

SUPREME COURT OF THE STATE OF CALIFORNIA

COPY

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff-Respondent,

vs.

KEVIN COOPER,

Defendant-Appellant.

CR 72787

Supreme Court

No. Crim 24552

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY

HONORABLE RICHARD C. GARNER, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

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IN PROPRIA PERSONA

68
VOLUME ~~50~~ of 68 volumes.
Pages 6183 to 6309, incl.

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Defendant.)

Pgs. 6183 thru 6309, incl.

Thursday, August 2, 1984

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1 ONTARIO, CALIFORNIA; THURSDAY, AUGUST 2, 1984; 9:40 A.M.

2 DEPARTMENT NO. 3

HON. RICHARD C. GARNER, JUDGE

3 APPEARANCES:

4 The Defendant with his Counsel, DAVID

5 NEGUS, Deputy Public Defender of San

6 Bernardino County; DENNIS KOTTMEIER,

7 District Attorney of San Bernardino

8 County, JOHN P. KOCHIS, Deputy

9 District Attorney of San Bernardino

10 County, representing the People of the

11 State of California.

12 (Jill D. McKimmey, C.S.R., Official Reporter, C-2314,

13 Brian Ratekin, C.S.R., Official Reporter, C-3715)

14

15 THE COURT: Good morning. All three attorneys are

16 present with the defendant, Mr. Cooper.

17 Mr. Negus.

18 MR. NEGUS: You asked us yesterday about the time

19 involved in the various ways of -- of separate juries versus

20 single juries.

21 First off, it seems to me clear that you don't have

22 to have sequestered voir dire if you -- on the guilt phase.

23 Basically, the general rule for guilt phase when the jury

24 does not have to -- to determine penalty is you don't even

25 tell them what the penalty is.

26 THE COURT: You wouldn't --

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1 MR. NEGUS: You certainly can ask them in this case,
2 juror, you're not to be concerned with penalty or punishment,
3 can you decide the case, the issue of guilt or innocence,
4 without concerning penalty or punishment.

5 THE COURT: But publicity you indicated before that
6 you wanted to --

7 MR. NEGUS: I was going to get to that. All right.
8 I think that as far as publicity is concerned, a couple of
9 more screening questions on the questionnaire can limit it
10 down to where the number of people that you're going to have
11 to talk to outside of the presence of the others is consider-
12 ably limited, so it's only probably a minority of the people
13 involved.

14 Experience has shown me that if you do have to talk
15 to some people in chambers, what I would just call procedural
16 inertia has its own way of limiting that number, so that
17 there's obviously certain disadvantages to the defense to
18 following a procedure where the procedural inertia is against
19 in-chambers voir dire as far as publicity is concerned. I'm
20 willing to live with those. I would be willing to --

21 THE COURT: I'm not sure I understand what you're
22 referring to.

23 MR. NEGUS: Well, I mean if you -- if you're sitting
24 out here in court and you go through and basically people
25 say, yeah, I heard something about it, but not much, and
26 they don't remember, they have a vague idea about the case

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1 and it's not going to -- and I don't have any strong opinions
2 about it one way or the t'other, that's not the sort of
3 thing you have to go back and ask them a bunch of detailed
4 questions back in chambers. There may be people that have
5 followed the case, that have followed the case, you know,
6 very closely, and have opinions. Those people you might
7 want to talk to in chambers. Generally, I've found -- and --
8 and that, I suppose, is a potential in every case, because
9 there's always -- we always offer jurors, if they have
10 something that's either -- either going to burn the rest
11 of the panel or which is too private for them, the oppor-
12 tunity to -- to express that to the Court in chambers
13 privately, rather than out in open court. Obviously, the
14 publicity ups the number of people that are involved in
15 that, but if you're doing the -- I'm -- just -- just as
16 sure as I'm sitting here, that I'll probably want to do it
17 more than you'll want to let me, and when you have a
18 situation where I have to sort of overcome what I would call
19 procedural inertia, that is, overcome the fact that we're
20 all out in open court to get you to do it, that's going to
21 limit quite a bit the number of people that we actually get
22 in chambers. I think that's just a fact of human nature,
23 and also probably I get tired of doing it more that way.
24 It's harder to get it started in -- in that sense. I would
25 assume that if we just pick the guilt phase and didn't have
26 any regular sequestered voir dire and only voir dired those

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1 people that we had some indication of -- and we would not --
2 first of all, we wouldn't have to set up these individual
3 appointments at 20-minute intervals. We could just bring in
4 40 or 60 people at a time, take excuses, start voir diring,
5 you know, move on -- move on to the next, just like with a
6 regular jury. You wouldn't have to go through all this --
7 this fancy stuff that we do with -- with the Hovey, so I
8 would assume that it wouldn't take -- well, my basic guess
9 is it would take -- it would take about four or five days.
10 Certainly, I can't imagine it taking more than two weeks
11 to pick a jury that way, max. Four or five days I think
12 would be much more likely and, obviously, if you find 12
13 you like at the beginning, you know, that's -- that's always
14 a possibility, because that certainly has happened --

15 THE COURT: And then when you come to the death
16 penalty phase --

17 MR. NEGUS: When you come to the death penalty phase,
18 if you come to the death penalty phase -- so let me just --
19 I think that you have -- that as far as let's look at it --
20 I can see three possible scenarios, leaving out hangs along
21 the way, because hangs -- if you have a hung jury, whichever
22 way you do it, it's going to lengthen it by the same
23 essentially amount of time. If Mr. Cooper is found not
24 guilty, then obviously you've saved a month worth of time.
25 If I'm right and -- and the way that they were doing it now
26 is unconstitutional, then you've saved six or eight months

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1 worth of time, because you've saved yourself a ground for
2 being reversed.

3 The only way that it won't save time is if I'm
4 wrong about the -- about the unconstitutionality of the way
5 we're doing it and if Mr. Cooper is convicted. Now --

6 THE COURT: In which case, it's going to take how
7 much longer?

8 MR. NEGUS: In which case, it would take -- the
9 other accommodation which I'm basically essentially I think
10 willing to make is --

11 THE COURT: I haven't found it.

12 MR. NEGUS: Well, I'm about to tell you what it is.

13 THE COURT: I haven't heard of any accommodation so
14 far.

15 MR. NEGUS: Well, well --

16 THE COURT: You said "other" I thought.

17 MR. NEGUS: Well, I wasn't -- I wasn't -- certainly
18 wasn't requesting sequestered voir dire at the guilt phase --
19 is to basically limit the sequestered voir dire at the
20 penalty phase, and there's -- again, this is something which
21 is normally considered to be a disadvantage to the defense,
22 but I am willing to do it in this particular case. I can
23 see two different ways -- well, the main way I can see of
24 doing it would be to do screening in open court and again
25 only sequestered voir dire a limited number of people. That
26 is, the overwhelming majority of jurors that you go through

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1 answer the three Witherspoon questions, "They can do it,
2 they can do it, they can do it," and there -- you know, we --
3 we don't -- they're not going to pollute the other people.
4 The problem is in -- in isolating those people -- the
5 people that aren't going to do it -- before we get into open
6 court. What I would suggest would be that you could ask
7 them the three Witherspoon -- and we could have a little
8 check thing, and they could check it off, and if they give
9 an answer other than "Yes, yes, yes," then we can talk to
10 them individually. If they give an answer "Yes, yes, yes,"
11 then we don't bother, because their views are not going to --
12 their views are not going to pollute the panel at the penalty
13 phase. I don't know --

14 THE COURT: That would get you --

15 MR. NEGUS: That would get you another -- that would
16 give you -- you know, that would take probably a week or two
17 to pick that jury, so, you know, you save a little time.

18 THE COURT: Well, what you're saying is that you
19 could -- well, the way you figure it out, I thought we were
20 talking about maybe six weeks, roughly, to pick a jury in a
21 death-qualifying type of thing, and you're talking about it
22 not taking any longer for two juries.

23 MR. NEGUS: I'm talking about taking shorter for two
24 juries to pick the juries, but you have the extra time of
25 the evidence.

26 THE COURT: Duplication of evidence.

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1 MR. NEGUS: The duplication of evidence, but shorter
2 jury selection.

3 THE COURT: But all the evidence wouldn't be
4 duplicated.

5 All right. Anything else you want to say before I
6 hear from the other side on just that possible --

7 MR. NEGUS: On just that possibly, you know, that's
8 what I could think of. I can't see making any promises
9 about evidence, because I think that could get me into deep
10 trouble, but looking for things that I can see to try and
11 shorten time, if we have -- to my mind, in this particular
12 case, the most important thing is at the guilt phase; so if
13 we have that particular -- I'm willing to -- to essentially
14 if we -- if we do that and we get to a penalty phase,
15 willing to lessen the Hoveyization of jurors, which I'm not
16 personally terribly convinced of the efficacy of, anyway.

17 (No omissions.)
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1 THE COURT: Do you find any Prosecutorial interest
2 in doing it that way, gentlemen?

3 MR. KOTTMEIER: No, Your Honor. Addressing
4 strictly the issue of time, and picking up with the last
5 point that was raised by the Court, I disagree. I think
6 that all evidence will be duplicated because of the specific
7 directions of the 190 sections, that a myriad of considerations
8 are involved in the jury's determination of the appropriateness
9 of the penalty, which includes a whole number of things, such
10 as how the crime was committed, issues relative to whether
11 or not the defendant had an accomplice, what his role was in
12 the crime. It is not a situation of where you can start with
13 a situation of advising the jury, "Ladies and Gentlemen, the
14 defendant has been convicted of four counts of murder, one
15 count of attempted murder. Your duty is to decide the issue
16 of penalty, and now we're going to hear extraneous matters
17 such as potentially the crimes of violence in the defendant's
18 past as well as the mitigating circumstances that the
19 defendant can offer in his behalf." They are going to have
20 to retry the entire factual issue.

21 THE COURT: Let me just interrupt you just one
22 second. The manner of the killing, the implements involved,
23 sure. The scene, you'd have to paint that for them. But --
24 but going through just -- just, for an example, maybe all
25 the details about how the hatchet was tested analyzed, we
26 wouldn't probably spend near so much time on that, I wouldn't

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1 think, near so much time with criminalists. You know, I
2 just thought it might be viewed by you as not an unreasonable
3 price to pay to -- to -- to keep out one chance of reversal.

4 You know, in reading Hovey, Fields, Witherspoon and
5 those cases, Witherspoon put on no such evidence as is being
6 offered here. Hovey presented evidence such as is being
7 offered here, but they specifically said, "Based upon the
8 evidence now, we can't say what bias producing factors will
9 still be under the -- our new procedures." In other words,
10 they left it open for taking another look at it based upon
11 new evidence. And you're getting -- they specifically invited
12 more and more empirical data.

13 So it's a factual question with the Court of Appeal.
14 They're going to look at it again, they feel -- they'll feel
15 unrestrained to follow Hovey and Fields. Fields decided it
16 on a representation cross section type of a basis as opposed
17 to what we're talking about more here.

18 I just think that -- I have no predictability at all.
19 I have no confidence that -- that the law that we have now is
20 going to stay. And I just thought it would be to your interest.
21 I'm not trying to talk you into it, Mr. Kottmeier. I respect
22 your position. But you have considered that, and you simply
23 don't think it's to your interest; is that correct?

24 MR. KOTTMEIER: I don't think it's to my interest
25 or to the Court's interest. And here's where I have the
26 difficulty with the material that you have just related, Your

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1 Honor.

2 Justice Kaus, in that supplemental decision, said
3 specifically that he's doing his best to give guidance to
4 trial courts as to how to handle this issue. That was
5 foremost in his mind. And, apparently, I think he speaks
6 for the majority, because they joined in that modification
7 of the Supreme Court in evaluating this particular issue,
8 and they said that the appropriate approach in California is
9 one separate death qualified jury.

10 Now, I would grant --

11 THE COURT: The four-two decision, Richardson --

12 MR. NEGUS: Three-one-two decision. And I --

13 MR. KOTTMEIER: -- and I would -- I would grant that,
14 in an atmosphere of avoidance, that certainly this could be
15 one area that somewhere in the future on this case or some
16 other case the California Supreme Court, if it shifts its
17 majority, could hang its hat.

18 But I would submit that it is not for us to, in
19 effect, to try and predict where they're going to go on an
20 issue that at least for the present has been settled,
21 especially when, in my view, what you have heard from Mr. Negus,
22 under the best of circumstances, is the granting of a couple
23 weeks in exchange for a few months of additional trial.

24 And I would submit that one of the issues that was
25 presented within the material in the Federal cases was that
26 there is a possibility that you can shift the other way, that

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1 But you have -- as far, then, as the separate juries
2 issue is concerned, you have read my -- the various things
3 which I consider to be an offer of proof. And I would point
4 out that I, unless my memory is really fouled up, Fields
5 was not a four-judge plurality on the -- on this particular
6 issue.

7 THE COURT: Well, you -- I didn't go into the various
8 dissenting opinions. It was four to two as far as concurring
9 and opposing.

10 MR. NEGUS: No.

11 THE COURT: But I didn't break it down, then.

12 MR. NEGUS: Right. But if you'll note that what
13 Justice -- you have -- on -- in -- in the lead opinion, you
14 have Justice Broussard, Justice Mosk and Justice Richardson
15 concurring. Justice Kaus concurred in all of the opinion
16 except part III-A. Part III-A is 95 percent of the opinion.
17 So with respect to part III-A, Justice Kaus' opinion -- and I
18 would submit that Justice Kaus, therefore, is the critical
19 opinion, because it's his -- it's his view, which is the --
20 the sort of narrower view of the -- of the two opinions. He
21 did not -- he thought that in fact he did not want to say
22 that -- that there was not a cognizable class, and he made that
23 clear, I believe, in some of his earlier opinions. But that
24 in his opinion in that case, it was -- he was coming down
25 merely on the weightiness of the balancing process between --
26 that the -- that the statute allows. And he said that the

1 weight on -- in that situation was -- favored the single
2 jury procedure as opposed to -- and that would be, even if,
3 you know, the people were a cognizable class, that would
4 outweigh it.

5 In effect -- in the -- in the additional research
6 that we have -- that's presented by way of an offer of proof,
7 two more elements were added in the weighing process that were
8 not present before the Court in -- in Fields. One is the
9 evidence that the effect of death qualification is not only
10 to exclude a cognizable class, those people who have strong
11 opinions against the death penalty, but also to exclude in a
12 statistically significant way Blacks and women.

13 There is no doubt but that Blacks and women are
14 cognizable classes. And there's no doubt but that a system
15 which excludes them is Constitutionally impermissible.

16 There is also additional evidence from the Haney
17 article that the full effect of making people sit in that --
18 in that setting with all these people, you know, surrounded
19 by eight people from the Court and one lone juror, and asking
20 them their opinions about the death penalty makes the jurors
21 more prone to -- to think the defendant guilty, more prone
22 to employ the death penalty, makes them think that the Judge
23 is in favor of the death penalty, whatever the Judge's own
24 personal predilections may be. And so there's additional
25 evidence again on the issue that has to be balanced against
26 the balance that Justice Kaus -- Justice Kaus drew. So I

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1 MR. NEGUS: Apparently when the -- after the Fields
2 case was decided in I think it was January -- December of
3 last year, the Fields case having been -- having been --
4 the lawyer representing Mr. Fields having been not a member
5 of the State Public Defender's Office, the State Public
6 Defender then filed a rather lengthy amicus brief on some
7 of these issues. They cited to the Court the -- amongst
8 other issues, the cases from North Carolina and Arkansas
9 that I provided to you.

10 THE COURT: The federal cases.

11 MR. NEGUS: Federal cases. Justice Mosk, Justice
12 Richardson and Justice Broussard were apparently not
13 convinced by those cases and said that the death-qualified --
14 I mean the Witherspoon excludables are not a cognizable
15 class. That wasn't -- I mean that was certainly -- that was
16 certainly the holding -- you know, the reason that the
17 federal cases came down, that was their particular justifi-
18 cation, but I believe that the added -- the added arguments
19 likewise can be proposed to the Court.

20 Justice Kaus did not -- he did not join in the
21 Court's rejection of those three cases. What he said was,
22 look, you guys, you can't keep -- this is a question of
23 death penalty appeals. There were other issues that we
24 decided besides the -- the III-A issue, and that -- that it
25 is important to -- there are -- there were some issues that
26 in fact were squarely decided by Fields that it's important

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1 to get that out to the trial courts,

2 Certainly, the III-A issue was not squarely decided,
3 because you didn't have a majority for any particular
4 *position* petition. He's telling the State Public Defender in his --
5 in his footnote, I'm sorry, but I'm not going to vote for
6 granting you a rehearing like I did in Easley when the
7 appointed lawyer misses a bunch of issues and then you guys
8 come in after we publish our opinion with these massive
9 amicus briefs that tells us what the other guy missed. If
10 you're going to do it that way, in order to have an orderly
11 processing of justice, then you're going to have to do it
12 by way of habeas corpus on the -- on the appellate counsel,
13 just so that we don't -- we don't have all of our -- all
14 of our affirmances going into limbo because you guys come
15 in and file these massive briefs which tell us all the issues
16 we should have addressed the first time around.

