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MEMORANDUM

To The File  
FROM Norman C. Hile  
DATE May 12, 2004  
RE **Telephone Conference with Judge Huff on May 12, 2004  
910536/2003**

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Nathan: Good morning Norm Hile. This is Law Clerk to Chief Judge Marilyn Huff.

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Nathan: Okay

Nathan: Is Holly there?

Holly Wilkens: Yes I am.

Nathan: Okay.

Judge Huff: Remember we have only appointed two people. Alright, this is Judge Huff. First for purposes of the hearing, the Court has reviewed the submissions of the parties and the Court will issue a scheduling order concerning the scope of the hearing. The pleadings and the papers submitted have been helpful to the Court and the Court will issue an Order concerning the scope of the hearing. Then as to the recent submission as to discovery, the Court is going to order – regulate the order of proof in this matter and so first we are focusing on the shoe concerning the Brady issue and the testing and so to the extent that there is request for additional items, the Court denies that without prejudice. Then additionally, as to Mr. Furrow and Mr. Coon, the Court is going to issue an Order permitting the parties to contact Mr. Furrow and Mr. Coon to see if they would be willing to voluntarily provide some type of DNA sample whether it be hair or otherwise. Probably hair, but I am not – you can figure out what would be the most effective and then as



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soon as we have Mr. Blake's – we have been contacted – the Court had issued an Order requested Dr. Blake to participate in the hearing. He is concerned with the Court's Order indicated that we would provided him reasonable compensation. He is concerned about getting reasonable compensation for the hearing. The Court believes that reasonable compensation for him is appropriate. I have checked with the Capitol \_\_\_\_\_ people and have a proposed solution to it pursuant to Federal Rules of Evidence 706 – the Court may appoint an expert with a consent to the parties with the consent of the expert, which I would believe that he would do. This is for the purpose of getting him compensation. Then the Court would then for purposes of the compensation order the government to pay. He has given an estimate to the Court and it would be the low end of the estimate. Which I

David Alexander: Judge Huff, this is David Alexander. If I might enquire just briefly on the very first item

Judge Huff: Yes

David Alexander: It is unclear to me because I know there were some admission made by the Attorney General, to which we did not yet had an opportunity to respond so I believe so I am not clear which matter your Honor had in mind when you said you would be issuing an Order. For example, with regard to Mr. Bard, I know that was a matter that we certainly want to address that and the \_\_\_\_\_ and so I was a little puzzled and I may be wrong. If with all due respect the Court could clarify which matters you believe there have been submitted by both parties on.

Judge Huff: Well, we have received numerous submissions on the Dalbert and on the purposes witness list and on the issue concerning proposed questions for the person who is in Hong Kong, so based on what the Court has reviewed, the Court will issue an order concerning the scope of the hearing as to the Brady matter. As I understand the case, the parties had made representation to the Ninth Circuit and included certain declarations to the \_\_\_\_\_ at the last minute.

David Alexander: If I might address that and I think Mr. Hile may also want for our part. With regard to \_\_\_\_\_ bare manner both sides made their initial submissions and this Friday they are filed at the same time our responses is to the others.



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Judge Huff: Sure.

David Alexander: Okay alright. I was just trying to clarify that then. (He keeps talking, but can't understand him.)

Judge Huff: Yes, I – no, no, no I am talking primarily I am going to issue an – the one side wants to call a whole bunch of witness, the Court is interested in a more focused approach and based on what I have reviewed the Court will issue an order concerning the scope of the hearing.

Norm Hile: Your Honor, this is Norm Hile. We have received an objection to \_\_\_\_\_ which we have not had a chance to respond to.

Judge Huff: It is not necessary for you to respond to. The Court on its own will issue an order concerning the scope of the hearing. The Court is interested in certain witnesses and the Court will deal with that. After we have dealt with that if it is necessary to do anything further, then the Court will then issue an appropriate order as well.

David Alexander: So these would be scientists \_\_\_\_\_ these would be to the extent witnesses that are not going to be called and sometimes without \_\_\_\_\_ and get as much done as we can as I understand it on the present date set

Judge Huff: And that may be enough. And that may be enough for the Court to decide the issue based on (David interrupts -- can't understand what the Judge is saying.)

David Alexander: We would like \_\_\_\_\_ Mr. Hile is prepared to address that if your Honor would be willing (can't understand him).

Judge Huff: Well, we don't need to do it at this time because when and where to hear an evidentiary hearing is up to the Court and so and the scope of the evidentiary hearing is up to the Court.

David Alexander: Of course your Honor, we just wanted to give the Court some additional input based on information that we received that I don't know if the Court has received and it might effect the Court's ruling on that.

