negotiate the agreement. And there was negotiation back and forth, and the wording of the agreement was discussed at length and so forth.

My vivid recollection -- Mr. Plourd was the guy who did most of that from the defense side, Mr. Millar for the prosecution. And I'm not saying it was improper or wrong, but it took three months to agree on the wording of that contract. And then having selected the analyst which we did, and only one analyst, of course, it necessarily took a long time for that, being the only guy who could do the work, to go forward.

Now we're here and now the prosecution, who resisted for four years doing this very testing, all this DNA testing that we're now at the point of, now says, "Well, for you to ask for the testing is just for the purposes of delay." I think that's not true, your Honor. As a matter of fact, the fastest way to get Mr. Cooper killed, which is the prosecution's goal, because that's their duty, as I see it, is to grant the motion, test the materials, and we'll know the answer.

We met with a number of media during the early stages of viewing the evidence and so forth in this case, both Mr. Millar and I. We talked to them. Invariably they said, "So what's the problem? Let's do the test and find out the answer." And certainly if we do the test, your Honor, and we find out the answer, what sort of appellate issues can be raised by the defense?

I would submit that some people -- if I were the prosecutor I'd say, "Sure, let's do it now. Let's do it last year. Do the mitochondrial testing too. Let's do it." It would be over. In less than six months we'd have the answer, and that is certainly not deliberately delaying anything.

If we don't do it, then we have appellate issues raised and these statutes, which have no appellate history at all, and to think that they're going to be resolved in less than six months is impossible. So I don't see how my request -- our request, the defense request to do mitochondrial testing could possibly be attributed to a desire to delay.

On the other hand, if the evidence turns out in

favor of the defense, that's where 1405 becomes very vague, I think, as to what happens then. I would assume, and it would be my position that we would come back to this Court and reargue whether relief should be granted. Now, whether we'd have to file that also as a habeas or not -- in other words, it doesn't say what happens if the defense wins.

Hopefully, the prosecution -- in this case the evidence at this point I think would be very significant, very material. But I seriously doubt, given the results of the nuclear DNA, that Mr. Millar or Mr. Kochis would say, "Well, let's let him out or let's modify his sentence." I think we would have to -- but that all remains to be seen. I think we would have to maybe have another hearing. That would only be necessary if the evidence is favorable to the defense, the outcome.

We're not standing here quarreling about how Mr. Myers and the DOJ lab, accompanied almost at all times by Dr. Blake, and selected jointly by the parties, these very people because both sides trusted what they did -- that Mr. Myers somehow contaminated the evidence in the midst of -- that he and Dr. Blake somehow -- I mean, we've got the answer now to the nuclear DNA. We don't have the answer to the mitochondrial DNA. All we're asking is that we do that testing, and the time spent involved would be, I think, less than six months and we'd know the answer.

So that's basically the argument I would like to make, reserving rebuttal, as I say. Thank you.

THE COURT: All right. Thank you.

Mr. Bernstein?

MR. BERNSTEIN: Yes. Thank you, your Honor.

I'd be the first to concede that the defendant has not made out a compelling case for evidence tampering at this hearing, but I don't think the statute requires him to make a compelling case, merely to show good cause, and that's sort of a nebulous standard that probably relies a lot on the subjective interpretation of various trial judges. I think the showing that Mr. Cooper has made, minimal as it is, should satisfy the good cause standard under the circumstances of this case.

We do know from Mr. Gregonis's testimony that 15 to 20 people had access to Mr. Cooper's blood when it was in the EDTA tube in the refrigerator at the San Bernardino crime lab, and we know that blood could be withdrawn from that tube without breaking any seals. We can't, of course, demonstrate how or who or when blood might have been planted on the shirt. If we could do that, we wouldn't need EDTA testing. We'd have that evidence without -- the tampering evidence without needing that.

There are some suspicious circumstances, at least. I mean, the shirt was defense evidence at the trial. There was no link to the defendant. There was testimony that the defendant couldn't have owned a shirt like that and Roger Lang, who the defendant stole clothes from when he left the house, indicated that the shirt was not his.

There are some suspicious circumstances regarding the cigarettes as well. On June 7th Ogino and Stockwell

searched the house, seized apparently only that one cigarette. On Wednesday, June 8th, I believe that was the date of Sergeant Arthur's declaration in support of the search warrant for the Ryen house, and he stated that hand-rolled cigarettes had been found in the house, even though they hadn't been.

Mr. Cooper was not a suspect, or at least not a particular suspect at that time. He was just one of a number of possibilities. They were mainly looking for three white men or three Mexican men at that time.

On Thursday, June 9th, the telephone records at the Lease house established that the defendant had been staying there, and he becomes the prime suspect immediately and a criminal complaint is issued against him that same day. Then Saturday, June 11th, the car is found in the parking lot and the two cigarettes are found in it.

There are a lot of missing cigarettes here that Mr. Cooper logically would have smoked. He testified at the trial in '83 that he smoked both commercial and hand-rolled cigarettes while he was in the Lease house. He certainly couldn't have anticipated these circumstances. That wasn't exculpatory testimony or self-serving testimony at the time. There's no reason to disbelieve it. That was his habit and custom, to smoke hand-rolled and commercial cigarettes.

So at this point I think that, minimal as it is, that should establish good cause because of the consequences of the testing here. If EDTA were found on the shirt in sufficient quantity to suggest it had been planted, that has

enormous consequences for the integrity of the evidence in this entire case, Mr. Cooper's guilt or innocence, more so, if counsel will forgive me, than any findings of mitochondrial testing on the hairs could provide.

Beyond that, I'd also like to address some of the People's arguments in their opposition, starting with the timeliness. It's true we had knowledge of the results of the testing a number of months before we actually made this motion. But this is a fairly new technology, the preservative testing, and we simply didn't think of it until Mr. Grele thought of it. There was no purposeful delay, and the statute doesn't suggest any particular time limit. So we think the timeliness argument should be rejected on their part.

I think to require that Mr. Cooper file a habeas corpus petition or motion to vacate the sentence prior to having any evidence to support it certainly would be elevating form over substance. We've made our legislative intent arguments in our discovery motion. We don't think that should be necessary, that a couple pieces of paper should be filed. If the Court wanted to and believed that should be the case, it could just deem this discovery motion as a habeas corpus petition.

The People say that this is Mr. Cooper's attempt to do an end run around section 1405 by using 1054.9, but that's not true. Under 1405 Mr. Cooper's already been granted access to the shirt through Mr. Blake, but that's only for the purpose of DNA testing. We're merely arguing that he should be granted continuing access for the purpose of EDTA testing,

which is not authorized by section 1405 but we think is covered by 1054.9.

The People say that in any event, the scientific acceptance or the acceptance in the scientific community of preservative testing hasn't been established and they would probably want a Kelly-Frye hearing if your Honor were inclined to grant the motion. We agree that would be appropriate.

That's about all I have to say.

THE COURT: Thank you, sir.

All right. Mr. Kochis?

MR. KOCHIS: Yes, your Honor.

THE COURT: I should accord you the same latitude that I accorded the defense on this. Have you discussed which order you would like to go?

MR. KOCHIS: I would go first.

THE COURT: Very well.

MR. KOCHIS: And with the Court's permission, I would address the defendant's last argument first, his request for additional discovery, which ties in also Mr. McGuigan's comments about evidence tampering.

The statute entails some showing of good cause. We've produced -- the People have produced numerous witnesses at this trial and this hearing, and the sum total of that testimony is that there has been no tampering. The testing of the materials at DOJ Berkeley was conducted in a blind testing fashion. We set out in some detail the fact that all the testing was completed before the known reference samples got to Berkeley. It's impossible for there to have been any

contamination in Berkeley.

Defense counsel talks about two of the pieces of evidence and why there's good cause that there should be testing. He talks about the cigarette butts taken from the Ryen car, one of them, and he talks about the T-shirt. Ironically, both of those items, both Trial Exhibit 169 and V-12, which later became Trial Exhibit 584, I believe, have remained in the continuous possession of the clerk in San Diego, the exhibit clerk, since the trial ended in 1985. We put on witnesses, the criminalist, to say they never came to San Diego and looked at that material.

If Mr. McGuigan concedes that there was no contamination in Berkeley, then he's either, by omission, suggesting that there's contamination here in the courthouse -- there's been no evidence of that -- or his argument is that there was some very subtle, sophisticated evidence tampering that took place in San Bernardino in 1983 and 1984. It was so sophisticated that it was done in a fashion that it didn't allow the prosecution to take advantage of it at the first trial.

It's absurd to suggest that someone would have sprinkled small spatters and smears on a T-shirt in 1983, that someone had a crystal ball and they could look into the future and project that there would be STR PCR Profiler Plus testing in 2001 and 2002 that would allow you to obtain those results.

Mr. Gregonis has testified he never put any of Mr. Cooper's blood on the T-shirt, he never put any of

Mr. Cooper's saliva on the cigarette butt. There's no evidence before this Court whatsoever of any tampering, of any contamination with any of those items, and the good cause showing that's necessary has simply not been met.

