

SUPREME COURT OF THE STATE OF CALIFORNIA

COPY

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff-Respondent,

vs.

KEVIN COOPER,

Defendant-Appellant.

CR 72787

Supreme Court

No. CR117

24552

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY

HONORABLE RICHARD C. GARNER, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

APPEARANCES:

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IN PROPRIA PERSONA

27  
VOLUME 1 volumes.  
Pages 1410 to 1448, incl.

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and  
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Official Reporters

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1 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
2 FOR THE COUNTY OF SAN BERNARDINO

3 THE PEOPLE OF THE STATE )  
4 OF CALIFORNIA, )

5 Plaintiff, )

6 vs. )

7 KEVIN COOPER, )

8 Defendant. )

NO. OCR-9319

VOLUME 17

Pgs. 1410 thru 1448, incl.

10 REPORTERS' DAILY TRANSCRIPT

11 BEFORE HONORABLE RICHARD C. GARNER, JUDGE

12 DEPARTMENT 3 - ONTARIO, CALIFORNIA

13 Thursday, April 26, 1984

14 APPEARANCES:

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1 ONTARIO, CALIFORNIA; THURSDAY, APRIL 26, 1984; 9:37 A.M.

2 DEPARTMENT NO. 3

HON. RICHARD C. GARNER, JUDGE

3 APPEARANCES:

4 The Defendant with his Counsel, DAVID  
5 NEGUS, Deputy Public Defender of San  
6 Bernardino County; DENNIS KOTTMEIER,  
7 District Attorney of San Bernardino  
8 County, and JOHN P. KOCHIS, Deputy  
9 District Attorney of San Bernardino  
10 County, representing the People of the  
11 State of California.

12 (Jill D. McKimney, C.S.R., Official Reporter, C-2314,  
13 Brian Ratekin, C.S.R., Official Reporter, C-3715)

14  
15 THE COURT: Good morning, everybody.  
16 Mr. Cooper's present, all counsel.

17  
18 D A N I E L J O H N G R E G O N I S, called as a witness  
19 by the People, having been previously duly sworn, was  
20 examined and testified further as follows:

21 THE COURT: Mr. Gregonis, welcome again.  
22 State your name for the record, and I remind you  
23 you are still under oath.

24 THE WITNESS: Daniel J. Gregonis.

25 THE COURT: You are now on direct, Mr. Kochis.

26 MR. KOCHIS: Thank you, Your Honor.

007795

## REDIRECT EXAMINATION

BY MR. KOCHIS:

Q Mr. Gregonis, directing your attention back to the cross-examination that took place on Monday and again on Tuesday afternoon that involved potential problems that may arise with the stain in electrophoresis or the electrophoretic run itself, will the standard that you use in the plate operate as a control to allow you to detect potential problems?

A Yes, it will.

Q For example, if there's an improper chemical mixture when you make your buffer, would you expect for that to manifest itself in the standard?

A Yes, it would.

Q Likewise, if there are heat problems that may have arisen, for example, on a long run, for example, the 16-hour Group II run, will those problems manifest themselves on the standard?

A Yes, it would.

Q If there's voltage problems in the electrical apparatus of the machine itself, will that manifest itself in the standard?

A Yes, it will.

Q And do you take these signposts into consideration when you read a plate?

A Yes, I do.

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1 Q Now, are you familiar with some of the writings of  
2 Dr. George Sensabaugh?

3 A Yes, I am.

4 Q And in fact, do you have Mr. Saferstein's handbook in  
5 your crime lab?

6 A Yes, I do.

7 Q One of the chapters of that handbook, Chapter 8, I  
8 believe, is written by Dr. Saferstein?

9 A Yes, it is.

10 Q You've read the chapter?

11 A Yes, I have.

12 Q And does it point out potential problems that may  
13 exist or may occur in an electrophoretic run?

14 A Yes, it does.

15 Q And does it discuss the various signposts that a  
16 serologist such as yourself should look for when you  
17 analyze a particular plate?

18 A To some extent, yes, it does.

19 Q And do you keep those signposts in mind when you read  
20 any plate?

21 A Most definitely, yes.

22 Q In a situation where a stain may be contaminated in  
23 that it may contain blood from two sources, two people,  
24 will that manifest itself in an electrophoretic run  
25 when you run as many systems, for example, as Groups I  
26 through IV?

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1 A Yes, it would. The only case where it would not is if  
2 all the enzymes in the ABO that I tested for were  
3 identical.

4 Q In both persons?

5 A In both persons.

6 Q So in a case where there may be blood from two sources  
7 in a -- contained in a single stain from people with  
8 different genetic profiles, that would manifest itself  
9 as you go through the different electrophoretic group  
10 runs?

11 A Yes, it would.

12 Q The problem of deamination that Mr. Negus discussed  
13 during his cross-examination, that is also something  
14 that is somewhat predictable?

15 A Yes, it is.

16 Q And when you read a plate in an electrophoretic run,  
17 are there certain signs that manifest themselves if  
18 deamination has taken place?

19 A Yes, there is.

20 Q And do you take those into consideration when you read  
21 a plate before you call the plate?

22 A Yes, I do.

23 Q Likewise, with some of the other dry and wet stain  
24 possible changes, for example, protein degradation or  
25 enzyme degradation, does that usually result in a loss  
26 of enzyme activity?

