

COPY

SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,)
Plaintiff-Respondent,)
vs.) CR 72787
KEVIN COOPER,) Supreme Court
Defendant-Appellant.) No. Crim 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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61
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Pages 5372 to 5437, incl.

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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.) NO. OCR-9319
7 KEVIN COOPER,) VOLUME 51
8 Defendant.) Pgs. 5372 thru 5437
9

10 REPORTERS' DAILY TRANSCRIPT
11 BEFORE HONORABLE RICHARD C. GARNER, JUDGE
12 DEPARTMENT 3 - ONTARIO, CALIFORNIA
13 Monday, July 23, 1984

14 APPEARANCES:

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ONTARIO, CALIFORNIA; MONDAY, JULY 23, 1984; 9:40 A.M.

DEPARTMENT NO. 3 HON. RICHARD C. GARNER, JUDGE

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, JOHN P. KOCHIS, Deputy District
9 Attorney of San Bernardino County,
10 representing the People of the State
11 of California.

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

15 THE COURT: Good morning, everybody. Mr. Cooper
16 and all counsel are present.

17 At this time, I have previously indicated to you
18 that I would like to hear your argument as to the Hitch
19 issue. In preparation for this, I didn't get to spend as
20 much time as I wanted to. I spent all day Thursday and
21 only a few hours this weekend, but Friday I expected to
22 have substantial time, and then due to the sickness of
23 one of the judges, I had to handle another calendar, so
24 Friday I didn't get to spend hardly any time on it, so I
25 would think that probably what's going to happen is that
26 I'll hear your sterling words of wisdom, and then not do

1 anything with it probably until tomorrow, give me the rest
2 of the day to work.

3 With that, Mr. Negus, would you care to go first?

4 MR. NEGUS: There's one additional case that I'd
5 like to -- at least one additional case I'd like to cite.
6 Actually, I think you already know about it, because you
7 gave us a copy of it, but it was People versus Gonzales,
8 and you gave us the -- the original case, but it didn't
9 become final until Friday, so I didn't think I should cite
10 it till today, but I believe it's now final, and that's
11 People versus Gonzales, 156 Cal.App.3d, 558. It's the
12 same opinion as the Daily Journal opinion that you gave us
13 except one paragraph referring to Trombetta has been
14 deleted because --

15 THE COURT: Okay.

16 MR. NEGUS: -- the Court of Appeals -- I'm not
17 precisely sure what exactly you wish me to address, so I
18 just made a general outline on the board of what I consider
19 to be the -- the different issues that are involved in this
20 particular motion, the legal issues. I haven't attempted
21 to apply it to particular facts. If you want me to try
22 and do that, then I'll -- then I will, but taking the three --
23 taking the three most important California cases, Hitch,
24 Nation and Moore, the thrust of this particular motion is
25 different than, for example, the motion to suppress under
26 1538.5, because under 1538.5, you're trying to deter unlawful

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1 police conduct. This particular motion doesn't -- it
2 doesn't matter as far as the motion -- that is, the existence
3 of the motion. It may matter as far as sanctions are
4 concerned, but it doesn't matter as far as the motion is
5 concerned whether the police behaved badly, goodly or
6 whatever. It's got to do with the -- it's got to do with
7 what is -- what is the truth of the matter rather than
8 whether or not the -- the police have done anything that --
9 that they shouldn't have.

10 THE COURT: The cases do speak frequently of good
11 or bad faith.

12 MR. NEGUS: Right, and usually -- I think the only
13 place that the good or bad faith comes in is down when you
14 get down to sanctions, and I'll -- I'll get to that, but --
15 but it's -- that they go over and over and over again, you
16 know, suppressing -- imposing sanctions, even though
17 there's -- there's -- there's good faith efforts on the
18 part of the -- on the part of -- on the part of the police,
19 and even Hitch itself doesn't involve -- I mean they took
20 a particular sanction because they assumed that the officers
21 were operating in good faith; that is, they weren't
22 deliberately trying to frame the defendant or to falsify
23 evidence. I mean that's the definition of bad faith that --
24 that seems to be operable. So you don't have -- in order
25 for the -- for there -- for there to be a motion under
26 Hitch, you don't have to prove that there is bad faith.

1 I mean it may affect the sanctions in certain instances,
2 and generally the cases say that if you do find bad faith,
3 then the sanction is dismissal, so bad faith is the sort
4 of thing which -- which -- which triggers the ultimate --
5 the ultimate sanction.

6 What is involved then is -- and Hitch and the
7 Law Review articles that -- that Hitch relies on, there's --
8 which came out of a case called United States versus Bryant,
9 which was cited in Hitch, and which I cited at one point
10 in time in the points -- points and authorities, all derive
11 the duty to preserve out of the duty to disclose. That is,
12 it's a -- it's a discovery issue.

13 In California, discovery has always been a matter
14 of due process. I mean there's no statutory criminal
15 discovery rights. It's a judicially created concept based
16 on the -- on the idea of due process, and the idea behind --
17 behind it is that if you have a duty to disclose it, then
18 you have a duty to preserve it because, you know, you can't
19 sort of -- you can't circumvent your duty to disclose things
20 by just sort of ignoring it and hoping it will go away,
21 so, you know, the duties -- the duties that -- that are
22 imposed have to do with -- with that. What the scope,
23 according to Hitch and the other cases, is all discoverable
24 evidence, and so I would submit that as far as what it is
25 that the prosecution has a duty to preserve, it's -- you
26 know, it's as broad as you can -- as broad as you can make it.

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1 It's all discoverable evidence.

2 Now, the prosecution has cited some cases which
3 I discussed in the points and authorities, and I don't
4 really see the need to go into them again, you know, that
5 particular analysis of their cases and my responses to it.
6 I would submit that what those cases really are about is
7 that the evidence that was involved in those particular
8 cases was really just not material and, you know, it didn't --
9 it wasn't going to -- it wasn't going to have an impact on
10 the defining of -- of -- of guilt or innocence. And I'm
11 going to argue, as we go along, that basically all of these
12 cases come down to that -- that one issue. I mean that is
13 the -- all the other issues about trying to -- trying to
14 limit what's involved in -- in -- in the duty to preserve
15 come down to the basic issue of materiality, and the case of
16 California versus Trombetta, which I believe you got by
17 way of Daily Journal opinion from Mr. Kochis --

18 THE COURT: I had it before. I had it before you
19 sent that to me.

20 MR. NEGUS: -- I got by way of Daily Journal opinion
21 from Mr. Kochis, in Footnote 7 and in -- in Footnote 10 is
22 that the gathering -- the definition of "gather" is basically
23 that -- that's not where -- where the issue is, that is
24 whether somebody picked it up, whether they left it at the
25 scene, whether they took it and put it in a loft and they
26 destroyed it. What -- you know, if the police had access

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1 to it, then it doesn't matter whether they took it away
2 with them to the station or they left it at the scene.
3 What does matter is, again, getting back to materiality,
4 that is, how important was what they left behind, took to
5 the loft and burned, or whatever, whatever they did with
6 it.

7 (No omissions.)

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1 That is, it doesn't have the -- the metaphysics of you see
2 it in front of you, look down at it and not -- not touch it,
3 does that somehow not create a duty to preserve, whereas you
4 pick it up, look at it and lay it down, does -- or, you pick
5 it up and put it in your pocket and then throw it away, all
6 of those are really rather silly distinctions. And the cases
7 in fact come down and make it.

8 There is language in some of the shorter opinions
9 cited by Mr. Kochis to the contrary. But I would submit that
10 they are no longer, if they ever were, good law. And even
11 though the results in those particular cases, that Hitch
12 didn't apply, was a perfectly good result, it was because the
13 stuff that they were -- they were arguing about really didn't
14 make -- didn't make any difference.

15 The Gonzales case, which you -- which you gave out
16 to us, you know, sort of essentially goes down to that
17 particular -- that particular point, that is, they say that --
18 they say that -- in Gonzales, you remember they had a -- they
19 they had a piece of paper with the -- with the tattoo written
20 on it of the -- of the robber, and it was written by a person
21 that didn't speak English. And it didn't match the tattoo
22 on the -- on the defendant. And so, you know, they -- they --
23 the police looked at it, wrote it down in their report, handed
24 it back to the -- to the guy, and then the next guy on the
25 shift threw it away.

26 The case, you know, Gonzales says that -- that --

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1 that -- that the way that the Prosecution wants to define
2 "gather" is defined as all evidence which is not lost. And
3 that Hitch is not so easily avoided, nor should it be.

4 So I would submit that -- that "gather," again, is
5 not the operative concept, that is, gather those things which
6 they -- which they come across in the course of investigation
7 and they -- and its evidentiary value is -- is something that
8 you don't have to speculate about. It -- it obviously has
9 some evidentiary value. The key concept is materiality.
10 And there may or not be a difference between the California
11 and the Federal rule.

12 The Court, in People vs. Cordova, 148 Cal. App. 3d,
13 which I -- which was in that list of cases that I gave you
14 last week, is, I think, critical on that particular -- that
15 particular issue.

16 THE COURT: Which case?

17 MR. NEGUS: Cordova, People vs. Cordova or Cordova
18 vs. Superior Court; I forget. It's 148 Cal. App. 3d.

19 THE COURT: This -- this was the --

20 MR. NEGUS: The handwritten list I gave you has
21 Cordova vs. Superior Court, 148 Cal. App. 3d, 177.

22 THE COURT: Yes, Counsel. I'm just trying to refresh
23 my memory. This is the alien witness case?

24 MR. NEGUS: Right. And they discussed in that
25 particular case the definition of materiality. And they --
26 the A.G. apparently in that case had submitted a brief in

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1 which they claimed that People vs. Mejia was no longer good
2 law because Federal law in the field had changed and that the
3 case of U.S. vs. Valenzuela-Bernal had changed the law of
4 materiality.

