

COPY

CASE NO. CRIM 24552

SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE  
OF CALIFORNIA,

PLAINTIFF,

-VS-

KEVIN COOPER,

DEFENDANT.

SUPERIOR COURT  
NO. CR-72787  
MOTIONS

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY

HONORABLE RICHARD C. GARNER, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

APPEARANCES:

FOR PLAINTIFF-RESPONDENT:

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IN PROPRIA PERSONA

REPORTED BY:

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AND  
JUDITH L. MORRIS  
C.S.R. NO. 2400  
OFFICIAL REPORTERS

VOLUME

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THE PEOPLE OF THE STATE  
OF CALIFORNIA,

**vs.**

**Defendant.**

CR-72787

Pgs. 1625 thru 1670, inc.

Thursday, May 3, 1984

## For the People:

DENNIS KOTTMEIER  
District Attorney  
By: JOHN P. KOCHIS  
Deputy District Attorney

DAVID McKENNA  
Public Defender  
By: DAVID NEGUS  
Deputy Public Defender

LEONARD D. GUNN  
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Official Reporter  
C.S.R. No. 2400

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I N D E XPEOPLE'S WITNESSPAGE

ROBERT S. SPARKES

Direct Examination by Mr. Kochis . . . . . 1626

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EXHIBITSFOR I.D.IN EVIDENCEK-12 Curriculum vitae of  
Dr. Sparkes

1628

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1 SAN BERNARDINO, CALIFORNIA, THURSDAY, MAY 3, 1984; 9:30 A.M.

2 DEPARTMENT NO. 10

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  
11 the State of California.

12 (Leonard D. Gunn, C.S.R., Official Reporter, C-1109,  
13 Judith L. Morris, C.S.R., Official Reporter, C-2400.)

14  
15 THE COURT: Good morning. People versus Kevin  
16 Cooper.

17 Both counsel are present, Mr. Kochis and Mr. Negus,  
18 and Mr. Cooper.

19 Mr. Kochis, you were going to have another witness  
20 for us today.

21 MR. KOCHIS: Yes, your Honor. We would call at  
22 this time Dr. Robert Sparkes.

23  
24 R O B E R T S. S P A R K E S, called as a witness  
25 by and on behalf of the People, was duly sworn,  
26 examined and testified as follows:

008158

1-2

1 THE CLERK: You do solemnly swear that the testimony  
2 you are about to give in the matter now pending before this  
3 Court shall be the truth, the whole truth and nothing but  
4 the truth, so help you God?

5 THE WITNESS: I do.

6 THE CLERK: Be seated, please.

7 State your full name and spell the last name, please.

8 THE WITNESS: Robert S. Sparkes, S-p-a-r-k-e-s.

9 MR. KOCHIS: May I proceed, your Honor?

10 THE COURT: Yes, sir.

11

12 DIRECT EXAMINATION

13 BY MR. KOCHIS:

14 Q Doctor, what is your current occupation or profession?

15 A I'm a professor at U.C.L.A.

16 Q In which department?

17 A I'm in the department -- several departments. My primary  
18 department is in internal medicine. .

19 Q Are you licensed to practice medicine in the state of  
20 California?

21 A Yes, I am.

22 Q How long have you been so licensed?

23 A I think it has been about 1963. I would have to check  
24 my records to be sure of that. It has been several  
25 years.

26 Q I take it to become a doctor, you, at one time, attended

0008159

1-3

- 1 and graduated from college?
- 2 A That's correct.
- 3 Q What was your major in college?
- 4 A Biology.
- 5 Q When did you graduate from medical school?
- 6 A 1956.
- 7 Q After you graduated from medical school, did you perform
- 8 an internship?
- 9 A I did.
- 10 Q In which particular field in the field of medicine?
- 11 A At that time, it was general internal medicine.
- 12 Q And did you likewise do a residency?
- 13 A Yes. I had two years of residency training in internal
- 14 medicine.
- 15 Q After you completed that, did you receive a fellowship?
- 16 A I took two years of fellowship training in medical
- 17 genetics.
- 18 Q And since that time, is it fair to say that you have
- 19 been employed continuously in the field of medicine?
- 20 A Yes. Primarily in medical genetics.
- 21 Q Approximately how long have you been teaching or involved
- 22 in the teaching process at the medical school at
- 23 U.C.L.A.?
- 24 A I started at U.C.L.A. in 1964 and initiated my teaching
- 25 responsibilities at that time, and these have continued.
- 26 Q Have you written any articles which have been accepted

0008160

1-4

1 for publication in the field of genetics?

2 A Yes, I have.

3 Q Directing your attention to an exhibit which has been  
4 marked for identification as Exhibit K-12, does that  
5 appear to be a Xerox copy of your current curriculum  
6 vitae?

7 A Yes, it does.

8 Q Within that document, have you reflected a number of  
9 the articles you have written in the field of genetics  
10 which have been accepted for publication?

11 A Yes.

12 Q And in terms of published articles, have you been  
13 published in the neighborhood of 239 times?

14 A That's correct.

15 Q Have you likewise authored chapters in books and books  
16 themselves?

17 A Yes, I have.

18 Q Are those books and titles reflected in your vitae as  
19 well?

20 A Yes, they are.

21 Q Now, is serology a topic that's related to the practice  
22 of medicine?

23 A Yes, it is.

24 Q And in your particular field in the field of genetics,  
25 do you use any of the body fluids in your study of  
26 genetics?

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1-5

- 1 A Yes, we do.
- 2 Q Would one of those body fluids that you use be blood?
- 3 A Yes.
- 4 Q Within your community, is the concept of the ABO blood  
5 group system accepted?
- 6 A Yes.
- 7 Q And does that concept essentially hold that, putting  
8 aside some rare types, that all human beings have a  
9 particular ABO blood type in their system?
- 10 A Yes.
- 11 Q Are there essentially four ABO blood types?
- 12 A Yes.
- 13 Q Could you tell us what they are?
- 14 A A, B, AB and O.
- 15 Q And is it recognized within your community that these  
16 ABO blood types are inherited genetically from our  
17 forefathers?
- 18 A Yes.
- 19 Q Do they remain constant throughout the life of a  
20 particular person?
- 21 A Yes.
- 22 Q Likewise, are there techniques that are accepted in  
23 your community as valid and reliable methods for testing  
24 a sample of whole blood to determine the ABO blood  
25 group type of that whole blood?
- 26 A Yes.

008162



1-6

1 Q Now that I have touched upon two particular terms,  
2 Doctor, those terms being "reliability" and "validity",  
3 do those terms have any meaning in the medical context?

