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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 30, 2004
JILL L. BROWN, ACTING WARDEN,)	9:00 a.m.
SAN QUENTIN STATE PRISON,)	
)	
Respondent.)	

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

APPEARANCES:

For the Petitioner:	DAVID T. ALEXANDER, ESQ. MBV Law 855 Front Street San Francisco, California 94111 (415) 781-4400
For the Respondent:	HOLLY D. WILKENS, ESQ. ADRIANNE S. DENAULT, ESQ. Office of the Attorney General 110 West A Street, Suite 1100 San Diego, California 92101 (619) 645-2287

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1 SAN DIEGO, CALIFORNIA WEDNESDAY, JUNE 30, 2004 9:00 A.M.

2 --oOo--

3 (Call to the order of the Court.)

4 THE CLERK: Number 1 on calendar, 04CV0656, Cooper
5 vs. Goughnour set for evidentiary hearing regarding habeas
6 corpus.

7 THE COURT: That should be changed on the
8 calendar. So why don't you go ahead and change it to --

9 MS. WILKENS: Jill L. Brown.

10 THE COURT: -- Brown.

11 MS. WILKENS: The Respondent.

12 THE COURT: It's easier to say too. And if you
13 could put that in so that then it comes up.

14 Good morning. Do you want to state your
15 appearances for the record?

16 MR. ALEXANDER: Good morning, your Honor. David
17 Alexander for the Petitioner.

18 MS. WILKENS: Yes, your Honor. Holly Wilkens,
19 Deputy Attorney General, for the Respondent.

20 MS. DENAULT: Good morning, your Honor. Deputy
21 Attorney General Adrienne Denault on behalf of Respondent.

22 THE COURT: And do we have a witness or not?

23 MR. ALEXANDER: We do not, your Honor, I'm sorry
24 to say. But it wasn't for lack of trying up until midnight
25 last night.

1 THE COURT: Could we try for July 26th here?

2 MR. ALEXANDER: Absolutely.

3 MS. WILKENS: Your Honor, may I address this issue
4 and the availability of the witness?

5 THE COURT: Sure.

6 MS. WILKENS: We have been continuing throughout
7 the evening and early this morning to locate the witness.
8 Of course our efforts have been hampered because we've been
9 provided no information other than the name. At this time,
10 we are interviewing the gentleman's son to attempt to locate
11 him so that we can inquire if he could be available today.

12 THE COURT: Oh, I see. But where is he, a couple
13 of hours away?

14 MS. WILKENS: We have no idea at this point.
15 Counsel mentioned the high desert. Our information suggests
16 Lake Elsinore. So I think it's unlikely that even if we
17 locate him, that he could be here today because of the
18 distance. But I wanted to state my strenuous objections on
19 the record to the fact that counsel was aware of this
20 witness on Friday and did not inform this Court on Monday
21 and seek leave of this Court to prevent an additional
22 witness.

23 He did not do it at the conclusion of his two
24 witnesses. He didn't do it yesterday morning. He didn't do
25 it yesterday afternoon, even when the Court concluded taking

1 testimony. Instead, he went through a rather lengthy
2 discussion seeking reconsideration of this Court's ruling so
3 that a time --

4 THE COURT: But that was at the Court's -- that's
5 at the Court's schedule.

6 MS. WILKENS: Well, that's true, but if he wanted
7 an additional witness, if he had mentioned that before the
8 Court heard the motion, the State would have stood a much
9 better chance of locating the gentleman. Because by the
10 time we heard his name, it was after 5:00, which complicated
11 our efforts.

12 THE COURT: In any event, we don't have him here
13 today. And I think given the -- what I do want to do is
14 discuss -- so I am available July 26th, I think. Let me --

15 MR. ALEXANDER: That works out perfectly because
16 that was the day we were to have the conference call.

17 THE COURT: And you're going to have the
18 telephonic conference, and instead we could be here at 10:00
19 o'clock.

20 MR. ALEXANDER: Although I must say, your Honor,
21 on Sunday when I left my home at 4:30 to make an airplane, I
22 got down here at 10:30 at night because of delays in
23 airplanes and everything else. So sometimes it happens.

24 THE COURT: But in the morning it's usually pretty
25 good because the airplane is right there.

1 MR. ALEXANDER: We will -- that time we'll come
2 down in the morning.

3 MS. WILKENS: Well, the other concern I have, your
4 Honor, quite candidly, the State has not persistently
5 requested reconsideration of all rulings adverse to the
6 State, et cetera, and we rarely get up and talk about due
7 process and general concepts. But I must say I am very
8 offended by the notion that counsel attempted to have a
9 secret witness and that counsel failed to inform us of this
10 witness once the witness was known. This is not the way the
11 Government conducts itself, nor would this Court tolerate
12 it.