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1 A Yes, it will.

2 Q And does that in turn usually result in an inability for  
3 you to read the plate to make a call whatsoever, or  
4 can it?

5 A Yes, it will.

6 Q For example, if the enzyme completely degrades, what  
7 you would expect to happen would be a situation where  
8 there's simply not enough for you to read and make a  
9 call one way or the other?

10 A There's nothing there to read if it completely degrades.

11 Q So in degradation, what most probably would result  
12 would be an inability to make a reading as opposed  
13 to a situation where you may misread one type as  
14 another?

15 A That is true, yes.

16 Q Directing your attention for a moment again to the  
17 chart which has been marked for this hearing, I  
18 believe, as Exhibit --

19 A K-1.

20 Q -- K-1, is there a reason that you use the particular  
21 stains that appear on that chart when you read the  
22 plates for the various enzymes?

23 A Yes, there is.

24 Q What is that reason?

25 A The reason is that each of those stains are designed  
26 in such a way that react with the enzyme that I'm

1 looking for specifically. Not any of the other  
2 enzymes that would be in the same area on the plate  
3 would react with that stain.

4 Q With the dry and wet changes, the potential changes  
5 that Mr. Negus discussed with you Monday and Tuesday  
6 during cross-examination, are there procedures that  
7 you employ to arrest those changes?

8 A Yes, there are.

9 Q And would that procedure include first making sure  
10 the particular bloodstain is allowed to dry?

11 A Yes, it would.

12 Q And then taking the bloodstain and freezing it?

13 A Yes, it would.

14 Q Directing your attention to the acid phosphatase test  
15 that you performed on the stain on the blanket to  
16 determine whether or not it was semen, are there other  
17 tests that can be performed on a blanket as a control  
18 to more or less check the accuracy of the acid  
19 phosphatase test?

20 A Yes, there are.

21 Q Would a microscopic examination to detect the presence  
22 of sperm be one of those tests?

23 A Yes, it would.

24 Q And, for example, did you do that in this case?

25 A Yes, I did.

26 Q And what information would a microscopic test reveal

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1       that would either confirm or not confirm the results  
2       of your acid phosphatase test?

3   A.   Well, if I got the stain which was positive on the  
4       acid phosphatase, indicating the presence of semen,  
5       I will then take a look microscopically.  If I see  
6       spermatozoa present, it definitely confirms the acid  
7       phosphatase test.

8   Q.   Likewise, with the use of the absorption-inhibition  
9       test on the stains, the saliva stains and the semen  
10      stains, do you use controls in that particular test?

11  A.   Yes, I do.

12  Q.   What type of control?

13  A.   In each of those controls or each of those tests, I'll  
14      use standards, essentially.  Those consist of either  
15      semen or saliva, usually saliva, A secretor, B secretor,  
16      O secretor and a non-secretor controls.

17  Q.   Directing your attention again back to the chart,  
18      within your community, the community of forensic  
19      serology, is the use of a starch gel medium in an  
20      electrophoretic run accepted as a valid and reliable  
21      means for determining EAP, ADA and AK enzyme types?

22  A.   Yes, it is.

23  Q.   And likewise, within your community, is the use of an  
24      agarose gel in an electrophoretic run accepted as a  
25      valid and reliable means of determining the transferrin  
26      and Gc serum protein types?

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1 A Yes, it is.

2 Q Within your community, is the use of electrophoresis

3 using an agarose gel medium accepted as a valid and  
4 reliable means for determining the various peptidase A  
5 and CA II enzyme types of both bloodstains and whole  
6 blood?

7 A Yes, it is.

8 Q And within your community, is the use of an electro-  
9 phoresis where you use a gradient acrylamide gel  
10 accepted as a valid and reliable means of determining  
11 the haptoglobin type of whole blood as well as blood-  
12 stains?

13 A Yes, it is.

14 MR. KOCHIS: Thank you.

15 I have no further questions.

16 THE COURT: Mr. Negus.

17

18 RE CROSS-EXAMINATION

19 BY MR. NEGUS:

20 Q Are the particular procedures, serological procedures,  
21 that you used in this particular case independent of  
22 the skill of the analyst?

23 A I don't understand your question.

24 Q As an example, if you were to run a blood sample to  
25 see whether it had any ethanol in it using the gas  
26 chromatograph, basically, if you stick it in correctly,

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1 the machine basically does the rest and prints out on  
2 a computer printout a result; is that right?

3 A In a very simplified manner, yes.

4 Q And all you have to do is be able to read English in  
5 order to know what the result is; is that correct?

6 A Not totally, but, again, in a very simplified manner,  
7 yes.

8 (No omissions.)  
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1 Q You bring in that little computer printout to court and  
2 show it to the jury, and it says "point two percent" or  
3 whatever it is, and they can see that that is a point two  
4 one percent?

5 A If they're shown the proper area of the computer readout,  
6 yes.

7 Q That is not very hard to find, is it?

8 A I would imagine to a layman it probably would be who  
9 knew nothing about the computer printout.

10 Q How long does it take somebody to learn that?

11 MR. KOCHIS: Your Honor, I would object as irrelevant.  
12 I think there's a much more direct way to get at what he  
13 wants to ask.