17 That's, you know, what Justice Kaus is saying in his --
18 in his particular footnote, as I read it. I mean you guys --
19 telling the State Public Defender they can't come in at the
20 last minute after they made up their mind and expect them
21 to change their mind every time they affirm a judgment of --
22 of death.

23 Justice Kaus nowhere indicates that issues are
24 properly presented to him, not framed in the sense that
25 they were in the -- apparently the original Fields case
26 which had to do with the cognizable class issue, but in

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1 terms of these other things, he's not saying which way he's
2 going to come down, and there's at least a hint in the fact
3 that he's -- that he talks about the significance of some
4 of these issues in -- you know, that maybe he's at least
5 listing some.

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6 I would submit that basically there certainly is
7 no binding precedent in the Fields case that rejects the
8 kind of position that we take here. We know we have two
9 votes that agree with me. We don't know what Justice Grodin's
10 vote is because he wasn't there, and we don't really know
11 what Justice Kaus' vote is, so I would -- I would submit
12 that the prosecutor's incorrect to say that somehow Fields
13 disposes of the issue. Fields, as near as I can tell,
14 doesn't dispose of the issue. All they did -- they decided
15 the case on different grounds, but they certainly didn't
16 dispose of that particular -- of that particular issue, and
17 I think that, you know, the -- the offers of proof are, you
18 know, summarized in -- in the various -- in the various
19 materials. I mean I apologize. They're somewhat
20 repetitious. I mean the same study's referred to in differ-
21 ent places, but Professor Kadane's study went that next step
22 that Chief Justice Bird in Hovey said had not been taken
23 and recalculated it on the basis of -- of Witherspoon
24 excludables from the prosecution's side, that is, the
25 automatic death penalty people, and found that -- and that's --
26 that's cited both in the table of contents to the Law and

1 Behavior thing, and in the -- I think it's the -- the
2 North Carolina case, but I don't -- it's one of the two
3 federal cases. Professor Kadane's study was cited, and he
4 recalculated and found out that taking those automatic
5 death people out did not change the basic statistical
6 significance of the earlier studies. That was the one step
7 that the Hovey people said you had to take, and that that
8 step has been taken.

9 In addition, there is the additional evidence mounting
10 as to what Professor Haney calls the process effect or the
11 actual effect of -- of submitting people to it and of the
12 effect on race, sex and class.

13 THE COURT: I'm not sure -- I'm going to have to
14 go back and look at the offer of proof again. The one
15 that talked about minorities and women was a 1977 jury
16 selection procedures by Van Dyck.

17 MR. NEGUS: Okay. There's also -- that was in Hovey
18 as well.

19 THE COURT: I know it was. So when I'm considering
20 what was new in this case, as opposed to what was considered
21 in Hovey --

22 MR. NEGUS: Well, in Hovey, they considered the
23 surveys, but they didn't go on to -- to follow up on it.
24 The Ellsworth study that's cited there of the 812 people in
25 Alameda County took those public opinion polls that was --
26 you know, that's basically what they showed in -- in -- in

1 Hovey. They -- they had public opinion polls which showed
2 that historically over time more Blacks and more -- more
3 women were opposed to death penalty. What the Ellsworth
4 study did that I -- that I gave you there tends -- was to
5 take and show on that table on page 47 the interconnection
6 between the Witherspoon excludables and those particular --
7 those particular attitudes, showing that you -- with having
8 Witherspoon excludables, you wipe out, amongst the most
9 significant, I would submit, women, Blacks and --

10 THE COURT: (Directed to the clerk) I want all this
11 offer-of-proof type of evidence.

12 Anything further? I'll come back to you.

13 Mr. Kottmeier.

14 MR. KOTTMEIER: Your Honor, first, I would like to
15 consider the offer of proof and what it potentially shows.
16 I would submit that for the Court's guidance that the
17 Fields issue is extremely important when evaluating the
18 offer of proof because Fields gives us the measure by which
19 to judge whether the defendant has offered through his
20 counsel an effective measure of proof that should be
21 considered through a full hearing. Within Fields, although
22 there are three individuals that present the issue, we know
23 that Justice Kaus has a position that basically a separate (sic)
24 jury is a right, a right that, in his opinion, overrides
25 the issues presented as far as a death-qualification jury
26 and as far as the issues raised in Fields, but the basis for

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1 evaluating sociological studies similar to the ones presented
2 in the offer of proof would be relative to the three opinions
3 of the justices that considered whether or not exclusion of
4 anti-death jurors is a cognizable class, and that particular
5 decision set down guidelines or groundwork for the Court to
6 evaluate cognizable class.

7 THE COURT: But if I only have three of them, is
8 that sufficient to consider it precedent?

9 MR. KOTTMEIER: Yes, because I would submit that
10 Justice Kaus is an automatic. Justice Kaus says that a
11 separate (sic) jury is primary and that it should be granted
12 unless there is something other to consider than just the
13 class issue --

14 THE COURT: You mean a single jury as opposed to
15 separate?

16 MR. KOTTMEIER: Single jury, yes; in other words, a
17 single jury, one jury, because of the state of the law, the
18 way in which the law is written, is a decision that should
19 come down in favor of that idea, regardless of the
20 presentation of the issue relating to sociological studies,
21 relating to death qualification and the exclusion of death
22 or anti-death jurors.

23 (No omissions.)
24
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1 So that I would submit that Justice Kaus is going
2 to come down on the side of one jury whenever the issue is
3 presented to him within the parameters as it was presented
4 in Fields.

5 The other three justices say, "Even in consideration
6 of the two Federal cases offered by the Defense to this
7 Court, that those do not present a cognizable class that is
8 being excluded." And they say, first, to establish a
9 cognizable class you have to have a common background, second,
10 that you have to have common experience, and that these two
11 factors have to come together and have a distinctive self-
12 conscious group. And in the absence of that, the sociological
13 studies are not matters that they are willing to consider as
14 being exclusion of a particular group.

15 And they are very specific. They say, for example,
16 "Shared views and attitudes on related issues of social and
17 legal policy are a position that we reject. We do not find
18 that that is a cognizable class." And that is only reasonable,
19 because you cannot say that every individual that, for
20 example, shares a Republican party label as far as his voter
21 registration is necessarily a cognizable class. He may be a
22 Republican, but he may be other things more important and
23 first.

24 In regard to this particular case, the law is clear
25 that there shouldn't be separate juries in the absence of good
26 cause. The defendant in this case has offered as their offer

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1 of proof material that has been evaluated, decided upon by
2 our California Supreme Court. And I would submit that's laid
3 this particular issue to rest, especially in light of the
4 burdensome cost in time, effort, when weighed against the
5 very limited, if any, potential advantage or protection that
6 would be given to the Defense.

7 I would submit that, as this Court is well aware,
8 that the voir dire procedure itself is certainly open to
9 protection, and that we are talking about a very small group
10 of individuals here, and that this particular information is
11 not at all the broad base kind of issue that sometimes the
12 sociologist would like to portray it. It's a relatively small
13 group that we're talking about.

14 THE COURT: There are two real issues that will be
15 decided ultimately by the higher courts. And one is whether
16 or not they'll stick to that definition of a cognizable class.
17 Fields is very specific on that. And if that is stuck to,
18 then one of the issues, as a matter of law, is eliminated.
19 And that is they don't share a common perspective because they
20 are a member of the group but rather they are a member of the
21 group because they share a common perspective. And also other
22 members of the community can represent the non-death
23 perspective. But the other issue is a question of fact. And
24 that's whether or not sufficient evidence is presented to
25 draw reliable conclusions about the non-neutrality of death
26 qualified jurors.

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1 While Hovey specifically says that sequestered voir
2 dire will minimize the problems raised of bias inducing
3 procedures, it leaves the question open. So you run a
4 double risk, Mr. Kottmeier, (a), on the question of law.
5 Mr. Negus doesn't think it's all that clear that Kaus is
6 going to come down the way you refer. (b), on the question
7 of fact. And, in balancing it all, I'm surely not as
8 convinced as you that there is going to be a significant
9 amount more time in the presentation of trial type evidence
10 in one phase or another. But I'm not going to decide it
11 right now.

12 MR. KOTTMEIER: Your Honor --

13 THE COURT: I don't mean to indicate that I am.
14 I'm not going to decide against you. I want to go back and
15 look at that and see what specific additional evidence I,
16 although I went through each of them, I maybe didn't consider
17 it in this manner --

18 MR. KOTTMEIER: Could I offer --

19 THE COURT: -- as presented now that wasn't presented
20 in Hovey.

21 Yes?

22 MR. KOTTMEIER: One additional thought, and that is
23 that, as I'm sure this Court may have during that period of
24 time, I experienced the frustration of trying to predict what
25 the United States Supreme Court meant in regard to the death
26 penalty decision that came back a few years ago, about 1974,

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1 when we tried to restructure everything, when everyone was
2 trying to guess which direction was the appropriate direction,
3 when we were told that discretion was the problem, so that
4 what you had to do in effect was direct the jury that, if they
5 found certain facts, that the death penalty becomes automatic;
6 it is not their decision.

7 I would submit that this is the same type of dangerous
8 time that we are involved in as far as this particular issue.
9 And based upon the experience that we went through in the
10 previous issue, the preference that I would offer as far as
11 the Prosecution is to follow the rules as we have in front of
12 us and wait until the California Supreme Court gives a
13 definitive answer as to what they find acceptable, whether it
14 is consistent with a procedure that we adopt or inconsistent.
15 If it becomes this case that they make their decision on and
16 lay down the guidelines, then if you're asking me should we
17 have tried something different, I would say no, because the
18 amount of predictability that it will provide for statewide
19 prosecutions will be more than worth the amount of effort
20 that we have to go through in retrying the issue. But to try
21 and guess --

22 THE COURT: For sure you have to retry the guilt
23 phase, and that's the significant part of the case.

24 You know, I'm perfectly willing to hide behind the
25 state of the law. I'm not at all desirous of being innovative
26 or to create any new law. The problem is I don't know what

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1 the law is. It is not all that clear. And they haven't
2 exactly inspired me with confidence as to what it will be
3 tomorrow.

4 Anything further?

5 MR. NEGUS: Well, I don't --

6 THE COURT: Otherwise, what I'm going to do is I'm
7 going to relook at some of the material and think about it,
8 and then I can let you know this afternoon or something like
9 that.

10 MR. NEGUS: That's -- okay. I mean, I'm sure that --
11 that's fine.

12 THE COURT: Okay. All right. Anything else?

13 Why don't we take a break until your witness gets
14 here, and we'll resume at the --

15 MR. NEGUS: I'm going to need about 20 minutes to
16 half an hour with my witness when he gets here, because I have
17 to take some pictures of some of his exhibits and Xerox some
18 stuff. I should be ready to start about eleven. And my
19 direct will not last more than 15 or 20 minutes.

20 THE COURT: That's -- can't you reserve that until
21 the noontime?

22 MR. NEGUS: Well, I -- I suppose, but I still need
23 to talk to him a little bit, because I haven't seen his --
24 the stuff that he's bringing.

25 THE COURT: All right. They'll be in their office,
26 and you in yours, I presume. But let's -- let's get started

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1 as soon as we can, because we know --

2 MR. NEGUS: If I could be done quicker, I will--

3 THE COURT: -- chances are --

4 MR. NEGUS: -- rush over --

5 THE COURT: -- we'll be with him most of the day,
6 if not longer.

7 We'll be in recess.

8 MR. NEGUS: Not if we can stick within the scope
9 of direct.

10 (Recess.)

11 THE COURT: If everybody's present.

12 Mr. Negus, your next witness.

13 MR. NEGUS: I would -- yeah, I was -- I got waylaid
14 in having some exhibits marked. My next witness is Dr. Edward
15 Blake.

16 THE COURT: You need a couple minutes to get
17 organized?

18 MR. NEGUS: I could use one more minute, yeah.

19 THE COURT: All right. Let the witness be sworn,
20 and we'll give you a couple minutes.

21 THE CLERK: Raise your right hand, please.

22

23 E D W A R D T H O M A S B L A K E, called as a witness by

24 and on behalf of the Defense, was sworn and testified

25 as follows:

26 / / / /

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

5 THE WITNESS: Yes.

6 THE CLERK: Please -- Do you want him seated, Your
7 Honor?

8 THE COURT: Yes. Come up.

9 THE CLERK: Please be seated.

10 THE COURT: Have a seat first, please.

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

13 THE WITNESS: Edward Thomas Blake, B-l-a-k-e.

14 MR. KOCHIS: Your Honor, if I could have a moment,
15 I have --

16 THE COURT: Call me as soon as you're ready.

17 (Recess.)

18
19 DIRECT EXAMINATION

20 BY MR. NEGUS:

21 Q Dr. Blake, what is your occupation?

22 A I'm a forensic serologist.

23 Q And showing you Exhibit H-395, is that a resume of your
24 background and training and credentials in the field
25 of serology prepared by yourself?

26 A Yes.

1 Q And does that accurately reflect your background and
2 training and experience in that field?

3 A Yes, up to about 1983.

4 Q In August of 1983, did you receive through the mail some
5 a sample of blood from Kevin Cooper?

6 A Yes.

7 Q And in August of 1983 did you analyze that blood to
8 determine Mr. Cooper's acid phosphatase type?

9 A Yes.

10 Q What type is Mr. Cooper?

11 A Type RB.

12 Q Are you familiar with the system developed by Brian
13 Wraxall which uses a one percent agarose-one percent
14 starch -- take it back.

15 Are you familiar with the system developed by
16 Brian Wraxall for the typing of acid phosphatase, ADA
17 and AK at the same time?

18 A Yes.

19 Q The first run that you did on Mr. Cooper's blood, was
20 that using that system?

21 A Yes.

22 Q Did you then recheck your results on August 13th using
23 another system?

24 A Yes.

25 Q What was the purpose of doing that?

26 A The purpose of doing that is to determine whether or not

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1 the judgment that was reached based upon the original
2 analysis would be verified or refuted by subsequent
3 analysis using a slightly different buffer system which
4 has some advantages for the typing of R samples.
5 Q What advantages are those?
6 A The -- the advantage is that the slow migrating R band
7 is clearly resolved from the other bands produced by
8 B's or A's.
9 Q In -- and did that, on August 13th, did that reconfirm
10 the results that Mr. Cooper was an RB?
11 A Yes, it did.
12 Q Then in July of this year did you receive in the mail
13 a second sample of blood from Mr. Cooper?
14 A Yes.
15 Q And did you likewise analyze that blood?
16 A Yes, I did.
17 Q Did you analyze it using the -- the system developed
18 by Mr. Wraxall?
19 A Yes, I did.
20 (No omissions.)
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1 Q Which samples did you use in conducting your experiment
2 on Mr. Cooper's blood in July?

3 A July of this year?

4 Q Yes. You have before you a series of xeroxes which have
5 been marked as Exhibit H-389. Are those xerox copies
6 of the notes that you made of your various experiments
7 at the time that you did them?

8 A Yes. Okay. There was several reference samples that --
9 that were used in the -- in the experiment, as well as
10 a frozen liquid sample from Mr. Cooper that was obtained
11 in August of '83, the sample from Mr. Cooper that was
12 obtained in July of '84, a bloodstain prepared from the
13 sample that was obtained in -- in August of '83, and
14 a reference Type B sample that was a stain prepared in
15 July of 1982 and --

16 Q Was there a second -- also another reference B sample?

17 A Yes.

18 Q And when was that stain prepared?

19 A That -- that was the stain that was prepared in -- in
20 July of 1982.

21 Q Was there also a B stain that was prepared in May of
22 1978?

23 A Yes. The liquid samples were --

24 Q Oh, excuse me.

25 A -- were just part of the reference samples that -- that
26 I use, and those stains were -- they weren't stains.

1 They're liquid samples that are maintained frozen, and
2 those were collected in 1978, and part of the purpose
3 of the experiment is to show what -- what can be
4 observed in older samples that have been stored frozen.

5 Q When you did your experiment, did -- what were the
6 results of the three samples from Mr. Cooper?

7 A Mr. Cooper's sample's R type is RB and are distinctive
8 from the BB samples, and, in particular, the BB stain
9 sample prepared, dried and frozen in 1982.

10 Q How do you -- well, showing you photograph H-345, and
11 directing your attention to the eleventh and the third
12 slot on those particular -- on that particular photograph,
13 from the photograph, what EAP type appear to be in those
14 slots?

15 A Okay. Assuming that the samples have been appropriately
16 doped with the reducing agent, those samples could very
17 well be RB's.

18 Q When you say could very well be RB's, what do you mean?

19 A Well, the -- the judgment on -- on -- or the interpre-
20 tation of a typing result is best done by looking at
21 the -- the actual plate itself. The photograph is a
22 representation of that plate. Some information is lost
23 in the photographic process in this particular photograph.
24 You can see that the gel has -- or the -- the gel has
25 been stained in such a way that some of the bands that
26 are in the anodal portion of the plate, that is, the

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1 portion of the plate the furthest away from where the
2 samples have been added are truncated by the staining
3 process, and the staining process isn't conducted far
4 enough in the anodal direction to -- you know, to be
5 absolutely sure of the -- the position and intensity
6 of all the bands, but the -- the R band is slightly
7 slower than the mixed disulfide oxidation product or
8 the B band, and it's also stronger in intensity in
9 samples that are treated with reducing agent. Both of
10 those samples have that property so they could very well
11 be RB's based upon an observation of the photograph
12 alone.

