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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

KEVIN COOPER,	)	Case No. 04CV0656-H(LSP)
	)	
Petitioner,	)	San Diego, California
	)	
vs.	)	Monday,
	)	November 22, 2004
JILL L. BROWN, ACTING WARDEN,	)	11:00 a.m.
SAN QUENTIN STATE PRISON,	)	
	)	
Respondent.	)	

TRANSCRIPT OF TELEPHONIC STATUS CONFERENCE  
BEFORE THE HONORABLE MARILYN L. HUFF  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 SAN DIEGO, CALIFORNIA MONDAY, NOVEMBER 22, 2004 11:00 A.M.

2 --oOo--

3 (Call to the order of the Court.)

4 THE COURT: Thank you for being here today. I've  
5 also received the recent fax clarifying the credentials of  
6 Mr. Taylor, and the Court apologizes. He has got a  
7 Bachelor's of Science degree in Zoology from California  
8 State Polytechnic University in 1972, and a graduate  
9 research in cellular (phonetic) biology through 1973. And  
10 then Steven Myers has a Masters Degree.

11 All right. Then, would the parties like to  
12 proceed? Mr. Alexander?

13 MR. ALEXANDER (Telephonic): Well, your Honor, we  
14 would -- in light of the declaration of Mr. Taylor and in  
15 light of the clarifying information that was submitted, we  
16 would like to proceed with -- with Mr. Taylor, and we also  
17 think that it has the advantage of him being in California,  
18 which is also a lot closer, and I think logistically it's  
19 easier.

20 I did speak with Mr. -- I requested Dr. Sinhaw  
21 (phonetic) early this morning, and he informed me that they  
22 have a 15-working-day turnaround. I didn't get a further  
23 break down, and I -- I must admit, I didn't ask the question  
24 of -- of whether they allow monitoring.

25 And I did call Dr. Melton, since you had made a

1 suggestion that I call her, just to see what information she  
2 had about the Reliateam (phonetic), and she was not in, but  
3 I spoke to Dr. Nelson, I think it is, who is her colleague,  
4 and asked if she knew if they had a -- whether she knew if  
5 Reliateam had a policy of no monitoring, and she said she  
6 did not. But I learned that their lab also apparently --  
7 and it's not an issue here, had such a policy.

8           So, it's more common than I had thought, and I  
9 inquired of the reason recently, and they said it's a  
10 contamination issue. The merits of that I can't comment on.  
11 So, we probably ought to -- so I can't, you know, pin down  
12 that anymore. I don't think that is an issue with Mr.  
13 Taylor.

14           THE COURT: Sometimes they might have a -- a  
15 general policy, but might pursuant to a court order  
16 permitted in this instance, if they agree, for example, Dr.  
17 Melton and the work that she did.

18           In any event then, what -- the issue doesn't fully  
19 address the connections of Mr. Taylor. In his most recent  
20 declaration, not this one that I just received today, but  
21 the prior one, he did talk about his work in the Kobe Bryant  
22 case, which obviously the prime -- the lead person was  
23 Elizabeth Johnson, the ex-wife of Dr. Ballard. And he is  
24 listed as a co-author with Dr. Ballard on articles.

25           So, let's -- that you do point out a point that he

1 is in California. It also doesn't directly address the  
2 mixture versus single source issue. Could you elaborate on  
3 that?

4 MR. ALEXANDER: Yes.

5 MY MYERS: Your Honor, could I interject that Gary  
6 Simms (phonetic) has joined us?

7 THE COURT: Thank you. Go ahead. This is Mr.  
8 Alexander.

9 MR. ALEXANDER: Yes, I -- I think he -- well, from  
10 talking to him, he is comfortable with the -- the proposed  
11 testing on mixed samples. I think he, like virtually  
12 everybody recognizes -- that does this work, recognizes that  
13 it is somewhat more complicated. I didn't get into -- I  
14 didn't speak to him, Mr. Kazemi did, at least in this most  
15 recent occasion. So I don't -- you know, he uses that, and  
16 that's what the intent -- he knows that it's a mixture, and  
17 it's just an issue I think we all have to recognize, that  
18 it's more complicated and whether extra care or whatever is  
19 appropriate, you know, I really can't comment.