14 MR. NEGUS: I don't want to go into blood alcohol too  
15 much.

16 Q (BY MR. NEGUS:) Taking blood alcohol as one -- as one --  
17 as one pole of what one can do, is more analyst skill  
18 required in order to get reliable results using techniques  
19 that you use than to determine ethanol?

20 A I would say yes.

21 Q If there are no problems with a run, a somewhat higher  
22 level of analyst skill -- a person of somewhat higher level  
23 of analyst skill can recognize paradigms once they have  
24 a little chart and have them pointed out; is that correct?

25 A I don't understand what "paradigm" means.

26 Q Recognize the patterns of the -- of the various enzymes

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1 on a plate, as you can -- you can bring in pictures or  
2 diagrams and show that to the Court fairly --

3 A. Yes, they can.

Q And it takes somewhat more analyst skill than reading  
the two one on the -- on the computer printout but it's  
still something that is well within the realm of most  
folks; is that correct?

8 A. Yes, it is.

9 Q Does that same relatively low level of analyst skill  
10 carry over to recognizing problems?

11 A. I would say you have to have an analyst with more skill  
12 and training to recognize the problems.

13 Q In order to recognize the problems, does that require a  
14 fairly good knowledge of biochemistry?

15 A You could probably train somebody just to recognize the  
16 problem on the plate by running plates and showing him  
17 various problems that you have rather than actually  
18 knowing the exact biochemistry. Biochemistry will help.

19 Q Well, are the -- can you get reliable results if you have  
20 an analyst that doesn't know how to recognize the problems?

21 A. I would say if the problems exist there and the analyst  
22 is not trained in recognizing the problems, no, you would  
23 not. Not in all -- all cases.

24 Q Well, in -- in -- in bloodstains from crime scenes,  
25 problems exist with a fairly good degree of frequency;  
26 isn't that correct? It's not unusual to get degraded

1 samples?

2 A I would say it's not unusual, but I wouldn't say that it  
3 happens in the majority of the times. Degraded samples  
4 would include the -- just deactivation of the enzymes,  
5 where I'm not picking them up, period, rather than having  
6 a what you might term a problem sample.

7 Q If one does electrophoresis ignoring one's known standards,  
8 is it still reliable?

9 A To some degree, no -- yes, but I would say it's not  
10 totally reliable, no.

11 Q If one does electrophoresis ignoring the fact that one's  
12 standards don't come out, you get nothing when you run  
13 your standards, is that reliable?

14 A I would say no.

15 Q Can you identify all of the things that can go wrong  
16 with an electrophoretic run through the use of standards?

17 A Not every single one, no.

18 Q What are those that you cannot identify?

19 A You may have problems with each individual sample, for  
20 instance, your previous discussion of the degradation of  
21 the sample. Also it's a possibility, although the ones  
22 I have seen manifested themselves in other areas, is a  
23 spot problem on the plate. You can usually pick that up,  
24 or, I have, to my knowledge, I have always picked it up  
25 when I have had a spot problem on the plate.

26 Q Anything else besides the -- just the basic degradation

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1 and the spot problems that you -- that you cannot pick up  
2 through the use -- proper use of known samples?

3 A. Not that I can think of at the present, no.

4 Q. When you told Mr. Kochis about sample degradation, what --  
5 eliminating a sample so you get no reading whatsoever,  
6 there's also an intermediate stage, is there not, when  
7 the sample is partially degraded? You can still see  
8 something, but reliability may be affected?

9 A. I would say readability may be affected.

10 Q. Rely -- I should have -- I misspoke, the reliability of  
11 a reading may be -- may be affected?

12 A. The fact as whether you may be able to read it or not  
13 may be affected. As to whether the reading is reliable  
14 or not, again, I'm looking at the readability rather  
15 than reliability.

16 Q. Well, different analysts will, for example, not read a  
17 set of bands -- well, erase that.

18 Is it true that different -- that -- that different  
19 analysts will read or not read different bands differently?  
20 That is, not everybody always comes out with the same  
21 results as to whether something is readable or not?

22 A. I'd say if you put ten different analysts in a -- in an  
23 extremely weak stain or something like that, one may come  
24 up with a reading and -- or, some may come up with a  
25 reading, some may not. However, those that come up with  
26 a reading will come up with the proper reading, as long

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1 as those people are properly trained.

2 Q Well, isn't one of the biggest problems in analyst  
3 interpretation inexperienced people reading where they  
4 shouldn't?

5 A That can be, yes.

6 Q Isn't that one of the hardest things to learn not to do?

7 A No, sir, I don't believe so. It depends on the person's  
8 training and the person's personality.

9 Q The analyst's willingness to not type a crucial bit of  
10 evidence if in fact it's really too weak to call can be  
11 one of the most critical factors in the reliability of  
12 interpretations; is that correct?

13 A As far as if he's just making a guess if it's not  
14 readable? Is that what you're getting at?

15 Q Looks like it but it doesn't, it's --

16 A Something that could be, that I would determine an  
17 inconclusive, I would hope that the person would call  
18 it inconclusive.

19 Q Wouldn't knowing how to draw that line, though, be one of  
20 the most critical factors as far as an analyst's reliability  
21 is concerned?

22 A It can be, depending on that person's experience.

23 Q To what extent were you familiar with the different  
24 problems elucidated by Dr. Sensabaugh back in June when  
25 you were doing the bulk of the testing in this particular  
26 case?