4 A Yes.

5 Q Is it possible for you to define for us laymen what the  
6 term "validity" means in the medical context?

7 A Validity generally will mean that in terms of a concept  
8 or finding, that these have been checked very carefully  
9 by one's peers and have been found accepted.

10 An example, as part of the publication of such  
11 findings, there is a process that one goes through and  
12 then, with further experience, they are also evaluated  
13 and validated.

14 If they are not validated, of course, they are no  
15 longer accepted.

16 Q Likewise, is it possible for you to give us a laymen's  
17 definition of the term of "reliability" as used in  
18 medical terms?

19 A Reliability in terms of a test is that the test has  
20 been proven to be valid and reliable in the sense that  
21 it can be repeated and is widely accepted in the given  
22 community, medical community.

23 Q To your knowledge, is the slide agglutination technique  
24 a technique that is an accepted and valid means of  
25 analyzing a sample of whole blood to determine a  
26 person's ABO blood group type?

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1-7

1 A Yes.

2 Q Are there other techniques that can be used?

3 A Yes, there are others such as two tests that can be  
4 used.

5 Q In your duties at U.C.L.A. Medical School, do you oversee  
6 a laboratory?

7 A Yes.

8 Q Is that laboratory involved in blood group typings?

9 A Yes, it does do blood group typing.

10 Q Is it involved in blood group typings for paternity  
11 as well as for genetic purposes?

12 A Yes. It involves both types of activities.

13 Q Is your laboratory involved in paternity testing in  
14 cases in which a determination is later made as to who  
15 the father of a particular child may or may not be?

16 A Yes.

17 Q In addition to the ABO blood group system, are there  
18 other genetic markers that exist in body fluids such as  
19 blood?

20 A Yes, there are.

21 Q Are the red cell enzymes and the serum proteins examples  
22 of these types of genetic markers?

23 A Yes.

24 Q Likewise, does your community accept the concept that  
25 these various serum proteins and red cell enzymes exist  
26 in the blood of all human beings?

008-164

1-8

1 A That's correct.

2 Q And does your community also accept the fact that a  
3 person's enzyme type or serum protein type is inherited  
4 genetically from their parents?

5 A Yes.

6 Q And absent transfusions and bone marrow transplants,  
7 does your community accept the fact that a person's  
8 enzyme types and serum protein types should remain  
9 constant throughout their life?

10 A Yes.

11 Q Are there methods that are accepted as valid and  
12 reliable means to determine the various enzyme types  
13 of a sample of whole blood, for example?

14 A Yes, there are.

15 Q And is the electrophoretic method recognized as such a  
16 method?

17 A Yes.

18 Q Do you use electrophoresis in your laboratory at the  
19 medical school at U.C.L.A.?

20 A Yes, we do.

21 Q And you do that, for example, to determine what the  
22 particular EsD and PGM enzyme types are of a particular  
23 sample of blood?

24 A Yes.

25 Q What type of medium do you use in your laboratory when  
26 you conduct your electrophoretic run?

0000155

1-9

- 1 A The support medium that we use is called starch gel.
- 2 Q Is that the only gel that's used by serologists
- 3 throughout the world to conduct an electrophoretic run
- 4 of those types of enzymes?
- 5 A No. There are other support mediums that other
- 6 laboratories will use.
- 7 Q Are you familiar with agarose gel?
- 8 A Yes.
- 9 Q Is agarose gel accepted within the community of
- 10 serologists as a gel which is proper to use in an
- 11 electrophoretic run to determine these various enzyme
- 12 and protein types?
- 13 A Yes.
- 14 Q Are you familiar with the term "gradient acrylamide gel"?
- 15 A Yes.
- 16 Q To your knowledge, is it used by other laboratories as
- 17 a medium in an electrophoretic run to determine the
- 18 haptoglobulin type?
- 19 A Yes.
- 20 Q Is there a concept in the field of serology that's
- 21 recognized called secretor versus nonsecretor?
- 22 A Yes.
- 23 Q Eventually, what is involved with a person who happens
- 24 to be a secretor?
- 25 A Secretor refers to the presence of antigens that are
- 26 found, for example, on the red blood cells like ABO

0000166

1-10

1 and also can be found in a soluble form in fluids such  
2 as saliva.

3 Q And semen?

4 A And semen.

5 Q And then would a nonsecretor typically be a person who  
6 does not secrete their antigens in their other body  
7 fluids such as saliva?

8 A Yes.

9 Q Are you familiar with the term "the Lewis blood group  
10 system"?

11 A Yes.

12 Q And within your field, is it recognized that there is  
13 a relationship between a certain Lewis blood group type  
14 and whether or not that person will secrete their ABO  
15 antigens in their body fluids?

16 A Yes, there is.

17 Q Are there likewise tests that are recognized in your  
18 community as valid and reliable means of testing a  
19 sample of whole blood to determine a person's Lewis  
20 blood group type?

21 A Yes.

22 Q Does your laboratory also conduct electrophoretic  
23 analysis of whole blood to determine the EAP, ADA and AK  
24 enzyme types?

25 A Yes.

26 Q Do you also conduct electrophoretic analysis of whole

008167

1-11

1 blood samples to determine the serum protein and  
2 transferrin and G6 serum protein types?

3 A Yes.

4 Q How long has your laboratory been using electrophoresis  
5 as a method of analyzing samples of whole blood to  
6 determine the various enzyme types?

7 A I believe we initiated our studies in about 1968.

8 Q So approximately over 15 years?

9 A Yes.

10 Q And you have been involved in the laboratory since that  
11 time?

12 A Yes.

13 Q And in your experience in overseeing the laboratory, in  
14 your opinion is electrophoresis, in particular the use  
15 of a starch gel medium, a valid and reliable technique  
16 to use on whole blood to determine the enzyme types of  
17 that whole blood?

18 A Yes.

19 Q Likewise, do you have any experience in the use of the  
20 electrophoretic technique on a drop of blood which dries,  
21 which is typically referred to as a bloodstain, to  
22 determine the enzyme types and serum protein types?

23 A We have had only limited experience in the somewhat  
24 distant past with that. Currently, almost all our  
25 work is with fresh blood samples.

26 Q The experience in the distant past was approximately

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1-12

1 in 1974 with Aerospace Industries and Bechtel?

2 A Yes, it was primarily with Aerospace. We were not  
3 interacting with Bechtel at the time.

4 Q At approximately that time, were you contacted by  
5 Aerospace to give them some assistance in setting up a  
6 bloodstain analysis system?

7 A That's correct.

8 Q Did you in fact help them set up their electrophoretic  
9 techniques to analyze blood stains?

10 A Yes.

11 Q Do you recall what type of medium you were using at that  
12 time that you set Aerospace up to use?

13 By that I mean the type of gel.

14 A Yes. The starch gel support medium.

15 Q Is that the system that you set them up with?

16 A Initially, yes.

17 Q Now, within your community, have there been studies  
18 done to determine the frequency with which a particular  
19 ABO blood group type exists in a given population?

