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SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,)
)
) Plaintiff-Respondent,)
)
 vs.)
)
 KEVIN COOPER,)
)
) Defendant-Appellant.)

CR 72787

Supreme Court

No. 021124552

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY

HONORABLE RICHARD C. GARNER, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

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

THE PEOPLE OF THE STATE)
OF CALIFORNIA,)
Plaintiff,)
vs.)
KEVIN COOPER,)
Defendant.)

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REPORTERS' DAILY TRANSCRIPT
BEFORE HONORABLE RICHARD C. GARNER, JUDGE
DEPARTMENT 3 - ONTARIO, CALIFORNIA
Thursday, August 9, 1984

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1 ONTARIO, CALIFORNIA; THURSDAY, AUGUST 9, 1984; 9:50 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 District
9 Attorney of San Bernardino County,
10 representing the People of the State
11 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. I assume this is your
16 next witness.

17 MR. NEGUS: Yes, Brian Wraxall.

18 THE COURT: Come forward, sir. Take the oath.
19 Defendant and both counsel are present.

20
21 B R I A N W R A X A L L, called as a witness by the defense,
22 was examined and testified as follows:

23 THE CLERK: You do solemnly swear the testimony
24 you are about to give in the action now pending before this
25 court shall be the truth, the whole truth, and nothing but
26 the truth, so help you God?

1 THE WITNESS: I do.

2 THE CLERK: Please be seated.

3 State your name, please, for the record, and spell
4 your last name.

5 THE WITNESS: My name is Brian Wraxall, spelled
6 W-r-a-x-a-l-l.

7 MR. NEGUS: Your Honor, Mr. Wraxall has previously
8 testified at the Kelly-Frye hearing, I'm sure as you
9 remember, and we've stipulated that his testimony at the
10 Kelly-Frye hearing be part of this -- this proceeding, so
11 the questions I'm going to ask him now are supplemental to
12 the questions I asked him before, or Mr. Kochis asked him.

13 THE COURT: Was that stipulation previously expressed?

14 MR. NEGUS: Yes. We stipulated that -- that you
15 could consider, rather than going through it all over again,
16 all of the testimony that was introduced at the Kelly-Frye
17 hearing as part of the Hitch.

18 THE COURT: All right. Accepted.

19 Go ahead.

20

21 DIRECT EXAMINATION

22 BY MR. NEGUS:

23 Q Mr. Wraxall, at -- did you in the late spring of 1984
24 contract with the District Attorney's Office of the
25 County of San Bernardino to do some serological testing?

26 A I did.

1 Q And in July of this year, did you begin that testing?

2 A Yes, I did.

3 Q Were you given to test two cigarette butts, one with a
4 laboratory -- San Bernardino Sheriff's Office laboratory
5 number of 42376, item V-12 and another one, item V-17?

6 A I was.

7 Q Was the item number V-12 a roll-your-own-type cigarette
8 butt?

9 A It might have been. I couldn't really tell from the
10 amount that I had, but it's certainly not inconsistent
11 with the fact that it was hand-rolled.

12 Q And was the item V-17 a filter cigarette?

13 A It was.

14 Q Did you test both of those cigarette butts?

15 A I did.

16 Q What tests -- did you perform the same series of tests
17 on each of them?

18 A Yes, I did.

19 Q What tests did you perform on them?

20 A I looked for the presence of the enzyme amylase, and
21 amylase occurs in large quantities in saliva.

22 I performed absorption-inhibition testing on both
23 of the cigarette butts for the presence of ABO, of blood
24 group substances that will also tell me the secretor
25 status of the individual, if present.

26 I also performed a much more sensitive test known as

1 the absorption-elution test for the presence of ABO blood
2 group substances.

3 I also performed a Lewis typing test, which could
4 give me some indication as to the secretor status of
5 the individual depositing the saliva on the cigarette
6 butt.

7 Q Starting with the -- with the -- with the test for amylase,
8 did -- was there any attempt made by yourself to reach a
9 rough quantification of the amount of amylase present in
10 the different stains?

11 A Not in terms of a figure, but it was compared with --
12 excuse me -- known dilutions of saliva.

13 Q And by comparing the -- well, does the positive test for
14 the -- for the amylase involve a circular stain over a --
15 over essentially starch?

16 A Yes; that's correct.

17 Q And does the -- is the area of the circular stain
18 approximately proportional to the amount of amylase
19 that you have?

20 A That's correct.

21 Q In both of these cigarette butts, was there amylase
22 present?

23 A I believe there was, yes.

24 Q And would you be able to make a rough quantification
25 of the amount of amylase that is in comparison with
26 your known dilutions of saliva?

1a

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1 A I could make -- it would be very rough. I don't have
2 the original plates with me, but I could make some sort
3 of guesstimate as to the amount of amylase there. In
4 a dilution sense, something like one in fifty, one in a
5 hundred, one in a thousand, something like that.

6 Q The amylase test, its purpose in -- in these particular
7 series of tests was just -- was to demonstrate that
8 there was saliva still present on the cigarette butts?

9 A That's correct, yes.

10 Q In -- one of the things that you were attempting to
11 determine from the cigarette butts was whether or not
12 the person that smoked them was a secretor or non-
13 secretor; is that correct?

14 A That's one of the determinations, yes.

15 Q In order to make that determination, is it necessary to
16 have this approximate quantification of the amount of
17 saliva?

18 A Not necessarily, but it certainly can give you a guide
19 when it comes to interpretation.

20 Q Now, you said that the -- that the absorption-inhibition
21 test you performed in order to determine secretor status;
22 is that correct?

23 A That's one of the functions of the absorption-inhibition
24 test, yes.

25 Q And, basically, if you get a result on the absorption-
26 inhibition test, then you know you have a secretor?

1 A That's correct.

2 Q If you don't, you may or may not have a non-secretor?

3 A That's correct.

4 Q In this particular case, were you able to determine
5 whether or not -- well, did you have a secretor on either
6 of the cigarette butts?

7 A I was not able to determine that.

8 Q With respect to the absorption-elution test, what
9 substances are actually being tested when you do the
10 absorption-elution test? That is, what -- what material?
11 Is it the saliva or is it something else?

12 A Well, it's anything that's on there, because the way it's
13 done is an extract is made of the material, in this case
14 the cigarette paper or the filter part. An extract is
15 made, and that is then dried down onto cotton, and the
16 absorption-elution test is done on that. Now, anything
17 that is on there that will react with the ABO antisera
18 that you'll be using would come up; so if it was saliva,
19 that would react. If it was perspiration, that would
20 react, if there was sufficient in there.

21 Q Could it also be cellular materials that came off the
22 smoker's lips when they were smoking the --

23 A Absolutely, yes.

24 Q So the -- the presence of -- is the presence of ABO
25 antigens as measured by the absorption-elution test
26 dependent upon their being -- the person who smoked the

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1 cigarette being a secretor?

2 A No.

3 Q You can get their ABO type whether they're a secretor
4 or non-secretor?

5 A That's absolutely correct.

6 Q As far as the cigarette butt V-12, were you able to get
7 a result?

8 A On the absorption-elution?

9 Q Yes.

10 A No.

11 Q Were you able to get a result on the V-17?

12 A Yes.

13 Q And what was that result?

14 A The result on V-17 was that I had a result of A, ABO
15 Type A.

16 Q What percent of the United States population has ABO
17 Type A?

18 A Approximately 40 percent.

19 Q The absorption-inhibition test that you did on the --
20 for Lewis antigens, the Lewis types are genetically --
21 are genetic markers just like any other kind of marker;
22 is that correct?

23 A That's correct, yes.

24 Q So one person will be -- if they're an a- b+,
25 they'll be an a- b+ their whole life?

26 A That's correct.

1 Q And the frequency of those particular types in the
2 population are likewise numbered; is that correct?

3 A Yes.

4 Q Is there a relationship between the -- your Lewis type
5 and your secretor status?

6 A Yes.

7 (No omissions.)

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- 1 Q What is that relationship?
- 2 A The relationship is that if somebody is an a- b+
- 3 they are secretor. If they are a positive b negative,
- 4 they are non-secretor. There's a third type, which is
- 5 a- b-, approximately of which 80 percent are secretors
- 6 and 20 percent are non-secretors.
- 7 Q Of those persons that are a -- well, the plus and the
- 8 minus essentially refers to whether or not you have in
- 9 your blood secreted the a antigen or the b antigen; is
- 10 that right?
- 11 A That's correct, yes.
- 12 Q And so an a- b- person would have neither antigen secreted
- 13 in their blood?
- 14 A That's correct.
- 15 Q In their -- in the -- in a person who's an a- b-, would
- 16 they nonetheless in some of their body fluids have a very
- 17 low level of those antigens present?
- 18 A That is possible, yes.
- 19 Q And if a person were -- had the a antigen present in --
- 20 in low levels in their saliva, even though they're a-
- 21 b-, would that mean they're going to be a non-secretor?
- 22 A Yes.
- 23 Q And if they had the b, would they be a secretor?
- 24 A That's correct.
- 25 Q Now, with respect to both V-12 and V-17, were you able
- 26 to reach a conclusive result as to the Lewis type of the

1 person that smoked that cigarette?

2 A I was not.

3 Q As to V-12, when you tested for the Lewis -- presence
4 of the Lewis b antigen, did you get some sort of
5 indication that there was a -- a -- a b person had
6 smoked the cigarette?

7 A What I obtained was small amount of inhibition of both
8 a and b Lewis substance.

9 Q To what did -- were you able to attribute that to any
10 particular thing?

11 A No, because I felt that the levels were very, very low.
12 The amount of the Lewis that is normally found in
13 saliva, particularly in secretors, is -- is fairly high.
14 And the amounts that I was detecting here were very, very
15 low. And I felt that it was unwise to draw any firm
16 conclusions from those results.

17 Q In -- in -- in doing your testing of the -- of the Lewis,
18 did you use controls of the known secretors and non-
19 secretors as far as --

20 A Yes, I believe I did.

21 Q And the Lewis a and the Lewis b are essentially separate
22 procedures, that is, you type them at different times?

23 A Yes, that's correct. Well, they're -- they're typed at
24 the same time, but they use different antisera.

25 Q And it's basically a different test? That is, you
26 could -- there's nothing -- you could do a Lewis b if you,

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1 for some reason, wanted to, without doing a Lewis a; is
2 that --

3 A Yes, you could.

4 Q Okay. Did -- with respect to the Lewis a, did you have
5 a problem with your controls?

6 A I can't recall that.

7 Q Do you have your notes available to you?

8 A Yeah, but not with the -- the -- the controls are not
9 on here.

10 Q What results should you have received on your Lewis a
11 controls?

12 A Lewis a, you would -- would normally see inhibition in
13 the a, and maybe you might even see some inhibition in
14 the b.

15 Q Would you expect to see the same amount in both?

16 A No.

17 Q Would you expect to see essentially no reaction in both?

18 A It's possible to see no reaction in both.

19 Q With the b, what would you expect to see?

20 A With the b, I would expect to see certainly b present.
21 But with secretors, there is often a large amount of a
22 present, too.

23 Q Why were the results that you obtained on the secretor
24 status of the person that smoked the two different
25 cigarette butts or the person or persons ^{or} inclusive?

26 A The reason that they were inclusive was that I used a very

1 small amount of liquid to extract the material from the
2 cigarette butts. And my standard procedure is to use a
3 reasonable sized portion of that extract for the
4 absorption-inhibition. Because of the other tests that
5 I was doing in this particular case, I reduced the amount
6 of sample that was being used for the absorption-
7 inhibition. And the control reactions on that test was
8 unsatisfactory.

9 Q Why did you reduce the amount that you used for absorption-
10 inhibition on these two cigarette butts?

11 A Because I felt that the amount of saliva present was
12 likely to be small.

13 Q And why was that?

14 A Because I didn't have the full cigarette butts to work
15 with.

16 Q There had already been taken from the cigarette butts
17 a large portion of the paper?

18 A I don't know about "large," but certainly something had
19 been removed from it.

20 Q Was that -- was on both cases the paper that had been
21 removed the end that was -- would have been closest to
22 the smoker's lips as the cigarette butts were being
23 smoked?

24 A Yes.

25 Q And is that the area of the cigarette butts which would
26 most likely have given you the strongest results?

1 A Logically, yes.

2 Q As you were performing the test, were you aware of the
3 procedures and results that had been obtained from
4 previous testing?

5 A I believe -- I don't know that I knew the procedures
6 that had been used. But my understanding was that
7 inhibition testing had been conducted on the cigarette
8 butts.

9 Q Were you also aware that conclusions had been drawn from
10 the inhibition testing?

11 A I believe so, yes.

12 Q In your opinion, were those conclusions supported by
13 the -- by the results that had been obtained?

14 A No.

15 Q Did the fact that the samples had previously been
16 tested, did that inhibit you getting results in the
17 testing that you did?

18 MR. KOCHIS: Well, I would object. That would call
19 for speculation on his part. He has no idea of what
20 condition they were in originally or how much was used. How
21 can he speculate on that?

22 THE COURT: Mr. Negus.

23 Q (BY MR. NEGUS:) Was there a -- let me -- I'll -- okay.

24 Was there approximately eight mill -- millimeters
25 of filter paper removed from the proximal end of the
26 filter of the cigarette butt?

1 A That would seem to be approximately correct, yes.

2 Q And approximately four millimeters removed from the
3 proximal end of the non-filter cigarette butt?

4 A That I can't tell because I don't know how long it was
5 to start with. See, with a filter, you can see. But
6 with the other cigarette, all I have is a small piece
7 with a burnt end. I don't know if one millimeter was
8 taken. It depends on how far down that cigarette butt
9 was smoked.

10 Q Assuming that it was four millimeters and that it was
11 eight millimeters taken off the cigarette butt, would
12 that additional amount of sample extracted from that
13 paper have allowed you to reach conclusive results as to
14 the secretor status and Lewis type of the smoker?

