

1       IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
2                IN AND FOR THE COUNTY OF ALAMEDA  
3       BEFORE THE HONORABLE ALFRED A. DELUCCHI, JUDGE  
4                DEPARTMENT NO. 3

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10 THE PEOPLE OF THE STATE OF CALIFORNIA,

11                Plaintiff,

12       vs.                        NO. 129807

13 GILES ALBERT NADEY, JR.,

14

15                Defendant.

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ALAMEDA COUNTY COURTHOUSE  
OAKLAND, CALIFORNIA

19

REPORTER'S TRANSCRIPT

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TUESDAY, FEBRUARY 16, 1999

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WEDNESDAY, FEBRUARY 17, 1999

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A P P E A R A N C E S

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25 For the People: THOMAS J. ORLOFF, DISTRICT ATTORNEY  
BY: JAMES ANDERSON, ASSIST. D.A.

26

For the Defendant: JAMES GILLER, ESQ., and  
27 DANIEL HOROWITZ, ESQ.

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D A T E S O F T R I A L

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P A G E V O L

3 TUESDAY, FEBRUARY 16, 1999

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4 WEDNESDAY, FEBRUARY 17, 1999

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1 TUESDAY, FEBRUARY 16, 1999 -- A.M. SESSION

2 PROCEEDINGS

3 ---o0o---

4 THE COURT: Welcome back, everybody. I'm glad

5 everybody is healthy.

6 This is the case of People versus Nadey.

7 Let the record show that the defendant is present

8 with counsel and the jury is present in the jury box along

9 with the alternates.

10 And, Ladies and Gentlemen of the Jury, now we are

11 going to have the arguments of the attorneys.

12 I want to remind you again that the arguments of the  
13 attorneys are not evidence in this case. You've heard all  
14 the evidence you're going to hear to help you decide this  
15 case. They can argue to you reasonable inferences and  
16 deductions from the evidence, so they can tell you about it.

17 If during the course of their arguments they make  
18 some reference to some portion of the evidence that's  
19 different from your interpretation of what was said or  
20 testified to, please feel free to rely on your own memory and  
21 disregard the attorney's version of the events. Because  
22 sometimes during the course of a trial, they ask a question,  
23 an answer is being given, and they are propounding the next  
24 question, they may not hear the answer the same way that you  
25 did. So it's not an attempt to deceive by any means, but  
26 sometimes during the course of the trial, the interpretation  
27 may differ a little bit. But you're the trier of fact, and  
28 what you decide is what goes.

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1 Okay?

2 Now before we start, I just want to remind you  
3 again -- I read this to you before. To put this case in  
4 context again just so you have your minds in the right alley,  
5 Count One, remember, charges the defendant here is charged  
6 with the murder of Terena Fermenick. Then he is charged with  
7 the use of a deadly and dangerous weapon clause and then the  
8 special circumstance.

9 Okay?

10 I already explained that to you.

11 Then there's a Second Count which is the -- the act  
12 of sodomy and the use clause.

13 Okay. So that's what they will be addressing in  
14 their arguments and the evidence accordingly.

15 The way this is done, we start with the argument by  
16 the district attorney. He starts out. And when the district  
17 attorney is done, then the defense attorney gets to argue to  
18 you. And then the district attorney gets to give you a  
19 closing argument. The reason why the prosecution gets two  
20 cracks at you and the defense only one is because the  
21 prosecution has the burden of proof, so the law says since  
22 you have the burden of proof, you get to argue twice to the

23 jury.

24 So Mr. Anderson will open, and then we are going to  
25 hear from Mr. Horowitz. He will argue for the defense, and  
26 then Mr. Anderson will close. There will be recesses  
27 accordingly.

28 And then when the arguments are all done, then I've

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1 prepared this jury book for you here. And I'll read the  
2 instructions to you, and you'll have this jury book with you  
3 up in the jury room for your deliberations.

4 Okay?

5 So let's start, Mr. Anderson.

6 MR. ANDERSON: Your Honor, Counsel, Ladies and  
7 Gentlemen of the Jury:

8 This is the time, as the Judge has indicated to you,  
9 the attorneys get to give a closing argument which they feel  
10 is what the evidence has shown and proved.

11 The Judge has indicated what the attorneys say to you  
12 in closing argument is not evidence. And I have to remind



13 you of that again because you are going to hear a lot of  
14 claims made during this closing argument today and probably  
15 into tomorrow. Some may be reasonable, some may be  
16 unreasonable, but they are mere words of an argument. They  
17 are not evidence. The only evidence, as the Court has  
18 explained to you and I will tell you now, came from that  
19 witness stand and any other tangible items of evidence which  
20 you can see, touch, or feel.

21 Please remember that what the attorneys say is not  
22 evidence.

23 The Judge has indicated what the charges are -- the  
24 murder of Terena Fermenick, Count One; the sodomy of Terena  
25 Fermenick, Count Two; and the special circumstance clause  
26 that the murder was committed during the act of sodomy, which  
27 also includes the escape therefrom.

28 When this case started, you wondered how I was going

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1 to prove the case, and it was proven through the calling of  
2 witnesses and the introduction into evidence of physical

3 items of evidence. I'm going to run through the witness list  
4 quickly just so you can have a reference to what I'm  
5 referring to.

6 First off was Dr. Rogers. He told you about how he  
7 reviewed the records of Dr. Herrmann, who did the autopsy.  
8 He gave you the conclusions and he laid the foundation for  
9 the photographs you'll be seeing in a second.

10 You heard from Lori Fermenick next, and she set the  
11 background of the time frame as to when Terena was first at  
12 the church, church house, that is.

13 You heard from Officer Jerry Erny. He was the first  
14 officer at the scene.

15 You heard from Technician Elizabeth Nice, did a lot  
16 of crime scene photos and gathered evidence.

17 You heard from Technician Eileen Bartosz, who drew  
18 scene diagrams.

19 You heard from Pauline Kelly, who gave us a time  
20 frame of shortly around 2:00 o'clock when Terena and the baby  
21 left the antique store in Alameda and had to go to the church  
22 to meet the carpet cleaner.

23 You heard from Mario Valencia. He was the gentleman  
24 who was the manager of the Lucky Store at South Shore who

25 told us of the time frame from the faulty cash register's "no  
26 sale" slip and the \$7.17 check for the diapers and the time  
27 on that check that showed she left that particular  
28 establishment at about 3:32 on the day in question, 1-18-96.

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1 You then heard from Paul Miller, the defendant's  
2 boss, and he told you about some of the clothing, the attire  
3 that the defendant wore on the day in question and the  
4 turning in of the original work order and the check for \$184  
5 some odd cents that Terena gave to Mr. Nadey prior to meeting  
6 her demise.

7 You then heard from Donald Fermenick. He was the one  
8 who found his wife in the morbid condition to which he  
9 testified.

10 You next heard from Technician Morrow. She is the  
11 one who changed the baby's diaper. And being a mother, she  
12 said that that baby hadn't been changed in quite a while.  
13 And that cuts with the time frame we know that Terena met her  
14 demise to the time around 9:15 when Donald found the baby and

15 the mother.

16 You then heard from Sergeant Taranto initially, and  
17 that was his testimony regarding the taped statement he took  
18 from the defendant. And I'll get into that later on.

19 You heard from Officer Steve Rodekoehr. He was the  
20 officer who had the defendant under surveillance, and he gave  
21 us what the defendant told him, more or less a pre-offense  
22 statement by the defendant. I'll get into that later on.

23 You then heard from Dan McCracken of the coroner's  
24 office about the chain of custody of the swabs and the jeans  
25 after the autopsy.

26 You heard from Steve Wilson, the nurse out at  
27 Highland Hospital who drew the blood from the defendant and  
28 his testimony about the unsanitary, unhygienic condition of

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1 the defendant's genitalia.

2 You heard from Sergeant Taranto, who was recalled  
3 with respect to the search warrant and about how he withdrew  
4 or helped get the blood back to the evidence locker from the

5 withdrawal of the blood from the defendant.

6       You heard from Detective Ron Miller of the Alameda  
7 Police Department, who served another search warrant. This  
8 was on the home of Mr. Nadey. And he recovered the various  
9 writing tablet, the pornographic book. And he also testified  
10 about the taping of the phone calls, the same 1-900 numbers  
11 that the defendant had used. And he also talked about going  
12 to the Jack in the Box restaurant, being unable to recover --  
13 and nobody ever found -- the jacket that the defendant said  
14 he left in the men's room while he was doing his duty.

15       You heard then from Jim Capili, a gentleman from the  
16 Pac Bell custodian of records, and he brought us, after a  
17 search warrant was served on Pac Bell, the printout of phone  
18 calls to and from the church house at 1515 Walnut. And I'll  
19 get into that later on.

20       You heard from Sharon Smith next from the sheriff's  
21 lab. She took the jeans and the swabs from the coroner's  
22 office. All she did was find the presence of semen. She  
23 identified nobody.

24       Taranto then takes the jeans, cutout swatches that  
25 she made, and the swabs, takes them over to Steve Myers from

26 the DNA lab.

27 And I'm not going to beat a dead horse to death about

28 DNA, but the RFLP on the rectal swabs and the jeans comes

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1 back to the defendant one in 32 billion with a B.

2 That was the People's case. Those were the witnesses

3 we called, and we rested after that.

4 Now, here is what the evidence conclusively shows as

5 we can recreate this nightmare on Walnut Street.

6 We know for a fact, and this is uncontroverted,

7 Terena Fermenick, a nursing mother of a five-month-old

8 infant, was definitely -- definitely at the church house at

9 1515 Walnut Street at around 3:54 p.m. on January the 18th of

10 1996.

11 How do we know this?

12 We know this from the statement of the defendant

13 himself. You remember his statement in the transcript you

14 followed?

15 Here is what we know. This was --

16 QUESTION: All right. What time was  
17 it when you think you left there?

18 This is Taranto to Nadey.

19 ANSWER: When I left there?

20 QUESTION: Uh-huh.

21 ANSWER: Probably 3:55, 3:56,  
22 according to this, and it says 3:54.

23 QUESTION: And you pretty much  
24 believe that's accurate; right?

25 ANSWER: Yes.

26 QUESTION: Okay. Did the lady that  
27 you dealt with there -- I notice that the  
28 signature here, her signature, looks like on

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1 the bottom of your work order. Did she sign  
2 that before you started to work or when  
3 you --

4 ANSWER: No, no.

5 QUESTION -- finished?

6           ANSWER: The only time we do that is  
7           after we receive payment, and that was after.

8           QUESTION: Okay. Pardon me. There's  
9           a check attached to this for \$184.80 made out  
10          to Skyline Chem Dry, and it looks like it's  
11          signed by the same signature. Did she make  
12          that check out to you?

13          ANSWER: Yes.

14          QUESTION: Yesterday?

15          ANSWER: Yes.

16          QUESTION: Okay. And that's a  
17          payment in full, I guess?

18          ANSWER: Yeah.

19          QUESTION: All right. And that was  
20          at the end of the job?

21          ANSWER: At the end of the job when  
22          she came back.

23          QUESTION: When you left the Walnut  
24          address -- Walnut Street address --

25          ANSWER: Yes.

26          QUESTION -- where was the lady?

27          ANSWER: She was standing in the



28 kitchen.

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1 QUESTION: Okay.

2 ANSWER: Because that's where she  
3 paid me at. And as I walked out and I said  
4 do you want me to close the doors, she says  
5 no, my kid's in the car. And I said okay and  
6 walked out, got into the truck, and left.

7 Going on.

8 QUESTION: And when the woman came  
9 back to -- from the store or wherever she was  
10 and you were done with your job and you were  
11 loading up the truck, she left the child in  
12 the car?

13 ANSWER: Yes.

14 QUESTION: Was there anyone else with  
15 her?

16 ANSWER: Not that I know of.

17 QUESTION: Did you see anybody else

18 in the area?

19 ANSWER: Not in the car.

20 QUESTION: And where did she pay you?

21 ANSWER: In the kitchen, right there

22 by the door, on the counter next to the sink.

23 QUESTION: Albert, when she wrote you

24 this check, did she do it in front of you?

25 ANSWER: Pardon me?

26 QUESTION: When she wrote you this

27 check, did she do it in front of you?

28 ANSWER: Yes.

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1 QUESTION: Did she -- strike that.

2 Did you or do you as a routine matter

3 ever ask for ID?

4 ANSWER: Yes. She showed me her

5 driver's license. It's on the work order.

6 QUESTION: All right.

7 ANSWER: And right down here.

8           QUESTION: Did she show you -- do you  
9           ask for any other ID?

10           ANSWER: No. That's all the company  
11           requires for us to do unless we know the  
12           customer or it's a repeat thing, and a lot of  
13           times it will have the driver's license,  
14           along with all measurements on the work  
15           order. So, you know, it's pretty routine  
16           there.

17           So by his own words and on that work order, we know  
18           that the victim in this case got back to 1515 Walnut Street  
19           roughly at 3:55, shortly before 4:00 o'clock.

20           What happened after that is why the defendant is in  
21           the defendant's seat in this courtroom.

22           Because she was obviously forced back into the master  
23           bedroom by someone -- and I'm saying someone at this point in  
24           time -- by someone where she was assaulted with some type of  
25           knife.

26           People's Exhibit 6 and People's Exhibit 7.

27           Now, these are conclusively proven facts. That's why  
28           I said someone instead of the defendant at this present time.

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1 We know that this occurred. She got back at five to 4:00,  
2 and someone when she was in that house assaulted her with a  
3 knife. Stab wounds on the side and the defensive wounds on  
4 the hand.

5 What happened after that was that she was stripped  
6 naked for the most part. And that is painfully obvious when  
7 you look at People's Exhibit 5 and People's Exhibit 25. No  
8 question these are conclusively proven. This is what  
9 happened.

10 Once she was stripped naked, she was forcibly  
11 sodomized. And I will hold up People's Number 11, showing  
12 you the five lacerations to the anus of this lady. Five.

13 Remember the testimony of the doctor?

14 Something larger than the opening caused this to rip.

15 Five lacerations conclusively proven.

16 And while she was face down, bent over the bed, she  
17 had her throat cut eight different cuts.

18 How do we know that?

19 Well, let's take a look at People's 27.

20 You imagine her being bent over at the foot of this  
21 bed. She was lying over. This is where the initial cut took  
22 place right there.

23 Can you imagine her being pulled up by the head,  
24 throat cut, down she goes on the bed? This is where the  
25 majority of the blood was from the initial cut. That's where  
26 it occurred.

27 This needs no introduction. This is what the throat  
28 looked like when it was cut.

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1 Okay?

2 Conclusively proven. This is what happened to her.

3 And how do we know that there were eight different  
4 cuts?

5 Recall the testimony of Dr. Rogers.

6 QUESTION: What happens when that is  
7 severed?

8 ANSWER: The vein is severed.

9 QUESTION: Yes, sir.

10 ANSWER: It bleeds.

11 QUESTION: And if it's severed  
12 completely and not checked, what happens to  
13 the person who has had that injury done to  
14 them?