13 Q Showing a photograph that I've marked as Exhibit H-392,
14 does that appear to be a higher contrast photograph of
15 the same one that I just showed you?

16 A It appears to be a somewhat higher contrast, but I'm not
17 sure that the -- the information content is significantly
18 different in the two photographs, at least to my eye.

19 Q Just using the larger one as something we can mark on,
20 would you indicate on the photograph the positions of
21 the various bands that -- that a B and an RB have.

22 A (Witness complies).

23 Q Do the -- with the exception of the band that's farthest
24 away from the origin, do -- do both BB's and RB's have
25 bands in the same spots, that is the B and the B prime
26 band on the -- on the -- on the -- on the plate?

1 A Yes.

2 Q The B and the RB would have, however, at the anodal
3 direction a slightly different spot in the -- on the
4 band that you have labeled B or R; is that right?

5 A Well, my writing may not be perfectly clear. The
6 oxidized B band is just slightly anodal or further
7 along the gel than the R band. The difference is a
8 subtle one. One of the -- I think the main criteria is
9 that the -- the B oxidation band can be removed or
10 converted to its reduced form by -- by the condition of
11 addition of reducing agent; so the relative intensity
12 band is dramatically different between a properly treated
13 B sample and a properly treated R sample; that is, it's
14 fairly equivalent to the situation of making a distinct-
15 ion between a BB, a CB and a CC. In some senses, it's
16 a little bit easier with the R, because the -- there's --
17 there's no -- there isn't even a subtle difference in the
18 mobility of the B and the C; whereas, with the R and the
19 oxidized form of the B, there is a subtle difference in
20 electrophoretic mobility.

21 Q So the way to distinguish a B from an RB is the relative
22 intensity of the bands and the slightly different
23 position of the -- of the R band from any untreated
24 product of oxidation?

25 A Yes.

26 Q Showing you two additional photographs -- well, showing

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1 you photograph H-393, a contact print of a negative,
2 and asking you to look at the -- at the slot that's been
3 marked on there in red VV-2, on that print what does
4 that appear to be from the photograph?

5 A. From the photograph, that sample appears to be an RB.

6 I think that this photograph is easier to -- to make that
7 determination than the other photograph is.

8 Q Why is that?

9 A. The -- the main reason is that the -- the gel is stained
10 beyond the position where all the bands appear, so
11 there -- you can see the difference between the R band
12 and the B oxidation band, for example, fairly nicely in
13 this photograph.

14 (No omissions.)

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1 Q Showing you then Photograph H-394, another photograph
2 contact print where the VV-2 -- the slot that's marked
3 VV-2, what would that appear to be from the photograph?

4 A. This sample could also be an RB. It's a little more
5 difficult to interpret this sample because the -- the
6 bands are just a little bit fuzzier. But there is a
7 slight -- there is a slight retardation in the mobility
8 of the most anodal band. The relative intensities are
9 about right. For example, there appears to be a -- a
10 B sample next to the VV-2 sample. The -- the oxidation
11 band from the B is slightly ahead of the -- of the R
12 band. And, again, the relative intensity of the B band
13 compared to the oxidation band relative to the VV-2
14 sample, where the B band and the R band are not quite of
15 equal intensity but close to the same intensity, with
16 the R being slightly less intense than the B.

17 Q Showing you finally a Xerox of a bunch of Polaroid
18 photographs with dates affixed to them, is that a Xerox
19 of the Polaroid photographs -- well, let me back up.

20 When^{you} did your various tests of the acid phosphatase,
21 did you take Polaroid photographs of your plates?

22 | A. Yes.

23 Q And is that exhibit, H-398, a Xerox of those Polaroid
24 photographs?

25 A. Yes.

26 MR. NEGUS: And, Your Honor, Mr. Kochis and I have

1 agreed that at the present time we could use the Xerox, and I
2 will take photographs of Mr. -- Dr. Blake's Polaroids and
3 furnish those to the Court early next week.

4 MR. KOCHIS: So stipulated.

5 THE COURT: All right. Accepted.

6 THE WITNESS: Can I have a glass of water, please.

7 MR. NEGUS: Sure.

8 THE COURT: I have one here, Mr. Negus.

9 Q (BY MR. NEGUS:) In the -- in human blood, between the
10 enzymes esterase D and PGM, which provides the most
11 activity as far -- that you can detect electrophoretically?

12 A Now, in -- in freshly prepared samples, I think both
13 enzymes are about -- about equal. Esterase D is not
14 nearly as -- as stable as ^GPGM is and more subject to
15 smearing in older samples than is PGM. So as -- as
16 samples age, PGM becomes more easily typeable compared
17 to esterase D.

18 Q Do you ever get a situation, if you use proper procedures,
19 where your -- where you'll have strong, clear esterase D
20 results and weak or invisible PGM results?

21 A That usually indicates that there -- that there's a
22 problem with the detection of the PGM. It's a diagnostic
23 indicator of -- of the -- a potential problem with the --
24 the stain.

25 Q One -- is one of the things that can be wrong with the
26 stain that the G6PD chemical, which is used in developing

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1 the stain, has somehow deteriorated so it's no longer
2 reacting the way it should?

3 A Was that a leading question?

4 Q Yes.

5 A Okay. I think that -- I'm not even sure it was a question.
6 I think that -- that what you're asking is why is it or
7 that G6PD can be a problem.

8 Q Well, I'm really asking can G6PD be one of the problems.

9 A Yes, it can.

10 Q If G6PD is a problem, is there anything you can do about
11 it?

12 A Yes.

13 Q What is that?

14 A One can simply put on a -- a new -- a new staining
15 solution, a new staining gel. The -- the PGM is a little
16 bit different in the -- than esterase D in the manner
17 in which the gel is stained in that the esterase D stained
18 solution doesn't require a complex series of chemical
19 reactions to take place. It is simply a -- a chemical
20 that the enzyme acts on in a very simple way. And one
21 looks at the product of that chemical reaction, doesn't
22 go through a series of chemical reactions.

23 PGM is more complicated. It requires the -- the use
24 of additional enzymes to detect a cascade of chemical
25 reactions. And for that reason the stain is incorporated
26 into a gel that is poured on top of the electrophoresis

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1 Q So if you had a fresh sample put in the original typing
2 gel, would you be able to read it by putting on a second
3 stain, including fresh G6PD?

4 A Yeah.

5 MR. KOCHIS: Objection. That would call for
6 speculation, because it assumes that when you were conserving
7 the original sample you put enough on to get a reading to
8 begin with. Simply because it's fresh doesn't mean you're
9 going to get a reading every time.

10 THE WITNESS: But there's a diagnostic indicator --

11 THE COURT: I'll overrule the objection. It may
12 remain.

13 MR. NEGUS: Okay. Go ahead.

14 He was about to answer, I think.

15 * THE COURT: Well, ask another question. I don't
16 want him volunteering.

17 Q (BY MR. NEGUS:) Well, the question was -- well, if,
18 for example, you get a strong, clear esterase D result,
19 can you -- and you have -- can you then add a second
20 overlay and get a readable PGM result?

21 A Yes. The -- I think that the question is a little bit
22 confused to me. If I can, if it's okay for me to -- to
23 restate the issues as I see it, that when you don't
24 get a result in general, there -- there -- there are
25 two explanations for not getting a result: either there
26 is an inadequate amount of sample applied to the testing

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1 procedure or the sample is bad. You added a lot of
2 sample but the sample is deteriorated or you have done
3 something wrong in your test to -- to detect what it is
4 you're looking for.

5 The point is there -- there are diagnostic indicators
6 for these various possibilities, particularly the
7 possibility that there's something wrong with the
8 procedure itself. And -- and that diagnostic indicator,
9 as I testified a few minutes ago, is an evaluation of
10 the other enzymes that -- that -- that are stained at
11 the same time that are derived from the exact same
12 specimen.

13 That's one of the advantages of -- of the -- of the
14 multisystem, is that it has the potential for using one
15 genetic marker as a diagnostic indicator of what one
16 expects from another genetic marker. The only thing
17 that one has to know in order to use that information
18 properly is the relative amounts of these enzymes that --
19 that exist in blood.

20 So with -- with a -- a situation where you have a
21 clear esterase D result, one expects to obtain a clear
22 PGM result, one expects to obtain a clear PGM result.
23 Something very peculiar has to occur in the sample if
24 the problem is associated with the sample rather than
25 the -- in the procedure. And in my own practice, it's --
26 it's -- it's not -- it's -- it's uncommon, but it's

1 certainly not unheard of for people to make technical
2 mistakes in the preparation of the stain solutions.
3 I have done that myself.

4 A situation that is a kind of situation that -- that
5 I have gotten caught in is a situation where I'm working
6 in the laboratory preparing my stain and I'm called away
7 to the phone to talk to Dave Negus about this case, and
8 I have -- I have already mixed my -- my samples together
9 and I'm just in the process of preparing the overlay
10 when I'm called away. I come back and I mistakenly
11 think that I have added the G6PD when I in fact have not.
12 I prepare the overlay, place it on the gel, it goes in
13 the oven and incubates. After 20 minutes to half an
14 hour, if I haven't seen anything, particularly in my
15 reference samples, and in those samples where I have
16 gotten a good result for esterase D, I know that I have
17 made an error in the preparation of the stain solution.
18 At that point the agar overlay can simply be peeled away
19 from the gel and the new agar overlay placed on top of
20 the gel, and that error of omission can be recovered
21 by -- by making that kind of an observation. So I hope
22 that illustrates the -- the point.

23 (No omissions.)
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1 MR. NEGUS: Yes. Thank you. And I have nothing
2 further.

3
4 CROSS-EXAMINATION

5 BY MR. KOCHIS:

6 Q Dr. Blake, the last example that you used, that would be
7 somewhat different than a situation in which you run the
8 Group I system, get what may be referred to as a strong
9 reaction with the ESD, then prepare the gel, put it on
10 the plate, run it for PGM, get a reaction, but it may be
11 faint, but not as strong as some of the reactions that
12 you've gotten, but it's not as if nothing's coming up
13 on the plate; that's somewhat of a different situation,
14 isn't it?

15 A Well, a weak reaction is -- is a slow reaction. The
16 thing that I think is appropriate to bear in mind is
17 that the things that we're looking at are enzymes, and
18 enzymes catalyze chemical reactions. The amount of
19 enzyme that is present in a sample influences the rate
20 of the chemical reaction. A weak reaction is a reaction
21 that develops very slowly, and in -- in the typing of
22 these enzymes, reference samples are used; and in this
23 particular application, multiple enzymes from the same
24 physical specimen are being observed, so that -- and
25 they're being -- they're being typed concordantly.
26 We're not typing esterase D one minute and then PGM the

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1 next minute. The electrophoresis process takes place
2 all at once, and we simply stain the various enzymes
3 in a -- in a sequential way, so if -- again, to follow
4 your question, if the esterase D result is clear, that
5 is, the bands are sharp, the activity that is observed
6 on the gel is good, one invariably expects to obtain a
7 very easily readable PGM result, and an observation of
8 the gel during its early stages of development is --
9 is the indicator of whether or not the development
10 process is proceeding in a normal fashion.

11 Q Perhaps my question should have been is there a difference
12 between a readable result which is very strong, a -- and --
13 number one, and number two, a result which is easily
14 readable, but it's fainter, and, then, number three,
15 nothing at all coming up on the plate?

16 A Yeah. Certainly there are differences between those --
17 those situations.

18 Q Now, these enzymes -- and let's stick, for example, with
19 EsD and the PGM. Do they exist in different quantities
20 in different people?

21 A Not significantly different quantities, no.

22 Q Is there a general rule between those two enzymes as to
23 which you would find more of in your average human being?

24 A Well, it's -- it's difficult to -- to compare except in
25 terms of the -- the kind of result that one -- that one
26 obtains upon a gel, because, after all, that's what we're

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1 concerned with here. In a fresh sample, if someone
2 were to make serial dilutions of a fresh sample and
3 then stain for esterase D and PGM, there will be a
4 point where the sample becomes so dilute that one or the
5 other of the enzymes will not be able to be observed.

6 Are you following my conceptual experiment?

7 Q So far.

8 A Okay. The -- the -- the question -- in order to answer
9 your question, the -- the question really asks which one
10 disappears first in a fresh sample, and the -- the
11 prediction would be that -- that they would both lose
12 their ability to be detected at about the same time
13 in a fresh sample. Such is not the case in -- in older
14 samples, because the esterase D deteriorates faster than
15 the PGM.

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16 Q With your example in mind, however, are there people,
17 for example, that may have a greater quantity of EsD
18 in them than PGM?

19 A That would be extremely unusual. I don't know of any --
20 I know of examples of situations where individuals have
21 a gene that fails to produce an active esterase D
22 enzyme. That -- such a gene would be called a null allele,
23 and those people have reduced activity rather than
24 enhanced activity; so that situation has been reported
25 in the literature. It is very rare, but it -- the amount
26 of individual variation is very slight, certainly --

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1 certainly not more than, you know -- All of the population
2 would fall within maybe 20 percent of an average value.

3 Q If it's unusual, then are you saying that it's possible,
4 but not probable?

5 A Yes.

6 Q And in those cases where it's possible, would you expect
7 that perhaps to manifest itself in an electrophoretic
8 run in terms of strengths -- a strong reaction and a
9 faint reaction, let's say, on Group I if you had the
10 rare person that had more ESD in them than PGM?

11 A Yes. Such situations, though, would -- one would expect
12 them to be extremely rare. In the example that you
13 propose, that is, stronger esterase D and weak PGM,
14 that would be a situation where there's -- where somebody
15 is deficient in PGM, rather than enhanced in esterase D,
16 and the -- the number of examples of null alleles in
17 PGM are extremely unusual.

18 Q A number of outside environmental factors can affect
19 these enzymes in just sticking with the EsD and the PGM;
20 is that true?

21 A Yes.

22 Q Passage of time?

23 A Yes.

24 Q Heat?

25 A Yes.

26 Q Moisture?

1 A Yes.

2 Q Do those three affect, for example, PGM the same as they
3 do the ESD?

4 A The general effect is the same. The rate of the
5 deterioration is different. Esterase D deteriorates
6 more rapidly than does PGM.

7 Q Moving to the multisystem, so there's no confusion for
8 the record and the Court, the G6PD is not an element
9 that enters into the first reading, which is the esterase
10 D reading; is that correct?

11 A That's correct.

12 Q And that reading takes place under some type of ultra-
13 violet light?

14 A Yes.

15 Q And then is there a premium on attempting to put the
16 gel that will allow you to do the PGM reading on the
17 plate as soon as possible after you read for esterase D?

18 A Yes. I mean it's not -- it's not a situation where
19 somebody is scurrying about concerned about minutes.

20 Q But you don't let hours pass?

21 A Or tens of minutes -- no. One does not want to let hours
22 pass, either.

23 Q And then this gel that we're talking about to allow you
24 to read for the PGM, that is -- starts off as a liquid?

25 A Yes.

26 Q You pour it onto the plate?

27 A Yes.

- 1 Q And you allow it to solidify?
- 2 A Yes.
- 3 Q And it's after that period in time in which you're going
- 4 to actually do your PGM reading?
- 5 A Yes.
- 6 Q Now, does it, for example, the unknown sample that has
- 7 the PGM enzyme in it -- does that at all diffuse into
- 8 this overlay that you put down to read for the PGM?
- 9 A Yes. The components that are in the overlay diffuse
- 10 into the electrophoresis gel. Some of the -- some of the
- 11 enzyme that is in the electrophoresis gel diffuses into
- 12 the overlay.
- 13 Q So you have then a portion of the sample that is now in
- 14 the gel that has the G6PD on it?
- 15 A There is a -- there is a proportion of the sample that
- 16 does diffuse into that gel, yes.
- 17 Q Then if you choose to restrain the plate with G6PD, for
- 18 example, you can't inject it right onto the plate at
- 19 that point, can you?
- 20 A It's possible to do it, but -- but I think that it would
- 21 be preferable to remove the overlay and prepare a new
- 22 overlay with fresh G6PD.
- 23 Q When you take the overlay off, then, of that Group I
- 24 plate, a portion of the standard is going to be in that
- 25 overlay; is that true?
- 26 A Yes, a proportion is.

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1 Q And you're going to lose that portion, obviously, when
2 you discard the overlay; isn't that true?

3 A Certainly, you will lose a portion, but it would be a
4 very small portion, provided that the recognition of a
5 problem is made certainly within the first hour after
6 the -- after the overlay is placed on the gel,

7 Q Well, you said there's no -- there's no hurry, people
8 aren't scurrying about at this point; is that true? I'm
9 sorry. When you do the -- let's go to the next step,
10 When you read for the PGM, is there some type of time
11 parameters after you pour the gel on during which you're
12 supposed to take the reading of the PGM?

13 A Well, I think that that's more a matter of common sense.
14 When one takes the reading, when the sample is capable
15 of being read, for very weak samples, the sample may be
16 read the following day. What I normally do is to monitor
17 the -- the gel fairly closely for about the first 45
18 minutes, and the reason for that is to make sure that
19 the samples are coming up, developing in the manner that --
20 that would be expected. A failure for the -- of the
21 samples to develop in that manner would -- would indicate
22 that there's been a problem, and then one has to -- to be
23 sufficiently clever to deal with that problem, particu-
24 larly if the sample is a valuable one that can't be
25 replaced,

26 Q Now, you mentioned something. If it's -- if it's a weak

1 sample, you can do the reading the next day?