Judge Huff: I don't think is it necessary at this time. So we will first deal with this as to the issues the that the Court is interested in having an evidentiary hearing on.



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Obviously, if you wanted to have an evidentiary hearing on every possible issue, we could have an evidentiary hearing for the next five years. I don't think that is what the Ninth Circuit intended. My

David \_\_\_\_\_ nor do we your Honor, again, I guess we will proceed  
Alexander: with \_\_\_\_\_ and with regard for example with regard to the  
\_\_\_\_\_ matter, I don't know whether or not how \_\_\_\_\_ to the  
people they have identified as \_\_\_\_\_ not on the schedule is  
that something \_\_\_\_\_ examination \_\_\_\_\_ based on what they  
have said whether that is contemplated \_\_\_\_\_ and that is just one  
example.

Judge Huff: It is not the Court's intent at this time to have necessarily witness called for the  
Dalbert hearing.

David Okay.  
Alexander:

Norm Hile: Your Honor, this is Norm Hile.

Judge Huff: Let me first interrupt because we are trying to get Dr. Blake. So let me make  
some

David (Can't understand him).  
Alexander:

Dr. Blake: I'm here Judge.

Judge Huff: Oh good! Alright thank you because that is the main reason that we are calling. I  
had received a request from Dr. Blake. The Attorney General had paid him  
witness fees because he had previously been hired by the defense and so the  
Attorney General had proceeded him as a recipient witness. The Court has a  
proposed solution. Let me read Federal Rules of Evidence 706 – for trying to find  
a reasonable mechanism to get you reasonable compensation recognizing that  
there are budgetary limits on all of these matters but we do believe since the Court  
had requested your participation in this hearing that it would not be fair to you to  
call you as a percipient witness so the Court's previous order had indicated that it  
would pay reasonable compensation to you. The proposed solution for the Court  
is under Federal Rules of Evidence 706 appointment. I will read it "the Court



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may on its own motion or on the motion of any party enter an order to show cause why expert witness should not be appointed and may request the parties to submit denomination. The Court may appoint any expert witness who is agreed upon by the parties and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the Court unless the witness consents to act. And I understand Dr. Blake that you have no problem acting for the purposes of this hearing. Is that correct?

Dr. Blake: That is correct.

Judge Huff: Okay. A witness so appointed shall be informed of the witnesses duties by the Court in writing, a copy of which should be filed with the Clerk, or at a conference in which the parties shall have the opportunity to participate. A witness so appointed shall advise the parties of the witnesses findings, if any, the witness deposition may be taken by any party, but that would be subject to the Court order and in this case the Court does not believe that this is necessary. And the witness may be called to testify by the Court or any party. We have already scheduled the hearing for Dr. Blake. The witness shall be subject to cross-examination by each party including the party calling the witness. It would not be the Court's intent to have ex-party communication with Dr. Blake. It would be the Court's intent to authorize a reasonable fee for him. He has indicated his hourly rate is \$175.00. I have made contact with the Capitol \_\_\_\_\_ Committee and if the Court issues an order appointing him then he can qualify for the federal government airfare and we are trying to schedule the hearing so it would not be necessary for him to stay overnight. I would request Dr. Blake had indicated that he would like to prepare for the hearing and the Court would authorize him to prepare and make a report that would then be given to the parties and then it would be the low end of your estimate for that report.

David Alexander: Your Honor, this is David Alexander. I apologize I don't mean to interrupt \_\_\_\_\_.

Judge Huff: Go ahead. Yes.

David Alexander: This is Mr. Alexander and I have a couple of inquiries following up on this. First of all, as you know, Dr. Blake was an expert for the defense at the trial of the matter and I just wanted to point that out. Number two, I think Dr. Blake may have two roles. One as a percipient and one if your Honor is choosing as an expert. For example, a very important part, and I have spoken to Dr. Blake



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\_\_\_\_\_ expert for us. To describe exactly what was done with regard to the testing in the hairs, testing on the tee-shirt, the testing on the hairs and I believe in fact he informed me that the report that was prepared by Dr. Myers was indeed either Dr. Blake correct me if I am wrong either merely conclusory, insufficient or wrong. I am not sure which, but in either event, I think it would be important

Dr. Blake: Hold on for a second.

David  
Alexander: Alright, let me just finish please. In any event, regardless of that event, I think it would be important and it is important to have Dr. Blake set forth precisely a step by step \_\_\_\_\_ to do to let us know what indeed was done previously with regard to both the hairs and the tee-shirt. I think that is a role as a percipient. And then with regard to the expert my only question would be the areas in which he would be designated by the Court as an expert.