15 MR. KOCHIS: Well, again, I would object. I think
16 that calls for speculation as to how much may have been there.

17 THE COURT: Well, he's asking him to assume.

18 MR. KOCHIS: Well, it assumes facts that aren't in
19 evidence, then.

20 MR. NEGUS: Well, he's already testified that eight
21 millimeters were missing, and I believe Mr. Gregonis testified
22 that he used four millimeters from V-12.

23 THE COURT: Do you know, Mr. Kochis?

24 MR. KOCHIS: I can't recall exactly what he said
25 in March.

26 THE COURT: Let's permit it, and we can search the

1 record later.

2 Overruled.

3 THE WITNESS: The -- it is possible, but I have to
4 speculate, because I don't know how much amylase or saliva
5 was on there to start with. It is possible, certainly, if
6 you assume that the cigarette butt is equally saturated with
7 the substance, that possibly if I have twice as much, then
8 I might be able to draw a much firmer conclusion. That's
9 assuming that the -- those things.

10 Q (BY MR. NEGUS:) And if in fact the part that was missing
11 had in fact even more than what was left, it becomes
12 even more likely; is that right?

13 A Sure, absolutely.

14 Q With bloodstains, are there different techniques which
15 are used to do absorption-elution testing for ABO
16 antigens?

17 A I assume you're meaning in terms of the extraction
18 procedure, or --

19 Q Right. Ammonia extraction versus different people putting
20 them on threads on acetate.

21 A Yes.

22 Q Are you -- are you familiar with a technique called in
23 California, at least, the chisum technique?

24 A Yes.

25 (No omissions.)

26

1 Q And that involves an ammonia extraction process?

2 A I believe it does.

3 Q Do you use that particular technique yourself?

4 A No.

5 Q Why not?

6 A I don't find that it shows any advantage over what I do
7 use now.

8 Q Is there any lessening of reliability using the chisum
9 technique over the technique that you use?

10 A That I'm not sure. My understanding is that the chisum
11 technique uses smaller amounts of agglutination to
12 determine a result, and I might have a problem with that,
13 but that might be up to the individual analyst.

14 Q As practiced or as it used to be practiced in
15 California, the amount of agglutination in order to get
16 a positive result on that test was like two or three
17 cells at times; is that correct?

18 A That's my understanding, yes.

19 Q And that would allow for much easier -- or much greater
20 possibility of contamination being the cause of your
21 result, rather than the blood?

22 A Absolutely.

23 Q This week did you test six samples of suspected blood to
24 determine -- to attempt to determine what transferrin
25 type they were?

26 A Yes.

- 1 Q And did those come to you with the same laboratory
2 number of 42376 and items number UU-2, UU-5, UU-6,
3 UU-9, UU-15 and UU-16?
- 4 A Yes, they did.
- 5 Q As to UU-5 and -6 and -15 and -16, were you requested
6 to do those samples first by Mr. Kochis?
- 7 A Yes.
- 8 Q And as to UU-2 and -9, did you select those samples
9 yourself?
- 10 A I did.
- 11 Q Why did you select those samples?
- 12 A I looked at the remaining samples. That was not the
13 only samples I received. I received a total of 16 samples,
14 and I selected two more to complete the plate that I was
15 running, and I looked at them all very briefly and picked
16 the ones which I thought might have a chance of giving
17 me a result.
- 18 Q Were most of the samples that you received in that UU
19 series 1 to 16 very small?
- 20 A Except for 9 and 15, yes.
- 21 Q Now, did you get results with respect to any of the
22 samples?
- 23 A Yes.
- 24 Q Which ones were those?
- 25 A Nine and fifteen.
- 26 Q And which result did you get?

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- 1 A I obtained a transferrin C result.
- 2 Q With respect to the other samples, did -- did you --
- 3 you did not get a result?
- 4 A That's correct.
- 5 Q Taking them one by one, are you able to form an opinion
- 6 as to why you did not get a result, starting with UU-5?
- 7 A UU-5 -- let me refer to my notes a minute. The UU-5
- 8 did not have a large amount of blood present. It was
- 9 smeary. It did not seem to be in drop form; and when I
- 10 tried to extract it, it indicated to me that the blood
- 11 was partially or fully insoluble; in other words, I did
- 12 not see any color coming out of the stain into the liquid,
- 13 and that's a good indication that the stain might be
- 14 insoluble.
- 15 Q If a stain -- well, if -- does whether the stain comes
- 16 to you in smear form or drop form make a difference in
- 17 your ability to type it?
- 18 A Yes.
- 19 Q And it's easier to type drops than it is smears?
- 20 A Yeah, just because it's more concentrated. Any time you
- 21 have a bloodstain that is in a drop form, it tends to
- 22 stay together, and it's just a lot more concentrated
- 23 than if you have something that is smeared on the
- 24 surface.
- 25 Q A smear when it's taken freshly, is it still going to be
- 26 soluble so that you can get a test out of it usually?

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1 A Yeah. Normally I would expect so.

2 Q So if a stain has -- is insoluble, that's because it's
3 been allowed to sit in an unpreserved form for a period
4 of time where it will harden and become insoluble?

5 A Yeah. Either it's been subjected to heat or it's just
6 been there a very long time before it was collected.

7 Q Was UU-6 -- was that the same problem?

8 A Yes, but that there was -- the blood was not in smear.
9 This time it was in little spots, very small spots, and,
10 again, it indicated to me when I made the extract, that
11 it was insoluble.

12 Q Why were you not able to get a result with UU-2?

13 A UU-2 was a very small amount of blood spots, and, again,
14 it indicated to me this was partially insoluble. I did
15 seem to obtain some color in the liquid, but not as much
16 as I would have expected from the blood.

17 Q With respect to UU-16, that was a doorknob?

18 A That's correct.

19 Q And in what -- what condition was the -- was the blood
20 on that doorknob?

21 A That was in a very, very small amount of blood was
22 present, and it was as a -- as a smear along this sort
23 of part of the doorknob. There was not very much there,

24 Q Was that soluble?

25 A It seemed to be, because I was able to swab that off
26 onto a piece of cotton thread so --

3b

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1 Q So the problem there was there was just not enough?

2 A That's correct.

3 Q As to any of the samples which you've tested so far,
4 is there any left?

5 A Yes.

6 Q Which ones?

7 A All of them have something left.

8 Q There's enough left to do another electrophoretic run
9 with any of them?

10 A I believe so.

11 Q How many -- let's start with UU-2. How many more can you
12 do with 2?

13 A I don't know, because with UU-2, I didn't obtain any
14 transferrin; so if I was going to do some more testing,
15 then what I would have to do is to probably use all of
16 that for one test, because I would feel that the amount
17 that is there is not very large; and if I couldn't get
18 transferrin, then if I was to go for something else,
19 I feel that I would need to probably use all of that
20 just to do one test.

21 Q Could you -- do you think that -- is there any testing
22 possible on UU-5 or UU-6?

23 A I think the same thing would apply. There is still some
24 blood left. The question is what test do you go for, and
25 I believe that what you would have to do, based on the
26 experience with the transferrin, is you would again have

1 to concentrate all that blood into one test,

2 Q If the -- if the blood was not soluble to begin with,

3 is there anything you can do to make it soluble?

4 A Yes. You can try extracting it in things like ammonia,

5 That sometimes helps to solubilize it. That's one trick

6 that you can try.

7 Q Is transferrin the hardest of all the different enzymes

8 that we can test for?

9 A It's probably one of the hardest, if not the hardest.

10 There's a lot of it there present in the serum, and it's

11 a protein as opposed to an enzyme, and my experience

12 has been that you can detect it a fair amount of time

13 after the blood was deposited.

14 Q In fact, in determining which test to do on this UU

15 series, was transferrin selected because in fact it was

16 the most likely to have survived?

17 A I believe so.

18 Q With the UU-9 drop of blood, is there enough to do more

19 than one test?

20 A Yes.

21 Q Is there enough to do a complete genetic profile?

22 A I would doubt it.

23 Q Maybe two or three tests?

24 A Possibly, yeah.

25 Q What about the UU-15?

26 A Fifteen has got the most of all of the samples that I

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1 tested. That seems to have a fair amount of blood
2 there, and, again, I don't know that there's enough for
3 a complete genetic profile, but there's certainly enough
4 for more than one further test, I would say.

5 Q Are you basically aware of the victims' blood types in
6 this particular case?

7 A Yes, very briefly. I have them here, but I -- you know,
8 I don't know them off the top of my head.

9 Q On both UU-9 and UU-15, is there enough left to, for
10 example, discriminate amongst the various victims?

11 A I would think there was, but I would have to again
12 review what the types were to be sure of that.

13 (No omissions.)
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1 Q Well, assuming that -- that -- that using ABO, PGM and
2 Es -- and EAP, that you could discriminate all the
3 victims, would that -- would there be enough to do that?

4 | A. Probably.

5 MR. NEGUS: I have nothing further.

CROSS EXAMINATION

8 BY MR. KOCHIS:

9 Q Mr. Wraxall, the transferrin that you did this week at
10 our request, is that the type of run in which you can
11 actually save the plate itself?

12 A Yes.

13 Q And did you save the plate?

14 A I do -- I did.

15 Q Did you bring it with you to court today?

16 A I did. I have, yes.

17 Q Prior to the time you started testifying, did you take a
18 few minutes and show that to Mr. Negus?

19 | A | I did.

20 Q So there's no confusion on UU-16, the stain that you
21 took that's labeled UU-16, was that actually on an
22 object when you started working with it?

23 A Yes. It's on the doorknob itself of the -- the piece
24 of the doorknob was submitted to me with the bloodstains
25 on it.

26 Q And you somehow got that off with a swab?

- 1 A Yes.
- 2 Q Now, in addition to the doorknob, was there some other
3 article with UU-16?
- 4 A Yes. There was a Ziploc polyethylene bag.
- 5 Q And did it appear to have something inside the bag itself?
- 6 A There seemed to be some sort of smearing inside, yes.
- 7 Q Did it appear to be stained as well?
- 8 A Yeah. There was -- it was a stain of some sort.
- 9 Q And the test for transferrin that you ran on UU-16, was
10 that restricted to the material -- only the material you
11 took off the doorknob?
- 12 A Yes.
- 13 Q You haven't done any testing on what may be in that
14 Ziploc bag?
- 15 A That's correct.
- 16 Q The chisum technique, is one of the advantages of that
17 technique that you can use a smaller portion of the
18 sample and conserve a limited blood supply with your
19 testing?
- 20 A That's my understanding. I -- I'm not very -- I'm
21 familiar with it, but I've not done a lot of it -- testing
22 myself using that technique.
- 23 Q When you have a limited amount of blood, for example,
24 one blood drop, would the type of test you chose to use
25 perhaps take into account choosing a particular test
26 that would allow you to conserve as much of the sample

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25 A Yes. You would normally do that test first, and the
26 reason --

1 Q Why?

2 A -- you do that test first is that if you obtain a result,
3 that not only tells you the ABO type but it also tells
4 you that the person is a secretor as well.

5 Q In a case in which you're working with a theory that
6 the person who may have deposited the saliva was a non-
7 secretor, does using the absorption-inhibition test give
8 you the opportunity or the possibility of excluding that
9 person with that test?

10 A Yes, because if you obtain a result by the absorption-
11 inhibition test, then that saliva could not have
12 originated from a non-secretor.

13 Q And it likewise will tell you the ABO blood group type
14 as well?

15 A That's correct.

16 Q Now, is it possible to obtain on the -- on the Lewis
17 system a different result when you type the same person's
18 blood and that person's saliva?

19 A Yes.

20 Q How is that possible?

21 A That normally occurs with the a- b- people in that the
22 Lewis types on the blood is not -- the cells, the blood
23 cells are the parts that are tested, but it does not
24 naturally occur on the blood cells. The Lewis substance
25 occurs in the serum and is absorbed onto the red blood
26 cells in -- from the serum. So the possibility with the

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1 Q What type of information was that?

2 A There was an indication on part of the filter in V-17
3 that there was some Lewis a substance present.

4 Q Did you see any Lewis b?

5 A I did not.

6 Q And if you would have found a sufficient quantity of
7 a and no b, would that be consistent, then, with a non-
8 secretor?

9 A Yes, it would.

10 Q Were you able to determine the ABO blood group type of
11 the person who deposited the saliva on the filtered
12 cigarette, V-17?

13 A Yes.

14 Q And that person was an ABO blood group Type A?

15 A That's correct.

16 Q Which is Mr. Cooper's blood type?

17 A That's correct.

18 Q And is it then your opinion that you did not get enough
19 information from the unfiltered cigarette, V-12, to have
20 a conclusion whether that person was a secretor or not?

21 A That's correct.

22 Q And your opinion as to the secretor status of V-17,
23 the filtered cigarette, is the same?

24 A In terms of the secretor status, yes.

25 Q Now, Mr. Negus asked you a question about results that
26 Mr. Gregonis may have had earlier in this case. Do you

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1 recall that?

2 A Yes.

3 Q And you're aware, are you not, that a portion of both
4 cigarettes were used by Mr. Gregonis to perform
5 absorption-inhibition tests to determine secretor status
6 in this case?

7 A Yes.

8 Q And do you feel that was an appropriate test to perform
9 in this case on both those cigarette butts?

10 A Yes.

11 Q Directing your attention to what appears to be a copy of
12 one of the pages of Mr. Gregonis' lab report, and
13 specifically what appears to be the fourth paragraph
14 from the bottom, that fourth to the last and the third
15 to the last paragraph, could you read those to yourself
16 for a minute, where it starts with "Serological Examina-
17 tion for the Presence of Amylase," and ending with
18 "Cigarette Butt V-17."