2 A Yes.

3 Q The longer that you leave the gel on, the more the sample
4 is going to diffuse into the overlay; is that fair to say?

5 A Yes.

6 Q And isn't one of the ways -- one of the solutions to
7 dealing with a weak sample, a weak reading, is to allow
8 the overlay to remain on the plate, let additional time
9 pass, and see if the -- if the reaction gets stronger?

10 A Yes,

11 (No omissions.)

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1 Q Is that, in the scientific community, an acceptable way
2 of dealing with what may be a weak reaction or a weak
3 sample?

4 A Well, it's the only way of dealing with a weak sample.
5 If there's a problem with the reaction, that's probably
6 not the best way of dealing with the situation.

7 Q The -- the G6PD, are you familiar -- well, you're familiar
8 with Brian Wraxall's multisystem?

9 A Yes.

10 Q A system you use yourself?

11 A Yes.

12 Q Are you familiar with the recommendations of how much
13 G6PD, for example, you should use in Group I system
14 PGM?

15 A As far as activity goes, usually a couple of units is
16 put in the overlay. The -- the samples that are sold
17 commercially that -- that would, at least the samples,
18 the way that they're prepared in my laboratory, that
19 would usually involve the addition of in the order of
20 10 to 20 microliters of the -- the suspended enzyme.

21 Q Can you safeguard in any way the potential of a weak
22 G6PD by, for example, doubling or tripling the amount you
23 would add to the gel?

24 A Well, obviously that is only a safeguard if the amount
25 of activity that has been lost is only, say, half of
26 what was there initially. If -- if half of the initial

1 reaction or half of the initial activity of the G6PD
2 were lost, doubling the amount of G6PD would make up
3 for that loss.

4 Q And tripling it?

5 A Tripling it would make up for a situation where the
6 activity has been -- has gone from a 100 percent to 30
7 percent. But if activity has gone from 100 percent to
8 1 percent, such solutions don't get you very far.

9 Q Well, let's take that hypothetical. If the activity of
10 the G6PD went from 100 percent to 1 percent, would you
11 expect to be able to get a reading off a PGM plate
12 with an unknown sample?

13 A I think that I could get a weak reaction, yes.

14 Q Something --

15 A I mean, after -- after all, if you would get a reaction
16 that is very strong after a 24-hour development period
17 such that it was a hundred times stronger than what was
18 necessary to read, having 1 percent of what was necessary
19 would provide a barely readable sample under the same
20 conditions.

21 Q So is what you're saying you would not have to have a
22 G6PD material that you were going to be using on a stain
23 that would be 100 percent active to get reliable readings?

24 A No. It's -- the issue is not one of reliability here.
25 The issue is one of readability at all. That is, the
26 question of reliability is -- is one of band position and

1 its relative band intensity.

2 Q Well, then, let's take readability. Are you saying

3 that you could have a G6PD substance which was not

4 100 percent active and still get readable results?

5 A Yes. [?]

6 Q And in serology is it unacceptable to make a call on a

7 plate where the reading may be faint but it's discernible?

8 It's not textbook clear, but it's faint?

9 A Yes.

10 Q You mentioned that the G6PD is one possible problem that

11 caused you to get a faint or a weak PGM reading. And

12 the amount of sample, I guess, would be another?

13 A In a general sense, the amount of sample is -- is another.

14 Again, there -- there are diagnostic indicators for --

15 for whether or not the amount of sample is adequate,

16 the diagnostic indicator, of course, being another --

17 another enzyme.

18 Q EsD?

19 A In the case, EsD, yes.

20 Q But the amount is still a factor?

21 A It is a factor that in general is a possibility that

22 can be -- of the three possibilities that were discussed

23 can be evaluated by the use of the other enzymes that

24 are -- that are being looked for in that sample.

25 Q And in terms of sample, once you take the overlay off

26 to restrain for PGM, you're going to have less sample

0-1-2-3-4-5-6-7-8-9-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26

1 than was there for your EsD reading; isn't that true?

2 A. There will be slightly, yes. There's -- there's no
3 question that a small amount of the sample is going to
4 come off in -- when the -- when the overlay is peeled
5 off. Of course, the same thing would be true for the --
6 for the esterase D. After all, the esterase D is stained
7 over the same general area where the -- where some -- at
8 least some of the PGM activity is. The removal of that
9 overlay to allow the staining of the esterase D removes
10 a very slight amount of the PGM, or we would -- we
11 certainly expect it to remove a small amount of PGM.
12 But in practice, that kind of procedure we know has --
13 has a negligible effect upon our ability to develop PGM.

14 By the same token, the removal of a poorly constructed
15 PGM overlay, if it's -- if it's done in a proper time
16 sequence, we also would expect to remove an insignificant
17 amount of PGM activity.

18 It's certainly the case that, you're correct, that
19 some is going to be removed. But that's -- "some" is
20 going to be a tiny amount of what is there.

21 Q. There is a little difference in the, isn't there, some
22 difference in the material you put over the plate for a
23 short period of time and then remove to allow you to do
24 the EsD reading and the agarose gel with the G6PD that
25 you actually pour onto the plate, allow to solidify,
26 to read the PGM?

00-1-2-3-4-5-6-7-8-9-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26

1 A It's not a significant difference. I mean, after -- if --
2 can we make a -- do a drawing here? Would that be
3 helpful?

4 Q I think I understand what you're saying so far.

5 A Okay. In my judgment, it's -- it's not a significant
6 difference. It's -- there may be a subtle difference,
7 but it -- it is a very subtle difference.

8 Q Well, you leave -- how long do you traditionally leave
9 the overlay on to stain for EsD so that you can read it?

10 A Half an hour to 45 minutes. It depends upon the strength
11 of the sample.

12 Q And the PGM, how long would -- in some cases you would
13 leave the agarose gel on for the PGM overnight or in
14 the neighborhood of 14 to 15 hours; isn't that true?

15 A Well, one can -- one -- you can leave esterase D on for
16 longer than that, but usually it's the case that the
17 esterase D result can be evaluated after that 45 minute
18 time period. I usually don't leave mine on for too
19 much longer than that, although I don't -- I'm more --
20 I'm more concerned about getting a result than in watching
21 my wristwatch.

22 And after about 45 minutes, it's usually the case
23 that one either has nothing or one has a streak or one
24 has something that's -- that's typeable and capable of
25 being recorded. At that point in time, the -- the PGM
26 overlay is put on the gel. The evaluation of the PGM

1 overlay is -- is done over a similar time period. After --
2 after 45 minutes, if -- if there's no detectable banding
3 in any of the samples for PGM, again, that's the -- the
4 diagnostic indicator that there's a problem.

5 Q With the EsD, is there anything unacceptable in your
6 community when it comes up if the results run as clear
7 as some of the, for example, photographs in a textbook
8 of calling it and moving on to the PGM?

9 A No.

10 Q And, likewise, with the PGM, when that comes up, is there
11 anything unacceptable with calling it if it's visible,
12 discernible, but perhaps not as clear as some of the
13 photographs in the textbooks and moving on to another
14 system?

15 A No. It's -- there's no question that the evaluation of
16 these typing gels is an evaluation that -- that requires
17 sound judgment.

18 Q With the -- the calls themselves, is it -- do you call
19 off the plate or off a photograph?

20 A Off the plate.

21 Q Okay. And, in your experience, are there things that
22 you see on a plate that you don't always pick up in the
23 photograph?

24 A Occasionally. It's more true with certain kinds of
25 stains than -- than with others. It's often the case
26 that the florescent stain material is very good in the

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1 photograph as opposed to some of the other -- other
2 stains that -- there's a style of stain among which PGM
3 is a representative of that particular strategy.
4 Basically it's a strategy that produces the tetrazolium
5 salt of MTT. Sometimes those -- those gels are not
6 nearly as clear in the photograph as they are in the
7 actual plate.

8 Q Okay. So PGM is an example of something in which, in
9 your experience, you get more information looking at the
10 plate than you do looking at your photographs afterwards?

11 A That -- that definitely can be the case, yes.

12 Q And in your experience have you had cases when you have
13 developed a particular stain to determine the PGM type,
14 you have gotten a result, you have photographed it, later
15 you put the -- you put the photograph next to your mind
16 as to what you saw, and, although you called it off on
17 a plate, you wouldn't feel comfortable calling it off
18 the photograph?

19 A Yes. Or -- yes, excuse me. I got a frog in my throat.

20 Could I have another glass of water?

21 THE COURT: You want to break now, Mr. Kochis?

22 MR. KOCHIS: No.

23 THE COURT: All right.

24 (No omissions.)
25
26

0-1-2-3-4-5-6-7

- 1 Q BY MR. KOCHIS; Directing your attention, while the
2 Judge pours your water, to two photographs which have
3 been -- two exhibits, one of which has been marked for
4 identification as H-345, the other has been marked for
5 identification as H-392, is H-392 in fact a picture --
6 a copy of the -- of an EAP run?
- 7 A H-392 is a photographic copy of an EAP run, yes.
- 8 Q And does that appear to be a copy of the picture which
9 appears, as you look at it, on the top of the other
10 exhibit, which is H-345?
- 11 A Yes.
- 12 Q And of the two photographs, is this one H-392 easier for
13 you to work with in terms of making a call?
- 14 A I think that the two are -- are reasonably equivalent,
15 as far as I'm concerned. The 392 photograph is a little
16 bit larger, so it -- it might be a bit easier for -- for
17 some people to use.
- 18 Q Starting with the -- with the first slot on the -- on
19 your left, do you have a -- a ballpoint pen?
- 20 A No, I don't.
- 21 Q Perhaps using mine, starting with the first slot to your
22 left, could you make that call as to what EAP enzyme
23 type is in the first slot?
- 24 A It appears to be a BA.
- 25 Q And could you then put BA on the top of the -- of that
26 particular slot.

1 A (Witness complies.)

2 Q And then, moving to the next slot, the number two slot,
3 is there enough information on that photograph for you
4 to call that particular enzyme type?

5 A Yes. It's either a BC or a BB,

6 Q And could you then place that information on the
7 photograph.

8 A (Witness complies.)

9 MR. KOCHIS: I suppose, Your Honor, this would be a
10 good time. I'm not going to finish with Dr. Blake by noon.

11 THE COURT: Would you please return at 1:30 this
12 afternoon, Doctor.

13 We will be in recess till 1:30.

14 (Whereupon, at 12:02 p.m. the noon recess
15 was taken.)

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001-20207

1 ONTARIO, CALIFORNIA; THURSDAY, AUGUST 2, 1984; 1:35 P.M.,
2 DEPARTMENT NO. 3 HON. RICHARD C. GARNER, JUDGE
3 (Appearances as heretofore noted.)
4

5 THE COURT: Please continue.
6

7 CROSS-EXAMINATION (Resumed)

8 BY MR. KOCHIS:

9 Q Dr. Blake, when we broke at lunch, I believe you were
10 working with an exhibit which has been marked for
11 identification in this hearing as H-392; is that
12 correct?

13 A Yes.

14 Q And that apparently is one of many photographs of an
15 electrophoretic run that was conducted by Mr. Gregonis
16 on or about August 4 determining -- in an attempt to
17 determine the EAP type of Kevin Cooper; isn't that true?

18 A It appears to be the case, yes.

19 Q Today is not the first time you've seen a photograph of
20 that electrophoretic run, is it?

21 A I don't believe so, no.

22 Q Do you recall the first time that you saw a photograph
23 of Mr. Gregonis' August 4 EAP run on VV-2?

24 A I think that the most likely time when I saw that was
25 when I was in San Bernardino quite some time ago.

26 THE COURT: Would you speak more into the microphone,

1 sir?

2 THE WITNESS: Excuse me.

3 THE COURT: The back of your head's to me.

4 THE WITNESS: I believe that -- that the first time
5 that I saw a collection of photographs would have been a
6 number of months ago when I was in San Bernardino, and to
7 consult with Mr. Negus and to conduct some work in the San
8 Bernardino laboratory.

9 Q BY MR. KOCHIS: October of 1983, is that the time you're
10 talking about?

11 A I believe so, yes. That sounds about right.

12 Q You were retained in this case on what date?

13 A That information I don't have with me.

14 Q Is it fair to say it was sometime between August the
15 1st and August the 9th of 1983?

16 A It may have been before that, but I'm not absolutely
17 sure.

18 Q It may have been prior to August the 1st you were retained?

19 A It -- it might be -- without -- without my record of
20 phone contacts and things of that nature, I -- I can't
21 give you a -- an accurate -- an accurate time.

22 Q When you were retained, was it by Mr. Negus?

23 A Yes, it was,

24 Q Was it your understanding that Mr. Cooper had already
25 been arraigned and was represented by Mr. Negus at that
26 point?

1 A Yes.

2 Q Now, on August the 9th of 1983, you ran a test on a
3 multisystem of a sample which you believed to be the
4 blood of Kevin Cooper; is that correct?

5 A That is correct, yes.

6 Q And who gave you the sample of the blood that you felt
7 was Mr. Cooper's?

8 A I received the sample from Arrowhead Agency, Inc.,
9 via U.S. Express Mail on August 9, 1983.

10 Q And then sometime on the 9th, you actually analyzed that
11 sample of blood?

12 A Yes.

13 Q At that time, had you been furnished with any of the
14 results of Mr. Gregonis' analysis of Mr. Cooper's whole
15 blood?

16 MR. NEGUS: Objection. That's irrelevant and beyond
17 the scope.

18 THE COURT: It goes to his credibility. Credibility
19 is always in the scope,

20 MR. NEGUS: Well, it -- I don't see how it goes to
21 his credibility.

22 THE COURT: You did precisely the same thing.

23 MR. NEGUS: Are you -- if -- if the subject is was he
24 furnished with the results of the particular test that he's
25 testified to, I will concede that that might be relevant,
26 but other test results are completely irrelevant and beyond

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1 the scope of direct examination. I only asked him about
2 one test that he did.

3 MR. KOCHIS: Well, at this point -- at this point,
4 let me reask the question.

5 Q Prior to the time that you conducted the analysis on
6 August the 9th, had you received results of Mr. Gregonis'
7 run just for acid phosphatase, the EAP on WV-2,
8 Mr. Cooper's whole blood?

9 A I think that I may have been told what result Mr. Gregonis
10 obtained.

11 Q The first test that you did on that sample was on a
12 multisystem; is that correct, on -- on your sample of
13 what was supposed to be Mr. Cooper's blood?

14 A Probably not. The first thing that would have been done
15 would have been an ABO typing determination.

16 Q I'm sorry. The first time you tested the sample to
17 determine what EAP type it was, that was on a multisystem?

18 A Yes.

19 Q Then after that, you moved to a single system?

20 A Yes.

21 Q And you tested it on approximately August the 13th?

22 A Yes.

23 Q August the 14th?

24 A I believe that I tested it again on August the 15th.

25 Q And you obtained EAP results on -- at that time?

26 A Yes.

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1 Q At that time, you were aware of Mr. Gregonis' EAP results
2 on Mr. Cooper's whole blood; isn't that true?

3 A I believe so, yes, but I'm not absolutely sure. I would
4 have to refer to my records to be absolutely precise
5 about that, but I believe that I did know.

6 Q Do you have your records with you?

7 A I have some of my records, but not all of my records.

8 Q From the records you have in court, can you review those
9 records to make a determination as to when you became
10 aware of Mr. Gregonis' call just of the EAP type on VV-2,
11 Mr. Cooper's whole blood?

12 A Those records I don't have, but I believe that I had
13 knowledge that Mr. Gregonis had determined through his
14 analysis that it was his view that Mr. Cooper was a Type
15 BB. That's my best recollection.

16 Q When you use the term BB, is this a term that other
17 serologists might have used -- just called B?

18 A Yes.

19 Q They're interchangeable?

20 A Yes.

21 Q Is it fair to say that you had no information as to
22 Mr. Gregonis' call on Kevin Cooper's whole blood before
23 September 1st?

24 A I believe so, yes.

25 Q And you came to San Bernardino County sometime in October
26 of 1983; is that correct?

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1 A Yes,

2 Q And is it also fair to say that when you came to San
3 Bernardino County in October, you had already run
4 Mr. Cooper's blood for the EAP type several times?

5 A Yes,

6 Q You also had sometime in the month of August the results
7 of Mr. Gregonis' runs on the EAP type of A-41?

8 MR. NEGUS: Objection. That's certainly beyond the
9 scope of direct examination.

10 MR. KOCHIS: Your Honor, I have an offer of proof to
11 make. I'd ask, so that I don't influence this witness'
12 testimony, that he be excused for a moment while I make the
13 offer of proof. It's going to cover a series of questions.
14 And after my offer of proof, the Court can rule on them as a
15 group.

16 THE COURT: Would you mind stepping out, then,
17 Doctor, please.

18 MR. KOCHIS: Your Honor, the Court's aware, from one
19 of the cases I cited in the Hitch hearing, the People vs.
20 Nation, that one of the factors the Supreme Court has taken
21 into consideration in determining whether Hitch would apply
22 and, if it would, what sanctions, is whether or not there's
23 any interplay in a case with the defense.