Judge Huff: Alright. As to those areas, I believe that what I think it would be helpful to have a \_\_\_\_\_ compilation of the physical evidence and a summary of the testing that was done to date. Dr. Blake, do you have an additional suggestions? As to the scope of your report? And then what we are also interested in is saving time and expense concerning any later mitochondrial testing or EDTA testing.

Dr. Blake: Okay. The Court is aware of the letter that I sent to the Court making certain proposals.

Judge Huff: Yes.

Dr. Blake: Is that correct?

Judge Huff: Yes.

Dr. Blake: Okay. One of the things that I am concerned about in regard to the current schedule is my ability to provide a comprehensive report.

Judge Huff: I think it can be done or else the Court is not interested. I think it can easily be done.

Dr. Blake: Well, I am concerned in that regard. There are so many hours in the day and I



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also have obligations to other cases.

Judge Huff: Well, you could be subpoenaed solely as a percipient witness.

Dr. Blake: I feel like I am being cheated here now, is that feeling correct?

Judge Huff: No, we have already set a schedule the schedule has been set some time ago. You have been contacted concerning the hearing and so the Court is requesting that you the Court could say just come and tell us about what you did. I thought we were being very fair to you in letting you have 20 hours to prepare a report. You certainly have time between now and the time of the hearing in order to get that done.

Dr. Blake: Well, I am being \_\_\_\_\_. There is no question about it. You know I mean if you want to conduct this affair in that fashion, then you are going to get the results of that. My judgment what should be going here is that I should be allowed to have time to deal with the hairs first. The hairs are very extensive. It makes \_\_\_\_\_. Once the hairs are described and documented for the Court, make a proposal about how those hairs might be dealt with in the current investigation.

Judge Huff: I appreciate that and we do not intend in any way to pressure you and if you are not interested then we don't need you. The whole thought we already had a whole day of hearing and there was some suggestion that we could save time and expense because there was another proposed hair person to evaluate the hairs and prepare them for further testing. We thought that since you had already participated in some of that that we could save time and expense. If the outcome is that we pay you to do it and then we pay the additional person to do now we have double payment and also we have set the schedule long ago and now we have just wasted time and doubled our expense. So from the Court's point of view that doesn't make any sense to have a duplication of effort. So the point of your testimony and Dr. Myers testimony is whether it would save time and expense so if you are reluctant to do that then we are not intending as I indicate to have you participate. We can call you as a percipient and then just if the Court believes that you should be entitled to reasonable compensation just have you testify about what you have done, whether there is a soak that is available and the extent of the hairs because I do have the benefit of the State Court matter as well. So it is up to you whether you wish to participate we are sticking with this schedule. If you don't wish to participate then obviously under Rule 706 then you



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are not required to participate at all. We could if we just wanted to find out whether there is a soak available we could go first with Dr. Myers and not have you participate. Because Dr. Myers was there for the soak, I believe, correct me if I am wrong.

Holly Wilkens: Your Honor, this is Holly Wilkens there was no soak with the respect to the blood stain.

Judge Huff: Okay.

Holly Wilkens: I have reported on that \_\_\_\_\_.

Judge Huff: Alright. And then in so far as we understand that the Court is requested the government have your produced for the hearing, but we are not going to compel you to be an expert if you don't want and then if the defense is going to retain you then there is a different funding mechanism, but that is also subject to budget and some other issues as well, so do you want to participate and if so, do you think it can be done understanding the limited scope for a limited purpose or are you and the defense going to get together if so we still are sticking with this schedule and the date is the date.

Dr. Blake: Well, I'll with 20 hours that's used up Judge, I am going to stop.

Dr. Huff: Alright.

Dr. Blake: If that is the way the Court wants to do it that's the way going to be done. With regard to the soak, I am very concerned that people are operating on the basis of total ignorance in the soak matter \_\_\_\_\_. Somebody has introduced the concept of a soak. I don't know what the scientific basis for that is, but there isn't. So the Court is spending a lot of time talking about soak when that is a figment of somebody's imagination and I would highly recommend that the Court wonder how many other examples of that existed. That is the whole point of doing this thoroughly. I have made the offer to do it thoroughly, but if the Court doesn't want to accept that offer the Court can accept the consequences later on down the road.

Judge Huff: You are actually you are the one that gave the estimate and I am going with the



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low end of your estimate given the constraints on the budget.

Dr. Blake: My estimate was 20 – 30 hours to prepare the hair evidence for documentation and that I assume that the Court's interest to be remains focused on the hair and that is where I will devote my energy. I think that I can contribute a great deal of information to this Court on other evidence that the Court has to consider, but I can't do that without being provided the funding and the time to do that – that job.