5 Cordova said that whatever the Federal law was, and
6 I submit it's not particularly clear as to what the definition
7 of materiality under the Federal law is, Mr. -- Justice Marshall,
8 in his -- in his Trombetta opinion, the result he -- he reached
9 in that particular case was -- was not, like, inconsistent
10 with the Hitch definition. And -- and I would submit that
11 basically the U.S. Supreme Court hasn't made up its mind
12 yet. And I suspect that the opinion was deliberately written
13 to be vague because they hadn't made up their mind yet as to --
14 as to what standard was required.

15 It's clear from -- from Hitch, from Cordova, that in
16 California the definition of materiality is the same definition
17 as has been used in informant cases, in deportation of
18 witness cases, in preservation of evidence cases, in any case
19 in which you cannot palpably demonstrate, you know, what the --
20 what the missing evidence would have proved. And that is if
21 it had a reasonable possibility of providing evidence favorable
22 to the defendant, then your -- then the definition of
23 material -- the -- the materiality element of -- of Hitch is --
24 is -- is satisfied.

25 And I am making this motion, or attempting to make
26 this motion, under both the California and United States

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1 Constitutions and, you know, the due process clause of the
2 California Constitution and the Fourteenth Amendment of the --
3 of the United States Constitution as applied to the states.

4 If there is a different definition of materiality than
5 Hitch as far as the Federal is concerned, I would submit that for
6 the most part in this particular case it doesn't make any
7 difference because the evidence which we're talking about in
8 this case satisfies either definition of -- of materiality.

9 The closest I can get to a -- a definition that --
10 that what might be, I suppose, the -- the Federal Rule is
11 found at the top middle column of the -- of the Daily Journal
12 slip opinion on -- on -- on Trombetta. And it's got -- it
13 has that the -- that the -- there's two steps: The exculpatory
14 value was apparent before the evidence was destroyed, and that
15 there's no alternate means for the Defense to get the same
16 information. And that's -- there is -- they -- they -- they
17 talk about the standard of Constitution materiality. And
18 that's the two limits that they -- that they put on it.

19 So I would submit that probably under both the --
20 the definition of materiality, if it is different, of the
21 Constitution and the -- and the California Constitution is --
22 is not going to make a big difference as far as most of the
23 evidence in this particular case is concerned because most
24 of the evidence I'm going to -- you know, I would submit,
25 that we're talking about is plainly material under -- under
26 either definition. However, Proposition 8 and other -- other

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1 changes in the California law have not done anything to
2 diminish the concept of independent state grounds, as
3 Cordova has -- has recognized and as, for the most part, as
4 Hitch things are not primarily dealing with sanctions like
5 suppressing evidence but rather with -- with either dismissal
6 or jury instructions, in some cases, suppression. As in -- in
7 Cordova, the A.G. conceded that Proposition 8 had no effect
8 on -- on the due process considerations that they were
9 considering.

10 I don't know whether the Prosecution in this case
11 is going to take a different tack, but I would submit that if
12 they do, because you're not dealing with questions of
13 deterring, that is, taking what is good evidence and not
14 letting the Prosecution use it to punish them, because you're
15 getting back to, you know, the issue of what they have done
16 is preventing -- is prevented the discovery of truth, that
17 it doesn't make any difference. And it is -- Proposition 8
18 does -- I mean, truth is truth, and Proposition 8 hasn't
19 changed what is -- what is -- what is truth.

20 If I can show that there was discoverable evidence
21 that is material, that -- that, you know, that the Prosecution
22 gathered in the -- in the broad definition of gather, using
23 Gonzales and Trombetta, then I get sanctions. I mean, you
24 know, unless the Prosecution can show that they had systematic
25 and rigorous procedures that were promulgated and enforced
26 and followed. And this -- the case that deals -- the leading

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1 California case on -- on that is still Hitch. I mean, because
2 that's the definition that they -- that they put in of the --
3 of the -- of the Defense.

4 In this particular case, I would submit that that is
5 not an issue. I mean, everybody from the sheriff's department
6 testifies they didn't -- nobody knew what the procedures were.
7 They certainly weren't promulgating them very much. Certainly,
8 nobody -- I saw no evidence anybody was enforcing whatever
9 few procedures they had. And obviously I would submit that
10 nobody followed them.

11 So that the defense has -- the -- the defense that
12 the Prosecution has, if they can show good faith, then --
13 then they have this -- then they have that -- that defense
14 available to them.

15 Leaving aside the question of whether they can show
16 good faith or not, I would submit that they didn't -- they
17 didn't -- they didn't establish any procedures that -- that
18 make any difference. And so, you know, there's no defense.
19 So if they're going to avoid sanctions, they're going to have
20 to either claim, you know, that I haven't proved one of the
21 elements up above.

22 Finally, you know, Zamora, which was a cited case
23 that there's three elements that go into -- that go into
24 sanctions that -- that will -- that can -- that can make an
25 effect on what sanctions you give. One is materiality, again.
26 And, obviously, you're not going to dismiss a case that --

1 where you know where the evidence destroyed can only have some
2 bearing on a collateral issue. At that point in time, then,
3 either if -- if it's the Prosecution that's attempting to --
4 to introduce evidence, that evidence may be -- that may be --
5 that evidence may be stricken. Or if it is the other way,
6 if the evidence could have helped the defendant, then the
7 defendant's entitled to a conclusive presumption that had the
8 evidence been preserved it would have been -- it would have
9 been in the defendant's favor. The greater the quantity of
10 evidence and the more that evidence goes to the heart of the
11 Prosecution case, the more significance does the element of
12 materiality become as far as what the sanctions are.

13 (No omissions.)

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1 MR. NEGUS: And I would submit that there comes a
2 point where there is so much evidence that's destroyed,
3 that you can no longer -- at least in certain kinds of
4 cases -- you can no longer have a situation where there's --
5 where you can have a reliable verdict of -- of -- of guilt
6 or innocence. There are lots of cases that I could
7 conceive of where doing a sloppy job of processing the
8 crime scene might not trigger any sanctions or certainly
9 wouldn't -- wouldn't trigger a dismissal, but what is
10 unique about this particular case is that the evidence
11 which the prosecution has to put -- to try and make
12 Mr. Cooper responsible for the crime is solely the kind of
13 evidence which they -- which they botched and failed to
14 preserve. If we had a situation like a -- a murder in the
15 course of a robbery where either you have basically eye-
16 witnesses or there's a -- one of -- you know, the television
17 cameras is taking down the whole thing or the defendant
18 comes in the next day and -- and confesses to the crime
19 to the police and there's tape recorded -- videotape
20 confession, like I've had in cases in the past, obviously
21 then there is a -- a difference in -- in the processing the
22 things that -- what the prosecution's trying to do, and
23 one of the prosecution cases, I think it was Watson -- I
24 forget which one it is, but it's the case where the
25 defendant was involved in -- in burglarizing a store, and
26 he breaks through the window, and he has the stolen property

1 in his hand, and they claim that -- that they should have
2 preserved the glass to see whether it came from the broken
3 window. The Court says, well, so what. I mean, you know,
4 that's not going to prove -- that's not going to prove
5 very much. It wasn't a physical evidence case. In a
6 physical evidence case, which is what we have here, then
7 the issue of the processing of the crime scene, you know,
8 the sanctions get to the stage where it is almost difficult,
9 if not impossible, to defend against a physical evidence
10 case when the prosecution doesn't collect or preserve the
11 evidence which can be analyzed to try and put their physical
12 evidence into context, to try and determine whether their
13 analysis of the physical evidence is accurate, and to try
14 and determine, you know, whether there are alternate
15 explanations of the physical evidence which point towards
16 the defendant's -- the defendant's guilt.

17 In this particular case thus far, as far as I'm
18 aware of, the only piece of evidence that puts Mr. Cooper
19 into the Ryen house, according to the prosecution theory
20 of the case, is that they believe that A-41 is consistent
21 with the type of blood. There is other additional circum-
22 stantial evidence which makes a connection between the
23 house next door and the Ryen residence, and so there's
24 a sort of a double leap that's involved in -- in -- in that
25 evidence that they can connect Mr. -- Mr. Cooper with the
26 house next door. They can connect the house next door with

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1 the -- with the Ryen house; therefore, there's a -- there's
2 a secondary connection there, but all of that evidence,
3 you know, is -- is evidence which is -- which is ambiguous
4 at -- at best. The drop of blood in the house, we can't
5 go back and analyze it. It was away from the scene of the
6 action. They don't know how it got there. They thought it
7 was sort of strange to find it there, to begin with, anyway.
8 They have no explanation as to why there should just be one
9 drop of blood isolated from the rest of the house, and
10 they have failed to preserve the evidence which, if analyzed
11 properly, could -- could answer those particular questions,
12 failed to preserve evidence which would show where the
13 victims were, what kind of struggle was involved, and
14 position people during the struggle from which one could
15 try to determine whether or not there was any bloodshed
16 by an assailant, analyze that blood, see whether it's
17 consistent with Mr. -- with Mr. Cooper's or not, all of
18 that kind of evidence, and -- you know, basically, the
19 testimony about this -- the issue of materiality from --
20 as far as I'm concerned, my best evidence on materiality,
21 you know, what difference does it make, is yet to come.
22 I mean I have built my presentation around the testimony of
23 Dr. Thornton, and he's the person who has analyzed the
24 transcripts from the point of view of a man who is a
25 criminalist for nine or ten years, including a laboratory
26 director, and has taught criminalists essentially ever since.

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1 and has been a consultant on many, many, many cases
2 of the magnitude of this one, the complexity of this one,
3 and so, you know, all the different prosecution testimony
4 that is too complex for us, it would take too much time,
5 I think that he can -- I'm counting on his testimony to
6 be able to show the falsity of it; that what was done was
7 not what should have been done, was done by most sheriff's
8 departments; that this was a very, very substandard job
9 of doing it, and it would have made a -- it could very well
10 have made a big difference, and there's just all kinds of
11 evidence you can point to which would -- which would
12 demonstrate that it's not just smoke, but there is sub-
13 stantial things that could have been done.

