

F I L E D

Clerk of the Superior Court

JUL 2 2003

By: ~~K.D. STURDIVANT~~, Deputy
C. Lewis

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THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Respondent,

vs.

KEVIN COOPER,

Defendant/Petitioner.

CASE NO. CR 72787

ORDER DENYING MOTION FOR
MITOCHONDRIAL DNA TESTING,
CLAIM OF EVIDENCE TAMPERING,
AND REQUEST FOR POST-
CONVICTION DISCOVERY.

THIS COURT HAVING READ THE MOTION FOR MITOCHONDRIAL DNA TESTING,
EVIDENCE TAMPERING, AND REQUEST FOR POST-CONVICTION DISCOVERY AS
WELL AS THE OPPOSITION AND REPLY THERETO, AND AFTER A HEARING FINDS
AS FOLLOWS:

I. Procedural Background:

Kevin Cooper ["Petitioner"] was convicted of four counts of first-degree murder for the 1983 slaying of a mother, father, daughter, and houseguest. This same jury also convicted him of the attempted murder on the youngest son, the only survivor. The jury found that Petitioner was

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1 eligible for the death penalty. The trial court imposed the death penalty and the California
2 Supreme Court affirmed the sentence.¹

3 On September 29, 2000, pursuant to the newly passed bill that became Penal Code § 1405,
4 Petitioner filed a motion with this court to obtain DNA testing. Prior to the issue being resolved
5 by the court, Petitioner and Respondent reached a mutual agreement for joint nuclear DNA
6 forensic testing on May 10, 2001. The parties agreed that a hand rolled cigarette butt, a
7 manufactured cigarette butt, a hatchet, the hairs recovered from the victims' hands², a tan shirt, a
8 bloodstain labeled A-41, the reference blood samples of the victims and Petitioner, and a bloody
9 button would all be analyzed through nuclear DNA testing. This evidence would be transferred
10 to the Department of Justice in Berkeley, California for testing.

11 After the transfer of the evidence, but prior to the completion of the nuclear DNA analysis,
12 Petitioner filed a motion seeking an evidentiary hearing. Petitioner claimed that prior to the
13 nuclear DNA testing, law enforcement personnel either tampered with or contaminated the
14 evidence. He claimed that in 1999, Dan Gregonis, a criminalist from the San Bernardino
15 Sheriff's Department, checked out some of the evidence used in Petitioner's case from the San
16 Bernardino Sheriff's property room. Gregonis did not return this evidence until the following
17 day. Respondent does not dispute this, but contends that Deputy District Attorney John Kochis
18 requested Gregonis to check out the evidence and verify that certain items still existed. WMP

19 On July 11, 2002, a report summarizing the findings of the nuclear DNA testing was
20 received. This report had findings which strongly indicated that Petitioner's nuclear DNA was
21 located on the bloodstain labeled A-41, the hand rolled cigarette, the three blood smears taken
22 from the bloodstained tan shirt, and the manufactured cigarette.

23 Then, on October 22, 2002, Petitioner filed a supplemental motion, supported by exhibits,
24 seeking Mitochondrial DNA ["mtDNA"] testing of approximately one thousand hairs recovered

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27 ¹ People v. Cooper (1991) 53 Cal. 3d 771.

28 ² These hairs were sent to the Department of Justice DNA Laboratory, to be analyzed using nuclear DNA testing. None of the hairs recovered from the victims' hands were appropriate for nuclear DNA testing. Petitioner is now seeking to have these same hairs analyzed using mtDNA testing.

1 from the victims' hands.³ Petitioner contended that the hairs recovered from the victims' hands
2 may have been pulled from the head of the assailant or assailants by the victims in attempts to
3 defend themselves. Therefore, Petitioner requested that these hairs be analyzed using mtDNA
4 testing so that he may be excluded as a possible donor. Within this same motion, he further
5 requested an evidentiary hearing based upon his previously filed motion regarding possible
6 evidence tampering or evidence contamination by law enforcement personnel.

7 Respondent filed an opposition, supported by exhibits, on January 24, 2003. Respondent
8 argued that mtDNA testing was unnecessary because of the wealth of substantial evidence
9 linking Petitioner to the crime. On April 15, 2003, a hearing was held to determine whether
10 Petitioner would be permitted to present evidence to the court in support of his tampering or
11 contamination claim and his request for mtDNA testing. The court issued an order for an
12 evidentiary hearing to take place on June 23, 2003.