I can't even conceive of an argument, I don't think there is an argument, a logical argument, that would explain how someone in 1983 or 1984 would have tampered with the T-shirt or the cigarette butt in anticipation that it would lay dormant for 20 years and then come to life and make the prosecution case stronger. It's absurd.

Turning to the request for the mito testing and focusing on (f)(4) and (f)(5), the standard, as everybody has discussed, is the prima facie showing that the evidence they want tested is material to the identity of Cooper or the perpetrator of the crime.

What do we know about the hair? Mr. Myers and Dr. Blake looked at the hair, and there's over a thousand hairs. There are no clumps of human hair with roots attached. That's the testimony at this hearing. The defense theory is perhaps the victims grabbed hair out of the head of the assailant. You would expect roots. There are no clumps of human hair with roots.

The defense next argues that it could be significant if you have hair on the hands of various victims that don't come back to the victims, that don't come back to the killer, but they come back to the same source.

You have that. You have dog hair and you have cat hair that didn't come from Mr. Cooper, that didn't come from

the victims. It's on the hands of more than one victim. It's in the hands of victims that are partially closed. And you know from Mr. Stockwell every autopsy he's been to the victim's hands have been partially closed, so there's no unique significance to that.

Mr. McGuigan argues it is significant. How could the hair get in the hands of victims that are partially closed unless it had something to do with the killing? The dogs and cats were not involved in the killing. They're not suspects, and yet their hair is in the closed hands of the victims. That shows that hair can get in the hands of the victims in this scene, hair that has nothing whatsoever to do with the identity of the killer.

Let's talk about the carpet and the condition of the house. Ogino, Stockwell and Gregonis are scientists, they're criminalists. They were all inside the house. The carpet was filthy. It was dirty. There was all kinds of hair on the carpet.

We know from Mr. Ogino and from Mr. Myers, two of the criminalists that testified here, that hair can get to a location, whether it's a crime scene, a number of different ways. We shed hair. We can bring it to a room and it can be deposited when we shed it. People shed hair on us. It can be brought to the scene by people who move into a room and the hair that other people have shed on them comes off. We know that hair has history. It can stay at a scene for days, for weeks and for months.

What do we know about the limits of mito testing?

Myers, Steve Myers, testified there is no search database for mito testing. If you get a profile, you can't plug it in and identify somebody. It's a process of exclusion.

So in this case, assuming for the sake of argument, because this is argument, that there is hair that's not animal hair that's in the victims' hands that doesn't come back to the victims or Mr. Cooper, what does that tell us about the identity of the killer?

As Steve Myers testified, you would have to have head hair samples from everybody that was in that house weeks and months prior to the killing -- the victim's family members, Dr. Howell, the grandmother, the victims' friends, the victims' neighbors, the victims' visitors, the emergency personnel that entered the scene, the sheriff's department personnel that entered the scene, everybody that entered the scene before the victims were removed -- and you'd have to profile them to exclude them. And then you would have perhaps some unknown hair that would not necessarily point to a killer. It could have been anybody that was ever in that house for a legitimate purpose.

The fact that that consistent profile appeared in the hand of more than one victim, that's not significant because the animal hair appears on the hands of more than one victim, and the animals were not involved in the killing.

The defense had a hair expert at the time of the trial, Dr. John Thornton, and the evidence that was brought out at this hearing by the Court's questions of Mr. Negus -- we didn't make an issue of chain. Ironically the defense has

made an issue of chain, and we have brought in all the people that handled certain pieces of evidence on the law enforcement side to lay the foundation for the chain going back 20 years to cigarette butts that were taken in Long Beach.

Their expert had the hair for a period of time. I have no idea what he did with it. I have no idea how many people handled it. It would have been very easy to bring him down to tie that up. The defense chose not to.

But what's more important and what was brought out from the Court's questioning was Mr. Negus had a hair expert. Mr. Negus did not ask any questions of that expert at the trial regarding the hair on the victims' hands. Mr. Negus did not raise any issue about the hair in the hands of the victims even though he had a hair expert that examined the hair all the way back in 1984. If there was a defense to be developed, it would have been developed.

The defense also had an expert in this proceeding that examined the hair, and ironically Dr. Edward Blake has not testified that in his opinion mito testing would provide any useful information. The prosecution did present an expert who talked about the limits of mito testing and that was Steve Myers, and he explained because of transference, because of the history, how long a hair can stay, because of the condition of the house, because of the people inside, that there are too many variables for those results to provide useful information.

Dr. Blake and Steve Myers washed the blood off the hair in the victims' hands; and the blood from each hair, each

group of hair that came from the victims' hands, the profile came back to that victim.

For all those reasons, we feel the prima facie showing that's necessary under 1405(f)(4) has not been met.

Turning now to (5), the reasonable probability -- what the defense has to establish, the reasonable probability that, in light of all the evidence, the defendant's sentence or verdict would have been more favorable if DNA testing had been available at that time.

Perhaps the California Supreme Court does not make factual findings, but they did say in their opinion, I believe on Page 836, that -- and I'm going to quote:

> "On the other hand, the evidence of guilt was extremely strong. Many items of circumstantial evidence pointed to defendant's guilt. Some alone were quite compelling; others less so. In combination, the evidence established defendant's guilt overwhelmingly."

So in light of all the evidence, here's some of the things that still exist: There was a very unique footwear impression on the bottom of a tennis shoe that was manufactured only for prison inmates. The evidence at trial was that Mr. Cooper left the prison wearing those tennis shoes.

That footwear impression, that Pro Ked footprint, was found in the Lease house where he made phone calls from, in dust in the game room, it was found in moisture on top of the spa cover that led right into the master bedroom where the Ryens were murdered, and it was found in blood on the sheet of

the bed that the Ryens were sleeping in when they were attacked. An expert testified that that print was made by a Pro Ked tennis shoe, and the size was the same size the defendant wore.

There was also the hatchet, which numerous witnesses identified as coming from the Lease house where the defendant hid and controlled. That hatchet was consistent with the hatchet that caused the wounds of all the victims.

There was also tobacco, prison-issued tobacco, and there were experts that testified that prison-issued tobacco was found in the closet in the Lease house where Mr. Cooper slept and it was found on the floorboard of the Ryen car that was stolen after they were murdered, and it was found in the hand-rolled cigarette butt in the Ryen car.

There were also numerous other pieces of evidence which linked Mr. Cooper to the crime, and the Supreme Court so found.

But let's stop and now let's look at exactly what (5) says. How would the evidence be different in light of the fact that there is now DNA testing? And here's the landscape today: At trial the prosecution argued that the drop of blood taken from the hallway close to where Jessica was found, close to the hallway that the boys later came down when they thought Mr. Cooper was out of the house -- the prosecution argued that was Mr. Cooper's blood. The defense argued there was ambiguity in that result because of the EAP typing, and obviously the jury decided differently. But Mr. Cooper argued there was an ambiguity as to A-41 at the time of the trial.

There was no DNA at the time of trial.

Well, there is no ambiguity now. A-41 has been retested with STR PCR Profiler Plus, and the results are the victims could not have deposited that blood. It's consistent with Mr. Cooper's profile, and the numbers are extremely high, perhaps 1 in 310 billion African-Americans. The evidence is hardly more favorable to Mr. Cooper.

What about the cigarette butts? The People argued at the time of the trial that both the hand-rolled cigarette butt, V-17 -- I'm sorry -- V-12 and the manufactured cigarette butt, V-17, incriminated Mr. Cooper. The Ryens didn't smoke. The hand-rolled cigarette butt had prison roll-right tobacco in it. There was serological testing just on the absorption inhibition level and we argued it was proof that a nonsecretor's saliva was on that. Mr. Negus argued that that was very ambiguous, that it really didn't show Mr. Cooper deposited the saliva on the cigarette butts.

Well, there's been DNA testing and there's no ambiguity now. That saliva could not have come from the victims. The results of V-17, the manufactured cigarette butt, are that the profile matches Mr. Cooper, and at random it matches 1 out of every 19 billion African-Americans. V-12 matches Mr. Cooper and matches 1 out of every 110 million African-Americans at random. That is not -- those are not results more favorable to Mr. Cooper. They're very incriminating.

The hatchet -- there's no ambiguity now about the blood type on the hatchet. People that deposited the blood on

the hatchet -- Doug Ryen, Jessica, Chris Hughes -- that links the hatchet as the murder weapon, links the hatchet to the Lease house where Mr. Cooper hid, the house that Mr. Cooper dominated from the time Kathy Bilbia moved out until the time of the murders.

The T-shirt. The T-shirt was argued a couple ways at trial. Mr. Negus argued it was proof that there were other people involved in the killing. He argued it was proof some people that were drinking at a bar some distance from the scene committed the murders, and they had blood on the T-shirt consistent with Doug Ryen.

We did do some ABO typing. The People argued in the alternative it either wasn't involved in the crime scene or -- it was found along the side of the road, a road that led from the Ryen house to the freeway. The freeway led to Long Beach. Mr. Cooper had some blood on him that belonged to the victim. He tossed the T-shirt out as he drove toward the freeway, just as he tossed the hatchet out of the car on the way out of Chino Hills, and it was found by the side of a paved road leading from the victims' house to a road that eventually connected to the freeway.