15 ANSWER: They will die.

16 QUESTION: Doctor, how many separate  
17 injuries in the area of the neck were  
18 discovered?

19 ANSWER: There was one large, deep  
20 incised defect. There were also surrounding  
21 it some other incised defects. These were  
22 superficial, and they total seven in number.

23 QUESTION: So whoever wielded the  
24 instrument which produced that injury did  
25 seven cutting-type motions to produce the  
26 injuries contained in People's Number 11?

27 ANSWER: It would be eight.  
28 Eight different wounds produced the injuries on

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1 People's Number 8.

2 Can you imagine how it feels to have your throat cut  
3 eight different times, getting deeper and deeper until it  
4 hits the jugular vein?

5 This was not an accident. I'll get into that later.

6 Recall Dr. Rogers' testimony after going into shock.

7 She went into shock at that point in time. And according to  
8 Dr. Rogers -- that's who told us about the shock -- then the  
9 evidence indicates she arose from this bed, and with her life  
10 ebbing away with each beat of her heart, pumping blood out  
11 through the severed jugular vein, sending more and more vital  
12 blood from that vein, she staggered from that bed of  
13 degradation to the living room where in a valiant effort to  
14 get to the phone she expired, her hands clasped as in a  
15 prayer.

16 See this?

17 MR. HOROWITZ: Your Honor, I'd ask that the Court be  
18 instructed (sic) --

19 THE COURT: It's an inference from the photograph.

20 You can argue to the contrary.

21 MR. ANDERSON: You draw your own conclusions what  
22 this minister's wife was doing at this point in time. Those  
23 hands are clasped as if in a prayer.

24 Now those are the uncontroverted facts. The lady got  
25 there shortly before 4:00, and once there, she was put back  
26 into that master bedroom, bent over, stripped of her  
27 clothing, sodomized, and then had her throat cut. She goes  
28 into shock and arises, makes for the phone, and bleeds out.

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1 You have the photographs. You've seen them before.

2 You'll see them again.

3 The person who did that didn't wait around for her to  
4 get up off that bed and go for the phone. He has fled.

5 Okay?

6 I'll get into that later.

7 Now, let's establish a time of death as we tighten  
8 the noose around Mr. Nadey. Let's establish a time of death.

9 We know from a Mario Valencia, the man who ran the  
10 Lucky Store, indicated to us when that check was accepted by



11 his market. This is direct examination by me.

12           May 21A be a photocopy of the check  
13 drawn on the account of Donald and Terena  
14 Fermerick for the amount of \$7.17, check  
15 number 622. Indicates it's drawn on the Bank  
16 of America payable to Lucky Stores, and it is  
17 for diapers is the indication. And on the  
18 back, there's certain types of imprinting.  
19 21A.

20           Mr. Valencia, I'm going to show you  
21 what's now being marked as 21A, ask you if  
22 you recognize that particular document.

23           His answer was: Yes, I do.

24           QUESTION: And what does that purport  
25 to be?

26           ANSWER: Well, it's a check written  
27 out to Lucky Stores in the amount of \$7.17  
28 (sic).

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1           QUESTION: And what Lucky Store was  
2           that drawn or was that written to?

3           ANSWER: Lucky Store number 57, which  
4           is the Lucky Store in South Shore.  
5           Okay. South Shore in Alameda.

6           QUESTION: South Shore?

7           ANSWER: Yes.

8           QUESTION: The one you were the  
9           manager of?

10          ANSWER: Yes.

11          QUESTION: Was that check run through  
12          the machine or the MICR, as you called it?

13          ANSWER: Well, it's tendered here at  
14          15:19 military time.

15          QUESTION: 15:19 military time would  
16          be 3:19 in the afternoon?

17          ANSWER: Yes.

18          QUESTION: Mr. Valencia, I'm going to  
19          show you what's been marked as People's 22A  
20          and ask you if you recognize that particular  
21          little document?

22 ANSWER: Yes, I do

23 QUESTION: What is that?

24 ANSWER: It's a receipt, "no sale"

25 receipt.

26 QUESTION: And was that done in your

27 presence when you pressed the "no sale"

28 receipt and got that printed from the cash

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1 register?

2 ANSWER: Yes, it was.

3 QUESTION: And was Detective Miller

4 there?

5 ANSWER: Yes. And when you called

6 POPCORN to ascertain the correct time from

7 Pac Bell or whomever, was the time on the

8 cash register receipt accurate with the time

9 at Pac Bell -- strike that -- with the time

10 that Pac Bell, whomever gave you?

11 ANSWER: No. The receipt showed it

12 was off by 13 minutes, I believe it was.

13 QUESTION: And off by 13 minutes?

14 ANSWER: Slow.

15 QUESTION: Slow.

16 And it was 13 minutes slow. If she  
17 came through at 3:19, then 13 minutes to that  
18 would be 3 --

19 ANSWER: 32.

20 QUESTION: 3:32?

21 ANSWER: Yeah.

22 Did you turn that cash receipt over  
23 to Detective Miller?

24 ANSWER: Yes, I did.

25 So we know she checked out of Lucky's at 3:32, went  
26 through the line.

27 Okay?

28 The time is getting close.

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1 We also know that she stopped at McDonald's because

2 there were some empty wrappers in her Saturn when the police  
3 arrived on the scene, and that was testified to by Sergeant  
4 Taranto.

5 This was direct examination again.

6 QUESTION: And when you -- you looked  
7 in the Saturn automobile when you were there  
8 at the scene; right?

9 ANSWER: Yeah. From the outside,  
10 yes.

11 QUESTION: And you saw some  
12 McDonald's left over from a McDonald's meal,  
13 right, a carton, a drink, some other things?

14 ANSWER: There was a drink carton.  
15 There was McDonald's bag.

16 QUESTION: Okay. And an empty fries  
17 bag?

18 ANSWER: Yeah, french fries.

19 QUESTION: And the drink, as a matter  
20 of fact, still had some liquid in it, didn't  
21 it?

22 ANSWER: Yes.

23 Wait. Let me correct that testimony.

24 I didn't know that at the time because we  
25 didn't touch it at the time.

26 QUESTION: Well, at some point in  
27 time you saw it and saw that it had liquid,  
28 right, still had a drink, part of it?

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1 ANSWER: When it was collected as  
2 evidence sometime later, yeah.

3 Okay. So what do we know now?

4 We know she left the Lucky's at South Store at 3:32.

5 There is a McDonald's at South Shore. We know she didn't

6 leave the house because she was butchered in the house. When

7 she got there at five to 4:00, she didn't go to get a

8 McDonald's, so she got that McDonald's sometime between 3:32

9 and before she got to the house at 3:54.

10 Okay?

11 Now, she would have eaten this burger within a

12 15-minute time frame because from the work order, People's

13 37A, the defendant himself notes the time that he completed

14 the job, 3:54.

15 You saw this. The time starts at 2:16 on the upper

16 left corner, completed at 3:54.

17 And by his own statement, this was made out as he got

18 to the truck. He was loading up his truck. He made this out

19 already because he had done the measurements, so he had this

20 made out waiting for her to return to get the check and to

21 sign it. So she got that hamburger between 3:32 and ate it

22 before she got there at 3:54. That's in the evidence in the

23 car. We know that for a fact. That's uncontroverted.

24 Now, I don't pretend to know the time it took for the

25 defendant to assault, to strip the clothing from, to inflict

26 the stab and slashing wounds to the hand and the body of

27 Ms. Fermenick, to sodomize her, sever her jugular vein, and

28 then let her bleed out in the living room. But the testimony

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1 of Dr. Rogers gives us a significant clue.

2 This is direct examination by me.

3 Doctor, I'm going to show you what

4 has now been marked as People's 15 and ask  
5 you if you recognize what is portrayed by  
6 that photograph?

7 ANSWER: Yes.

8 QUESTION: And what does it pertain  
9 to be?

10 ANSWER: The stomach contents.

11 QUESTION: Doctor, do they appear to  
12 be food that is non-digested at the point in  
13 time; is that correct?

14 ANSWER: I think so. It's been  
15 masticated or broken up but really not --  
16 does not look to be digested.

17 QUESTION: Doctor, do you have an  
18 opinion of how long Ms. Fermenick ingested  
19 that food prior to her death?

20 ANSWER: I can't say exactly, but  
21 typically if a person eats, their stomach  
22 will generally empty its contents into the  
23 intestines within sometime over a four-hour  
24 period.



25 Doctor --

26 QUESTION: -- in your opinion, could

27 that food have been ingested by the victim

28 less than one-half hour prior to her death?

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1 ANSWER: Yes, it could.

2 And there is the stomach contents.

3 Okay?

4 So now we are starting to pinpoint the time she died

5 a little bit more closely now. A little bit more closely.

6 Leave South Shore at 3:32, eats that burger sometime

7 around 3:45 or so, whatever it took, and then got to the

8 house at 3:54.

9 Okay?

10 And since we know -- we know from all the testimony

11 that the defendant called his office from the Jack in the Box

12 at about 4:30 after driving from Alameda, now allowing about

13 ten to 15 minutes for that trip, we can almost rest assured

14 that she died sometime around 4:05 -- between 4:05 and 4:15.

15 Okay?

16 Within a half hour, if she got that hamburger at,  
17 say, 3:45, she died at 4:10, 415. That's from the doctor's  
18 testimony. That testimony is uncontroverted.

19 Okay?

20 That's what we have.

21 Now, let's look at the time frames that were  
22 testified to by Lori and Don Fermenick to further pinpoint  
23 the time of the murder and of the body being discovered.

24 This was Lori Fermenick's direct examination by me.

25 QUESTION: Okay. And sometime that  
26 afternoon, did you receive a phone call from  
27 her?

28 ANSWER: Yes, I did.

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1 QUESTION: Do you know what time in  
2 the afternoon it was?

3 ANSWER: It was approximately  
4 1:30 p.m.

5 And what do we know from the phone records of

6 Mr. Capili?

7 Lori Fermenick was obviously wrong because the phone

8 call came at 1:25. So she was right. She was at the house

9 in Pleasanton when Lori (sic) called her from the church

10 house.

11 Remember?

12 I am here. The man isn't here yet. I'm going to go

13 wait -- go out to Alameda and kill some time and come back.

14 And she got back roughly around 2:00 o'clock.

15 So Lori Fermenick is right when she said the last

16 time that she talked to her was 1:30. It was 1:25.

17 And where were you when you received

18 that phone call from her?

19 ANSWER: I was at home in Pleasanton.

20 QUESTION: And what is the phone

21 number there?

22 ANSWER: It's 846-8367.

23 Going on to show you how the time frames are starting

24 to fit in.

25 This is cross-examination by Mr. Giller, by the way:

26 Yeah, he was the one that didn't

27 appear worried and said things you've said.

28 She may be in traffic, she may have gotten

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1 stalled, whatever.

2 Right?

3 ANSWER: Yeah.

4 QUESTION: Okay.

5 ANSWER: I think by the time that I  
6 left, he was starting -- because he had been  
7 calling the house. He is -- he's very -- he  
8 doesn't tell me a lot what he is feeling, but  
9 for him to start calling the house -- but  
10 then he was thinking about it.

11 QUESTION: Well, this was after  
12 6:00 o'clock before you left, in fact; right?

13 ANSWER: He had called the house two  
14 or three times before I left.

15 QUESTION: Well, what time would that  
16 have been?

17 ANSWER: Probably around 5:00 or 6:00

18 he started calling.

19 QUESTION: You don't really know, do

20 you?

21 ANSWER: Well, it was sometime in the

22 late afternoon, dinner time.

23 What do the records show?

24 A phone call from the Pleasanton house to the church

25 house at 4:55, at 6:07, and at 6:39. And if you recall the

26 testimony from Lori Fermenick, she went off at 7:00 o'clock

27 to the Weight Watchers, and there were three phone calls made

28 by her son to that particular church house. Everything she

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1 said is corroborated by the phone records.

2 Okay?

3 Next what do the phone records show about Donald

4 Fermenick?

5 QUESTION: Okay.

6 This is direct examination by me:

7           Okay. Did she return at 4:30?

8           ANSWER: No.

9           QUESTION: Did you do anything to try

10          and contact her?

11          ANSWER: Yes.

12          QUESTION: What did you do?

13          THE COURT: After 4:30?

14          MR. ANDERSON: Yeah.

15          QUESTION: Around 4:30 or shortly

16          thereafter?

17          ANSWER: Yes. I picked up the phone

18          and called the house in Alameda.

19          What do the records show?

20          The phone call was made at 4:55. Okay. 4:55.

21          QUESTION: And did you get any

22          response from the home?

23          ANSWER: No.

24          QUESTION: Okay. Did you try again?

25          ANSWER: Yes.

26          QUESTION: How long after the initial

27          phone call?

28 ANSWER: I don't know. An hour or

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1 so.

2 Phone call first occurs at 4:55.

3 The next phone call from the record, People's 43A,

4 shows that at 6:07, about an hour or so -- that looks like

5 about an hour and 12 minutes.

6 You think Donald Fermenick is wrong?

7 No. The records prove he is right.

8 QUESTION: Did you try and make any

9 more phone calls to the church house?

10 ANSWER: Yes.

11 And what do they show?

12 Again, 6:39, 7:29, and 8:31.

13 Okay?

14 He's telling it like it was. He is pinpointing a

15 time frame.

16 And then we know at 8:31, he asked his dad for the

17 car and left at that point in time.

18 But going on, I showed him the picture of his wife

19 and how he found the body in People's Number 25.

20 QUESTION: What did you do then?

21 ANSWER: I screamed. Then I

22 basically fell backwards out of the room, and

23 I ran to the kitchen phone and I called 911.

24 QUESTION: Are you okay now? Do you

25 want to keep going?

26 ANSWER: I'm fine. I'm fine.

27 QUESTION: When you called 911, was

28 somebody at the other end of the phone that

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1 received that call?

2 ANSWER: Yes.

3 QUESTION: Did you say anything into

4 the receiver at that point?

5 ANSWER: Yes.

6 QUESTION: Did you basically explain

7 what you had discovered?



8 ANSWER: Yes.

9 QUESTION: Did you hang the phone up  
10 at that point?

11 ANSWER: Yes.

12 QUESTION: And what did you do after  
13 that, sir?

14 ANSWER: I think I picked up the  
15 phone again and called my dad.

16 QUESTION: What did you tell your  
17 dad?

18 ANSWER: I said, "Dad, I'm at the  
19 house. I found her. She was naked."

20 And what do the phone records prove?

21 At 9:24 is the call from 1515 Walnut to the church  
22 house (sic).

23 Okay?

24 That corroborates the fact because of when Officer  
25 Erny got there. So everything else, and the time frames that  
26 the Fermenicks gave us --

27 THE COURT: Mr. Anderson, I think you misspoke. You  
28 said 1515 to the Walnut -- to the church.

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1 MR. ANDERSON: To the Pleasanton house. I'm sorry.