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1 A I would say pretty much an equal amount as to what I have  
2 testified to in court to today -- or, over the past few  
3 days.

4 Q So if you were confused as to the effect of the deamidation  
5 on samples over the past few days, you would have been  
6 confused back in June?

7 A If that's the case, probably, yes.

8 (No omissions.)  
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1 Q With contamination which involves a mixture of stains  
2 that you spoke to Mr. Kochis about, if blood from a  
3 person who was an AK 1 was mixed with blood from a  
4 person who was an AK 2, would you get on your plate  
5 something that was readable as a mixture of AK 1 and 2  
6 or would you get something on your plate that looked  
7 like an AK 2-1?

8 A You probably would get something that would be readable  
9 or look like a mixture of an AK 1 and 2.

10 Q Why is that?

11 A The only circumstance where you would not is if you  
12 were going to take it in a laboratory and know the  
13 activities of the AK 1 and the AK 2 and put exactly  
14 equal amounts together so that you get the equal  
15 intensities of the bands.

16 Q Well, do you only read AK 2-1's when you have equal  
17 intensities?

18 A Yes, essentially.

19 Q You spoke, again, of a protein degradation. Are all  
20 protein degradations the same, that is, they all come  
21 from the same cause?

22 A I didn't catch your last --

23 Q Do they all come from the same cause?

24 A No.

25 Q Do -- well, one -- one reason for loss of -- of  
26 protein activity can be oxidation; correct?

3a

0007950

1 A Yes.

2 Q Another could be the action of proteases eating them  
3 up?

4 A Proteases, yes.

5 Q Do those reactions proceed in the same way and at the  
6 same rate?

7 A I'd say they probably do not. I know they do not  
8 proceed in the same way, and they probably do not  
9 proceed in the same rate.

10 Q Do the proteases differentiate between different  
11 alleles at the speed at which they eat up the protein?

12 A No, sir.

13 Q When you do your ABO testing on suspected bloodstains,  
14 in addition to your samples of known blood, do you  
15 also use negative controls, that is, controls taken  
16 from the area and the same material as the bloodstain,  
17 but which presumably don't contain the bloodstain?

18 A When available, yes.

19 Q Are those negative controls necessary in order to have  
20 reliability?

21 A Not absolutely, no.

22 Q What do you mean?

23 A Negative controls, the ones I've run in the past, have  
24 shown very little interference with the ABO antigen  
25 system or the antibody system. The -- when you type  
26 something, you're still picking up an antigen or --

007951

1 in the case of looking for the antigen, and that is  
2 showing me the positive test for that antigen, and

3 like I said, the negative controls in the past have  
4 shown very little interference, in other words, having  
5 the same antigen that I'm picking up in the stain.

6 Q Are you saying that never happens that you get the  
7 same antigen in the stain from your negative controls  
8 or it just doesn't happen very often?

9 A It doesn't happen very often.

10 Q But it does happen?

11 A It can happen, and it does happen.

12 Q When you're doing your ABO testing, there are many  
13 different things in the plant and animal kingdom that  
14 can cause reactions similar to certain ABO antigens;  
15 is that correct?

16 A Yes, there is.

17 Q And if those things are present in proper quantity,  
18 there's no way of distinguishing just by doing an ABO --  
19 for example, an ABO test for antigens as to whether or  
20 not you have those microbes or whatever they are or  
21 the ABO antigens; is that correct?

22 A Not really, no.

23 Q Is that one of the reasons why you use the Lattes test  
24 as a -- in addition to the absorption-elution?

25 A That is one of the reasons, yes.

26 Q The Lattes test will -- is to determine whether

007952

2 | A That is correct, yes.

7 | A. That is true, yes.

13 A I would say it's reliable, but not as -- obviously  
14 as reliable as if you were to use those other things.

18 A. That's essentially correct, yes.

22 THE COURT: All right. Go ahead.

24

26 BY MR. NEGUS:

007953

1 Q Can the brand of antisera that you use in doing your  
2 ABO typing affect the reliability of the test?

3 A It can, yes.

4 Q Is that likewise true for the antiserum -- or  
5 antisera that you use to test for transferrin and  
6 Gc?

7 A I would say in that case, it's more readability than  
8 reliability. Again, you're using standards on the  
9 plate. If you're picking up the standards properly,  
10 then that shows that your antisera is working properly.

11 Q Where do you get the antisera that you use in doing  
12 your ABO testing?

13 A From a company called Accugenics.

14 Q Is that company's products accepted as reliable within  
15 the field of forensic science?

16 A Yes, they are.

17 (No omissions.)  
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- 1 Q Do you do any independent testing of those antisera  
2 before you use them in case work to make sure that what  
3 you've got is reliable?
- 4 A Yes, I do.
- 5 Q How do you do that?
- 6 A I test them against standard bloodstains, standard ABO,  
7 saliva stains and semen stains, and I also test them  
8 against the known red blood cells.
- 9 Q Does the anti-A serum -- sera cause you to the most  
10 problems?
- 11 A No.
- 12 Q Cause one the most problems?
- 13 A The only thing with the Accugenics is that it's extremely  
14 strong, so I have to dilute it for the tests.
- 15 Q And improperly diluted antisera can make the whole test  
16 unreliable?
- 17 A Most likely make it unreadable rather than unreliable,  
18 or the sensitivities may be off also.
- 19 Q What about the absorption-inhibition test? Can improperly  
20 diluted antisera make that unreliable?
- 21 A Again, it's unreadable rather than unreliable. And,  
22 again, it's a sensitivity problem.
- 23 Q Can overloading a sample cause reliability problems?
- 24 A On what test?
- 25 Q On electrophoretic runs.
- 26 A I'd say, again, it's a readable -- a readability problem

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1       rather than a reliability problem. You would get, if  
2       you have too much of the stain there, you'll end up with  
3       streaking on the plate.