20 A Yes.

21 Q Likewise, have there been studies done to determine  
22 the frequency with which a particular enzyme type, for  
23 example, PGM<sub>1</sub> 2-1, exists in a given population?

24 A Yes.

25 Q In the course of your field, are records regularly kept  
26 of those studies?

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1-13

1 A Yes, they are, and many of these have been published.

2 Q Likewise, is there a procedure that is often used to  
3 determine the frequency with which a particular genetic  
4 profile may exist in a given population?

5 A Yes.

6 (No omissions)

7

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1 Q Are there any of the enzyme types, the ones that we've  
2 discussed this morning, including for example the  
3 haptoglobin, are they in any way related or determined  
4 by a person's ABO blood group type?

5 A They appear to be independent.

6 Q Is there any literature that indicates AK may be an  
7 exception to that?

8 A Not in a general population sense, though within a  
9 family it's possible that certain types of ABO and AK  
10 may go together. But in unrelated individuals they are  
11 quite independent of the other.

12 Q Is one of the methods that is used to determine the  
13 frequency with which a particular genetic profile exists  
14 in a given population simply to take the frequency of  
15 occurrence of each of the gene types -- excuse me, each  
16 of the enzyme and serum protein types, and multiply  
17 them together to get a frequency for the entire genetic  
18 profile occurring?

19 A Yes. This is a technique that we are not personally  
20 involved with because of the nature of our own work, but  
21 it's my understanding that there are mathematical  
22 formulas that can accomplish that.

23 Q Returning for a moment to bloodstains and the use of  
24 electrophoresis to determine enzyme and serum protein  
25 types of a bloodstain, once the bloodstain is put in  
26 a solution and placed on the gel medium on the plate, is

0000171

1 the electrophoretic technique essentially the same to  
2 analyze a bloodstain as it is a sample of whole blood?

3 A That is my understanding, and based upon the work with  
4 Aerospace, yes.

5 MR. KOCHIS: Thank you. I have no further questions,  
6 Your Honor.

7 THE COURT: Mr. Negus.

8  
9 CROSS-EXAMINATION

10 BY MR. NEGUS:

11 Q Is salivary amylase likewise a polymorphic enzyme?

12 A Yes, it is.

13 Q Can the various phenotypes of salivary enzyme -- of the,  
14 excuse me -- can the various phenotypes of salivary  
15 amylase be distinguished electrophoretically?

16 A Our own experience has been in the study of blood samples  
17 looking at that particular enzyme, and with that  
18 technique, yes.

19 Q And is that a reliable method of distinguishing  
20 phenotypes?

21 A Yes, it is.

22 Q Have you done any work with the typing of salivary  
23 amylase in saliva?

24 A We have not.

25 Q Are you aware of others who have?

26 A Yes.

008172

1 Q In the scientific community is electrophoresis accepted  
2 as a reliable means of typing the different phenotypes  
3 of salivary amylase from saliva?

4 A That I cannot comment. I don't know, since we are  
5 ourselves don't work with saliva, so all I have is  
6 essentially hearsay information.

7 Q What do you hear in your scientific community?

8 A That it is accepted.

9 Q The connection you mentioned between AK and ABO, that  
10 connection is called a linkage?

11 A That is correct.

12 Q And what is a linkage?

13 A It gets fairly technical, but let me try to simplify  
14 it for you. All the genes that we have are located on  
15 what we call chromosomes, and chromosomes can be  
16 distinguished. In normal humans there are 46 chromosomes.

17 When we talk about linkage, we're talking about two  
18 genes that are close together on the same chromosome.  
19 So linkage refers to -- such as in the AK and the ABO  
20 indicates that these two genes are relatively close to  
21 each other on the same chromosome.

22 Q So that there exists a probability that when you get one  
23 of your -- for example, your mother's two alleles of  
24 AK, you'll be getting the -- ABO, you'll be getting the  
25 AK allele which exists on the same side of the chromosome  
26 because of their proximity?

0000173

1 A That's correct, yes.

2 Q That fact, however, does it have any effect upon the  
3 independence of AK and ABO in the entire world  
4 population?

5 A It's my understanding it does not.

6 Q And why is that?

7 A Because these traits are separate genetic traits, and  
8 they can separate through a process called crossing over.  
9 And if one looks at unrelated individuals, there should  
10 not be any particular relation between what we call the  
11 specific allelic types on the same chromosome.

12 MR. NEGUS: Nothing further.

13 MR. KOCHIS: No redirect.

14 THE COURT: Doctor, thank you very much.

15 THE WITNESS: Thank you.

16 THE COURT: You are excused.

17 Mr. Kochis, any further witnesses?

18 MR. KOCHIS: No, Your Honor. I would move into  
19 evidence at this time the remaining exhibit, which I believe  
20 has been marked for this hearing as K-12. And with that,  
21 we have no further evidence to present and we would rest.

22 THE COURT: On this issue?

23 MR. KOCHIS: On this issue.

24 THE COURT: Mr. Negus?

25 MR. NEGUS: I have no evidence on this issue other  
26 than that which has already been presented.

008174

1 THE COURT: Counsel, I have not received prior to  
2 argument any Points and Authorities. Have you prepared any?

3 MR. NEGUS: My office now has a system in the West  
4 End where you have to take turns, and you have to put your  
5 name in to get things typed. My written document that I wish  
6 to submit to the Court is being typed at the present time,  
7 and it will be ready no later than noon.

8 MR. KOCHIS: Your Honor, I'm going to be relying in  
9 terms of a legal argument essentially on the California  
10 Supreme Court case of People vs. Kelly, which I believe the  
11 Court has --

12 THE COURT: I've read it.

13 MR. KOCHIS: -- and the rules that are established  
14 in that case. It's my understanding -- and Mr. Negus can  
15 correct me if I'm wrong -- that he's not going to be  
16 submitting Points and Authorities in opposition to this  
17 particular concept. He's going to have a list for the Court  
18 of findings of fact and conclusions of law which he wishes  
19 this Court to make. My understanding is it may be lengthy.  
20 It may be five to ten typewritten pages.

21 I'm not sure that the Court is required to make any  
22 such findings on a Kelly-Frye hearing in a case such as  
23 this. And I'm not sure what I'm going to be doing this  
24 afternoon when I get Mr. Negus's list, if I'm going to be  
25 prepared to proceed. I hope to read it and argue against it,  
26 or if there are any areas I can agree on, but it doesn't

008175

1 appear that he's going to be submitting Points and  
2 Authorities in opposition to at least the testimony of the  
3 witnesses, other than Mr. Gregonis, who have testified.  
4 And I don't think at this point he's contesting any longer  
5 the acceptance in the scientific community of the use of  
6 electrophoresis to determine enzyme and serum protein types.