24 In Nation, it was a case in which there was a slide
25 which was preserved, The Supreme Court held there was no
26 sanctions because it actually ended up in the hands of the

1 defense lawyer.

2 Here's my offer of proof as to how that's analogous
3 in this case. My offer of proof would be that in August of
4 1983, Mr. Blake was aware of his opinion as to the potential
5 EAP type of Kevin Cooper's blood, that, in his opinion, it
6 may be an RB. He was also aware that that is potentially in
7 conflict with Mr. Gregonis' opinion as to Kevin Cooper's
8 blood type of B. He also knew in September of 1983 that
9 Mr. Gregonis had analyzed the Group II for A-41 and that,
10 in the opinion of Mr. Gregonis, the EAP type of A-41 was a
11 B. I believe further questioning would elicit that.

12 I also believe that Dr. Blake will testify that when
13 he came down here in October, he looked at the sample.
14 Further questioning may even reveal that he actually handled
15 the sample in preparing it for a run, and that he knew at
16 that time that the further testing was going to expend the
17 sample; that any conflict that may exist in the state of the
18 evidence between Mr. Gregonis' results and another expert's
19 opinion, that the -- that the ability to test that piece of
20 evidence would be lost; that by his silence, he acquiesced,
21 knowing that with the Group III tests that were conducted
22 and the haptoglobin test, that the sample would be exhausted,
23 and that we would never be able to redetermine through an
24 independent expert from the prosecution, we would never be
25 able to retype A-41 for EAP,

26 (No omissions.)

1 THE COURT: Mr. Negus.

2 MR. NEGUS: Certainly is beyond the scope of direct
3 examination. Dr. Blake has -- has been brought down here,
4 basically --

5 THE COURT: You can call him on direct if you're
6 concerned about it.

7 MR. NEGUS: Then I would assert the work product
8 privilege as to anything that's beyond the scope of direct,
9 because Dr. Blake is my consultant. The testimony of Mr.
10 Gregonis as to what had occurred in October was that they --
11 Mr. Gregonis realized that he was going to do certain tests,
12 he realized that would exhaust the sample, he called Dr. Blake
13 to be present and to assist him in doing those tests. Mr.
14 Gregonis had decided what tests that were going to be done,
15 and those are the tests that were done. That was Mr. Gregonis'
16 testimony on this particular subject. Anything that Dr. Blake
17 testifies to beyond the scope of direct is covered by the
18 work product privilege because it has to do with -- with his
19 role as a consultant with me.

20 THE COURT: Well, isn't the scope Hitch and sanctions,
21 sir?

22 MR. NEGUS: No. The only scope that I have -- only
23 questions I have asked Dr. Blake are two questions: "How do
24 you stain PGM" and "What is Mr. Cooper's EAP type?" I asked
25 him nothing beyond that. And that is the scope of direct.

26 It does not open up to Mr. Kottmeier -- to Mr. Kochis

1 to get discovery of all of the thought processes of the
2 Defense in this particular case. And Dr. Blake is in fact
3 probably the heart of the processes of the Defense, that -- at
4 least as far as serology is concerned in this particular case.
5 And his testimony in this particular situation was extremely
6 limited.

7 I mean, I -- I would be asserting, as to any question,
8 not only it's beyond the scope but it's also covered by the
9 work product privilege and Mr. Cooper's privilege against
10 self-incrimination.

11 THE COURT: Mr. Kochis, finally.

12 MR. KOCHIS: Well, along the lines Mr. Negus has
13 argued in the past, certainly there has been testimony that
14 what may affect your reading of a plate is whether or not
15 the reading is blind, i.e., whether or not you know what
16 other people have called the sample. He's testified under
17 oath that he has analyzed Mr. Cooper's EAP type as recently
18 as July of 1984, that he analyzed it three times in September.
19 And I think, even under limiting me strictly, accepting just
20 for the sake of argument Mr. Negus' position, then certainly
21 I'm allowed to know what EAP results he was aware of and
22 whether or not they may have affected his reading.

23 For example, he testified he did a reading in July
24 of 1984. I think I have a right to testify -- to ask him,
25 "Well, you knew what the EAP reading was of A-41" to establish
26 circumstantially that that may have affected his readings in

1 August and his readings in July of this year. And also, in
2 a Hitch case, I can imagine a situation in which a Defense
3 expert stands there, realizing there may be a conflict in a
4 piece of evidence, puts his hands behind his back while the
5 sample is exhausted and a question may be lost forever, and
6 then the People are going to be penalized for that, when we,
7 at the time, are not aware of things the Defense is aware of.

8 MR. NEGUS: Well, the problem with that particular
9 argument is that the People, recognizing that Mr. Cooper had
10 a lawyer, went and did their EAP test without allowing Dr.
11 Blake to watch it. If they had not done that, if they had
12 allowed us to be there when Mr. Gregonis on August the 2nd
13 ran the A-41, we wouldn't have had this particular problem.

14 THE COURT: Right. That's enough, Counsel, both
15 of you. You're making arguments beyond the Court; I'm
16 convinced of that.

17 In any event, I do not find this to be beyond the
18 scope of the direct examination. I think you wish to limit
19 it too carefully. I'm not invading your work product, but
20 I'll overrule your objection at this point.

21 MR. NEGUS: Well --

22 THE COURT: Let's hold it within tight reins,
23 Mr. Neg -- Mr. Kochis.

24 MR. NEGUS: Let me just make clear what -- Mr. Kochis
25 has asked -- has already asked and answered about Dr. Blake's
26 knowledge of A-41, and that's what his last argument went to,

0-1-2-3-4-5-6-7-8-9-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26

1 his knowledge of Mr. Gregonis' results of A-41 prior to --
2 prior to July, 1984. I didn't make any issue about -- about
3 that.

4 He's now trying to talk about -- about other
5 testing that -- that -- that went on with -- with Mr. Gregonis.
6 And as to transferrin, haptoglobin, things that would have
7 nothing to do with EAP, that's not within the scope.

8 THE COURT: Call the witness back in, please.

9 MR. NEGUS: Your Honor, let me, before you call the
10 witness back in, let me -- I would assert the work product
11 privilege as to that.

12 THE COURT: You have, Mr. Negus, and I have considered
13 it.

14 MR. NEGUS: Then I would withdraw Dr. Blake's
15 testimony and ask that an expert be appointed at this time
16 to examine Mr. Cooper's blood. I am -- I am not prepared to --
17 to give up the -- the thinking of Dr. Blake, which is my
18 thinking, on this particular issue for this very limited point
19 that any competent serologist could answer.

20 THE COURT: Well, do you -- I don't -- you talk about
21 thinking --

22 MR. KOCHIS: Your Honor, Mr. Negus is jumping ahead.

23 THE COURT: You're going, I believe, beyond what I
24 thought he was going to open up at this particular point.

25 MR. NEGUS: He's going to start asking him --

26 THE COURT: "What do you know about Mr. Gregonis'

0-1-2-3-4-5-6-7-8-9-0

1 testing at this particular point?"

2 MR. NEGUS: He's already asked and answered that.
3 He's already asked -- he's already determined that Mr. --
4 that Dr. Blake at some point in time, certainly by September,
5 knew that Mr. Gregonis had tested -- tested -- tested A-41
6 and had tested -- and had tested Mr. Cooper and thought both
7 were B. That's been established.

8 THE COURT: But now he's coming back in October.

9 MR. NEGUS: Right. And there's nothing that happened
10 in October about -- about -- about EAP in his knowledge,
11 anything -- nothing happened in October about any -- any
12 knowledge Dr. Blake had with respect to EAP.

13 MR. KOCHIS: The question that the objection was
14 interposed to was, "You knew in September what the EAP type
15 of A-41 was."

16 MR. NEGUS: That's not the --

17 MR. KOCHIS: And then from there I'm going to go to
18 what he observed in October in the crime lab. And then from
19 there I'm going to go back to the photographs. And then
20 Mr. Negus is right, after that period of time I'm going to
21 move to another area. I anticipate an objection. I'm going
22 to make an offer of proof, and the -- the Court's going to
23 rule one way or the other.

24 THE COURT: Let's stick to this one point.

25 MR. KOCHIS: That's all I'm going to --

26 THE COURT: You said you wanted to observe him --

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1 what he observed in October of what went on in October.
2 Your offer of proof there is to show that he stood idly by,
3 knowing the sample was going to be exhausted at that point?

4 MR. KOCHIS: Yes.

5 THE COURT: Anything else?

6 MR. KOCHIS: Not on that issue. At a later time,
7 I'm going to come back to what he observed in October in
8 the laboratory. And I anticipate an objection. That's an
9 unrelated issue, and we're going to deal with that at that
10 time.

11 THE COURT: Take them one at a time.

12 Mr. Negus, I think that's all right.

13 MR. NEGUS: Well, it's -- it has nothing to do with --
14 with what --

15 THE COURT: Counsel, I don't wish to debate it with
16 you forever.

17 MR. NEGUS: Then I'm withdrawing -- then I would
18 move to strike Dr. Blake's testimony, because I do not -- I
19 will not allow him to be examined on -- on things that are
20 extraneous to his testimony. I made decisions as to a rather --
21 a decision to bring him down here to testify as to two limited
22 issues: one, what type is Mr. Cooper, and other PGM staining
23 techniques. Those are issues which any competent serologist
24 could testify to and would come up with the same results.

25 If you are going to use -- let Mr. Kochis allow that
26 to happen, to use that as a discovery tool to determine my

1 thought processes, then I would move to strike Dr. Blake's
2 testimony, and I would request at this point in time that an
3 independent competent serologist be appointed to examine Mr.
4 Cooper's blood, and we'll find out from him what type Mr.
5 Cooper's --

6 THE COURT: I have had nothing but many well
7 qualified serologists so far on the case. I'm not inclined to
8 appoint another one, an additional one.

9 Mr. Kochis, with reference to his offer to withdraw?

10 MR. KOCHIS: May I have a moment to discuss that.

11 (A discussion was held between Mr. Kochis
12 and Mr. Kottmeier.)

13 MR. KOCHIS: Well, Your Honor, I still wish to have
14 Dr. Blake testify as to when he received the information about
15 the EAP type of A-41, that he had it before he got to the lab,
16 that he came into the lab and saw the size of the sample
17 that was in the lab, that the tests were conducted, that he
18 knew when the tests were done that there wouldn't be anything
19 left.

20 THE COURT: Let's back up just a bit, Mr. Kochis.

21 MR. NEGUS: That's not a fact in dispute.

22 THE COURT: Then let him testify to it, Mr. Negus.

23 MR. NEGUS: No, sir, because Mr. Gregonis has already
24 so testified that that's -- and it's not a fact in dispute.
25 And I don't wish to waive any privilege that I have. And I
26 think that that -- that any testimony beyond that is privileged,

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1 and I would move to strike his testimony.

2 THE COURT: When I indicated let's back up a little
3 bit, Mr. Kochis --

4 MR. KOCHIS: Yes, Your Honor.

5 THE COURT: -- in what way now is this within the
6 scope -- it's within the scope of Hitch in general, but let's
7 go back. We're on sound grounds here. I don't wish to move
8 precipitously.

9 MR. KOCHIS: Well, he's testified as to when he ran
10 the tests; he's testified that he's rerun the tests as late
11 as July. As I mentioned before, there's been testimony from
12 serologists that whether or not the test is blind can affect
13 the reading of the test.

14 I think it's important to know when he became aware
15 of A-41. And I certainly think, within Hitch, what he did
16 in there is important. It certainly goes to his memory, to
17 his ability to recall, to his recollection, to his credibility,
18 to his bias. And those are all things that I'm entitled to
19 examine a witness on.

20 I also intend to go into some of the other photographs.
21 That's a separate issue. If there's any argument as to work
22 product --

23 THE COURT: We're not talking about it. Let's stick
24 with this.

25 MR. KOCHIS: I have a right to examine him as to
26 his recollection --

1 THE COURT: Well, he's already --

2 MR. KOCHIS: -- his credibility --

3 THE COURT: -- he's already indicated --

4 MR. KOCHIS: -- to his bias.

5 THE COURT: -- he's already indicated, has he not,
6 that he became aware of Mr. Gregonis' analysis of Mr. Cooper's
7 blood long before October.

8 MR. KOCHIS: Yes.

9 THE COURT: And so you're going through -- the
10 October joint testing is going to tell us what else?

11 MR. KOCHIS: It's not, at this -- now the Court's
12 confused. It's not my intention to go through the joint
13 testing that took place in October at this time.

14 THE COURT: What was in his mind as far as knowing
15 the results of what Mr. Gregonis had come up with and as far
16 as knowing the defendant's blood type.

17 MR. KOCHIS: That he was aware -- that he was aware --
18 he is there as a critical piece of evidence is being expended.
19 Certainly his --

20 THE COURT: All right. I think you've established
21 that circumstantially. I don't think it's worth the sanction
22 that he's suggested that we get involved in here.

23 Thank you. You can argue I can find it circumstantially,
24 but it's not worth appointing more experts on in this case,
25 delaying it or -- or creating possible error.

26 (No omissions.)

1 MR. KOCHIS: The Court doesn't have to appoint
2 another expert. He's simply threatening the Court,

3 THE COURT: Well, I don't think it's a threat. I
4 think he's exercising his rights.

5 All right. I will reverse myself.

6 MR. KOCHIS: Then I'd make a motion to strike his
7 testimony on the ground that I'm denied adequate cross-
8 examination of a witness on a key area.

9 THE COURT: All right. Denied.

10 Do you want the witness back for further questions?
11 Please bring him in.

12 MR. KOCHIS: Am I not allowed to ask him when he
13 became aware of the EAP on A-41?

14 MR. NEGUS: That would be asked and answered.

15 MR. KOCHIS: That was the question to which the
16 objection was interposed.

17 MR. NEGUS: I don't believe so.

18 THE COURT: I can't be sure.

19 Ask your question in his presence now, and we'll
20 hash it out.

21 Q BY MR. KOCHIS: Dr. Blake, did I ask you prior to the
22 recess when you became -- if you became aware during the
23 month of August of the EAP results from Mr. Gregonis'
24 tests on A-41?

25 THE COURT: You don't remember --

26 THE WITNESS: Just before we went out for lunch?

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1 Q BY MR. KOCHIS; No, just before you went outside.

2 A Yes.

3 Q Did you answer the question?

4 A Yes, I did.

5 MR. KOCHIS; In my own mind, may I ask him what his
6 answer was? I don't recall it.

7 MR. NEGUS; Perhaps it could be read back.

8 THE COURT: It's just going to take a lot of time.
9 Do you recall?

10 MR. NEGUS; I believe he said he became aware of it
11 before September 1st.

12 THE COURT: Is that correct, sir?

13 THE WITNESS; That's my best recollection,
14 Your Honor.

15 MR. KOCHIS; And, then, so I can appreciate the Court's
16 ruling, am I precluded from asking any questions about --
17 he's already testified he's been in this county in October
18 to do tests.

19 THE COURT: We've already got that established by
20 other witnesses as well. I don't want to get into the loss
21 of Dr. Blake, the expense of further witnesses and possible
22 constitutional error or privilege error, not on something
23 that minor,

24 MR. KOCHIS; Excuse me?

25 THE COURT: Not over something that -- I do not
26 consider that a critical issue, because it's basically

1 established.

2 MR. KOCHIS: So the Court feels it's established
3 that when Dr. Blake was here in San Bernardino, he was aware
4 that the additional two tests would exhaust the sample
5 completely?

6 MR. NEGUS: That was certainly the testimony of
7 Gregonis.

8 THE COURT: So far, I've got no contrary evidence
9 to that, and this -- this gentleman seems every bit as
10 qualified as Mr. Gregonis,

11 Take it as the Court having so found,

12 Q BY MR. KOCHIS: Back to the photograph, do you have a
13 pen you can work with this afternoon, a ballpoint?

14 A No, I don't, if I could borrow yours.

15 Q Moving to slot number three, is there enough information
16 on that photograph to allow you to render an opinion as
17 to the acid phosphatase type of the sample that's in
18 that particular slot?

19 A This -- this sample appears to be an RB. Again, I want
20 to preface all of the judgments made on this photograph
21 with the caveat that looking at the actual gel is far
22 better than looking at a photographic representation,
23 so as long as you understand that.

24 Q Let's stop for a minute.

25 A Okay.

26 Q Is the sample in slot three consistent with being a B,

1 what you refer to as a BB?

2 A. I think it's more consistent with an RB, but if somebody
3 wanted to make a strong position that it looks like a
4 B to them, it wouldn't be totally unreasonable for them
5 to do that. It would depend upon their state of know-
6 ledge. There aren't any reference samples or reference
7 samples on the gel. The gel is not stained very far in
8 the anode direction; so from the photograph itself, there
9 could be some ambiguity in that area, yes.

10 Q. You wouldn't expect someone to call that a BA, would you?

11 A. No.

12 Q. You wouldn't expect them to call it a CB? .

13 A. Well, again, I think, as you're no doubt aware, given
14 the discussion that's taken place on -- on the EAP typing,
15 that the distinction between a B, a CB and a C is a
16 matter of judging the relative intensities of the bands.
17 And without knowing what the reference samples that are
18 on this particular plate, it's hard for me to -- to make
19 to make that judgment based upon the photograph alone.

20 Q. We're going to get to that in a minute, but for now --
21 your first choice on that would be RB, and your second
22 choice would be a B; is that fair to say?