14 The good faith-bad faith, that comes in -- that --
15 as near as I can tell, from reading the cases, that is --
16 primarily has to do with should the ultimate sanction be --
17 be imposed, and in some cases, they say -- and I would
18 submit that that's an alternate theory of dismissal to the
19 one where the evidence was so material that, you know, you
20 can't have reliable -- you can't have a reliable finding of
21 guilt or innocence, based upon the kind of evidence that
22 the prosecution is going to -- is going to present.

23 There is certain evidence in this case which I think
24 is -- clearly comes under the -- under the -- under the --
25 under the heading of bad faith. Mr. -- and that has to do
26 with the testimony or the evidence that came from Joshua

1 Ryen and could have come from Joshua Ryen had there not
2 been a suppression of evidence.

3 Mr. O'Campo said that there was nothing discussed
4 that would -- in his meeting with Josh on June the 6th
5 about suspects and what happened in the crime.

6 I presented one evidence -- one witness who was
7 present who it is highly unlikely would have made that
8 sort of thing up to contradict it. I'm prepared, if we
9 get that far, to present, if I have to, the other witness,
10 the other person who was in the room, to testify to the
11 same effect as Mrs. Headley, the other witness besides
12 Josh and O'Campo, and there's just no way that you could
13 think that Mr. O'Campo could have forgotten, neglected,
14 ignored, had a good faith belief that what he was hearing
15 from Josh didn't happen. That is compounded by the
16 radically different version as far as the issue of number
17 of suspects that was given of the June 14 interview by
18 Mr. O'Campo. That is further compounded by Mr. O'Campo
19 having Sheriff's Office "I don't recall-itis" with respect
20 to all of the conversations that occurred between the 6th
21 and the 14th.

22 That's even further compounded by the fact that --
23 that Mr. O'Campo demonstrated through even the testimony of
24 a reserve lieutenant that he was not interested in
25 preserving any evidence which conflicted with his theory
26 that Mr. Cooper was responsible for the crime.

1 The testimony of Luis Simo that the day after the
2 interview with Josh, he called him up to have -- to convey
3 a statement that Mr. O'Campo -- I mean all of that stuff
4 from Mr. O'Campo, maybe now, given the state of the
5 preservation of it, they could explain it away, and maybe
6 one could argue, well, he just sort of -- O'Campo thought
7 there was just trauma on Josh's part, but because he
8 intentionally didn't preserve it, he didn't write a report
9 on it, and it only came to light when there was publicity
10 about it, and Mr. Simo called up again and said, hey, hey,
11 hey, you know, what are you doing, why didn't you put
12 this in, indicates that -- that there are already palpably
13 demonstrative things that O'Campo edited out which were
14 very, very favorable to -- to Mr. Cooper. I mean if Josh
15 Ryen thinks that Mr. Cooper didn't do it or thought at
16 that point in time -- I doubt if, given all the things
17 that have happened, that's still the case, but if -- if
18 that were his state of mind at the time, and Mr. O'Campo
19 had this relationship of great rapport with Josh, and we
20 have all these things which are not recorded, and where
21 we can at least circumstantially demonstrate at least the
22 tip of the iceberg as to what Mr. O'Campo did to -- to try
23 and switch the evidence, I think that we are entitled to
24 make inferences that even -- there was even more that was
25 done which we -- there were no witnesses to which we can't
26 demonstrate which Linda Headley's memory and various other

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1 people's memories are not -- are not -- are not as good
2 when three or four months later when Mr. Forbush first
3 reaches them as they were -- they would have been -- would
4 have been at the time, they have -- they don't have good
5 memories as much anymore, All they can remember is the
6 significant details, and there -- I think the inferences
7 is that there were -- that there were much other evidence
8 that would have been helpful to Mr. Cooper that Mr. O'Campo
9 intentionally left out, and there's just no way that he
10 could have, you know, forgotten it, I would submit, given
11 the significance of the evidence, intentionally left out.

12 (No omissions.)

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1 That in itself, if -- if it were true that Joshua
2 Ryen knew who did it and it wasn't Mr. Cooper, can't get any
3 better evidence than that. And that's the kind of evidence
4 which there -- where there is, I -- I would submit, strong
5 evidence of -- of bad faith. I mean, never going to get
6 anybody to get up there and admit, "I cheated, I lied, I --
7 I tried to frame Mr. Cooper." And -- but I think that, as
8 far as circumstantial evidence is concerned, you won't find
9 too much stronger evidence than we had as to Mr. O'Campo's
10 bad faith as to a critical issue in the case.

11 Last thing that Zamora talks about, as far as
12 sanctions, is the effect of future conduct on -- on -- on
13 the Court's ruling. They don't ever go in and define that,
14 and other cases have never dealt with it. I'm not sure whether
15 that still has a -- how much vitality that particular issue
16 has or not, as they don't give us any guidance as to how they
17 are -- how you're supposed to implement that particular thing.
18 I don't really have much to -- to say about it.

19 Anyway, that's my -- that's my general outline as
20 to what I think the law -- the law is. I mean, it's -- it
21 seems to me that it's -- that the -- you know, the application
22 will -- the application of it to the facts of this case is
23 exceedingly complex. I submit that it requires dismissal.
24 If you find otherwise, then I think we're going to have to
25 go through point by point, evidence by evidence to see, you
26 know, what sanctions apply.

1 Obviously, even A-41 is a -- is a tremendously
2 complex -- tremendously complex, you know. Trying to -- if
3 you don't -- if you don't -- if you don't suppress A-41,
4 and that is the evidence of it, then how to work it out,
5 given the fact that they haven't reserved anything from which
6 we can re-analyze -- that we could have had a chance to re-
7 analyze several tests or even be present at several critical
8 tests, which we weren't at at least two, that -- you know, what
9 to do about it. I mean --

10 THE COURT: Let me interrupt you just for a second.
11 In that regard, with A-41, before the defendant was ever
12 arrested and you got in on the case, they had analyzed it
13 partially. 14

14 MR. NEGUS: Right.

15 THE COURT: So if you're talking about suppression
16 of A-41, you must only be talking about the analysis that went
17 on subsequent to July 30th.

18 MR. NEGUS: One of the problems is that with the --
19 with the analysis that came out before July 30th, the -- all
20 we have is Group I and ABO, okay? The -- again, I -- I think
21 it's established from the testimony of Mr. Gregonis, and I
22 can bring in more testimony on it, if -- if necessary, but
23 Mr. Gregonis failed to do steps which competent serologists
24 should have done in order to preserve a record in which another
25 serologist can tell whether his results are correct.

26 As far as the Group I is concerned, he testified

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1 that -- that his photograph of the EsD isn't any good to
2 tell whether his call of A-41 is correct. His standard,
3 which was 2-1, looks like a 1. So something's wrong with the
4 photograph as far as --

5 THE COURT: Counsel, that's regular cross examination
6 and a credibility issue.

7 MR. NEGUS: No. I think it -- well, as far as the
8 PGM is concerned, which is the -- which is the critical one,
9 the A-41, there is no photograph that you can see of what --
10 of what A-41 looks like.

11 We have had testimony, which is part of this hearing,
12 from Dr. Sensabaugh, others, that -- that the -- that in
13 the field of serology the results are reliable if either,
14 you know, preferably another serologist can repeat the
15 experiment or if you take photographs so that another serolo-
16 gist can look at them.

17 The A-41 photograph of PGM is blank. There is at
18 least a possibility that because of the improper staining
19 techniques that Mr. Gregonis did, he just negligently failed
20 to do it, that he wasn't getting the results that he should
21 from his G6PD. There's no way anybody can look at that
22 photograph and tell what you got. I mean, it's just a blank.
23 And had it been a 2-1+, which even Mr. Gregonis, given the --
24 given the -- given the quality of his G6PD, had it been a
25 2-1+, it couldn't have come from Mr. Cooper.

26 Similarly, there is the test that took place on

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1 August 2nd, which is the test of the Group II. That was
2 after Mr. Cooper was arraigned, done at the same time that
3 they did Mr. Cooper's whole blood. So Mr. Gregonis couldn't
4 have had any delusions that Mr. Cooper, you know, wasn't
5 caught. And we weren't permitted to be there at that
6 particular test.

7 Again, according to Mr. Gregonis, one time he says
8 the --

9 THE COURT: You weren't denied. You said you
10 weren't permitted. They just didn't contact you.

11 MR. NEGUS: Right.

12 THE COURT: Okay. It's only on the 4th of August
13 that they -- you had contact.

14 MR. NEGUS: Right. And then they -- after they --
15 yeah, right. They didn't contact me on the -- on the 4th.
16 But I was on the case on the 1st, and they knew Mr. -- Mr.
17 Cooper was in custody.

18 You know, there is differences as -- as to -- as to --
19 there's different sanctions that one can apply to their not --
20 to their not providing an adequate record to verify. One
21 sanction I suppose in some -- which might be applicable to
22 some enzymes which they didn't preserve a record on is to make
23 them stick by Mr. Gregonis' analysis. If he calls something
24 a, for example, a -- a carbonic anhydrase Type 1, and I can
25 prove Mr. Cooper's 2-1, then they shouldn't be -- you know,
26 one could argue they shouldn't be allowed to quibble because

1 they didn't preserve me a record. And, you know, the -- the --
2 the thing -- the thing being is that as far -- the principle
3 being that as far as disputed issues, where they didn't
4 preserve a record, then you're entitled to a result which
5 would favor the defendant.

6 The Gonzales case, which you gave us, I think is an
7 example of just such a sanction, where, taking the carbonic
8 anhydrase example, if -- if evidence comes up that -- that --
9 that a Type 1 would prove that the blood didn't come from
10 Mr. Cooper, then they shouldn't be allowed to -- to try and
11 quibble -- undercut it, to say, "There's a reasonable
12 explanation here. Here's how come. Dan -- Dan -- Dan
13 made a mistake." Conversely, as far as the PGM, the other,
14 the PGM, I think we're entitled to -- I mean, we're entitled
15 to instruction that -- that -- that the result would have
16 been also to exclude Mr. Cooper because had we been allowed
17 to retest that, had he not wasted sample doing ABO, had he
18 not wasted sample doing the -- doing the Group II, you know,
19 outside our -- our presence and taken sloppy pictures so we
20 can't -- we can't find out what is -- what is involved, we
21 could have rerun these particular tests with a competent
22 serologist to demonstrate that the blood didn't come from
23 Mr. Cooper.