7 MR. NEGUS: I think the factual issues which exist  
8 in the case and which the Court's going to have to rule on  
9 is what are the techniques that are in fact reliable and what  
10 are the ones that aren't. Some of the techniques that Mr.  
11 Gregonis articulated may be reliable. I believe a couple of  
12 them are not, according to the testimony of Mr. Wraxall and  
13 Dr. Sensabaugh. And some of them are reliable only if  
14 certain conditions are met. So my findings are really just  
15 with respect to requested findings about what's reliable and  
16 what's not based upon the evidence.

17 As the testimony was that each and every one of the  
18 tests that is done has a separate indicia of reliability  
19 as does each and every marker -- that is, some markers are  
20 reliable, some aren't; some markers are reliable in some  
21 circumstances, some aren't -- I felt that it was more  
22 helpful in presenting my argument to have it all written  
23 than to try and do it orally.

24 THE COURT: So what you'd like at this point would  
25 be to break it to some point this afternoon to give you a  
26 chance to get those Points and Authorities in?

008176

1 MR. NEGUS: Right.

2 THE COURT: And for Mr. Kochis and I to review them.

3 MR. NEGUS: Right. I have a couple of matters that  
4 don't relate to the Kelly-Frye motion, which won't take very  
5 long, but which I nonetheless would like to bring to the  
6 Court's attention before we leave.

7 THE COURT: Why don't we take that. Then we'll break  
8 until, say, two o'clock and resume. That will give us both  
9 a chance to study it.

10 MR. NEGUS: As soon as the typist is finished with  
11 them, I'll bring them over to both of you.

12 THE COURT: What new matters would you like to take  
13 up?

14 MR. NEGUS: Neither of these are of great weight  
15 in terms of the outcome of the case, but one of them matters  
16 a lot to Mr. Cooper. I mentioned earlier to the Court that  
17 Mr. Cooper, when he was arrested in Los Angeles, that his  
18 glasses were not taken and preserved at that point in time.  
19 Mr. Forbush has arranged for an optometrist who would be  
20 willing to go out to the jail to examine Mr. Cooper and to  
21 provide him with a prescription for the glasses and to have  
22 those glasses prepared. Mr. Cooper has friends who are  
23 willing to pay for that, so it's not going to cost the county.

24 So what I'm requesting is an order to the sheriff  
25 to allow a Dr. Bernard Rubin, who has done this work before,  
26 he apparently did it for Mr. Diaz --

008177

1 THE COURT: Did you prepare an order?

2 MR. NEGUS: The order is being typed. It's in the  
3 same priority. But I do have an order that's being prepared.  
4 Just in case the sheriff has any problems with that, I'd like  
5 to just let them know that I'm bringing that up again.

6 MR. KOCHIS: Your Honor, I think we would like a short  
7 period of time to check Mr. Rubin out. As the Court recalls,  
8 the last time we had the order signed for the person who was  
9 going to cut Mr. Cooper's hair, there were some problems  
10 with his background in terms of being a guest himself at  
11 the county jail at one time.

12 THE COURT: Give Detective Arthur any detailed  
13 information you have about the doctor and let's take it up  
14 then at two o'clock.

15 MR. NEGUS: Fine. The other thing I'd like to  
16 request, Your Honor, is this: I have a handwritten list  
17 of photograph numbers that I am requesting that the Court  
18 purchase from the sheriff's department for use in the Hitch  
19 motion. Apparently Mr. Kochis and I both have copies that  
20 we use all the time of various photographs of the crime scene.  
21 During the Preliminary Hearing we were in a situation of  
22 refreshing witnesses' recollection and that sort of thing  
23 by showing our copies of the photographs to various witnesses.  
24 That doesn't leave a very clear record, because there's  
25 nothing left in the Court's file --

26 THE COURT: Haven't we got exhibits marked individually

008178



1 as exhibits?

2 MR. NEGUS: These photographs, I believe -- these  
3 photographs were never introduced into evidence at the  
4 Preliminary Hearing. That's the problem we had with them.  
5 We were just showing them each other's books, referring to  
6 them by number, but not introducing them into evidence,  
7 because we didn't have extra copies.

8 My understanding is that the sheriff's office wants  
9 the Court to pay for them rather than the sheriff's office.  
10 So I believe that there's a lot of them, and all I'm asking  
11 for is three-by-five photographs. But nobody else is willing  
12 to provide the photographs, so I request the Court to do it.

13 THE COURT: Do you see a similar need, Mr. Kochis?

14 MR. KOCHIS: I think the record's unclear as to what  
15 took place at the prelim in some aspects, because Mr. Negus  
16 would show a witness a photograph and that photograph was  
17 never marked and entered into evidence.

18 The problem the sheriff's office is having is they  
19 made a copy for their master file, they made a copy for  
20 Mr. Negus, they made a copy for my office. And they feel  
21 that they're being put to some steps that they're ordinarily  
22 not required to do, and it seems like every time they turn  
23 around they're required to make an entire new set. They're  
24 concerned about the effort they're having to spend on this  
25 case making four or five copies.

26 THE COURT: I can't conceive of doing a similar thing

008179

1 at the time of trial. Every tangible document shown to a  
2 witness is going to be marked for identification.

3 MR. NEGUS: I agree. That's why I wanted to have  
4 copies we can have marked. I can't continue --

5 MR. KOCHIS: Your Honor, there's no problem with that,  
6 but that enhances the nature of the problem. They likewise  
7 have prepared for us a series of photographs that are going  
8 to be used during the trial. Those photographs don't all  
9 cover the areas that Mr. Negus is interested in having  
10 covered on the Hitch issue, because the issues are much  
11 different.

12 THE COURT: Does the list that you have then  
13 prepared take into consideration the list that they have  
14 already prepared copies of?

15 MR. NEGUS: My understanding was that they don't  
16 wish to use any of the photographs that they're going to use  
17 at the trial for the Hitch motion. Therefore, I went  
18 through my notebooks and picked out the photographs that I  
19 believe -- there's a lot of them, but I believe that they'll  
20 all probably be reasonably likely to have to be referred to  
21 during the course of the Hitch motion. And the sheriff  
22 charges an exorbitant sum for each of their little three-by-  
23 fives. I'm perfectly willing to take their negatives and  
24 go down and have them done for one-eighth the price, but  
25 that may cause them other problems.

26 THE COURT: It appears it will be necessarily for us

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1 to have the additional prints. My pocket is a little deeper  
2 than the sheriff's pocket. It comes out of the same fund.  
3 But I suppose for budgetary reasons -- is that your position,  
4 Detective Arthur?

