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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KEVIN COOPER,)	Case No. 04CV0656-H(LSP)
)	
Petitioner,)	San Diego, California
)	
vs.)	Wednesday,
)	June 2, 2004
JILL L. BROWN, ACTING WARDEN,)	4:30 p.m.
SAN QUENTIN STATE PRISON,)	
)	
Respondent.)	

TRANSCRIPT OF IN-CHAMBERS PROCEEDINGS
BEFORE THE HONORABLE MARILYN L. HUFF
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Petitioner:	NORMAN HILE, ESQ. GEORGE A. YUHAS, ESQ. MBV Law 855 Front Street San Francisco, California 94111 (415) 781-4400
For the Respondent:	ADRIANNE DENAULT, ESQ. HOLLY WILKENS, ESQ. Office of the Attorney General 110 West A Street, Suite 1100 San Diego, California 92101 (619) 645-2001
Transcript Ordered by:	ADRIANNE DENAULT, ESQ.

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transcript produced by transcription service.

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Court Recorder:

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1 SAN DIEGO, CALIFORNIA WEDNESDAY, JUNE 2, 2004 4:30 P.M.

2 ---oOo---

3 (Call to order of the Court.)

4 THE COURT: We're going to record this. I've
5 received two proposed orders. One has -- the Petitioner
6 wants 12 hairs, the Respondent has identified 10 hairs. I
7 think I had said at the hearing 10 hairs.

8 MR. HILE: I thought ours said 30, your Honor,
9 and I --

10 THE COURT: Yours is actually 30?

11 MR. HILE: Yes.

12 THE COURT: I was just looking at paragraph 1.2.
13 Since it's -- I don't think that we need 30 hairs for the
14 testing, and I think we should limit it to 10, so go back
15 and take a look at those 10 that you want to be examined,
16 and then as -- because I was counting the 12 -- hair on
17 right hand, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 --

18 MR. HILE: I'm sorry, your Honor --

19 THE COURT: -- 11, 12, 13.

20 MR. HILE: Yes. May I explain that?

21 THE COURT: You may.

22 MR. HILE: These particular exhibits -- each
23 contains many -- sometimes more than hundreds of hairs. If
24 you look at paragraph 3.2, we've suggested that the expert
25 narrow it down to no more than 30 hairs.

1 THE COURT: Yeah, and what I'm suggesting is that
2 it should be 10.

3 MR. HILE: Understood, but I just wanted the
4 Court to be aware that paragraph 1.2 -- the reference is
5 not to an individual hair. It is to many hairs within each
6 of these exhibit numbers, and what happened was that the
7 investigators collected hairs from -- for instance, the
8 right hand of Jessica Ryen, and there were many hairs
9 there, and they're in a group.

10 THE COURT: Right. I know. That's why we're
11 having the other people come and testify because many are
12 cut hairs, not root hairs.

13 MR. HILE: Understood.

14 THE COURT: And so I think it would be productive
15 to have the testimony to then narrow it down, but one issue
16 area is you now want 30 hairs, as I understand it, not 10,
17 and you want 10 hairs.

18 MS. WILKENS: Well, we want none.

19 THE COURT: You want none -- over objection --

20 MS. WILKENS: Right.

21 THE COURT: Then I think what you would have to
22 give an argument -- as to why these particular ones have to
23 be done. We don't have to decide that today.

24 MS. WILKENS: Right.

25 THE COURT: Then, additionally, the question is

1 the timing.

2 The Court would like to have the work done and
3 the report to the Court by July 19th, so hopefully by
4 tomorrow we'll be able to come up with an order -- not
5 tomorrow -- by Friday -- come up with an order and then get
6 the testing going -- given the information that the Court
7 has. That's the Court's tentative schedule.