19 A (Witness complies.) Yes.

20 Q Now, when you looked at V-12, based on your complete
21 examination, is there anything inconsistent with the
22 saliva being from a non-secretor?

23 A No.

24 Q And with V-17, is there anything inconsistent with
25 being a non-secretor?

26 A No.

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1 Q The results that Mr. Gregonis placed in his report where
2 he said "indicative of a non-secretor," is that
3 inconsistent with what you actually found?

4 A No.

5 Q Is it your position that, with your analysis, what
6 you're saying is you simply didn't get enough information
7 to make the call one way or another?

8 A That's correct.

9 MR. KOCHIS: If I could have a moment, Your Honor.
10 Your Honor, I don't have any further questions on
11 cross. However, because Mr. Wraxall is with us all the way from
12 Northern California, I was going to ask him a limited question
13 in two other areas that I doubt would take more than five or
14 six minutes.

15 THE COURT: Why don't we go right ahead.

16 MR. NEGUS: Could I just finish --

17 THE COURT: If you'd like.

18 MR. NEGUS: -- that much so I can remember.

19 THE COURT: Sure.

20

21 REDIRECT EXAMINATION

22 BY MR. NEGUS:

23 Q In criminalistics, do the words "indicative of,"
24 "consistent with" and "inconclusive" mean the same thing?

25 A No.

26 Q Okay. What -- what's the difference between "indicative

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1 of" and "inconclusive"?

2 A "Indicative of" gives you an indication of -- of one
3 result or another. "Inconclusive," to me, means I can't
4 tell you one way or another.

5 Q Okay. So your testing of the cigarette butts, you just
6 can't tell us one way or the other?

7 A That's correct.

8 Q And your negative results on the absorption-inhibition
9 tests you interpret to mean that it could be a secretor
10 or non-secretor?

11 A That's correct.

12 Q And you can't pick one -- one over the other?

13 A That's right.

14 Q Why did you repeat the absorption-inhibition test that
15 Mr. Gregonis had already done?

16 A Just for sake of completeness, because I was using a
17 different extract. And a possibility at the time that
18 I was considering the test was that there might have
19 been more saliva on the portion I was testing than on the
20 portion that he tested.

21 Q With respect to UU-16, the smear on the Ziploc bag --

22 A Yes.

23 Q -- how much of the smear is there, if you can guess?

24 A It's very, very small, even if it's blood. I don't even
25 know that. But it -- it's brown in color and it's very
26 small.

- 1 Q Is there enough to do an electrophoretic run on it?
- 2 A You can attempt it, but whether there's enough to get a
- 3 result, I don't know.
- 4 Q Was this a plastic bag?
- 5 A Yes.
- 6 Q Was it sealed when you got it? I mean zipped?
- 7 A No.
- 8 Q It was open?
- 9 A It was open, yes.
- 10 Q Is it good serological practice to -- to store serological
- 11 samples in plastic Ziploc bags?
- 12 A I don't believe so.
- 13 Q What happens if you do that?
- 14 A It tends to make them -- If they're not dry, it tends to
- 15 make them seal the blood in a wet, moist atmosphere,
- 16 which is not good for the bloodstains.
- 17 Q When you test -- you tested as well some saliva that was
- 18 sent up to you I believe the end of last month from
- 19 Mr. Cooper?
- 20 A That's correct.
- 21 Q Item 42376 quadruple E?
- 22 A Yes.
- 23 Q Did you detect in that saliva any evidence of the Lewis
- 24 b antigen?
- 25 A I did not.
- 26 Q You did take -- detect low levels of a; is that right?
- 27 A That's correct.

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1 MR. NEGUS: Nothing further.

2 MR. KOCHIS: I have one other question that was
3 brought up, and then I could move to the other areas.

4
5 RECROSS-EXAMINATION

6 BY MR. KOCHIS:

7 Q Mr. Wraxall, with the plastic bags, is there anything
8 that's improper serological practice to take a bloodstain
9 which is dry and put it in a plastic bag?

10 A No. It's just if you know for sure that it's dry.

11 Q The -- you had a chance to actually see the quantity,
12 the size of the material that's in the plastic bag that's
13 UU-16?

14 A That's correct.

15 Q Assuming hypothetically that that was deposited at a home
16 on the 4th or 5th of June and remained in the home and was
17 not collected until the 30th of June, would you expect a
18 sample that small to have dried?

19 A Yes.

20 DIRECT EXAMINATION

21 BY MR. KOCHIS:

22 Q Turning your attention to Group I electrophoretic runs,
23 specifically the PGM and the ESD, if you complete your
24 ESD run, move to your PGM run and the run comes up and
25 it's faint, do you create any risk to the unknown
26 sample by attempting to change the overlay which has the
27 G6PD in it?

28 A I believe so, yes.

1 Q What is the potential risk?

2 A The potential risk is that the activity that you are
3 seeing there when the activity occurs, in fact when the
4 reaction occurs, there is diffusion of the enzyme up
5 into that overlay; so that when you peel the overlay off,
6 there is -- you can see banding up in both the top overlay
7 and also in the bottom portion of the gel. If you take
8 those two away and then put another overlay on, I think
9 you run the risk that there's some activity that was in
10 the top overlay is then removed from -- and therefore
11 reduces your ability to read what is in the final plate,
12 in other words, what is in the bottom when you put the
13 new overlay on.

14 Q So although you may potentially increase the stain, you
15 potentially run the risk of decreasing the amount of the
16 unknown that you're actually trying to read?

17 A Yeah, because, you know, in normal circumstances, if
18 everything is correct, you have an excess of all of the
19 reactants that are required to show that stain up, and
20 if you -- therefore, you have an excess of reactants in
21 comparison to the amount of bloodstain material or
22 enzyme activity that you've got in a particular stain.

23 Q Turning to another topic, to the multisystem that you
24 designed, have you memorialized anywhere in writing a
25 proper methodology that is to be employed by persons
26 outside your laboratory if they're going to use your

2 A Yeah. There is a manual that we put out that we give to
3 students when we train them in -- in the Bloodstain
4 Analysis System.

8 | A. Yes.

10

12 BY MR. NEGUS:

16 | A. Yes.

19 A. It does a little bit. In the manual that we put out,
20 there is a section on interpretation.

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26 A. No, but normally if the G6PD is degraded, you don't get

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1 any reaction at all, so at that point -- you know that
2 fairly soon. You know that within about 25 to 30
3 minutes. At that point then it's very appropriate to
4 pull that overlay off; however, when it becomes a
5 problem is if you're seeing some activity occurring,
6 you have to make the determination whether in fact there
7 is enough G6PD there and other reactants to make sure
8 that you'll get a result.

9 Now, if you partially degrade a G6PD, you know, that
10 that becomes a very difficult decision to make. You pull
11 the thing off or do you leave it there and let it
12 incubate for a much longer period of time.

13 Q Generally, in order to do that, you have to watch the
14 plate as it's coming up?

15 A That's correct.

16 Q I mean you can't just sit there and leave it for an hour
17 and a half and then come back later?

18 A No.

19 Q So if you're not watching it come up, then you can't make
20 these determinations essentially till it's too late?

21 A Right. The procedure that I would use is after about 25
22 to 30 minutes, I look at it to see if there's some
23 activity. If there's not, I would then -- I'd look at it
24 very closely, and if I didn't see anything, then I would
25 assume that either something's wrong, either something
26 has gone wrong and I need to put a new ~~reaction~~ on, then

Reactant 3

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1 I'd pull the overlay and put a new one on.

2 Q If you wait after an hour and a half, two hours, whenever
3 it is you're going to actually read the plate, and at that
4 point in time you determine that everything is too faint,
5 then you could at that point in time either let it go
6 longer or try another fresh G6PD plate -- stain?

7 A A fresh overlay; right, but I think at that point you
8 run the risk that any activity that you've already got
9 coming up there will be lost, because when you take that
10 overlay off, some of that reaction is in the overlay,
11 and you throw it away.

12 Q If you have a strong and readable ESD which you do first,
13 then -- result and a weak or non-existent PGM result, is
14 that -- does that tell you you have a G6PD problem?

15 MR. KOCHIS: I'm going to object. It's compound.
16 I think there's a big difference between a weak PGM result
17 and a non-existent PGM result.

18 THE COURT: Well, let's let him explain it, though.
19 I will permit the question.

20 THE WITNESS: That's one indication. G6PD is the
21 liquid enzyme, which is a co-enzyme, which is one of the
22 first things to go, so it might indicate that you have a
23 problem there, but you'd have to look at the overall plate
24 and see exactly what the thing looks like.

25 Q BY MR. NEGUS: If you have -- well, for example, in --
26 samples that come from like autopsies, vaginal samples,

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6 Q So if you're getting a lot of activity from your autopsy
7 samples or some activity from your autopsy samples,
8 rather than a lot, and not much activity from your
9 standard or anything else, would that be indicative of
10 a degrading G6PD?

12 Q At that point in time, if that's what you have after an
13 hour and a half, is there anything lost by taking off
14 the one stain and attempting to get something from
15 another?

21 Q What can you do to make it better -- I mean if it's hard
22 to read, hard to photograph after an hour and a half,
23 two hours, what can you do other than taking off the
24 overlay?

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1 overnight and then try to read it the next day.

2 Normally speaking, if you're seeing some activity, it
3 will just take a little longer to get there, but it
4 will get there.

5 Q So that you're -- so that rather -- if you have problems
6 in seeing it, in photographing it, you wouldn't just let
7 it sit and forget it?

8 A No.

9 Q But you would let it go longer?

10 A Yes. That's what I would do.

11 THE COURT: But suppose it's faint, but not so faint
12 but what you can't make a good reading from the plate, and
13 yet too faint to photograph. Then what should you do?

14 THE WITNESS: I don't think there's anything you can
15 do, see, because the point at which you make your overlay --
16 well, what you could do is you could -- you could leave it
17 overnight and photograph it and read it. If you can read it
18 and you can't photograph it, well, at least you've got a
19 reading. If you feel that you need a photograph at that
20 point, what you could do, although it's very late in the day,
21 is to pull that overlay off and put another overlay on at that
22 point, see, but I think then you will have lost something,
23 and you may not -- I think it would be unlikely that you
24 would get something of a weak stain the next day that long
25 afterward. The problem is when you make the decision to
26 pull that overlay off -- and it's not easy to make that

1 decision, particularly if you're getting some activity --
2 most people, if they see some activity, will leave it. It's
3 very early on that if they see no activity at all, that's
4 the time when a decision is made to pull the overlay off
5 and put a fresh one on, because then you know there's
6 something completely wrong.

7 Q BY MR. NEGUS: With -- you're using as your example a
8 very weak stain. If you have a strong stain, that is,
9 a strong sample, which is only weak because you've --
10 you have degraded staining procedures, then a fresh
11 stain will bring that out; is that correct?

12 A I don't know that. I really don't know that.

13 Q You haven't had any experience with that?

14 A No. Normally what I've seen is that if -- if the G6PD
15 is off, it's gone off completely and you see nothing,
16 at that point you know that within a very short period
17 of time, and you don't have a problem with -- see, the
18 problem is the longer you leave this at 37 degrees, the
19 more diffusion you're going to get of the bands; so if
20 you have nothing for it to react to, it's coming up and
21 diffusing sideways to the point you're not going to see
22 anything anyway. If you leave it too long before you
23 put an overlay on, then all you're going to see is a lot
24 of diffused bands which you're not going to be able to
25 call anyway.

26 (No omissions.)

1 Q Have you ever seen Ed Blake strip his stains off of
2 PGM and --

3 A I'm sure he has. I don't recall ever seeing him do it.

4 MR. NEGUS: I have nothing further.

5

6 REDIRECT EXAMINATION

7 BY MR. KOCHIS:

8 Q Along the line where we left off, Mr. Wraxall, are you
9 saying, then, if you had problems with your -- with your
10 G6PD, you would expect to get no enzyme reaction whatso-
11 ever?

12 A Yeah. I mean, you can get -- well, it depends on, you
13 know, the status of the -- I mean, you can postulate
14 that there are samples that you've got G6PD and, say,
15 you've got a thousand units of activity, and at -- you
16 know, it gets to a point where it gets down to zero
17 units, then you're not going to get any activity at all;
18 you're not going to get any reaction. But there is a
19 potential that, you know, you may only lose half the
20 amount. Okay. You're then down to five hundred units.
21 And then theoretically at that point you're going to
22 need -- you're only going to get half the reactivity.
23 But normally that stuff is in there in excess, so that
24 there's more than enough for -- for a reaction to occur.
25 And if you see your standards reacting, then you know
26 that -- that at least there is some reaction going on.

1 The question is, you know, whether in fact the G6PD is --
2 well, it's obviously not completely degraded or else
3 you wouldn't get any result at all.

4 Q On the issue of photography, in your experience, do your
5 photographs pick up everything that you see on the
6 plate with your naked eye?

7 A No, not at all.

8 Q Have you in your experience had the occasion to make a
9 call off a plate based on what you see on the plate and
10 then, with the photograph that you have taken, be un-
11 willing to make the call from the photograph?

12 A Oh, yeah. And the reason for this is that most of us
13 are using Polaroid photographs, and that they have a
14 very high speed range of 3000 ASA, and it's very, very
15 high. Therefore, you don't get the contrast. And quite
16 often you can't get the contrast between the background
17 of the plate and the actual bands. So it is quite usual
18 to see results that you can see with the naked eye that
19 you cannot pick up with a photograph.

20 MR. KOCHIS: I don't have anything else.

21

22 RE CROSS EXAMINATION

23 BY MR. NEGUS:

24 Q When you take a Polaroid, do you compare it with your
25 plate to make sure that you have --

26 A Yeah. I mean, you don't go down, you know, but you look

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1 at it sideways. Basically what I do is I look at the
2 Polaroid to see if I've got the correct exposure. And
3 if there's a weak stain there, and I feel that I might
4 have a chance of -- of -- of obtaining that, seeing that,
5 getting that on a photograph, I might take another
6 exposure. But, generally speaking, we have the exposure
7 worked out that we know that we're going to get it fairly
8 close.