24 And they have, through negligence, provided us with
25 the -- the inability to do that. And the standards of what
26 serology -- what serologists do, the -- the reason why this

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1 is important is if you -- in -- in -- in Trombetta, the
2 reason that they said that you don't have -- in Footnote 10,
3 the reason that they said that you don't have to -- you don't
4 have to preserve a breath sample is basically there have been
5 umpteeumpt hundred reasons on the breath -- breath sample.
6 And it's almost always right. Not so with serology. And I
7 believe the testimony has -- has varied. But there's between
8 a 1 and 5 percent error rate, even amongst, you know, amongst
9 sheriff's type of -- of serologists. Well, when you have 11
10 different systems and you have to compare -- you have to
11 compare a drop of blood with a suspect, that's -- the odds
12 are, if it's 5 percent, that in every case you're going to
13 make a mistake as far as your comparisons. The way Mr.
14 Gregonis did it, it's even more so, because basically he knows
15 what answers are as far as Mr. Cooper before he looks at A-41.

16 And I would submit that -- that, you know, that --
17 that is a -- a further example, you know, that he's -- that
18 he -- that a lot of this is subjective, that has a lot of
19 interpretation.

20 THE COURT: Counsel, don't they do comparison
21 analysis all the time where they're checking knowns and un-
22 knowns and they oftentimes know the results of one before
23 they test another?

24 MR. NEGUS: Right. But some are more reliable than
25 others. And the reason why it's important to be able to
26 re-test the blood is that serologists make mistakes all the

1 time. And they don't always know the reason for it. And
2 Mr. Gregonis, if you get -- I mean, if we get this far, again,
3 Mr. Gregonis' explanation of chemistry and things and various
4 things about how the various things that can go wrong work
5 are nonsensical. I mean, that's -- I'm going to -- we haven't
6 got to that. I think you can infer that if you compare the
7 testimony of Dr. Sensabaugh with Mr. Gregonis, basically he
8 doesn't understand wet versus dry changes. I mean, his
9 answers he makes don't make any sense. He gets -- he describes
10 wet changes and dry changes and gets it all mixed up, which
11 was where there was testimony that that particular under-
12 standing is a critical one for not making mistakes.

13 He doesn't take -- he doesn't -- he doesn't pay
14 any attention to his -- his staining techniques so he can
15 bring out good results. I mean, he has barely visible results
16 which he can't see them in the photograph for what's supposed
17 to be fresh blood. And that just shouldn't -- that just
18 shouldn't be.

19 There's a whole range of things that he does which
20 are wrong. And there is a whole range of things which, if
21 we could re-test, would be able to exonerate Mr. Cooper
22 because just Mr. Cooper not matching one enzyme means that
23 the blood could not have come from Mr. Cooper. And that is
24 the -- that is the thing about -- about serology.

25 Mr. Gregonis was given some -- some examples about
26 percentages. One additional test will raise you from the

1 99.9 percent connection to a 99.99 percent connection. And
2 that is looking at it from the point of view of the
3 Prosecution. That is each additional test that Mr. Gregonis
4 did using up samples so that we couldn't check his earlier
5 results. It gave very little extra weight to the Prosecution
6 evidence. But each test that we could have repeated, where
7 it looked like he may have made a mistake, has -- has -- has
8 a better than 50 percent chance of proving that the blood
9 didn't come from Mr. Cooper. So, you know, it's -- it's
10 all in the way it's -- it's -- it's -- it's -- his statistics
11 are looking at it from a -- from what -- how it's going to
12 benefit the Prosecution. But how it's going to benefit Mr.
13 Cooper doesn't matter. If Mr. Cooper is -- matches the
14 blood on nine out of ten, if he's not one of those types
15 that's A-41, then it didn't come from him, and there's no
16 way you can get around that. And that's what we were deprived
17 of the opportunity to -- to prove by the way he handled the
18 analysis.

19 (No omissions.)

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1 THE COURT: Suppose back, say, in the middle of
2 June they had completely analyzed and exhausted A-41
3 before the defendant was ever arrested. Would your argument
4 be as valid?

5 MR. NEGUS: Yes, I think so, because, basically,
6 what they did -- remember, what they did was they wasted
7 it. He re-ran ABO where there was no ambiguity in the
8 results. He -- he had problems, and he didn't do anything
9 to try -- to try and correct them.

10 THE COURT: I can't find that is in bad faith in
11 any way, so if he makes an error, a judgment error --

12 MR. NEGUS: We are not talking about bad faith.
13 Bad faith has got nothing to do with whether you dismiss
14 the case. If he doesn't follow systematic and rigorous
15 procedures -- his only defense is good faith plus systematic
16 and rigorous procedures. His procedures are neither
17 systematic nor rigorous, nor do they follow standard
18 serological practice. That's why that standard serological
19 practice stuff is important. They have to show, if they're
20 going to try and say good faith, that he followed systematic
21 and rigorous procedures. He didn't. He was -- he was
22 sloppy. He doesn't understand the basic chemistry half
23 the time, and he just didn't do -- he didn't do it -- he
24 didn't do what he was supposed to do as far as what Hitch
25 requires as an excuse for destroying evidence. And if he
26 had done the same sloppy -- I mean he was -- he was in

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1 fact -- they're lucky that they did call me in and have me
2 there, because at least they have two results which I may
3 be able to say that Mr. -- that Mr. Gregonis is wrong about
4 them, based on -- on testimony of somebody else, but, you
5 know, their smartest move for the Hitch motion was when
6 Mr. Kochis got on the phone, and I wouldn't be surprised
7 that Mr. Kochis didn't think of that when he got on the
8 phone, because at least as far as the last two tests are
9 concerned, he has -- I mean I can't complain about the way --
10 the way that they were -- the way that they were done or
11 that had they taken better photographs or something like
12 that, I could have proved it differently. I mean Dr. Blake
13 was there watching it, so I would submit that as far as
14 when the testing was done, as far as the last two tests,
15 they're better off that they called me, and they probably
16 would have been better off, as far as the case is concerned,
17 if they had either got a competent serologist to begin with
18 who could adequately document his work, or waited until the
19 defendant was caught and done it. You can't expect them
20 necessarily to wait until the defendant was caught to do
21 the work if they don't know that he's going to be caught,
22 but what they do do, they have to follow the systematic
23 and rigorous procedures, and they didn't.

24 THE COURT; Well, you can't complain too much about
25 the last two tests, and you can't complain too much about,
26 the first test, at least until he gets to the point of

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1 retesting ABO; right?

2 MR. NEGUS: Well, I can complain about the first --
3 the Group I test, and I do, because he had already done
4 tests where he knew from his previous results the day
5 before that his G6PD was bad. He took a Polaroid picture.
6 He looked at the Polaroid picture. He didn't notice that
7 you couldn't see anything about A-41 on it. I mean he didn't
8 even bother to look. All he did was look and see whether
9 he had an image, and in -- it's quite possible that in
10 order to provide the proper documentation, all he would have
11 had to have done was to do another picture to see whether --
12 to see whether it came out. It may well have been that
13 he -- that he, for some reason having to do with his
14 inexperience or whatever, or just the -- the nature of the
15 samples, he didn't get the -- didn't get the PGM tested
16 right to come out right. Even if he had rerun that when
17 he did the APC unnecessarily and adequately documented it,
18 then I couldn't argue, but the testimony was that the
19 photos aren't good enough on four of the critical tests
20 that he did before they called me into the case, the EAP,
21 the CA II, the EsD and the PGM. Any one of those they make
22 a mistake, and then they've got the wrong person. There's
23 no law that says they have to wait for me, but there is a
24 law that says if they use it up so that I can't check them
25 out and they negligently don't document it so I can't check
26 it out, then they have to -- they have to -- they have to

1 show that they're using systematic and rigorous procedures
2 to try and save it as best they can. I don't think they
3 can do that.

4 THE COURT: Anything further?

5 MR. NEGUS: If you have any questions, I mean, you've
6 been asking me for the last --

7 THE COURT: I have been trying to interject the
8 ones that I do have.

9 MR. NEGUS: If you have any others, I will be glad
10 to try and answer them as best I can.

11 THE COURT: Not at the moment. I will come back
12 to you.

13 MR. NEGUS: Okay.

14 THE COURT: Go ahead, Mr. Kochis.

15 MR. KOCHIS: Your Honor, the arguments Mr. Negus
16 makes are much the same as the arguments he made in his
17 995, and I responded to each one of those arguments in
18 writing, and I know the Court has read that argument, but
19 I'd again refer the Court to pages 60 through 73 of that
20 portion of my response to his 995 motion. I do that for
21 two reasons. One, Mr. Negus and I spent some time in, I
22 believe, March sitting down and articulating in writing
23 our thoughts on the Hitch and the various facts that pertain
24 to that, and we cited the appropriate cases. Since that
25 time, with the exception of the Supreme Court decision in
26 Trombetta and Gonzales, there have been no new cases that

1 deal with those points, and it was our position at that
2 time that we felt we were educating the Court with what
3 the rules of law were that should guide the Court in its
4 decision, and those are still the rules which apply today.

5 What Mr. Negus does is he takes what he considers
6 the three key cases that should govern the Court's decision,
7 those being, I believe, Moore, Hitch and Nation, each one
8 of those cases which deals with a specific, a very particular
9 fact situation. Then he takes the theory that was used in
10 dealing with a specific fact and wants to apply it to the
11 investigation, really, that was conducted in this particular
12 case.

13 Nation, of course, was simply a case in which the
14 Supreme Court said because of the possible materiality,
15 you must preserve semen samples in a rape case. And if
16 you are to take Nation literally and apply it to the facts
17 of this case, there's no violation, because we took those
18 types of samples from all the victims in this case. Just
19 by analogy, we took the rectal samples, the vaginal samples
20 from the women and the oral samples because it was obvious
21 that that might be potential material evidence, and we
22 preserved it, and quite literally, as to the rule that was
23 enunciated in Nation, we have followed that.