13 And I think the point I want to make is the Court
14 has continually drawn an analogy to a criminal trial. And
15 in a criminal trial, there is reciprocal discovery. And we
16 do not play hide the ball. And when we come before this
17 Court, Mr. Cooper has no greater rights than the State. He
18 is seeking an equitable remedy. This entire proceeding
19 relates to the truth as opposed to gamesmanship. And we're
20 deeply offended that this Court scheduled two days for
21 taking witnesses and now we are extending beyond it.

22 And frankly, I am concerned because, as your Honor
23 noticed, Mr. Alexander asked every witness yesterday who
24 frequented the bar in June of 1983. And I must say that the
25 State, in coming before the Court, focused on witnesses who

1 had been demonstrably placed at the bar in 1983. We did so
2 because that lends some credibility. These are people who
3 cooperated with law enforcement, were known to both sides.

4 And so now we're going to see a parade of
5 witnesses ostensibly to corroborate Ms. Melon (phonetic) and
6 Ms. Sloniker (phonetic). But I have to note that the issue
7 before the Court is Brady. And Ms. Sloniker saw -- her
8 testimony is she saw a uniform outside the bar, tan pants,
9 tan shirt. Ms. Melon has admitted that she was confusing
10 perhaps two evenings.

11 So we have the two witnesses that were cited to
12 the Ninth Circuit in this court who are not facing a law
13 enforcement official inside the bar. We know that the
14 sheriff's department had jurisdiction. They wear forest
15 green pants. We know that they were not called or
16 dispatched to the bar. So when we look at the issues before
17 the Court, in terms of corroborating Ms. Sloniker and Ms.
18 Melon, there's very little to corroborate in terms of the
19 Brady claim.

20 If we're going to talk about covered with blood,
21 basically that is a side issue with respect to credibility
22 on the Brady issue. We're not relitigating the case. We're
23 not relitigating the three men at the bar. If it's to
24 corroborate something as silly as the bar lighting or
25 something that's de minimis of whether or not they spoke to

1 the gentlemen, again, the focus is was there a law
2 enforcement officer responding to that bar and dealing with
3 those patrons because those are the allegations.

4 And so this hearing was very limited in scope. It
5 was noticed to both parties. And if we come back on the
6 26th, how many more witnesses are we going to have and how
7 long is the investigation going to go on? And we have very
8 finite resources, your Honor. I don't want to belabor the
9 point with the Court, but we see an increasing shift in our
10 law enforcement resources for these kinds of activities, and
11 we have very finite resources.

12 THE COURT: On the resource issue, it is the State
13 of California, and the State is seeking the capital
14 punishment. And the Ninth Circuit has directed this Court
15 to permit Petitioner to be able to file a successive
16 petition. So on the resource issue, obviously the
17 Petitioner has sought to have resources, and we're working
18 through that, throughout mechanisms that we have. I
19 understand the Respondent's issue, but if the Respondent
20 wishes to address resources, it's a court order that we've
21 been directed to do, and that's what we're doing.

22 And so I will permit the Petitioner to try to --
23 has had a good-faith belief as to some witness that he
24 located on Friday when we were in Riverside or some --
25 right?

1 MR. ALEXANDER: Well, I learned about him. I
2 learned about him on Thursday for the first time.

3 THE COURT: All right.

4 MR. ALEXANDER: And then I met with him on --

5 THE COURT: Well, obviously he needs to check him
6 out to see if he is credible or if it's worth pursuing or
7 not. I will note that it's been 20 years, and so there is
8 some difficulty on locating witnesses. However, the
9 application for the successive petition was pursued some
10 time ago. It's a matter of balancing.

11 I understand the Petitioner's concerns. I
12 understand the Respondent's concerns. If we're able to
13 locate this witness for the 26th, that would be a date --

14 (Court conferring with clerk.)

15 THE COURT: Ten-thirty. We can do it at 10:30.

16 MR. ALEXANDER: Okay.

17 MS. WILKENS: Your Honor, again noting the
18 limitations on the Court's calendar, do we have any guidance
19 from the Court about additional witnesses that Mr. Alexander
20 may discover between now and then, and do we have any
21 guidance with respect to Respondent's ability to respond?
22 And again, with respect to the resources, it is only to the
23 extent that we seek to curtail to those matters that the
24 Court is focusing on. Again, we accept the obligation of
25 responding, but we are very concerned.