9 MR. NEGUS: Thank you.

10 MR. KOCHIS: I have nothing further.

11 THE COURT: Thank you so much.

12 Counsel, will there be further evidence on this?

13 MR. NEGUS: There is still some stuff I'd like to
14 find out from the crime lab. And there may or may -- may not.
15 I don't think so. I would like to at this point in time take
16 the opportunity, if I could, I think I have a couple of
17 stipulations with Mr. -- with Mr. Kochis.

18 THE COURT: Would you like to have a recess first?

19 MR. NEGUS: And I also was going to move to
20 introduce certain exhibits. I can make the motion to
21 introduce the exhibits right now.

22 THE COURT: Go ahead.

23 MR. NEGUS: If I can find them.

24 I would be moving to introduce all of the exhibits
25 which we have marked as H-1 through 390, with the exception
26 of H-296 which we didn't have any testimony on. Would also

24 MR. NEGUS: I think it's relevant, because it shows
25 what they went out there to take, and they stated their
26 reasons for -- for wanting to take things. And it's

1 inconsistent with some reasons, and it also goes to their
2 state of mind, which is important.

3 THE COURT: Let me -- I'm inclined to agree with you,
4 Mr. Negus. Maybe not much, but it has some bearing upon the
5 state of mind. So overruled. It will come in.

6 MR. KOCHIS: The second matter is I believe there's
7 going to be a stipulation proposed by Mr. Negus that Mr.
8 Kottmeier's going to agree to, and I am --

9 MR. NEGUS: That's -- I didn't bring that in with
10 me. I mean, I can do it in open court, or I can go get it.

11 THE COURT: Counsel, unless we have more oral
12 testimony by witnesses, I'd just as soon conclude the rest of
13 this matter in chambers. If I get into byplay with Counsel
14 or rulings, I don't think it would be good to have the media
15 pick it up.

16 MR. NEGUS: I'm easy.

17 THE COURT: Okay?

18 MR. KOCHIS: I have no objection to that.

19 THE COURT: So if there's no objection, why don't
20 you get it, Mr. Negus.

21 MR. NEGUS: Okay. Well, do you want me to be --
22 okay.

23 (Mr. Negus retrieved the document.)

24 MR. NEGUS: The stipulation would be, first, that
25 as to any exhibits mentioned or shown to Dr. Root during the
26 course of the Preliminary Hearing at the Preliminary -- that

1 were Preliminary Hearing exhibits, they would considered to
2 be part of the record of this particular motion.

3 MR. KOCHIS: So stipulated.

4 MR. NEGUS: Secondly, if Dr. Root were called to
5 testify, that he would testify that during the autopsy that
6 he performed on Peggy Ryan that he would have observed the
7 following: there are a few small splatters of dry blood on
8 the sole of the feet; there are no broad areas of smear of
9 blood on the feet; there is no evidence to suggest that the
10 subject had walked, sustaining smearing of blood pools on
11 the soles of the feet.

12 MR. KOTTMEIER: So stipulated, Your Honor.

13 THE COURT: Accepted, both of you.

14 MR. NEGUS: One additional stipulation. We're
15 getting some stuff from the crime lab. Mr. Forbush went to
16 get it right now. Mr. Kochis and I had a -- misunderstood.
17 I thought it was going to be here. He'll have it by 1:30,
18 which is additional results of testing, which we're going to
19 stipulate can be just handed to you as part of the motion.

20 MR. KOCHIS: It's additional tests that he -- Mr.
21 Gregonis is still performing on the bed sheets, the sections --
22 the 41 sections that were frozen. And he's not completely
23 done with that. And as they're done, I'll give Mr. Negus
24 the results.

25 THE COURT: How is that going to change the picture
26 on Hitch?

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26 THE COURT: All right? Okay. Any further evidence?

1 All the other exhibits will be received for purposes
2 of ruling on the Hitch motion.

3 Wish to be heard?

4 MR. NEGUS: With respect to non -- if I could
5 separate it into A-41 issues and non-A-41 issues.

6 With respect to the non-A-41 issues, I'm not going
7 to repeat the arguments that I have already made as to
8 dismissal, because they haven't changed a heck of a lot.

9 THE COURT: And I told you --

10 MR. NEGUS: I know what you told me.

11 THE COURT: -- on the record, I think, that Dr.
12 Thornton didn't improve your situation any. So the ruling
13 will remain the same, then.

14 MR. NEGUS: What I'd like to do is, however, there's
15 sanctions other than dismissal, which I think, if you overrule
16 me on dismissal, are appropriate.

17 THE COURT: I'm considering all sanctions.

18 MR. NEGUS: Okay.

19 (No omissions.)
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1 THE COURT: I'm considering all sanctions,

2 MR. NEGUS: Okay. Well, I just --

3 THE COURT: Go ahead.

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4 MR. NEGUS: I think that there are things that are --
5 that the -- that we can do in the course of jury instructions
6 on issues that the prosecution hasn't preserved. They did
7 not -- taking the easiest one first, they did not preserve
8 the hatchet. Mr. Gregonis testified that you should get
9 results off the hatchet when it was only there for a day.
10 He -- there was testimony that there is a problem with
11 Dura-Print. Mr. Gregonis said he proposed to do a test
12 which might show something else, but he never has done the
13 test. All we have done -- all -- the only evidence we have
14 at the present time is that you can't get results. There's
15 no reason for not getting results that anybody has demonstrated
16 other than that Dura-Print has a bad effect on enzymes;
17 therefore, I would submit that they -- as far as the
18 serological evidence with the hatchet is concerned, that X
19 there has been a failure to preserve that evidence for
20 testing by the defense, and they destroyed evidence.

21 That may not warrant a dismissal, but it certainly
22 warrants some sanctions with respect to serological evidence
23 that they could present as far as the hatchet. One would be
24 the best that the defense could hope for out of serological
25 testing was evidence that the hatchet didn't come from --
26 that the blood on the hatchet didn't match any of the victims.

3 I would suggest that that kind of instruction to the
4 jury should be given, because had they preserved it, that's
5 what we could have gotten. That's basically what the cases
6 have said is that if there is stuff that is not determinative
7 of guilt or innocence, but is part of a chain, which is what
8 we have in this particular case, that you have to fashion a
9 sanction to meet the actual transgression.

12 MR. NEGUS: They've wiped -- Dan did umpty-ump tests
13 on the hatchet. And the Dura-Print, or whatever it was --
14 the only evidence we have is that it's Dura-Print -- destroyed
15 that ability to test; so you can't get any results from it.
16 They are all inconclusive, and the testimony was you normally
17 wouldn't expect it to be inconclusive.

19 MR. NEGUS: With respect to Joshua, if it's all right
20 with you, there -- I have various things that -- that are
21 involved with that, but I think that that could be more
22 profitably argued when we get to the other testimony about
23 Joshua.

26 THE COURT: That's fine with me.

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1 MR. NEGUS: With respect to the -- with respect to
2 the luminol results, there's two -- at least several things
3 that haven't been properly preserved. One was the footprints
4 inside the house that came up in luminol which then could
5 have been more precisely compared with -- with other people.
6 I would submit that the sanction for that should be that the
7 footprint did not come from any investigator or -- or anybody
8 else in the house other than suspects, because that is the
9 kind of thing which could have shown, had the scene been
10 processed correctly, that there were footprints in blood of
11 people who -- of more than one suspect in the house.

12 With respect to the shower at 2991, there was many
13 different testimonies about the reaction on the shower.
14 They originally testified that all the reaction was between
15 three -- knee and shoulder at the preliminary hearing, and
16 that was introduced as prior inconsistent statements here.
17 Having found out that that's inconsistent with their theory
18 of how the blood got there, they changed their testimony, and
19 it became -- it varied. None of -- the statements were
20 basically inconsistent with one another.

21 There were several things that they could have done
22 to preserve those reactions, which they didn't; therefore,
23 they should not be allowed to testify about the luminol
24 reaction in the shower at all, I would submit, because they
25 are trying to draw an inference that -- that these patterns,
26 which they haven't preserved and describe inconsistently,

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25 So the evidence about the Pro-Ked shoe prints in the
26 house, on the spa and on the bedsheet, I think should be

1 likewise suppressed.

2 As far as reconstruction is concerned, had they
3 collected the proper samples, that then we could have
4 demonstrated that there was types of blood other than
5 Mr. Cooper's and the victims' in the house. I think that we
6 are entitled to an instruction to the effect you shall
7 conclusively assume that there is blood other than
8 Mr. Cooper's and the victims' in the house, because if they
9 properly preserved it, that's what we would have hoped out
10 of it. The rule is that you give the instruction that would
11 be what the defense could hope to get out of the evidence
12 had it been properly preserved, and just that would seem if
13 they don't preserve it, then I think we are entitled to
14 instruction that what we could have gotten out of it.

15 Now, your earlier presentation, you indicated that
16 you didn't think that was exculpatory, but I would submit
17 that it's certainly something that is going to be a bone of
18 contention in this particular lawsuit, and the prosecution
19 shouldn't have the advantage of arguing it one way when they
20 didn't preserve the evidence which could have refuted their
21 argument.

22 Similarly -- I mean I think that one should be --
23 that basically that instruction that the evidence would
24 have shown more than one assailant would be likewise applied
25 to the -- to the -- to the trace evidence.

26 Finally, with respect to reconstructions, I would be

1 very, very surprised if the prosecution didn't attempt, in
2 the course of their arguing the case and presenting their
3 evidence, to have a reconstructed version of what happened
4 based upon their -- on their analysis of the physical evidence.
5 We will be at great disadvantage in trying to disprove any
6 such reconstruction because the -- they haven't preserved
7 the evidence in a fashion that would allow that. I would
8 submit that would be a denial of due process to let them try
9 and argue or present evidence as to a reconstruction of events
10 based on the physical evidence when plainly they didn't
11 preserve the scene in a fashion which would allow -- allow
12 them to be refuted, so I think there's sanctions again there.

13 With respect to the reconstruction, you may not feel
14 that it would have been able to prove Mr. Cooper guilty, but
15 certainly they shouldn't be able to allow -- they should not
16 be allowed to -- to use the physical evidence to try and make
17 inferences to show that he's guilty when they didn't preserve
18 enough for us to refute them.

19 (No omissions.)
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1 And I would submit finally that, with
2 respect to the -- well, that I think that's the basic
3 arguments that I have with respect to the --

4 THE COURT: Non-A-41?

5 MR. NEGUS: -- non-A-41.

6 THE COURT: All right. Mr. Kochis or Mr. Kottmeier,
7 you wish to be heard?

8 MR. KOCHIS: Yes, Your Honor. But I couldn't tell
9 by your last comments if you were asking Mr. Negus to now
10 move to A-41 and talk about --

11 THE COURT: No, I wasn't. Let's go ahead with this.

12 MR. KOCHIS: I believe there's a conflict between
13 Mr. Negus' recollection of the testimony on the hatchet and
14 what the evidence at the Hitch issue showed. Mr. Gregonis
15 testified that one possible reason for an inability to
16 get electrophoretic results on the blood was that the stains
17 were on metal, the metal laid in some grass in the field,
18 that it may have laid there overnight, and that the sun beat
19 down on the hatchet, and it is in his experience that type of
20 heat was sufficient to cause potential inactivity.

21 It's our position in this case also that Mr. Gregonis
22 testified that so far the experiments he's done with blood and
23 Dura-Print does not show that Dura-Print has a negative effect
24 on serological typing of blood. It's not consistent, I
25 believe, with what Mr. Negus said.

26 In this case, the hatchet was seized. There was some

1 discussion over what would be the most valuable piece of
2 evidence. They attempted to look for prints first; they
3 looked for blood second. We got an ABO type off the blood,
4 which indicates that the stain is blood, that it's human,
5 that it's from, I believe, a type B person, which is consistent
6 with Joshua Ryen. And the fact that we don't get additional
7 electrophoretic tests which would have allowed us, for example,
8 to say almost conclusively that it is Joshua Ryen's blood,
9 we can't say that now. All we can say is it's human, it's
10 consistent with Joshua and every other person in the country
11 that has his blood type.

12 The fact that we can't pin it down any further
13 doesn't make sense to deprive us of the ability to introduce
14 the results to the jury to show that there is human blood on
15 it, that it is consistent with a portion of the population
16 that happens to be consistent with one of the victims. And I
17 do not think it would be appropriate in this case to fashion
18 a jury instruction that the blood on the hatchet did not come
19 from the victim. That's completely inconsistent with the
20 facts in this case, and I don't feel it would be an appropriate
21 sanction.

22 As to the luminol on the footprint, I assume by
23 Mr. Negus' cryptic remarks that he was referring to a shoe
24 wear impression in the Ryen home on the carpet.

25 *OK* MR. KOCHIS: That's true.

26 *giss* THE COURT: And he has had both Mr. Ogino and

reversed

1 Mr. Stockwell diagram what in their recollection the
2 impression of the shoe -- the footwear impression looked
3 like, the shoe wear impression looked like.

4 He is allowed to argue from their description that
5 it may not be consistent with the size and the pattern of the
6 investigators that were at the scene. And he can then argue,
7 he has the evidence from which to argue, "That print was
8 probably made, if you believe their experts, by someone
9 tracking through blood. It's not consistent with the
10 footwear of the investigators. It's got to be the footwear
11 of the true assailant and not my client." So we preserved
12 potentially that argument for him in that both Mr. Ogino and
13 Mr. Stockwell diagramed what the shoe wear impression looked
14 like. And in Mr. Stockwell's opinion, the trend pattern
15 was consistent, I believe, with the tread pattern of the
16 soles on his own feet. But he felt that there was some
17 discrepancy in the size, potential size of the shoe.