8 MS. WILKENS: And that would be the completion of
9 the selection and the testing --

10 THE COURT: Correct.

11 MS. WILKENS: -- and the reporting.

12 THE COURT: Correct. And then another issue is
13 whether the Court selects your proposed expert, Mr.
14 DeForest. I'll hear from Dr. Blake -- Mr. Blake --
15 concerning the identification of the hairs that's already
16 been done to see if we can avoid additional expense and the
17 cost proposed -- you should have the proposed cost of the
18 three hairs -- is that in your budget? Have you narrowed
19 it down that way?

20 MR. HILE: Yes, your Honor. The testimony from
21 Dr. Melton at the tutorial was that the cost per hair to be
22 analyzed was \$2,500 per hair.

23 THE COURT: Uh-huh.

24 MR. HILE: However, there's an additional cost
25 for the reference samples, and what she has told me -- that

1 the most inexpensive way to do this is that the reference
2 samples don't need to be hairs. They can be -- they can do
3 a mitochondrial analysis to gather what they want for
4 reference sample from blood -- and so, if we can use a
5 blood sample, it's cheaper than doing a mitochondrial
6 analysis on an actual hair.

7 THE COURT: So what --

8 MS. WILKENS: It's also more reliable.

9 MR. HILE: Right.

10 MS. WILKENS: Our scientists are recommending
11 that blood samples be used for the reference --

12 THE RECORDER: Excuse me -- I need for you to
13 speak up a little.

14 MS. WILKENS: Yes, I'm sorry. Our scientists
15 have indicated that the reference samples to be used by
16 Mitotyping should be blood samples --

17 THE COURT: So both parties --

18 MS. WILKENS: That would be the most reliable.

19 THE COURT: -- agree on that.

20 MR. HILE: And that's fine with us.

21 THE COURT: Okay, and there's an additional cost
22 on that.

23 MR. HILE: Well, there's an additional cost, but
24 if it's cheaper than if the reference samples were done by
25 hair, so --

1 THE COURT: Okay. And then what about also --
2 what about also incorporating if Mr. Koon is willing to
3 give a voluntary hair sample to have his included in this?

4 MS. WILKENS: The Court may wish to find out if
5 the hairs are consistent with the victims' because, if the
6 profiles are consistent with the victims', it serves no
7 purpose to compare with Mr. Koon because it doesn't afford
8 that kind of specificity, and Mr. Myers can address that.

9 THE COURT: He will be addressing it tomorrow?

10 MS. WILKENS: Yes.

11 THE COURT: Okay. I'll defer that.

12 MS. WILKENS: The other thing, too, your Honor, I
13 did want to report to the Court -- we were asked to inquire
14 of Mr. Koon and Mr. Furrow, and Mr. Koon has indicated
15 through an intermediary we're using the Nashville
16 Metropolitan Police detective, but Mr. Koon has indicated
17 he will provide whatever the Court would request,
18 voluntarily.

19 We have a letter from Mr. Furrow's attorney
20 declining to do so, and he has indicated we can share that
21 with the Court. So we will file with the Court.

22 THE COURT: And will you share with --

23 MS. WILKENS: Yes.

24 THE COURT: -- counsel.

25 MS. WILKENS: Yes.

1 THE COURT: All right. So Mr. Furrow doesn't
2 want to participate.

3 MR. HILE: And if I can just comment briefly,
4 your Honor, with respect to the way we understand this
5 testing would go.

6 The reference samples that we're talking about
7 are for each of the victims, and if the state is willing to
8 stipulate that none of them are Mr. Cooper's hairs, then we
9 don't have to test a reference sample for his.

10 I left it in this draft because I wasn't sure
11 they were willing to stipulate to that, but assuming for a
12 moment that --

13 THE COURT: These reference ones that have
14 already been -- I mean, they're not --

15 MR. HILE: Let me explain how that works. As Dr.
16 Melton explained, what she will do is she will get a
17 reference sample for the four victims and for Mr. Cooper
18 and, if we have it, for Mr. Koon against which when she
19 does a hair that -- in our proposal, Dr. DeForest has
20 identified as one that should be tested -- when she does
21 the mitochondrial analysis and profiling of that hair, she
22 will then be able to compare it to the victims, Mr. Cooper
23 and Mr. Koon and see if there is a match.