2 Thank you, Your Honor.

3 So everything is corroborated.

4 Now, let's take a look at the evidence again and see  
5 if we can't pinpoint the events as they unfolded from the  
6 evidence and the inferences that can be drawn from this  
7 evidence.

8 Now, we know from the defendant's statement that she  
9 signed the check in the kitchen right by the door, and that's  
10 where she got the work receipt. This was her copy. Don't  
11 forget the original one was turned in to the boss. This was  
12 her copy.

13 Okay?

14 She leaves the baby in the car, runs up, signs the  
15 check, signs the work order, and that was going to be it.

16 That is not it. We know that the initial assault  
17 took place right after that because in People's 28A, the  
18 photo shows that a copy of the work receipt was on the floor  
19 next to the bed. She didn't even have enough time to fold

20 that up and put it away in her purse or anything else.

21 If you think I'm making that up, Ladies and

22 Gentlemen, take a look at the yellow receipt right by her

23 shoe, right to the right side of the bed. That's People's

24 36A. She didn't even have enough time to put her copy away.

25 Now, how do you think it got there?

26 She signs it. She tears it off. She is about to go,

27 and she is brought back into the master bedroom.

28 Why is it on the floor there?

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1 Ask yourself that.

2 What inference can you draw from where she signed

3 that work order and gave the check to finding it right there

4 by this bed she was brutalized.

5 It happened like that. She didn't even have enough

6 time to put it away.

7 Okay?

8 It was probably still in her hand as she was pulled

9 into that bedroom.

10 What happened next?

11 The knife was produced, and Mr. Nadey threatened her  
12 with it.

13 You recall the picture of the defensive wounds?

14 I can imagine the words stated -- take your clothes  
15 off or strip, or whatever you want to use. He produces a  
16 knife. He comes at her. She puts her hand up. He cuts her.

17 You think the guy meant business at this point in  
18 time?

19 A defensive wound. You put your hand in front of  
20 your face to prevent being slashed.

21 This was there. This is the -- probably the first  
22 attack that occurred. He slashed her. She covered. She  
23 knows now he means business.

24 We know that the upper clothing was removed in a rush  
25 or in a hurry.

26 You recall the words of the Technician Betty Nice?

27 Question -- this is direct examination by me:

28 QUESTION: Okay. How about any other

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1 outer garment of clothing belonging to a  
2 female, more specifically a sweatshirt and  
3 other items?

4 ANSWER: Well, the sweatshirt. And  
5 then there was a shirt under the sweatshirt  
6 that had a turned-down collar. And then the  
7 bra.

8 On a person, the way this clothing  
9 was removed -- I was able to determine that  
10 the person would have been wearing the bra  
11 and the shirt with the turned-down collar,  
12 and then the sweatshirt over the top of those  
13 two items.

14 QUESTION: The recovery of those  
15 items, can you describe the manner in which  
16 they were observed by you when recovered?

17 ANSWER: In my observation, they  
18 appeared to have been pulled off all of a  
19 piece. In other words, all three garments  
20 were removed at the same time. They were not

21 removed separately. They were pulled off --

22 I would say pulled off over someone's head.

23 Now, is that the way a woman would take her clothing

24 off, just all three garments taken, pulled right over her

25 head?

26 I don't think so. I don't think so. That looks like

27 it was forcibly removed.

28 Doesn't that sound like a reasonable inference to

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1 you, forcibly removing those garments?

2 That is not the work of a female stripping down.

3 That is the work of the defendant. That is his handiwork.

4 We know that -- also that the stab wounds on the side

5 of the torso were delivered after she was stripped. The side

6 wounds were delivered after the clothing came off.

7 And how do we know that?

8 This is the testimony of Sharon Smith. This is

9 redirect examination by me.

10 QUESTION: Did you have occasion to

11 also examine pursuant to your lab records  
12 outer garments, shirts belonging to the  
13 victim in this case?

14 ANSWER: Yes, I did.

15 QUESTION: Did you notice whether or  
16 not there were any cut marks to those outer  
17 garments?

18 Or puncture marks, I guess, would be  
19 the more appropriate term.

20 ANSWER: I did not observe any cuts  
21 or fabric separations on the sweatshirt.

22 QUESTION: Did or did not?

23 ANSWER: Did not.

24 Okay?

25 So after those outer garments come off, obviously  
26 done by someone with superior force pulling them off, after  
27 the first defensive wound, just to get her attention, stabs  
28 her in the side. And it had to be after those garments were

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1 off because the fabric in the garments was uncut.

2 Anybody want to challenge that?

3 That's uncontroverted. There is no other inference

4 you can draw from that.

5 So after placing this poor mother of a five-month old

6 in this condition, he sodomized her. And not wanting to

7 leave any witnesses to his foul deeds, he cuts her throat and

8 flees.

9 Now don't forget Dr. Rogers testified that she went

10 into shock initially.

11 Okay?

12 Shock. She was just stunned there.

13 The fecal matter. You recall the fecal matter on the

14 bed coverings indicates that the defendant attempted to clean

15 himself off prior to leaving.

16 Now, what happens, Terena is dying. She slides off

17 the side of the bed to the left. You can see where the trail

18 goes off the left side of the bed closest to the door.

19 Here is a better photo.

20 She bent over the bed. Her throat is cut. She goes

21 into shock. And as she gets up, you can see the trail is off

22 the left side of the bed.



23       Okay?

24       She is going out to the door now, going toward the  
25 phone.

26       She goes out the door. You can see the blood trails  
27 from the other photographs, makes -- tries to make it to the  
28 phone, doesn't make it to the phone. She hits the wall

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1 there -- you can see the smears on the wall -- and she dies.

2       There is the phone. There is the blood smears on the  
3 wall. That's where she met her reward.

4       Okay?

5       This is uncontroverted. This is what happened,  
6 absolute, uncontroverted proof this is what happened.

7       Now, the defense would have you believe that there  
8 should be blood on the defendant's shoes from walking in this  
9 bloody mess. But let's remember the facts. This bloody  
10 trail did not occur until the defendant had left. She goes  
11 into shock. The defendant wipes himself off, wipes off the  
12 fecal matter, does the swipe mark on the mattress.

13 Remember the swipe marks as testified to by

14 Technician Elizabeth Nice?

15 The defendant at that point in time gets up and

16 departs. After coming out of shock is when she gets up and

17 leaves that blood trail through the house.

18 Of course the defendant is not going to have any

19 blood on his shoes. Of course not. He left before that

20 bloody trail was even there. There is no blood on his shoes.

21 However, let's revisit the defendant's jacket because

22 that is one key to this particular case.

23 Now, the defendant obviously had this coat a very

24 long while.

25 Okay?

26 He had it for a long while, and he obviously was

27 quite fond of it.

28 This is direct examination, Mr. Paul Miller.

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1 QUESTION: Now, you had mentioned he

2 had wearing a raincoat that day?

3 ANSWER: An old yellow --

4 QUESTION: It was kind of an old,  
5 beat-up raincoat?

6 ANSWER: Yes.

7 QUESTION: It wasn't a regular-size  
8 raincoat, was it?

9 ANSWER: It was very small for him.

10 QUESTION: It was very small. Just  
11 came, where, to the waist or something?

12 ANSWER: Just around there.

13 QUESTION: Yeah, barely.

14 ANSWER: It wasn't even worth putting  
15 it on, to be honest with you.

16 QUESTION: Okay.

17 ANSWER: It was destroyed.

18 QUESTION: It was a kind of a piece  
19 of rag?

20 ANSWER: Exactly.

21 QUESTION: Okay. As a matter of  
22 fact, when he came there to work in the  
23 morning, it looked like some kind of a

24 scroungy, and Louisa washed it?

25 ANSWER: Yeah, while we were at the

26 Southern Pacific Police Station job.

27 Okay. So if anybody is going to wear anything like

28 that, it's like your security blanket. If you're fond of a

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1 scroungy old rag, you obviously have had it a long time;

2 right?

3 No question about it. He's fond of that particular

4 item. In fact, he had the lady at the job site (sic) wash it

5 for him while he was on the job with the boss in the morning.

6 We also know that he was loading up the truck when

7 Terena arrived. He told us that in his own statement.

8 Okay?

9 And we know it was raining that day.

10 Okay?

11 So what do we know then?

12 The defendant obviously has that coat on when he is

13 loading up the truck. His job is finished. We know it. We

14 know it because he told us that.

15           QUESTION: And when the woman came  
16 back from the store or wherever she was and  
17 you were done with your job and you were  
18 loading up the truck, she left her child in  
19 the car?

20           ANSWER: Yes.

21           QUESTION: And where did she pay you?

22           ANSWER: In the kitchen, right there  
23 by the door.

24           So he was loading up the truck with all of his gear,  
25 and it's raining outside. He's got this jacket on, the rain  
26 jacket on. And then he goes back into the house.

27           So now we put him back in the house where she  
28 hurriedly leaves the kid in the car, in the Saturn, and she

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1 is signing the work order. Nadey just comes in the house,  
2 and he's got that jacket on.  
3           Okay?

4 And we already know what happened after she got back  
5 into the house.

6 Now, can you just picture Mr. Nadey after he  
7 withdraws from her, cleans himself off with the bedding, and  
8 reaches down to her, pulls her head back by her hair. And as  
9 she was bent over, reaches around, and with his right he's  
10 got her head back, cuts her throat like that eight different  
11 times.

12 What is going to happen?

13 Blood is going to spurt from that severed vein. It's  
14 going to get on the sleeves of the right hand doing the  
15 cutting. And if your head is back here, it's probably going  
16 to get on the underneath part of the sleeve on the left hand.

17 Okay?

18 Now, we know he's got the jacket on because he was  
19 loading up and he was through.

20 We know she was forced back into that bedroom because  
21 the work order was on the floor there. She didn't even have  
22 time to put it away.

23 Okay?

24 The cutting of the throat motion, as I've indicated,  
25 would explain blood on the cutting arm and blood on the

26 sleeve of the left arm.

27 Now, do you think when he did this cutting that he

28 wouldn't have gotten blood on his sleeves?

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1 That's ridiculous. There is no question about that.

2 So what do we know now?

3 The defendant has a dying woman in the house. He  
4 makes certain of that. He got the jugular vein. He has to  
5 get out of Dodge as soon as possible.

6 And how do we know that?

7 Because he bypasses 18 separate outdoor telephones,  
8 two gas stations, and a number of restaurants to go to  
9 Oakland to do his duty and then call into his office.

10 Is that version credible?

11 That's a crock. Give me a break.

12 He has to dump that coat, and whatever he has to do,  
13 he's got to get rid of that coat in a different jurisdiction.

14 He cannot have that coat be found in Alameda, because if a  
15 bloody coat is found in Alameda with a woman, you know,

16 slashed to death in Alameda, the cops aren't exactly morons.

17 They are going to put two and two together. He gets out of

18 Alameda, and he dumps that coat God only knows where -- in a

19 bathroom, in a dumpster, in the estuary, or who knows where,

20 in a vacant lot. But it won't be Alameda.

21 Now, isn't it amazing that he took his coat off,

22 quote, to do his duty, and he leaves this cherished

23 garment -- if it's an old rag that he just loves, never got

24 another one, he leaves it in the public bathroom?

25 Dumping a bloodstained coat in a different city

26 explains the passing of all of those phones.

27 Now, we know what Sky Chem's policy about phone

28 numbers after the job is completed.

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1 Right?

2 We know that. Mr. Miller told us.

3 You remember what he told us their job description

4 was?

5 When they were through with the job, they are to go



6 to the phone and phone in immediately, phone in immediately

7 to let them know that they're done. And we know that he

8 didn't call until 4:30 from that Jack in the Box restaurant.

9 And what did we know that Mr. Nadey told the police

10 later on about what happens after the job is through?

11 QUESTION: Were you going to say

12 something?

13 ANSWER: Yeah. We're supposed to --

14 when we call in, we do that for reasons. But

15 just in case we do pick up another job, like

16 an emergency, you know, yeah. And they keep

17 pretty good tabs on us, what we are doing and

18 where we are at. And me still being on

19 probation or review or whatever you want to

20 call it, because my review comes up in

21 February, I mean I try to stick very tight

22 with it.

23 Oh, really?

24 Now he's supposed to call in right away?

25 Right. He was supposed to call in right away. He

26 tried to stick very tight with it. Yet he claims he left at

27 3:56 and doesn't call in until 4:30.

28 Explain to me this little over one-half hour.

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1 Explain to me if he is going to stick tight to the office

2 policy.

3 We know what transpired in that half hour. There is

4 no question about it.

5 If there were no problems at 1515 Walnut Street and

6 if everything was going according to Hoyle and there was no

7 sexual intent on his part, why not ask Terena to use the

8 phone there?

9 It's a local call to Emeryville. It won't be

10 charged. He certainly knows where the phones are.

11 Why not ask this nice lady who he knows was the wife

12 of the pastor to use the phone to call in when the work was

13 completed?

14 Instead, he goes 1.8 miles out of his way, and while

15 doing such, he loses his prized coat.

16 Is that a credible story?

17 What a crock.

18 Don't forget Detective Miller went to the Jack in the  
19 Box to see if that coat was recovered. This was also a  
20 question by me, direct examination.

21 QUESTION: Sometime after that  
22 interview with Mr. Paul Miller was over, did  
23 you in the company of another Alameda police  
24 officer go to the Jack in the Box at 2424  
25 East 14th Street, City of Oakland?

26 ANSWER: Yes.

27 QUESTION: And do you know what time  
28 of the day that was?

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1 ANSWER: It was around 4:00 o'clock  
2 in the afternoon.

3 QUESTION: Okay. Why did you go to  
4 that location?

5 ANSWER: I was looking for a  
6 raincoat. After speaking with Paul Miller,

7 he told me that Mr. Nadey went -- after he  
8 went to a carpet cleaning job at the Walnut  
9 Street address, the last time he saw  
10 Mr. Nadey, he was wearing a raincoat. And  
11 when he returned, that rain coat was not  
12 there.

13 During the course of the interview  
14 with Mr. Miller, Mr. Miller told me that  
15 Mr. Nadey had called from the Jack in the  
16 Box, that he stopped there. And when he  
17 returned from the Jack in the Box without the  
18 raincoat, Miller asked him where was the  
19 raincoat, and Mr. Nadey said he left it  
20 behind in the restaurant restroom.

21 QUESTION: So this was on the 19th,  
22 one day after the homicide that you went out  
23 to the Jack in the Box at the 2400 block of  
24 East 14th?

25 ANSWER: I believe so, yeah.

26 QUESTION: And did you go into the  
27 restroom there, the men's room?

28 ANSWER: Yes.

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1 QUESTION: Did you find anything you  
2 were looking for?

3 ANSWER: No. The raincoat wasn't  
4 there.

5 QUESTION: Did you speak to the  
6 manager of the Jack in the Box at that point  
7 in time?

8 ANSWER: Yes. I asked him to ask all  
9 of his employees and the janitor staff if  
10 there was -- if they found a raincoat and  
11 they hadn't.