Well, there's certainly no ambiguity now on the T-shirt. Mr. Cooper's blood is on the T-shirt. Doug Ryen's blood is on the T-shirt. You have a garment that links the defendant and the victim in time, in activity, bleeding, back to the crime scene. We know from the T-shirt, Trial Exhibit 169, that Mr. Cooper and Doug Ryen were bleeding at the same time and that their blood got on the same garment. Mr. Cooper

either was wearing it when he did the attack or he put it on afterwards and was wiping blood up.

Now, ironically there was a portion of the T-shirt that stayed in San Bernardino. CC stayed in San Bernardino where Dan Gregonis and anybody else, any of the other 15 people, could have broken the seal, resealed it, and injected Mr. Cooper's blood onto it, and guess what? No one found Mr. Cooper's blood on CC. No one found Mr. Cooper's DNA on the portion of the T-shirt that remained at the crime lab in San Bernardino with Mr. Gregonis. If he was going to plant something, certainly he had the opportunity and he didn't. The blood was found on the T-shirt that remained in San Diego.

The defense argues that the way to avoid delay is to go ahead and do the testing and you could do it in six months, and the fastest way to move toward judgment is the testing. It's an ironic argument to make, considering the history of their request. Mr. McGuigan is correct. Years ago they were interested in DNA testing. The People were not. They solicited the help of the media, and the question asked is: How could you not test the drop of blood in the hallway? How could you not find out what the results are?

So there was an agreement and we did it, and look what happened. We get motions regarding evidence tampering. We get motions for an evidentiary hearing. We get motions for EDTA testing. You want the testing so you can build a record and expand the record and start making motions and allegations as to how the evidence was handled, when the results point back to Mr. Cooper.

Returning for a moment to (5), 1405(f)(5), you have the overwhelming evidence of Mr. Cooper's guilt at trial that was outlined in the California Supreme Court opinion, and now we have what I would suggest is at least overwhelming evidence of Mr. Cooper's guilt, if not beyond overwhelming evidence of Mr. Cooper's guilt, that's been developed through the DNA testing that's been agreed upon.

In light of that, our position is -- the People's position is that the standard has not been met that there is a reasonable probability that additional testing, in light of all the evidence I referred to, would have resulted in a verdict or a sentence more favorable to Mr. Cooper at the time. The contrary is true. If this -- if these DNA results were available at the time of the trial, the case would have been even stronger than it was.

For those reasons we would ask the Court to deny the request for EDTA testing, deny the request for additional DNA testing. Thank you.

THE COURT: Thank you.

How about giving her ten minutes and then I'll hear from you, Mr. Millar. Is that all right?

MR. MILLAR: Certainly.

THE COURT: We'll be in recess for ten minutes.

(At 10:33 a.m. a recess was taken until 10:45 a.m.)

THE COURT: Mr. Millar?

MR. MILLAR: Thank you, your Honor. I will try, of course, to not duplicate things that Mr. Kochis has addressed.

The first thing that I wanted to do before

addressing our substantive affirmative argument is to address a few of the things that were raised in the arguments of Mr. McGuigan and Mr. Bernstein. Some of these, I should note in passing, are arguments that they have raised in recent U.S. Supreme Court filings, which I have responded to there.

One of the things that was raised is the assertion that the California Supreme Court did not actually make a finding -- did not actually make a finding that the evidence was overwhelming. Well, I would agree that appellate courts don't necessarily make the same kind of findings that trial courts make. However, that was not a passing statement in there.

If your Honor reads the opinion, that statement was made in the course of addressing whether the admission of a certain exhibit constituted harmless error or was prejudicial. And that statement, that conclusion that the evidence was overwhelming was made in the context of the California Supreme Court's conclusion that the error -- or any error in that regard was harmless. It was not dictum. It was not a passing observation made for no purpose. It was relevant to the decision and to the resolution of that particular issue.

Now, with respect to the length of the jury deliberations --

THE COURT: Well, it had to do with an exhibit, did it not, that was erroneously given to the jury?

MR. MILLAR: It inadvertently came into evidence. There were over 700 exhibits. That one slipped in, and on appeal it was -- it was an issue that was raised, was the defendant

prejudiced. That exhibit related to the preliminary hearing in Los Angeles on the prior convictions, and the counsel in that earlier case had made statements relating to 1368 and was Mr. Cooper having problems, et cetera, et cetera.

That exhibit had been marked for identification, but it was not supposed to have come into evidence. It did come into evidence because there were blocks of exhibits that were introduced. They didn't go through them all one by one, and this was part of a block of exhibits which defense counsel had offered, and nobody was thinking at the time, oh, that exhibit is in there.

But the point is that the California Supreme Court, in addressing that claim of error, concluded that any error -- first of all, they said there was no jury misconduct because the jury hadn't done anything wrong in admitting that exhibit. They said to the extent there was any error in the inadvertent admission of that exhibit into evidence, it was harmless error. And in reaching that conclusion, a significant part of their reason for that is they said the evidence of Mr. Cooper's guilt was overwhelming, and on the other side of the coin that particular exhibit was not of, you know, particular significance.

So that conclusion -- if you don't want to call it a finding, that conclusion that the evidence of guilt was overwhelming was made in the context of the California Supreme Court's rejection of a claim of error and its conclusion that any error in that regard was harmless, not prejudicial. So it was not a passing comment. It had significance to the

opinion. It was a carefully considered conclusion that the court reached in disposing of that claim of error.

Now, another suggestion that was made or issue that was raised was about the length of the jury deliberations. The California Supreme Court did not attach the same significance to the length of jury deliberations that Mr. McGuigan has done here. On -- I think it was the same page, but it's 736 to 737, in that range. I don't have the -- no. It would be -- excuse me -- 837.

Okay. The California Supreme Court said, quote: "Defendant argues that the jury deliberated for 27 hours over 7 court days, thus showing it considered the issue of guilt to be close."

And then they discuss, well, exactly how long it was, what were the actual deliberations, and discuss that. And then they said:

"The trial lasted over three months. Dozens of witnesses testified, some about complex scientific testing. Well over 700 exhibits were admitted into evidence. This was a capital case. It is not surprising that the deliberations were protracted. Even accepting defendant's time estimate, the length of the deliberations demonstrates nothing more than that the jury was conscientious in its performance of high civic duty."

That was the conclusion of the California Supreme Court. Whether we call it a finding or a conclusion, that was the California Supreme Court's conclusion on that point.

It's been argued that -- or the question has been raised, why would Mr. Cooper steal the Ryen vehicle and then abandon it in Long Beach? Well, actually, the inference to be drawn is entirely unfavorable to Mr. Cooper. If their argument is that this was a mere thief who stole the car, why would a mere thief murder the family, steal the car, and then abandon the car if the motive is monetary gain, abandon the car in Long Beach, in Long Beach, a long distance away?

Now, contrast that with Mr. Cooper. Mr. Cooper doesn't need to sell the car. He doesn't need the money from the car like a car thief would. He needs transportation out of the area. Once the transportation out of the area has served its purpose, Cooper can abandon the car in Long Beach. It's Mr. Cooper who has escaped from Chino and is the subject of a massive manhunt, literally the largest manhunt in the history of California up to that point in time. He knows that.

He testified at trial that when he was hiding out in the Lease house and he's in that bedroom, he's keeping the -- trying to keep from emitting too much light from the bedroom. He's got a little TV that he's watching in there, et cetera, et cetera. He knows that he's the subject of a massive manhunt.

There were telephone calls and evidence introduced at trial that Mr. Cooper made telephone calls to two female friends of his in an effort to do what? Get out of the area. He is trapped in that house. He has to get out of that house. He has to get away. He calls two people. They say, "No,

you're not getting help from us." That's all evidence at trial. It's discussed in the California Supreme Court's opinion.

What's the point? Mr. Cooper -- and by the way, the last of those calls the California Supreme Court noted was made -- I believe it was around an hour or so before the family -- the victims' family comes back from the barbecue, and then the murders take place shortly thereafter.

Mr. Cooper knows, I'm not getting any help getting out of here. I'm not getting away from this massive manhunt. And he knows one other thing too which is very important. He's been in that hideout house for about two and a half days, okay? When he first takes refuge in that house, the Lease hideout house, it appears to be, you know, semi-abandoned. There's no one occupying the house at that time.

Kathleen Bilbia, who had been there, was a ranch hand. She had vacated that house and that bedroom, actually, that Cooper took refuge in only a matter of a couple days earlier and she had scrubbed it down and all of this, and that was all in the record at trial.

But here's the point: Cooper's there for two and a half days. Why doesn't he stay there indefinitely? He's got this safe place. Why doesn't he stay there indefinitely until this massive manhunt dissolves? Well, something happens on the afternoon that the murders take place, that night, and that is Virginia Lang, who is the wife of one of the owners of that Lease hideout house, she comes back to the hideout house. What for? She's only there for about two minutes to

get a sweater. She comes in, she leaves. Fortunately for her, she doesn't confront Cooper, okay, or we might have another dead body.