4   Q   If you have streaking on the plate, then you shouldn't  
5       call it?

6   A   No. In some circumstances you can call it. If it's too  
7       much, then I would not call it, yes.

8   Q   How do you -- is that -- is that a problem of skill there,  
9       to be able to draw that line?

10   A   I would say that it's experience. Partly experience, yes.

11   Q   You indicated a couple days ago that you do something  
12       to clean up the streaking in the haptoglobin before you  
13       test it. What -- in this particular case, what techniques  
14       did you clean to use up the haptoglobin?

15   A   I wash it with chloroform.

16   Q   And what does that do?

17   A   Cleans up all the excess cellular debris and things that  
18       I'm essentially not looking for, those things that cause  
19       the streaking.

20   Q   That's cellular debris?

21   A   Part of it, yes.

22   Q   What else?

23   A   I'm not totally sure of what everything else is in there  
24       that would cause the streaking. It would be excess  
25       hemoglobin, degradation products of the sample.

26   Q   Well, doesn't the chloroform just make it easier to

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1 precipitate out the hemoglobin? Isn't that all it does?

2 A Into the clean up, yeah, sure does.

3 Q I mean, doesn't clean up cellular debris or other stuff  
4 like that, the chloroform does?

5 A I believe that's just what I stated.

6 Q Well, you said it -- you said that it doesn't clean up  
7 cellular debris. That's not true, though, is it -- is it?

8 A Well, the wash will get rid of the cellular debris in the  
9 sample that I'm putting on the plate.

10 Q Do you centrifuge it?

11 A Yes, I do.

12 Q Does putting a bloodstain in a substance called Dura-Print  
13 prior to typing affect ABO typing?

14 MR. KOCHIS: Your Honor, I'm going to object. That  
15 certainly is not relevant to Kelly-Frye.

16 THE COURT: Mr. Negus?

17 Q (BY MR. NEGUS:) Affect the reliability of ABO typing?

18 MR. KOCHIS: Same objection.

19 THE COURT: Counsel, we're -- on credibility, as far  
20 as the foundation of his expertise is concerned, I'll permit  
21 it. Go ahead.

22 THE WITNESS: As far as previous reports from another  
23 analyst, it does not seem to. Also, I have done some work  
24 myself in that field and, again, it does not seem to affect  
25 the reliability of the ABO or the enzymes. It may affect  
26 the quantity that is available to type. And also I have to

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- 1 say that I am continuing a study on the Dura-Print.
- 2 Q (BY MR. NEGUS:) So you don't know yet?
- 3 A Well, from what I've said before, the studies that I've  
4 seen, the analysts that I've talked to that has experience  
5 on it, plus the studies I have done before indicate that  
6 it does not have an effect on the ABO typing or the  
7 enzyme typing.
- 8 Q Are you aware of any published literature on that issue?
- 9 A Not at this current time, no.
- 10 Q In your proficiency testing that you have done, the 12  
11 different matches, how many times have you been tested  
12 on PEP A 2-1?
- 13 A Believe it's about four times.
- 14 Q How many times have you been tested on --
- 15 A Excuse me. Specifically 2-1?
- 16 Q Yeah.
- 17 A I would have to look at the results specifically for that.  
18 I don't recall.
- 19 Q How many times have you -- Do you have the results with you?
- 20 A No, I do not.
- 21 Q How many times have you been testified (sic) on transferrin  
22 CD?
- 23 A Again, I do not recall the specific results on that.
- 24 Q And what about haptoglobin 2-1M?
- 25 A Again, I do not recall the specific results.
- 26 MR. NEGUS: I have no further questions at this time.

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2 MR. KOCHIS: I have no re-recross -- re-redirect.

7 THE COURT: We have been on that.

11 THE COURT: Oh, I see.

15 THE COURT: Any objection, Mr. Kochis?

16 MR. KOCHIS: I have to --

19 MR. KOCHIS: I'll have to discuss that with him  
20 because he's in the academy now. He does that five days a  
21 week and he does his case work on Saturdays. And I'm not  
22 sure --

25 MR. KOCHIS: I'd still like to discuss it with  
26 Mr. Gregonis. And if I have an objection, I'll bring it to

1 the Court's attention on Monday.

2 THE COURT: All right.

3 MR. NEGUS: I'd also request, by way of discovery,  
4 the actual documents from his proficiency testing.

5 THE COURT: He hasn't indicated that he still has  
6 those.

7 Do you, sir?

8 THE WITNESS: I believe that I have about four -- or,  
9 eight of the formal ones still in the laboratory, yes.

10 THE COURT: All right. Gather them up, all of your  
11 proficiency testing on the matter that we have examined on  
12 here. And next time you come back to court, bring them with  
13 you with copies thereof for the Defense.