12 Oh, what a shock. What a shock.

13 Did he lose it in the bathroom, or did he dump it  
14 because it had incriminating evidence on the sleeves?

15 It's either in a dumpster or in the estuary or in a  
16 sewer.

17 Now, don't forget this coat was ratty, according to  
18 the testimony of the boss. And if it's all ratty and not

19 worth a damn, why would somebody -- if he hung it in that  
20 restaurant restroom, why would somebody take such a coat as  
21 that?

22 That coat was never there. It was dumped.

23 Now, let's look at the evidence which points now to  
24 Giles Nadey as the guilty party. We have, one, the  
25 defendant's statement to Officer Rodekohr.

26 This is direct examination.

27 Remember Officer Rodekohr was the man or one of the  
28 officers who was doing the surveilling of the defendant.

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1 QUESTION: And what did he tell you?

2 ANSWER: He told me --

3 Now, this is on January 25th, okay, about a week  
4 later.

5 He told me that he was going to  
6 cooperate with us as much as he could,  
7 letting us know where he was going to drive  
8 and so that we can easily follow him around.

9           And he had asked -- he had mentioned  
10          that when we arrested him, if we can do it at  
11          his place of work instead of his house so it  
12          wouldn't embarrass his mother.

13           QUESTION: Now, did you ever initiate  
14          that conversation with him at all?

15           ANSWER: Never.

16           QUESTION: So he just comes out of  
17          the house and begins talking to you and says  
18          when you arrest me, please do it at my work  
19          so my mom will not be embarrassed?

20           ANSWER: That's correct.

21          Now wait a minute. If you haven't done something for  
22          which you're going to be arrested, who says "When you arrest  
23          me, can you give me a break and do it at my place of work"?  
24          Who even dreams of something like that? How many of you ever  
25          said to somebody, "Hey, when you come to arrest me, do it at  
26          work; I don't want to embarrass my family or my kids"?

27          If you aren't the guilty party, why would you even  
28          mention that?

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1 That shows a consciousness of guilt. That shows a

2 consciousness of guilt.

3 And, again, another mind-boggling comment is made

4 later on the following day, on 1-26.

5 QUESTION: Okay. And at that point

6 in time, did he engage you in conversation?

7 ANSWER: Right. He said that he had

8 spoken to an attorney and that he was advised

9 not to speak with us. I told him that was

10 fine. And they went back into the house.

11 That's Nadey and his friend.

12 He came back out to the car that I

13 was sitting in, and he told me -- he says,

14 I'm starting to feel the weight of this, all

15 of this on my shoulders.

16 Well, if you've done nothing wrong, why do you feel

17 the weight of this on your shoulders?

18 The day before he says when you come to arrest me, do

19 me a favor. And now he is starting to the feel the weight of



20 this on his shoulders. If these statements aren't a  
21 consciousness of guilt, then I'm losing my mind. He knows he  
22 is going to be arrested for this. He knows.

23 And do you want to know why?

24 Because he knows that the DNA is coming because he's  
25 given blood and he knows what is going to happen once they do  
26 that.

27 Second thing which conclusively proves that Nadey is  
28 guilty other than what I've spoken before is the semen swabs

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1 from the autopsy. There is absolutely no doubt that that  
2 degrading act was done to the wife of the minister. I don't  
3 even want to show you People's Exhibit Number 11 again.

4 But what else do we know about Mr. Nadey?

5 He was absolutely fixated on that kind of sexual  
6 activity. Now, if sodomy is his specialty, I just wonder how  
7 many times one has to do something like that to become a  
8 specialist?

9 Think about that.

10 How do you become a specialist in sodomy?

11 Take a look at People's 41A, the writing tablet. The  
12 writing tablet. This was recovered from the defendant's  
13 bedroom by the search warrant. Officer Ron Miller or  
14 Detective Ron Miller.

15 What do we know about that?

16 I asked the Court for permission to have Detective  
17 Miller read the relevant passage from that writing tablet  
18 into the record:

19 "I also like to endure in anal sex, which by the way  
20 is one of my specialties. You will come so hard your eyes  
21 will roll back in your head."

22 I'm not going to even get into the meaning of that,  
23 but I think you all get the picture.

24 One of his specialties.

25 And just what was the type of crime done before she  
26 was murdered by the defendant?

27 Take a look at the five lacerations on this  
28 photograph. And I don't want to go into too much more

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1 detail. She was given one of his specialties.

2 Okay?

3 No question about it.

4 And if that is not enough for you to know who the  
5 guilty party was, they recovered a book, People's 42A, titled  
6 Deep Thrills. Deep Thrills.

7 Let me go to page 72. You'll see a couple engaging  
8 in what appears to be an act of sodomy. It's called "Back  
9 Door Lovers, Sliding Up the Old Dirt Road."

10 Yeah. These are the things that he amuses himself  
11 with. Maybe that is how he became a specialist. That's what  
12 happened to our victim, and it was done by the specialist.

13 Do you have any doubts whatsoever as to his sexual  
14 appetite?

15 We also know that he had an abrasion on the head of  
16 his penis when he was examined when he is giving the blood.

17 Isn't it remarkable -- isn't it reasonable to assume  
18 that you could get an abrasion to your penis by trying and  
19 sodomizing an unwilling victim?

20 Remember the five lacerations.

21 Do you think that she was a willing participant?

22 I don't think so. I don't think so.

23 Next comes the DNA. Now, I'm not going to beat this  
24 to death. We've had about three-and-a-half days of testimony  
25 on that, and you know what the results were.

26 But the RFLP DNA on the rectal swabs and her jeans,  
27 one in 32 billion. The PCR DNA has Nadey's semen as the  
28 major donor on the other swabs.

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1 Can you have any doubts now as to who did this and  
2 why?

3 Now, I know you're going to hear the defense  
4 challenge the results of the DNA expert and the computer is  
5 faulty, the FBI databases are bad and so forth. He goes on  
6 and on. You're probably going to hear that until you're sick  
7 of DNA.

8 But just remember when Mr. Horowitz screams  
9 contamination and all the other things he is probably going  
10 to scream about, the swabs and the blood were received by  
11 Sharon Smith on 1-22, as were the jeans. The testing on the

12 swabs was done to see if semen were present -- was present,  
13 and if it was, that's all her role in this thing was, to  
14 determine the presence of semen.

15 And the chain went from the ACSO lab, the Alameda  
16 County Sheriff's Office Lab, to Sergeant Taranto to Steve  
17 Myers. The jeans stayed at the sheriff's lab.

18 So while Steve Myers was conducting preliminary  
19 testing on the swabs, Sharon Smith began work on the jeans on  
20 1-30-96 after -- after the preliminary DNA was done.

21 Myers didn't get the jeans cutouts, didn't get the  
22 jeans cutouts until April the 30th, 1996. So some three  
23 months later, after Myers has indicated that the defendant  
24 was the donor of the semen on the swabs, then and only then  
25 does he receive the cutouts from Terena's jeans from Sharon  
26 Smith.

27 Now, you remember I asked Steve Myers this question,  
28 direct examination:

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1 How would you contaminate a sperm

2 fraction if you so desired?

3 ANSWER: Again, as long as separation  
4 is complete, really the only way to  
5 contaminate a sample prior to fraction would  
6 be to add sperm.

7 QUESTION: Do you have in your  
8 laboratory as a matter of course little vials  
9 of sperm that you can contaminate samples  
10 that you have in your lab?

11 ANSWER: No. We don't keep those  
12 things on our lab bench.

13 QUESTION: So there is no trip to a  
14 sperm bank to get some samples so you can do  
15 a test to contaminate the samples you're  
16 looking at; is that right?

17 ANSWER: No.

18 Now, did you hear anyone for the defense testify to  
19 disprove Mr. Myers' findings or results?

20 Not one. Not one.

21 Here we have the uncontroverted testimony and  
22 unquestioned expert in the field of DNA whose lab is

23 accredited by the American Society of Crime Lab Directors,  
24 whose results were reviewed by others and found to be  
25 entirely correct. It was done by a person who has never had  
26 an incorrect result on any of his proficiency tests.

27 You remember that?

28 He's never been wrong on a proficiency test result.

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1 He tells us that Nadey's sperm is on the rectal swabs  
2 and the jeans of Terena.

3 And so the defendant's profile on the six RFLP  
4 markers -- and that's the chart you saw with the autorads  
5 that we showed on the overheads -- is one in 32 billion.

6 Now, that's what I would call proof of this case  
7 beyond a reasonable doubt.

8 I rested with Steve Myers' testimony.

9 What was the defense to all this?

10 None. The fact that a street person was inside the  
11 church some one and a half to two years prior to this  
12 depraved murder proves absolutely nothing.

13       The fact that Don Fermenick was in a state of shock  
14 when he was arrested after finding his wife in that condition  
15 proves zero.

16       The fact that there was no blood in Nadey's van  
17 proves absolutely zero because he got out of Dodge long  
18 before that trail of blood led to Terena's dying by the  
19 phone.

20       The defense was zero.

21       Now, the Court is going to instruct you on motive.

22       Motive is not an element of the crime charged and  
23 need not be shown. However, you may consider motive or the  
24 lack of motive as a circumstance in this case. Presence of  
25 motive may tend to establish the defendant is guilty.  
26 Absence of motive may tend to show the defendant is not  
27 guilty.

28       That's the law. You are going to hear that from the

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1 Court.

2 Let's take a look at motive now. The person who



3 sodomized Terena absolutely had to murder her if his identity  
4 were known to her. Here there is no doubt that if she was  
5 sodomized and then Nadey just left the scene, she certainly  
6 would have known who had done that.

7 If he sodomized her and just fled, he is going to  
8 leave her there for her to go to the police?

9 No way. If you're known, if you're the sexual  
10 assailant and you are known to your victim, you don't sit  
11 around and leave that person alive. That's just not the way  
12 it's done. You know, you see all these serial rapists and  
13 people like that who are unknown to the people. They get in  
14 there and they do their foul deed and they flee.

15 But if you're known to the victim, you cannot leave  
16 that person alive unless you want to go to jail. And I'm  
17 sure Mr. Nadey didn't want to go to jail. The police would  
18 have been on him in a flash if he had sodomized her and then  
19 left her alive. An unknown sexual predator doesn't have to  
20 kill. He can do the crime, as I stated, with no  
21 identification able to be made.

22 With the carpet cleaner who was hired by the  
23 Fermenicks, however, who knows the company name Skyline Chem  
24 Dry, and it's an easy step to find out who was there, who did

25 the job. If he doesn't slay her, he is going back to jail.

26 He is going to jail no question about it. He has to kill

27 her. That is a no-brainer. He doesn't want to leave

28 somebody to identify him.

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1 Can there be any doubt that this murder was carried  
2 out to facilitate the escape thereof or avoid detection of a  
3 sodomy?

4 That is a no-brainer, Ladies and Gentlemen. That is  
5 a no-brainer.

6 The Court is going to instruct you that the unlawful  
7 killing of a human being, whether intentional, unintentional,  
8 or accidental, which occurs during the commission of the  
9 crime of sodomy is murder of the first degree when the  
10 perpetrator had the specific intent to commit the crime of  
11 sodomy.

12 And the Court will tell you what the specific intent  
13 of the crime of sodomy is.

14 So you sodomize somebody and then you murder them,

15 that's called a felony-murder rule. It's murder of the first  
16 degree.

17 And with respect to the special, to find that the  
18 special circumstance referred to in these instructions is  
19 murder in the commission of a sodomy is true, it must be  
20 proved that the murder was committed while the defendant was  
21 engaged in the commission of sodomy or the murder was  
22 committed during the immediate flight of the commission of a  
23 sodomy and the murder was committed in order to carry out or  
24 advance the commission of the crime of sodomy or to  
25 facilitate the escape therefrom or to avoid detection.

26 And that sure sounds like what we've got in this  
27 case, Ladies and Gentlemen.

28 Ladies and Gentlemen, you review the evidence in this

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1 case, you review all the inferences that can be drawn from  
2 the evidence, and I know you are going to come to the  
3 inescapable conclusion that the defendant is guilty of these  
4 charges, guilty as charged.

5 Thank you very much.

6 THE COURT: Thank you, Mr. Anderson.

7 All right. Ladies and Gentlemen, we'll take the  
8 morning recess for 15 minutes, until 11:15, and then we'll  
9 hear from Mr. Horowitz.

10 And remember the admonition I have heretofore given  
11 you.

12 (Recess.)

13 THE COURT: All right. This is the case of People  
14 versus Nadey.

15 Let the record show the defendant is present with  
16 counsel and the jury is present in the jury box along with  
17 the alternates.

18 And, Mr. Horowitz, you have the floor.

19 MR. HOROWITZ: Thank you, Your Honor.

20 This is a big case, and there is a lot to say about  
21 it.

22 I'm going to take all of today and a significant part  
23 of tomorrow. And there are going to be times when I'm going  
24 to bore the heck out of you. And hopefully there will be  
25 times that I'm engaging, too.

26 But the point is this is probably the most important  
27 decision that you are going to make in your life about  
28 something other than your own family. So if I take a lot of

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1 time and if at times I'm saying things that you already know,  
2 bear in mind that there are 12 and four of you, 16 of you,  
3 and if there is just one person gets something from what I  
4 say or, you know, if it gives you something to think about  
5 it, even if you come back guilty, in the end at least you've  
6 thought it through; you've had a full hearing on it.

7 One thing that's bothered me and bothering now is the  
8 constant use of the words "the minister's wife," "the hands  
9 in prayer."

10 And, in fact, if you look at the photos you'll see  
11 the way she was lying on her stomach. The hands are not in  
12 prayer. They are just in front of her when she fell.

13 So I want to read something, something from  
14 literature just to frame things in the context that I think  
15 this case should be framed. And I'm not going to do too much

16 reading from things not really related to the case. But this  
17 is why George Bernard Shaw, born in Dublin, I think, in 1856,  
18 one of the smartest men around, a great playwright, and he  
19 dealt with the issue of the difference between atonement and  
20 punishment.

21 This is one paragraph, about 30 lines, and I think  
22 it's the proper context to think about a case that's  
23 potentially a death case in terms of whether you convict  
24 somebody rightly or wrongly and how you approach your task.

25 The primitive idea of justice is  
26 partly legalized revenge and partly expiation  
27 by sacrifice. It works out from both sides  
28 in the notion that two blacks make a white,

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1 and that when a wrong has been done, it  
2 should be paid for by an equivalent  
3 suffering. It seems to the... majority a  
4 matter of course that this compensating  
5 suffering should be inflicted on the

6 wrongdoer for the sake of its deterrent  
7 effect upon other wrongdoers; but a moment's  
8 reflection will show that this application  
9 corrupts the entire transaction. For  
10 example, the shedding of innocent blood  
11 cannot be balanced by the shedding of guilty  
12 blood. Sacrificing a criminal to propitiate  
13 God for the murder of one of his righteous  
14 servants is like sacrificing a mangy sheep or  
15 an ox with the rinderpest: it calls down the  
16 wrath instead of appeasing it. In doing it  
17 we offer God as a sacrifice the gratification  
18 of our own revenge and the protection of our  
19 own lives without cost to ourselves; and cost  
20 to ourselves is the essence of sacrifice.  
21 However much the... majority has succeeded in  
22 confusing these things in practice.  
23 And then he cites Dicken's novel. He says:  
24       The Baronet's cousin in Dicken's  
25 novel, who, perplexed by the failure of the  
26 police to discover the murderer of the  
27 baronet's attorney, said far better hang

28 wrong fellow than no fellow at all.