Judge Huff: It says

Dr. Blake: I am not going to do a job that I can't do thoroughly because it is simply inappropriate as a matter of science to not do things thoroughly. That is why we are in the situation that we are in now.

Judge Huff: I am just reading from your own letter. I estimate the time involved in the preparation of this duly illustrated report to be on the order of 20 – 30 hours.

Dr. Blake: That was in regard to the hair work. It was not in regard to other the other evidentiary matters that are under consideration here, which involves the bar shirt, the A-41 blood stain sample and the cigarette butt.

Judge Huff: Well, what we were interested in for purposes of this hearing is seeing whether there would be a way to save time and expense of your knowledge of the hair samples instead of having an additional person also do hair analysis as well and so that was the contact letter.

Dr. Blake: You missed it. There is only two people on the table here that are familiar with the hair evidence in this case and one is Mr. Myers and the other is myself. Who is this other person?

Judge Huff: There was another person proposed at the earlier hearing.

Dr. Blake: But that other person is not familiar with this evidence.

Judge Huff: That is exactly why I wanted you to come to see if we could save some time and effort, but the other person may be Mr. Alexander can say the name of the first witness at the hearing.

? DeForest.



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David Alexander: Yes, it is Mr. DeForest.

Dr. Blake: Yeah, Peter, I know Peter DeForest. He was my teaching assistant when I was a student at Cal, but Mr. DeForest is not familiar with this evidence. He couldn't possibly give any confident statement about the state of the evidence because he has never seen it before.

Judge Huff: Well, that is why we have suggest bringing you in and seeing what has already been done. There was another the mitochondrial expert needed the hair samples to be prepared so we said rather than jumping to Mr. DeForest, why don't we first find out what has been done through you to see if could then perhaps save time and expense not having Mr. DeForest involved.

Holly Wilkens: Your Honor, this is Holly Wilkens, also, we have not reached the point of deciding whether or not to actually conduct the testing and since there is allegations about whether or not the hair has in fact been examined, it was also to clarify that as well – is that correct?

Judge Huff: Exactly.

Holly Wilkens: Now, another thing your Honor, my understanding as to the science presentation on June 3rd and 4th, from the three scientists was that its was focused solely on the hair evidence. Is that correct?

David Alexander: That is not correct. This is Mr. Alexander. We were addressing and demonstrated by the very point of Ms. Wilkens brief that we will be responding to on Friday addressing and proposing two new witnesses now regarding EDTA. There is no question about it. In fact, I think your Honor articulated – I don't mean to speak for you, but I don't think there is an issue of the mitochondrial testing and scientific reliability

Judge Huff: Correct.

David Alexander: The issue there is the management of it.

Judge Huff: Correct.



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David Alexander: Your Honor has just described. With regard to the EDTA testing, I think your Honor wanted to hear more about that matter and that would be the thrust of the Daubert hearing principal thrust of the Daubert hearing that we are going to have. So, I believe Ms. Wilkens is in error and I would only comment with regard to the so called soak and people we are all unfamiliar except Dr. Blake with the terminologies and the like. We may be talking about the same thing, calling it something wrong, I don't know, but Ms. Wilkens had a very vague reference in a footnote saying that there was no soak. We don't know who she talked to, what the source of that is or anything else. With all due respect given the nature of this matter, I am simply not prepared to accept her representation on this and I think it is appropriate to put evidence on.

Judge Huff: No, I don't think we are going to have evidence on everything – this is where we have a fundamental difference about that. We are taking it one step at a time. There are two primary issues. The Brady issue and the testing issue. And the testing has two breaches. The mitochondrial branch and EDTA branch. The court the EDTA was the subject of a Ninth Circuit en banc opinion. If you have not examined before whether there was sufficient scientific basis to even do and so that is why we are have the Daubert analysis of that. It was not my intent to have witnesses to called as to that. If Ms. Wilkens if you want to just put whatever they have to say in a declaration, you are free to submit a declaration and I

David Alexander: She does that \_\_\_\_\_ . She does that and we will respond.

Judge Huff: Yeah.

David Alexander: On Friday.

Judge Huff: And then I don't think it was the Court's intent to have them as additional witnesses as far as the Brady matter as I said, I am going to issue an order narrowing the scope.

David Alexander: Your Honor, in that regard, if we might and going back to the Ninth Circuit opinion, I think and I don't have it in front of me so I apologize, but I think it is appropriate when considering the brief matter that not only is it not only appropriate to consider very specific information, but all of the evidence that



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relates to that particular claim and that is why for our part and we will address it after the hearing and go as far as we can go in these three days Mr. Baird and alike Ms. Carol will be present because we just subpoenaed her and she confirmed that she will be there. We are happy to proceed with \_\_\_\_\_.