But here's the point, here's the point: Once she comes in that house Cooper knows, if he ever thought he could, he can't stay there forever. He can't just sit and wait this out. He has to do something. He's not getting help from his girlfriends. He's not getting help getting out of there. He needs transportation.

A mere thief doesn't need transportation that they're going to abandon in Long Beach. A car thief who wants to get money from the car is going to steal the car, sell it. They're going to take it to a chop shop, whatever. They're not going to steal it, drive it all the way to Long Beach, which, by the way, is the area where Mr. Cooper is from. His prior burglaries were in L.A. County. That's why he's in Chino, from where he escapes. He's from there.

A mere car thief, they're going to drive the car to Long Beach and then just abandon it? No. That makes no sense. It makes a lot of sense for somebody like Kevin Cooper, who is an escapee from CIM, who needs transportation to get away from that massive manhunt, who needs to get to Long Beach so he can then make his way to Mexico. That's not a fact which casts any doubt on the guilt of Mr. Cooper. It's just the opposite.

An issue was raised that -- how could one person like Kevin Cooper have killed all of these victims, and that -- the suggestion was made that Dr. Root, who did the

autopsies, supported that conclusion.

Well, at the preliminary hearing he discussed that and he said that initially he was -- he had that concern, that question, okay? However, at trial -- what counsel has neglected to mention is at trial Dr. Root testified that the injuries that were inflicted on each one of those victims, taking each of them separately for a moment, could have been inflicted in less than a minute, less than one minute for each one.

He also testified at trial that a single hatchet wound to the head -- and I don't know that you need an autopsy or a pathologist to testify to this. I think it would be a matter of common knowledge. A single hatchet wound to the head of any of those victims would incapacitate them. It would either render them unconscious or they'd be seeing stars and it would incapacitate them. They would be no match for Kevin Cooper, who the trial evidence established was ambidextrous, who was armed with a hatchet in one hand and a Buck knife in the other. A single wound, okay?

And remember too, the victims are not all huddled together in the bedroom trying to figure out how they're going to defend themselves against this attack by Kevin Cooper. That isn't how it happened. That isn't how it happened. Mr. and Mrs. Ryen are in the bedroom, the master bedroom. They are either asleep or falling asleep, okay? They are in bed. It's nighttime. It's dark. They are not expecting to be attacked in what the California Supreme Court said was the sanctity of the Ryen home. They're not expecting that.

Okay. They are attacked. Cooper can take them out with literally a couple of blows to each one, less than a minute for each one, a single blow incapacitating each one, okay?

What about the three children? The three children aren't initially in the master bedroom. They are in another part of the house. They're sleeping. They apparently hear sounds, screams, et cetera. Josh Ryen said in some of his statements this wakes them up, okay? They go down the hall one after the other, a dark hallway, one after the other. Apparently Jessica is first because when Josh comes down the hall he sees Jessica's body, okay?

They come down the hall one after the other, apparently Jessica first, and then Chris Hughes, and then Josh -- saying, "Where's Josh, where's Josh?" Okay. Dark hallway. They're not going to be any match for Kevin Cooper, who has already taken out mom and dad, and the kids come down this dark hallway one after the other.

Okay. The argument that the hair must have been seized because it was considered useful, had value. Well, we all know criminalists seize a lot of things and they're hoping that they have value, okay? But consider this, okay? Yeah, if the hair had been found to match Kevin Cooper, would it have had value? You bet, of course. It's like a lot of evidence, okay? But the evidence at trial -- and it was in all of the sheriff's department records -- is that evidence didn't match Kevin Cooper. We don't need mito testing to establish that fact, okay?

Well, but what about the argument that if it shows it was the real killer, it wasn't Kevin Cooper, what about that, okay? That goes back to the testimony of Mr. Myers. You're talking about apples and oranges when you're talking about including somebody by getting positive results, and excluding, okay? What the defense wants to do in this case is to exclude the victims and Mr. Cooper, and then say the conclusion follows that it must be the real killer.

But what did Mr. Myers testify? It's not quite that simple. It doesn't tell you who the real killer is. What it tells you is you've got a hair or hairs that you can establish through mito testing to be sure don't match Mr. Cooper. We already know that. We knew that at the time of trial. It doesn't match the victims. So what? In effect, that's what Mr. Myers has testified. So what?

Why? Because those hairs can get there in any number of ways. How, as Mr. Kochis pointed out, did the dog -- the animal hair, the dog hair and the cat hair get there, okay? They weren't the killers. How did their hairs get in the hands? So what?

In fact, I thought it was very interesting that when Mr. Myers testified, he said not only wouldn't he be surprised to find hairs that didn't match the victims and Kevin Cooper, given the condition of the house and all of the circumstances of the crime, he said he would be surprised if -- what? If you didn't come up with hairs like that.

Now, what does that tell this Court? So what? That's what you would expect, given the condition of the house

and given all of the circumstances of the crime. So what is mito testing going to tell us? So what?

As Mr. Kochis pointed out, without being able to match up any hairs that don't match the victims or Kevin Cooper, without having a database where you match that up, it's not going to tell you who the real killer is. It's not going to tell you anything.

It's not going to tell you that it wasn't a repairman, friend, relative, postman, FedEx man, veterinarian -- they raised horses there -- friends, relatives, visitors. It's not going to tell you that none of those was there. It's not going to tell you it wasn't one or more of the law enforcement people that were there before the bodies were moved. It's not going to tell you that. And 20 years later there is no way in God's creation that you're ever going to be able to prove that.

That's fine, of course, for the defense, okay? That's fine. They're happy just simply saying, "We've got a hair or hairs that don't match Mr. Cooper or the victims. It must be the real killer. It's up to the prosecution to figure out, of course, who the real killer is." You can't do it and it's not the real killer, okay? It could be anybody.

I thought the example that, again, Mr. Myers used was extremely telling. Remember when he testified about the single blond hair on his coat and he said, "Hey, it's not my wife's hair. She's black. It's not my hair. Take a look at my hair," he points out. Okay. Now, why don't we just do mito testing on that hair, Mr. Myers, and we'll be able to

prove to your wife who it was so we can convince her it's not some mistress of yours or something, okay? Who are you gonna get for hair samples?

Now, here's somebody in current time, not 20 years ago, okay? Was it somebody from the lab where he works? Well, why don't we just get samples from all of them, okay? Well, maybe it wasn't somebody from the lab. What if he's walking down the street and he brushes up against somebody or a hair falls out of the air or whatever.

The point is if you can't do that, if you can't do mito testing on that single blond hair on his coat and find out whose hair it is, how can you possibly do mito testing on the hairs in this case and say, oh, well, we've got a stray hair or two that don't match, and therefore what? Mr. Cooper didn't commit the crimes?

And what happens to all the other evidence in the case, by the way, if you get a result, you get a stray hair that doesn't match? Does all the other evidence in the case just magically disappear, the overwhelming evidence of guilt that the California Supreme Court had found at trial before DNA testing? All of the DNA tests which thoroughly incriminate Mr. Cooper and show that the result of the trial was right? That evidence doesn't go away.

When you put a result like that up against that evidence, what do you say? Hey, there's stray hairs all over, okay? And anybody who saw the condition of that house and the condition of that bedroom would tell you the same thing. There are stray hairs everywhere.

And don't be confused by the argument, yeah, but they weren't in the hands. What about the dog and cat hairs in the hands? They weren't the real killers. How did their hairs get in the hands of the victims, and not just one victim, more than one victim? And what about the fact Mr. Myers testified that a lot of these hairs are cut hairs, okay? How do you get cut hairs?

Well, all of these victims had horrific hatchet wounds to their heads. That's how you get cut hairs. If their theory had merit we ought to have clumps of what? Hairs with roots and with that material attached to them that Mr. Myers testified about. I forget the exact wording that he used.

What did he testify? You don't have that here. You don't have evidence supporting their theory here. Could you in another case? Maybe. That's not this case. In this case you've got animal hairs, you've got cut hairs. You do not have in the hands of any of the victims a clump of hair with roots and with the material attached to it that you would expect if their theory had any merit.

And, of course, again I want to emphasize to the Court, consider just the total illogic of their theory to begin with. Their theory is that all four of the murder victims, all four of them -- Doug Ryen, Peggy Ryen, Jessica Ryen, and Chris Hughes -- all four of them, including two children, two children in the dark of night, somehow get really lucky and manage to do what? All four of them manage to pull a clump of hair from the head of their

hatchet-wielding attacker's head, all four of them.

Now, that is a rather amazing coincidence that they require in order to support their theory to begin with. On its face it's ludicrous. It's absurd. Chris Hughes grabs a clump of hair in the dark as he's walking down this hallway, not expecting to be attacked? He gets attacked presumably like Josh Ryen said, he was attacked from behind, okay, which is what you would expect from an attacker.