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1 He was expressing a common sentiment, the common  
2 sentiment that it is better to hang the wrong fellow, in  
3 fact, better maybe to hang the wrong fellow than the right  
4 fellow to hang.

5 The point is a cardinal one. Until  
6 we grasp it, not only does historical  
7 Christianity remain unintelligible to us.

8 It goes on, and the point he is making is it would  
9 not at all assuage our guilt to sacrifice somebody who is  
10 wrong or a man with tattoos on his knuckles, whether or not  
11 he did it. It would make us feel good.

12 But it doesn't do justice, doesn't right the wrong,  
13 and basically we have to resist that impulse for revenge in  
14 deciding whether somebody did it or not.

15 Because the constant reference to "the minister's  
16 wife," the constant reference to "hands in prayer" is really  
17 a way of calling to that instinct that Bernard Shaw was



18 talking about, which is we've got to get somebody for it.  
19 And he is being a wiseacre by saying let's get somebody who  
20 didn't do it. That's even better, makes the point that  
21 sacrificing somebody, killing somebody to make us feel like  
22 it's all better doesn't make anything better. So if you're  
23 going to get somebody who is just downtrodden or somebody who  
24 is not the same social class as you, you know, get anybody.  
25       The point is in this case we have to deal with not  
26 who Mr. Nadey is in opening statement, the man with tattoos  
27 on his knuckles, nor with who Terena Feramenick was or who  
28 Donald Feramenick was. We have to deal with what happened,

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1 and you have to look at the facts in the case.

2       Now, there is no question in this case that the DNA  
3 includes a finding, a concession, an agreement, an admission  
4 by the prosecution that there is DNA of somebody other than  
5 Donald Feramenick, Terena Feramenick, or Giles Nadey in this  
6 case.

7       Now, this is not an exact copy. None of my charts

8 are exact copies of Mr. Myers' charts.

9 Today I don't have a cold.

10 The secret of getting rid of a cold quick is the

11 Judge's green tea.

12 Oops. I've now collapsed the board, but...

13 THE COURT: Mr. Horowitz, I may have an extra clip

14 here.

15 MR. HOROWITZ: Great. Thank you, Your Honor.

16 THE COURT: If that doesn't fit, we've got bigger

17 ones.

18 MR. HOROWITZ: All right. This will work.

19 Now, what you've got are the STR results. I will go

20 into this detail again what is going on with the DNA. This

21 is just a real quick overview because I think it's good that

22 you know where I'm going when I talk.

23 According to Mr. Myers -- according to Mr. Myers,

24 this right here, this right here, and this right here belong

25 to somebody other than Donald Fermenick and other than

26 Mr. Nadey.

27 Okay?

28 That's in his own tests.

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1 Now, there are other places where this fellow shows  
2 up. And let me give you a preview of what I'm going to be  
3 arguing, but I'm going to take a long time to get to it. In  
4 other words, I'll tell you now what I'm going to do, but it's  
5 going to be a long time in coming before you really see how  
6 it comes together.

7 And I'm going to show you that in every single PCR  
8 test that Mr. Myers did, when you look at all of his results,  
9 the ones that he put on the chart and the ones that I had to  
10 pull out of his notes, out of his bench notes, in every one,  
11 this guy shows up. Every one of his PCR tests. And that's  
12 on the vulva and on the rectal swabs.

13 Okay?

14 So this is just -- I put this up just to start  
15 because this is what he volunteered on his own.

16 So there is somebody else involved here, and the role  
17 of that somebody else is something that I think requires  
18 serious consideration.

19        Maybe I should tell you where I'm going. I'm going  
20 to tell you where I'm going. I'm going to argue to you in  
21 the end that Mr. Nadey has no sperm -- there is no sperm of  
22 Mr. Nadey's in the rectum of Terena Fermenick. And I'm going  
23 to argue to you that, in fact, nobody's sperm -- nobody's  
24 sperm is in the rectal sample of Terena Fermenick.

25        I'm going to argue that there is a skin sample found  
26 and that that skin sample belongs not to Mr. Nadey and not to  
27 Terena Fermenick. It belongs to somebody else. And I'll  
28 show you that that's right in the DNA. I'm going to keep you

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1 hanging on that. I'm not asking you to accept that now. I'm  
2 just telling you eventually where I'm going.

3        First I'd like to just talk about the mundane or the  
4 regular non-DNA details of this case.

5        Let's look at the facts that I think favor Mr. Nadey.

6        First of all, there was no sign of physical disarray  
7 on his person when he returned to work. He didn't seem  
8 different or in any way unusual when he returned to work.

9 And I think that Mr. Anderson made a mistake and, you  
10 know, it wasn't on purpose. My mistakes aren't on purpose.

11 But when Paul Miller testified, I think what he said  
12 was not that Mr. Nadey called at 4:30. I think what he said  
13 was he called about 4:10, 4:15, and was back at work by 4:30.  
14 I think that's what he said.

15 So you can check that. I mean you can either check  
16 your notes, and the reporter obviously has everything down,  
17 and she is a great reporter. She's got everything right.

18 So he really -- that time frame is not quite right.

19 And I think also if you think about it, Mr. Miller  
20 did say that it's not unusual, particularly at the end of the  
21 day, to stop and get something to eat. So in terms of  
22 Mr. Nadey's activities to the rest of the world, not to  
23 Mr. Anderson as he says things happened, were not unusual.  
24 Nobody had any suspicion about anything being wrong.

25 Now, the raincoat itself -- I don't know how it  
26 became like this pet raincoat like Linus in Snoopy with the  
27 blanket or whoever it is that likes the blanket, but it's  
28 just a ratty raincoat that he had that day because it was

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1 raining. And that's all it was. And it wasn't very big.

2 And presumably if you're getting blood gushing out of

3 a neck wound and you're sodomizing somebody and there's blood

4 all over the bed and everything else, that raincoat is not

5 going to protect you even from the waist up or down the

6 sleeves. I mean if I just picked up this right now and I

7 spill it, you know, it's going to go -- it's going to get on

8 my shirt sleeve, too, and on my hands.

9 And -- plus if he's really doing these acts as

10 Mr. Anderson describes them, as you cut -- I mean as I cut,

11 look at what is happening to my sleeve. This is my raincoat.

12 Watch my sleeve as I cut. The shirt is coming out. There is

13 going to be blood.

14 So the raincoat, you'll have to decide how meaningful

15 that raincoat was as protection, how meaningful its loss is.

16 And I think in the end, if you think he is guilty,

17 then you'll think the raincoat loss is very meaningful. And

18 if you think he is not guilty, I think you'll think it's not

19 meaningful. I think it's one of those things where its

20 importance turns on the bigger issues in the case.

21 Now, I would disagree with Mr. Anderson, and I'd  
22 suggest that these voluntary statements made to the police  
23 are not evidence of guilt. They are actually to some degree  
24 evidence of innocence because -- or at least lack of guilt,  
25 because if you have already been asked by the police to give  
26 a sample of your blood and your pubic hairs and your -- they  
27 check your whole body out at the hospital. They've taken  
28 your underwear, which is what Nurse Wilson said.

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1 You know, you kind of know you're a suspect in a  
2 case. And then the police are following you around 24 hours  
3 a day. You'd have to be about the stupidest person on this  
4 planet not to figure that the police are planning on  
5 arresting you at some point. And so when you say to the  
6 police please don't arrest me at work, you know, I mean, at  
7 my house to upset my mother, I mean that's just being  
8 considerate of your mother. I mean it's also being real. I  
9 mean it's obvious that they are focused on him.

10 Now, that whole business about the weight on his

11 shoulders is the same way. If the police were following me  
12 for that length of time --

13 I mean I watched the Rockford Files. One of the most  
14 fun things to do is when the police follow you is to make  
15 them lose you and --

16 But he took it seriously, and he treated them with  
17 respect, and he told them where he was going. There's  
18 nothing wrong with that.

19 And he never tried to run away. That's the thing.  
20 If you've got a consciousness of guilt, then maybe what you  
21 were doing, you know, that they are taking your samples and  
22 that they are following you and that you know you're about to  
23 be arrested because he is saying that to them, maybe you'd  
24 run away.

25 See, if he'd run away and tried to hide or tried to  
26 escape, then that would be consciousness of guilt and I'd  
27 have a tough argument. When he is just letting it happen and  
28 not trying to escape, I think that's something to think

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1 about, anyway, in terms of, you know, what his state of mind  
2 was.

3 And keep in mind, too, when he was arrested, he  
4 started retching. That's what the officer says. He was so  
5 frightened, he started to retch like he was going to vomit.  
6 So he was emotionally upset about this situation.

7 And, yeah, when he went to see Nurse Wilson, he  
8 looked like hell. He looks like a raggedy man. He looks  
9 like a street person because this was very upsetting to him.

10 But remember he looked good when he did these jobs.  
11 I mean remember Paul Miller made it clear that these -- Paul  
12 was with him that morning at the Southern Pacific and Paul  
13 saw him coming back. He looked good to start.

14 And then he went downhill when the police had taken  
15 his samples and were following him. He thinks he is going to  
16 be arrested. He doesn't run, but, yeah, he degrades. He  
17 de-something. That's not unexplainable or un-understandable.  
18 But it is pretty important to realize that at the time of  
19 this incident he looked good.

20 That's very key because Mr. Anderson needs to explain  
21 this DNA of Mr. Unknown, and the way he tries to do it is by

22 saying that Mr. Nadey had a dirty, flaky penis and  
23 transferred some stuff from some other guy, you know, which  
24 he got from some woman who had had sex with the other guy,  
25 and because he is such a dirty, ratty, unclean guy, that then  
26 when he sodomized her, he transferred it to her.

27       And that's his theory. And it turns on you believing  
28 that Mr. Nadey was a dirty, unkempt, slovenly guy. Not in

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1 front of Nurse Wilson, because that's a given. Nurse Wilson  
2 said it; we accept it. But you have to believe it the day of  
3 this incident, and on that day you've got Paul Miller who  
4 says that it is not true. It's not the way he was.

5       And you see, if you don't have that slovenly, dirty  
6 penis theory, then you don't have an explanation of the type  
7 the prosecution would like from Mr. Unknown. Then you can't  
8 go with Mr. Unknown is the fault of Mr. Nadey, and that means  
9 that you as a jury have to deal with who Mr. Unknown is and  
10 what his role is in this case and whether it's significant or  
11 meaningful to this case.

12 And I think that's a fair issue for discussion. You  
13 may in the end reject or feel that Mr. Unknown means nothing  
14 to the case, but I think it's important to accept that he is  
15 there and that his role or absence of role should be  
16 discussed. It should be discussed and analyzed. For you to  
17 really fully look at the case and to reject it based upon the  
18 dirty penis theory I think is unfair, and it's -- does a  
19 disservice to this process.

20 Now, there is an absence of blood or anything else on  
21 Mr. Nadey's person.

22 You've got to deal with the raincoat. And, like I  
23 said, you'll decide if that raincoat really was where all the  
24 forensic evidence went or not.

25 But putting that aside for a second, there is no  
26 evidence of anything in the van, anything on Mr. Nadey's  
27 body, person, clothing, face, hair, anything.

28 If you think about it, the FBI Agent Skeels, Special

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1 Agent Skeels, saw no sign that that van had been cleaned.

2 And she looked with her available technology except for the  
3 carcinogenic technology, and she saw no signs of semen or  
4 blood or any unusual stains in the van.

5 When Mr. Nadey went back to work -- and he was back  
6 at work at 4:30 -- he looked fine. There was nothing on his  
7 pants, on his shoes. Nothing.

8 That's evidence of something. It has meaning. I  
9 mean blood is flying around that much, Mr. Anderson needs you  
10 to feel that it all went on the jacket, the raincoat,  
11 whatever. Because it certainly wasn't anywhere else.

12 And if you took that raincoat into the van, you know,  
13 it's amazing that it didn't get on the van if it had blood on  
14 it or on his body or anything else.

15 This is a problem that Mr. Anderson has with the  
16 case, and it can't be answered, with all due respect, by  
17 saying words like "the minister's wife" or showing you the  
18 gory pictures. It can't be answered that way. It has to be  
19 answered logically.

20 Now, Mr. Giller pointed out to you through  
21 examination of Donald's father, who is Mark Fermenick, that  
22 there were people -- this is not an isolated area -- that  
23 there were people going around.

24 And, you know, he had a tough job on that witness  
25 stand because, you know, he's obviously not on our side. And  
26 maybe --

27 He did a very, I thought, admirable job of being very  
28 fair and very objective and very civil to us.

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1 But he did let you know that there's an apartment  
2 building in the back, that people go through, and all that  
3 means is that there is at least the ability of people other  
4 than Mr. Nadey to have been there. Doesn't mean that  
5 Mr. Nadey didn't do this. It does mean that if we suggest  
6 that there might have been a Mr. Unknown involved, that that  
7 is not unknown, a fantasy. This was not Fort Knox.

8 Let's look at things not done in this case, because I  
9 suggest to you that if you look at the things that were not  
10 done, a lot of things that were not done could have solved a  
11 lot of these riddles. There is a lot of things that were not  
12 done.

13 Let's start with the pubic hair combing.

14 They took Terena's pubic hair, and they combed it for  
15 pubic hair and not hers, and they found a pubic hair.

16 It might be interesting to know whose that was?

17 Let's think about it.

18 It could have been Donald's. It wouldn't have meant  
19 much then.

20 It could have been Mr. Nadey's. Then you sure would  
21 know something, wouldn't you? That would tell you a lot.

22 Or it could have matched none of them. And that sure  
23 would have been meaningful, too.

24 And given the fact that they had not only the burden  
25 of proof, and they have the burden of proof, but that they  
26 were the ones with the labs and all the investigative  
27 agencies, it's interesting that they didn't bother to do  
28 that.

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1 And I'm not going to hold back. Let me tell you why  
2 they didn't do a lot of these tests. They had a theory of  
3 the case very early on that Mr. Nadey sodomized Terena

4 Fermenick, and all of their evidence collection focused on  
5 Mr. Nadey and getting him. And anything that would have  
6 looked at Mr. Unknown or anybody else was put to the side.

7       Number one example. Think about what they found in  
8 that house and didn't test: The dagger, the dagger in the  
9 house, the hunting knife, as you want to call it. That was  
10 not tested. That is the perfect, perfect weapon to have been  
11 the murder weapon in terms of the size, the shape, the  
12 location in the house.