23 A. Yeah,

24 Q. Could you put that on the --

25 A. In my -- in my judgment, unless something very peculiar
26 has happened to the sample, it could not be a BA. Okay,

1 Q So perhaps could you put RB slash B,

2 A Okay.

3 Q And the sample in slot number four would be what?

4 A A BA.

5 Q Okay. Could you place that in slot number four.

6 A (Witness complies,)

7 Q The sample in slot number five would be what type of EAP?

8 A It appears to be a B,

9 Q Is it -- would it be consistent, in your mind, with a --
10 with an RB?

11 A No,

12 Q Could you put B there then,

13 A (Witness complies,)

14 Q Six, slot number six.

15 A Okay, That would appear to be a BA,

16 Q Could you place that on the photograph.

17 A (Witness complies.)

18 Q And slot number seven.

19 A It's not typeable, in my judgment.

20 Q Could you simply put a zero there or an X,

21 A How about NT?

22 THE COURT: A question mark perhaps,

23 THE WITNESS: Question mark would be good, yeah.

24 Q BY MR. KOCHIS: We're up to slot eight, aren't we?

25 A Yes.

26 Q And would you make a call as to slot eight.

1 A That sample could be a BC or a B,

2 Q An RB?

3 A No, not in my judgment,

4 Q Between those two, between the BC and the B, which one
5 would you go first?

6 A Well, again, without having reference samples, it's very
7 hard. If you want to tell me that there's a reference
8 sample on here, that -- that would make it a little bit
9 easier.

10 Q First let's do it from the photograph. Then why don't
11 you put B slash RB.

12 A Well, I don't think it's an RB.

13 Q I mean B slash BC -- CB -- or CB.

14 A (Witness complies.)

15 Q And slot nine.

16 A Both of those samples appear to be BA's.

17 Q Could you place that there.

18 A That would be nine and ten,

19 Q And could you tell us, in your opinion, what call you
20 would make, if any, from the photograph as to slots --
21 the remaining slots. Are they 11 and 10 -- or 11 and 12?

22 A Eleven and twelve. Eleven appears to be an RB, and
23 twelve is an A,

24 Q With slot 11, you're aware from notation on the photo-
25 graph what blood that is, aren't you?

26 A Obviously, yes.

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11-7

- 1 Q Mr. Cooper's blood?
- 2 A Yes.
- 3 Q Is there anything consistent in the photograph with the
- 4 EAP type of that particular blood being a B?
- 5 A Yes.
- 6 Q And slot number 12 is what again?
- 7 A An A, AA.
- 8 Q Is that the last slot on the photograph?
- 9 A Yes.
- 10 Q The --
- 11 A May I make one comment?
- 12 Q I was going to ask a question, and that may clear some-
- 13 thing up.
- 14 A Okay.
- 15 Q On Exhibit H-345, that appears to contain the photograph
- 16 the same photograph that you had in your hand, another
- 17 copy; isn't that true?
- 18 A Yes.
- 19 Q And on the front, there appears to be some documentation
- 20 as to where the standards are and, in fact, what the
- 21 standards are; isn't that true?
- 22 A Yes.
- 23 Q And you've reviewed that prior to the time you got on
- 24 the witness stand today, haven't you?
- 25 A No, I have not.
- 26 Q Could you do that.

11-8

1 A Yes. Top to bottom reads left to right; is that
2 correct?

3 Q Let's assume that for the purpose of our discussion.

4 A Okay. The first sample was called a BA. The marking on
5 the chart is BA.

6 Q Without going down, what I'd like you to do, Doctor, is
7 could you look at the standards on the chart, and then
8 when you've done that, look back at the photograph and --

9 MR. NEGUS: Perhaps we should tell Dr. Blake -- he
10 may not understand Mr. Gregonis' nomenclature -- which ones
11 are the standards. I think there's four -- five.

12 Q BY MR. KOCHIS: That's --

13 A Sample four.

14 Q That's right.

15 A Sample four is a standard; is that correct?

16 Q I'm not sure about that. The only ones I'm sure about
17 are --

18 A Well, let me tell you why I'm saying that. The reason
19 that I'm saying that sample four is a standard is that
20 what is written under the column labeled "sample" is
21 BA slash 2 dash 1 slash 1, which stands for BA being
22 the acid phosphatase type, 2-1 probably being the AK
23 type, and then 1 being the ADA type.

24 (No omissions.)
25
26

0-1-2-3-4-5-6-7-8-9-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26

1 Q Okay, fine. Operating under that assumption.

2 A That assumption is incorrect, however. Excuse me.

3 Looking at the -- looking across the -- the -- the
4 designation to the right, the 2-1 represents the ADA
5 type and 1 represents the AK type.

6 MR. NEGUS: So that we don't get lost on -- on --
7 I'm willing to enter into a stipulation as to which five
8 slots are the samples. (sic)

9 MR. KOCHIS: Fine.

10 MR. NEGUS: I would stipulate that 4, 6, 7, 8 and 12
11 are the standards used by Mr. Gregonis.

12 MR. KOCHIS: So stipulated.

13 Q (BY MR. KOCHIS:) With that in mind, could you look at
14 those four standards.

15 A Okay.

16 Q Then return to the photograph and indicate which of the
17 calls you would change, if any, based on your knowledge
18 now of where the standards are slotted and what the types
19 are.

20 A (Witness complies.)

21 Q Okay.

22 A I would, based upon the standards, I would still have
23 uncertainty with the -- the BB, BC samples.

24 Q Would you --

25 A I don't see a clear distinction, for example, between
26 Slot No. 2, which has been interpreted as a Type B, and

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1 the standard CB sample in Slot No. 8 based upon the
2 relative intensity of these bands. You know, this is
3 one of the reasons why looking at the actual gel and
4 seeing it develop is -- is helpful.

5 Q On that photograph, the -- the two -- the two samples
6 of VV-2, those are in Slots 3 and 11, aren't they?

7 A Yes.

8 Q And would the answers that you gave without looking at
9 the standards be essentially the same as your analysis
10 of the photograph, knowing what the -- what the standards
11 are?

12 A Yes. And if I may explain my reasons for -- for making
13 the judgment that I have made, I'd like to do so.

14 Q We're going to get to that in just a minute.

15 If you could do a chart for me first.

16 MR. NEGUS: Perhaps he could explain his answer
17 before we get -- get it lost.

18 THE WITNESS: Okay. The -- the --

19 THE COURT: Well, just a minute.

20 MR. KOCHIS: I'm sorry.

21 THE COURT: That's entirely appropriate. If in fact
22 he can't give a complete answer, then he's allowed to explain.

23 THE WITNESS: Thank you, Your Honor.

24 The reason for making that judgment is the strong
25 banding at the anodal portion of the plate where -- where
26 the stain has sort of cut the -- appears to have cut the band

0-1-2-3-4-5-6-7-8-9-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26

1 in half. In the samples that are -- that are B samples,
2 you don't see that. So that -- that -- that's the primary
3 consideration why I think that -- that both of those samples
4 could -- could be RB's based upon the photograph alone.

5 Q (BY MR. KOCHIS:) Okay. And that's based on what you
6 see and what is typically the R band position, right?

7 A Yes.

8 Q Okay. Is there anything else you want to explain about
9 your calls on that photograph as to those two?

10 A No.

11 Q With this blank piece of paper, H-390, could you diagram
12 for me the B and the RB.

13 A Okay.

14 Q Saving some room to put one additional type on there.

15 A (Witness complies.)

16 Q And could you indicate --

17 A It's not quite in line.

18 Q And would that be the -- the RB example you're giving us?

19 A Yes.

20 Q Could you indicate that on the diagram.

21 A Okay. (Witness complies.)

22 Q And then --

23 A RB.

24 Q -- the lines that you placed above both BB and RB, would
25 those indicate, for example, the approximate location
26 of a slot on a plate that you put the sample in?

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1 A Yes. (The document was marked by the witness.)

2 Q And, again, so that there's no confusion for the record,
3 when you -- when you put "BB" on the diagram, that's
4 consistent with Type B?

5 A Yes.

6 Q Then on the right -- to the right as you look at the
7 piece of paper, could you diagram the CB type?

8 A Okay. The -- the -- the appearance of the CB is somewhat
9 dependent upon the manner in which the -- the gel is
10 stained, so -- (The witness marked the diagram.)

11 Q And in the CB, the -- the two bands, both the C and the
12 B bands are of approximately equal intensity; isn't that
13 true?

14 A The B band is usually a little bit more intense than
15 the C band by the way that I stain up for this enzyme.
16 There -- there is a little bit of variation in the
17 relative intensity from one person's staining procedure
18 to the other. That's why it's helpful to have reference
19 samples on the plate.

20 Q Okay. And then beneath that could you put a line that
21 would indicate a slot and then the -- the CB.

22 A (Witness complies.)

23 Q Dr. Blake, I'm going to just take for a minute a red
24 pen and I'm going to draw a line across the section of
25 the piece of paper, and then I'm going to place an
26 arrow on the diagram just so you know which part I'm

0-1-2-3-4-5-6-7

1 talking about.

2 A Yes.

3 Q Now, assuming that from the red down is an electrophoretic
4 run and you're reading a plate, if you read the portion
5 of the plate, for example, from the -- from the red line
6 down, is it relatively easy to tell -- for a competent
7 serologist to distinguish, for example, a CB from an RB?

8 A Yes, because doing it the way you have done it there --
9 you can't tell an RB from a BB.

10 Q Well, we're moving down the line. And is it relatively
11 easy to distinguish between a CB and a B when you read
12 that portion of the plate?

13 A It's relatively easy, yes.

14 Q Okay. The -- is the distinction to make between a B and
15 an RB a much more subtle one than the distinction between,
16 for example, the B and the CB when you're reading that
17 portion of the plate?

18 A Well, your question is an unfair question, because what
19 you have done you have omitted the portion of the plate
20 that has the R information.

21 Q Okay. Well --

22 A So -- so that in -- in that sense the -- the question
23 is not fair, the -- the reading of an RB and a BB is
24 equivalent in its complexity or its simplicity as the
25 reading between a BB and a -- and a CB is, that the
26 judgment is made upon relative intensities, this band

0-1-2-3-4-5-6-7-8-9

1 relative to that band, referring to the most anodal
2 band in the R position, and in the CB-BB situation, the
3 slow B band or C band compared to the fast B band.

4 Q Well, let me -- let me break it down. And I'm sure if
5 there's a question that's really unfair, there's going
6 to be an objection from the other two lawyers in the
7 courtroom.

8 MR. NEGUS: That's not necessarily true.

9 Q (BY MR. KOCHIS:) Let me ask this. Is the position of
10 the bands the same for all three types, essentially?

11 A Yes.

12 Q And is the position of the B bands essentially the same
13 for all three types?

14 A Yes.

15 Q The intensity of the bands in the Type B and the Type R,
16 the B band intensity, are they essentially the same?

17 A Yes.

18 Q And the C band with the B and the RB, are they
19 essentially the same or is there a difference in your
20 mind?

21 A No. They would be approximately the same, because the
22 only thing that is being observed is your diagram has --
23 has not constructed the situation as the product of the
24 B gene. The only -- the only thing that can be observed
25 in this diagram is the product of the B gene and the
26 product of the C gene. The diagram is constructed in

1 such a way that it's impossible to see the product of
2 the R gene.

3 Q Okay.

4 A So there -- you know, there -- there is no -- there is
5 no difference between a BB and an RB in the --

6 Q First two bands, the C and the B band? But the --

7 A That's correct.

8 Q -- the difference that we all agree on is the difference
9 in the banding in the R position.

10 A Yes.

11 Q Which is the furthest band away from the slot in which
12 you put the sample?

13 A That's correct.

14 (No omissions.)

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1 Q Is the multisystem designed to distinguish as readily
2 RB's from B's as it is, for example, B's from C's?

3 A I think so, yes.

4 Q Is there a reason when you re-ran your sample of
5 Mr. Cooper's blood you moved to a single system as opposed
6 to sticking with the multisystem?

7 A It's a -- the -- it's not a question of going from a
8 single system -- from a multisystem to a single system.
9 That -- that has nothing -- nothing to do with the
10 experiment that was conducted. The reason for conducting
11 the experiment was simply to have a double check.

12 Q You didn't feel that the single system was more sophis-
13 ticated or a better indicator of whether the sample of
14 Mr. Cooper's blood was an RB versus a B?

15 A The thing that the -- that the -- that the phosphate
16 system does that the citrate phosphate system does not
17 do is that it allows the recognition of the slow R band
18 in a unique position that cannot be obscured by any of
19 the other bands that may be associated with -- with the --
20 with the B gene or the A gene.

21 MR. KOCHIS: If I could have a moment, Your Honor,
22 to locate the next photograph while Mr. Negus positions
23 himself for an objection.

24 Q Dr. Blake, directing your attention to an exhibit which --

25 THE COURT: Counsel, don't go beyond the direct just
26 to draw sparks or something like that.

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12 2

1 MR. KOCHIS: Your Honor, I'm asking a question
2 about his -- one of the issues in Hitch is that -- Mr. Negus
3 has raised, that the Court has adopted, whether Mr. Negus or
4 I raised it at all, is the photograph I have, A-41, and
5 whether someone else can make a call from a photograph.

6 MR. NEGUS: But that wasn't the issue that I called
7 Dr. Blake to testify on, and I called Dr. Blake because he
8 has done the work.

9 As I indicated before, any competent serologist
10 could testify as to the manner in which Dr. Blake did today,
11 without having to bring in somebody who is a -- who is
12 essentially my advisor in this particular case. If we're
13 going to go beyond that, then, as I've said before, I would
14 just as soon have a -- somebody who is not my investigator
15 and whom Mr. Kochis is not going to be able to say, well,
16 that's -- that's the defense's position. Let a neutral
17 person do it, and then Mr. Kochis can ask a neutral person
18 any question that he wants about it. I have no problem with
19 that. I brought down Dr. Blake as a matter of convenience
20 and cost saving. It should not be an opportunity for
21 prosecutorial discovery.

22 THE COURT: Mr. Kochis, it sounds persuasive to me.

23 MR. KOCHIS: But, Your Honor, I have questioned him
24 on the differences in reading RB's from B's, and that's the
25 only issue I intend to go into on this photograph, on the
26 additional photograph I have of A-41, his ability to read or

1 to discern that distinction.

2 MR. NEGUS: I'm sure that he can get that from any
3 neutral serologist he wants, but, obviously, Dr. Blake has
4 talked to me at great length about A-41.

5 THE COURT: All right. Based upon the offer of
6 proof, you make your objection.

7 MR. NEGUS: I did.

8 THE COURT: And I will sustain it.

9 MR. KOCHIS: The Group II system -- well, Your Honor,
10 I would intend to ask Dr. Blake questions about systems
11 that he ran on blood he testified to be Mr. Cooper's outside
12 the Group II system. Rather than ask each and every question
13 and relitigate it, I would ask permission to do this.

14 MR. NEGUS: I would object, same grounds.

15 THE COURT: Mr. Kochis, you can see, unless you can
16 persuade me otherwise that it's not beyond the scope and it's
17 not a violation of the privilege, work product privilege --

18 MR. KOCHIS: Well, Your Honor, he's called a witness
19 to the stand, and I think it would be analogous to a
20 psychiatrist who's called to the stand and says -- he's
21 called to the stand and he's testified as to Mr. Cooper's
22 EAP blood type. That's like a psychiatrist getting on the
23 stand and saying this is my client's mental state. And
24 once that happens, there's a waiver of a work product, I'm
25 allowed wide latitude to cross-examine a witness, an expert
26 who expresses an opinion in a court of law, and the Court's

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1 position would be similar to a position where Mr. Negus
2 calls a mental health expert who gives an opinion and then
3 allows me to only examine him in one limited area, perhaps
4 reading the police reports.

5 MR. NEGUS: I think there's a distinction between
6 the kind of question Mr. Kochis asked, which I would submit
7 is the kind of question that, for example, I asked
8 Dr. Thornton, who in other ways stands in the same position
9 to me as Dr. Blake, and I did not object as Mr. Kochis went
10 blood drop by blood drop through the house, because I asked
11 him a very broad, general question: Did they -- did they
12 botch the investigation?

13 Dr. Blake I've asked narrow, technical questions,
14 two of them, and I have not opened it up to did Dan Gregonis
15 do a good job.

16 THE COURT: Mr. Kochis, you're going to get your
17 opportunity, apparently, to cross-examine this witness, but
18 now is not the time on all these other issues. Unless you
19 have something more germane, I'll turn him back for redirect.

20 MR. KOCHIS: I also was intending to ask Mr. --
21 Dr. Blake about the A-41 photographs, aside from his work.

22 THE COURT: No, sustained.

23 Q. BY MR. KOCHIS: Dr. Blake, when you conducted your test
24 on the sample for EAP on the 13th of August, you did not
25 use a CB standard, did you?

26 A. No.

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1 Q And likewise, on the 15th, you did not use a -- any CB
2 standard?

3 A No.

4 May I explain my answer?

5 THE COURT: You may explain.

6 THE WITNESS: The inquiry at that point was -- was a
7 very limited one. The original analysis, using what you've
8 characterized as the multisystem, got to the point where the
9 the choice was is the sample from Mr. Cooper a BB or an RB.
10 Based upon my judgment, the sample was an RB.