18 As to the luminol in the shower at the Lease house,
19 the diagram is before the Court where Mr. Ogino noted on the
20 diagram of the house the areas in which he got a positive
21 luminol reaction. That included which walls of the shower.
22 Both Mr. Ogino and Mr. Stockwell talked about the problems
23 in photographing patterns, they diagramed to the best of their
24 recollection what the patterns --

25 THE COURT: Excuse me just a moment.

26 If there's anybody out in the courtroom, there will

1 be nothing further in open court on this case, I believe,
2 today.

3 THE CLERK: Okay.

4 MR. KOCHIS: He diagramed the areas on the shower
5 walls in which the luminol appeared. And it's the People's
6 position that because the photographs didn't come out
7 perfectly or because they're not able to put in each and
8 every spot on the wall that may have reacted with luminol,
9 that the appropriate sanction would not be simply to suppress
10 all the luminol results in that house. If that were the
11 ruling, then in every case in which the police officers could
12 not completely reconstruct every portion of a wall and every
13 pattern which reacted with luminol, it would never be admissible.

14 The -- and as the Court is aware, Mr. Negus has
15 brought out a number of things that are consistent with the
16 reaction not being consistent with luminol: microorganisms,
17 metals. He is still able to argue that a number of things
18 could have triggered that luminol and that it's not consistent
19 with someone with blood washing themselves off in a shower.

20 As to the rope, that was one of the two items inside
21 the Ryen -- excuse me, inside the Lease house where we have
22 alleged that Mr. Cooper stayed. We received ABO blood types
23 off the rope, and that type is consistent with coming from a
24 large percentage of the population. Two of those people happen
25 to be Doug Ryen and Kevin Cooper. And Mr. Negus makes much
26 of the fact that it was placed in a plastic bag. But

26 The footprint on the sheet -- the sheet is still

1 there. The -- the footprint is still on the sheet. Some of
2 the photographs of the scene when they're enlarged show the
3 footprint on the sheet. And it's our position that, by saving
4 the sheet and by photographing the sheet, we have preserved the
5 diamond shape pattern and blood on the sheet itself.

6 As to the blood in the Ryen home, if you accept Mr.
7 Negus' argument that the jury should specifically be instructed
8 that there is blood inside the house other than an assailant
9 and victims', what the Court would rule is that in any scene
10 in which you didn't type every drop of blood, because to
11 conclusively exclude that possibility you have to type every
12 drop of blood, in every scene in which the officers did not
13 type every drop of blood, the instruction would be given to
14 the jury that among the samples that weren't typed are blood
15 samples that belong to persons other than the accused and the
16 victims in this case. And that does not seem rational.

17 The officers seized all the fingerprints in the
18 house. Their fingerprints -- none of the fingerprints from
19 the house belong to Mr. Cooper. Not all the fingerprints
20 in the house have been attributed to a known person, victim
21 or friend of the family. Mr. Negus still has that argument
22 to make to the jury in terms of a reconstruction, i.e.,
23 "Ladies and Gentlemen, there are prints that the Prosecution
24 can't account for. And the reason for that is that they
25 belong to the real assailants."

26 Turning a moment to A-41, just as it pertains to

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1 Mr. Negus' argument, if you accept the testimony of his
2 expert --

3 THE COURT: Don't talk about A-41 for a minute.

4 MR. KOCHIS: Well, because -- I have to.

5 THE COURT: Do you?

6 MR. KOCHIS: If you accept the testimony of Mr. Blake
7 that Mr. Cooper's EAP type is an RB, and if the Prosecution
8 is stuck with Mr. Gregonis saying the EAP type of A-41 is a
9 B, then, lo and behold, the Prosecution on behalf of Mr.
10 Negus has preserved a sample of blood that, if you accept his
11 testimony and the state of the evidence at this point of
12 A-41 did not come from Mr. Cooper, it's not --

13 THE COURT: I don't know why you're talking about
14 A-41 for a minute. I see no reason why you can't pass that.
15 Let's go back to that.

16 MR. KOCHIS: Because, Judge, it's evidence I'm
17 sure Mr. Negus is going to argue to a jury at some day, that it
18 did not come from the victims, it could not have, and it didn't
19 come from Mr. Cooper, and then that's the blood that belongs
20 to --

21 THE COURT: Mr. Kochis, I'm aware of that possibility,
22 as you are. I'll consider it separately.

23 MR. KOCHIS: Okay. Then I will pass that.

24 As to the trace, again, Dr. Thornton has the trace.
25 He hasn't looked at all the trace. It seems premature at
26 this point for him to have an opinion as to what he can do and

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1 what he can't do. And, again, along the lines of the blood,
2 what Mr. Negus is asking the Court to do is unless we
3 immediately take every fiber off the carpet, every hair off
4 the carpet, measure it, then a jury instruction should be
5 given that there was trace evidence at the scene that could
6 have shown that there were assailants other than Mr. Cooper,
7 and that wasn't preserved. And in this case, it was vacuumed.
8 Those were taken. And his expert is looking at all of that.
9 That possibility is still there.

10 In terms of a reconstruction, I think it was very
11 obvious to the Court that Dr. Thornton came into court and
12 said you could essentially, in a reconstruction, potentially
13 do a number of things: position of victim, position of
14 assailant, handedness of the assailant, possibly the number
15 of assailants, and perhaps sequence. I think it's obvious
16 to the Court that he can almost tell you from start to finish
17 the position of Doug Ryen, Josh, Jessica and Chris Hughes.
18 He attempts to have some further opinions on Peg Ryen, so it
19 appears that he's going to be able to answer that question.

20 He is also going to have an opinion on handedness;
21 he's also going to have an opinion on sequence; he's also
22 going to have an opinion on position of assailants; he is
23 then going to have some opinion on number of assailants.
24 So it appears the three categories reconstruction falls into
25 for Thornton is, one, questions he's already answered; two,
26 questions he will answer but he didn't want to share with us

1 the information on the witness stand; three, those questions
2 that he admits even in an ideal world, under the best of
3 circumstances, couldn't have been answered. And I'm confident
4 in this case that the Defense is going to have a reconstruction.
5 And it would seem inappropriate to preclude the People from
6 making any comments in terms of a reconstruction on physical
7 evidence.

8 (No omissions.)
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1 THE COURT: Conclude, Mr. Negus.

2 MR. NEGUS: On the evidence about the hatchet,
3 Mr. -- Dr. Sensabaugh testified as to the effect of Dura-Print
4 on the -- on blood and at the Kelly-Frye hearing. That was
5 the testimony I was referring to. Mr. Gregonis didn't know;
6 so there's no conflict in the evidence, just no -- Mr. Gregonis
7 was ignorant. Mr. Gregonis did not say that he knew that
8 the hatchet in the sun could cause a degradation. He
9 speculated that it might. He said he was going to perform
10 an experiment to see whether it did, but he has not yet, to
11 my knowledge, performed the experiment. Speculation that it
12 might, without performing the experiment by the prosecution,
13 hardly seems of evidence of any weight to try and counteract
14 the only evidence on the issue.

15 With respect to the rope, the same thing again.
16 There -- Mr. Gregonis acknowledged that there was nowhere in
17 the literature any evidence that he was aware of that nylon
18 had any effect on blood typing, that he used nylon -- that
19 you can type off nylon panties, for example, without too much
20 problem. He wanted to do some future experiments to try and
21 prove that. He hadn't done them yet and, to my knowledge,
22 he still hasn't done them yet, so I would -- Mr. Kochis is
23 again trying to -- to -- to take speculation which has not
24 yet been proven and do that in the evidence. The only
25 testimony was that you shouldn't put things in plastic bags.
26 It has the effect that was had. No other explanation has been

1 given other than the improper handling; so I would submit on
2 the state of the evidence that the -- that that particular
3 testimony should be suppressed.

4 There's basically a bunch of different -- there's
5 different classifications of evidence that we have. The
6 hatchet, the rope, certain other evidence has to do with
7 evidence which the prosecution wants to introduce in a partial
8 form without -- without preserving enough to -- to do -- to
9 get definitive results. That is, they got -- they got a
10 little bit, but they didn't preserve it very well, so we
11 can't -- we can't test it any further. That type of
12 evidence -- and there's more than just the examples I gave,
13 but, basically, that type of evidence I would submit should
14 be suppressed.

15 There's other kinds of evidence, the trace evidence,
16 the footprint evidence where what the prosecution has done
17 is by allowing the 72-plus spectators to stream through the
18 house in violation of good police procedure, they have given
19 themselves an argument that, well, I mean we don't know how
20 many people were in that house, I mean maybe that footprint
21 in blood came from somebody else.

22 Same with the trace evidence. If Dr. Thornton finds
23 hair evidence, we don't know how many people were in that
24 house, That could have come from anybody any time. They
25 didn't use proper police procedures, so they are trying to
26 preclude any -- by that, they can argue to try and preclude

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1 any significance of -- of trace evidence which might help
2 the defense. My argument is that the same thing should be
3 applied back to them. By failing to preserve the crime scene,
4 they did not let us analyze correctly the significance of
5 the -- for example, the Pro-Ked footprints. There's no way
6 of knowing who was in that crime scene. We know some of the
7 people were there, and some of those people we know what kind
8 of shoes they are, and some of them we don't, because they
9 don't remember. There's no way of knowing who had Pro-Keds
10 and who didn't, who was allowed access to that crime scene.
11 Because they failed to preserve the scene in such a way that
12 makes analysis of the trace evidence and impression evidence
13 meaningful, they should not be allowed to have the benefit
14 of those parts of it which they selected out which they think
15 helps them.

16 I would be very surprised if Dr. Thornton can answer
17 all the questions that he said could be answered from the
18 crime scene when he testifies,

19 Mr. Kochis made in his -- when Dr. Thornton was
20 testifying, made reference to, well, Dr. Thornton will say
21 now that he can't do anything, but he's going to come back
22 at trial and say the opposite. I would submit that if that
23 is likely to be the case, I mean, well, that's an absurd
24 scenario. You have already indicated before we brought
25 Dr. Thornton down what you think about that particular type
26 of evidence; therefore, the only -- the only reason for

1 bringing him down is to preserve an issue on appeal, You're
2 not allowed to take appeals of Hitch motions prior to the end
3 of the case.

4 If Dr. Thornton testifies to the contrary as to what
5 he's already said at trial, I'm sure that an Appellate Court
6 would have no difficulty whatsoever in saying that any error
7 was obviously harmless because there he came back and he was
8 able to do the reconstruction; so I think that it's -- it's --
9 it's silly to say that, oh, Dr. Thornton's going to come back
10 with a complete reconstruction when -- when it comes down to
11 the -- when it comes down to trial, If he were going to do
12 that, I wouldn't have brought him down and set him up for
13 impeachment with Mr. Kochis coming in to say, oh, he testified
14 before he can't do it. That just I think would be tactically
15 silly and wouldn't get me anywhere. And that, I would submit,
16 is not a likely scenario.

17 Obviously, they do have their theories as to
18 reconstruction. They are the prosecution, and, obviously,
19 they have crippled the defense in trying to -- to reduce --
20 to counter it.

21 Dr. Thornton's testimony, you know, getting back to
22 it, was that the best way to answer the question of who did
23 it was through being able to do the kind of reconstruction
24 that we have. We, in a case like this -- if you don't know
25 the number of assailants, then there's no way that you can
26 assess various degrees of culpability among various assailants

3 And, finally, Mr. Kochis always tries to get the
4 testimony to be if you -- that the only way to have satisfied
5 the due process standards, other than what they did, was to
6 have typed every drop of blood in the house. That's just
7 not what the state of the evidence is. The state of the
8 evidence is that they did -- that they fell abysmally below
9 standard police practices, even, in many cases, their own
10 standards, and the sanctions should be applied not because
11 they did not type every drop of blood. I think it's an open
12 question whether they should have preserved every drop of
13 blood or not. They certainly didn't have to type everything
14 that they preserved, but whether they had to preserve every-
15 thing or not, they certainly had to preserve representative
16 samples in sufficient quantity that you could do meaningful
17 analysis. Even Mr. Gregonis, their own serologist, says
18 that's approximately a hundred eighty-five more samples than
19 excuse me -- a hundred fifty more samples than they preserved,
20 so I would -- I would submit that they just -- that Mr. Kochis'

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1 reduction to absurdity argument just doesn't make any sense.

2 THE COURT: Have you concluded?

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3 MR. NEGUS: Yep.

4 THE COURT: I have never had a case where counsel
5 has, and each of you have, worked towards appellate review
6 more than this case. I think you're both excellent attorneys
7 all three of you, and you're making a record that won't end,
8 and we continue to do this, and that's fine. I'm not sure
9 that I am nearly so much assisting you in making a record.
10 I don't articulate many of the things that I could by way of
11 explanation. Generally, I think over the years, whenever I
12 make a ruling on a contested or disputed issue, I try to
13 explain to counsel some reason for my ruling, other than
14 some judges who say the less you say, the better off on
15 appellate review.