24 Now, if it matches none of the victims, then we
25 have a hair of some person other than the victims that was

1 on the hand of one of the victims -- that is significant.

2 THE COURT: These are only ones with root
3 samples?

4 MR. HILE: It --

5 MS. WILKENS: No. Mitochondrial DNA is not quite
6 as specific as nuclear DNA, and therefore they don't
7 require the roots with the sheaths.

8 THE COURT: Okay.

9 MR. HILE: And so you can test the hair
10 regardless of whether there is a root or a sheath on it.

11 THE COURT: Well, maybe counsel has a point to
12 defer Mr. Koon -- I'll give that some thought.

13 MS. WILKENS: Well, we also provided in our
14 proposed -- at the recommendation of our scientist that
15 Mitotyping do the mitochondrial typing of the evidence hair
16 first and then receive the blood reference samples to type.

17 THE COURT: You mean just so -- to keep
18 everybody -- why?

19 MS. WILKENS: Just so there's no predisposition.

20 THE COURT: I think that's a very good idea.

21 MR. HILE: Certainly that can be done, your
22 Honor, and I talked to Dr. Melton about it.

23 THE COURT: I think it's a good idea.

24 MR. HILE: What she explained to me -- just so
25 the record's clear and so you know is that it would be less

1 expensive for her to do the reference samples, have them
2 when she does the -- however many hairs the Court agrees
3 and Dr. DeForest sees needs to be done.

4 As the Court will see in my proposal --

5 THE COURT: If you could get from her with a
6 phone call tonight to find out what's the difference.

7 MR. HILE: Okay.

8 THE COURT: But I do think that it's probably
9 good to just do it first before we know what the answer to
10 the quiz is.

11 MR. HILE: That's the way we'll do it, then.

12 MS. WILKENS: And also --

13 THE COURT: Absent a huge, gigantic cost
14 issue -- I don't think it's going to be that --

15 MS. WILKENS: And Mr. Myers can address this and
16 will address this in his testimony, but a match is somewhat
17 of a misnomer because this is not the same specificity that
18 you have with the nuclear DNA. So you can say that it's
19 consistent with or inconsistent with, but there is a
20 broader universe of potential.

21 So we're not dealing with what we were with the
22 nuclear.

23 THE COURT: All right.

24 MR. HILE: That's correct, your Honor, but to
25 this extent. At the tutorial, as Dr. Melton testified, you

1 can exclude people with mitochondrial testing to type of
2 surety that the statisticians make us feel pretty good
3 about.

4 Whether you have an actual match is another
5 question.

6 THE COURT: Okay.

7 MR. HILE: And that's because of the fact that it
8 is a maternally-passed-on gene, so you can't exclude the
9 possibility of somebody being a -- somehow linked on the
10 maternal line.

11 THE COURT: And I'm not inclined to have the
12 attorneys present --

13 MS. WILKENS: We didn't include that because we
14 felt it served no purpose.

15 THE COURT: I don't think --

16 MS. WILKENS: And, frankly, we have every
17 confidence in Dr. DeForest and Dr. Melton, and we don't
18 feel that we have any issues, so we certainly wouldn't want
19 to be present, and we don't think it adds anything.

20 MR. HILE: I don't -- for the testing, I don't
21 need to be present at all, your Honor. That was
22 not -- what we wanted to do was to be present solely when
23 the evidence was gathered and looked at and then sent off,
24 so we saw what it was that was being sent. Right now
25 we --

1 THE COURT: Do you mean from the clerk's office?

2 MS. WILKENS: Or from the labs.

3 MR. HILE: From the labs.

4 MS. WILKENS: They wanted to go over to DOJ and
5 watch DOJ package it up, and I don't feel that's necessary.

6 MR. HILE: It would not take very long, and it
7 would at least allow us to be able to see what it is that's
8 being sent.