11 The purpose of the second two experiments was simply
12 to confirm or refute the judgment that was reached based
13 upon the original analysis. There's no issue about CB's
14 being involved, so, of course, I didn't put a CB standard
15 on.

16 MR. KOCHIS: I understand that. That's why I didn't
17 ask the question.

18 I have no further questions on cross.

19 THE COURT: Anything else?

20

21 REDIRECT EXAMINATION

22 BY MR. NEGUS;

23 Q Is the reason that you -- well, what is the reason that
24 you used Polaroid photographs of your gels?

25 A One reason for using Polaroid photographs is that you
26 get a photographic record fairly quickly.

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1 Q And what do you -- do you normally do something with
2 that photograph when you get it fairly quickly?

3 A Well, the -- the advantage that a Polaroid photograph
4 has is that it allows you to determine whether your
5 photographic record corresponds to the reality that --
6 that you have observed to make your judgment; and if
7 the photograph is poor, then you have an opportunity at
8 that point in time to take another photograph.

9 MR. NEGUS: Thank you.

10 Nothing further.

11

12 RECROSS-EXAMINATION

13 BY MR. KOCHIS;

14 Q Well, Doctor, on that line, limited to that issue,
15 every time that you get a photograph that's not as clear
16 in your own mind as what you see on the plate, do you
17 re-run -- do you restrain the test, for example, an EAP
18 test?

19 A Redo the analysis?

20 Q Yes.

21 A That happens, yes.

22 Q Every time?

23 A Well, maybe I'm not understanding your question.

24 Q Okay. Let me back up.

25 A Okay,

26 Q You take Polaroid pictures of your plates?

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1 A Yes, I do,

2 Q And you call -- you make your calls from the plates and
3 not from the photographs?

4 A Yes,

5 Q And one of the reasons is because you can look at the
6 plate, I assume, from different angles; isn't that true?

7 A Yes,

8 Q And you can't do that because a photograph is two
9 dimensional?

10 A That's correct,

11 Q So you get more information off your plates in most
12 cases than you do your photographs?

13 A Yes,

14 MR. KOCHIS: I have nothing else.

15

16 EXAMINATION

17 BY THE COURT;

18 Q How soon do you look at your photograph after taking the
19 picture?

20 A It takes about a minute for the -- for the Polaroid to
21 develop, and then when it's pulled -- when the develop-
22 ment backing is pulled off, it's observed to see if the --

23 Q It takes a while for a photograph to come out and become
24 readable from the Polaroid process. You don't from time
25 to time take your picture, set the photograph aside, go
26 on back to your work, make your call and move on to other

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1 things without going back and checking the photograph?

2 A No, Your Honor, because I don't -- that -- that's not
3 what my experience with -- at least the Polaroid camera
4 that I use is. My experience is that you take the
5 picture, pull it out of the camera, which wipes the
6 development across the -- the paper. One minute later,
7 the paper is pulled off, and then it's -- it's ready for
8 observation.

9 Q You stand there and hold it all that one minute?

10 A Well, the photographs are taken in a darkroom; so you're
11 already away from the portion of the laboratory where
12 you're doing other things. One -- one minute I -- I
13 hope I don't charge so much that one minute is a --

14 (No omissions.)
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1 Q Simply trying to find out your procedure.

2 A Okay. This -- this -- let me describe the procedure.
3 The procedure is as follows. The electrophoresis is
4 conducted for a period of time. At the end of that
5 time, the gel is developed by pouring on these various
6 solutions. At that point, the gel goes in an oven for
7 a period of time. After a period of time, which will
8 vary a little bit depending on a particular enzyme that's
9 being typed, the gel is either taken into the darkroom
10 to be photographed or taken into the darkroom to be
11 observed under ultraviolet light because the observation
12 under ultraviolet light requires a darkened room.

13 An assessment is made of the quality of the result
14 at that point. There are basically two possibilities:
15 either the sample is not fully developed such that it is
16 satisfactory to observe, or it is satisfactorily developed.
17 If it is satisfactorily developed, a Polaroid photograph
18 is taken, and that process takes about a minute, and
19 that -- the -- the photograph is then observed to make
20 sure that it reflects as best as is possible through
21 the use of photography that information which is in the
22 original gel.

23 Now, we have already had some discussion about the
24 limitations of photography. Frequently it's not possible
25 to get a photograph that is as good as the original.
26 And -- and I certainly don't mean to imply that the

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1 photograph is either better than the original or is as
2 good as the original.

3 Q But if you can read the plate and you can't read the
4 photograph, what would you do? We're not talking about
5 general quality now. One is readable, the other one is
6 not. What does good serology practice indicate?

7 A Well, I -- I -- in general, there are two solutions.
8 It -- it depends on why one thinks the photograph is --
9 is -- does not have the information in it that the
10 original gel has.

11 If it is a situation that you can read the original
12 gel simply because you're able to, as Mr. Kochis has
13 pointed out, lifted up and looked at it at different
14 angles and see something that's very, very weak that in
15 your judgment as a -- as professional serologist no
16 further development would enhance, then that -- you
17 stop at that point, because you have realized that there's
18 -- there's nothing more than you can do.

19 But there are situations that -- that occur where
20 simply developing it for a long period of time may cause
21 the bands to be stronger or brighter such that a -- a
22 photograph at a later point in time will be satisfactory.

23 That -- that is basically the -- the kind of
24 decision that's -- that's made in the -- in the first
25 stage of -- of the evaluation of the plate that I -- that
26 I described previously, that is, after the development.

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1 You go into a darkroom, observe it, and either it goes
2 back for longer development or, if you're satisfied at
3 that point in time, you -- you make a record, a photo-
4 graphic record.

5 THE COURT: Anything?
6

7 FURTHER REDIRECT EXAMINATION

8 BY MR. NEGUS:

9 Q Do you ever, when you take a photograph of a gel, just
10 not check it against the gel to see that it's correct?

11 A That is not my practice, no.

12 Q If it is impossible to get a photograph that properly
13 shows what's on the gel, do you normally make a note of
14 that?

15 A No, I don't -- I wouldn't make a note of that, because
16 it -- it's -- it would be obvious. My -- my attitude
17 about note keeping is that my notes are primarily for
18 my own purposes with -- with the following slight
19 exception. I think that one has a responsibility to
20 take extra special care to record those analyses that --
21 that simply cannot be repeated because of paucity of
22 sample. So I -- I'll -- I'll go an extra -- make an
23 extra effort with -- you know, to try to get a -- an
24 adequate photograph with those kinds of samples. But
25 sometimes it's not possible.

26 MR. NEGUS: Thank you.

1 Nothing further.

2 MR. KOCHIS: Nothing further.

3 THE COURT: Thank you, doctor.

4 MR. NEGUS: I need to take some pictures of Dr.
5 Blake's pictures before -- could I be excused to do that,
6 and I can probably be back within a short period of time.

7 THE COURT: Well, all right. Back by three o'clock?

8 MR. NEGUS: Hope so. I would think so.

9 THE COURT: All right. Let's try it. At that time
10 I think it's like -- there will be no further testimony
11 today?

12 MR. NEGUS: That's it.

13 THE COURT: I think I'd like to see Counsel, the
14 defendant in chambers at that point.

15 (Recess.)

16 (Whereupon the following proceedings were
17 held in chambers:)

18 THE COURT: Counsel, the reason I asked you back
19 here is because any findings I may make or comments I may
20 make are likely to be picked up by the press, and I don't
21 think that's to the benefit of the administration of justice.

22 Let me explore the matter that we were on earlier
23 this morning with reference to the Witherspoon issue or
24 the one versus two possible juries. Have you thought
25 particularly again, Mr. Negus, as to what would happen if
26 the unthinkable happens, so to speak, and your client was

1 found guilty of all four murders, say, which, therefore,
2 includes the special circumstances, which gets us right into
3 the guilt -- the penalty phase? By then we would have had
4 a very celebrated case, highly covered by the media, much
5 publicity, both television, radio and newsprint. Would we
6 be able to move right into a penalty jury and phase?

7 MR. NEGUS: What do you mean, "right into"?

8 THE COURT: Well --

9 MR. NEGUS: Next day, or --

10 THE COURT: No, within, say, a week or something
11 like that or less, you know. I mean, normally you -- you
12 know, normally a small break, but -- but I mean within any
13 reasonable time of a few days or weeks even or a week even,
14 the recollection of everything that the other people in the
15 community have read about the case in the guilt phase would
16 be fresh in their mind. Do you find that an impediment to
17 a penalty phase? Have you thought about it?

18 MR. NEGUS: Well, obviously I have thought about it.
19 Let's put it this way. I doubt if I would be making a
20 change of venue motion at that time. I am not even sure
21 I could. So I wouldn't use two juries as a trick to get
22 another change of venue motion, if that's what you're
23 asking. If you're asking would I be asking for a long
24 continuance, no.

25 THE COURT: I wasn't even asking that.

26 MR. NEGUS: I mean, I'm not sure what your question

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1 was, then.

2 THE COURT: Do you -- well, all right. Do you find --
3 for instance, trying to think it through in the possible
4 contingencies we would get into, here we would have gone
5 through a long trial, highly publicized, relating to the
6 guilt phase, but on which people could very definitely form
7 opinions, have conversations, have prejudicial attitudes
8 or biases. I'm not talking about us all being exhausted at
9 that phase and needing a few days off; I'm talking about the
10 ability to get a -- a penalty jury shortly thereafter.

11 MR. NEGUS: Well --

12 THE COURT: Do you find any difficulty with that?
13 It seemed to me to be a separate subject. We would come
14 right in with the idea that we're going to go through this
15 phase and we're going to present much of the evidence that
16 we presented before or some of it. But "can you consider
17 separately the question of penalty and keep an open mind in
18 that regard," in effect?

19 MR. NEGUS: Yeah. Obviously I'm not -- yeah, I don't
20 -- I am sure that people will have their minds made up, and
21 we may have to excuse people for cause.

22 THE COURT: Made up for what, though? On the
23 penalty?

24 MR. NEGUS: Haven't made their mind up on the issue
25 of penalty. And we may have to excuse people for cause.
26 But I certainly would not use -- I'm not going to ask you to

1 give me two juries and then try and use the fact that you
2 did against you like either to try and delay the thing or
3 move the trial or -- or challenge the procedures that way.

4 (No omissions.)
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1 MR. KOCHIS: We would have no control over potential
2 jurors of the second phase, We could not restrict the
3 community of San Diego as to what they see on TV or in the
4 news. We would in the guilt phase pollute possibly the
5 county with -- with comments, and it would -- obviously, we
6 have control over the 16 people in the courtroom, They can
7 be admonished not to watch the TV, not to read the press.
8 We don't have that control over the rest of the community.
9 That would present a potential problem in a two-jury system.

10 You would also -- we'd not be able to predict with
11 certainty I'm sure the exact day at which we're going to
12 conclude the guilt phase, at which point deliberations from
13 the jury are going to conclude, and there would probably be
14 a hiatus of up to a month to allow the jury commissioner to
15 get us another pool of 200, 250 to go through the whole
16 process again start to finish. So those are two additional
17 problems, I'm sure the guilt phase --

18 THE COURT: Why would there be a hiatus?

19 MR. KOCHIS: Well, because you can't predict when --
20 how long a jury's going to be out, and the jury commissioner
21 needs, I believe, what, 30 days to get us a large pool for
22 the guilt phase.

23 THE COURT: I don't know that to be a fact.

24 MR. KOCHIS: We need that length of time to get a
25 number of people, enough people for the penalty phase, and I
26 don't see Mr. Negus at this point expressing any stipulation

25 THE COURT: Sure, you'd have to excuse people for
26 cause.

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1 MR. NEGUS; But other than that, I don't -- from my
2 point of view, and, you know, this is based upon not just
3 my legal thing, but there's certain life choices that
4 Mr. Cooper has to make, and he -- we have discussed these.
5 We feel that the paramount part of this particular trial is
6 having a fair jury on the issue of guilt or innocence, and
7 the -- we certainly -- you know, if he gets convicted, we
8 certainly don't want to have an unfair jury on the issue of
9 penalty, but there's trade-offs involved in that, and so I
10 suppose the fact that -- that there -- if we got to a penalty
11 phase with the second jury, that more of those people would
12 be exposed to -- to publicity is something you have to take
13 into account, but it doesn't -- I'd rather pay that price
14 than -- than to have an unfair jury on the issue of guilt.

15 Secondly, I do not believe, and I have never believed
16 that -- and I have had much experience to the contrary, that
17 jurors do not hear the -- or do not come in contact with the
18 publicity. I mean we admonish them -- we admonish them, but
19 I -- I just don't believe it, unless you lock them up in a
20 motel, and I still don't believe it then, and I certainly
21 am not advocating sequestered --

22 THE COURT: You're talking about if you had one jury,
23 the admonition is ineffective?

24 MR. NEGUS: Yeah. I think that -- I don't -- I
25 don't see it's going to make much difference.

26 THE COURT: Okay. I suppose if I tried to articulate

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1 my concern about -- reflected by my question of you -- is I
2 suspect this is going to be a case of unprecedented publicity.
3 The newspapers and media are simply going to be full of it;
4 and then if that eventuality occurred, then you're saying
5 how can we possibly proceed in a fair manner on the second
6 phase with all this publicity?

7 MR. NEGUS: I'm not going to do that.

8 THE COURT: That's still a concern of mine.

9 MR. NEGUS: I would consider that to be unfair to
10 the Court. If I ask you to do something in order -- because
11 Mr. Cooper and I have decided that we think that if you have
12 to have trade-offs, we want -- we want it on the side of a
13 fair guilt phase, then I'm not going to, you know, try and
14 make -- try and trick you into -- and make a --

15 THE COURT: I never thought that.

16 MR. NEGUS: Well, I'm just trying to -- I'm just
17 trying to speak --

18 MR. KOTTMEIER: The difficulty is that we have
19 transferred out of this county on relatively mild publicity
20 issues. By "mild," I mean we've discussed facts. We've
21 not gotten into the type of publicity that will probably
22 come out in the trial. For example, Josh was never an issue
23 at the preliminary hearing.

24 THE COURT: What was never an issue?

25 MR. KOTTMEIER: Josh, Josh Ryen,

26 MR. NEGUS: Well, I mean he was --

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1 we could have had a right to go to trial right here in this
2 county, if we wanted to, and that is not a right that the
3 prosecution has. It's Mr. Cooper's right, and --

4 THE COURT: What's your point?

5 MR. NEGUS: So if we waive asking for a change of
6 venue or a continuance, I don't see that the prosecution has
7 any complaint. And that's our desire.

8 MR. KOTTMEIER: My complaint is just the fact that
9 I view the situation as one that on appellate review will
10 automatically put us in a no-win position.

11 THE COURT: How is that, Mr. Kottmeier? I really
12 don't understand -- unless you're grounded with Scotch
13 penny-pinching in some way, I really can't understand your
14 position in this case. I don't understand why. You'd be
15 more worried about appellate review with one jury than you
16 would be with two.

17 MR. KOTTMEIER: I'm worried about trying to find a
18 jury through the eyes of the Appellate Court. I'm not
19 personally concerned as far as the prosecution's side. I'm
20 worried that we're going to wind up with a jury panel that
21 will come in that will create such a problem of selection
22 that it becomes apparent that we have created a set stage,
23 as far as Mr. Cooper's penalty is concerned, that we have
24 available to us virtually only hanging jurors.

25 MR. NEGUS: I'd much rather have that problem at the
26 penalty phase than the guilt phase.

1 THE COURT; Let me understand you before I go on,
2 How are we going to do that? If I go through two juries in
3 some way, are we going to have a set stage at the penalty
4 stage?

5 MR. KOTTMEIER; Yes, as far as jury selection.

6 THE COURT; Because of this massive publicity?

7 MR. KOTTMEIER; Yes, because of the publicity that
8 occurs during the guilt phase of the trial, that, in effect,
9 when it comes time to select the jury for the penalty phase,
10 you're working from a pool that has been polluted by whatever
11 publicity that has occurred.

12 MR. NEGUS: You know, Judge, I appreciate the
13 prosecution's position, and they may -- they may be worried
14 about appeal, but several times in this course of this case,
15 they've come in and said, oh, we can't go to that place or,
16 oh, we can't do this because of its harmful effect on the
17 defendant. We can't go to Los Angeles because, obviously,
18 they don't want a Los Angeles jury, but they say it's
19 because of the defendant. They want a hanging jury on the
20 guilt phase, but they object to it on behalf of the defendant.
21 I don't think that the prosecution --

22 (No omissions.)
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1 MR. KOTTMEIER: That's exactly a misstatement of
2 our position. And I do not appreciate Mr. Negus exaggerating
3 what our position has been. It's clear on the record.

4 THE COURT: Just make me -- make sure I understand
5 what your position is. You're worried about a poisoned
6 atmosphere and an inability to collect a fair jury in the
7 penalty phase where, regardless of Mr. Negus' position or
8 even Mr. Cooper's position, on appellate review they'd say
9 that that was not a fair trial.

10 MR. KOTTMEIER: Illustration: We start with our
11 jury selection process. We go through 25 separate jurors.
12 All 25 jurors say, for example, "I watched portions of this
13 case as edited on Channel 34," or whatever it is on television.
14 "I watched Josh Ryen on the witness stand, and I can tell
15 you that if the defendant was found guilty he's gonna die."