16 In the additional evidence that we've had since the
17 Court made a tentative decision, I haven't simply found
18 anything of significance to change the tentative conclusions
19 that I previously reached. I want you to understand, however,
20 that I -- first, I took -- I'm up to about notepad ten now.
21 This is nine, and I've got others, I have taken notes. I
22 have re-read testimony. I spent many hours. We have had
23 a daily transcript. I have referred to it in part in
24 analyzing the Hitch issues. I got one whole notepad entitled
25 "Hitch Points and Authorities," wherein I've taken your
26 various points and authorities and the cases that you at

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1 various times cited and looked up all of those cases and
2 made my own notes on those. I -- after doing that and
3 studying it -- I also have another notepad entitled "Hitch
4 Analysis" wherein I took, before I ever made that tentative
5 decision, each of these various areas and tried to consider
6 whether or not there's been a violation of Hitch. And just
7 looking down the notes that I made some long time ago, I
8 listed, one, hatchet; two, three shoe prints, Pro-Keds, from
9 Taylor to Cooper and so forth; three, A-41 and all the various
10 matters connected with that, a lot of it, four, carpet
11 unrestricted traffic, failure to timely collect trace
12 evidence, failure to preserve serological evidence along
13 with furniture and furnishings and walls and ID loft,
14 contamination without paper rolling, mildew, plastic bags;
15 five, failure to collect adequate samples (a) to find blood
16 of other attackers (b) to permit reconstruction; six, pillow-
17 case; seven, failure of Stockwell to record precise source
18 of samples; eight, bedding not separately wrapped, carpet;
19 nine, oddball blood not collected, drop near light, hall
20 wall, drop inside refrigerator; ten, the thundering herd;
21 eleven, destruction of notes on Josh Cooper (sic), with
22 sub-topics; twelve, failure to properly photograph electro-
23 phoretic runs, and then there's sub-topics under some of
24 those.

(No omissions.)

1 We went into each of those and went through and
2 analyzed them separately. And rightly or wrongly, I concluded
3 that there was not a Hitch violation on any except the
4 handling of the A-41 drop. And in doing that, coming to that
5 conclusion, I found no Hitch violation, no sanctions. So we
6 have in effect argued that twice.

7 There's no sanction that I will impose by way of
8 jury instructions, suppression of evidence or other types
9 of sanctions. And I'm aware of the -- the various ways you
10 fashioned them to fit the circumstances with reference to
11 any of that.

12 So your motion under the so-called Hitch class is
13 denied on all non-A-41 bits of evidence.

14 Do you wish to pursue a -- a final decision with
15 reference to A-41, considering Dr. Thornton's analysis? Do
16 you wish any suppression-of sanction there?

17 MR. NEGUS: Well, okay. With respect to A-41, I
18 mean, the -- it would appear to me that the -- there's two --
19 well, there's three sanctions that have been mentioned. Three
20 sanctions; one sanction that I think -- that -- one I'm not
21 sure whether you did, but certainly Mr. Kochis has been
22 mentioning it, and two that I can think of.

23 The one that Mr. Kochis has been talking about is
24 suppressing all those samples where all those tests that were
25 done where Mr. Gregonis made a mistake or didn't take proper
26 photographs or something of that nature. That to me is a

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20 In that situation, it seems to me that the proper
21 sanction is one of two others -- one of two. Either you make
22 a -- you suppress A-41, don't allow them to introduce evidence
23 of it whatsoever. That's one possible sanction. And,
24 generally, when you fail to preserve something, I think that's
25 the general sanction that people -- that people -- that people
26 use. It's certainly the one that Hitch fashioned. That is,

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1 you don't dismiss the case, but you do suppress the breath
2 test.

3 Well, you don't dismiss the case, but you do suppress
4 the serological evidence concerning A-41. You suppress A-41.

5 The other one that comes up in the facts of this
6 particular case is that one of the things that we're precluded
7 from doing -- well, one of the things that I suspect that Mr.
8 Kochis will want to argue is that his own serologist is wrong
9 and that he made a mistake. And I would submit that that's
10 where -- that People vs. Gonzales case, you know, about the
11 mot gulty that we discussed earlier is very appropriate.

12 THE COURT: Refresh my memory again.

13 MR. NEGUS: That was the robbery where the non-
14 English speaking victim wrote down the word "guilty" --

15 THE COURT: Oh, yes.

16 MR. NEGUS: -- off a tattoo. The defendant had a
17 tattoo --

18 THE COURT: Yes; I recall it.

19 MR. NEGUS: -- "mot gulty." They didn't match.
20 The sanction that was fashioned was that the jury was
21 instructed they would conclusively presume that the testimony
22 of the -- of the victim was correct; it said "guilty."

23 I would submit that an alternate sanction in this
24 particular case, the only one that makes any particular sense,
25 is that, with respect to the EAP results, that the sanction
26 should be that there be a conclusive finding that Mr. Gregonis

1 is right as to A-41.

2 THE COURT: And that would be the only sanction on
3 A-41?

4 MR. NEGUS: Well, I would live with that.

5 THE COURT: Okay. That's really all you're asking
6 for, then, is that correct, on A-41?—

7 MR. NEGUS: Well, I -- I -- my first -- my first
8 line of thinking is that A-41 should just be suppressed in
9 toto. If you don't do that, then I would suggest that there
10 be a conclusive finding that Mr. Gregonis is right as to his
11 EAP results on A-41.

12 THE COURT: All right. Mr. Kochis.

13 MR. KOCHIS: Let me first articulate why the last
14 sanction would certainly be a travesty in this case if we
15 apply Hitch at all. I don't think there's any conflict in
16 the evidence -- well, first of all, the situation Mr. Negus
17 is in now is he has an expert who will say, "If Mr. Gregonis
18 is right, that blood could not have come from my client, it's
19 physically impossible, and it's physically impossible from
20 coming from any of the victims, it has to come from a seventh
21 person."

22 THE COURT: To do that, we would have to use the
23 EAP result?

24 MR. KOCHIS: Yes. Here's how Gonzales certainly
25 is contrary to this and Hitch. I don't think there's any
26 conflict in the evidence but that on August 15th Mr. Blake

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1 knew what Mr. Cooper's EAP type was. He had run four
2 separate -- three separate tests on Mr. Cooper, the multi-
3 system, that he ran a single system where he focused in only
4 on Mr. Cooper's EAP. He was as confident as he is ever going
5 to be that in his opinion Mr. Cooper was an RB. He also
6 testified that prior to September of 1983 he knew what Mr.
7 Gregonis thought Mr. Cooper was, that he was a B, and he
8 knew what Mr. Gregonis thought the EAP type of A-41 was, that
9 it was a B.

10 So you have the Defense showing up in Gonzales and
11 seeing the piece of paper with the writing on it. They then
12 come down to San Bernardino County, sit with their hands in
13 their pockets while the tests are run and are aware through
14 the testimony of Mr. Gregonis that when those tests are done
15 there's going to be nothing left of that sample, and that if
16 there is a potential conflict that needs to be resolved, that
17 door is going to be closed forever. It is as if in Gonzales
18 they showed up, the investigator for the police, the investigator
19 for the Defense lawyer, and the investigator for the police
20 said, "There's this piece of paper with a tattoo on it," and
21 the Defense investigators look at it, realizes what the
22 tattoo is on his client in the jail, realizes they're the
23 same, and says, "Why don't we throw that away? We really
24 don't need that."

25 That is really what happened in this case by Mr.
26 Blake's silence. He sat there while we moved to other tests,

1 while the sample was exhausted in his presence. And that
2 question may never be resolved.


3 The case is also distinguishable from Gonzales and
4 from Hitch in that three of the tests are run with the
5 Defense expert standing there. We did everything we could
6 to comply with Hitch by having a Defense expert there who
7 would watch the test, who could see that they were conducted
8 properly, to make sure they were conducted in a proper fashion.
9 Some of the tests on that sample of blood, the ABO, the
10 presumptive test and the species test, cannot be photographed.

11 We have a small sample of blood. We don't know
12 whether it's important or not until we start testing it.
13 Mr. Cooper did not give us the benefit of his capture until
14 months afterwards. We had to start some investigation, and
15 they did it with those three tests that you can't photograph.
16 Many of the tests that were photographed, there's no conflict
17 in the evidence but that you can make the call from the
18 picture. The ADA, the AKA (sic), the peptidase A, perhaps the
19 EAP. Those are all calls that you can make from the existing
20 photograph. Dr. Blake didn't take the stand and say, "I can't
21 tell you from that what those types are."

22 There's no conflict but that we have preserved
23 those through the proper procedures of documenting with
24 photographs. I agree you can't call the CA II from a picture.

25 And I'll rest on my earlier comments about Mr.
26 Gregonis talking about the unique problems in photographing

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1 that particular enzyme. Mr. Negus has made much about the
2 fact that Mr. Gregonis may have been less than perfect in
3 not checking his G6PD and that, therefore, there's a problem
4 with the first two runs. But G6PD has no part or no play
5 whatsoever in an EsD run, the first run to come up on the
6 photo. And certainly, even if you accept Mr. Negus' argument
7 that there was some negligence on Mr. Gregonis' part, it
8 would have nothing to do with the EsD. 

9 In this case, you're dealing with a situation, I
10 believe, where all the experts agree that you can't fuel
11 inject new sample onto the plate when that first plate comes
12 up, that you can see things on the plate you can't see on the
13 photograph when you can look at it three dimensionally.
14 You're then stuck with perhaps three alternatives: one,
15 additional pictures; two, letting it come up longer; three,
16 trying to move the gel. And this is only on the PGM. And
17 when you take the gel off, as Mr. Gregonis and Mr. Wraxall
18 have testified to, you run the risk of removing some of the
19 sample which is diffused into the gel. And that's going to
20 increase the probability of you getting -- being worse off
21 than you were before.

22 Mr. Gregonis has testified that he did not feel he
23 had a G6PD problem at the time, that he was using two to three
24 times the recommended sample as a safeguard, they were going
25 through G6PD every other week, that it was relatively fresh.
26 And it's our position that he did everything he could do to
27 preserve all of those results.

1 MR. KOCHIS: It is our position that to give the
2 jury, in effect, a directed verdict instruction on A-41
3 would be a complete travesty. Mr. Negus can make that
4 argument through Dr. Blake, through Mr. Wraxall, through
5 Mr. Sensabaugh that, well, what you're saying, Doctor, is
6 Mr. Cooper could not have deposited that drop of blood on the
7 wall if in fact Mr. Gregonis was correct. That has to be
8 the blood from another person? Yes, that's my opinion.

9 That argument has been preserved. The problem I
10 have with Mr. Negus' specific instruction is his expert's
11 standing there -- the defense is aware of the potential
12 problem, and they sit back, and now they want it both ways.
13 They want to profit from our lack of knowledge of the
14 conflict at the time and get the results and an instruction.
15 So it is our position that A-41 should not be suppressed,
16 nor should there be a directed verdict as to that drop of
17 blood, which would be tantamount to telling the jury that
18 it's the blood from a seventh person.

19 MR. NEGUS: Mr. Kochis tries to put the blame on the
20 defense for their screw-ups, and I just don't think that's
21 right. First off, they tested that drop of blood twice, not
22 once, but twice, one of them before Mr. Cooper was captured,
23 one of them after Mr. Cooper was captured. They didn't invite
24 us to be there at the EAP. What are we supposed to do? If
25 we re-run it for EAP again for the third time, then we can't
26 run it for transferrin. We can't run it for haptoglobin.

1 What he wants us to do is to give up a test where they've
2 already run it twice to do -- to do a test where they've
3 already run it twice where -- and to not get the benefit of
4 the two additional tests that could have been done,

5 The testimony was that Mr. Gregonis decided to do
6 those two additional tests.

7 You have seen in this particular case the prosecution's
8 the one that calls the tests. We are invited to be there as
9 an observer. That's what the testimony was, to be as an
10 observer, and Dr. Blake came down to help with the test.
11 Mr. Gregonis testified that he decided what tests to do.

12 Mr. Kochis wants us to essentially be in a position
13 where we have to tell him, no, you can't do the test that
14 you want to do, you should do a test that you've already
15 done twice, one of which when you could have invited us to
16 be there and watched, and then if -- all they had to do was
17 to invite Dr. Blake to be there at the first -- at the first
18 EAP test and they wouldn't have had any problem. He could
19 have told from being there when -- on August 2 whether or
20 not A-41 was a B or an RB by seeing the plate, which is the
21 best evidence. By going ahead and analyzing it without doing
22 that, they deprived us of that particular opportunity. Now
23 they want us to have to give up the transferrin and the
24 haptoglobin in order to do that. That's just not what Hitch
25 says you have to do. There's nothing in Hitch that says you
26 have -- that we have to pick -- we have to tell the prosecution

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1 that you guys can't pick the test that you want to do, you
2 have to do it our way and protest in order -- in order to
3 get -- in order to get sanctions. They decided the tests
4 that were going to be done on A-41. They decided which ones
5 we were going to be present at and which ones we weren't
6 going to be present at. You can't blame that on us,

7 They also at any time they had the photographs and
8 the blood of Mr. Cooper. Mr. Cooper's blood's been passed
9 around, my understanding, all over creation. They could have
10 taken that to an independent serologist if they had any doubt
11 about it and had them -- had somebody else look at pictures
12 of Mr. Cooper. It's -- you know, they're trying to put on
13 us a duty that before they do two tests that they've decided
14 to do, we have to tell them stuff that we know that they
15 don't, and there's just no duty on the part of the defense
16 to tell the prosecution stuff that they don't know. And when
17 they decide the test, when they decided which ones we're
18 going to be at, which ones we're not, his whole argument, I
19 submit, is nonsense, and there's certainly no support in the
20 cases.

21 The EsD photographs, Dan Gregonis himself testified
22 there were problems with them. The problem was that he had
23 a 2-1 standard which, if you looked at the photograph, was
24 clearly a 1. That told him, as far as the EsD is concerned,
25 that there was something wrong with his photographs. There
26 was something wrong with the PGM photographs. There was

1 maybe or maybe not, I suspect now that the prosecution is
2 going to argue there's something wrong with the EAP photo-
3 graphs, or they're going to attempt to, but the upshot is
4 that the defense did not waste any sample. We participated --
5 in fact, Dr. Blake helped Dan to get results off of the two
6 tests which had the highest discriminating power of all the
7 unknown tests that could have been done. Both the haptoglobin
8 and the transferrin were very informative -- were very
9 informative tests.