14 THE WITNESS: Yes, sir.

15 THE COURT: Anything else?

16 MR. NEGUS: No.

17 THE COURT: It's indeed before noon. Anything else  
18 we can do?

19 MR. KOCHIS: Your Honor, what I'm going to do is  
20 return to my office, review some of the 1101b cases with the  
21 notice I provided Mr. Negus, see if there's any modification  
22 I can make in my own mind, and then, with the assistance of  
23 a secretary, start duplicating police reports, which I hope  
24 to have to this Court sometime this afternoon or tomorrow  
25 morning so the Court can read those before we have the hearing

26 THE COURT: I think you're going to find the

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1 authorities -- I haven't looked it up -- now are not all  
2 under the annotations of 1101b.

3 MR. KOCHIS: That's correct.

4 MR. NEGUS: Well, Your Honor --

5 THE COURT: But you're talking about almost a  
6 signature when you get around to similars. You're talking  
7 about MO's that are very closely, nearly the same, some of  
8 those things seem to me to be, just on initial look at them,  
9 perhaps. Of course, I don't know the details, but --

10 MR. KOCHIS: Your Honor, I'm confident that I may be  
11 able to modify the list downward somewhat.

12 THE COURT: I would expect so.

13 MR. KOCHIS: And I think what Mr. Negus -- he's not  
14 asking for a specific offer of proof. What he wants is if  
15 there's any modification of the list, that it can be made now  
16 so that, when he goes to Judge Kayashima, where he's in a  
17 different posture --

18 MR. NEGUS: Basically I'm not asking the -- to decide  
19 the ultimate outcome on the eleven oh -- on that particular  
20 in limine motion at this point in time. Judge Kayashima just  
21 asked that if there was a rough screening -- I told him there  
22 was 24 acts -- if there was a rough screening that we could do  
23 as to something that's obviously not going to be relevant,  
24 then I won't have to investigate them. I don't want to have  
25 a final ruling on the 1101b motion until I have had a chance  
26 to investigate those which there's any dispute about. But it

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1 looked like maybe it could have been proved out a bit. So  
2 that's all I'm asking for at this point.

3 MR. KOCHIS: Your Honor, if the Court's available  
4 this afternoon for me to reappear at 2:30 or 3, I might be  
5 able to have some type of rough screening accomplished by  
6 then. And it's possible that I may have those pared down  
7 from the 24 factors to the 1101 even by then. And then the  
8 Court could decide on the remaining if you want to see  
9 reports.

10 THE COURT: I definitely will be available.

11 Mr. Negus, is it all right with you?

12 MR. NEGUS: I'm all right.

13 THE COURT: All right. When would you take him back,  
14 Detective Arthur?

15 SERGEANT ARTHUR: We're planning to take him back  
16 right after this hearing.

17 MR. NEGUS: Mr. Cooper, for that limited purpose,  
18 do you want to be here or --

19 THE DEFENDANT: Do I need to be here?

20 MR. NEGUS: No.

21 THE DEFENDANT: I don't want to be here.

22 THE COURT: You waive and give up your right to be  
23 present? We'll do everything on the record with the reporter  
24 here, but you'll permit us to go ahead as to if you were  
25 here on that limited issue?

26 THE DEFENDANT: Yes, if it's okay with my attorney.

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1 MR. NEGUS: It's okay, Your Honor.

2 THE COURT: Okay. Then it will be subject to your  
3 calling my clerk and getting together and coming over at  
4 any time. All right?

5 MR. KOCHIS: Why don't we set it for 2:30 this  
6 afternoon?

7 THE COURT: That's fine. 2:30 this afternoon. Thank  
8 you.

9 (Whereupon a recess was taken at 10:27 a.m.)  
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1 ONTARIO, CALIFORNIA; THURSDAY, APRIL 26, 1984; 2:25 P.M.

2 DEPARTMENT NO. 3

HON. RICHARD C. GARNER, JUDGE

3 --oOo--

4 (Whereupon, the following proceedings  
5 were had in chambers:)

6 THE COURT: On the record with reference to  
7 People versus Kevin Cooper. Mr. Kochis and Mr. Negus  
8 are here without the defendant, having waived his presence.

9 We were going to kind of have a preliminary  
10 rundown from you, I guess, Mr. Kochis, as to which ones  
11 you were willing to capitulate on perhaps now, and then  
12 later on, we may have a hearing as to other matters in  
13 controversy.

14 MR. KOCHIS: That's correct. Using the numbers  
15 as a reference point, taking first as a group Items 1  
16 through 4 inclusive, it's not my intention to use those --

17 THE COURT: I'm just going to cross them out.

18 MR. KOCHIS: -- with the caveat I'm going to read  
19 into the record at the end. Item 5 is an area -- Item 5 on  
20 page 2 is an item we intend to introduce. Items 6 through  
21 22 inclusive we do not intend to use.