5 DETECTIVE ARTHUR: Yes.

6 THE COURT: Will you give us a cut rate? I'll order  
7 the sheriff's department to produce the exhibits indicated  
8 by Mr. Negus, and you can charge it to the Court.

9 MR. NEGUS: I believe I gave a copy to Mr. Kochis.

10 MR. KOCHIS: He has.

11 MR. NEGUS: I believe I did, and I can find a copy  
12 for Detective Arthur. That's I believe all of the matters  
13 I had at the present time.

14 THE COURT: Let's adjourn, then, until the hour of  
15 2 p.m. this afternoon. As soon as your papers are received,  
16 would the clerk put it back on my desk.

17 If the students would like to chat informally with  
18 the Court back in chambers, the bailiff will show you down  
19 around through the corridor, and I'll be happy to see you  
20 informally back in chambers, if you wish.

21 Court will be in adjournment.

22 (Whereupon a recess was taken from 10:57 a.m.  
23 until 2 p.m of the same day.)  
24  
25  
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0000101

1 SAN BERNARDINO, CALIFORNIA, THURSDAY, MAY 3, 1984; 2:00 P.M.

2 DEPARTMENT NO. 10

HON. RICHARD C. GARNER, JUDGE

3 (APPEARANCES AS HERETOFORE NOTED)

4  
5 THE COURT: All right. We are once again assembled.

6 Since I saw you last, Mr. Negus, I have received  
7 your document entitled, "Defendant's Proposed Findings  
8 Regarding Reliability of Serological Evidence".

9 I'm not sure which is the best way to proceed. I  
10 would think that you would go first, Mr. Negus.

11 Is that all right, Mr. Kochis, if he wishes to be  
12 heard on the motion?

13 MR. KOCHIS: Do I?

14 THE COURT: If Mr. Negus goes first.

15 MR. KOCHIS: I have no objection to him starting.

16 THE COURT: Would you care to be heard, sir?

17 MR. NEGUS: Yes. What I have done with the proposed  
18 findings regarding the reliability of serological evidence,  
19 your Honor, is essentially summarize the testimony of the  
20 various prosecution witnesses with respect to the different  
21 techniques that we have been using.

22 I think it's pretty clear from Mr. Gregonis'  
23 testimony, from all the people's testimony, that each  
24 individual test has to rise and fall on its own merits.  
25 You can't put them all together in a bunch.

26 Mr. Gregonis testified to that effect on page 1105,

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1 and through the literature it's clear that when each  
2 additional test for each additional marker comes up, it's  
3 retested. Some may be reliable and some may not. Some may  
4 be accepted and some may be rejected.

5 That poses the problem of how does one look at these.  
6 And in particular there are no cases, as I have indicated  
7 before, on it, on the admissibility in California courts of  
8 any of these various markers.

9 In some situations, the Court has just looked to the  
10 literature to determine whether or not they are reliable.

11 In this particular case, we haven't been presented  
12 with very much of the literature, and, as the District  
13 Attorneys Association has argued in the past, they argued  
14 essentially the same thing I'm arguing at a case called  
15 People v. Brown, which was argued in the Supreme Court at  
16 the beginning of last month, that a Court can't really  
17 look to just the literature in the abstract to determine  
18 the reliability of these particular techniques because it's  
19 too technical and you need the experts to tell you which  
20 techniques are reliable and which ones aren't.

21 And I think that that's basically the kind of  
22 testimony that we had in this particular case.

23 There are three different classifications that I  
24 would like to make of the various tests. I would submit  
25 that with respect to one test, that is the test for  
26 transferrin, that although there was no evidence presented

008183

3-3

1 that if certain precautions were followed, it's not  
2 unreliable, basically the evidence that was presented showed  
3 that if you take certain precautions, it's reliable, but  
4 that's only one-half of the Kelly-Frye criteria.

5 As People v. Kelly said, California adopts a very  
6 conservative approach to scientific evidence. You have got  
7 to show both that something is reliable and something is  
8 accepted in the scientific community, which are not  
9 necessarily exactly the same.

10 In the Kelly case, the prosecution was arguing for  
11 a test which had been adopted in various federal jurisdictions  
12 that all you have to do is prove reliability.

13 But that general test was not accepted by Kelly-Frye,  
14 and the reason was they pointed out that scientific evidence  
15 can almost take on an aura of mystic infallibility, so that  
16 in California we want to wait a bit, make sure, not  
17 introduce that kind of overwhelmingly powerful evidence  
18 until it has had a chance to stand the test of time.

19 The testimony about transferrin was that the basic  
20 techniques have never been -- that were used for bloodstains  
21 -- have not been in fact published anywhere in an actual  
22 published form. They have been presented in papers to some  
23 groups of criminalists.

24 Of the prosecution witnesses outside the field of  
25 forensic science, Dr. Sparkes does transferrin using a  
26 different technique. Dr. Morris didn't do transferrin

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3-4

1 at all.

2 Of the people that testified within, Mr. Wraxall,  
3 the developer of the technique, thought it was reliable.  
4 So did Dr. Sensabaugh.

5 But they both conceded that it was basically a new  
6 technique which hadn't gained general -- I'll take it back.  
7 They conceded it was a new technique, and Dr. Sensabaugh  
8 even conceded that in a chapter he wrote as recently as  
9 three years ago which the prosecution introduced as  
10 Exhibit K-10-B. He had ~~ad~~<sup>o</sup>mitted that from those lists of  
11 markers that had gained general acceptance.

12 So if it has gained general acceptance, it's only  
13 in the last few years, and I would submit that it hasn't  
14 been published. And it was testified that it was not  
15 widely used.

16 Even if there is evidence, it's ~~un~~<sup>o</sup>reliable. It  
17 hasn't gained general acceptance yet.

18 If you rule against me on that, the second group of  
19 tests, the ones which basically Mr. Gregonis testified to,  
20 was -- In this particular hearing, he described, you know,  
21 what types of tests he did work on as to determining a  
22 nonsecretor status.

23 He indicated that he used the absorption inhibition  
24 test, and that test alone, to determine nonsecretor status.

25 Both Mr. Wraxall and Dr. Sensabaugh said that that  
26 doesn't prove what Mr. Gregonis claimed it did.

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1           So with respect to that issue, that is, can you  
2 prove nonsecretor status using the absorption inhibition  
3 test, both of the prosecution experts said you can<sup>1</sup>

4           Now, they said you can prove secretor status using  
5 it, but as Dr. Sensabaugh explained and Mr. Wraxall  
6 indicated, that's not the same thing.