10 So if you don't suppress the whole blood, what I'm
11 saying is that they should not be able to go back and argue
12 that because Dan flubbed the first test and because he didn't
13 invite the defense to be present at the second test, well,
14 now it's really not what he says it was.

15 If he had allowed Dr. Blake to be there at that first
16 test, there would be no dispute, but he didn't, and that's
17 the problem.

18 MR. KOCHIS: May I make one or two comments? I'm
19 sure he's going to respond, but I would like to make -- and
20 they're going to be short.

21 THE COURT: All right.

22 MR. KOCHIS: Mr. Negus says there's no case authority.
23 I neglected to mention Nation in which the Court held that
24 the prosecution didn't preserve the semen sample but the
25 defendant could hardly complain because he was the one that
26 got possession of it, and I think the testimony in this case

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1 is Mr. Blake is actually there working with Mr. Gregonis
2 on the last part of A-41, and he's involved with that
3 sample. He's not in another room reading monitors or
4 something. He's there actually touching it, actually working
5 with it.

6 Mr. Negus makes much out of the fact that we were
7 choosing the test, and everybody would have to speculate as
8 to what would happen if he would have informed us of the
9 potential conflict in August, but if the Court recalls, all
10 the -- what seemed like endless argument at UU where we had
11 small samples, that wasn't the prosecution's position. The
12 prosecution's position on UU where we had small samples is
13 we simply didn't want to be the last people to know. If
14 Mr. Negus wanted to choose the test, he could, provided our
15 expert was there to see what was being tested for, We didn't
16 want to be the last people to know.

17 And Mr. Negus has the argument with the test results
18 that he can make to the jury that that sample is not consis-
19 tent with coming from his client. It's hard to see how he's
20 prejudiced in not informing us of taking the one test that
21 could have completely excluded his client or the reason he
22 didn't tell us was it also could have included his client
23 and nailed him to the wall, so he made a tactical decision not
24 to tell us, but now he has results which exclude his client
25 from being the donor of that drop of blood, and he can argue
26 that to the jury.

1 THE COURT: Let's conclude, please,

2 MR. NEGUS: The problem with Mr. Kochis' argument is
3 two tests that they -- that they did perform also could have
4 completely excluded Mr. Cooper and had the highest probability
5 of doing so. The -- the Nation argument I -- I -- I submit
6 is -- is phony. We did not have possession. Dr. Blake was
7 not going to be allowed to do with that sample whatever he
8 wished to do, and my understanding of the prosecution's
9 position is on UU at the present time, and it has been,
10 because I certainly -- is that we have not been allowed to
11 choose the test. They chose the tests that were to be done,
12 and I was informed by Mr. Kochis that, for example, on the
13 UU, that he was no longer willing to let us choose the test;
14 that he was going to do it, and they have in fact done it,
15 and the tests that they have performed were not the tests
16 that I would have performed, and I have told them that --
17 that haptoglobin I thought was more informative, but they
18 have gone ahead and done transferrin. I don't think you can
19 the prosecution -- I think that there -- that it's -- it's
20 phony of them to say that -- that we could have done whatever
21 we wanted with it. We just let them watch.

22 THE COURT: You referred, Mr. Negus, to the fact that
23 there's nothing in Hitch, in the Hitch line of cases, that
24 requires a certain burden being put on you, and I wrote down
25 "What's in Hitch?" I don't really know what a so-called Hitch
26 rule is. There is not a case like this. There is no real

1 precedent along the Hitch line of cases for this type of
2 factual set of circumstances. Perhaps Mr. Gregonis is not
3 the most capable individual around as a criminalist, but I
4 indicated before that I do not find any bad faith, I do not
5 find any conspiracy to frame or anything at all of that
6 nature. I find that Mr. Gregonis was in good faith perhaps
7 mistaken, but in good faith.

8 I now find that things aren't so clear at all with
9 reference to A-41 as they were before since we received
10 further evidence from Gregonis, Thornton and Wraxall,
11 particularly; that there were many judgment calls that could
12 have been made at the time with reference to time and possible
13 corrective actions. It seems entirely illogical to me to
14 suppress all of the A-41 when there's certainly no problem
15 with reference to some of the tests, didn't require photo-
16 graphs. You've got photographs, readable photographs. Many
17 of the runs are perfectly okay, and they have preserved the
18 evidence.

19 (No omissions,)
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1 I think in fact if I suppressed all reference from the
2 trial to A-41 that I would perhaps be committing reversible
3 error in spite of your urging, perhaps, in view of the way
4 the evidence has come down the last few days now, to the
5 effect that now part of the disputed analysis will strongly
6 assist the Defense.

7 You know, the cases indicate that we should look at
8 all of the circumstances not only in formulating appropriate
9 sanctions but also in determining whether or not there has
10 been a violation. The basic issue of Hitch, or, the basic
11 rule is has there been a denial of due process, has the
12 Prosecution been unfair to the Defense. Now, looking at all
13 of the evidence in the case, I don't think so.

14 I will not find a violation of Hitch with reference
15 to A-41, no sanctions will be applied with reference to A-41.
16 Each side of -- you can present your best shots at the time
17 of trial to the jury on credibility and whatever A-41 shows.
18 And I feel comfortable with that ruling now.

19 Anything further?

20 We're past the noon period. I'd like to talk
21 to Counsel. I'd like to -- I'd like to give you a -- we're
22 coming back with reference to more blood on Monday?

23 MR. KOCHIS: Yes.

24 MR. NEGUS: Yes.

25 MR. KOCHIS: Your Honor, if we're not coming back
26 this afternoon, there is something that I -- I would like to

1 mention at this point. We can do it at 1:30 if we're coming
2 back.

3 MR. NEGUS: I would just as soon go ahead, if there's
4 not a problem for the staff, but it -- or the Court, but --

5 THE COURT: I'm getting negative nods here. I'm
6 willing to proceed on if you want for a while yet.

7 MR. KOCHIS: A couple of things that maybe I've
8 taken for granted is, for example, on the -- on the 1538.5
9 motion, we spent, I think, three weeks taking testimony and
10 arguing that motion, and we resolved it. And I'm taking it
11 for granted when I assume that the Court decided that issue
12 and we would not relitigate that issue in front of a jury.

13 THE COURT: What were you talking about, now?
14 Another motion to suppress before a jury?

15 MR. KOCHIS: I -- what I'm saying is I would be
16 bringing a motion perhaps at this time if there's not an
17 understanding to preclude us from relitigating the 1538.5
18 in front of a jury in that there's not a jury present, it's
19 a question that this Court decides.

20 THE COURT: Do you have any dispute with that?

21 MR. NEGUS: I'm not sure what he means. I mean,
22 do you mean am I going to be claiming that the jury shouldn't
23 claim -- shouldn't consider evidence because the search warrants
24 were -- were invalid? I'm not -- I don't think I --

25 MR. KOCHIS: No. I'm saying I -- I would assume
26 we're not going line by line with a jury through -- like, for

1 example, I would not intend to introduce search warrants in
2 this case. We had a lengthy hearing on search warrants on
3 the facts and where they came from and who may have --

4 THE COURT: Counsel, he's has had two shots at that.
5 I don't see any reason to go through it again. From my
6 understanding --

7 MR. KOCHIS: I think that's what the law is, but I
8 want to be sure I'm not taking something for granted.

9 THE COURT: You're not as far as I'm concerned, unless
10 Mr. Negus speaks now, or forever hold your peace.

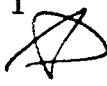
11 MR. NEGUS: I think he's leading up -- I think this
12 is sort of a -- this is a subtle way of getting into something
13 -- into something else where I think we do have perhaps a
14 dispute.

15 MR. KOCHIS: Let me go right then to the issue at
16 hand. By analogy, my argument would be we spent five weeks,
17 perhaps, in Municipal Court, and we spent what now has been
18 the longest motion I have ever participated in in Superior
19 Court, on the Hitch issue. I believe the Newsome case
20 indicates that in a Hitch decision a Judge decides the factual
21 issues and makes a legal ruling, and that whether or not
22 there's a Hitch violation is not a question for a jury, it's
23 a question for a Judge, to be handled in a pre-trial fashion,
24 as was done in Hitch.

25 THE COURT: You dispute that, Mr. Negus?

26 MR. NEGUS: Well, I --

1 THE COURT: I'm not about to let the jurors determine
2 admissibility of evidence and sanctions that will be applied.


3 MR. NEGUS: I tend to agree. I think what Mr. Kochis
4 is probably leading up to is he doesn't want any -- that --
5 that I think obviously the evidence that came in at the
6 Hitch motion is certainly relevant on the issues in front of
7 the jury. I'm not going to ask them to determine the
8 admissibility of evidence because that's obviously not their
9 function. But certainly a lot of the evidence of Hitch I
10 would expect to come in front of the jury. 

11 THE COURT: It may come in, but it's going to come
12 in with different relevancy. And I'm not going to permit a
13 lot of the arguments that have been made --

14 MR. KOCHIS: Well, for example, Your Honor --

15 THE COURT: -- before a jury.

16 MR. KOCHIS: -- I'm talking about lines of questioning
17 of what could have been collected, what may have been shown,
18 all the things the Court had no problem considering which were
19 speculation in ruling on sanctions. It would be my opinion --
20 for example, I would expect Mr. Negus to bring in evidence of
21 the number of people in the house if we introduced the foot-
22 wear impression. That makes sense. But I would not expect
23 us to go through blood drop by blood drop why this blood
24 drop wasn't collected, what it might have shown, why this --
25 why the carpet wasn't vacuumed until this point, what it might
26 have shown, why the luminol wasn't photographed, each and



2 THE COURT: The only way --

5 THE COURT: The only way that we can properly handle
6 that concern of ours is to take it up probably item by item.
7 And that's going to take more time than we have at the moment.
8 We can do that later on, if you want.

10 THE COURT: I'll have to decide the relevancy for
11 the remaining issues before the jury. But you -- you wouldn't
12 be able to argue, for instance, Mr. Negus, they didn't take
13 enough samples in that house and make enough analysis of --
14 of various blood to assist the Defense in some way. I -- I
15 can't -- I can't see --

19 ~~THE COURT:~~ To go to the credibility of witnesses,
20 you can say --

22 THE COURT: -- "Mr. Stockwell, you didn't do these
23 other things; therefore, you're incompetent, aren't you?"
24 I suppose to some extent you might get some of that.

25 MR. NEGUS: Certainly that. And also, if they're
26 going to introduce evidence as to the various serological

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1 types, I think that you certainly would be able to ask Mr.
2 Stockwell, "Well, why did you take that drop if you know where
3 you got it from and why didn't you take some other drop,"
4 and, you know, "Why are you doing it?" That certainly is a
5 standard type line of questioning. I can't see, if they're
6 going to introduce evidence of all of this stuff, I don't
7 see how you can preclude them from testing them as to the
8 sloppiness of their job and what could have been done better
9 if they had done it correctly. I mean, that seems to be just
10 standard. It's almost standard procedure in asking those
11 questions at trial. I can imagine it not being relevant.

12 THE COURT: Mr. Kochis?

13 MR. KOCHIS: Well, then, what he's saying is we are
14 going to litigate -- start to finish Hitch in front of a jury.

15 THE COURT: No way. I double guarantee it. Some of
16 these things he can bring out. The argument will not be the
17 same, the purpose of bringing it out is not going to be the
18 same. And we simply have to go through, as I indicate, one
19 by one or at the time he attempts to bring it out. Certainly
20 I won't permit the degree that I have permitted in this case.
21 We're not -- the jurors are not going to be submitted those
22 issues, instructions will not be made on Hitch issues.

23 MR. KOCHIS: Can I do this, then. We're coming
24 back on the 3rd. Can I have filed prior to that time, if I
25 think it's appropriate, in writing a list of some of the
26 issues that I think are outside the areas of -- of admissibility

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1 Mr. Negus has referred to that are strictly Hitch issues that
2 a Court would decide, not a jury, and to have a 402 Motion
3 to preclude Mr. Negus from going into those, and have some
4 guidance from the Court?

5 THE COURT: I think you're entitled to bring your
6 402 Motion.

7 MR. NEGUS: I would request that perhaps we not do
8 it right on the 3rd and the 4th or whenever it is in there
9 but some time before we finish the voir dire. I may need
10 time to respond. And I have other things I have scheduled
11 to do for the next three weeks.

12 MR. KOCHIS: As long as I have some guidance prior
13 to opening statements so I don't hear, during Mr. Negus'
14 opening statement, a --

15 THE COURT: You prepare your list, if you want.
16 Give it to the Court and Counsel. And I don't think it's
17 going to take an awful long period of time to handle it. And
18 I think we can -- we're going to have some time. Jurors are
19 going to be quickly excused, they're not going to show up,
20 one thing or another, to where we're going to have some time
21 at some point --

22 MR. KOCHIS: Fine.

23 THE COURT: -- before arguments.

24 MR. KOCHIS: Fine.

25 MR. NEGUS: I would certainly not -- not object to
26 doing it sometime before opening statements.

1 THE COURT: What else?

2 MR. KOCHIS: Has the Court had a chance to communi-
3 cate our arrival to San Diego?

4 THE COURT: I tried. In that regard, Mr. Pierce,
5 the executive officer jury commissioner down there, is out of
6 the office. And I even had my secretary try to get his
7 assistant to find out why they have not responded to my letter.
8 And I still haven't had a communication. I know my -- I
9 assume my secretary has tried. So I don't know.

10 I regret greatly my putting in the letter what I did,
11 in effect getting me in the position of being an advocate now.
12 And I never -- I never thought about that.