9 THE COURT: But --

10 MR. HILE: Since we're doing this without being
11 paid by the court for our time, it's certainly not an
12 expense for the court.

13 THE COURT: But there is a little bit of a -- I
14 mean, then you're there and so --

15 MS. WILKENS: And it certainly didn't help us
16 last time with the impugning the integrity of every
17 scientist involved.

18 So I don't know -- I guess that's where we're
19 coming from. There's going to be accusations till the end
20 of time on this, so --

21 THE COURT: I'll take that under submission.

22 MR. HILE: All right.

23 THE COURT: But I think maybe they could just
24 photograph what they sent -- when they package it up, they
25 can take a digital, and then they send it, and then no

1 attorneys are there -- it's one lab to another lab. They
2 do all this time.

3 MS. WILKENS: And they do document it, and they
4 can testify to what they did.

5 THE COURT: Yeah -- but let me think about that.
6 And are there any other major issues on --

7 MS. WILKENS: Well, we had focused on the left
8 hand, and again that's something we can take up with the
9 Court, but I think from the testimony that we'll get from
10 the scientist, it may be evident that all of the hairs have
11 already been screened, and the screening that has been done
12 is the same in essence that would be done for what we're
13 doing, and Dr. Blake participated; he was designated by Mr.
14 Cooper. Three hairs were selected, two of whom Mr. Myers
15 agreed with -- the third one, he didn't, but they went
16 ahead and did it.

17 So I think, you know, the Court will see that a
18 lot of work has gone into this, and everyone focused in the
19 Ninth Circuit on the left hand, and so we focused on the
20 left hand.

21 We don't feel any testing should be done, but
22 they've made quite a fuss about the left hand. They've
23 gotten a lot of attention from that, and it seems odd that
24 now they want to expand the universe of the search.

25 MR. HILE: I disagree with everything Ms. Wilkens

1 just said, and we get along fine.

2 The fact of the matter is, your Honor, that in
3 our petition -- as in the petition that we supplied to the
4 Ninth Circuit -- we asked for testing of the hairs that
5 were in all of the victims' hands -- both hands -- and that
6 was also what was tested for nuclear DNA back the last time
7 the testing was done. This is a different type of testing,
8 and as you'll hear from Dr. Blake and from Mr. Myers, they
9 were not sorting the hair at that time for purposes of
10 trying to determine which were appropriate for
11 mitochondrial DNA testing.

12 Our petition asks for it. Our petition to the
13 Ninth Circuit asks for it. What we want is simply to have
14 Dr. DeForest, if the Court agrees, look at the hairs from
15 all of the victims' hands -- right and left hands -- and
16 choose what we suggest is no more than 30 for the testing,
17 and all we're trying to do is to determine first whether or
18 not there is a hair that does not match any of the
19 victims', and to do only one hand of one of the victims is
20 to be giving not a half of a loaf but one eighth of a loaf
21 of what it is that the whole testing issue is about, and
22 we --

23 THE COURT: That was primarily the position with
24 the previous argument. I'll take a look at that and then
25 make a decision.

1 MR. HILE: I have some references -- if the Court
2 wishes -- to our current petition as well as the petition
3 we sent to the Ninth Circuit.

4 THE COURT: I read your position.

5 MR. HILE: Where every time we talk about the
6 hairs that are in the hands of the victims, plural.

7 MS. WILKENS: Every time but one, and the one
8 time that you didn't include all of them -- that's the one
9 that was quoted in the Ninth Circuit's decision. Every
10 other time -- I agree -- you mentioned every hand and every
11 victim.

12 MR. HILE: Yeah. And that's in our current
13 petition.

14 MS. WILKENS: But on one occasion, you mentioned
15 just Jessica, and that was what was quoted by the Ninth
16 Circuit in their decision.