13 On June 16, 2003, Petitioner filed a post-conviction discovery motion. Pursuant to Penal
14 Code § 1054.9, Petitioner requested access to the blood stained tan shirt so that it may be further
15 analyzed using preservative testing. Through this type of testing, the presence of certain
16 enzymes located within the bloodstains on the tan shirt could be determined. Using this
17 preservative testing, Petitioner argued that it would be possible to pinpoint whether the blood on
18 the tan shirt came from his body or from a test tube. If the testing indicated that the source of the
19 blood on the tan shirt originated from a test tube, this would be strongly indicative of evidence
20 tampering.

21 Respondent filed an opposition on June 19, 2003. They argued that Petitioner's motion was
22 untimely and procedurally incorrect. Further, they asserted that even if the court reaches the
23 merits of the motion, Petitioner is essentially trying to "end run" Penal Code § 1405. Although
24 Penal Code § 1054.9 permits post-conviction discovery in certain circumstances, Respondent
25 claimed that Petitioner is essentially trying to obtain discovery to conduct further DNA testing.

26 Petitioner's request for mtDNA testing, a determination on his claim of evidence tampering,
27 and his request for post-conviction discovery was heard in Department 54 of the above entitled
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³ These were the same hairs first subjected to nuclear DNA testing.

1 court, on June 23 through June 25, 2003. Petitioner called Christopher Plourd as an expert who
2 established that mtDNA testing would be appropriate in his case. Petitioner further called his
3 trial counsel from 1983 as a witness. Respondent produced several witnesses from the San
4 Bernardino Sheriff's Department and an exhibit clerk from San Diego Superior Court to
5 establish the chain of custody of the evidence analyzed through nuclear DNA testing. Three of
6 these witnesses were also the original criminalists who were present at the scene of the crime and
7 collected the evidence. Respondent also called Steven P. Myers, a senior criminalist at the
8 Department of Justice, as an expert to convey the results of the nuclear DNA testing as well as to
9 testify concerning the appropriateness of mtDNA testing in this case.

10 II. mtDNA Testing:

11 First, although nuclear DNA testing has already been completed pursuant to Penal Code §
12 1405, Petitioner argues that the court should order the hairs recovered from the victims' hands to
13 be analyzed using mtDNA testing. He contends that the victims pulled at the hair of the assailant
14 or assailants in attempts to defend themselves. Therefore, through mtDNA testing he could be
15 excluded as the donor of those hairs. Respondent is opposed to the requested testing, and argues
16 that it is unnecessary because of the wealth of evidence that establishes Petitioner's presence and
17 participation in the crime. Penal Code § 1405 sets forth the procedure and standard a convicted
18 individual must meet to obtain court ordered DNA testing subsequent to his or her guilty verdict.
19 Specifically, Penal Code § 1405(f) sets forth eight factors, which a court must determine have
20 been met prior to granting a motion for DNA testing.

21 A. Penal Code § 1405(f)(1):

22 An individual must first establish that the evidence sought for testing is available and in a
23 condition that will permit DNA testing. Petitioner argues that the evidence, approximately one
24 thousand hairs recovered from the victims' hands, is available and in a condition that would
25 permit the requested testing. The hairs recovered from the victims' hands were photographed
26 and the photographs were presented at the hearing on June 23, 2003, which demonstrate that the
27 evidence is available and in a condition to permit mtDNA testing. Petitioner also elicited
28 testimony from Christopher Plourd that in his expert opinion, an appropriate amount of genetic

1 material exists to complete mtDNA testing. This element was not contested. The court finds
2 that this element has been met.

3 B. Penal Code § 1405(f)(2):

4 Secondly, an individual is required to prove that the evidence to be tested was subject to a
5 sufficient chain of custody, which demonstrates the evidence has not been tampered with or
6 contaminated. At the hearing, Petitioner did not produce evidence or testimony that would
7 establish a chain of custody from the time the hairs were collected from the victims' hands to the
8 current location of the evidence with the Department of Justice in Berkeley, California.
9 Therefore, this element has not been met.

10 C. Penal Code § 1405(f)(3):

11 An individual must further show that the perpetrator's identity was a significant issue in the
12 case. Petitioner has maintained for 20 years that he was never present within the Ryen house.
13 Petitioner continues to claim that he did not commit this crime and was not present at the scene.
14 This element is not contested and therefore has been met.