1 MR. ALEXANDER: If I might address that, your
2 Honor.

3 THE COURT: We said the 26th. Let me back that
4 up. Are you available on the 23rd?

5 Check my calendar on the 23rd instead of the 26th.

6 MR. ALEXANDER: The only reason the 26th works --
7 (Court confers with clerk.)

8 MR. ALEXANDER: What day? I don't have --

9 THE COURT: That's a Friday. Friday the 23rd.

10 MS. WILKENS: That's fine, your Honor.

11 MR. ALEXANDER: Yeah. The only thing I suggest is
12 if we were going to do something on the 26th, we could do it
13 in person if we get them both on one day.

14 MS. WILKENS: I don't believe we'll have the
15 information.

16 MR. ALEXANDER: It's a question of Friday or
17 Monday.

18 THE COURT: My calendar my clerk tells me is full
19 for the 26th.

20 MR. ALEXANDER: Oh, all right.

21 THE COURT: And we have two matters -- two motions
22 at 10:30. On the 23rd, I do not have anything currently
23 scheduled. I was planning to be out of the district, but I
24 could be here. I could rearrange my schedule to be here.

25 MS. WILKENS: Well, we may need to do the

1 telephonic on the 26th, depending upon Doctor Melton's
2 schedule because --

3 THE COURT: Correct. If you can arrange -- if
4 Doctor Melton is done by the 23rd, we can do it then.

5 MR. ALEXANDER: Sure. Sure.

6 THE COURT: But if she's not done, then we'll do
7 it telephonically on the 26th. And that time, instead of
8 9:00, would be 10:30 --

9 MR. ALEXANDER: Okay.

10 THE COURT: -- for the Court's calendar.

11 MR. ALEXANDER: On the 23rd.

12 THE COURT: On the -- if we do it telephonically
13 on the 26th for Doctor Melton, that would be at 10:30.

14 MR. ALEXANDER: And on the Friday, the 23rd?

15 THE COURT: Friday, the 23rd, at -- we'll make it
16 at 10:00 or as soon as you come.

17 MR. ALEXANDER: Okay.

18 MS. WILKENS: Your Honor, are there any procedures
19 or requirements with respect to any parties seeking to
20 present testimony from additional witnesses? Is there any
21 request as to --

22 THE COURT: If there are additional witnesses,
23 then you need to give notice ahead of time. And you need to
24 give notice by the 19th without good cause.

25 MR. ALEXANDER: Okay.

1 MS. WILKENS: And is it required to seek leave of
2 Court for the particular witness or will you just entertain
3 whatever witnesses?

4 THE COURT: If they've located witnesses that were
5 there that have information on the Brady issue, then they
6 may present that.

7 MS. WILKENS: Without limitation as to number
8 or --

9 MR. ALEXANDER: Without limitation as to number.
10 If I could address this very briefly, just to be clear.
11 First of all, the presentation of evidence to avoid
12 duplication of witnesses not only relates to the Brady
13 claim, but there is our first claim of one of actual
14 innocence. And so we don't want to split up and bring
15 people back for separate claims.

16 But to the extent it is a Brady claim and we
17 acknowledge that, in part, it is and it relates to the
18 police report, Ms. Wilkens informed us of Mr. Hoots
19 (phonetic) on Monday night and gave us that log that we have
20 never seen before and never been produced on Monday night,
21 yet she has known for a long, long time that that was an
22 issue in the case. I'm not pointing fingers. It happens.
23 I think we can manage the witnesses.

24 THE COURT: No. But as to the log, there was
25 testimony at the trial about three people in a station wagon.

1 MR. ALEXANDER: Yes.

2 THE COURT: So it's information that's known to
3 the Defense.

4 MS. WILKENS: Again, I didn't locate Mr. Hoots
5 until I told counsel because, frankly, we wanted to bring in
6 the best witness possible to interpret the log. We did not
7 even have the log until we provided them because they're
8 difficult to find. It's 20 plus years, and we were able to
9 bring in Officer Hoots, who was there.

10 THE COURT: Well, to bring this full circle, we'll
11 have an evidentiary hearing on July 23 at 10:00 o'clock or
12 as soon as people can come here, and you'll -- are you going
13 to secure the witness?