7           So basically, Mr. Gregonis' proposed method has not  
8 gained general acceptance, and, in fact, it was explicitly  
9 rejected by the two prosecution witnesses who testified on  
10 the subject.

11           So with respect to nonsecretor status, I would say  
12 Mr. Gregonis is flat-out wrong. The techniques that he's  
13 suggested don't show what he thought they did.

14           With respect to the other techniques that are involved,  
15 and that is which are involved in the bulk of what I did as  
16 far as outline as far as the proposed findings of fact are  
17 concerned, the prosecution under Kelly and under Shirley has  
18 the burden of proving general acceptance.

19           As the District Attorneys Association in the past  
20 has argued, what technique you are talking about, again,  
21 determines whether or not it's reliable. So that in trying  
22 to get a handle on what is reliable and what is not, what  
23 technique we are talking about, it looks like you have to  
24 be fairly clear in what your definitions are.

25           There are some parts of it which may just go to  
26 weight rather than to admissibility. For example, you will

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1 note that there was a lot of testimony about not using the  
2 cooling system properly, not using proper staining  
3 techniques, a bunch of things, bunch of technical  
4 procedures which, if you mess them up, you can get unreliable  
5 results.

6 But I did not include those techniques in my proposed  
7 findings of fact because the way the testimony came out, it  
8 appeared that failure to do that would come up in the next  
9 part of the motion that we get to, if we get that far.

10 The third prong, as it were, of the Kelly-Frye  
11 standard, were reliable tests performed in a satisfactory  
12 manner in this particular case.

13 The evidence that we have had thus far did not get  
14 to that particular issue, and I would concede that those  
15 particular standards are not part of the definition of what  
16 makes a reliable test, that goes to weight rather than  
17 admissibility.

18 But with respect to those things which I did put  
19 into the proposed findings, I would submit that they are  
20 part of the definition of what constitutes a reliably run  
21 method.

22 There are some of the things that have to do with  
23 the controls that you use, and it's clear from the testimony  
24 that if you don't use proper controls, you don't know whether  
25 your results are accurate or not.

26 So basically, the prosecution didn't do a heck of a

008187

3-7

7           So we know at least that's the test they are talking  
8   about.

9 With respect to Wraxall and Sensabaugh, the people  
10 who had experience in the forensic context, they both  
11 indicated that in order for those tests to be reliable,  
12 part of that test was to use noncontrolled and, in certain  
13 cases, negative controls as proper standards.

14 So I think that the first part of that which applies  
15 to all the different tests is shown by the evidence to be  
16 part of the test. If you don't have that, you don't have  
17 a test finding that's reliable.

18 Similarly, when you get down to the enzymes, the  
19 rules that they indicated have to be followed in order for  
20 the interpretation to be reliable, if your test is involved  
21 in a technique which doesn't follow those results, then  
22 you are not using the technique that they said was reliable.

23 Those rules are part of the definition of the  
24 technique, and in order for the prosecution to fulfill and  
25 carry their burden of proof of showing them reliable, those  
26 sort of essential conditions to reliability which the

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1 experts testified to, and if you omit those from your  
2 definition of your technique, you are not dealing with the  
3 same technique that they testified about.

4 Finally, the definition I have included under the  
5 minimum standards that are required for the operator could  
6 be argued, and I expect Mr. Kochis will try to argue that  
7 that goes to Mr. Gregonis' qualifications as an expert.

8 (No omissions)  
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1 But I would submit that -- which we'll take up in  
2 a month or so. But I would submit that they are in fact  
3 an essential part of the reliability of the technique, because  
4 if you recall the testimony of Dr. Sensabaugh, he indicated  
5 that the different methodologies require a different level  
6 of scientific sophistication in order to carry them out.  
7 That is to say, you can't have a person who is barely  
8 qualified to run gas chromatographs running a neutron  
9 activation analysis.

10 Similarly, there's a minimum standard that the  
11 techniques require just in order to make them work right in  
12 serology. And what I spelled out in the finding of facts  
13 is what Dr. Sensabaugh testified to was that minimum level.

14 On a couple of issues, Dr. Sensabaugh and Mr.  
15 Wraxall varied slightly in their testimony. The one that  
16 comes to mind is Dr. Sensabaugh indicated that three  
17 different standards were required for the acid phosphatase  
18 to be run reliably. Mr. Wraxall was willing to get by with  
19 two. In the findings of fact I included Dr. Sensabaugh's  
20 description rather than Mr. Wraxall's. The reason for that  
21 is again, we're dealing with a conservative standard, and a  
22 standard that the courts have deliberately designed to be  
23 conservative. So that if the Prosecution's experts don't  
24 agree, I would submit that it's the more rigorous standard  
25 which both Mr. Wraxall and Dr. Sensabaugh can agree on,  
26 and that's the one that the evidence in this particular case

008190

1 shows to be accepted in the scientific community.

2 In ruling on this motion, the Court is basically just  
3 going on the eleven or whatever it was exhibits and the  
4 testimony of the five witnesses that were presented. Based  
5 on that record, I would submit that the findings which I  
6 have submitted to the Court are justified.

7 THE COURT: All right. Thank you.

8 Mr. Kochis.

9 MR. KOCHIS: Your Honor, first of all Mr. Negus cites  
10 no case as authority to this Court for the proposition that  
11 this Court is required to make specific findings of fact and  
12 conclusions of law. I think the Kelly case, specifically at  
13 Page 30, sets out what is required. It's simply required that  
14 the proponent of the evidence, in this case the Prosecution,  
15 make a preliminary showing of a general acceptance of the  
16 new technique within the scientific community.

17 We have to show essentially three things: The  
18 reliability of the method must be established, and Kelly  
19 says we must establish that through expert testimony; second,  
20 the witness who furnishes an opinion must be qualified as  
21 an expert to give an opinion on the subject; and third, we  
22 must demonstrate that the correct scientific procedures  
23 were employed in this particular case. \*

24 I don't think Mr. Negus has argued on or is in a  
25 position to argue that the five witnesses who testified in  
26 this hearing were not experts. If you look at the vitae of

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1 Mr. Sparks, Dr. Sensabaugh, the testimony of Dr. Morris,  
2 Mr. Wraxall, and Mr. Gregonis, they're all experts within  
3 the definition of the Evidence Code who were qualified to  
4 give an opinion.

5 On Monday, April the 23rd, in Ontario, Mr. Negus  
6 articulated the burden that he was going to put the Court  
7 to, put the Prosecution to, and I believe it was on Page 1067.  
8 I had it set out, and I seem to have misplaced it.