He doesn't walk out and say, "Hi, I'm Kevin Cooper," and hit him in the head with the hatchet. He's hiding in the hallway and he takes them out one after another. How is it they're going to be able to pull a clump of hair from the head of the real murderer? It never happened, okay? And we know that because Mr. Myers said they don't have clumps of hairs in their hands which are human hairs pulled from somebody's head. That's not the evidence. Mito testing isn't going to do any good whatsoever here.

Now, as Mr. Kochis indicated, I found just amazing the argument about the delay, the delay in this case. That's quite interesting. The crimes occurred -- we passed the 20-year anniversary of the commission of these crimes in June of 1983, okay? The intervening 20 years have been based upon various petitions, motions, claims made by Mr. Cooper.

With respect to the DNA testing here, we agree to do DNA testing. We do the DNA testing. They want more DNA testing. They want to challenge the results. They have no evidence to attack the results.

And in that regard, again, where is Dr. Blake?

Where is Dr. Blake? He is their DNA expert. Not only is he their DNA expert now, he was their serologist at trial. He had the opportunity to see all of this evidence at trial, okay? He had the opportunity to see it. Where is Dr. Blake testifying, "Oh, I think there was contamination here. It doesn't look the same to me as it did at trial." Where is that testimony by Dr. Blake? He's not here. He didn't testify to that. Where is the testimony from Dr. Blake that our lab did not appropriately test the evidence, okay? There's no evidence like that here. They haven't produced that.

In the Court's order setting this matter for hearing the Court said:

> "This ruling is not predicated on a finding that the defendant has met the 'reasonable probability' burden argued at the hearing, as the court opines that such a determination would be premature. However, the defendant will be required to make the 'reasonable probability' showing, along with meeting the other requirements of Penal Code section 1405(f)" -- as in Frank -- "(1) through (8) at the hearing."

They've had their opportunity. This Court has afforded them their opportunity to make that showing. They haven't done it. Dr. Blake hasn't been here. What about the chain of custody requirement in (f)(2)? As Mr. Kochis pointed out, where is -- where is Dr. Thornton? Where is Mr. Espinoza?

Where is the testimony to establish that that hair

that they want mito testing on is in the same condition it was at the time of trial and has not been tampered with or altered? Where is that testimony? It's not here. The Court did not get that testimony from trial counsel, Mr. Negus. He didn't -- he testified about the hair, but he certainly didn't testify in a manner which would allow this Court to make that finding.

Under 1405(f) it says, "The court shall grant the motion for DNA testing if it determines all of the following have been established," not one, not two, not some, not maybe, "if all of the following have been established." They didn't establish that, the chain of custody, and neither have they established the requirements in subsection (4). It's not material. Mr. Myers has explained why it's not material.

The question of whether you can do mito testing on hair is not the relevant question. Of course you can. The question is should you. How do we answer the question should you? We have the statute. The statute says you should if you meet all of those statutory requirements. Can you do it? That's not the question under the statute. The statute doesn't say if the defendant wants testing on something and the DNA testing that they propose can be done, by golly, it should be done. The statute doesn't say that.

The statute imposes a "reasonable probability" requirement, and in our opposition papers we spent considerable time and effort -- and there was a reason -- to explain to the Court what "reasonable probability" means. This was not an inadvertent piece of language which crept into

the statute. That was the advertent language that the Legislature chose as the statutory standard. It has a lengthy history in the cases.

Strickland says -- that's Strickland, S-t-r-i-c-k-l-a-n-d, versus Washington, a leading case, as the Court well knows, on ineffective assistance of counsel -- "A reasonable probability," and I quote, "is a probability sufficient to undermine confidence in the outcome," meaning the outcome of the trial, and that's Strickland at Page 687. "A reasonable probability is a probability sufficient to undermine confidence in the outcome."

I have no doubt that the trial judge had confidence in the outcome before DNA testing. Does this Court have confidence in the outcome of the trial? I certainly hope so. I think, based on all of the evidence at trial, the conclusion of the California Supreme Court, the result of the DNA testing -- which they've had an opportunity to produce evidence that this Court should not rely upon as valid testing and they haven't done that -- this Court should have absolutely no doubt whatsoever in the outcome of the trial, no doubt whatsoever.

But that's what a reasonable probability is designed to test. And in Strickland the court went on and talked about ineffective assistance of counsel and the reasonable probability requirement as meaning there have to be errors, quote, "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." That's what we're talking about here. Do we need to do DNA testing in order to

determine that the result of the trial was reliable? We don't. Obviously, we don't.

In other cases that we cited, in Wood versus Bartholomew -- W-o-o-d versus Bartholomew, B-a-r-t-h-o-l-o-m-e-w -- the Supreme Court emphasized, concerning Brady violations -- and Brady is an analogous context because it says, hey, you didn't have all the evidence there, did you? The prosecutor withheld critical evidence, okay? Which we don't have here, but they said -- in Brady they say they reversed the Court of Appeals because its judgment finding a Brady violation was, quote, "based on mere speculation, in violation of the standards we have established," the standard being reasonable probability. Mere speculation, they said, is not reasonable probability.

If it were, you would get virtually every case reversed because you can always speculate. If the defense can't come up with some kind of speculation, they're not very good defense attorneys. Speculation is not the standard. Reasonable probability is. The United States Supreme Court has repeatedly emphasized that.

The California Supreme Court has done the same thing in People versus Watson, which is the leading case on harmless error analysis, 46 Cal.2d 818 at Page 837, which again adopted a reasonable probability standard to determine whether error was prejudicial on appeal. The California Supreme Court emphasized that the test of prejudicial error, quote, "must necessarily be based upon reasonable probabilities rather than upon mere possibilities." Why? They said in the next breath,

"Otherwise, the entire purpose of the constitutional provision would be defeated." That's 46 Cal.2d at Page 837.

Watson is designed to protect against miscarriages of justice. It's an interpretation of what is now Article 6, section 13 of the California Constitution. What is 1405 designed to do? To protect against miscarriages of justice in situations where, what? We cannot rely upon the result of the trial. We need more testing.

The question ultimately before this Court is when is enough enough. The California Supreme Court said we had overwhelming evidence of guilt at trial. We now have the DNA test results, which remove any alleged doubt whatsoever. The defendant's argument was, "Please, please, do some DNA testing and we'll prove that Mr. Cooper's not guilty." It proved exactly the opposite. The testing has incriminated him at every turn.

They've said, "Oh, yeah, but there's probably contamination, tampering." This Court has afforded the defense an opportunity to produce the evidence of what they claim was contamination and tampering. There was absolutely no such evidence that I heard.

Yes, they raised some additional possibilities. We've got 15 or 20 other criminalists. So apparently now it's not Mr. Gregonis who tampered with the evidence or contaminated the evidence. They can't prove that. So what do they say? "Oh, you didn't bring in the other 15 or 20 criminalists." Presumably they were doing his dirty work for him, for some reason that is unknown. There is no evidence of

that.

And what about the evidence that's remained here in the San Diego Superior Court evidence room under the control of the court's own officers, the evidence clerk, Mr. Nicks, who came in and testified? Mr. Gregonis has had no access to that evidence since the time of trial, no access to that evidence.

How does the blood get on that T-shirt, okay, Mr. Cooper's blood? How does it get on there? They haven't got an explanation for that. Has your Honor seen in their papers any point in time where they've come up with a specific theory as to how that blood got on that T-shirt? They can't do it. They can't explain the fact that that T-shirt has been under the custody and control of the evidence clerk here. They can't do it and they haven't done it, and they've had a hearing to be allowed to do it if they could do it.

I have just a couple more comments, and then I will be done.

We have talked about -- in our opposition to their request for EDTA testing, I want to emphasize that the basic point is you only do EDTA testing where you have evidence which supports the conclusion that maybe there's been contamination or tampering. If this Court concludes there's been no such evidence, their theories are absurd and ridiculous, why do you need to do EDTA testing?

I know why they want it done. It's in their interest to have this case continue on indefinitely, into the 22nd century, okay? I understand why they would want more

testing. I understand why they would want EDTA testing, okay? But the question this Court has to ask itself is: When is enough enough? They can ask for testing on other items of evidence, if they don't like the results on the mitochondrial testing.

If you look just at the blood evidence in this case that hasn't been tested, there was blood all over the room. The photographs at trial show there was blood all over that room, arterial blood squirting out from Doug Ryen on the walls and stuff. How do we know -- how do we know that unless we tested every drop of that blood? Maybe the real killer's blood is hidden in there somewhere. We'd be here until the cows come home if we do that.

This case will never have an end if that's the standard, but it's not the standard. Why? Because the statute says: Is there a reasonable probability if we did that, just like if there's a reasonable probability if we did mito testing on the hair, that it's going to tell us anything of value? Steve Myers said it's not going to do that. It's not going to do that. Can it be done? Yes. Should it be done? No. Why? There's no reasonable probability it's going to produce anything of value.