24 Hitch has limited applicability to this case,
25 because the authors of Hitch said that they specifically
26 limited the facts of that case -- the holding in that case

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1 to the facts, and you're dealing with one test ampoule that
2 essentially is one third of a drunk driving case. In a
3 drunk driving case, you have the officers' observations of
4 the driving, then you have the physical symptoms of
5 intoxication, and you have a chemical test, and it's no
6 question but that that was important.

7 We don't have that situation, really, in this case.

8 Moore is analogous to Hitch in that you have a
9 probation revocation in which the only evidence of violation
10 is a specific piece of evidence, a urine sample, that was
11 tested and shown that the defendant was still using drugs.

12 Again, we don't have that -- that very limited
13 fact situation in this case.

14 At the 995 we argued that the cases that controlled
15 in this case were the language from Beagle, the language
16 from Hogan, the language from Maese, and that there is no
17 standard of judicial review for pretrial investigation,
18 and that is what really is the crux of Mr. Negus' argument
19 in this particular case. It's not really a classic Nation
20 situation, in that we seized a lot of items of evidence.
21 It's not a classic Hitch situation in that many, many of
22 the items that we seized are still available for analysis.
23 Mr. Negus, for example, has been mailed, his expert has been
24 mailed, samples of things that we took, and he's analyzing
25 those. It's not even a Moore situation -- or excuse me --
26 the Cordova situation, because what Cordova held was that

1 the prosecution had a duty to keep either witnesses or
2 their availability known, their whereabouts known, so the
3 defense can interview them and see if there's any exculpatory
4 evidence.

5 For example, Joshua Ryan, from the prosecution's
6 standpoint, is a classic example of how we've complied with
7 Cordova. Mr. Negus would lead you to believe that
8 Mr. O'Campo has lied, he's trying to frame Mr. Cooper;
9 however, Mr. O'Campo has testified that when he interviewed
10 Josh Ryan, Josh Ryan said I believe the people who are
11 responsible for doing this to my parents are the following:
12 The three male Mexican adults. These are the descriptions.
13 They were at the house earlier. I believe these are the
14 people that came back to the house and murdered my family.

15 That's hardly consistent with the People's case.

16 Likewise, what Cordova said is in a case in which
17 you have eyewitnesses to an event -- in that case, it happened
18 to be a crime -- you cannot deport them, make them un-
19 available to the defense.

20 In this case, through reports, through hospital
21 records, Mr. Negus has been able to interview at length
22 people like Linda Headley, people like Dr. Hoyle, whose
23 name appears in the report, people like Mr. Gamundoy,
24 people like Mr. Fisher, and the Court has heard all of
25 those witnesses testify about statements Joshua made or
26 motions that are consistent with assertive conduct in an

1 attempt to communicate information which is completely
2 inconsistent with our case.

3 If you believe Mr. Gamundoy, Mr. Hoyle, Mr. Fisher,
4 they have evidence which is beneficial to Mr. Cooper.
5 There's no question that they are available, and they
6 are available because their name appears in hospital
7 records, and their name -- for example, Mr. Hoyle's name
8 appears in the reports, so we've complied with Cordova in
9 that we've made people available which Mr. Negus can
10 produce in court, and he can elicit the testimony which is
11 favorable to his client and not favorable to the People.

12 The cases we cited at the 995 gave examples of
13 various pieces of evidence that weren't collected by the
14 police, and those cases, Hogan and Beagle and Cooper,
15 indicated that the police are not required to seize every-
16 thing at a scene which may, with hindsight, be potentially
17 favorable to the defendant, or at least you can speculate
18 that they may be potentially favorable.

19 (No omissions.)

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1 Mr. Negus' quarrel with the case is not specifically
2 a limited Hitch situation. He quarrels with really every
3 aspect of the investigation. He says there was no procedure
4 by which we did any processing in this case. Well, there
5 was a procedure. It apparently is not a procedure that's
6 acceptable to Mr. Negus. You have had the homicide detectives
7 testify as to how they processed the various scenes. There
8 was a discussion, there was different divisions, that they went
9 into the house, for example, with photography and prints.
10 The crime lab collected certain things, the crime lab saved
11 certain things.

12 THE COURT: Are you really contending, Mr. Kochis,
13 that they protected the scene and they investigated property
14 in accordance with rigorous and systematic policies which
15 they enforced, either they or the criminalists?

16 MR. KOCHIS: Is the Court asking me if that's my
17 opinion?

18 THE COURT: Yes. Are you so contending? Because I
19 was about to concede that point way back when.

20 MR. KOCHIS: Well, Your Honor, my position is they
21 did process the scene and they did process the scene in a
22 fashion that not only --

23 THE COURT: But not following the manual and not
24 following rigorously and systematic procedures.

25 MR. KOCHIS: Well, I know they didn't dot all the
26 I's, they didn't cross all the T's. We didn't freeze everything

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1 that could have been frozen. But take a look at the car,
2 take a look at the Lease house. Look at the car. We don't
3 find the car for a week. It's photographed inside and out.
4 They lift every print that they can find from the car. They
5 vacuum it, they keep the vacuum sweepings. They seize the
6 items that you have on Exhibit A-291. That shows the number
7 of items that they seized. And what's the result of that in
8 terms of preserving a defense for Mr. Negus? Mr. Cooper's
9 fingerprints are nowhere in that automobile. There's blood in
10 that automobile that they test that's consistent possibly
11 with one of the victims and possibly with Mr. Cooper. But
12 it's consistent with a large percentage of the population.

13 What I'm saying is we can -- we preserved things in the
14 car which are in effect inconsistent with Mr. Cooper's
15 presence in that car. His fingerprints aren't anywhere in
16 that car.

17 Look at the Ryen scene. They lifted a large number
18 of fingerprints from that scene. I think it's incumbent on
19 the police to preserve that type of evidence to show who was
20 in the house. None of those prints come back to Mr. Cooper.
21 Certainly that's something Mr. Negus can argue to a jury,
22 that, well, the prints inside the house that don't come back
23 to the victims or friends of the victims are prints that
24 belong to the real killers.

25 Look at the Lease house. It was sealed off. They
26 vacuumed the bedroom, they saved the carpet -- the vacuum

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1 sweepings. They fingerprinted the house... They took items
2 from the house which didn't appear to belong there. You can't
3 take everything from a house which isn't yours. Some of those
4 pieces of evidence, items of evidence, are consistent with
5 Mr. Cooper's being there. You've got phone calls, a footprint
6 and a fingerprint and a semen sample. And those pieces of
7 evidence indicate that Mr. Cooper was inside that house just
8 as sure as he's inside that -- this courtroom. And taking
9 everything in the house and freezing it would not have changed
10 that.

11 We concede that we didn't -- we didn't freeze 200
12 samples of blood from the house. There's been testimony that
13 they took 41 samples from the bedding on the blood -- from the
14 bedding in the master bedroom alone. And the Court can see
15 from the photographs that that was the center of the activity
16 in the room in which the homicides took place. They took the
17 UU series. That's another 16. They took the 16 samples
18 from around the room. And the logical inference to draw with
19 A-41 is if we didn't take more samples, what we really did
20 was conduct the investigation to the defendant's benefit,
21 because the inference that one would logically draw is that
22 once you have his blood in the house, if you would have
23 analyzed every drop of blood inside the house, you would
24 have found more of Mr. Cooper's blood. And unless you
25 analyze every drop of blood in the house, where do you stop?
26 No matter what standard you use, somebody -- some Defense

1 lawyer or some Defense expert is going to argue that the
2 samples weren't sufficient. And if you would have taken
3 that additional 10 or 20, you could have, by inference or by
4 speculation, found the blood of more people or the real
5 killers. And I don't think there's a case that stands for
6 the proposition that in a scene such as this we have to freeze
7 the entire scene, analyze every sample of blood. And once
8 you get beyond that, I don't see how you're going to give
9 and choose which samples to take and ever satisfy the
10 Defense.

11 Mr. Negus would have you believe that what we're
12 required to do is process a scene in a fashion that would
13 allow you to completely reconstruct what went on inside the
14 scene. And as we pointed out in written argument at the
15 995, and as the experts have testified to so far in this
16 case, a complete reconstruction is not always possible. And
17 the experts in this case, for example, testified that they
18 did not see the type of evidence at the Ryen scene that would
19 allow you to determine the identity of the assailants.

20 For example, in the Lease house, there's some pieces
21 of evidence which allow you circumstantially to infer who was
22 in that house. Fingerprint, a footprint and phone calls;
23 those types of things were gathered in the Ryen scene. They
24 didn't come back to Mr. Cooper, but those are the types of
25 things, fingerprints and footprints, that allow you to make
26 that determination. And, in this case, it's difficult for me

1 to see how Mr. Cooper is hampered in a case where we process
2 a scene, we take the pieces of evidence which are the most
3 discriminative in terms of saying he's inside the scene,
4 and they don't come back to Mr. Cooper.

5 It wasn't as if we were burning fingerprints which
6 didn't belong to Mr. Cooper. We photographed the scene inside
7 and out. And Mr. Negus would lead you to believe that that
8 really doesn't matter much. However, with the items that we
9 have taken, with the photographs in particular, it's obvious
10 that he's talked to Defense experts who can tell him something
11 about the scene, because he's cross examined people on the
12 stand at length based on the photographs that we took, not
13 the photographs that he took, about directionality of blood,
14 different types of patterns, locations on the victim's feet,
15 inferences that you can draw from the blood on someone's
16 feet. "Isn't that consistent with her being attacked first
17 or that particular person being attacked first?"

18 It's our position with that, with the diagrams and
19 with the photographs and the pieces of evidence that we took,
20 those items are available for Mr. Negus and his experts to
21 analyze to see which of these questions, if any, can be
22 answered. But what he does again is he takes a specific
23 fact situation. For example, he gets a criminalist to admit
24 that in a certain type of case you can't determine identity
25 from physical evidence, for example, a fingernail or finger-
26 print or footprint, and, from there, he makes the leap to this

1 scene, that in this scene, had it have been handled differently,
2 you would have been able to show that there were people other
3 than Mr. Cooper who committed the crime. And that's not
4 consistent with the facts.