13 MR. KOCHIS: In the request for the materials?

14 THE COURT: Yes. I shouldn't have done that. For
15 instance, "If possible, could you answer the following
16 questions or send information therefor. One, the procedures
17 you use in summoning jurors, from what list and so forth.
18 Two, the source of your jurors' routinely called for downtown
19 cases. I think both Counsel will be happy to have your
20 usual panel as opposed to reaching North Coverage and so forth.
21 Three, do you have anything by way of followup on some of
22 the jurors' failure to appear," and a couple that I added,
23 apparently, "Are your jury lists for" -- "Are your jury lists
24 arranged alphabetically when sent to the courtroom, and does
25 your jury room have telephone numbers?"

26 I just don't know. It's probably all right, and I'll

1 probably get no flak from it. But I -- I probably shouldn't
2 have done that. But I'm going to have to follow up. And I
3 will continue to do so. And I'll let you know whatever
4 information I get. But -- but as far as following up on that,
5 other than that, I'm not going to press them at all myself
6 for that information.

7 MR. NEGUS: Well, I mean -- okay. What I was -- I
8 mean, do you want me to, if I -- if we don't get something
9 soon, do you want me to subpoena them?

10 THE COURT: I think -- I think you're going to have
11 to do whatever you do. Otherwise --

12 MR. NEGUS: Normally, I ask for discovery proceedings
13 from you. That's why I did it.

14 THE COURT: Discovery motion for that?

15 MR. NEGUS: Right. See, you -- you sent off for
16 those materials because I made a discovery motion to get it.
17 And so we didn't have them here. So you did it. My under-
18 standing is that I have never seen any jury commissioner
19 resist giving that kind of stuff out.

20 THE COURT: And I may be reading too much into the
21 silence that I got.

22 MR. NEGUS: They don't like it when I subpoena them
23 after they give it to me, but --

24 (No omissions.)
25
26

1 THE COURT: He's at a meeting somewhere, apparently,
2 and that's why I haven't heard, I don't know what's
3 happening, but I hope that I haven't worn my welcome out.

4 I tried to recap, and I ran into trouble on some
5 time matters and number of jurors. Giving you a chance to
6 read through the first page, I think there's probably no
7 difficulty until we get down to September 19.

8 MR. NEGUS: Actually, I asked for two days for the
9 challenge, actually.

10 THE COURT: Let me just suggest to you -- I know you
11 did. The way I had it figured -- let's see. You note the
12 17th --

13 MR. NEGUS: Well, the reason I need more than the
14 17th is I have to have an afternoon to collate the information.

15 THE COURT: Let's see here.

16 MR. NEGUS: A half day on the 17th we need to spend
17 collating information.

18 THE COURT: I figured you had -- you see, on the
19 17th you have a half a day there.

20 MR. NEGUS: Right, and I need that to count up all
21 the numbers,

22 THE COURT: That's fine, We'd break at noon on that
23 day, and then the 18th I thought, you know, it's not going
24 to be horribly long. I could have you maybe come in at
25 1:30 on the 18th. I thought that would give you a half day
26 on the 17th and maybe a half day on the 18th, and you wouldn't

1 require any more time than that.

2 MR. NEGUS: Well, I think that experience has shown
3 that it takes like a day and a half or so to get the evidence
4 in. And if they want to put counter-evidence, that takes --
5 that takes a couple hours more, so that's why I thought two
6 days. I thought we'd be in court on the 18th and 19th doing
7 the jury challenge, you know, taking evidence. If in fact
8 I find out that there's underrepresentation -- obviously, if
9 I find out there's no underrepresentation, then we don't
10 have a challenge.

11 THE COURT: I think that probably it's a safe bet
12 to say that, just pulling raw numbers out of a jury room,
13 as compared with the demographic breakdown in a jurisdiction,
14 it's going to make almost a prima facie case almost anywhere
15 in the United States, certainly in California, to where you're
16 going to have the burden, Mr. Kochis. If you read Harris,
17 once he shows the discrepancy, it's up to you to do -- to
18 put on further evidence.

19 Well, I can set that back and change the 19th then
20 to the 20th. This is just a worksheet, and then start in --
21 in over to the next page then and put the 21st, and on down,

22 Where I ran into problems was trying to figure out
23 how many days we're going to need of sequestered voir dire,
24 and when I'm -- for instance, when we finish with the -- with
25 a juror after examining them privately, when are we going to
26 have them come back? And as I took it, we had -- let's see,

1 You've got 26, 26 and then 4 alternates and, being liberal
2 on that, if I give you 8 and 8, you've only got a total of
3 52, 62, 68 possible peremptories, and then you're going to --
4 we're going to lose probably I would suggest maybe a third
5 of the jurors on -- more than Gray -- on the sequestered
6 voir dire; so I just don't know how many days it's going
7 to take us to get enough of a panel, but if we lose -- for
8 instance, if we start with 300 and if we lose 150 for time,
9 leaving us with 150, and then we lose a third of that or
10 50 during the sequestered voir dire, that leaves us with a
11 jury panel of death-qualified and publicity-qualified people
12 of 100; with 68 peremptories is probably sufficient, but to
13 go through all of that, I've got -- I had -- I had 12 days
14 for sequestered voir dire, and if we go through 16 a day --

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15 MR. KOCHIS: That's almost 200. You're not going to
16 need that many.

17 THE COURT: That's bad mathematics somewhere. So
18 when would we bring back -- When we examine the first and
19 qualify the first sequestered person, when are we going to
20 bring them back? Not October 15 then. October 10th or
21 something like this?

22 MR. KOCHIS: It would be -- we would better be able
23 to determine that based on how many people we're losing on
24 the time initially. If we're only losing a third and have
25 300, we have 200 that we can Witherspoon, the schedule is
26 perfect.

1 THE COURT: Well, save it then until we see how many
2 we're going to lose out of the large panel, and then make
3 our refinements kind of as we go along.

4 MR. KOCHIS: Because you're not going to have to
5 give them a date certain to report for general voir dire
6 until the date we start our Witherspoon, and by then, we'll
7 know how many are left from the time.

8 THE COURT: Okay. Mr. Negus?

9 MR. KOCHIS: The only thing I have is I think I --
10 I don't know if Mr. Negus would agree, but I think 60 is a
11 large number to bring back every day for general voir dire,
12 in that I can't imagine the courtroom comfortably accommodating
13 60 people, and I don't think we're going to get through a
14 panel of 60 in a day.

15 THE COURT: Wait a minute, What date are you on?

16 MR. KOCHIS: I'm on October 16, bringing them in in
17 groups of 60, 60 people in the courtroom.

18 THE COURT: Yes, I agree with that.

19 MR. KOCHIS: Probably about 40, 45 would be enough.

20 THE COURT: Well, the first one we could start off
21 with 60 and then -- no, You see, what I've done is I was
22 giving us two days there for the first panel of 60, and then
23 on October 17, I left it blank, and continuing supplemental
24 panel of blank each day, and I'm thinking maybe, depending
25 upon how fast we go, we can set that at the time, 30 or 40,
26 whatever, you know, we get through for cause and peremptories.

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1 MR. KOTTMEIER: November the 1st is a Thursday.
2 MR. KOCHIS: I'm sorry. And the memo you gave us
3 said you would be gone from the 1st to the 9th; so what we
4 need to know is will Halloween be the last day we're in court
5 of that week?
6 THE COURT: Just a second. I want to find my memo,
7 if I can.
8 I may have -- there's a memo on this under the
9 papers. I can't lay my fingers right on it. It's kind of a
10 low priority,
11 Did you mark me off, Linda?
12 THE CLERK: Is it marked off, Your Honor? I may not
13 have marked it off.
14 THE COURT: In November it doesn't seem to show it.
15 THE CLERK: I can get my other book.
16 THE COURT: Didn't you get a copy of my memo?
17 MR. KOCHIS: We all did.
18 THE COURT: Yes, but I can't lay my fingers on it.
19 I think I leave on Thursday, which -- which is consistent,
20 That would be the 8th, so I'm off from the 8th -- I work the
21 7th, which is a Wednesday, and then I'm off the 8th, and I
22 wouldn't come back then --
23 MR. KOCHIS: Judge, the date you gave me --
24 THE COURT: -- till the 19th.
25 MR. KOCHIS: The dates you gave us were the 1st
26 through the 9th you were gone. Move forward in time one week

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1 to November the 1st, which is a Thursday,

2 THE COURT: Okay. Well, 1st through the 9th. I
3 wouldn't be back then until the 12th.

4 MR. KOCHIS: Right.

5 MR. NEGUS: So you'd leave on a Thursday.

6 MR. KOCHIS: What we were curious is --

7 THE COURT: She has it. She has me gone on Thursday,
8 the 1st, through the 9th, and I'm back on the 11th. Court
9 holiday on the 12th.

10 MR. NEGUS: Court holiday is the 11th, I believe,
11 isn't it?

12 MR. KOTTMEIER: November you have Veterans Day on
13 the 11th.

14 THE COURT: There's a holiday in November?

15 MR. KOTTMEIER: Veterans Day on the 11th, Your Honor.

16 THE COURT: Veterans Day is Sunday, the 11th, closed
17 Monday, November 12th, according to the notes I have.

18 MR. NEGUS: So you leave -- so November 1st through
19 13th you're gone?

20 THE COURT: Well, not through the -- I'll be --

21 MR. NEGUS: You come back on the 13th?

22 THE COURT: I'll be back on the 11th, but apparently
23 the court is closed, so we would resume on the 12th. I don't
24 know why she shows the 12th, My notes show that --

25 (No omissions,)

26

1 MR. NEGUS: Well, the Court -- Sunday's the 11th. So I
2 imagine they put the Court holiday over to the 12th.

3 MR. KOCHIS: The state gives you the day off if it
4 falls on a weekend.

5 THE COURT: Closed Monday, November 12th. You've
6 got the right. You show --

7 MR. NEGUS: That sounds right.

8 THE COURT: You show the 11th being on Monday.
9 This shows Monday, November 12th.

10 MR. NEGUS: So the last day --

11 THE COURT: Monday is the -- is the 12th.
12 What calendar have you got here?

13 THE CLERK: I have the monthly calendar, and it
14 starts out on Sunday.

15 THE COURT: Well, this is not correct.

16 THE CLERK: See, but this is Sunday.

17 THE COURT: This is Sunday. Okay. So I will --
18 we will resume, then -- we will be off on Thursday, the 1st.
19 We will resume on Tuesday, the 13th. You're correct.
20 Complicated.

21 The one other refinement in here in working on
22 this with my clerk, she suggested, you know, that down at the
23 bottom of the first page, bring in four jurors at 9:15. You --
24 you know, you originally planned on bringing them in one
25 other time at 20 minute intervals, have them scheduled in that
26 fashion. But some will be late. She thought it would be

1 better bringing them in four at a time. And I agree. So
2 I've changed that slightly. We'll still try and keep the
3 same order.

4 Any need for us to come back this afternoon?

5 MR. KOCHIS: None that I can see.

6 MR. NEGUS: I've got these things right here.

7 Let me just -- I'm just looking here.

8 THE COURT: Based on this information now, I will
9 be contacting Mr. Pierce, I mean, like immediately, and
10 telling him to have the 60 people in -- those 300 people in
11 on certain days. But I need -- we need really to know from
12 whence he gets those people. If they're from his regular
13 panel downtown, I guess that's okay, though, wherever that
14 may be.

15 MR. NEGUS: That's what we want.

16 THE COURT: Okay. What else do you have, Mr. Negus?

17 MR. KOCHIS: And then the only thing, back on the --
18 on the Hitch trial issue, I will have -- I will have that
19 outlined early. And the reason I need some guidance, I think
20 the Court needs some guidance prior to opening statements,
21 is I think that will affect substantially the length of the
22 time it takes to try the case when we get our estimate to the
23 jurors as to how long they can expect to sit with us.

24 THE COURT: I don't see this case taking as long as
25 we originally estimated. But it's still going to be a
26 mammoth --

1 MR. NEGUS: I don't think it will substantially
2 affect the length of time.

3 THE COURT: Well, we can go through it. But you
4 have to list down --

5 MR. KOCHIS: I'm going to.

6 THE COURT: -- what limitations you want and why,
7 and -- and then we'll give Mr. Negus an opportunity to study
8 it and respond, and then we'll have to have 402 Hearings on
9 each area.

10 You're still going to have the officers on trial
11 one way or another, I suspect.

12 MR. NEGUS: Wait a minute. We have the two copies.
13 I don't see anything in here that I think is -- I want to
14 make, that I particularly feel like arguing.

15 THE COURT: Wonderful, wonderful.

16 MR. NEGUS: I would just like to stipulate that we
17 have -- we can get a copy of this made and type it all together,
18 that we have additional records of runs by Mr. Gregonis done
19 in July and August on the bedding using the same lab number
20 that we already have and put that into evidence.

21 THE COURT: You're in effect talking discovery now.

22 MR. NEGUS: No. I'm just -- this -- these pieces
23 of paper are -- I'd just like to have as an -- part of the
24 record as to what Mr. Gregonis did as far as analyzing the
25 sheets.

26 THE COURT: Okay. This is what we were talking about

1 before, okay?

2 MR. NEGUS: All right. So we -- we can have a copy
3 of this made, and I'll -- I'll make it and give it to the
4 clerk and mark it as H next in order, admitted into evidence
5 pursuant to stipulation.

6 THE COURT: Any objection, Mr. Kochis?

7 MR. KOCHIS: No.

8 THE COURT: All right, then. The clerk will take
9 the ones that Mr. Negus has here and then make us a copy
10 which will be received into evidence and give this back to
11 him, then.

12 Anything further?

13 MR. KOCHIS: Not at this time.

14 MR. NEGUS: Es toto.

15 THE COURT: See you tomorrow --

16 MR. NEGUS: Monday.

17 MR. KOCHIS: Monday morning.

18 THE COURT: -- Monday. Okay. Thank you, Counsel.

19 (Whereupon the proceedings were concluded
20 at 12:38 p.m.)
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