22 THE COURT: Six through twenty-two?

23 MR. KOCHIS: Yes. Items 23 and 24 we do.

24 THE COURT: Just a second.

25 MR. KOCHIS: So that would leave only three. That  
26 would be Item 5 on page 2 and Items 23 and 24 on page 5,

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1 with the following caveat: I would agree not to attempt  
2 to introduce evidence in the case in chief under Section  
3 1101, but I do not want to preclude myself in the event,  
4 for example, during cross-examination, Mr. Negus elicits  
5 that type of evidence, for example, from Diana Williams  
6 about prior acts that may have occurred against her to  
7 indicate a bias against Mr. Cooper and then put myself in  
8 a position where I would not be able to bring other  
9 witnesses out to corroborate her. Likewise, if during  
10 the defense case, Mr. Negus introduces psychiatric testimony  
11 or the defendant takes the stand and makes statements,  
12 that I could impeach him with any of these prior acts.  
13 I do not want to be bound at this time in saying I would  
14 never use those on rebuttal, but as far as 1101 case in  
15 chief, there's only three I'm interested in.

16 THE COURT: Impeaching the defendant if and when  
17 he takes the stand by prior felony is not rebuttal. Are  
18 you saying that you would not impeach him with any of  
19 these so-called convictions?

20 MR. KOCHIS: Most of these are not convictions.  
21 What I'm concerned about is, for example, the defendant  
22 taking the stand and saying, I always get accused of  
23 things I don't do. For example, I got accused of some  
24 things in Santa Barbara and they're totally without merit.  
25 My not putting anything on rebuttal and then having  
26 Mr. Negus argue, well, you know, my client has to be

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1 telling the truth because if there was anything to the  
2 Santa Barbara stuff, the D.A. would have put it on to show  
3 my client wasn't telling the truth. Likewise, if  
4 Mr. Negus were to put a psychiatric expert to say I've  
5 talked to my client and he doesn't have the intent to kill,  
6 he's got no prior history of any violence or anything,  
7 and I don't think he's capable of forming that intent,  
8 I don't want to be boxed in, but I'm not going to go  
9 through the litany of those arguments during my case in  
10 chief.

11 THE COURT: Okay. You've got only three?

12 MR. KOCHIS: Yes.

13 THE COURT: You've got five, twenty-three and  
14 twenty-four --

15 MR. KOCHIS: Yes.

16 THE COURT: -- that you intend to proceed on?

17 MR. KOCHIS: Yes.

18 THE COURT: Where is Lori Strahl at?

19 MR. KOCHIS: She's in Pittsburgh, and she is a  
20 witness that has been interviewed not only by the  
21 investigators in Pittsburgh, but by the investigators in  
22 San Bernardino. Copies of those interviews have been  
23 given to Mr. Negus. She's represented by an attorney,  
24 and I believe Mr. Negus has been in contact with her  
25 attorney or is going to contact her attorney and not  
26 contact her directly about that particular incident.

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1 THE COURT: Is Diane Williams in Pennsylvania or  
2 is she out here?

3 MR. KOCHIS: She's in Pittsburgh.

4 THE COURT: All three of those are in Pittsburgh,  
5 so I don't think you'll have any trouble with Judge Kayashima,  
6 or all of them are in Pennsylvania.

7 MR. NEGUS: Mr. Kochis solves the problem as far  
8 as the guilt phase is concerned, you know.

9 THE COURT: Okay. As far as the -- as far as the  
10 penalty phase, if we get there, there's another one of  
11 these in my file, is there?

12 MR. KOCHIS: In your sealed confidential file.

13 THE COURT: Are you now telling us only as far as  
14 the guilt phase is concerned?

15 MR. KOCHIS: Right. That's all Mr. Negus I believe  
16 asked me to do at this point. He said that the guilt  
17 phase -- the penalty phase (1) we might never get to (2)  
18 that we might be able to resolve at a later time.

19 THE COURT: Okay.

20 MR. NEGUS: As far as my immediate needs are  
21 concerned, I have no problem with that. I will try and  
22 resolve it at such a time so it wouldn't require any  
23 extensive continuance to do it, but what I'm really  
24 concerned about is being ready for the guilt phase.

25 THE COURT: Sure. Well, I anticipated a lot more  
26 work on this motion, and you emasculated it, really.

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1 MR. NEGUS: I think that you will find that  
2 there's still with respect to number 5, at least, and  
3 number 13 -- or number 23, that there's at least still  
4 substantial things to argue about.

5 THE COURT: I don't even recall reading anything  
6 about number 5.

7 MR. KOCHIS: I concede we will have an argument  
8 and evidentiary hearing on that, but I certainly have  
9 pared the list down to satisfy Judge Kayashima.

10 MR. NEGUS: Fine. I have no problem. We'll get  
11 to the hearing later.

12 THE COURT: That's fine. When you're talking  
13 about "later", it's still going to be before we go wherever  
14 we're going to go?

15 MR. NEGUS: Right.

16 THE COURT: And you'll give each other notice or  
17 something, then give me notice, perhaps.

18 MR. NEGUS: I'm going to try and --

19 MR. KOCHIS: Mr. Negus has put me on notice. I  
20 intend to file, hopefully, something in writing in  
21 opposition and attach my position and possibly police  
22 reports as an offer of proof.

23 THE COURT: Put you on notice on what?

24 MR. KOCHIS: He's already put me on notice that  
25 he would object to my attempting to introduce this type  
26 of evidence during the guilt phase, and that we are going

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1 to have a hearing on it, and I will try to reduce my  
2 position to writing.

3 THE COURT: I'm just trying to anticipate when.

4 MR. NEGUS: Well, basically, again, we anticipate  
5 starting up on whatever date it is you're coming back,  
6 May the 14th, with a fairly lengthy motion with respect  
7 to destruction of evidence, and we'll be having lots of  
8 different witnesses in for some period of time after that.