Just one additional thing concerning the T-shirt. I thought it was quite interesting because Mr. Myers testified about this. Mr. Kochis alluded to the fact that Mr. Gregonis would apparently have to have been very, very sophisticated and clairvoyant to think, well, let's see, I don't want to sprinkle blood on the T-shirt and then have it tested at the

time of trial and say it's Cooper's, okay? What I'm going to do is I'm going to sprinkle this on, and I'm thinking down the road here -- there's no DNA testing now, but in several years there could be DNA testing, and 20 years later they may do DNA testing and somebody will find the blood on the T-shirt.

What did Mr. Myers tell you about how that blood on the T-shirt was found? Did he say Mr. Gregonis called up and said, "Oh, be sure and test the T-shirt. You're going to find Mr. Cooper's blood on there"? Did our lab say, "Oh, we think that" -- it was Dr. Blake who suggested doing that testing, their expert. That's why those spatters were found. He said, "You know, I think I see some faint smears on here. I want that tested."

Remember, Mr. Myers said he was almost adamant. He virtually insisted on that. That's their own expert. This wasn't some concoction of Mr. Gregonis. It wasn't even the initiative of our lab. It was their own expert who said, "I want that tested." It was tested. What does it come back? That's more of Mr. Cooper's blood.

Now, with respect to Dr. Thornton, I anticipate that one of the things that the defense will argue in that regard is, "Ah, yes, but Dr. Thornton at the trial, all he could do was microscopic examination of the hair. He didn't have mito testing available." That's true, okay? So what's the relevance of that?

The relevance of that is this: As Mr. Kochis argued, trial counsel, who left no stone unturned in those 107 volumes of trial transcripts in this case, okay, did not make

any issue about the hair evidence at trial. Why? Because Mr. Thornton's examination didn't give him any reason to believe that that hair came from anybody other than the victims or Mr. Cooper, or that if it did, it's going to be of any value, stray hairs, et cetera, et cetera. There was no issue made at trial.

But now we've got mito testing, the argument will be made, okay? But what's the relevance? The Court has to find a reasonable probability that because we have mito testing we should do it; because we can do it, we should do it.

The fact that there was no issue raised at trial should suggest that there's no reasonable probability that because we have another test available now, we're going to come up with anything different than what? Than presumably what Dr. Thornton told trial counsel. It's pointless. It's pointless.

There's no reasonable probability that even though we now have mito testing that we didn't have at that time, that trial counsel didn't have -- there's no reasonable probability that we're going to reach any different result than what trial counsel had available to him through Dr. Thornton.

And again, we haven't heard from Dr. Thornton what the results of his examination were, or Mr. Espinoza. We haven't even heard about the chain of evidence, okay? We haven't heard about any of that. We haven't heard from Dr. Blake casting any doubt on that, suggesting that there was any contamination, none of that, none of that.

They've had their hearing. This Court gave them that opportunity. It is their burden. The statute sets forth specific requirements. They cannot meet the chain of custody requirement. They can't get to first base. They can't show chain of custody even. They can't get to first base. They can't show (4), that it's material, for the reasons that Mr. Myers testified. They can't show (5), that there is a reasonable probability.

There are at least three requirements under the statute and they have to satisfy every one of them, and it is their burden. They've had the hearing. They've had the opportunity. They just don't have the evidence. I submit it.

THE COURT: Thank you, Mr. Millar.

MR. BERNSTEIN: Your Honor, we were going to reverse the order for our rebuttal if that's permissible.

THE COURT: Any objection to that?

MR. KOCHIS: No.

THE COURT: Go ahead.

MR. BERNSTEIN: First, I think that the People have misrepresented some of our arguments at this hearing. With regard to the cigarettes, we've never suggested that any saliva was planted on the cigarettes. What we suggested is that cigarettes that Kevin Cooper smoked and are unaccounted for in the Lease house could have been planted in the station wagon.

As regard to -- with regard to the blood on A-41 and on the T-shirt, there's no question that that's Mr. Cooper's blood. The question is how did it get there. So all of the

argument in the world that, yes, this proves it's Mr. Cooper's blood doesn't respond to what we have to say.

And as for Mr. Gregonis and the EAP matter, perhaps at trial that was used to try to impeach his results because he was asked, "Well, if your result was correct, then it couldn't be Mr. Cooper, right?" Which he was forced to admit. But the purpose of our bringing that up at this hearing is simply to reflect on Mr. Gregonis's credibility. Apparently he's willing to embellish his testimony beyond what his findings are. He was willing to do it in this case at trial, and that's the only reason we bring that up.

With regard to the People's characterization of the evidence at trial, it's not nearly as unambiguous as they claim. When Mr. Cooper was in the Lease house he called his girlfriend in Pennsylvania asking for money, wanted money sent to him, but there was no way she could send to it him because where would she send it? Assuming even that Mr. Cooper somehow could pick it up, that there was a Western Union out here, he didn't know where he was. He couldn't tell her where to send it.

His primary need, at least in his own mind, was money. Yet we know from testimony at the trial that there was cash lying around in the Ryen house in plain view that was never taken. He must have seen it if it was him because some of the cash lying on the counter in the kitchen was illuminated by the refrigerator door when the refrigerator door was opened, and there was victims' blood inside the refrigerator. So somebody involved in the killings opened

that refrigerator door, saw that money, must have seen it, didn't take it.

On a stool right next to the money was Peg Ryen's purse which, from the testimony, had a good deal of cash in it. No one examined that purse. No one took any money out of that purse. There was more cash in Doug Ryen's pants, which were lying in the bedroom. Nobody examined those.

The prosecution didn't suggest any motive for the crimes at the time of trial. The California Supreme Court came up with the idea that the obvious motive was to steal the car. It wasn't obvious enough for the trial prosecutors to figure it out if that was the motive.

The testimony was uncontradicted that the car keys were in the car at the time. He didn't need to go in the house at all to steal the car. And even if he didn't see the keys, there was no evidence from the crime scene photos that there was any ransacking going on when the murders happened. Somebody took a beer. That's the only evidence. The drawers remained closed. There was no evidence that anyone searched for the keys inside the car.

The evidence also established there were two loaded guns in that bedroom about five feet from where Mr. and Mrs. Ryen were sleeping. If Kevin Cooper alone was attacking them, it would seem the other adult, the one not attacked first, could make an attempt to get those guns. There was no attempt to get the guns. So there are questions about the evidence.

Mr. Kochis suggested where the T-shirt was found is incriminating to Kevin Cooper because it was right near a

freeway that led directly to Long Beach. Obviously, that freeway leads to a lot of places, not just Long Beach. If Mr. Cooper took the car, he was less than two hours from the Mexican border. Why wouldn't he drive it across the border himself rather than take it to Long Beach and risk additional time before the bodies are discovered in the United States?

There are reasons to doubt this evidence. Most of the case relies on -- it relies on scientific evidence and the circumstantial fact that Mr. Cooper was in the Lease house beforehand. Well, yes, he was in the Lease house beforehand. He admitted that himself. That wouldn't be enough. It's A-41, these cigarettes. These are the things that incriminated Mr. Cooper more than anything else, which leads me back to EDTA testing.

We don't know -- as counsel have stated, we don't know whether it was Mr. Gregonis. We don't know who it was. We don't even know if it happened. We can't show it. We can't show that blood was planted on the T-shirt. Obviously it was not planted on the T-shirt before trial. It's just a theory the People are floating because it's easy to shoot down and ridicule. Obviously, the police did not plant blood on Mr. Cooper's shirt before trial and then not find it at trial. It had to have happened sometime afterwards.

If it did happen, it happened post-1997 because that's the first time we were really discussing DNA testing at all, and of course Mr. Gregonis or whoever did that, if it happened, wouldn't call the crime lab and say, "Be sure and test the T-shirt." That wouldn't be necessary. If the blood

was on there, they'd find it then.

EDTA testing is a fairly simple procedure. If the results were that there was EDTA in sufficient concentration to show that the blood was planted, that has enormous materiality, enormous consequences for the evidence in this case and for the integrity of the entire case against Mr. Cooper. It's a simple, easy thing to do. It wouldn't involve any delay.

Mr. Cooper has other proceedings, Atkins and Ring proceedings in the California Supreme Court at this time. If they're denied, they go to Federal Court. All this testing would be done and completed long before those issues are resolved. So there's no issue of delay. It's a death penalty case, and simple justice requires that this test be done. It's a simple test. The results could be very, very material and they simply should be done.

THE COURT: Mr. McGuigan?

MR. McGUIGAN: Thank you, your Honor. We're going to make it before lunch.

Mr. Millar is always capable of getting the juices flowing. But I would submit, your Honor, as the Court knows -- and I know the Court has listened to at least hundreds and probably thousands of lawyers argue their cases -- one of the techniques which Mr. Millar uses is it's much easier to set up a contention that the defense is making, not the contention they're making but one that you can ridicule, and say that's really the contention that they're making.

This is a facet of his arguments that I've noticed

over the years in reading his replies. He usually rewords the appellate pleadings and says, "Well, they say these are the questions, but they aren't. These are the questions they really should be asking, one, two, three. Now let me attack those questions." And he does that, and he did that here. So, you know, it's an effective argument, but I think it's called setting up a straw man.