9 It's on 1047, and it's Lines 11 through 25. He  
10 asked us to lay the Kelly-Frye foundation for electrophoresis  
11 as to the various serum proteins and enzymes which are  
12 depicted on K-1. He asked us to lay a Kelly-Frye foundation  
13 for Lewis typing of blood, for the test Mr. Gregonis performed,  
14 to determine whether or not someone is a secretor or a non-  
15 secretor when you analyze body fluids such as semen and  
16 saliva; also with respect to determining amylase in saliva  
17 stains.

18 Within that Mr. Negus made a request for a Kelly-Frye  
19 foundation for certain things, for example, isoelectric  
20 focusing with PGM subtypes. We did not introduce that type  
21 of evidence, because our expert did not perform those types  
22 of results, and I won't talk about those.

23 I don't think there's any quarrel within the  
24 Preliminary Hearing foundation that's required by Kelly that  
25 all the experts agree that not only in the community of  
26 forensic scientists -- which Mr. Wraxall, Dr. Sensabaugh,

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1 and Mr. Gregonis practiced in -- but in the field of medicine,  
2 the use of an electrophoretic technique is accepted in those  
3 communities as a valid and reliable means of typing whole  
4 blood to determine enzyme and serum protein types; bloodstains  
5 as well. They all agreed as to the techniques to type whole  
6 blood to determine ABO status, the slide agglutin technique,  
7 the absorption-elution and Lattes test on stains.

8 Mr. Gregonis testified about the Lattes test that  
9 he performed. He talked about the significance of someone  
10 being a particular Lewis type, and a microcapillary tube  
11 test that is performed to determine a particular Lewis type.

12 Mr. Wraxall testified that that's accepted in the  
13 community as a valid and reliable means of determining some-  
14 one's Lewis type, as did Dr. Sensabaugh.

15 I disagree with Mr. Negus's interpretation of the  
16 evidence as to transferring and absorption-elution --  
17 absorption-inhibition on the stains. Both Dr. Sensabaugh  
18 and Mr. Wraxall testified that transferrin is a serum  
19 protein that is tested on electrophoretic run using the  
20 same technique that has been developed to test the other  
21 enzyme types for years. We know that Dr. Sparks in the  
22 field of medicine has been using electrophoresis for over  
23 15 years, and we know that Mr. Wraxall started working on  
24 electrophoresis in London sometime in the mid-60's, a period  
25 of 20 years.

26 They have testified that they have added transferrin

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1 to the group that can be reliably typed, and I believe  
2 Mr. Wraxall testified that the work that Dr. Sensabaugh has  
3 done, and his own work, indicates that transferrin can be  
4 reliably typed using electrophoresis.

5 Likewise with the absorption-inhibition on Page 1286,  
6 Lines 21 through 26, the question was asked of Mr. Wraxall:  
7 And within your community of forensic serology is the  
8 absorption-inhibition test an acceptable means, a valid  
9 and reliable means, to determine -- to test the type of body  
10 fluids you just mentioned, saliva and semen, to determine  
11 if someone is a secretor or not? Answer: Yes, it is.

12 Mr. Gregonis testified in the same fashion. It's  
13 our position, Your Honor, that many of the factors Mr. Negus  
14 has set for the Court in this seven-page document are items  
15 that go to the weight a trier of fact, in this case a jury,  
16 should give to the testimony, not whether or not on a  
17 foundational ground it should be admissible.

18 The purpose of this hearing was simply to present  
19 evidence to the Court that these techniques have received  
20 acceptance in the scientific community, to allow us to call  
21 the experts to testify at the trial, to allow them to be  
22 subject to cross-examination, to allow Mr. Negus to call  
23 any witness, any expert witness he may have in opposition,  
24 and then allow the trier of fact, the jury, to make a  
25 determination as to what weight if any they're going to give  
26 this type of evidence.

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1 But it's our position that the test Mr. Negus  
2 required us to meet on April the 23rd we have met within  
3 the definition of Kelly-Frye by the five witnesses that we've  
4 called. I would also point out that if you take examples  
5 of what Mr. Negus would have the Court do, specifically his  
6 document, for example on Page 4 of the document, Lines 22 and  
7 23, he would request the Court to make a finding that for  
8 each marker typing, calls should be made only if -- and then  
9 for an example turning to Page 5, Line 6 -- with the EsD,  
10 the bands are not diffused. And he cites as authority for  
11 that, or as a reference for that, Dr. Sensabaugh's testimony  
12 on Page 1527.

13 And the testimony consists of this: Question: And  
14 if they become diffused, then it's considered then not  
15 readable? Answer: If it's too diffuse, many analysts would  
16 not consider it readable.

17 There's nothing in that exchange that indicates  
18 that there's a rule that must be followed before you can  
19 make the call or that there are a group of analysts who  
20 agree that you can never make a call unless that rule is  
21 followed. It's a very vague statement, and Mr. Negus has  
22 pulled from that what he chooses the Court to adopt and  
23 submitted it in writing.

24 It's our position that the Court is not required to  
25 make that type of finding.

26 THE COURT: What type of order would you desire for

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1 me to make?

2 MR. KOCHIS: Your Honor, with respect to electro-  
3 phoresis, to the use of the technique, the multisystem that  
4 appears on K-1, the use of electrophoresis to test PGM, EsD,  
5 ADA, EAP, AK, peptidase A, CA II, the use of the acrylamide  
6 gel, and electrophoresis to test for haptoglobin --

7 THE COURT: Excuse me, Mr. Kochis.

8 MR. KOCHIS: Yes.

9 THE COURT: Is there any opinion testimony from  
10 Mr. Gregonis which you would withdraw for purposes of lack  
11 of foundation that was brought out by the evidence?

12 MR. KOCHIS: No.

13 THE COURT: All right. Thank you.

14 Mr. Negus, do you wish to respond?

15 MR. NEGUS: With respect to the test for non-  
16 secretor status, the question that Mr. Kochis asked Mr.  
17 Wraxall was ambiguous, because the absorption-inhibition  
18 test, according to his testimony, can be used to determine  
19 secretor status. But in order to determine non-secretor  
20 status, one has to do more for both semen and for saliva.

21 The same ambiguity existed in his questions with  
22 respect to Dr. Sensabaugh. They both explicitly stated that  
23 in order to determine non-secretor status absorption-inhibition  
24 test alone is not reliable. Mr. Gregonis not only was  
25 mistaken as to the general sensitivity levels of amylase  
26 versus red cell antigens and saliva and testified to the

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1 contrary to testimony of Dr. Sensabaugh and Mr. Wraxall on  
2 that, but he also indicated that in his mind the absorption-  
3 inhibition method alone was enough to determine non-secretor  
4 status. He was wrong.