17 THE COURT: I'll give that some consideration.
18 You could test theoretically everything, or you could
19 test -- you'd have to have a representative sample that's
20 not -- we wouldn't want to be three years from now, and
21 they say, "Okay, now go test some more."

22 At the same time, it is expensive testing, and so
23 it's not a complete open checkbook, and so we're trying to
24 be reasonable about that.

25 MR. HILE: I understand.

1 THE COURT: And so I'll give that some
2 consideration. I'll have the benefit of the input of the
3 experts.

4 Are you saying that we could use Blake directly
5 to their expert, or are you agreeing that Mr. DeForest is
6 appropriate to --

7 MS. WILKENS: We agree -- Dr. DeForest is a
8 reputable, ethical scientist. We have no objections to
9 him -- none.

10 THE COURT: Okay -- no objections to him. Okay,
11 that's helpful for the Court to know.

12 Okay, it's been a long day. I'll let you go. I
13 actually have another matter now, and then I will see you
14 tomorrow -- can you -- have you made a determination --

15 MR. HILE: Yes, your Honor, and let me just
16 explain what Holly and I have talked about for scheduling.

17 THE COURT: Uh-huh.

18 MR. HILE: We would like to have Derek Pacifico
19 testify tomorrow morning, and he is available. We do not
20 need Mr. Maldonado, so that will take care of the morning
21 as far as witnesses.

22 For child care reasons, we would like to -- and
23 Ms. Wilkens has graciously agreed -- that we will put on
24 Sandra Coke at 1:00, and then after that Steven Myers.

25 THE COURT: Great. I can even move it -- we can

1 go straight through lunch if you want -- take a short
2 break.

3 MS. WILKENS: When would you like Detective
4 Pacifico here? When would you like to start tomorrow?

5 THE COURT: How long do you think he will be? It
6 doesn't make sense to come at 9:00 if we're going to go
7 till -- so we could actually -- how long do you think he
8 will be?

9 MR. HILE: I don't think it will be more than an
10 hour. My suggestion would be we do him at a convenient
11 time for the Court in the morning --

12 THE COURT: 10:30.

13 MR. HILE: And then break for lunch. I want to
14 make sure that -- because I think that Sandra Coke will not
15 get here before noon, so I think it would be a good idea to
16 have lunch and come back --

17 THE COURT: So if we did him 10:30 to noon --

18 MR. HILE: That would be great.

19 THE COURT: -- and then her at 1:00.

20 MR. HILE: Yes.

21 THE COURT: And then Dr. Myers.

22 MS. WILKENS: And per the Court's request, Mr.
23 Myers is available on Friday as well, if we don't finish
24 because the Court had indicated --

25 THE COURT: Oh, okay.

1 MS. WILKENS: -- to make sure he stayed because
2 he would go after Dr. Thornton and Dr. Blake if we didn't
3 finish.

4 THE COURT: Okay.

5 MS. WILKENS: And we've done that.

6 THE COURT: So who will be first up, then?

7 MS. WILKENS: We're supposed to start with Dr.
8 Thornton first thing in the morning -- who is arriving
9 tomorrow afternoon -- so he will be here, and that's on our
10 dime.

11 THE COURT: Okay.

12 MS. WILKENS: And then Dr. Blake is flying in
13 that morning, and we have an agent picking him up at the
14 airport and bringing him straight to the courthouse, so he
15 should be arriving -- Adrienne, do you --

16 MS. DENAULT: His plane arrives at 8:30.

17 MS. WILKENS: So he should be here waiting to go
18 on after Dr. Thornton, and then Mr. Myers will be here in
19 the event that we don't finish, and then he can go back on
20 after Dr. Blake.

21 THE COURT: Okay. All right, thank you. So
22 we'll see you, you think, tomorrow at 10:30 is reasonable
23 for us to get all the work done, then?