I don't like to use words like "amazing," "ludicrous," "ridiculous" and so forth in argument. And I know that, death penalty cases being so polarizing as they are, there is a tendency for both sides to slip into that, and I try to avoid that. I'll try not to make any ridiculous or ludicrous arguments, and I leave it to the Court to decide whether I have.

Mr. Millar spent some time stating that the most massive manhunt California has ever seen was launched for Mr. Cooper when he walked out of CIM on a res-burg commit. A massive manhunt happened after the murders. It would be -- what shall I say? It would be ridiculous to launch a massive manhunt for any escapee from Chino, which at that time was a fairly open facility.

And in the media -- this case was transferred from San Bernardino because of excessive media pressure and influence, and the community was very wrought up about it. And among the materials that were presented to the court on that transfer hearing was an interview with this guy from CIM, and the reporter is saying, "How did -- how did Cooper get away?" And he said, "Well, I suppose he just walked right

under that fence over there where it goes over the culvert. That's the way a lot of the guys do it."

"Well, has this happened before?

"Oh, yeah, probably.

"How often?

"Oh, two, three, four times a month.

"What?" says the reporter. "How do they get away?"

He said, "They usually just call their girlfriends and ask them to pick them up."

Now, if every one of those escapes had resulted in the most massive manhunt in California history, we would have just been existing in a total state of massive manhunt. So the massive manhunt took place, of course, after Mr. Cooper was designated as a murder suspect, not because of a nonviolent walk-away from Chino, which was a common occurrence at the time.

So there's absolutely no basis for him to be desperate. In fact, as I argued to the Court earlier and as Mr. Millar obviously agrees, the way to get a massive manhunt focused on you is to murder four people. Then you will get a massive manhunt focused on you.

Now, we are back to the point where how could, you know, the People be so prescient, the prosecution folks, back in 1983 to plant this blood? But the defense, Mr. Negus and/or Dr. Thornton, are so prescient as to alter the hairs so they will be discovered now. And I have commented on both of those things, and those are not our arguments.

Now, the ambiguity about A-41, your Honor, is as to

the drop itself, and there was ambiguity as to the serology that was done at the trial also. At that time, as the Court I'm sure remembers, there was a great deal of dispute about serology and the techniques that were used in serology, and as soon as DNA became readily available that whole area was dropped. So it was a perfectly legitimate attack to make and was made in many courts, but there was always another ambiguity as to the drop itself.

The Court, I recall, questioned Mr. Stockwell quite closely on the drop, on how it came to be and its path. And the interesting thing is that it was found down the hall, away from the murder scene, where, according to Mr. Millar, Kevin Cooper waded around in his tennis shoes in the blood and then walked down the hall without leaving any bloody footprints whatsoever, and dropped this single drop about 10 or 12 feet down the hall.

Now, the problem arises from the time A-41 was seized by Mr. Stockwell until it was finally tested at the lab. A person named Baird was one of the persons at the lab at that time, is no longer there. Later on, not at that time but later on, he apparently became addicted, took --

MR. KOCHIS: I'm going to object. There's no evidence of that in this hearing.

THE COURT: Sustained. Besides, I don't necessarily think it's relevant how to characterize the gentleman.

MR. McGUIGAN: Anyway, he is the person who tested A-41. We've always had and it's always been a question that's been raised many times throughout the course of the appellate

proceedings in this case, whether A-41 was replaced or substituted within the crime lab itself, and that's a serious question which has been raised and never definitively answered. So that's why A-41 remains ambiguous to this day.

And the tennis shoes, I think the prints were not the same size. And the other Pro Keds -- there was another set of Pro Keds found in the lab, also in the custody of Mr. Baird, which were not Kevin Cooper's because -- I don't think they ever recovered them from Kevin Cooper.

So the hair -- once again, we're talking about the dog hair and the cat hair, and I said at the beginning and I'll say it again because apparently -- we're not saying that the dog hair and the cat hair should be tested, and Mr. Myers, the state's own criminalist, said it's not difficult for any qualified examiner with the spectroscopic microscope to sort through and sort out the animal hairs, and then they can even look at close calls with a higher magnifying power microscope.

So it wouldn't be difficult to reject all the cat and dog hairs. We're not asking for any of those cat and dog hairs to be tested. We're certainly not contending that the cats and dogs -- you know, there's red herrings, and I guess there's red dogs and red cats. We talk about these things, but that's not what the issue is.

Our issue -- and we're not asking -- we're not seeking to go out and arrest the perpetrator or the person who deposited these clumps of hairs. I know that's a problem for the prosecution, and it's not surprising that they find it disturbing and difficult, and I made it clear to Mr. Myers, I

made it clear in my opening argument, and let me repeat again.

What we believe makes this evidence material is if it matches -- if the mitochondrial DNA from different hairs in different persons' hands match one to the other, which Mr. Myers admitted was quite possible and which he admitted would be a very significant finding, that's one thing. We can also determine whether they are indeed the victims' hairs because we have all those materials.

The database that we would be comparing it to is the database we have, the database that these hairs will provide us, and of course everyone agrees it's not Mr. Cooper's hair anyway but we'll compare it to that just in case. And if it comes out to be -- it's not like there's one or two hairs. It's not like poor Mr. Myers, who had the single blond hair. I notice he didn't suggest that we make comparisons with other girlfriends of his to tell his wife the results.

But here we have Exhibit 44, Exhibit 41, large clumps of hair, your Honor, and they're human hairs, and we can look at them and see that. And there are some animal hairs -- a few animal hairs mixed in with these, that's true, and there was a lot of animal hairs on the carpet.

We didn't need -- I'm sure your Honor -- I don't know. I have a basset hound. I got him because I had an Akita before and he shed all over the house all the time, and so I said the next dog is going to have short hair. So I got this basset hound, and he's been shedding all over the house ever since. So anyone who's had a dog knows that they all shed all over the house, and you try to keep it clean and it

doesn't take long for that to happen.

That didn't prevent these criminalists from seizing samples of all the hair that they thought were significant. And, of course the hair in the hands of the victims is significant, and they also seized all the other hair from their bodies.

Now, I have never suggested in this hearing to this Court that we test that other hair because to me it seems very likely that that is hair that was picked up when the person was rolling around. If the Court should order this testing which we are requesting it to do, I would refer that to the criminalists, just as we have with the DNA testing, for them to decide whether any of those other hairs should be tested or not, and I fully expect that that will include Mr. Myers' input. As far as I'm concerned, it will.

So we're asking for the testing of the hair in the hands, and we're asking that the animal hair be thrown out. And if it all comes back -- if it comes back to maternal ancestry of numerous different people, the state's argument which they made here, they can make it again and it's going to be a very powerful argument. But to say that that's going to happen now before we've even done the test is not a viable way to argue.

Now, to say that Mr. Cooper has been delaying this case for 20 years, I will submit it's true, he doesn't want to die any more than anyone else wants to die. Everyone is entitled to do what they can to stay alive, within reason.

But half of the time or more that Mr. Cooper has

been sitting in death row, just like everybody else in death row in this state, is because he's sitting there without a lawyer. There's nothing he can do about that. It takes a long time to get the lawyer appointed on appeal in the first place. It takes a long time to get the lawyer appointed on a habeas in the second place. So at least half of that time is because he's waiting for a lawyer, and that's true of everybody on the row. Some of the guys have been up there a long time and they still don't have a lawyer.

One of the reasons is that, of course, it's very difficult to get funding and to get the funds paid promptly. And so to say that we should somehow go and launch a manhunt for Mr. Espinoza and produce him here to say that, "Hey, I didn't alter the hairs," and produce Dr. Thornton here to say, "Well, hey, I don't remember anything about this. My files are long gone" -- so what we had was we had Mr. Negus.

If the prosecution thought that they had altered the hairs back then, in the same prescient way they accused us of suggesting the blood was planted, they got this stuff all back, they examined it all, they looked at it. There was no complaint ever registered, "Hey, what happened to this thing here? It doesn't look like the same hairs. We have photographs. It doesn't look like the same boxes."

There's no basis for assuming that in some way -- the chain of custody which the statute talks about is a chain which is sufficient for the Court to be reasonably certain that the evidence to be tested will be reliable, and I think we've made that showing very adequately. The evidence is

going to be reliable, because it provides its own reliability. We get a mitochondrial result from it, and the mitochondrial result, if it's, you know, all totally random, which is what the prosecution says it's going to be, that's what it will be.

But the mere appearance of the evidence that's presented here is sufficient to raise questions about how totally random it could be. It may come back consistent with the victims. It could.

But it's not too clear why anybody would deliberately plant the victims' hair in the process of court-ordered testing by the court at that time in San Bernardino, transferred to a forensic doctor who is very well known, reliable, and still teaching and practicing to this day, and it was under his custody and control until it was turned back in.

I could complain like Mr. Millar is doing, well, they have the sheets where it was turned back in. Where are they? Where are they? I don't think that's necessary. We already talked about that. I mean, the time in which it was returned was late '84, '85. I don't think anyone denies that.