Judge Huff: Well, the Court will evaluate it and then issue an appropriate order. So now, first to get back to Dr. Blake. Do you believe that purposes of the hair analysis where I a copy of the letter saying that you estimated the time involved in the preparation of the fully illustrated report to be on the order of 20 – 30 hours. The Court will also contemplate a proposed means for selecting the individual hair samples for pretential mitochondrial DNA testing should the Court judge such testing to be meritorious. Should the Court agree with this proposal, I requested an order be issued that clearly specifies that you would be paid your normal rate of \$175.00 per hour and \$1,400.00 per day and that you would be allowed to prepare a report concerning the hair evidence extending no more and what I said was the low end of your range 20 hours.

David Alexander: Your Honor, if I might, this is Mr. Alexander and \_\_\_\_\_  
Mr. Blake Dr. Blake excuse me has retained I believe an attorney to advise him in this matter and I am just wondering

Dr. Blake: That is not correct.

David Alexander: Alright, I apologize.

Judge Huff: Alright.

David Alexander: I thought you said you did.

Judge Huff: Alright, Dr. Blake is that sufficient for purposes of this hearing that we would have a report with 20 hours subject to if you end up the 20 hours and if you say I can – just do the best that you can within that amount of time.

Dr. Blake: With the scope of the report defined to the hair evidence.

Judge Huff: Exactly.



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Dr. Blake: Okay. My concern was that I thought I heard the Court saying that what the Court anticipated to occur on June 4 was a complete examination and consideration of all of the relevant evidence, which extends from the hair to the bar shirt to the cigarette butt to the A-41 sample.

Judge Huff: And you are saying that you are not prepared to that within your 20 hour estimate.

Dr. Blake: Okay, so that is fair.

David  
Alexander: Your Honor, Mr. Alexander again, we will need Dr. Blake as a percipient witness to tell us what happened in terms testing on the EDTA and I don't know whether and again it is now outside

Judge Huff: No, but you said

David  
Alexander: that is critical to make the determination that he needs to make.

Judge Huff: He is subject to cross-examination at the hearing. So he is being paid for his report which is and then he is also being asked to come for the hearing and he is being compensated for his time and then you I would think that you would meet with him and Ms. Wilkens would follow up.

Holly  
Wilkens: Your Honor, this is Holly Wilkens. If I could clarify it is my understanding that the science testimony will relate sole to the hair evidence and we will have arguments on the Daubert motion.

Judge Huff: Correct.

Holly  
Wilkens: Okay, so Mr. Alexander will not be permitted to examine the witness with regard to the issue of \_\_\_\_\_.

David  
Alexander: Well, I take strong objection and object to that your Honor. This is Mr. Alexander because in order to do a proper evaluation particularly the Court probably has not had an opportunity understandably to review Ms. Wilkens submission, but it is very important for the Court to understand that this is a case of the hairs. What was done in the testing of the tee-shirt in order to evaluate whether or not what Mr. Ballard proposes can be done can in fact be done. They take no exception to the scientific reliability of EDTA testing as set forth in their papers. All they



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question is whether or not it can be relied you know what is proposed to be tested here can be reliably done. I would submit that the only way to know that is to do the testing and then do the examination. Even if that is done, if that is the case, it is simply inappropriate and I would object to their trying to cut us off and cut your Honor off from knowing what is happened with this EDTA what is the status of.

Holly Wilkens: (Can't hear her.)

David Wilkens: and that is percipient testimony that is absolutely critical.

Holly Wilkens: No, I don't

David Wilkens: for our presentation to know just as it is in the case of the mitochondrial hairs what it is in the EDTA and I'll refer to Dr. Blake on that assessment.

Holly Wilkens: Your Honor, this is Holly Wilkens. Your Honor permitted both parties to make presentations on April 2nd

Judge Huff: Right.

Holly Wilkens: Mr. Alexander also has an opportunity once again on Friday to bring information to this Court in the form of a declaration.

Judge Huff: Correct.

Holly Wilkens: And there is no excuse to objecting to the scope of the science hearing which has been set for quit some time.

Judge Huff: I agree.

David Alexander: Well, your Honor.

Judge Huff: I agree so to the extent you have an objection, that objection is sustained and or overruled. The purpose of Dr. Blake is to do a preliminary information concerning the hairs so that the Court has background about whether we can then



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proceed with the mitochondrial DNA testing.