14 MS. WILKENS: If the Court would prefer that, we
15 would be perfectly willing to do so.

16 MR. ALEXANDER: We'll secure the witness.

17 THE COURT: Well, either side may secure the
18 witness.

19 MR. ALEXANDER: And the reason I say that is --
20 and I'll just let you know without the specifics -- because
21 based on a conversation last Friday -- and this is to relate
22 to the history on this -- I learned of this gentleman on
23 Thursday, and we came down and had the hearing with Mr.
24 Lowko (phonetic) on --

25 THE COURT: I don't think we need to go into all

1 of this.

2 MR. ALEXANDER: And then I went and saw him, and
3 he told me, "Sir, I have prepared a statement," then tried
4 to send it down to him. I could not get a hold of him on
5 Sunday, and I've not been able to get a hold of him since
6 then because he's got some sort of job -- I don't know what
7 it is -- where he goes out into sort of the country and
8 guards construction equipment or something at night. And he
9 stays out in a trailer home, apparently.

10 THE COURT: Uh-huh.

11 MR. ALEXANDER: I've been trying my darnedest to
12 get a hold of him.

13 THE COURT: Uh-huh. So go ahead. You may or the
14 State may, but I would like the witness secured. And
15 sometimes the State has a better --

16 MS. WILKENS: We would be happy to secure the
17 Defendant with the understanding that he's not our witness.
18 We'll make every effort to have him here for the Court.

19 THE COURT: I'm also not restricting you from
20 contacting him or getting any statement.

21 MS. WILKENS: Thank you, your Honor.

22 THE COURT: I mean, if he's -- he's a witness.
23 He's a witness.

24 All right. Then I would like to invite the
25 Petitioner to submit any -- as I said, we're trying to work

1 on the funding issues.

2 MR. ALEXANDER: Yes, your Honor.

3 THE COURT: And work through federal bureaucracy
4 on the funding issues.

5 MR. ALEXANDER: Yes, your Honor.

6 THE COURT: And so if you could bring up to date
7 any fees and expense -- any -- the expenses --

8 MR. ALEXANDER: Yes, your Honor.

9 THE COURT: -- out-of-pocket expenses.

10 MR. ALEXANDER: Uh-huh.

11 THE COURT: We're pursuing the criminal justice act
12 on the one hand. There's some -- the pro bono fund on the
13 other hand, and working with our restrictions on both.

14 MR. ALEXANDER: Thank you.

15 THE COURT: If you could do that. I need more
16 than just a line item. I need more than --

17 MR. ALEXANDER: Yes. No. We'll give you the
18 receipts and --

19 THE COURT: If you -- and not a blanket one. So I
20 can't say investigator, eight hours. I need -- I need
21 some --

22 MR. ALEXANDER: I'll be able to describe the
23 services --

24 THE COURT: Yes.

25 MR. ALEXANDER: -- for example.

1 THE COURT: And then --

2 MR. ALEXANDER: When would you like this by, your
3 Honor?

4 THE COURT: As soon as possible. This is the
5 reason. We have advised all of our Criminal Justice Act
6 counsel that the fund for the Criminal Justice Act is -- has
7 budget restrictions, and the budget ends September 30. They
8 are on notice and have been invited to submit bills as soon
9 as possible because there may come a point in time this year
10 where the fund is out and then it rolls over to next year.
11 Given the election and the uncertainties, there may not be a
12 new budget.

13 And this has happened periodically over the time
14 so that then there's restrictions on payment until we get a
15 new budget. And because of the election situation, that may
16 be delayed. And so for our practitioners, we've advised
17 them, get it in as soon as possible so that we can process
18 it as we go.

19 Also, as to Mr. -- Doctor Ballard, we still have
20 under consideration whether we can work out any of the
21 Court's concerns as to him. I did have a concern about the
22 \$300 an hour being reasonable, so I need more information on
23 that. But as to the tutorial, the Court would pay for him.
24 And as to his counsel to you up to the date of the Court's
25 order and even perhaps beyond that if you're trying to work

1 that out, the Court would authorize payment to him if we
2 could work out a reasonable rate.

3 MR. ALEXANDER: Very well.

4 THE COURT: His rate is quite different than --

5 MR. ALEXANDER: Everyone else.

6 THE COURT: -- everyone else.

7 MR. ALEXANDER: I'm aware of that, and we're
8 working on that also, your Honor.

9 THE COURT: And so the -- Doctor Melton, I mean,
10 she's got really great credentials and her rate is less than
11 Doctor Ballard. So if you -- I am willing to then pay him
12 for the time. And then also for Doctor Melton and for the
13 other ones who have already testified --

14 MR. ALEXANDER: Uh-huh.

15 THE COURT: -- if you want to submit information
16 so that we can get something to you.

17 MR. ALEXANDER: Support the rate. Okay.

18 THE COURT: Oh, no. Not in the support of the
19 rates as to Doctor Melton.

20 MR. ALEXANDER: Oh, I see.

21 THE COURT: I don't think -- we don't have a bill.
22 We don't have any --

23 MR. ALEXANDER: Well, we'll get that.

24 THE COURT: And what I'm saying is, before the --
25 before -- typically there's -- there are projections, and

1 the projections are that this fund may not be able to
2 compensate all of the demands, so they are in line for
3 payment. As you get in the queue, it's better to get in the
4 queue now rather than later.