20 I do note this. Well -- I can -- I can raise  
21 this, and maybe Mr. Myers can comment on this, but the --  
22 there are apparently kits that are manufactured, I think  
23 Applied Biosystems does the one that would be involved  
24 almost anywhere that we would go, and then there is a  
25 reference, and I saw this on -- and I think we have had

1 reference to a co-filer, and in that sense, as I understand  
2 it, deals with additional Lo Ci (phonetic) if that's the  
3 proper pronunciation, that could be -- that could be tested.

4 Now, my understanding is it is not necessary to go  
5 to that immediately. In fact, it's not as good as the  
6 initial -- the initial test that is done. But that test  
7 might also be able to be done in the event that there's some  
8 ambiguity or the like.

9 THE COURT: But he's not -- Mr. Taylor is not  
10 advocating that at this time?

11 MR. ALEXANDER: No, he is not. In fact, to the  
12 contrary, I think he's saying don't do that to -- to start.

13 THE COURT: I had a question that was on my mind  
14 about this. What about the connection between Mr. Taylor  
15 and Elizabeth Johnson and Dr. Ballard? Does he have  
16 anything currently going for Dr. Ballard in his lab?

17 MR. ALEXANDER: No, and I was not aware -- I don't  
18 think -- no, he does not. And I don't believe Dr. Ballard  
19 was involved in the -- the Bryant case. Ms. Johnson was,  
20 and that's as far as I can -- I can go on that. I can  
21 certainly find out from Mr. Taylor what involvement he had.  
22 I think it's simply may be that his lab was used by Ms.  
23 Johnson to do the testing, but don't hold me to that, your  
24 Honor, because I don't know for certain.

25 THE COURT: What's his daily rate if he went up to

1 the DOJ lab, being in California?

2 MR. ALEXANDER: The only rate I -- let's see what  
3 Mr. Kazemi submitted at budget. I know he's comfortable  
4 with the \$200 per hour rate, because I believe among other  
5 things, that's his normal rate. If you'll allow me for a  
6 moment, I just need to grab the budget that we submitted.  
7 It's on -- I think it's on there. One moment, please.

8 Thank you, your Honor. I'm looking at the X -- I  
9 don't know that he has a full day rate. He indicated on  
10 here that he goes up to -- he goes up to the last --

11 THE COURT: Okay, well, if you're looking at that,  
12 let me here from Respondent.

13 MS. WILKENS: I -- yes, your Honor. I -- I wanted  
14 to clarify for the record the discussion of Mr. Myers'  
15 credentials.

16 THE COURT: Yes.

17 MS. WILKENS: It sounds that he is not a CLD lab  
18 certified as a DNA technical lead. You can only have one  
19 person per laboratory identified as their technical lead.  
20 So, that's Mr. Simms.

21 THE COURT: All right.

22 MS. WILKENS: So, that's the explanation for why  
23 Mr. Myers' doesn't have that. He's qualified to be a  
24 technical lead based on both his education, which is a  
25 masters, and his experience.

1 Also, Mr. Myers' is certified by the American  
2 Board of Criminalist, and is a molecular biology --

3 THE COURT: Thank you.

4 MS. WILKENS: Mr. Taylor doesn't have the same  
5 qualifications because he's not -- he's not board  
6 certified.

7 THE COURT: Thank you.

8 MS. WILKENS: Now, with respect to co-filer. This  
9 is something DOJ doesn't allow, if that were something, you  
10 know, the Court decided where that's a fair rate.

11 THE COURT: All right.

12 MS. WILKENS: I -- I still have to be frank about  
13 Mr. Taylor because I still have read testimony, in the last  
14 two or so years where, he's not simply saying that mixtures  
15 are more complicated, he's differentiating the acceptability  
16 from (indiscernible) mixtures.