5 It's our position that the officers did everything
6 that they could to process this scene effectively, that they
7 spent more time at the scene than they would in any other
8 case, that they collected and gathered more pieces of
9 evidence to make a determination as to who was involved than
10 they did in any other case. And you have to remember that
11 the evidence in this case didn't focus on Mr. Cooper until
12 the phone calls became known, until after the Lease house
13 became known. And, at that point, the majority of the processing
14 of the Ryen house was already completed. And so I fail to
15 find any validity in Mr. Negus' argument that they were
16 trying to frame Mr. Cooper in the manner in which they
17 conducted their investigation, because on June the 5th,
18 June the 6th and on June the 7th they weren't aware of the
19 Lease house, they weren't aware of the evidence in that they
20 weren't aware of the evidence that related to Mr. Cooper,
21 and they in effect were processing the scene with an open
22 mind.

23 It's not a case in which they had apprehended a
24 suspect, in which they knew which evidence would trace back
25 to the scene. They didn't have that type of guideline. And,
26 again, with the Ryen home, perhaps they didn't handle the

1 carpet in the fashion that Mr. Negus suggested that it should
2 be handled. But they photographed it, they diagramed all the
3 items off it, they picked trace evidence up off the carpet,
4 they eventually seized the carpet, they vacuumed the carpet,
5 they separated the vacuum sweepings. You know, from the
6 other motions Mr. Negus has filed, that he's going to ask
7 for some of that evidence to be released so his expert can
8 look at it, it seems inconsistent that he's arguing we didn't
9 collect the evidence that would allow him to draw the
10 inferences that he's going to make, and yet he's going to
11 have a motion before this Court to analyze the evidence that
12 we have seized.

13 THE COURT: Let's hold the thought and take the
14 morning recess. We'll come back in 10 or 15 minutes.

15 Thank you.

16 (Recess.)

17 THE COURT: Go ahead.

18 MR. KOCHIS: Your Honor, I'd like to perhaps address
19 further the comment made to me about the sheriff's guidelines
20 and whether or not those -- any of those guidelines were
21 followed in this particular case. And I think it's important
22 that we recall that the testimony about the documents is that
23 they are guidelines, that they're not maxims to be employed
24 in each and every case. Because of the wide variety of type
25 of scenes that officers are confronted with when they
26 investigate crimes, there are no hard and fast rules that

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1 apply to each and every case. And, for example, in this case
2 there were some unusual facts that contributed to the fact
3 that the scene was not processed as textbooks might recommend.
4 For example, there was a survivor at the scene, and there were
5 certain lifesaving efforts that were implemented and did
6 result in the saving of Joshua Ryen's life. That resulted
7 in a helicopter landing at the scene; it resulted in fire
8 personnel and paramedics entering the scene, walking around
9 the scene, treating Joshua Ryen. That certainly added to
10 the contamination of the scene. But we feel that that was
11 justified in this case. And they preserved -- in doing that,
12 they actually preserved a witness who has testimony which,
13 as the Court has heard, is potentially favorable to Mr. Cooper.

14 There was also testimony from the criminalist that
15 the scene appeared to have been contaminated to a great degree
16 prior to the time any crime took place in that the house, the
17 condition in which the house was kept, was that it was kept
18 filthy, that the carpets were worn, that there was a lot of
19 debris there that the criminalist attributed to being there
20 prior to the crime, and that they took this into consideration
21 in determining whether or not processing the rug in a textbook
22 fashion would yield any results.

23 There was also indication that, the criminalist
24 testified, that it appeared that there was contamination which
25 took place inside the master bedroom during the commission
26 of the crime itself and that there was blood around the room,

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1 that it appeared the victims may have moved around the room,
2 that Mr. Stockwell, Mr. Ogino, I believe, testified that it
3 was their belief that this would contribute to the possibility
4 of mixed bloodstains throughout the room, that a number of
5 people had been assaulted, that the blood on the wall was
6 consistent with victims being assaulted. And they took that
7 into consideration in determining whether or not they should
8 take more samples.

9 If you look at the manuals, the guidelines, it also
10 indicates that many of the things that are put there as a
11 guideline were followed in this particular case in terms of
12 diagraming, the photography, the moving items and packaging
13 the items separately, taking the items to the crime lab,
14 taking samples from large items, freezing the samples. All
15 of those key elements were followed in this case, and those
16 are items that are mentioned in the manual themselves.

17 One of the things that the new Trombetta case talks
18 about in determining -- in discussing the materiality is that
19 the item must possess an exculpatory value. And it's our
20 position that that is quite different from the types of things
21 the criminalist said might be done in this case, for example,
22 a location of a victim when they were bleeding, a position in
23 a room when they were bleeding. That certainly doesn't seem
24 to be the type of exculpatory evidence that Trombetta is
25 talking about. And also, as Trombetta points out, the value
26 must have been apparent when the evidence was destroyed. And

1 I think what the Court must do is look into the mental
2 processes of the officers when they were there at the scene
3 during those two days. And there's no question but that a
4 year later after Mr. Negus and the other lawyers and experts
5 have had countless hours and days to examine in minute detail
6 the scene and what could have been done or what should have
7 been done, we might have a different perspective. But
8 Trombetta points out that's not the rule. It's what value
9 was apparent at the time. And in this case, that would have
10 been on the 5th and 6th of June.

11 Trombetta also points out that the evidence must
12 be of such a nature that the defendant is unable to obtain
13 comparable evidence by other reasonably available means.
14 And Mr. Cooper's defense, I would assume, is that he did not
15 do it, that he was not present, is not going to be any type
16 of psychiatric defense. And we collected pieces of evidence
17 from the scene that allow Mr. Negus to make that argument,
18 the absence, for example, of his fingerprints, his footprints,
19 his clothing, anything of that nature inside the scene itself.
20 It seems that he has those pieces of evidence available to
21 himself just from the items we have collected.

22 (No omissions.)

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1 MR. KOCHIS: As to Mr. Negus' comments about A-41,
2 Zamora indicates that lawful testing is not destruction,
3 I don't know of any case that stands for the proposition
4 that we cannot test -- use scientific tests to test
5 pieces of evidence we get at a scene unless there's a
6 defense investigator present or a defense expert present
7 and that we cannot conduct tests unless there's going to
8 be enough of a sample left for Mr. Negus to re-analyze.

9 In this case, practically speaking, there was no
10 one to contact prior to July the 31st. Mr. Cooper didn't
11 remain in the area, didn't make himself available to be
12 arrested so he could get a lawyer and we could cross that
13 bridge.

14 On August the 4th, we contact Mr. Negus. He gets
15 an expert. That expert is there for three of the tests
16 with the transferrin, the haptoglobin and the group
17 specific component. And if there was a fault in those
18 techniques, his expert was there. His expert can argue
19 that if you make a mistake as an expert in one set of
20 techniques, that it is reasonable to infer you made mistakes
21 in other parts of your examination. So his expert is
22 actually there witnessing Mr. Gregonis doing his tests,
23 and we have preserved through photographs and records the
24 procedure that was used.

25 Mr. Negus has gotten a certain amount of mileage
26 out of those. For example, he has drawn the inference

1 that there were problems with the staining technique that
2 Mr. Gregonis used, the G6PD, and he's allowed to make that
3 argument because we took photographs of the runs. He's
4 obviously shown those photographs to an expert who has
5 made certain suggestions to him, and he will therefore be
6 able to argue to the jury if your staining technique's
7 improper, your results certainly are questionable, here
8 are photographs, my expert will say that it wasn't a proper
9 procedure Mr. Gregonis used and, therefore, it casts some
10 doubt on the reliability of his results.

11 That argument has been preserved for him as well.

12 It is our position that we didn't investigate the
13 case in a fashion that the defense wanted it investigated,
14 but that is not the standard. The standard is did we
15 conduct the investigation in such a fashion that Mr. Cooper
16 can get a fair trial, and it is our position that we have,
17 and that we seized many items of evidence which are
18 consistent with Mr. Negus' theory of the case that his
19 client was not involved. And with the seizure of those
20 pieces of evidence, we've preserved a defense, whether
21 Mr. Cooper chooses to take the stand or not. Mr. Negus
22 can make certain arguments, based on the way we've processed
23 the scene and the items of evidence that we seized from
24 the scene.

25 When the Court looks at the long list of things
26 that were seized from the scene, the Court can see that the

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1 officers were seizing things that they thought might have
2 had some value. Some of those items are completely
3 neutral. They don't point in any direction. I think that
4 shows that in good faith we were trying to answer questions
5 at the scene. Some of the things do point to Mr. Cooper's
6 guilt. Those were items of evidence that were there.
7 Certainly Mr. Negus doesn't suggest that the police could
8 not pick up pieces of evidence that incriminate his client,
9 and we selected pieces of evidence which are not consistent
10 with the People's case, and I think that shows that we
11 weren't attempting to destroy or hide evidence that was
12 favorable to the defense.

13 And with that, I would submit it.

14 THE COURT: You don't wish to be heard specifically
15 on Josh Ryen's statements nor A-41?

16 MR. KOCHIS: Well, as to Josh Ryen, Your Honor, I
17 believe the cases we cited at the prelim indicate that
18 there is no obligation on the part of the police to tape
19 record an interview. The officers testified that in
20 accordance with their normal procedure, Mr. O'Campo took
21 notes, He caused the notes to be reduced to a typewritten
22 report that he dictated. He compared the typewritten
23 report with his notes before they were discarded. He
24 reflected in the report the persons present during the
25 interview. Mr. Negus has, from that point and from the
26 hospital records, other people who watched Joshua Ryen.