5 MS. WILKENS: Your Honor, if I could clarify. You
6 referenced working out problems with Doctor Ballard. Has
7 the Court modified its order that counsel is to provide a
8 qualified expert by July 12th other than Doctor Ballard?

9 THE COURT: No.

10 MS. WILKENS: Okay.

11 THE COURT: And I did also -- after yesterday's
12 discussion, I was giving some thought to this about the law
13 enforcement. The Court's thought was, if we go into the
14 testing with somebody that either side or the Court has
15 reservations about, then what we get in the outcome may not
16 be credible or there may still be those lingering
17 reservations.

18 MS. WILKENS: Well, the other problem is --

19 THE COURT: And let me just say then on the law
20 enforcement side, if -- then it may be the flip side. If
21 it's somebody affiliated with law enforcement that does the
22 test and it comes back negative, do we then risk -- run the
23 risk that somebody says, "Oh, well, they're affiliated with
24 law enforcement. What do you expect?"

25 So what I was thinking in the order is, if we're

1 going out and getting a neutral expert, not -- we're getting
2 a neutral qualified expert, that we want to know the
3 science. And if we can come up with somebody who doesn't
4 have baggage on either side, then we've got the results, and
5 then we can interpret the results.

6 If we're able to then work out some alternative
7 where either there's double-blind testing or there are
8 adequate controls, then I still have notice of potential
9 problems. Not with methodology and interpretation of
10 results. So that's part of the Court's thought on that.

11 MR. ALEXANDER: I understand. And in fact -- and
12 I'm not rearguing Doctor Ballard, but just to point out, he
13 does -- I don't think the Court can determine about, well,
14 they're with law enforcement. Therefore, they're biased one
15 way or the other. He principally is retained by law
16 enforcement in cases. So I don't think that bias is there.

17 THE COURT: Let me amend that to say if you're
18 satisfied with somebody affiliated with law enforcement and
19 think that it would be reliable, then the Court would be
20 willing to consider that. The Court would be willing to
21 consider any reputable and qualified expert that's
22 available. And you may then make your submissions.

23 MR. ALEXANDER: Thank you.

24 THE COURT: Also on the protocol, you've submitted
25 one protocol that obviously -- here's your wish list, and

1 the Government has then submitted its criticisms of that.
2 If you wish to submit an alternative one that that does
3 address, now that the Respondent has indicated its specifics
4 on the concerns, I am interested in doing on the bar shirt
5 the blood that's already been identified as Kevin Cooper's
6 and a surrounding area, not all blood. Not -- let's do
7 that, see what happens, not -- not a re-exam of everything.
8 Because that's what's been identified. And if that is -- if
9 the EDTA argument doesn't relate -- doesn't end up relating
10 to that, then I don't think it's necessary to do all areas
11 of the shirt. Also, that then leaves the remainder of the
12 evidence in its original condition as well.

13 On that issue, you mentioned that you would do
14 the -- have the centrifuge for the DNA. It was the Court's
15 thought that if you did the DNA in the area where Kevin
16 Cooper's blood has been identified with Doug Ryan's blood,
17 that area, and then a surrounding area, how are you -- where
18 there is probably no blood, how is the DNA elicited from an
19 area of the shirt where there's no blood?

20 MS. WILKENS: There would be none, your Honor.

21 MR. ALEXANDER: Yeah.

22 MS. WILKENS: The only potential DNA would be
23 habitual wear, and that would only be in habitual wear
24 spots, which would be the back of the collar or the armpits.

25 MR. ALEXANDER: And they were unable to get any

1 DNA in those areas, as I understand, at that time.

2 MS. WILKENS: There were efforts. And I would
3 suggest that a revised protocol that it be clear that it's
4 been done with the assistance of qualified experts, which
5 can be done by attaching declarations in support of the
6 proposals. Because the impression of our scientist is that
7 the experts being identified in the protocol have not really
8 been involved with the development of the protocol, which is
9 not of assistance to the Court.