15 D. Penal Code § 1405(f)(4):

16 An individual is required to make a "prima facie" showing that the evidence sought for DNA
17 testing is material to the identity of the perpetrator. The California Supreme Court lays out a
18 clear interpretation of the term of art "prima facie" showing. The court stated that a petitioner
19 should "(i) state fully and with particularity the facts on which relief is sought [citations omitted]
20 as well as (ii) include copies of reasonably available documentary evidence supporting the claim,
21 including pertinent portions of trial transcripts and affidavits or declarations."⁴ The Court went
22 on to state "[c]onclusory allegations made without any explanation of the basis for the
23 allegations do not warrant relief, let alone an evidentiary hearing."⁵

24 At the hearing, Petitioner argued that the mtDNA testing is material to the identity of the
25 perpetrator. Petitioner's theory is that during the attack, the victims may have grabbed and
26 pulled at the assailant or assailants' hair when trying to defend themselves. He argues that this

27 ⁴ People v. Duvall (1995) 9 Cal. 4th 464, 474.

28 ⁵ Ibid.

1 would explain the presence of hairs in the victims' hands. He claims that mtDNA testing of
2 these hairs would exclude him as the donor of the hairs, therefore showing that someone else had
3 committed this crime.

4 Respondent argued that if Petitioner's theory were accurate, the hairs found in the victims'
5 hands would have roots or sheaths attached as a result of being pulled from the head of the
6 assailant or assailants. However, Senior Criminalist Myers testified that of the one thousand
7 hairs available for testing, none had sheath material present and only three had a root still
8 attached. He further testified that many of the hairs recovered from the hands of the victims
9 were animal hairs. In addition to Myers' testimony, several San Bernardino criminalists testified
10 that the condition of the home and the carpet was extremely dirty, therefore the number of
11 possible donors of shed hair in the home would be quite large. Myers testified that mtDNA
12 testing cannot identify the donor of the hairs unless a reference sample is present. He stated that
13 mtDNA testing is less discriminatory than nuclear DNA testing and concluded that in this case
14 mtDNA testing would not provide useful results.

15 Based on the above, even if Petitioner was excluded as the donor of the hairs recovered from
16 the victims' hands, the condition of the Ryen home and the carpet would decrease the
17 effectiveness of mtDNA testing. Petitioner has failed make a prima facie showing that mtDNA
18 testing of the hairs recovered from the hands of the victims would be material to the
19 determination of the identity of the perpetrator. The court finds that this element has not been
20 met.

21 E. Penal Code § 1405(f)(5):

22 An individual must further demonstrate that DNA testing results would raise a "reasonable
23 probability" that, in light of all of the evidence, a conviction or sentence would have been more
24 favorable if the results of the DNA testing had been available at the time of the conviction. The
25 United States Supreme Court has defined the term "reasonable probability." The Court stated
26 "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome."⁶

27 Petitioner argues that the results of mtDNA testing may exclude him as the donor of the hairs

28 ⁶ Strickland v. Washington (1984) 466 U.S. 668, 694.

1 recovered from the hands of the victims. He argues that if mtDNA testing had excluded him as
2 the donor of the hairs recovered from the victims' hands at the time of trial, the outcome would
3 have been different. Further, at the hearing, Petitioner also went on to argue that if through
4 mtDNA analysis, one unknown individual was the donor of hair located in the hand of every
5 victim, this would be material and would tend to show that he did not commit the crime.
6 However, Criminalist Myers concluded in his expert opinion that this was not a realistic
7 possibility. Further, the dirty condition of the home, which resulted in a hair-laden environment,
8 would reduce the reliability of such a result.

9 Respondent argues that the totality of the evidence, including the nuclear DNA testing
10 results, is so strong that even if the mtDNA testing results were favorable, these results would
11 not have reasonably impacted the verdict or sentence in Petitioner's case. Respondent further
12 cited to the California Supreme Court's affirmance of Petitioner's sentence.

13 The court stated,

14 The evidence of guilt was extremely strong. Many items of circumstantial
15 evidence pointed to defendant's guilt. Some alone were quite compelling; others
16 less so. In combination, the evidence established defendant's guilt
overwhelmingly.⁷

17 The results from the nuclear DNA testing are persuasive. There is a strong indication that
18 Petitioner's nuclear DNA is highly consistent with nuclear DNA recovered from the scene of the
19 crime. Further, the California Supreme Court confirmed that the evidence against Petitioner was
20 compelling.⁸ Looking at the nuclear DNA results, as well as the wealth of circumstantial
21 evidence examined by the California Supreme Court, and Petitioner's own trial testimony, this
22 court cannot find that the completion of mtDNA testing, even if favorable, would have
23 reasonably led to a different verdict or sentence.