9 THE COURT: Wait a minute. Let's talk for a  
10 second. Monday is the 30th of April.

11 MR. NEGUS: Uh-huh.

12 THE COURT: We are going to conclude --

13 MR. NEGUS: On May 4.

14 THE COURT: We are not going to conclude on  
15 Monday the matter in which we are presently engaged?

16 MR. NEGUS: No.

17 MR. KOCHIS: No. The witness I'm calling on  
18 Monday Mr. Negus doesn't feel we will finish with on  
19 Monday, and we won't finish with him until sometime on  
20 Tuesday, hopefully by noon, so I can get him back to the  
21 airport; and then my last witness, Dr. Sparks, is not  
22 available to testify Wednesday. He's available to testify  
23 Thursday, and I'll put him on --

24 THE COURT: What are we going to do Wednesday?

25 MR. NEGUS: Well, I have a bunch of discovery  
26 things I'm trying to get reduced to writing. Mr. Kochis

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1 probably won't be surprised by them. Maybe we can do  
2 some of that.

3 THE COURT: Well, I mean can't we -- can we  
4 jump to the next issue like we have a little bit here  
5 with your cross-examination of one of the witnesses?

6 MR. NEGUS: There's a real problem --

7 THE COURT: There's nothing wrong with having a  
8 couple of these going at one time, provided you can  
9 handle it, that's all.

10 MR. NEGUS: With respect to the evidentiary  
11 motions, I won't be ready to do anything until -- I have  
12 been planning on your vacation, and I'm planning on having  
13 people subpoenaed for May 14 to start taking lots of  
14 testimony at that point in time.

15 THE COURT: When am I on vacation?

16 MR. NEGUS: I was under the impression that you  
17 were going to be gone from the 7th to the 11th of May,  
18 so that's basically what I'm planning on. I am planning  
19 on having a whole bunch of people subpoenaed on May 14,  
20 and that will probably take us three, maybe four weeks to  
21 finish with all the witnesses that we'll be doing there.  
22 In that interim period, I intend to try and have written --  
23 at least a -- at a minimum, a list and for some of the  
24 motions, more formal motions, have the rest of the motions  
25 that I intend to raise before we start picking a jury,  
26 and you'll be getting that as I have a chance to work on it

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1 during the period of time that we're taking motion (sic)  
2 on the Hitch motion; so by the time we get through with  
3 that three or four weeks of testimony taking, we should  
4 have a complete list, I hope, of all the rest of the work  
5 that we have to do.

6 THE COURT: Your logistics don't sound bad.

7 In your 995 motion and in the transcript, you --  
8 you spent considerable time with reference to failure to  
9 collect, preserve evidence, and I read points and  
10 authorities and things on that. Are we going to go  
11 through all of that again?

12 MR. NEGUS: Yep, and more. I mean it won't  
13 necessarily be the same, but there will be a lot of it.

14 THE COURT: Well, I haven't relooked at the  
15 authorities, but, you know, in Mr. Kochis' response to  
16 you, he cites cases to the effect that there's no duty  
17 on the prosecution to collect certain evidence and things  
18 of this nature, and a considerable part of your argument  
19 was with reference to their failure to collect evidence,  
20 not to preserve it.

21 MR. NEGUS: I would say that that was a minority  
22 of my argument.

23 THE COURT: I thought it was the majority of the  
24 transcript time. Maybe I'm wrong.

25 MR. NEGUS: I don't think so. They collected  
26 practically most of the evidence in that house.

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1 THE COURT: Well, the rugs and the walls that  
2 were put in the loft.

3 MR. NEGUS: They collected practically all the  
4 stuff. They didn't preserve very much, but they actually  
5 physically took it, and the things that they didn't  
6 preserve were, I would say, a minority of the blood that  
7 was in the house.

5b 8 THE COURT: Mr. Negus, I fully think that you're  
9 competent to do things not -- you know, that you're not  
10 just wasting our time, but I just wanted -- I just wanted  
11 to tell you to -- if you find a way to shorten it or  
12 something like that, do so, or to incorporate by reference.  
13 Let's don't just --

14 MR. NEGUS: I don't feel comfortable in this case,  
15 Your Honor, stipulating that we can do it on the basis of  
16 the transcript at the preliminary hearing for a wide  
17 variety of reasons; therefore, I want to have -- I wouldn't  
18 be willing to stipulate to do -- to the Court considering  
19 that; therefore, we're going to have to have testimony.  
20 If it comes down to you would rule some of the testimony  
21 is irrelevant, you do, but then I have a record that I can  
22 use to appeal from. I think the testimony I'm going to  
23 be bringing in is basically all relevant. I'm reasonably  
24 confident that I can have it in a fairly organized fashion  
25 so I can get it on as quickly as I can, but there's just  
26 lots and lots of witnesses.

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1 THE COURT: Okay. So be it. I bow. I'll see  
2 you.

3 MR. KOCHIS: Monday morning in San Bernardino,  
4 Department 10.

5 THE COURT: 9:30 over there. We'll all find our  
6 way. Enjoy your weekend.

7 (Whereupon, at 2:37 p.m. an adjournment  
8 was taken in this matter.)

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