17 MR. ALEXANDER: Well, if you would like me to  
18 respond I think I can -- I'm happy to do so.

19 THE COURT: All right. Let me have Ms. Wilkens  
20 proceed.

21 Anything else?

22 MS. WILKENS: Well, I'm not able to confirm for  
23 your Honor the policy of the lab in Louisiana on  
24 observation.

25 Mr. Simms or Mr. Myers, do you have any knowledge

1 of -- to that particular laboratories policies?

2 MR. MYERS: I have no knowledge, your Honor, of --  
3 of their policies.

4 MR. SIMMS: I -- I don't either.

5 THE COURT: And as between Mr. Taylor, who has a  
6 connection to Ballard's ex-wife, and Dr. Sinhaw, who is the  
7 doctor, why does it make a difference to you, Mr. Alexander,  
8 whether you go with a reputable DNA person that has higher  
9 credentials than Mr. Taylor versus Mr. Taylor?

10 MR. ALEXANDER: Well, there are two reasons. One  
11 -- first of all, I don't know that much about Dr. Sinhaw,  
12 other than we were asked to find another lab, we quickly  
13 checked around and that name was suggested to us.

14 Number two, it is a large lab. And I am much more  
15 comfortable with a smaller operation, such as Mr. Taylor,  
16 and I think if he were allowed to respond, that Mr. Myers  
17 will tell you, just as Myers -- just as Taylor said about  
18 Myers, that Mr. Taylor is quite capable of -- of conducting  
19 this DNA testing.

20 And if you look at the specifics of his article,  
21 formed relatively recently on mixtures, and the fact remains  
22 that even as the court observed in the -- in the Henderson  
23 case, and as Dr. Maddix (phonetic) already had involved in  
24 this case, there is more complication in a mixture. And I  
25 don't think he could have -- what Dr. -- or Mr. Taylor was

1 saying, was taking any hard and fast positions against it.  
2 He was relating what was the state of the art at the time,  
3 which was 2000, 2001. He has now got additional experience.  
4 He has worked with Promangle (phonetic), which I believe is  
5 the manufacturer of the co-filer test kit, and has been in a  
6 number of presentations, and he's definitely qualified to do  
7 this and I think the California factor is just a really  
8 convenient factor. I don't know how many trips up and back  
9 this might take, so --

10 THE COURT: Then, were there any other comments  
11 that he had about the substance of the test to be bordered?  
12 Either side.

13 MR. ALEXANDER: Only this, your Honor. Doing a  
14 little research over the weekend. I think in both  
15 instances, given the size of the material that was cut out,  
16 that there's plenty enough to save. And I think we should  
17 make every effort, and I'll leave it up to -- to the experts  
18 that we select, to make every effort to retain some portion  
19 of the material. I can't make that judgement, I don't have  
20 the expertise to do so. But if we could avoid totally  
21 destructive testing I think that that would be important.

22 I will say, I talked with Dr. Sinhaw very early  
23 this morning, he says it's his practice to do so. I would  
24 assume that that would be the practice of any good  
25 scientists.

1 THE COURT: Ms. Wilkens?

2 MS. WILKENS: Yes, your Honor. The -- the goal at  
3 this juncture is to determine whether or not a DNA profile  
4 can be obtained from a stain, and it's not to try and be  
5 able to do it twice. Most likely that will preclude getting  
6 a DNA profile. I mean, I brought this up at the -- at the  
7 offset, because it's really counter-productive to the goal  
8 tending with the legal issues that has been created.

9 Obviously Mr. Cooper's Counsel have no incentive  
10 to have his DNA obtained from that stain, and to focus on,  
11 you know, retaining what is virtually a -- a minut amount,  
12 so that it's "not destructive" is entirely counter-  
13 productive.

14 MR. ALEXANDER: If I might respond briefly, your  
15 Honor. We are trying to obtain, and did we think in the  
16 instance of Dr. Ballard, opposed to what we (indiscernible)  
17 the possible people that are available in this area.