24 F. Penal Code § 1405(f)(6):

25 An individual must show that the evidence has not been tested previously, or it has been
26 tested but the new results are reasonably more discriminating or contradictory of prior results.

27 ⁷ Cooper, 53 Cal. 3d at 836.

28 ⁸ Ibid.

1 The hairs Petitioner is requesting to have tested have not been previously tested. This element is
2 uncontested.

3 G. Penal Code § 1405(f)(7):

4 Another element required by Penal Code § 1405 is that the testing method selected must be
5 generally accepted within the scientific community. The scientific practice of mtDNA testing
6 has been generally accepted within the relevant scientific community. The court finds that this
7 element is met.

8 H. Penal Code § 1405(f)(8):

9 Finally, an individual bringing a motion for DNA testing under Penal Code § 1405 must
10 demonstrate that the motion seeking DNA testing is not filed solely for the purposes of delay.
11 Petitioner argues the purpose of filing this motion for mtDNA testing is to aid in his claim of
12 innocence by excluding him as the donor of the hair.

13 Respondent argues that this testing is being sought solely for the purposes of delay. They
14 argue that Petitioner requested nuclear DNA testing, which they complied with. He then filed a
15 motion for an evidentiary hearing claiming that the evidence being tested had either been
16 tampered with or contaminated by Criminalist Dan Gregonis. Now, after unfavorable nuclear
17 DNA results, Petitioner is bringing a motion for mtDNA testing. Respondent asserts that the
18 nuclear DNA results, along with the evidence presented at Petitioner's jury trial, establish his
19 guilt. Therefore, mtDNA testing would only contribute to the twenty-year delay on the
20 imposition of Petitioner's sentence.

21 However, because several of the above elements have not been met, the court finds it
22 unnecessary to make findings specific to the issue of delay.

23 I. Conclusion Regarding mtDNA Testing:

24 Petitioner's motion must fail. Petitioner did not establish the necessary chain of custody for
25 the hairs he is requesting be tested. Further, Petitioner has not made a prima facie showing that
26 mtDNA testing of the hairs recovered from the victims' hands is material to the identity of the
27 perpetrator. In addition, even if Petitioner received a favorable mtDNA testing result, this court
28 finds that it would not create a reasonable probability that a different verdict or sentence would

1 have been returned by the jury. Petitioner remains linked to the crime by a wealth of evidence
2 produced at his trial as well as the nuclear DNA results. Accordingly, this court finds that
3 Petitioner has not met the burden required by Penal Code § 1405 and the motion for mtDNA
4 testing is denied.

5 III. Evidence Tampering:

6 Next, Petitioner claims law enforcement personnel has tampered with or contaminated the
7 evidence that was analyzed using nuclear DNA testing. He correctly asserts that he carries the
8 burden to support this claim. However, he argues that the applicable standard should be a
9 showing of "good cause." He concedes that he has not made a compelling showing, however he
10 argues that the showing presented to the court meets the standard of "good cause."

11 In People v. Diaz⁹, the court addressed the issue of evidence tampering prior to its admission
12 at trial. Although Petitioner's claim is brought in a post-conviction motion, this case law
13 provides the court with some guidance. The general rule dealing with a claim attacking the chain
14 of custody is,

15 [t]he burden on the party offering the evidence is to show to the satisfaction of the
16 trial court that, taking all the circumstances into account including the ease or
17 difficulty with which the particular evidence could have been altered, it is
18 reasonably certain that there was no alteration. [P] The requirement if reasonable
19 certainty is not met when some vital link in the chain of possession is not accounted
20 for, because then it is as likely as not that the evidence analyzed was not the
evidence originally received. Left to such speculation the court must exclude the
evidence. Conversely, when it is the barest speculation that there was tampering, it
is proper to admit the evidence and let what doubt remains go to its weight.¹⁰

21 Petitioner argues that criminalist Dan Gregonis checked out evidence from the property room
22 of San Bernardino Sheriff's Department on the morning of August 12, 1999. Gregonis did not
23 return this evidence until the morning of August 13, 1999. Petitioner argues that the above
24 creates an inference that the evidence subject to nuclear DNA testing may have been tampered
25 with or contaminated.

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27 ⁹ People v. Diaz (1992) 3 Cal. 4th 445.

28 ¹⁰ Id. at 559.