24 MS. WILKENS: Yes.

25 MR. HILE: Yes, your Honor.

1 THE COURT: What about the Daubert? Do you want
2 to reserve argument on the Daubert? Do you think that
3 we'll have enough time to reserve argument until after I've
4 heard the experts?

5 MS. WILKENS: With Dr. Blake, I don't know.

6 (Laughter.)

7 THE COURT: Or do you want to do the Daubert
8 argument tomorrow at 9:00?

9 MS. WILKENS: That would be fine with us.

10 MR. HILE: Do we know what time --

11 THE COURT: It wouldn't take an hour and a
12 half --

13 (Pause.)

14 MS. WILKENS: He'd probably be assuming we're
15 starting at 9:00.

16 MR. HILE: I'll confirm with that. Do you think
17 if we started at 9:30 --

18 THE COURT: 9:30, and then I'll let you argue the
19 Daubert, and there's two issues on the Daubert. One is
20 just the overall Daubert -- it does appear from the
21 declaration of the one individual that you submitted that
22 the EDTA testing is recognized, but another, more critical
23 issue to the core is whether the proposed expert meets the
24 criteria -- whether the Court should really authorize court
25 funds on an expert whose testimony has been rejected by two

1 courts.

2 And that may not be strictly a Daubert analysis.
3 It could be --

4 MR. HILE: One thing that I have proposed to Ms.
5 Wilkens when we were discussing the issue of these orders,
6 and I am still offering it -- we put together -- in part of
7 the suggestion of Dr. Blake -- a method for doing the EDTA,
8 oxalic and citric acid testing through Dr. Ballard -- that
9 would be a blind testing, and we've put that proposal
10 together, and I've offered it to the Attorney General.

11 So to the extent --

12 THE COURT: Is there anybody else you could get?

13 MR. HILE: Every one that we have talked to has
14 said that Dr. Ballard -- the one in his lab is the one that
15 does it.

16 So what we did in order to try to alleviate the
17 concerns --

18 THE COURT: But he said anybody could do it with
19 the machine.

20 MR. HILE: What we did in order to try to
21 alleviate the concerns that the Court might have and that
22 the Attorney General has expressed is to put together a
23 proposal for a blind method of testing so that in effect
24 what would happen is that Dr. Ballard would receive --

25 THE COURT: Several --

1 MR. HILE: -- 25 vials that all look exactly like
2 and he'd have no idea which is which. Some of them are
3 controls; some of them are actual stains.

4 THE COURT: Uh-huh.

5 MR. HILE: But he doesn't know which ones they
6 are.

7 THE COURT: Uh-huh.

8 MR. HILE: And then he tests them all, gives his
9 results, and sends them back, and then we match them up
10 with the code as to which is which.

11 THE COURT: Uh-huh.

12 MR. HILE: And that way what he'd be doing is
13 completely blind -- just as he testified he'd done before
14 blind testing --

15 MS. WILKENS: We have concerns about how blind
16 that is --

17 THE COURT: That's a little --

18 MS. WILKENS: -- because you can do presumptive
19 testing to see if it's blood-oriented, and also it drives
20 up the cost, and frankly we will never agree to Dr. Ballard
21 or his laboratory coming anywhere near that evidence.

22 THE COURT: See, I think my -- see, that's a
23 separate issue -- the EDTA, yeah -- but the Ballard --
24 that's really -- if you could come up with an alternative,
25 that might be very helpful.

1 MR. HILE: Well, we will certainly try, your
2 Honor. Let me also say that the Attorney General hasn't
3 proposed an alternative to him, and I think that reflects
4 the fact that he is the person at the moment who has the
5 most experience doing this.

6 MS. WILKENS: No, it doesn't reflect that.

7 MR. HILE: And --

8 THE COURT: I think given the results in Pompey
9 which seem to be so similar here -- with the destructive
10 testing --

11 MR. HILE: This will not be destructive --

12 THE COURT: You think it will be --

13 MR. HILE: No, it will not.

14 MS. WILKENS: We have enormous concerns about Dr.
15 Ballard specifically and his lab -- and, frankly, part of
16 the reason there's no one else doing what Dr. Ballard
17 is -- there's reasons for it.