13       Why didn't they test that? What if they had tested  
14 that and found blood on it?

15       What if they had tested it and done all of those  
16 advanced fingerprinting techniques instead of just dusting  
17 with powder at the scene and they found a fingerprint?

18       Wouldn't you be curious whose was on it?

19       Donald told the police, hey, that is my cousin's.  
20 That belongs to my cousin. And they accepted that, and they  
21 put it aside because their theory of the case was Mr. Nadey.

22       So they did a big deal about those leatherman or  
23 Pliers Plus tools that they found in Mr. Nadey's house, and  
24 they did nothing, really nothing with the dagger found in the

25 house.

26 I mean if I told you forget about this case, go home

27 after the trial is over, after the trial is over -- it's just

28 a fantasy -- you can talk about the case now, yeah we had

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1 this case, and this woman was found with her throat cut, and

2 there was a dagger found right in the bedroom, the next

3 question is going to be was that the murder weapon, was that

4 the murder weapon.

5 And the answer is going to be darned if I know. They

6 didn't even bother to test it.

7 And the next response is going to be you've got to be

8 kidding.

9 And remember they had a lot of techniques available

10 to them.

11 I'm reading from Ms. Nice's testimony.

12 Ninhydrin, iodine, fluorescent powders, dimethyl

13 sulfide, super glue, fluorescent dye, silver powder, black

14 powder, and amido black. She had a lot of different, fancy



15 techniques to look at that knife. They used none of them.

16 There's more.

17 And do you remember what Ms. Nice said as to why she

18 didn't look at that dagger?

19 Because that's not her call. In other words, she did

20 a quick dusting at the scene, but any more work on that is

21 supposed to be ordered by the police. They didn't order it.

22 Okay. The fingernail cuttings. Dr. Herrmann took

23 cuttings of Terena Fermenick's fingernails because they had

24 stuff underneath them, they had blood underneath them, and

25 they had fiber underneath them.

26 Okay. These were not examined. The blood underneath

27 her fingernails could have been her own blood. Could have

28 been her own blood.

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1 What else could it have been?

2 Could have been the blood of somebody else.

3 Wouldn't you like to know one way or the other?

4 If they told you it's only her own blood, no problem.

5       What if they told now she is type O and this was type

6 A?

7       Whoa. How did type A get under her fingernails?

8       Mr. Nadey didn't have any scratches on him; right?

9       We know that. They noted that. He looked fine.

10 That would have been something.

11       The hair under the fingernails or the fiber was not

12 looked at.

13       Hairs found on the mattress, not looked at.

14       Dr. Herrmann found fibers on both hands. Hair

15 fibers, carpet fibers, they were not tested.

16       I believe you'll have to tell me what Dr. Rogers

17 said. I believe Dr. Rogers said he found natural human hair

18 on one of the hands. Could be wrong. Maybe that was just a

19 fiber.

20       These should have been looked at.

21       What if it was a hair that did not match Mr. Nadey

22 and did not match her own hair?

23       They didn't do these tests.

24       How about the doorknob?

25       Now, whoever did this crime probably touched the

26 doorknob on the way out unless the door was left open.

27 Well, Mr. Nadey's prints were on the doorknob. So  
28 what? He's been in and out of the house.

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1 Donald Fermenick's prints. So what?

2 The family's prints. So what?

3 Terena's prints. So what?

4 What if the prints on the inside of that doorknob

5 were somebody else?

6 You know, we do have those databases where you can

7 take all the DMV thumb prints and send your prints to

8 Sacramento and find out -- we see that on TV all the time.

9 Whose print was on the doorknob?

10 They didn't bother to save the doorknob to print it.

11 Now, let me talk about the prints, footprints.

12 I made a big deal, if you remember, talking to

13 Technician Nice saying, hey, how many people were running

14 around in and out of this house while you were doing your

15 work. So there was a bunch of officers. I don't know how

16 many.

17 Wait a minute. Don't you remember in the JonBenet  
18 Ramsey case when they let people walk through the scene and  
19 that ruined the evidence?

20 Oh, okay. I can address it now, though.

21 That's a big deal. Because think about it. The --  
22 there should not be any footprints in that house on the  
23 blood. None. Except where Donald said he came in the door  
24 and went over to his wife and went to the phone, except for  
25 where he walked, nobody should have left a single bloody  
26 footprint in that house.

27 But obviously whoever cut her throat probably got  
28 some blood on his feet while he was doing this. Maybe not,

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1 but it's possible. I'm not talking about after she staggered  
2 out and goes to the phone. I'm talking about right there in  
3 the bedroom when this was happening. You don't need much.

4 If you had taken even a part of a footprint, a part  
5 of a foot impression, if you had one and it matched  
6 Mr. Nadey, I'd sit down right now. I have nothing else to

7 say.

8 If there was a footprint and it matched Donald  
9 Fermenick, well, you could say, well, you know, he forgot  
10 that he walked into that room. He was --

11 But if it was a footprint that matched none of  
12 them -- not Terena, not Donald, not Mr. Nadey -- then you --  
13 then you'd be going walk him out the door. You'd say open up  
14 the door, let him go. He didn't do it.

15 And that evidence was destroyed that day that the  
16 police came through, waddled all around.

17 And Ms. Nice didn't even bother to look for those  
18 things, didn't think they were important.

19 I just sit here and imagine a footprint sitting there  
20 and the officers walking by looking, the same ones who didn't  
21 find the knives when they looked in the house.

22 By the way, even if there was officers going through  
23 and they are stepping right on the footprint but there's  
24 still a little piece left and at that point they step over it  
25 and finally there's just this much left but a clear  
26 impression of something, Nike or whatever has a particular  
27 tread, and then you see Technician Nice walk in, writing

28 everything down, walking right by and never paying attention,

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1 and then they all leave, and it's lost forever.

2 The time of death really was not established in this

3 case and it should have been.

4 Now, Dr. Rogers said that that food is in a condition

5 from zero to four hours after it was eaten, and then

6 Mr. Anderson said: Could it be a half hour? And the answer

7 is yes.

8 So what?

9 If something is between zero and four hours, then if

10 I say could it be 31 minutes, yes, could it be 32 minutes,

11 yes, how about 33 minutes, yes. Anything between zero and

12 four hours is going to be a yes. So, yeah, if it fits

13 Mr. Anderson's half hour, it fits an hour.

14 The point is they didn't do any sort of body

15 temperature.

16 Did anybody even tell if you there was rigor mortis?

17 I mean when I asked Ms. Nice about the turn over,

18 wasn't she in rigor mortis and that's why her hands were put  
19 together, she didn't even know. They didn't make any  
20 notations to really tell you what the time of death was.

21 But now in a capital case, they want you to accept  
22 their time frame as if it's a definite. And it's not a  
23 definite, and it's not a definite because of what they didn't  
24 do.

25 It's not my fault, and it's not our fault.

26 Now, let's talk about Dr. Rogers really quickly.

27 I want to remind you -- and I think we made this  
28 point, but this is an example of where I'm going to say

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1 something and maybe I don't need to say it.

2 When I look at the pictures that show Terena  
3 Fermenick's face and it looks like somebody has punched her  
4 in the eyes and punched her in the mouth -- not what  
5 happened.

6 I asked Dr. Rogers because, you know, in voir dire a  
7 lot of you were asked the question. You were given that

8 question that tells you about the crime to see if it's so bad  
9 that you are always going to vote for death, and it was  
10 something like she was assaulted and then sodomized and then  
11 her throat was cut.

12 So then people are going to see these pictures and  
13 say, wow, gee, she was assaulted, bam in the eye, bam in the  
14 other eye, bam in the mouth.

15 But that is not what happened.

16 When I asked Dr. Rogers about that -- and you can  
17 have his testimony read back -- if there are any contusions,  
18 she was not, as far as he could see -- as far as he could  
19 see, punched in the face. And that kind of thing that looks  
20 like a punch in the face are what happens to a body when it's  
21 face down after you're dead.

22 So it's important to know that there is no evidence  
23 of that assaulting, you know, as you might have gotten the  
24 impression that it happened. It's not there.

25 The -- the bruise on the leg, the hickey, that  
26 so-called hickey --

27 First, I've been practicing. You know, it doesn't --  
28 to me, that doesn't look like a hickey. It looks more like



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1 what would be a bite mark, the oval shape like on the top and  
2 the bottom was a hickey, kind of pulls more of the middle.  
3 You're not allowed to do experiments, so I'm going to have to  
4 do the hickey for you.

5 But the point is -- the point is that they are trying  
6 to make it a hickey to make the crime more emotional and more  
7 horrible. But you remember that their own lab showed no  
8 saliva on that spot. And it's not really a fair thing to  
9 present to you something that their own forensic dentist says  
10 is not a bite. Their own doctor says it's a bruise, could be  
11 caused by a hickey or anything else. I don't know the  
12 answer. Then their own lab has it's got no saliva on it, and  
13 then to argue to you that it's a hickey, it's -- and it's one  
14 of those emotional arguments that has no -- it's not fair,  
15 and it's not meant to appeal to your intelligence. And  
16 that's why, again, I don't like that kind of argument. I  
17 resent it.

18 And talking about resent, you probably know me well  
19 enough by now to know that I strongly and I still resent

20 Technician Nice. And I popped her every way I could:

21 Are you a real police officer?

22 So you're just a technician?

23 I did everything I could to basically let her know

24 how I feel about her.

25 And why?

26 I'll tell you why. It's the prayer -- hands in

27 prayer portion. Because I kind of illustrated how when

28 you're falling flat on your face you're not praying, you're

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1 grabbing and you fall.

2 And you'll see the picture. As awful as it is, you

3 can see that her hands aren't in prayer. Look at one hand

4 with the elbow up -- I'll start here -- and the other hand

5 down. They are not clasped together in prayer in the way in

6 which she voiced it, just a picture of how somebody falls.

7 See that one hand is up?

8 They can't be that close to each other. It's just

9 the way the hands happened.

10 But it fits their theme of emotion that Bernard Shaw  
11 warned about.

12 And let me tell you. She set me up with it, which is  
13 what's made me so mad. Listen to the questions and answers  
14 and tell me if you don't think I was set up and that was  
15 something that she had planned.

16 And I'm not blaming Mr. Anderson for this. I'm  
17 blaming her because she is an experienced witness. She is an  
18 experienced technician. She testified at length that she  
19 knew what she was doing.

20 Mr. Anderson questioning:

21 Do these -- those hands appear folded  
22 to you, ma'am?

23 ANSWER: Yes, sir. They appear  
24 clasped to me.

25 No problem.

26 QUESTION: As in together?

27 ANSWER: Yes, sir, almost a  
28 prayerful --

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1       And then you remember I couldn't -- I didn't even  
2 have words. I just vocalized. I didn't have words I was so  
3 mad. I mean it's hard enough with all the church things here  
4 to deal with somebody deliberately pounding that. Maybe she  
5 pounded it once too often. After that, she is on my bad  
6 list, and she'll remain there.

7       The problems in this case for the prosecution start  
8 with Sharon Smith. They end with Steve Myers. And I'm going  
9 to show you that Steve Myers is not truthful with you. He  
10 was not truthful. He misrepresented things to you. And I'm  
11 going to show you how, and it's not going to be close. I  
12 mean you are going to see it.

13       But let me start by picking on Sharon Smith because  
14 she deserves it. And I'll tell you what she did wrong. She  
15 contaminated the heck out of these samples. And I'll go over  
16 things in detail. And I'm going to read you from the  
17 transcripts. But I'll tell you the short version.

18       Dr. Herrmann, medical Dr. Herrmann, pathologist, does  
19 this all the time, took a swab directly from the vagina of  
20 Ms. Fermenick and he put it on a slide, on a little piece of

21 glass. And he sealed it in an envelope. And he took a swab  
22 and made a rectal slide the same way direct from the rectum  
23 right to the slide.

24 And he sent these to Sharon Smith.

25 All right?

26 And when Sharon Smith looked at Dr. Herrmann's rectal  
27 slide, do you remember that she saw no sperm?

28 Now you're getting a little bit of an idea of why I'm

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1 arguing to you that Mr. Nadey's sperm never was really found  
2 in the rectum of Terena Fermenick. When Sharon Smith looked  
3 at the vaginal slide made by Dr. Herrmann, what she found was  
4 sperm.

5 By the time she was done with her tests days later,  
6 total reversal happened. Now you had no vaginal sperm -- and  
7 she reported to the Grand Jury -- but she did have sperm in  
8 the rectum.

9 I would like this to stick in your minds throughout  
10 this whole argument phase and to do that I'm going to do

11 something visual.

12 Basically, you started with no sperm in the rectal  
13 sample. Then you put it in Sharon Smith's lab, and it  
14 turned. In other words, it turned from red and blue to  
15 yellow and green. It's like a magic trick that she did.

16 The difference is we know that this is a gimmick.  
17 It's a trick. It's not meant to fool you. It's not meant  
18 for you to rely on it.

19 I'm not trying to tell you that this really turned  
20 color. But she's actually telling you that that rectal  
21 slide, the rectal sample, that the rectum which had no sperm  
22 now has sperm. And she tried to tell the Grand Jury just the  
23 opposite, that the vaginal slide which twice, by the way, had  
24 sperm didn't have sperm.

25 So the question is what is going on with Sharon  
26 Smith?

27 Well, let's start with the fact that Sharon Smith  
28 relies on her notes. She barely remembers doing these tests.

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1 She barely remembers anything about this case. She relies  
2 almost primarily upon her notes. And that's my first blowup  
3 about Sharon Smith.

4 I guess you folks know that we get the transcripts  
5 like Mr. Anderson has there, so that's where he is getting  
6 his quotes, and that's where I get mine.

7 My wife says this is on purpose.

8 Question to the jury:

9 Can you rely upon Sharon Smith's notes?

10 No. But that wasn't a joke or a trick. I just  
11 misspoke it.

12 But look what the questions and answers show.

13 First of all, I established the importance of her  
14 notes to her.

15 And is it important -- I don't know if everyone can  
16 read back there.

17 Is it important to be precise and accurate in your  
18 note taking?

19 Yes, it is.

20 Okay. Why?

21 And is that in part because you eventually testify in  
22 cases and you rely extensively upon your notes to provide

23 information that will be used by the jury?

24 You saw that's what happened. She was reading her  
25 answers.

26 That's correct. The notes are basically used --

27 This is a line, our six, seven, eight, nine.

28 That's correct. The notes are basically used to

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1 refresh my recollection of the types of work that I did on  
2 the case.

3 But then there was a time where she was handling  
4 samples, and the way it reads, if you look at the time, she  
5 is -- she took the blood out, she did certain extractions,  
6 and then at 8:15 or something, she made gauze. She took  
7 blood and made gauze.

8 And I said: Is that true, you had everything out and  
9 then you were making gauze?

10 She said: No. Even though it was written as if I  
11 did it at 8:10, really that's not what I did.

12 Wait a minute. You did that drawing of things at



13 7:30. That's what you said. And yet the blood patch

14 notation is at 8:10.

15 How do you reconcile that?

16 That's just the way I write my notes.

17 So you're saying that your notes are not accurate to

18 time?