1 However, at the hearing Respondent called several San Bernardino law enforcement
2 personnel to establish the chain of custody of the evidence in question. Gregonis testified that
3 Mr. Kochis requested that the certain pieces of evidence be cataloged. Gregonis explained that
4 Petitioner had submitted requests for nuclear DNA analysis concerning specific items of
5 evidence and Mr. Kochis wanted to determine if these items still existed. He further testified that
6 he checked out the evidence on August 12, 1999 and returned the evidence on August 13, 1999.
7 While the evidence was in his custody, he testified he did not open the individually packaged
8 pieces of evidence and did not contaminate or tamper with any piece of evidence. In addition,
9 William Nicks, a San Diego Superior Court exhibit clerk, testified that the shirt and the cigarette
10 butts at issue have been in continuous possession of the San Diego Superior Court. Nicks further
11 testified that the shirt and cigarette butts had not been checked out or looked at by anyone prior
12 to the nuclear DNA testing.

13 The proffered testimony was credible. Furthermore, Petitioner did not offer any evidence to
14 rebut this testimony. Therefore, this court finds that Petitioner has not made any showing that
15 law enforcement personnel tampered with or contaminated any evidence in his case.

16 IV. Post-Conviction Discovery;

17 Finally, Petitioner filed a motion for post-conviction discovery requesting access to physical
18 evidence from his case. He is requesting access to the bloodstained tan shirt so further testing
19 may be completed pursuant to Penal Code § 1054.9.

20 Penal Code § 1054.9(a) requires that a request for post-conviction discovery be made “[u]pon
21 the prosecution of a post-conviction writ of habeas corpus or a motion to vacate a judgment.”
22 Petitioner has not complied with this requirement. Currently, Petitioner does not have a petition
23 for writ of habeas corpus or a motion to vacate judgment before this court. Therefore, Petitioner
24 has not complied with the procedural requirements of Penal Code § 1054.9.

25 However, reaching the merits of the motion, Penal Code § 1054.9(c), requires that an
26 individual show good cause that the evidence being requested is reasonably necessary to the
27 individual’s effort to obtain relief.

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1 Petitioner argues that he needs access to the bloodstained tan shirt to aid in establishing his
2 theory that law enforcement personnel tampered with or contaminated evidence in his case. He
3 contends that preservation testing is necessary to determine if certain enzymes are present within
4 the bloodstains on the tan shirt. The presence of certain enzymes would be a strong indication
5 that the source of the blood was from a test tube and not directly from Petitioner. He argues that
6 this result would be strongly indicative of evidence tampering.¹¹

7 Respondent argues that Petitioner is attempting to circumvent the procedures set forth in
8 Penal Code § 1405. They argue that Petitioner is attempting to gain access to the bloodstained
9 tan shirt without complying with the eight elements required under Penal Code § 1405(f) and
10 previously set forth above. Respondent argues that Penal Code § 1054.9(c) specifically
11 precludes discovery of evidence through this statute when the ultimate desire is to obtain further
12 DNA testing of the evidence.

13 Petitioner's request for access to the blood stained tan shirt stems from his desire to have
14 further testing conducted on that piece of evidence. Therefore, this court finds that Petitioner
15 may not gain access to the bloodstained tan shirt through the use of Penal Code § 1054.9.
16 Further, this court finds that Petitioner's request for the bloodstained tan shirt also fails under
17 Penal Code § 1405. Therefore, the motion for post-conviction discovery is denied.

18 V. Conclusion:

19 Based on the above, this court finds that Petitioner has failed to meet the burden required for
20 mtDNA testing. Further he has failed to make any showing that the evidence in his case was
21 tampered with or contaminated. Finally, he has not met the burden necessary to gain access to
22 the bloodstained tan shirt for continued testing. Accordingly, all three requests are denied.

23 It is further ordered that a copy of this Order be served upon (1) Petitioner's counsel
24 (William M. McGuigan and David Bernstein); (2) The District Attorney for San Bernardino

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28 ¹¹ However, as previously stated, this court has found that Petitioner did not make a sufficient showing to conclude
that law enforcement personnel tampered with or contaminated any evidence.

1 (Deputy District Attorney John P. Kochis); and (3) the Attorney General (Deputy Attorney
2 General Frederick R. Millar.)

3 IT IS SO ORDERED.

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DATED: July 2, 2003

William H. Kennedy
WILLIAM H. KENNEDY
JUDGE OF THE SUPERIOR COURT