David  
Alexander: Your Honor

Judge Huff: As to the EDTA, the Court already had a preliminary hearing and then will have an opportunity to hear argument from the parties on the Daubert issue and then make a determination about whether Dr. Ballard is the one, whether we have a blind testing of several samples where Dr. Ballard doesn't know what samples are testing. There has not been a lot of hair review. The Court has some major questions about whether there is sufficient hair review and scientific validity to the whole process, but the Court (side one of the tape ended – I think there is missing parts of the conversation)

You have you submitted a budget. I don't know whether the budget included Dr. Blake or not. If you wanted Dr. Blake it should be in your budget.

Norm Hile: It did not your Honor and we will worry about that. That is between us and Dr. Blake as you told us previously.

Judge Huff: Alright.

Norm Hile: And, as I said we reserve our right to apply the Court for it, but I understand the Court's position on it.

Judge Huff: Okay, so to answer Dr. Blake's question, I am referring back to his own letter.

Norm Hile: Your Honor, this is Norm Hile.

Judge Huff: And I will give

David  
Alexander: We need a copy of that letter. Can the Court make copies for both the petitioner and respondent?

Judge Huff: I will.

David  
Alexander: Thank you.



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Judge Huff: And \_\_\_\_\_ the report. During the first post conviction investigation he produced one heads up report for the Court and counsel of record at that time. The report is imposed as Exhibit 4. He has produced no other post conviction report. He estimates the time involved in the preparation of the fully illustrated report to be on the order of 20 – 30 hours. The report will also contemplate a proposed means for selecting individual hair samples for potential mitochondrial DNA testing should the Court judge such testing to be meritorious and that is the scope of the report.

Dr. Blake: The scope of my report is defined in the hair.

Judge Huff: Correct.

Dr. Blake: Is the Court giving me permission to engage in a educational consulting to \_\_\_\_\_ the \_\_\_\_\_ paid for by Mr. Alexander and Mr. Hile first. Is there any objection to that?

Judge Huff: As to that they were required to submit a budget to the Court. Their budge that was submitted did not include that. If they they are pro bono counsel and are fully able to then decide what they want to do subject to the Court deciding what is reasonable so I am just saying that it has to be reasonable and that that is between you and their firm.

Dr. Blake: That is not my question Judge. My question is the Court have any difficulty is there a legal reason why I should not engage in that educational consulting relationship?

Judge Huff: I can't advise you on that because I am the Judge. What I can say is that the Court has a dual role. The Court rules on the merits at the same time the Court, Magistrate Judge or someone rules on funded. If the funding exceeds what is reasonably limited what is reasonably necessary then their firm may be responsible for it. They may not get full funding for it if the Court thinks that it is outside of their budget or not reasonable.

Holly Wilkens: Your Honor, this is Holly Wilkens. If I could clarify because it is very important for my ethical consideration. I am unclear on whether or not the consultation with Dr. Blake would be within the umbrella that was contrived earlier where they are simply discussing what has transpired before. If it is actually an expert relationship for this proceeding, I need to have that clarified because then I would



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not be contacting Dr. Blake at all. I wanted to know what we are discussing. Are we discussing Mr. Alexander and Mr. Hile contemplating him as an expert for what is really percipient information or are they in fact retaining Dr. Blake as an expert.

Judge Huff: I don't know.

Norm Hile: I don't know that Ms. Wilkens needs to know that.

Judge Huff: She does need to know it in order to whether she can contact him to get percipient information or not.

Norm Hile: We don't have any objection to that.

Judge Huff: Okay, alright and so I think the answer you don't need to be vague about this, but all funding is subject to approval by the Court. It is also subject to approval by a Capitol Case Committee and the Ninth Circuit Judicial Counsel which so there is multiple layers of review.

Dr. Blake: You are still baiting the question that I am asking. I think I know what the answer but the Court hasn't been direct on the point. Given then my acting more or less as a Court appointed

Judge Huff: No, I think well

Dr. Blake: Is there any bar is there any legal bar to me providing educational assistance to Mr. Hile and Mr. Alexander with regard to the physical evidence/items that were the subject of the first post conviction inquiry?

Judge Huff: The answer in my opinion is no. In that the Court suggestion of the Court appointed expert should not be misconstrued. It was solely to provide a funding mechanism so that you would not be limited to being a percipient witness for the purpose of this hearing.

Dr. Blake: In regards to the hair.

Judge Huff: Correct. It would not pose any bar to you being retained by the defense.

Dr. Blake: For this educational purpose that I just described.



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Judge Huff: Correct.

Dr. Blake: Does Ms. Wilkens have an objection to that?