10 THE COURT: So this is helpful to the Court. What
11 you're saying is that the immediate surrounding areas, if
12 they don't have -- if they're white --

13 MR. ALEXANDER: If I could --

14 THE COURT: -- then they cannot be controlled
15 areas.

16 MR. ALEXANDER: No, no, no. I think the point is,
17 your Honor --

18 THE COURT: If you could be at the mic.

19 MR. ALEXANDER: I'm sorry.

20 THE COURT: Or you could each be at a table and
21 argue.

22 MR. ALEXANDER: I think the point is -- and I want
23 to be careful.

24 THE COURT: You can consult with the expert.

25 MR. ALEXANDER: What I understand is, what you're

1 really trying to see is we know that to some extent, EDTA is
2 ubiquitous. It's been lots of different things.

3 THE COURT: Uh-huh.

4 MR. ALEXANDER: And it might be in a detergent
5 or --

6 THE COURT: Uh-huh.

7 MR. ALEXANDER: So that in areas around the blood
8 spot, okay, EDTA could be there because there's some as a
9 result of let's say laundry determine. But those are in
10 much lower concentrations than it is the amount that someone
11 would expect from the purple top too. That's my
12 understanding, simplistic as it is.

13 So you're testing the area around not so much --
14 not at all really for blood. We're glad there's no blood
15 there because then you can get the material itself not
16 impacted by blood and seed. You know, there's de minimis
17 EDTA, yet there's a lot more EDTA right where the blood spot
18 is.

19 THE COURT: Okay. I agree on that. And so what I
20 was thinking of is let's say you say a two-inch
21 circumference or a three-inch circumference and you test
22 four spots around that circumference of where the blood area
23 is.

24 MR. ALEXANDER: Right.

25 THE COURT: If there's -- how does one get the

1 material to test -- we were talking about cutting the shirt
2 or not cutting the shirt?

3 MS. WILKENS: No. You would cut the shirt. And
4 one of the concerns that our scientists have expressed is
5 when you're accounting for background behind the blood
6 stain, you're going to have to have controls that are
7 comparable size. So it's quite a complex process. And
8 that's why our scientists are interested in their putting
9 forward a very detailed proposal as to how they would do
10 this because --

11 THE COURT: Could you do that for your submission
12 on or before July 12th? I mean, your --

13 MR. ALEXANDER: Yeah. I think the person who is
14 going to be doing this -- the blood that's been tested for
15 DNA purposes, okay, apparently -- I have not seen the shirt,
16 but my understanding, it's already been cut out.

17 THE COURT: Correct.

18 MR. ALEXANDER: I don't know what the size of
19 those cutouts are and whether they went, you know, far
20 enough around it that they may, in cutting out, also have
21 some of that area. But Doctor DeForest is the one that
22 we're going to be utilizing --

23 THE COURT: Isn't that -- is that -- uh-huh.

24 MR. ALEXANDER: -- to do that aspect of it. In
25 fact, Mr. Ballard suggest that. He would like that. And so

1 he's the gentleman I need to talk to. And I'm reluctant to
2 go too much farther on this because I simply don't know.

3 THE COURT: Okay. But could you then in the
4 submission for the 12th come up with a protocol that also --
5 at least given the Court's tentative thinking that what I'm
6 interested in is testing the area where the DNA was
7 discovered and control areas around it with capillary
8 action.

9 MR. ALEXANDER: Yeah.

10 THE COURT: You have to control against -- if it
11 was in one area, obviously it could seep out. But -- so how
12 would you accomplish that?

13 MR. ALEXANDER: Yes. I understand.

14 MS. WILKENS: Also, if Doctor DeForest would have
15 the benefit of -- I mean, we put on the presentation of the
16 science tutorial. There was very specific identification of
17 different stains by the DOJ lab. And I thin that Doctor
18 DeForest needs to really be well informed and have
19 everything that our scientists have had and looked at so
20 that we get a very specific proposal. Because our
21 scientists very much want to review it. But I went over the
22 proposal with them, and it was --

23 THE COURT: If you get it done on the 12th with a
24 revised protocol which has more specifics, how would you
25 propose your testing? And could you also -- you could

1 submit two, but I'm not interested in the other coagulants
2 for which we haven't had a showing that -- what we're
3 focusing on is the purple top too. So have one where it's
4 limited to the EDTA, and if you want to submit another one
5 for purposes of your record, you may do that, but we're
6 focusing on the EDTA testing.

7 I think as to the others, there isn't the same
8 kind of -- well, there's standards that it would be 'X'
9 milliliters per whatever.