1 He's been able to interview those people, as we've seen
2 when he at the motion in this case attempted to either
3 impeach or refresh persons' recollections from interviews
4 that Mr. Forbush had tape recorded, and if we had an
5 obligation, it would extend to that, to making the defense
6 aware of other people and their whereabouts that may have
7 had contact with Joshua Ryen, and we have done that, and
8 it is our belief that we have preserved Joshua Ryen as a
9 witness. We have preserved the identity of people he's
10 talked to; and if he's made inconsistent statements, we
11 have preserved those as well. And the Court's aware, from
12 the testimony adduced at this hearing, that people -- some
13 people claim -- and those people are available to Mr. Negus --
14 that Josh Ryen has made statements which are completely
15 inconsistent with the prosecution's theory of the case
16 that Mr. Cooper was the assailant, and Mr. Negus has those
17 available to bring to a jury.

18 As to A-41, I believe I have addressed that in that
19 the sample was exhausted through scientific tests, The
20 Group II was re-run because the first time it was run,
21 the results were not readable. Mr. Gregonis did re-run
22 the ABO. That was a further scientific test that re-checked
23 his initial analysis, and he's testified that, if anything,
24 what was lost was a sufficient portion of the sample to
25 run one group test. It's not as if he put something in
26 the trash can, burned something up or took a quantity which

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1 would have allowed the defense to run every group system,
2 It was a very small amount, and he subjected it to a
3 scientific test. We made Mr. Negus aware of the quantity
4 that was remaining. He hired an expert. The expert was
5 present during the last series of tests during which the
6 sample was expended, and we think we went over and beyond
7 any duty we had in Hitch in making that available to
8 Mr. Negus.

9 THE COURT: Okay. Thank you very much.

10 Mr. Negus.

11 MR. NEGUS: You know, we still haven't --
12 Mr. Kochis basically went more into the facts than I did,
13 and, you know, we still haven't heard all the facts. I am
14 not completely comfortable, you know, arguing all the
15 materiality of each of the various items of -- of evidence,
16 because that, I believe, is the thrust of what Mr. Thornton --
17 Dr. Thornton's testimony's going to be, but one of the
18 things that always interests me about the prosecution's
19 testimony and Mr. Kochis' argument is that from what they
20 say, from what Mr. Kochis argues, you'd think that A-41
21 and the shoe print on the sheets should not be admissible
22 because the scene's so contaminated as to make any -- any
23 evidence of identity of a suspect that came out of that
24 house completely unreliable and not -- and there's nothing
25 one should do about it.

26 Obviously, if they -- their case is going to rely

1 on evidence which has to do with identity which came from
2 that house, I don't think that the argument is available
3 to them that somehow it was a -- it's sort of silly to
4 suggest that -- that you should have been looking for that
5 kind of stuff in the house. I mean that's what their whole
6 case is, and Mr. Kochis' argument that somehow it's too
7 contaminated, if you wanted -- if they want to withdraw
8 offering A-41 and their evidence about the shoe print on
9 the sheet, you know, then maybe -- then maybe the -- then
10 maybe that would be a good compromise, but I'm just saying
11 that facetiously, because, obviously, they're not going to
12 do that, but I think that their argument doesn't make a
13 heck of a lot of sense, either, that is, their argument
14 that there is no material evidence essentially that was
15 there to be preserved. Obviously, there was some material
16 evidence, because they want to use it.

17 Mr. Kochis argues that the UU series has been
18 preserved. We don't know that yet. We haven't analyzed
19 it yet, and according to the testimony of Mr. Gregonis,
20 one could expect that most, if not all, of that will not
21 be analyzable because of the way that they processed the
22 crime scene, so you have -- you have a situation where
23 there -- where the blood in the house, if properly analyzed,
24 could have done two things. It could have either shown
25 types totally inconsistent with Mr. Cooper connected with
26 the actual violence to the victims; or had there been

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1 another type that was consistent with A-41 which had been
2 preserved for analysis and there was -- the testimony was
3 that they didn't do anything to try and figure out where
4 that might be, and didn't preserve the evidence, the carpet
5 around it, they waited 30 days to even look at the walls
6 around it till after the place had been luminoled and who
7 knows what else, then we would have been able to reanalyze
8 that to prove that A-41 is not consistent with blood of
9 Mr. Cooper.

10 The materiality of that, I think, is obvious.

7a 11 The materiality of the blood splatter reconstruction,
12 of the trace evidence, of the impression evidence that was
13 in the house, I think will become -- it's already somewhat
14 apparent from the testimony of the prosecution's own
15 criminalist. I think it will become more apparent when
16 Dr. Thornton testifies. This is not stuff that the -- and
17 I'm, you know, now making an offer of proof, but this is
18 not stuff that is somehow, you know, Star Wars-type
19 technology you need to do it or is stuff that is concocted
20 by a defense lawyer in court. This is the kind of stuff
21 that they got that they had at that crime scene, and that
22 they, you know, essentially botched in collecting and
23 preserving, is the kind of stuff that sheriff's officers
24 all over the state seize, analyze and preserve every day
25 because its significance is obvious. I mean we are not
26 talking about stuff that is -- that -- that -- that sheriffs

1 don't -- don't seize, Mr. Kochis argued that somehow,
2 well, look at the car and look at the Lease house. I
3 suppose you can to a certain extent look at the car and
4 look at the Lease house to show how the Ryen house to a
5 certain extent at least -- how it could have been done
6 better, to show that the Sheriff's Office itself knew to
7 partition the -- the -- the floor to get the -- to get the
8 stuff before there's 72 to 90, whatever the number of
9 people is, tromping through the scene, to -- how to get
10 all the items that have anything that looked like stains
11 on them, I mean they seized items out of the car that
12 looked like they had Coca Cola stains or something like
13 that. They obviously knew how to do it right.

14 The argument I have always made all along is not
15 that they were trying to frame Mr. Cooper from June the 5th,
16 but I think the evidence circumstantially shows that on
17 June the 5th and 6th, they botched the scene. They --
18 it was a big -- it was a big crime. It was more than they
19 can handle. Everybody wanted to come in and see what had
20 happened. Everybody wanted to get in the act. They, for
21 reasons best only known to them, brought in a criminalist
22 who had no experience, didn't know what he was doing, and
23 had no -- no ability to -- to try and handle the multitude
24 of people who were coming and contaminating the scene.
25 I think that there is evidence that after they botched the
26 scene and they found that Mr. Cooper was next door, that

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1 evidence was distorted to try and be consistent with --
2 with their theory that Mr. Cooper did it.

3 (No omissions.)

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1 It's just as much bad faith, I would submit, to distort
2 evidence because you believe somebody's guilty as it is to
3 distort evidence because you believe somebody is innocent
4 and you're trying to frame them.

5 I would submit that the evidence shows that -- that --
6 I'm sure the police thought that Mr. Guilt -- that Mr. Cooper
7 was guilty because they found -- because they found evidence
8 that he was next door. In fact, they filed a Complaint against
9 him when they had no further evidence than that he was next
10 door. But that doesn't make the undermining of the truth-
11 finding process any less relevant with respect to, for
12 example, Mr. O'Campo and Josh than -- than if Mr. O'Campo
13 knew Mr. Cooper didn't do it and was trying to -- was trying
14 to frame him.

15 You can -- you can -- you can destroy and distort
16 evidence in bad faith for -- in two different ways. And I
17 would not for a minute suggest that the evidence shows that
18 Mr. O'Campo believes that Mr. Cooper didn't do it. I think
19 he obviously does believe he didn't do it. But he's willing
20 to twist the evidence to try to make it consistent with that.

21 As far as the -- as far as what --

22 THE COURT: But everything came out, didn't it?

23 MR. NEGUS: No.

24 THE COURT: Didn't everything? I mean --

25 MR. NEGUS: No.

26 THE COURT: -- no evidence was ultimately suppressed.

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1 MR. NEGUS: I don't -- I think that's not true.
2 THE COURT: Delayed, perhaps, but not -- not covered
3 up.

4 MR. NEGUS: Well, O'Campo on that particular day
5 said on the witness stand under oath that --

6 THE COURT: That the conversation didn't happen.

7 MR. NEGUS: We don't know what the conversations
8 he had with Joshua were. We have a situation where -- where
9 when you get independent witnesses, Josh is first saying
10 that three white guys did it, and then there are conversations
11 with O'Campo, which we don't know much about, just snatches
12 people overheard, and then there's another conversation two
13 weeks later where there's -- where there's -- where there's
14 nothing, we don't know what went on between. We do know that,
15 leaving aside right now -- I'm not, you know, the -- I cited
16 the Jones case and the other case about notes in the -- in
17 the -- in the Points and Authorities. But even more
18 fundamental than destroying his notes is Brady vs. Maryland,
19 which stands for the proposition that withholding favorable
20 evidence from the Defense, be it notes, oral, whatever, is a
21 violation of due process. And I submit that that's what
22 O'Campo did.

23 I heard Mr. Kochis argue that somehow the Defense
24 found out about all these things due to Prosecution discovery.
25 Memories are convenient. I received no evidence in discovery
26 from Mr. Kochis about Mr. Gamundoy, no evidence in discovery

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1 from Mr. Kochis about Mr. Fisher, no evidence from discovery
2 about Linda Headley or Dr. Jerry Hoyle. That evidence
3 Mr. Kochis received from me. I subpoenaed the hospital
4 records, Mr. Forbush went out and talked to the people there,
5 we gave Mr. Kochis the evidence which had the identity of these
6 particular people in them. They didn't even go and contact
7 them until after I had brought up their names at the Preliminary
8 Hearing. So it is completely -- if -- if I hadn't happened
9 to subpoena the hospital records and Mr. Forbush hadn't had
10 been able to talk to the people which, you know, quite often
11 in many, many cases, hospital people won't talk to them, if
12 we had not found that information by independent investigation,
13 we wouldn't ever have known what Mr. O'Campo did. So it
14 certainly wasn't anything that we got in discovery which --
15 which enabled us to do it. It was the fact that we happened
16 to have an excellent investigator that can go out and find
17 things out. But it wasn't from the Prosecution.