18 Now, we are not looking for someone to do it  
19 slobbily or otherwise. I believe that the state of the  
20 technology, and I think this is in the public literature,  
21 that you can do adequate DNA -- more than adequate DNA  
22 testing with far smaller amount of material that are going  
23 to be involved, and we have the benefit of -- of having  
24 something, in case something goes wrong for any reason.

25 And so I actually would simply defer to the -- to

1 the two experts that are going to be involved in that  
2 regard.

3 MS. WILKENS: Your Honor --

4 MR. ALEXANDER: You can do DNA on a single cell if  
5 you have the right lab.

6 I'm sorry, I didn't mean to --

7 MS. WILKENS: Your Honor, if Counsel is interested  
8 in the very best experts, with respect to each specialty --

9 THE COURT: I'd go with Cellnark probably.

10 MS. WILKENS: Well, I certainly wouldn't be going  
11 with Mr. Taylor when he has had a lot of testimony that is  
12 very problematic, and he's a -- he's a minority expert who  
13 has been testifying for the defense in a number of cases,  
14 over the last few years, expressing a minority view about  
15 Fantom (phonetic) profiles and other issues that need not be  
16 interjected in this case. Like with Dr. Simms said. So,  
17 that's troubling.

18 But, Mr. Myers did the DNA testing in 2001. He  
19 has indicated, that based on that testing, it is unrealistic  
20 to expect to have anything left over.

21 MR. ALEXANDER: I don't -- I don't quite  
22 understand what the attack on Mr. Taylor is now. In other  
23 -- in other context, and apparently the Court in Henderson  
24 agreed that the capillary electrical foresis (sic) testing  
25 at the time had not been established, and that's why the

1 court held the hearing on that, and it did rule on it, and  
2 it came to the conclusion that it did intend and then went  
3 from there and said that the -- the issue will go to the  
4 jury, as to -- as to what the implications are for mixture  
5 testing.

6           If Mr. Myers could simply be allowed to state  
7 whether or not he believes in Mr. Taylor to be qualified,  
8 and to do this I would point out Mr. Taylor has testified  
9 for the defense -- for the prosecution, in the State of  
10 California, Texas and other places. I don't know that Mr.  
11 Myers has ever testified for the defense, but --

12           THE COURT: Probably working at DOJ, probably not.

13           MR. ALEXANDER: I would suspect that's the case,  
14 so --

15           MS. WILKENS: If not --

16           MR. ALEXANDER: -- so pick your, you know, want to  
17 pick your areas if you're looking for bias. These people  
18 will be monitoring one another.

19           THE COURT: Well, let me do that. I will send out  
20 our proposed protocol order when it's ready and not say the  
21 name of the defense expert, and then you can comment if  
22 there is any issues with respect to that, and you can  
23 comment on that -- and then probably given the issue that I  
24 do want to know whether there's genetic material or not, and  
25 we did indicate at the very beginning that what we're

1 leading down the road is to destructive testing, and we made  
2 that very clear that we may or may not decide to retain any  
3 of these samples if we have the two experts involved.

4           And so I'll send out a draft recognizing that the  
5 Court can modify it, and then if you could just briefly fax  
6 a one-page response to the Court, by this afternoon if you  
7 get it today, or by tomorrow morning, then we'll go ahead  
8 and issue the order, select the experts and then proceed  
9 with the tests.

10           MR. ALEXANDER: Very well.

11           THE COURT: Thank you.

12           MR. ALEXANDER: Thank you very much, your Honor.

13           THE COURT: And then on the issue of the request  
14 for discovery, we're doing a scheduling order on that.

15           MR. ALEXANDER: Thank you very much, your Honor.

16           THE COURT: Thank you. Bye-bye.

17           (Proceedings concluded.)

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1 I certify that the foregoing is a correct  
2 transcript from the electronic sound recording of the  
3 proceedings in the above-entitled matter.

4  
5 Tara Gunn 8/4/05  
Transcriber Date

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