Holly  
Wilkens: I don't that I am entitled to Dr. Blake.

Dr. Blake: (Laughing)

David  
Alexander: So stipulated your Honor.

Judge Huff: I agree.

Dr. Blake: Okay.

Judge Huff: Alright, so all I am saying is that it should be if you submit a bill for 50 hours then that would seem to be a little unreasonable to the Court.

Dr. Blake: Is that a question directed to me or to Mr. Hile.

Judge Huff: Both.

Dr. Blake: Well, I am not going to submit any bills to the Court other than the bill associated with the report on the hair that the Court has approved.

Judge Huff: Correct.

Dr. Blake: My understanding for my interaction with Mr. Alexander and Mr. Hile is that their firm, given their pro bono

Judge Huff: yes

Dr. Blake: \_\_\_\_\_ in the Cooper defense. Their firm is prepared to simply pay me for my time down with them so that they can become educated about the evidence in this case.

Judge Huff: There is no bar at that.



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Dr. Blake: Okay, I just wanted to make sure.

Judge Huff: But then they have to submit if they want to get that your expenses paid, they have to submit approval to the Court.

Dr. Blake: That part of it, I understand Judge it is between Mr. Hile and Mr. Alexander and the Court. That is not between me and the Court.

Judge Huff: Correct.

? That is correct.

David  
Alexander: Your Honor, this is Mr. Alexander (papers shuffling) there is no doubt between \_\_\_\_\_ going to be second through the fourth. There is absolutely no

Judge Huff: I will issue a scheduling order.

Norm Hile: \_\_\_\_\_ this is Norm Hile. May I address that just for a second please. Other than the scheduling matter, but it also has something to do how we go forth. I don't know when the Court will issue that order to who is going to be allowed to testify and we did not respond and had a chance to respond to the objections that were filed by the Respondent to our witnesses and we haven't made any objections yet because we just got their witness list. There is a question a gray question in my mind first whether we will be able to fit other witnesses in when we don't know when the Court will rule on.

Judge Huff: It is not going to be a problem because the Court is going to restrict the number of witnesses.

David  
Alexander: Your Honor, just to reinforce Mr. Hile. Many of the people who are listed we don't know who they are. They didn't even tell us. The only person we listed was Mr. Beard was the Crime Lab Manager. The key guy on the tennis shoes from the Crime Lab point of view, who I think your Honor may be aware that there are no questions about this, but was serious drug problem and was going through therapy on this.

Judge Huff: That was well known from that has been well known.



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David Alexander: That is exactly and we intend to talk intend to talk to him, but what I want to make if Ms. Wilkens can even tell us who these people are who she intends to call then we can properly and what the offer is on them. She can by letter today \_\_\_\_\_ at least we \_\_\_\_\_ and throw a name out there doesn't assist us in the least in having our opportunity to object just as they had an opportunity to object to ours.

Judge Huff: Do you have Mr. Beard under subpoena?

Norm Hile: The answer to that is no.

David Alexander: The answer is no we do not. We are planning to go talk to him and before the proceeding to see if in fact, there are questions there and I am not going to disclose them, there that we want to pursue that we think relate very directly to very specific issues that are \_\_\_\_\_. I would at least at a minimum request the opportunity to visit this issue. Once we have done that we will go about doing that quit promptly.

Judge Huff: Well, after I

David Alexander: He is up in Washington, he is up in the State of Washington.

Judge Huff: After I have reviewed the submissions more fully, I will issue a scheduling order, but I can tell you that it is going to be more limited based on the Court's review of the matters to date.

Norm Hile: Your Honor, the fact remains Norm Hile. The respondent has listed four witness who we have never heard of before this listing came out. We don't know who they are and that is the reason we wanted to have some of the discovery that we requested. I appreciate that the Court has scheduled a hearing, but at the moment we don't know who the witness are that they have identified. We don't know which witness the Court is going to approve and we don't yet have a ruling on our discovery motion and we don't even know whether or not we are going to have a chance to know who these people are so my request would be from a scheduling standpoint if the Court could allow us.

Judge Huff: Let's first – Dr. Blake thank you for your participation. I will issue an order.



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Dr. Blake: Okay.

Judge Huff: And then we look forward to seeing you.

Dr. Blake: Okay great.

Judge Huff: Thank you very much.

Dr. Blake: Bye-bye.

Judge Huff: Alright good bye. On the discovery request, I thought what I had said (total silence on tape) the Court will permit you to see if you can get a voluntary DNA sample from Mr. Furrow and Mr. Koon.