18 And I really think that that is really false and
19 misleading. You know, the person who found out that Mr.
20 O'Campo was lying was Mr. Forbush, not the Prosecution telling
21 us. And we don't know all the things that Mr. O'Campo did
22 to try and interact with Joshua. He won't admit that he did
23 anything. I can prove that's not true. But I can't -- I
24 have no way of knowing what he -- what those other conversations
25 he had with Josh Ryen are. There's no way of believing Mr.
26 O'Campo that he didn't talk about the case, because he lied

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1 about that to begin with. And that is the -- to me, as far
2 as -- as the bad faith is concerned, that is the critical
3 thing, is we have an officer that lies under oath. I mean,
4 there's just no way that he could have had that conversation
5 with Josh Ryan and forgotten it. I just find that inherently
6 incredible. So you have to find that he's lying. And there's
7 no way you can tell whatever influence he has had on Josh.

8 His description of that conversation, which Mr.
9 Kochis says helps me, really is consistent with Mr. Kochis'
10 theory of the case. It is that Joshua didn't have a real
11 memory of seeing three people. He just was confused. That's
12 the way Mr. O'Campo's cleaned up version of the statement
13 comes out. Comes out, "I didn't see anybody."

14 THE COURT: Counsel, if I might interrupt briefly,
15 if we're talking about due process, the defendant's right to
16 fair trial, we have the information now ~~to~~ some long time
17 before it's presented to a jury.

18 MR. NEGUS: I don't have the information. What did
19 Mr. -- what did Mr. O'Campo talk about with Josh Ryan on
20 June the 8th, June the 9th, June the 10th, June the 11th,
21 June the 12th? What did he say to Josh Ryan to get him to --
22 to -- to -- to change his mind? I don't have that information.
23 If I had it, then that would be different.

24 I don't know -- I don't even know what happened in
25 the conversation on June the 14th. I don't know what
26 happened in the conversation on June the 6th. I know that

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1 Linda Headley and Dr. Mary Howell overheard certain parts of
2 it. But they -- that's just certain parts that they can
3 recall. I don't know what happened in that conversation.
4 I don't have the information. O'Campo lies about it. He
5 won't tell us. And I doubt seriously if Josh -- in fact, I
6 know that, I mean, Josh doesn't remember. So where am I going
7 to get it? I mean, I don't think that's true, that I have
8 the information that -- that is there unless Mr. O'Campo
9 decides to -- to tell us what really happened. If he knows,
10 can still remember, we don't -- we don't know. And that's
11 withholding evidence, and it's withholding evidence about
12 the sole survivor of a mass murder. And I can't think of
13 anything more critical.

14 I don't know the way you want me to go as far as
15 Mr. Kochis, you know, is concerned, about materiality. I
16 don't know whether to not -- now is the time to try and go
17 detail by detail through the different items of the house
18 which -- you know, suggesting what kind of sanctions should
19 be -- should be made for failure to preserve and why there
20 was failure to preserve and -- and all the details of that --
21 THE COURT: If sanctions are imposed, it can become
22 appropriate on anything.

23 MR. NEGUS: Then I would just as soon not go into
24 that now.

25 Mr. Kochis would like to say that Hitch somehow
26 limits itself to the -- to its facts. And I don't think that's

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1 really true. I mean, I can't imagine a more broadly written
2 opinion. They talk about what should you do when evidence
3 subject to disclosure is no longer in existence. They talk
4 about all discoverable evidence. I mean, they seem to be
5 setting up a fairly broad set of rules.

6 THE COURT: But the case --

7 MR. NEGUS: The limitation that they make is what --
8 with respect to breath samples. Now they're talking -- the
9 only limitation they make is with respect to breathalyzer
10 They're talking about the -- the -- the prospective-retro-
11 spective effect of their particular decision. So that's
12 when they limited -- they -- when they're talking about
13 prospective versus retrospective, they limited their decision,
14 the effect -- the effect of their decision about breathalyzer
15 tests to tests done after the date of their particular --
16 that particular decision. They don't in any way limit the --
17 the case to -- to just breathalyzer tests, nor does Moore,
18 nor does Nation. The reason I picked Moore, Hitch and Nation
19 is that those are the three Supreme Court cases which are
20 primarily on destruction of evidence. And I submit that that's
21 not an unreasonable type thing to -- an unreasonable type
22 thing to do.

23 There have been cases which have imposed sanctions
24 for not providing us with the names of witnesses. That's --
25 we're a San Diego case now. That was a San Diego Appellate
26 Department case. But I don't know if that's binding on us

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1 now because we're a San Diego case or not. But it was
2 published as the case of People vs. Loomis, which I gave to
3 you the cite, and I thought, -- I gave you the cite on that because
4 I thought that it was -- it was very analogous in this
5 particular situation. Prosecution wants to introduce evidence
6 of footprints in the Ryen house. But they can't tell us who's
7 feet were tromping through the house. They made a list of 60
8 people that they thought were in the house. I gave them 12
9 more names at the prelim, and they added them to the list.
10 They have no way of knowing who was in that house and who
11 was not.

12 And that's -- Detective Arthur said that he doesn't --
13 he doesn't see why people take names down of people going
14 in the house. He teaches it -- he teaches it at the academy,
15 that you should, without knowing why. But he didn't do it.

16 You know, the presence of witnesses, People vs. Jones,
17 in certain -- in certain cases, notes of officers, there's
18 umpteeumpt cases on -- on tapes which I won't go into. I
19 did that on another case. There are evidence of various
20 types of serological -- serological evidence. Blood has
21 been -- has been -- has been mentioned.

22 I should just point out that since 1957, People vs.
23 Carter, I think, was the case, 48 Cal. 2d. It's cited some-
24 where on the -- on some one of our various motions. You know,
25 blood splatter evidence has been admissible in -- in -- in
26 California courts since -- since 1957.

1 THE COURT: May I interrupt just a moment?

2 MR. NEGUS: Sure.

3 THE COURT: You have to concede that the materiality
4 of Hitch is considered perhaps a little different than the
5 materiality of the various pieces of evidence in this
6 particular case. Some of the cases do speak, when you get
7 to considering the materiality of evidence, you consider
8 all the circumstances in the case and, you know, you did
9 not cite, nor apparently is there any case that comes
10 remotely close to the complexities and the volume of this
11 case; so it's not necessarily controlling and not always --

12 MR. NEGUS: Well, the thing is that if all -- if
13 the items must be preserved -- if there's individual cases
14 that say you have to preserve serological evidence, you
15 have to preserve witnesses' names, all these other things,
16 if there -- if you have to do it individually, then
17 certainly you have to do it in the aggregate. And Hitch
18 says -- it can't be plainer in there -- "All discoverable
19 evidence." The duty applies to everything. Everything
20 may not be material, and I will certainly agree that there
21 are -- I have asked some questions about stuff that they're
22 not preserving whose materiality is not the strongest.
23 On the other hand, I think I've asked questions about
24 their failing to preserve stuff whose materiality is crucial
25 and stuff which could show us who did the crime and who
26 didn't, and that's -- again, I think Dr. Thornton can better

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1 tell you what evidence can tell you what than -- than I
2 can.

3 THE COURT: Counsel, we had admissions from some of
4 the witnesses who have testified so far and confessions
5 to the effect that proper analysis and reconstruction could
6 have told us a lot of the seven questions that you had on
7 the board.

8 MR. NEGUS: That's because the seven questions on
9 the board were not Dr. Thornton's formulation of what can
10 be done analyzing physical evidence. Those seven
11 questions were taken by me from previous testimony of
12 prosecution witnesses as to what they said you could do
13 with -- in this particular case as to what they said you
14 could do with physical evidence, so I mean I don't want to --
15 didn't want to be sneaky about it --

16 THE COURT: For purposes of considering the motion
17 ~~could have~~ here, I am going to assume that a lot ~~has~~ been told from
18 the scene that has not been told.

19 MR. NEGUS: Then I think I've satisfied the material-
20 ity element of it, I mean, because either -- either you find
21 that -- either you find that that could have proved that
22 Mr. Cooper was -- was -- was innocent, at which time -- if
23 there's a reasonable possibility it could prove he was
24 innocent, I think the case has to be dismissed. If it's
25 something less than that, then I think we have to draft
26 appropriate sanctions, either keeping out some evidence the

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1 prosecution wants in, or making jury instructions, as they
2 suggest in the various cases, which addresses that which
3 they failed to preserve, because Mr. Cooper is entitled to
4 the inferences that can be drawn from that evidence which
5 are favorable to him, if it is material, if they should
6 have preserved it, and if they didn't.

7 I have a few other little itsy-bitsy points, but
8 I'm -- about the facts, but assuming we're not getting down
9 to the individual items of evidence at this point in time,
10 I don't have anything more in general, unless you have
11 questions.

12 THE COURT: When I first started preparing for
13 this Wednesday or Thursday, I went through my notes and
14 your prior points and authorities and did in fact list
15 each and every item in dispute, and then filled in on that
16 from your points and authorities and from notes, and then
17 I read -- re-read all the defense points and authorities
18 and about half of the prosecution's points and authorities
19 so far, and I read, I think, all the cases that have been
20 cited, but I still have much work to do. I will -- would
21 like you back at 9:30 tomorrow morning.

22 Anything further?

23 MR. NEGUS: Are we going to spend the morning on
24 this tomorrow or --

25 THE COURT: No, no, no. I expect to, win, lose or
26 draw, to go into issues number two or -- in your list.

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1 MR. NEGUS: Okay.

2 THE COURT: Tomorrow, at the very least, although

3 I don't -- I don't think those are going to take all that

4 long. I don't have them before me, but be prepared on

5 other things to take us the rest of the day. I would

6 expect within just -- this is not -- yes, it is -- no.

7 That's a copy of mine.

8 THE CLERK: Yes, it is, Your Honor.

9 THE COURT: I would expect not to be too verbose

10 in the morning, one way or the other, because I don't --

11 well, for various reasons. So be prepared on other matters.

12 Okay. See you tomorrow.

13 (Whereupon, at 11:45 a.m. an adjournment

14 was taken in this matter until July 24,

15 1984.)

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