10 MR. ALEXANDER: Without agreeing to the exclusion
11 of others, I understand for these purposes your Honor's
12 direction. If there is any information that they have that
13 they think -- we have sent Doctor DeForest -- and of course
14 Doctor Ballard has all the information on -- you know, the
15 picture I think was 169. And that whole presentation and
16 the like, he has all of that and other information. I'm
17 trying to think of -- I don't know what Ms. Wilkens --

18 MS. WILKENS: Does he have the slides from our
19 science tutorial presentation showing a photograph of the
20 shirt and identifying the various stains?

21 MR. ALEXANDER: Yes. Oh, yes.

22 MS. WILKENS: We could make that available.

23 MR. ALEXANDER: That was that one --

24 MS. WILKENS: Right.

25 MR. ALEXANDER: -- the 169, the shirt on it.

1 MS. WILKENS: Right.

2 MR. ALEXANDER: Oh, he absolutely has that.

3 THE COURT: Okay. Then also on the motion for
4 reconsideration, if -- what I am concerned about is
5 releasing evidence that would be, in essence, destructive to
6 one person and making sure that we have adequate controls or
7 some other coincidental testing. If -- alternatively, if
8 there is a way that this can be done by two people blind,
9 each not knowing the results of the other with no
10 communication, then -- what you don't want is a sprinkling
11 of the EDTA or some erroneous problem in the lab that
12 affects the results.

13 MR. ALEXANDER: And I assume that that can be done
14 subject to the limitation of how much material we have to
15 test.

16 MS. WILKENS: Your Honor, the other thing too is,
17 I understand the affiliation issue with law enforcement
18 labs. And there's also another consideration. It is my
19 understanding that a law enforcement laboratory will not
20 permit someone to come in and do testing unless they are a
21 member of that laboratory.

22 So I mention that -- and also, in terms of what
23 scientists affiliated with laboratories can do, it has to be
24 acceptable to the laboratory. So there are a lot of
25 limitations on law enforcement laboratories that may or may

1 not exist with private laboratories in terms of who can come
2 in and do the actual work.

3 MR. ALEXANDER: Well, let's see if that's an
4 issue.

5 THE COURT: Well, why don't you see if you have
6 some -- or we have the direction from the Ninth Circuit.
7 We'd like to come up with a protocol that gives everybody
8 confidence in the results and minimizes problems with the
9 results on the scientific level so that whatever we have,
10 then we can evaluate. And so we'll get a submission from
11 you --

12 MR. ALEXANDER: Yes. The 12th.

13 THE COURT: -- by July 12th. And if you can then
14 also have the protocol. We want some --

15 MR. ALEXANDER: Yes.

16 THE COURT: Otherwise, you'll have Judge Huff
17 designing the test.

18 MR. ALEXANDER: That may be -- that may be the
19 best --

20 THE COURT: Based on all of my vast scientific
21 knowledge and expertise.

22 MR. ALEXANDER: Let's see. The 12th.

23 THE COURT: I would recommend that you give me
24 some advice and counsel about -- on both sides. And if you
25 just say no, then if then I have one side that says, "Here's

1 what we do it" and the other side saying, "No, let's not do
2 it," I need some help as well.

3 MS. WILKENS: And also, I want to make clear
4 that's not what we're doing. We're trying to provide as
5 much assistance as possible. But our scientists are not
6 able to devise controls. Because if they could, they would.
7 They don't feel that it can scientifically reliably account
8 for the background.

9 Now, if --

10 THE COURT: Okay. Recognizing that's your -- like
11 I said, that's your wish list position. And then if then we
12 go ahead and do it, what would we do that would at least
13 build in some -- some --

14 MS. WILKENS: Safeguard.

15 THE COURT: -- safeguard.

16 MS. WILKENS: By analogy -- by analogy to the hair
17 evidence, our position was that forensically antigen hairs
18 were the only significance. And when we went forward to
19 select 10 hairs, you'll note that our scientists did not
20 participate. Because at that point, they leave it to Mr.
21 Cooper's experts because in their opinion, there is no way
22 that they could have input in terms of selecting those 10
23 hairs. And the 10 hairs that have been selected, they have
24 no roots, let alone antigen roots.

25 So our position is, there's no forensic value. So

1 this is -- they're not trying to be difficult, mind you.
2 And I have spoken to them at length and asked them to give
3 the Court every degree of assistance they can. But it's
4 very close to the hair. If there's no scientifically
5 reliable valid method for the selection of hair beyond
6 antigen roots or any roots, how do they devise something
7 that's scientifically reliable. Their opinion is there is
8 none.