Norm Hile: Alright and what I wanted to ask from a scheduling standpoint your Honor was we would like to file a motion to continue the hearing date.

Judge Huff: The Court denies that because you have got the warden under subpoena and then I believe James Taylor is scheduled to be here and then based on the submissions the Court has reviewed the Court may or may not need additional witnesses.

Norm Hile: Your Honor, for purposes of scheduling this is so we can make our record. If I file such a motion for a continuance at least we have a record of what we have asked for. How do I schedule that with respect to an order shortening time?

Judge Huff: You can just make a motion now, an oral motion to continue the hearing and the Court denies that.

Norm Hile: Alright then, I don't need to schedule a hearing for it?

Judge Huff: No, it is not necessary.

Norm Hile: Okay, we will file a motion then to that extent. Now the other thing that I just wanted to ask the Court about is with respect to the lodgment of 15 audiotapes which were lodged with the Court, some of them including people who the respondents are going to call were some were participate \_\_\_\_\_ as the respondents are going to call

Judge Huff: Right.



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Norm Hile: as witnesses. Is the Court is the Court going to consider those for purposes of the hearing on June 2 or should we are we allowed to do some discovery with respect to that if the Court is going to allow people who submitted those tape or participated on those tapes to be part of the hearing are we going to have a chance to get discovery about that?

Judge Huff: The Court denies the request for discovery. In criminal cases people I mean it this is a case where we have already had post-conviction review. We have already had an affirmative post-conviction review. The Ninth Circuit has now sent it back for further habeas petition, a successive habeas petition and has given some direction to the Court. It is not the case in every habeas case that just because it is labels civil that you do all civil discovery. We have got a hearing, they have given you the tapes. If it was a criminal case they would give you the tapes and you can go and talk to people if they want to talk to you or they don't talk to you.

Norm Hile: But your Honor

Judge Huff: You have got the benefit of their tapes. We don't need any discovery on that and then we can have the hearing. The Court will, based on the submission of the parties decide the scope of the evidentiary hearing and I am giving you no surprise that the Court intends to constrict it a little more based on the submissions that the Court has received.

David Alexander: Your Honor if I might just raise a point that we might need to consider. These tapes were in part, I don't know how many because I don't know who all of the people are conducted in interviews done on the phone \_\_\_\_\_ and we have a very serious questions that I don't purport to have the answer now

Judge Huff: They are law enforcement, they are allowed to do that.

David Alexander: Well, there is an exception your Honor for law enforcement but I would

Judge Huff: They are law enforcement

David Alexander: raise the issue because we are looking at that



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Judge Huff: They are law enforcement

David Alexander: Law enforcement that is contemplated by the statute so we would like the opportunity to look at that before the dates are listed to \_\_\_\_\_ the tapes themselves are hearsay evidence. I don't know what they are being submitted for. We may turn out we want to use them also, but I want to raise this issue because it is one that we are looking into and we intend to advise the Court whether we have an objection or whether that is a matter we need to have briefed.

Judge Huff: Alright. Anything else.

Holly Wilkens: Yes your Honor, I wanted to clarify I have a discovery motion on my desk, is that something that I do not need to respond to?

Judge Huff: No, you should respond to it in writing for purposes of the record \_\_\_\_\_.

David Alexander: Your Honor, we \_\_\_\_\_ of the Court is we give, we will be receiving for this first time on Monday were are expecting the official transcript of the tutorial.

Judge Huff: Alright.

David Alexander: So we don't have that at this time we have some of the unauthorized transcript that I believe the AG obtained of just a portion of it.

Judge Huff: Okay. Alright. So we will see you at the date of the scheduled hearing and I will issue a scheduling hearing.

Norm Hile: Your Honor, it is Norm Hile. Can you give us some idea of when that will come out because \_\_\_\_\_. I would like to raise one other question on scheduling then. Just by the way these things fall, the petitioners demurrer should be filed when it is due the day of the hearing.

Judge Huff: Mhuh.

Norm Hile: And the respondent has filed a answer with exhibits that are seven inches thick and I would ask that if we are going to go ahead with the evidentiary hearing on the 2nd through the 4th that we be given an extension of time to file our \_\_\_\_\_. Now that we are given that we are doing the evidentiary a



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evidentiary hearing before the pleadings have been sent

Judge Huff: I don't I don't think

Norm Hile: I would like to ask if the Court would allow us an additional 30 days to file our  
trevers

Judge Huff: The Court denies that. You can file it a week later. You can have an extra week.

Norm Hile: Thank you your Honor.

Judge Huff: Alright thank you very much.

Holly  
Wilkins: Thank you your Honor.

Judge Huff: Bye.

? Your Honor

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