19 It's just the way I do the order of how I wrote the

20 notes.

21 So, in other words, what she is doing --

22 Technically, this is her notes. She is writing 7:10,

23 and then she comes down here and she goes, okay, 8:15. This

24 is -- so I say to her: Didn't you do this at 8:15?

25 She goes: No, I did it at 7:10. I just write it

26 down that way.

27 I'm going: Come on. Give me a break. It's weird.

28 And -- and I'll show you in context later that she is

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1 trying to get out of a mess up that she did by saying that

2 her notes were wrong. So here is somebody who is supposed to

3 be relying on her notes. She hardly ever writes the times  
4 down. When she does write the time down and somebody  
5 comments on it, all of a sudden she is telling you that  
6 doesn't count.

7 THE COURT: Mr. Horowitz, let me interrupt you now.

8 We are going to take the afternoon recess. You can  
9 pick up at 1:30.

10 MR. HOROWITZ: Thank you, Your Honor.

11 THE COURT: All right. Ladies and Gentlemen, we'll  
12 take the afternoon recess.

13 Remember the admonition I have heretofore given you.

14 You're not to discuss this case among yourselves or  
15 with any other persons or to form or express any opinion  
16 about this case until the matter is submitted to you.

17 We'll reconvene at 1:30. We'll pick up where  
18 Mr. Horowitz left off.

19 (Noon recess.)

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1 TUESDAY, FEBRUARY 16, 1999 -- P.M. SESSION

2 PROCEEDINGS

3 ---o0o---

4 THE COURT: This is the case of People versus Nadey.

5 Let the record show the defendant is present with

6 counsel and the jury is present in the jury box along with

7 the alternates.

8 And Mr. Horowitz.

9 MR. HOROWITZ: Thank you.

10 I hope you all had a good lunch. I had one, and I

11 would rather go home and sleep now. But let me try and get

12 your interest a little bit.

13 I was talking about Sharon Smith and how her notes

14 were supposed to be accurate, but then they weren't accurate,  
15 and she wanted us to believe that she wrote things  
16 differently.

17 This is not the only instance of this kind of a  
18 problem, and there are some pretty important instances. For  
19 example, I pulled these out of the transcript.

20 QUESTION: So is it correct then that  
21 it was your practice and procedure to write  
22 the time that you started an action and then  
23 do the action and complete it and then write  
24 notes about it next to that time?

25 Okay. Then she says that's correct. That's the  
26 context.

27 But let's look at our situations where this came up.

28 Here is a question:

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1 Did Mr. Harmon from the DA's office  
2 tell you that a dagger was found at the scene  
3 where the woman was found killed?

4 ANSWER: A dagger?

5 QUESTION: Yes.

6 She says it's not indicated in my notes.

7 So, first of all, if her notes are accurate, that

8 means Rock Harmon did not tell her about the dagger, and,

9 two, she is relying on her notes. She's got to go to her

10 notes for her answers.

11 And why am I focussing on the notes?

12 Here is why. Note taking is a problem for her. She

13 admitted that she failed the proficiency test. I wonder if

14 you remember why she failed it. I'll just read it to you.

15 QUESTION: Have you ever failed a

16 proficiency test, made a mistake in one?

17 That's what I mean by failing.

18 ANSWER: Yes, I have. That was in

19 the early '80s. There was a blood

20 proficiency test.

21 QUESTION: What was the nature of the

22 error that you made?

23 One of them was a clerical error. It

24 was a typo on a reported result.

25 See, she had record-keeping problems that predate

26 this case.

27 Now, she also had another proficiency test failure,

28 and that's where she miscalled the type, the blood type, and

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1 her excuse is it's a rare sample or it's an actual -- the

2 actual sample was a rare type that we hadn't seen before and

3 we miscalled it.

4 Well, let me first of all talk about proficiency

5 tests. They are not as tough as real-life testing because

6 you could see the condition of the samples in this case from

7 somebody who has been dead for a period of time. There is

8 mixtures of bodily fluids with the DNA. It's collected.

9 It's stored. It's brought to a lab. That is how the real

10 forensic stuff is.

11 Whereas, you know, DNA like in a hospital, for

12 example, you just take it right from a fresh person, so it's

13 really easy. It's clean.

14 And one thing, one theme --

15 See, you can always tell when I'm departing from my

16 notes, but I have to tell you this right.

17       One thing you are going to see in all the DNA work is  
18 when you talk about those blood samples that were taken from  
19 Mr. Nadey, Ms. Fermenick, or Donald Fermenick, there is no  
20 problem with the test results. Like when I put up that PCR  
21 chart or any of the charts, you are going to see no traces,  
22 no mixed results, no questionable results, just pure, great  
23 results. The blood always comes up great. That's just  
24 because you've got a lot of it, there is no contamination,  
25 there is no environmental assaults on it. It's easy to test  
26 it.

27       A proficiency test is sort of in between. They kind  
28 of dummy up the sample a little bit. But you heard Mr. Myers

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1 talk about it. But it's still not as severe as a regular  
2 sample. That's why failing a proficiency test twice is a  
3 pretty big thing because a proficiency test you've got  
4 somebody grading you and they are catching your mistake.

5       She didn't catch the mistake. You know. Either her

6 supervisor did and failed her, or the people providing the  
7 test failed her.

8 Now, in a case like this, the only person to catch  
9 the mistakes is me because there is no -- with a proficiency  
10 test, they know what the right answer is supposed to be in  
11 advance. That's how they check it. In this case, you don't  
12 know what the right answer is or at least you shouldn't.

13 So what is really interesting is when she says that  
14 she failed one because of a clerical error, we already know  
15 that her notes are not to be trusted. She doesn't keep good  
16 notes.

17 But the other one she failed is when there was a type  
18 she wasn't familiar with and she missed it. So that's  
19 telling us what we always thought about these tests, I think,  
20 as being like the test is either one way or the other. Isn't  
21 that kind of how we were thinking about it, sort of like you  
22 turn on your car, it either starts or it doesn't.

23 But it's obvious that these tests aren't like that.  
24 I mean these tests have a lot of judgment, because if there  
25 is a rare type that she hasn't seen, so what? If this test  
26 is -- you know, it's like a traffic light. Red light says



27 go -- I mean stop -- green light says go, and yellow means  
28 caution. All you have to do is look at the light, what color

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1 lit up.

2 That is not what her tests are about. There is  
3 gradations. There's judgments. Just like you saw with the  
4 PCR, you see that judgment issue is the key thing.

5 In this case in terms of both Sharon Smith and Steven  
6 Myers, besides the fact that they did terrible, terrible  
7 contaminations and that they were very poor in their handling  
8 of samples and their preparations, on top of that is their  
9 bias in the case.

10 And that is my theme for the next while because when  
11 you have interpretation, then bias comes into play.

12 Now, here is what I thought about last night at about  
13 1:00 in the morning, so I think it might not be so good. But  
14 let's see.

15 Bias can mean prejudice, a deliberate desire to be  
16 unfair. That is how we think about bias, like I don't like

17 that person's race, and so they are all that way.

18 But, you know, bias is something else in science,  
19 really. Bias can be an unconscious -- not a malicious, not a  
20 deliberate -- tendency to favor one thing over the other.

21 And then I tried to think of examples.

22 Okay?

23 I bet if you looked at yourselves over the course of  
24 this trial, some of you have a bias towards bright clothing.  
25 Some of you have a bias towards, you know, wearing your  
26 jacket here, some not, leaving it upstairs. That is a bias.  
27 That is the way you are. It's the way you look at things.  
28 But it's personal to you. It's fine.

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1 But in science, sometimes there is a bias that can  
2 affect your results if you let it. For example, isn't it  
3 human nature to want approval, to want people to like you?

4 You think right now I'm not looking at your faces  
5 hoping that you're paying attention?

6 You know I am. And so is Mr. Anderson, and so are

7 you up in that jury room. We all want approval to make sense  
8 and so on. It's normal. You want to give people what they  
9 want.

10 Now, what are these lab people doing?

11 They are both employed by police agencies. That's  
12 their employers. They are working with police to catch bad  
13 guys.

14 Now, that's normal, isn't it?

15 It's normal to want to catch the person who did a  
16 crime like this. Almost getting back to that Bernard Shaw  
17 thing, it's normal to want to have somebody and say they did  
18 it. That's why Shaw is saying even if it's an innocent  
19 person, all the better. Let's just get him because we want  
20 it over with. It's a normal tendency.

21 And so the way that you avoid that and get truth out  
22 of a lab, assuming that they handle things right and do  
23 things right and they are competent and keep good notes is  
24 you don't tell them what results should be. You just say  
25 here is the stuff. You tell me. And if the lab persons says  
26 what is this case about, you go, well, I'm not going to tell  
27 you. You tell me. Here are some samples. Here is where  
28 they are from in the human body. You tell me what you find.

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1 I'm not going to tell you in advance what I'd like you to  
2 find.

3 That is -- that really comes down to that whole  
4 double-blind theory, that whole theory that when you're a  
5 scientist, you don't want to know what the outcome is  
6 supposed to be. When you have a pill that you're testing on  
7 a person and this pill is either going to cure their migraine  
8 headaches or it's a sugar pill, well, if you know that it's a  
9 good pill, you are going to look at them and just feel good  
10 because you are helping someone. And they may pick that up  
11 and feel relaxed, and their migraines may go away just  
12 because they feel better that they are cared for.

13 That's why double-blind studies. Both the subject  
14 and the person giving it to them, they are both blind.  
15 Neither of them know if it's a sugar pill or a real pill.

16 But in this case -- in this case -- it wasn't like  
17 that. These were not double-blind tests.

18 And I'm talking about with Mr. Myers and Sharon

19 Smith. Let me put up some quotes.

20 (Brief pause.)

21 Okay. This is a question to you that I've written

22 for you.

23 Question to the jury: Were these double-blind tests

24 that the scientists or People who wanted to be scientists

25 did?

26 This is her own testimony:

27 According to my notes, it looks like

28 Mr. Harmon was reviewing some aspects of the

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1 case with me and what potential evidence

2 might be.

3 QUESTION: Can you be more specific?

4 In other words, did he tell you that this was

5 a potential sodomy throat-cutting murder?

6 ANSWER: Yes, he did.

7 And this also tainted Mr. Myers because, question to

8 Mr. Myers:

9           And did anybody ever tell you the  
10       nature of the sex acts or the way that the  
11       murder took place?

12           ANSWER: Well, I definitely knew that  
13       there was a rectal assault. The rectal swabs  
14       being sent to me with a note that there were  
15       semen or that there were sperm detected  
16       certainly indicated right off that there was  
17       a rectal assault.

18       So they both knew at this time.

19       And why is this so important?

20       Well, it's so blatant in Sharon Smith's case that  
21       when she found no sperm in the rectal slide, she went and  
22       made another one and found sperm.

23       And I'll tell you how that got contaminated. I can  
24       show you based upon her examination where the contamination  
25       took place.

26       Then, most interestingly with the vaginal slide,  
27       there's sperm on it when she looks. But that doesn't meet  
28       her expectation of the case, so she goes and makes another

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1 slide. And, as you remember, that had sperm on it, also.

2 So what does she do?

3 She goes and makes yet another slide, and this time

4 there is no sperm on it, and that's the results she is happy

5 with.

6 That's bias. That right there is bias.

7 And basically bias makes you feel good because when

8 Sharon Smith was done -- when Sharon Smith started, she had

9 results that Sergeant Taranto or Rock Harmon would not like.

10 She had results that were inconsistent and hurt the

11 prosecution theory of the case, undercut it seriously. By

12 the time she was done, she had results that the prosecution

13 liked.

14 And that's pretty -- that's pretty important. And,

15 in fact, the prosecution liked those results so much that

16 when it came time to go in front of the Grand Jury, remember

17 what the Grand Jury was told by Sharon Smith?

18 No semen found in the vaginal slide.

19 That's what was presented to a jury similar to

20 yourselves in a different setting, a different context, no  
21 defense attorneys present. That's supposed to be giving the  
22 facts. You know, a Grand Jury, as you know just from the  
23 Clinton case, is supposed to be looking at the facts  
24 objectively, standing in for the public, and the Grand Jury  
25 has to be told the truth because there is not a defense  
26 attorney there to challenge things. There is just the  
27 prosecutor and the witnesses and the grand jurors. The Grand  
28 Jury has to be told the truth. It's so critical there

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1 because important decisions are made.

2 But let's talk, also, now, besides -- besides this  
3 note taking and bias and truthfulness issue with Sharon  
4 Smith, let me talk about her problems with sample handling,  
5 because in the end she might be a bad note taker, she might  
6 not be a very honest person, but if she correctly handled the  
7 samples, then she hasn't really done the kind of harm that  
8 I'm telling you she did. So let me talk about how bad she  
9 was in handling things.



10 But I'm going to take the focus off her and give her

11 a little bit of a break.

12 There is an issue here about the potentially missing

13 vial of blood. Now, I don't know if I made that clear by my

14 questioning, so let me tell you what I was thinking.

15 When -- Steve Wilson, Nurse Wilson -- Nurse Wilson

16 testified he talked about I believe two vials of blood.

17 Okay?

18 But Sharon Smith, when I started questioning her --

19 she ends up with just one vial, so here is how I approached

20 it.

21 First thing I asked her -- there was an objection,

22 and I talked about my blind cousin.

23 I said did you feel what was in that envelope? Did

24 you feel how many vials or tubes were in the envelope?

25 There was objections. You know, how can she know

26 what's in it. She didn't see.

27 I'm going: My blind cousin can feel the envelope and

28 know what's in it.

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1       And it turns out that she didn't make any notes. In  
2 other words, when that envelope 1 and 1A with the blood from  
3 Mr. Nadey's blood comes in, she makes no notes about what was  
4 done with them.

5           So isn't it correct then that you  
6 don't make any indication in your notes as to  
7 what was done with 1 and 1A, Mr. Nadey's  
8 blood?

9           ANSWER: I can tell you what's done  
10 with them. They would be --

11       And then I interrupt. I say: Judge, she is not  
12 answering my question.

13       Do you know or do you not know?

14       And then I say, look, you don't have any independent  
15 recollection of what you did with 1 and 1A on January 22nd,  
16 1996, do you?

17           ANSWER: Not independently.

18       Well, it's not independently and she doesn't have it  
19 in her notes, so all she wants to do is tell me what she is  
20 supposed to do and makes you think that that's what she did.

21       But -- okay. That was my third slide here.

22 Question for the jury: Is there a missing tube of  
23 blood?

24 I call these slides because on my computer they were  
25 going to be slides.

26 Okay. Two pages here. Start with this one.

27 Okay?

28 This is where I started with Nurse Wilson.

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1 Okay?

2 Nurse Wilson believes that he draws two tubes of  
3 blood. Here is the question:

4 Okay. When you drew blood from  
5 Mr. Nadey, was it in a vial or Pyrex tube of  
6 some sort?

7 ANSWER: Yes.

8 QUESTION: And how many vials did you  
9 draw at that time if you can recall?

10 ANSWER: I believe I withdrew two.

11 So, you know, it's reasonable to say he wasn't a

12 hundred percent sure because that is also the way he talked a  
13 little bit. He wasn't that confident.