Now, the only other area that I wanted to mention, your Honor, is burden of proof issues. We talked about that to some extent at the hearing over whether to have a hearing when the Court was interested in burdens of proof at that time, and I have addressed it. The People have addressed it. Mr. Millar has responded and addressed it, and he has the cases which he's talked about to you.

There is no Supreme Court opinion, obviously, on

this statute, what the burden should be. There's a Supreme Court opinion in Strickland which we all know very well, and it says the evidence or the assistance -- incompetent assistance has to be material enough so that it raises a doubt about the outcome of the justice of the trial.

Every time that standard goes to an appellate court we have an opinion, sometimes two to one, and then every time it goes to the Ninth Circuit we have an opinion where they say, "Oh, yes, that's the way it is, and there's no question that it's material." And then it goes to the Supreme Court and they say, "There's no question that it's not material."

Well, we know everything that we need to know to decide the Strickland case. There's the trial, there's the performance of the lawyer, and still people differ on what's material and what's not.

Here I think the Court should be looking at the fact that we don't know the outcome yet. The time to decide how material it is -- it could be material, as we've presented to the Court. It's when we know the answer, that's the time to decide that.

And, you know, we -- when the issue came up, the first thing we wanted and the thing we focused on from the very beginning was the hair in the victims' hands, and we wanted mitochondrial testing of it done. The defense wanted that. The prosecution didn't want to do the mitochondrial testing.

So we negotiated an agreement where we mentioned it, but we left it out of the agreement, and both sides left it to

be decided because we couldn't agree on it. And we're the ones who wanted it. They're the ones who didn't want it. And now they come and say, "Look, they dilly-dallied around for two years and they wasted time and delayed the proceedings because now they come in and want mitochondrial testing," which the prosecution refused to agree to when we agreed on the agreed testing, and they didn't agree to that until coincidentally the statute was about to go into effect.

Even then we filed the motion 60 days before the statute went into effect, and it was at that point that the prosecution said, "Well, we might as well do the testing. Let's get together and agree on it." And that's why this Court -- not this Court but our Court here has monitored the progress of the testing done under that agreement with review hearings every four months or so. So I don't think the delay point is well-taken.

As to the burden of proof, I've argued what I think it is. Some of the cases that the prosecution has cited, the -- some of the cases they've cited where the Court refused to reverse because the standard wasn't met were reversed later because DNA evidence came forward, things like that.

So the Court has to, I think, bear in mind that this is evidence, it's material. The fact that they had hairs in their hands shows that Mr. Cooper is not the attacker. I will certainly bear that in mind the next time that there is no hair in the victims' hands or the next time that a client of mine has hair -- his hair in the victim's hands, I'll point out how ridiculous that would be to think that he would grab

hair. So I don't think that's necessarily a cogent argument.

Almost all the arguments that both sides have presented here, both sides, as is usually true, reasonably competent lawyers can usually come up with two edges to almost every sword. But for this Court to decide, I think it's whether we've made a sufficient material showing. We've shown the evidence is there, we've shown it can be tested, and we've shown there is an outcome that could be very significant and affect the case.

So I believe we have met our burdens, and I think the Court should order mitochondrial testing. Thank you, your Honor.

MR. BERNSTEIN: Your Honor --

MR. McGUIGAN: We could -- and I haven't done that yet because I think it's premature, but we're ready at any time, your Honor to present labs -- in fact, Mr. Plourd mentioned it briefly and so did Mr. Myers. We do have labs that would be available to do this testing. They're viable. Mr. Plourd and Mr. Myers at least agree. I'm willing to defer to them. The testing would not be overwhelmingly expensive, and the time frames we've discussed are the time frames we've been told. So we can provide that information to the Court anytime it needs it.

MR. BERNSTEIN: Your Honor has been incredibly indulgent in bending its rules of procedure for this hearing. I was hoping I could get 30 more seconds' worth of indulgence to make a point.

THE COURT: Let's make it quick, though.

MR. BERNSTEIN: Yes. There's been repeated references to the California Supreme Court's characterization of the evidence in this case as overwhelming, but the evidence that I've mentioned that was contrary to the conclusion that Mr. Cooper was guilty was never mentioned at all in that opinion, and of course any evidence that is presented as though there was no rebuttal to it is going to seem overwhelming.

The California Supreme Court never mentioned any of the matters I mentioned. It didn't, I believe, mention the bloody coveralls that could have been favorable evidence for Mr. Cooper, but were thrown away by the police. Counsel can correct me, but I don't recall that being mentioned in the opinion either.

Certainly the evidence was legally sufficient to convict Mr. Cooper, but that doesn't mean there was no contrary evidence. There was. And I think that the California Supreme Court's overwhelming evidence characterization should be considered in that light. That's all. Thank you, your Honor.

THE COURT: All right. Is the matter now -- all these matters now submitted?

MR. KOCHIS: Yes, your Honor.

MR. BERNSTEIN: Yes, your Honor.

MR. McGUIGAN: Yes, your Honor.

THE COURT: I'll take them under submission because I have a lot of homework to do in connection with reaching decisions in this matter.

While we're here, I have a couple of questions. One is, shouldn't there be some sort of a cutoff point for the filing of additional post-conviction motions? I mean, does this go on forever?

MR. McGUIGAN: I believe some --

MR. BERNSTEIN: Are you addressing --

THE COURT: I'm addressing counsel. I'm not addressing anyone particularly.

MR. McGUIGAN: Some states do go on forever -- not forever, because everybody dies sooner or later. But others do not. And I would certainly tell the Court that Mr. Millar is a master of timeliness rules on appeal for habeas, for federal filings, state filings. And there are many, many hurdles that have to be jumped, and they're very difficult to jump when these kinds of motions are brought.

MR. BERNSTEIN: Your Honor, I don't think the statutes -- the relevant statutes provide for any time limit, and certainly 1405 was only passed --

THE COURT: I'm not challenging the ones that have been made. I'm challenging --

MR. McGUIGAN: The suggestion that future --

THE COURT: -- the imaginations of counsel in the future and whether or not there shouldn't be a closed door for these things.

MR. MILLAR: Two things: First of all, in federal proceedings -- and I know we're not in federal proceedings -- there are time limits which were imposed by the -- what we call the AEDPA -- capital A-E-D as in David, P as in Paul, A.

It's the Anti-terrorism and Effective Death Penalty Act of 1996 -- which essentially imposes a one-year time period measured from various points in time, and then it also precludes second or successive petitions. In other words, once the federal habeas petitioner has his first bite at the apple he has to meet stringent requirements to get a second petition heard.

Now, in this case, for example, Mr. Cooper was through the federal system on his first petition. He's attempted to file two additional federal habeas petitions. In order to do that you first have to get under the AEDPA. You first have to get authorization from the Court of Appeals, the Ninth Circuit, to do that. They have twice denied him that authorization.

Now, with respect to the state proceedings, as the Court probably knows, there are certain general limitations on habeas petitions which the California Supreme Court has set forth in their policies governing post-conviction petitions.

With respect to 1405, I do note that although there's no specific time requirement, 1405 -- let me get the right subsections here. 1405(f)(8) says one of the requirements that the defendant has to show or the Court has to find is that the motion is not made solely for the purpose of delay. So if the Court were to conclude that that was a consideration here -- and certainly with respect to the EDTA testing we have argued that there's delay.

But -- and I'm not saying that their 1405 motion was in that regard because, as counsel pointed out, that was filed

shortly before the statute was even adopted. But I can only point out that generally there is this general limitation if something is made for the purpose of delay. But other than that, I'm not aware of anything in 1405.

I was pretty heavily involved in the discussions, the various versions of the bill and different things in that regard. I'm not aware of anything that sets a specific time limit on motions, for example, successive 1405 motions.

I think they are certainly contemplated in the sense that 1405(f)(6)(A) and (B) contain alternative provisions. (A) is where the evidence was not tested previously, and (B) is the evidence was tested previously, but the requested DNA test would provide results, et cetera, et cetera.

So there is nothing in the statute which absolutely precludes somebody from making successive requests.

THE COURT: Thank you.

Thank you, gentlemen. We'll be in recess, and I will get this out as quickly as I can.

MR. MILLAR: Thank you, your Honor.

MR. BERNSTEIN: Thank you, your Honor.

MR. KOCHIS: Thank you, your Honor.

MR. McGUIGAN: Thank you, your Honor. We all appreciate the Court's patience through the disruptive hearing -- not disruptive, but out of sequence, it's fair to say.

(At 11:55 a.m. proceedings concluded.)

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STATE OF CALIFORNIA)
: ss.
COUNTY OF SAN DIEGO)

I, Kay E. Collier, CSR No. 2725, an Official Reporter of the Superior Court of the State of California, in and for the County of San Diego, do hereby certify that I reported in shorthand the proceedings had in the above-entitled cause on June 25, 2003, and that the foregoing transcript, consisting of pages numbered from 313 to 386, inclusive, is a full, true and correct transcript of the proceedings had in said cause on said date.

Dated this 29th day of September, 2003, at San Diego, California.

Kay E. Collier, CSR No. 2725
Official Court Reporter