16 Now, we go through 25 jurors that say that, one
17 right after another. What do we do at that point? Say,
18 "Well, we're going to keep going until we find twelve jurors
19 that do not have this attitude"?

20 THE COURT: You wouldn't have much confidence in
21 them, I presume.

22 MR. KOTTMEIER: Where are we going to stop? Where
23 is it, in effect, that, regardless of what Mr. Negus has
24 said, regardless of what Mr. Cooper is willing to do, that
25 an Appellate Court, on reading the record, is going to say
26 Judge Garner should have stepped in and made sure that we

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1 had a fair penalty jury by moving to Alameda, Sacramento
2 or wherever?

3 MR. NEGUS: There's no right of anybody to have a
4 change of venue except the defendant. There's case law on
5 that, Ruchelmagee, and I think the other one is Jackson vs.
6 Superior Court. I can get you the cites. So you can, if
7 you -- if there's no right -- I mean, Mr. -- I think Mr.
8 Kottmeier is totally wrong about them, because you can't
9 force us -- you know, if we wanted to stay in San Diego
10 County, and, you know, obviously you know my position on
11 that, but -- or if we want to stay in San Bernardino County,
12 no Judge in the world, no Prosecutor has the right to budge
13 us. Similarly, if we don't want to have a continuance, no
14 Judge in the world, no Prosecutor has the right to budge us.

15 We're telling you that I don't care what he says,
16 I mean, about protecting Mr. Cooper's rights. We do not want
17 to delay things if Mr. Cooper's found guilty. And I don't
18 think that his scenario of 25 people in a row is a reasonable
19 one.

20 THE COURT: People who will watch, to use your
21 example, Joshua Ryen on T.V. and are horrified by this
22 scenario that unfolds before them during the course of the
23 trial are the same people that have predispositions, at least
24 a percentage of them, to, (a), never vote for death penalty
25 or, (b), always vote for death penalty. Do you think those
26 people are going to be irrevocably in concrete or something

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1 to where they're not going to still be able to say, "I'll
2 consider the rest of his background, I'll consider the other
3 evidence that is brought out in the penalty phase in
4 addition to the nature of this crime itself"?

5 MR. KOTTMEIER: The difference is that they also have
6 found that the previous jury has found the defendant guilty.
7 That's one of the factors that has been missing from all
8 of the prior coverage or publicity. It is a different
9 aspect --

10 MR. NEGUS: Well --

11 MR. KOTTMEIER: -- that is, it has put a different
12 light on the testimony, the arguments and--

13 MR. NEGUS: But they'll be told that.

14 THE COURT: There's a repetitive indication of
15 guilt, so to speak, by the --

16 MR. NEGUS: Well, but guilt is no longer the issue.

17 THE COURT: -- in voir dire.

18 MR. NEGUS: At penalty phases, guilt is no longer
19 the issue. I mean, and they're going to be told that, any-
20 way. Whoever you get in there at your guilt phase is going
21 to -- is -- if that is prejudicial, then we should never
22 have the same jury go from one stage to the other, because
23 it certainly is a heck of a lot more prejudicial to have a
24 jury that has actually found him guilty in the penalty phase
25 than jurors who may have heard other folks found him guilty
26 in the penalty phase.

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1 MR. KOTTMEIER: The difference is that the jury that
2 found him guilty did so under controlled regulation of the
3 Court. That is, that they have been advised as far as
4 limiting the scope of their evidence that has been received
5 to that which occurred in the courtroom. That control is
6 not available to the Court as far as the jury pool.

7 There is one other minor consideration that we kind
8 of skip over, and I assume we're just talking in the
9 abstract, and that is that --

10 THE COURT: I'm talking about this case, and I'm
11 probably within a few minutes of making a decision. And it's
12 a tough one.

13 MR. KOTTMEIER: Well, one difficulty that we have
14 made, through Mr. Negus -- Mr. Negus has made an offer of
15 proof. That is not the same as having a full-blown hearing,
16 so that in effect --

17 THE COURT: I'm fully aware of that.

18 MR. KOTTMEIER: And one of the concerns beyond the
19 selection process, that is, penalty versus guilt phase is
20 that a jury that comes in knowing in effect that they are
21 dealing with the guilt phase as well as the potential penalty
22 if they reach it I would submit is one that will tend to
23 have a more open mind as far as penalty up until the point
24 that they reach it than someone who comes in and has been
25 told, "Oh, by the way, somebody else has found this guy
26 guilty," and they may ignore the evidence in the early part

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1 of the going that is extremely important, thinking, "Well,
2 we're just here to decide whether or not the guy ought to
3 be put to death."

4 MR. NEGUS: Well, Mr. Kottmeier ought to be a
5 Defense lawyer, then, so he can make these judgments. But
6 I think that that's basically a judgment call. And I think
7 that Mr. Cooper and I are better able to make that from a
8 Defense point of view than Mr. Kottmeier.

9 THE COURT: Well, Counsel, I really struggled with
10 this because, to a large extent, I'm sympathetic with the
11 matters that I have read. Death qualifying of jurors causes
12 me a great deal of concern with the proposition substantiated
13 by the offer of proof, at least, that they may be conditioned
14 to be pro-Prosecution and less willing to accept the Defense
15 position.

16 In going back and rereading Fields and Hovey and --
17 and the position of Justice Kaus, I can't predict what he's
18 going to do. I've reread also the -- the dissenting opinion
19 of Chief Justice Bird and Reynosa as indicating as well that
20 he goes right along with her.

21 The only thing that's different at this time other
22 than a cumulative effect over the evidence that was considered
23 in Hovey was the article that you have offered, Due Process
24 versus Crime Control by Fitzgerald and Ellsworth, which
25 talks about one-fifth of all women and one-fourth of all
26 Blacks are forbidden to serve, and that the representative nature

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1 of a jury is threatened by it being more discriminatory
2 against such people and other demographic groups.

3 In Hovey, quoting from Page 383, "In addition, the
4 guilt phase includeable group was found to contain a higher
5 percentage of Blacks and women than the rest of the jury
6 pooled," end of quote. So they considered it all there.
7 Perhaps they just didn't consider it as much.

8 I'm convinced that there will be other surveys,
9 there will be other studies, treatises and articles and
10 cases speaking of it to where, when the matter's considered
11 again, I don't have a great deal of confidence as to what
12 is going to all -- what it will all shake down to. But even
13 before we commence talking about it today, I was concerned
14 with what would happen once we select another jury or get
15 into the selection process. And I have made a note of it
16 to mention it to you this morning but didn't.

17 I think it would be extremely difficult at that
18 point, after being bombarded with all of this and knowing
19 that another jury has -- has found him guilty just recently
20 and knowing that there are children involved, to get a fair
21 jury. I feel like I'm between the devil and the deep blue
22 sea. But if all of the materials that you presented by way
23 of your offer of proof were presented to me in an evidentiary
24 fashion with proper foundation, I would deny your motion at
25 this stage to have two juries.

26 So it gets us right back into the matters that we

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1 were at before. Today is Thursday. You're going to have
2 Wraxall on Monday?

3 MR. NEGUS: Thursday.

4 THE COURT: Pardon?

5 MR. NEGUS: We had it set up to do -- to do Diane
6 Williams, James Taylor, and I forgot what else, whatever
7 else is left over of that -- of the stuff that can be done
8 without Hitch on Tuesday. Brian Wraxall on Thursday. You're
9 not going to be here Wednesday, you're not going to be
10 here Monday afternoon.

11 THE COURT: I'm here Monday morning.

12 MR. NEGUS: Okay. I don't know if we have anything
13 that we need to --

14 MR. KOCHIS: I have a motion to make.

15 THE COURT: Now?

16 MR. KOCHIS: Yes. I prefer to make it in here out
17 of the presence of the news media.

18 I would have a motion to have a registered nurse in
19 the presence of Mr. Negus take a sample, a current sample,
20 of Mr. Cooper's blood so that I can have it analyzed by
21 Brian Wraxall in light of the testimony of Dr. Blake. And
22 I'd like to put on the record that I'm informing Mr. Negus
23 of my intention to have Mr. Wraxall examine the blood.

24 It is my understanding that after the testimony of
25 Dr. Blake he has no objection to Mr. Wraxall doing that,
26 although he had an objection at an earlier point in time to

1 Mr. Wraxall being involved in blood analysis.

2 (No omissions.)

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1 MR. NEGUS: That's correct. Although -- I mean
2 that's correct about Mr. Wraxall. It's not correct that I
3 agree that more blood be drawn from Mr. Cooper, I believe
4 that they still have blood from Mr. Cooper, and Mr. Gregonis
5 has even been using it as standards from time to time.

6 THE COURT: Has he got so much?

7 MR. NEGUS: He has.

8 THE COURT: Why do you need more?

9 MR. KOCHIS: Well, we want something that's relative-
10 ly fresh so that if there's any issue on the typing of the
11 blood due to the fact that it's now 11 months old -- well,
12 it's over a year old. The blood's over a year old.

13 THE COURT: Oh, I thought we went through another
14 sample just recently.

15 But that was for you?

16 MR. KOCHIS: That was for him.

17 I would have no objection, assuming there's a
18 stipulation to chain, that a portion of that blood be given
19 to -- to Dr. Wraxall.

20 MR. NEGUS: I object to them getting any more blood.
21 If you do order them to get more blood, I'd just as soon
22 have a portion of that which Dr. Blake has already given to
23 Mr. Wraxall, if I had between the two choices of drawing it
24 from Mr. Cooper and giving some of what Dr. Blake has.

25 THE COURT: Is that satisfactory?

26 MR. KOCHIS: If I can call Mr. Wraxall and make sure.

1 The Court's aware, from the ~~Kelly-Frye~~, there's so
2 many things that can affect blood; heat, time, storage,
3 treatment. The most reliable results are going to be ones
4 that are fresh, and that I can in some way control.

5 MR. NEGUS: The 7-27 sample was sent up, when, a
6 week or two ago?

7 MR. FORBUSH: I think it was just a week, maybe a
8 few days over a week. I have the notes.

9 MR. NEGUS: It went up very recently. It was sent
10 up apparently in what Dr. Blake considered to be very good
11 packaging with blue ice around it, but not frozen, but just
12 right, and it's been preserved in frozen form, liquid form,
13 and variety of forms in the same freezer that Mr. Wraxall
14 uses, and it has been ever since.

15 THE COURT: Let's try that first. I think it's
16 reasonable that they get another sample under the circum-
17 stances, so I'm willing to go along with it coming from
18 Blake as opposed to a fresh sample, provided he can get
19 readable results.

20 It sounds like he can. We're still reserving the
21 balance of A-41 Hitch.

22 MR. NEGUS: Till after we hear from Mr. Wraxall.
23 That's my request, and we still haven't heard from the UU
24 series, but I guess that may be slowed down even more,
25 from what I've been told.

26 THE COURT: I don't know of anything else, unless

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1 you have something. I bid you adieu,

2 MR. KOCHIS; What -- what we've left up in the air
3 is Monday. My understanding is the Court has a commitment
4 in another county sometime on Monday; is that true?

5 THE COURT; I'm going to take Monday afternoon for
6 the Olympics is what I'm going to do, and next Wednesday as
7 well,

8 MR. KOCHIS; Well, that's a commitment in another
9 county.

10 THE COURT; Excuse me. Would you get me my calendar
11 off the bench, please. I have a couple matters on notes
12 there of matters I'd like to see.

13 I appreciate your attempting to protect the Court,
14 even though I didn't appreciate your comment about threat
15 in open court, but no big deal.

16 MR. KOCHIS; Back to my last comment, what time do
17 you have to leave so -- I don't think Mr. Negus is going to
18 be terribly disappointed if we're not here Monday morning.

19 THE COURT; It's okay with me, really. Honestly,
20 I've just had no time for the rest of my work at all. I'm
21 wishing now that I heeded your advice before and somehow
22 gotten rid of these other matters that I'm handling.

23 MR. KOCHIS; Do you need Monday morning to work on
24 those matters?

25 THE COURT; Oh, my, I could use all next week.

26 MR. KOCHIS; You've got it.

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1 MR. NEGUS: You've got it.

2 THE COURT: No. This isn't the calendar I wanted,
3 because I made a couple notes on it.

4 THE CLERK: I didn't see the notes,

5 THE COURT: It's back a few days, I'll find it.
6 I think one of them was to advise you that in September,
7 the 24th and 25th of September, there's the judges'
8 conference in Monterey, and I will attend. Instead of
9 giving you Friday off, the 28th of September, I would expect
10 us to work straight through just three days that week, if
11 that's all right.

12 MR. NEGUS: Are you talking about working Wednesday,
13 Thursday and Friday; is that it?

14 THE COURT: Wednesday, Thursday and Friday, only
15 three days that week.

16 MR. KOCHIS: Of Witherspoon?

17 THE COURT: I beg your pardon?

18 MR. KOCHIS: Those are the first three days of
19 Witherspoon, and I think we could adjust -- I know I can
20 adjust my schedule.

21 MR. NEGUS: So you're talking about -- so we'd
22 Witherspoon 26th, 27th and 28th, instead of the 24th through
23 the 27th?

24 THE COURT: That's correct.

25 MR. NEGUS: I think I could probably live with that.

26 THE COURT: The second one was is there any chance

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1 that venue can be done here, venue from San Diego?

2 MR. NEGUS: I don't know.

3 THE COURT: I mean we could wait, you know, until
4 right before we physically open up down there, because I
5 appreciate you need time to collect evidence.

6 MR. NEGUS: Judge, it was -- basically, it was your
7 idea to do it down there, to begin with.

8 THE COURT: Mine?

9 MR. NEGUS: Yeah.

10 THE COURT: Okay.

11 MR. NEGUS: So if you want to change your mind and --
12 and do it here, I'm easy, The only thing is that I'll be
13 subpoenaing in San Diego --

14 THE COURT: If it was my idea, why did I have that
15 idea, if you can conjecture?

16 MR. NEGUS: I believe that what you said was that
17 seeing as how that's going to involve San Diego witnesses,
18 evidence and that sort of thing, that that would be the
19 logical place to do it.

20 THE COURT: Well, it depends. It's not going to be
21 long. I guess it's no big deal.

22 MR. NEGUS: Didn't we have a day allotted?

23 MR. KOCHIS: One day.

24 THE COURT: Yes, It's probably best to do it there.

25 MR. NEGUS: So we could get oriented to the courtroom,
26 and what have you, the first day.

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1 THE COURT: All right, and I've exhausted myself.
2 Anything else?

3 MR. KOCHIS: Not unless I can ask Dr. Blake some
4 more questions.

5 MR. NEGUS: Well, you'll have to run fast to catch
6 him. I think he's in the air.

7 THE CLERK, Your Honor, there was a couple of
8 exhibits that were marked, but they were withdrawn before
9 they were ever presented to the witness, and now I have one
10 exhibit number out of order. Does that need to be told to
11 anybody?

12 MR. NEGUS: It's my fault. I gave the clerk three
13 copies of the same document, and then I noticed it and said
14 "oops," I think it is, what, 391 that we don't have.

15 THE CLERK: 291 -- or 3 --

16 MR. NEGUS: It's got to be 3-something.

17 THE CLERK: 391.

18 MR. NEGUS: I'm willing to stipulate that 391 can
19 forevermore remain blank.

20 MR. KOCHIS: So stipulated.

21 THE COURT: You don't have another copy of it just
22 to substitute?

23 MR. NEGUS: I can give her a copy back of the same
24 thing, but that would seem to me to be -- or if you don't
25 like that, we can -- I'll stipulate that when -- I'm sure
26 that when Mr. Wraxall comes down, we'll probably have an

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1 exhibit or two then, so we can stick in one of Mr. Wraxall's --

2 THE COURT: It would seem to me to be better practice
3 to substitute, even though it's kind of a useless exhibit
4 now, to keep the record complete,

5 MR. NEGUS: How about when Mr. Wraxall comes down,
6 we'll put in an exhibit in that H-391 slot.

7 THE COURT: Remind them.

8 THE CLERK: All right, Your Honor.

9 THE COURT: It may turn up by then,

10 MR. NEGUS: No, no. It's not lost. I took it back.

11 THE COURT: Oh, I see.

12 MR. NEGUS: I made three copies of Dr. Blake's notes
13 to -- I was going to -- I -- one for me, one for -- I was
14 going to give to Mr. Jones, but then I got sidetracked before
15 I did, and one for the Court and one for Mr. Kochis, and I
16 gave one to Mr. Kochis and three to --

17 THE COURT: You were more successful in keeping it
18 restricted than you thought you'd be and, therefore, you
19 didn't have to use it.

20 MR. NEGUS: No, no, no. I gave it to Mr. Kochis,
21 I was just going to give another one to Mr. Jones there,
22 their serologist who was sitting in the court.

23 THE COURT: Well, I'm agreeable either way you want
24 to do it. Do you want to just keep with your stipulation to
25 keep 391 blank?

26 MR. NEGUS: Fine.

1 MR. KOCHIS: Fine.

2 THE COURT: All right. So be it.

3 Anything else?

4 MR. KOCHIS: No.

5 THE COURT: Take the rest of the day off.

6 (Whereupon, at 3:23 p.m. an adjournment
7 was taken in this matter.)

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