9 MR. ALEXANDER: Perhaps --

10 MS. WILKENS: So it's the same issue.

11 MR. ALEXANDER: Perhaps we could have our
12 scientist talk to their scientist, and maybe they'll come up
13 with this thing and they'll win the Nobel Prize together in
14 chemistry, and there we go. But that's a possibility. I mean,
15 we're trying to solve a problem.

16 THE COURT: Well, you -- there's nothing to
17 prohibit -- preclude the two of you from talking about
18 proposals, recognizing that your one position is no, and
19 your position is everything. And then somewhere the Court
20 decides to order something. And I'm trying to order
21 something appropriate that people would then have confidence
22 in the outcome of the proceeding.

23 Then also, I just wanted to mention on the issue
24 with respect to Doctor Blake, I did want to clarify that the
25 report that he did was actually very helpful on the hair

1 documentation. And the Court could have ordered him here as
2 a percipient witness. But now we have for the record the
3 whole documentation and photos of the testing that's been
4 done for the benefit of Doctor DeForest, for the benefit of
5 Doctor Melton, for the benefit of the Court.

6 And the Court had appointed him, based on our
7 telephonic hearing where the Petitioner had no objection to
8 it. And had the Petitioner had an objection to that
9 mechanism, then the Court may not have gone in that
10 direction.

11 MR. ALEXANDER: My -- oh, excuse me, your Honor.

12 THE COURT: So for the same federal bureaucracy
13 that we're trying to work through on both sides, we -- I
14 just wanted to make that clear, and then the Court had done
15 an order to that effect.

16 MR. ALEXANDER: My -- as I raised, I think, at the
17 time with respect to Doctor Blake, he's quite a character in
18 a lot of ways, and what I really took exception to is some
19 of his comments about, you know, our theories of the case
20 and like which is really opinion. It's irrelevant, frankly,
21 and that's why I just wanted to make it clear that I thought
22 that was inappropriate to be in any type of a report as a
23 percipient witness, your Honor.

24 THE COURT: All right. Thank you.

25 MR. ALEXANDER: Thank you. Thank you very much.

1 THE COURT: Anything else?

2 MS. WILKENS: Well, your Honor, also, with respect
3 to the scientists -- and I think we've demonstrated this --
4 once the scientists are named and a protocol is in place
5 from the Court, they work very cooperatively together and
6 they do very well. But at this juncture, we're waiting for
7 counsel to put forward experts that are acceptable to the
8 Court. So we would continue to deal attorney to attorney.
9 And of course, our scientists will provide whatever
10 information their scientists may or may not require.

11 THE COURT: Uh-huh.

12 MS. WILKENS: And so -- but --

13 THE COURT: And if you -- and if they come up with
14 a method where the concerns about Doctor Ballard are
15 alleviated and you don't have an objection, recognizing
16 whatever we do is subject to appeal, and if then the
17 Appellate Court says, "No, you shouldn't have done this, you
18 shouldn't have done that," you may build in an additional
19 issue that otherwise wouldn't be there. But at the same
20 time, I want to have confidence in the outcome.

21 MS. WILKENS: Well, and to clarify, there is no --
22 there is no approach that can be taken to address our
23 concerns with Doctor Ballard because they extend beyond the
24 science, and they are well documented. And we do not want
25 him to have access to that evidence. We do not want to use

1 his labs, and we do not want him involved. And I think it's
2 a -- I think it speaks volumes if we cannot locate an
3 analytical chemist who can perform what Doctor Ballard
4 insists can be done.

5 So we continue to have extreme concerns about
6 Doctor Ballard. And we've been very cooperative about the
7 experts, and we've been very quick to identify reputable,
8 ethical scientists and have been very cooperative in that
9 regard.

10 THE COURT: All right. Well, then we will await
11 the submissions on the 12th, and then we will see you here
12 on the 23rd with the witness. And then we will have the
13 telephonic conference with Doctor Melton on the 26th at
14 10:30 or, if she's ready to go on the 23rd, that would be
15 preferable.

16 MR. ALEXANDER: I think we might be able to do it
17 from the courtroom here.

18 MS. WILKENS: Oh, and one more housekeeping
19 matter. Your Honor, with respect to an additional protocol
20 filed on the 12th, when would you want DOJ to respond to
21 that?

22 THE COURT: I think as long as you could respond
23 in time for me to review it on the 23rd.

24 MS. WILKENS: Yes, your Honor.

25 THE COURT: Thank you.