18 THE COURT: What you want is you want validity,
19 you want acceptance, you want -- if the result stands, it's
20 potentially exonerating.

21 If you choose somebody at the getgo that the
22 other side who you're in an adversarial circumstance says
23 that -- "We've got huge problems," what have we
24 accomplished?

25 If you want a potential resolution where somehow

1 the Attorney General says, "Well, you know, maybe we'll not
2 go for the death penalty," you're not going to get -- I
3 don't know whether you'd ever go for that -- but if you
4 want -- you need to have somebody that you don't have
5 reservations --

6 MR. HILE: I understand that. This is the first
7 time that Ms. Wilkens has ever told me that under no
8 circumstances will they ever accept Ballard -- under any
9 circumstances or anything.

10 THE COURT: I don't know that she said that. She
11 said she has huge reservations --

12 MS. WILKENS: Well, we would never acquiesce. It
13 would be over our objections because of his background. I
14 mean, frankly, he's --

15 MR. HILE: All right.

16 MS. WILKENS: -- a junk scientist with baggage.

17 MR. HILE: Well --

18 MS. WILKENS: And, frankly, I think --

19 MR. HILE: We're respectfully disagreeing with
20 that; however, I understand the Court's concern, and we
21 will redouble our efforts to find someone that is
22 acceptable, but I would also ask the Attorney General to do
23 the same.

24 THE COURT: Uh-huh.

25 MS. WILKENS: Well, part of the problem is we

1 can't find someone to do what Dr. Ballard's doing because
2 he's taking information and coming up with conclusions
3 without any basis --

4 MR. HILE: What about -- they submitted a
5 declaration from Mr. LeBeau as part of their papers on
6 this.

7 THE COURT: Uh-huh.

8 MR. HILE: He says this can be done. He says
9 that both what Dr. Ballard says can be done can be done.
10 He also says that it can be done --

11 THE COURT: Not the eyeball method.

12 MR. HILE: No, but that's not what Dr. Ballard is
13 proposing to do and not what we would have him do under
14 what we proposed.

15 But they then impeach Mr. LeBeau with Mr.
16 Phillips, so --

17 THE COURT: No, what --

18 MR. HILE: -- what's the matter with --

19 THE COURT: LeBeau clearly helps you, but if we
20 could find somebody --

21 MR. HILE: What's the matter with him?

22 THE COURT: -- who doesn't have the bag --
23 pardon?

24 MR. HILE: What is the matter with Mr. LeBeau?

25 MS. WILKENS: Mr. LeBeau had problems in Syber,

1 and frankly I think the Court has really clarified --
2 what's the Florida case -- that was the Florida case with
3 the poisons --

4 THE COURT: Oh.

5 MR. HILE: He works for the FBI, doesn't he?

6 MS. WILKENS: I don't know --

7 THE COURT: Give it some thought, and I haven't
8 decided, but if there would be somebody who has less
9 baggage, then it would be more -- it would be better.

10 MS. WILKENS: Well, the other thing, too, is
11 quite frankly I don't think the goal is exoneration. I
12 think the goal is ambiguity, and the goal is continued
13 public relations, and it was sold to the Ninth Circuit as
14 dispositive and definitive, and it is not, and that's why
15 we're having difficulty coming up with someone who is going
16 to provide the kind of testing you described to the Court
17 because --

18 THE COURT: I'm just following the Ninth
19 Circuit's orders, and then we'll hear from the people
20 tomorrow, and then -- but give that some thought. If you
21 could come up with an alternative that -- as I said, the
22 Daubert is based on LeBeau's declaration. I'm not as
23 concerned about whether it's recognized, but then in its
24 application in this case there are several issues. One is
25 the nature of the expert; two is whether we've got the