5 Mr. Kochis used some sort of preliminary finding as  
6 if there were some lesser standard that he had to prove as  
7 it were in a Preliminary Hearing from Kelly, and he cited  
8 Page 30. I am unable to find that particular language that  
9 he's quoting in Kelly. ✓

10 They talk about a two-stage process. The reliability  
11 of the method must be established and the witness furnishing  
12 such testimony must be qualified as an expert to give an  
13 opinion. Those are the two things that we are -- ah. Mr.  
14 Kochis points out -- let me just go on. Let me just finish  
15 up and I'll get back to what Mr. Kochis pointed out.

16 A two-stage process is what we've done so far. We  
17 did not get to this third additionally because if you'll  
18 note from the proposed motion order, we haven't reached  
19 that particular stage yet.

20 The preliminary showing that Mr. Kochis has required  
21 doesn't say anything about a lesser standard of proof. He's  
22 got to prove general acceptance of the new technique in the  
23 relevant scientific community. The problem in this  
24 particular case that you're dealing with is how precisely  
25 do you have to define the technique? Some of the cases have  
26 just gone into voice prints in general. But as Huntington vs.

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1 Crowley, from which the language from Mr. Kochis makes clear  
2 not all blood tests are alike, and Huntington vs. Crowley  
3 specifically says that even though ABO maybe acceptable,  
4 other particular antigens may not have met that level of  
5 acceptability. And they reject it in Huntington vs. Crowley,  
6 the use of the antigen for just that reason. Some  
7 are reliable, some aren't. In terms of the defining the  
8 techniques, some techniques are reliable, some aren't. You  
9 need experts to tell you exactly what techniques are reliable.

10 Mr. Gregonis is not able to articulate that well  
11 what the standards are that you have to use, what the  
12 definition of the technique is. The experts that <sup>know</sup> no more  
13 about it, Mr. Wraxall and Dr. Sensabaugh, did articulate  
14 what those standards are.

15 Again, in making those particular statements that I  
16 did, I have taken the most rigorous statements that they made.  
17 The reason for that is that when they say some analysts think  
18 you can get by with less, some analysts think you can get  
19 by with more, it stands to reason that the more rigorous is  
20 the one that's generally accepted in the scientific community,  
21 the less rigorous if some accept it and some don't is not  
22 generally accepted. And that seems to be just a very easy  
23 concept to understand.

24 If you're dealing with general acceptance, the most  
25 rigorous is reliable; the things where people disagree is  
26 not reliable. And if we were dealing with the Federal standards,

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1 Mr. Kochis may well have fulfilled his burdens. But  
2 California rejected those general standards. They took the  
3 test of general acceptance. General acceptance is what's  
4 most vigorously accepted by everybody, and that's what I've  
5 tried to define as precisely as I could in the findings.

6 I would also request that I don't believe that for  
7 the purposes of the Hitch motion that the precise techniques  
8 which would be required in order to make them accurate are  
9 particularly relevant, but there was also testimony that G6PD,  
10 haptoglobin, GLO, and PGM subtyping can be reliably done  
11 using certain techniques.

12 (No omissions.)  
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1           That, I think, is going to be the only relevant  
2 factor at the Hitch motion. And I would request the Court  
3 also to make findings along with it that under using some  
4 techniques those can be reliably done.

5           THE COURT: Give me about 10 or 15 minutes. I will  
6 call you back.

7           We will be in recess.

8           (Whereupon a brief recess was taken.)

9           THE COURT: All right. We are all assembled.

10          With respect to the requested findings, I decline  
11 to endorse an abstract judicial manual of approved serology  
12 techniques and a laundry list of do's and don'ts for  
13 criminalists.

14          Mr. Negus, with all respect, I find your proposed  
15 findings to be on precise evidentiary facts in minuteness  
16 of detail some arguable as opposed to ultimate facts. But  
17 it's sufficient that the findings are of ultimate facts.

18          I do find that all the contested serological  
19 techniques or methods employed here have reached the  
20 requisite degree of general acceptance in the pertinent  
21 scientific communities. And, further, that the reliability  
22 and validity of the testing methods, as the terms have  
23 been generally defined by the testimony, have been  
24 established, and that the prosecution has carried their  
25 burden in that regard.

26          Secondly, while it's not necessary to that finding,

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1 I do find that Dan Gregonis was and is qualified to render  
2 an expert opinion regarding the judgment of scholars and  
3 experts on the question of acceptance within the general  
4 scientific community, which opinion is buttressed, of course,  
5 by the other experts who have testified on this issue.

6 Your point referring to Mr. Kochis' remarks about  
7 the weight of the evidence I think would be better made to  
8 the ultimate trier of fact through cross-examination and  
9 direct examination and ultimate argument.

10 Mr. Kochis, do you, as a proponent of the evidence,  
11 desire more specific findings?

12 MR. KOCHIS: No.

13 THE COURT: Then I think that's as far as I need or  
14 should go in that regard.

15 I assume that you are both ready to resume next  
16 Monday.

17 MR. KOCHIS: Your Honor, you are apparently going  
18 to be unavailable next Monday.

19 THE COURT: I keep forgetting my own vacation.  
20 The following Monday.

21 MR. KOCHIS: May the 14th, we are.

22 THE COURT: The 14th of May. Then we will resume  
23 at 9:30 on that day.

24 MR. NEGUS: Before we go, the requested order for  
25 the eye examination for glasses.

26 MR. KOCHIS: Sergeant Arthur informed me that the

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1 jail has no objection to the doctor whose name Mr. Negus  
2 mentioned this morning conducting the examination.

3 THE COURT: Then if I may see your order?

4 All right. I signed the order. Hopefully, that  
5 will accomplish the desired result.

6 Your proposed findings is ordered to be marked and  
7 filed and maintained in the file in the case.

8 Did you have something else?

9 MR. NEGUS: I just wanted to inform the Court that  
10 just so we don't have any problems, that I'm requesting --  
11 and I believe there is no opposition -- that the testimony  
12 and exhibits that were taken on this motion be deemed to  
13 be part of the next motion we are going to hear, the Hitch  
14 motion, and also the motion which I'm going to request  
15 after that, that the prosecution be required to prove that  
16 Mr. Gregonis used the proper techniques in this particular  
17 case.

18 THE COURT: So stipulated?

19 MR. KOCHIS: Yes. I might add it's refreshing to  
20 find out we can use the testimony of this hearing and not  
21 have to call everybody back again.

22 THE COURT: I hope that's what he means.

23 MR. KOCHIS: That's what I mean, your Honor. And  
24 my position has been all along that the reason that you  
25 can't use the preliminary hearing is because there are  
26 issues of credibility and you can't do that on a transcript.

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3 THE COURT: All right. The stipulation is accepted  
4 and approved. You may make reference to those transcripts  
5 hereafter.

7 THE COURT: May 14. Enjoy your break.

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