14 But then let's look at Mr. Anderson's opening  
15 statement. Talking about opening statement, this is right  
16 out of Mr. Anderson's opening.

17 "You will hear next from Officer Fuji, who received  
18 those defendant's vials," vials in the plural, "those  
19 defendant's vials of blood from Steve Wilson, the nurse. And  
20 Officer Fuji kept the chain, took the blood back to the  
21 locker."

22 So it wasn't just Nurse Wilson who thought there was  
23 multiple vials. It was also Mr. Anderson himself in his  
24 opening statement.

25 Now, you had that mixup with Sergeant Taranto and  
26 Fuji about who handled the blood and what -- and I didn't  
27 quite get what that mixup was. But, in any case, the first  
28 change in the vernacular, first time we talked about a single

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1 vial in this case is only when Taranto is on the stand and

2 all of a sudden Mr. Anderson is questioning and when they  
3 were discussing being at Highland Hospital and his collecting  
4 the -- these various items. And you were asked what was done  
5 with the vial of blood, all of a sudden it's a single vial.

6 He said, well, it was not received by me. It was  
7 turned over to Officer Fuji.

8 And so all of a sudden something happened, and now  
9 they are talking about one vial of blood for the first time.

10 And this is where Taranto explains the mixup with him  
11 and Fuji. It's not for my argument. I just put it in there  
12 just so you had the whole context. But then when Sharon  
13 Smith finally opens up 1A, what she says was -- what she says  
14 is there was one tube of blood inside that envelope and it  
15 was labeled Nadey, Giles, along with some other writing that  
16 was on the tube of blood.

17 Now, I say this to you: I say that Steve Wilson, the  
18 nurse, believed that he drew two. Mr. Anderson obviously  
19 believed that there was more than one vial. He said "vials."  
20 Now, Smith opens it, and in her notes there is only one.

21 There's two things that could have happened -- well  
22 there's three. There is a few things that could have

23 happened.

24 One is Wilson could be wrong. Nurse Wilson could be  
25 wrong, and Mr. Anderson might not have been thinking too  
26 carefully about the issue, not meant to say one way or the  
27 other, and there really always was one vial. That's a  
28 realistic possibility.

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1 Number two, there could have been two vials, and if  
2 there were, let's think about what might have happened to  
3 them.

4 First of all, if there's two vials, like Nurse Wilson  
5 says, and somebody is handling evidence in a case like this  
6 and they drop a vial and spill it or they break a vial --  
7 whether it's Fuji, Taranto, or Sharon Smith -- they may not  
8 want to report it. There might be a tendency to say, well,  
9 there's another vial. I'm not going to report it. That is  
10 an explanation.

11 Then there's the innocent explanation. You know,  
12 like I said, that there always was one and Nurse Wilson was

13 confused.

14 And then there's a nefarious one: Somebody took the  
15 extra vial and used it to contaminate evidence and didn't  
16 want people to know.

17 I can't tell you that that's that extreme thing that  
18 somebody contaminated evidence. It's a logical possibility.

19 Do I think that's what happened?

20 No, I don't.

21 Okay. But I think -- I can't say that one of you  
22 doesn't have a good argument for why it happened. I'm  
23 telling you here that I don't think that that extreme thing  
24 happened.

25 I think that either Steve Wilson made a mistake or I  
26 think that somebody did spill it or break it or lose it, one  
27 of those two things. And you can draw from that what you  
28 wish. You know, lost -- there were sloppy -- spilled or

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1 broke, got to be a little more concerned about where it  
2 happened.

3 Steve Wilson being wrong and mistaken, not too much  
4 you need to do with that. It can happen. Steve Wilson can  
5 make a mistake.

6 The point is this is the kind of thing that I think  
7 in the jury room needs to be resolved in your minds, you  
8 know, in the context of 12 people who have heard the evidence  
9 objectively and to see whether this is of any importance or  
10 not. So I point it out to you.

11 Now, getting back to the issue that I think is more  
12 important, where I am going to take a strong position as  
13 opposed to just throwing it out to you, Sharon Smith's bias.

14 Now, I alluded to what she did to the Grand Jury.  
15 How she testified in this courtroom was also untruthful, and  
16 this one I'm not hedging like with the missing tube of blood.  
17 In this one, I'm telling you she was misleading to you on  
18 direct testimony and she was misleading to the Grand Jury,  
19 and I'm telling you it was on purpose.

20 And let me show you what she said.

21 Now, I pose the question. I pose the question to the  
22 jury: Is the following perjury or clever wordsmithing?

23 And I guess we've heard ad nauseam what perjury is.

24 In any case, not truthful. Whether it's legal



25 perjury is a different issue. That's why I put it this way.

26 Let me read it to you. In court -- this is to you as

27 a jury here -- is what she is representing to you.

28 Mr. Anderson: Were you able to

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1 confirm the presence or not presence of semen

2 on the vaginal swabs?

3 And she says: I couldn't confirm the

4 presence of semen on the vaginal swab.

5 Now, is there anybody sitting here --

6 Let me stop you for a second.

7 Who took that to mean that there was sperm on the

8 vaginal swab?

9 No, I don't think so. I think if you think back in

10 your minds that this misled you that when you were hearing

11 that, you were going, okay, there is no sperm in the vagina.

12 That's what you had to have heard from her, and that's wrong.

13 It's not the truth, and she knew it was misleading.

14 And that's how it was left with you until I came up

15 and questioned. That's how it was left.

16 Now, this is not the first time she's done this.

17 Look what she said to the Grand Jury:

18 Does that now refresh your

19 recollection as to what you told the Grand

20 Jury?

21 That's correct.

22 Remember I asked her about it, and she didn't

23 remember what she said to the Grand Jury?

24 But then when I showed her her testimony, here is

25 what she said:

26 That you told them that you couldn't

27 confirm the presence of semen on the vaginal

28 swabs; right?

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1 ANSWER: That's correct.

2 So twice now she's used these words to juries, twice:

3 I can't confirm the presence of semen on the vaginal swab.

4 Well, now she had a way out of it. If she wanted to

5 be really cute, she could have said, well, in my opinion, you  
6 know, there's a difference between semen and sperm, and so  
7 when I said there is no semen, I didn't mean there was no  
8 sperm. You know, she could have said that.

9 But out of her own mouth -- I said the question: But  
10 it's not possible to have sperm without semen.

11 Well, sperm are -- semen is the fluid that carry the  
12 sperm. So if sperm are present, then semen would have to be  
13 present, also.

14 Let's think about that: If sperm are present, then  
15 semen would have to be present, also.

16 So she is saying -- and this is as clear as day -- if  
17 you have sperm, you have semen.

18 Well, you know and I know that she saw sperm on two  
19 vaginal slides and on the third one she says she didn't. So  
20 when she told the Grand Jury "I couldn't confirm the presence  
21 of semen on the vaginal swabs," and when she told you in  
22 court "I couldn't confirm the presence of semen on the  
23 vaginal swab," knowing that she had seen sperm twice on that  
24 vaginal slide, on the two slides, that wasn't the truth.

25 And just to remind you what she saw in that first

26 coroner's slide, I read through about 14 different citings of  
27 sperm or 12, whatever the number was.

28 Here is the question: So now what is that?

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1 That would be a sperm.

2 That's completely intact so that the head, the neck,  
3 and the tail are present.

4 I don't think she can really tell you that she didn't  
5 see sperm on that slide.

6 Okay. You saw that on the vaginal slide at 21 by  
7 140?

8 That's correct.

9 That's just the kind of language -- remember how many  
10 times I repeated that?

11 You were probably -- you were probably saying why is  
12 Horowitz going through each and every sperm and the location?

13 He is driving us crazy. We get the point.

14 But this was my point. I wanted you to see, no  
15 question, there was sperm there. She saw it, so that's why I

16 did it.

17 And here are some more examples. I won't read them.

18 It's there. It's there.

19 I asked her what the heads of the sperm mean just to  
20 make a point to you that she is finding sperm and she is not  
21 confused.

22 And, you know, it's funny, too, because when she  
23 talked to Sergeant Taranto -- we are not just talking about  
24 maybe she didn't understand the words or there is something  
25 wrong in her brain, she just sees the world differently. But  
26 she talked to Sergeant Taranto, she told him that there was  
27 sperm on the vaginal slide.

28 Okay. Is it true that the next day about 9:45 in the

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1 morning, you informed Sergeant Taranto that you had found  
2 sperm cells on the vaginal slide?

3 I have a note from the 24th of January at 9:45. I  
4 told him at that time that I saw a small number of sperm on  
5 the vaginal slide.

6 So she knows how to tell people what she found. It's  
7 not like she's got some sort of disability or trouble  
8 understanding or expressing herself. When she wants to tell  
9 the truth to her friends, the police officers, she told them.

10 But when she reports results to a Grand Jury and to  
11 you, she doesn't.

12 Judge Delucchi will read you an instruction. How do  
13 I know this? Because he tells us in advance what he is going  
14 to read.

15 And it says that a witness who is willfully false in  
16 one material part of his or her testimony is to be distrusted  
17 in others. You may reject the whole testimony of a witness  
18 who willfully has testified falsely to a material point  
19 unless from all of the evidence you believe the probability  
20 of truth favors his or her testimony in other particulars.

21 I would suggest to you, folks, that this witness,  
22 Sharon Smith, was willfully false to the Grand Jury and  
23 willfully false in this courtroom and that this reflects on  
24 her part a strong prosecution bias. It doesn't mean that  
25 everything out of her mouth is a lie. I don't say that. But  
26 I think it means that everything she says is filtered through  
27 her desire to promote the prosecution case.

28 And I will suggest that the pattern of testing and

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1 what she did in her lab is equally suspect for that reason.

2 Why else do you take the vaginal slide and do it  
3 three times where -- and the rectal slide twice and then stop  
4 when you get the results that you want?

5 That's an example of it. That's what bias -- that is  
6 the kind of bias that is in this case.

7 But that is not enough to find Mr. Nadey not guilty.  
8 I'm not saying that it is. What I'm trying to say is that as  
9 I get into the real details of these tests, that I'm going to  
10 show you how the tests are really messed up, how there is  
11 cross-contamination, how there are test results that have  
12 been presented to you as good and they are not.

13 You see how clear I'm being?

14 I'm telling you that the RFLP results in particular  
15 that were represented to you as real were not. And I think  
16 you already have a clue as to where I'm going with that. I'm  
17 going to show you that you have been bamboozled or at least

18 they attempted to. And I don't think they succeeded entirely  
19 by these two witnesses. And I'm going to show you how it  
20 happened. This is the start. It starts with their bias and  
21 it goes from there.

22       Okay. Here is another one. Now we are getting sort  
23 of to the point.

24       Sharon Smith, I'm telling you, exposed multiple  
25 samples at one time, which you know is not right. And even  
26 though she tried to deny it, I caught her, and I got her to  
27 admit it once.

28       Now, this is a situation where I don't think it

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1 affected the results in any material way, but I want to show  
2 you that Sharon Smith is capable of violating her lab rules  
3 and all the rules of science, keeping samples open at one  
4 time when she shouldn't.

5       This has to do with Donald Fermenick's blood sample.  
6 And, again, this is not because she is biassed, this part.  
7 It's just because she is sloppy. But she tries to cover up



8 what she did and makes like she is good because she wants you  
9 to think her results are good. But this is where she is  
10 sloppy.

11 5A indicates envelope with Donald Fermenick's blood.

12 And I go through the envelope, and I talk about how  
13 full it is, and I showed it to her, and now I talk about the  
14 time, 1-25 at 7:30 a.m.

15 Let me do this on the board.

16 This is like an archetype. This is the way that she  
17 does stuff, so by seeing how she made this mistake and  
18 admitted it to you, you'll see how other mistakes worked that  
19 she didn't admit to.

20 All right. So she's got Donald Fermenick's blood  
21 open at 1-25 at 7:30 a.m.

22 And I'll put "Don blood."

23 All right. Can everybody see?

24 "Don blood" 7:30 a.m., 1-25.

25 And -- and then under here -- I'm sort of like  
26 reading what is on her notes -- under here is all the  
27 different tests results -- Anti-A, Anti-B, Anti-C, all the  
28 different tests she did.

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1           And she says: Yeah, that's correct.

2           And then I go: And you did all of  
3 those tests; right?

4           ANSWER: Yes, I did.

5           QUESTION: And then you even took the  
6 whole blood and you put it on a gauze, on a  
7 piece of gauze to make a blood patch?

8           ANSWER: Yes, I did.

9           And at that time the tube was  
10 one-third full, and you didn't start your  
11 work on the vaginal head counts, the vaginal  
12 swab head counts, until 8:15.

13          Okay. So what is going on here is that she is  
14 looking at the slide of the vagina at 8:15.

15          Now, in the questioning, what you maybe remember, or  
16 not -- but if you need to have it read back, what you'll find  
17 is that she started with this vaginal slide, looking at it,  
18 the day before, at 1-24 at the end of the day.

19 Okay?

20 And what she does is that she writes the information

21 there like end of day, and then she writes 1-25, and then she

22 puts the vaginal results.

23 So it looks like -- what it looked like in her notes

24 was that she started looking at the vaginal slide at the end

25 of the 24th, stopped, left it in the box --

26 Remember she is talking about leaving the slide in

27 that little wooden box.

28 -- and then the next morning finished looking at it

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1 because that is what the results were.

2 But -- and then she makes a note here that says at

3 8:15 she looks at the vaginal slide.

4 And what that means is that in between, even though

5 the first chart made it look like she stopped the vaginal

6 slide and completed it the next morning, what really happened

7 was she stopped the vaginal slide, put it in the box, went

8 and opened the blood, and then went back to the vaginal

9 slide.

10 Now, we don't really know, you know, whether the  
11 vaginal slide was in the same room, different room. That is  
12 not the point. The point is she had two things going at  
13 once. She forgot about this test and left it, did the blood,  
14 and then came back to that. And at first her notes didn't  
15 show it.

16 So this is my complaint of Sharon Smith. And, again,  
17 I use this as an illustration not because this is actually  
18 contamination in this case but because this is the kind of  
19 thing that she was doing regularly. And there is times when  
20 she had all of the forensic samples open at the same time --  
21 blood and also the swabs, you know, at the same time at the  
22 same table, despite what she led you to believe.

23 Do you remember she led you to believe that she never  
24 had them in the same room even if they were open at the same  
25 time?

26 They weren't in the same room.

27 Do you remember that?

28 That is not what happened. Sometimes they were open

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1 right in the same place.

2 All right. So, let me go through with you --

3 And, again, this is going to be a little dry so

4 forgive me. But there's a lot of facts here, and I'm taking

5 right from her testimony what she did with all the samples,

6 and now I'm getting to my point. I am going to show you

7 exactly when she had stuff open so that she could contaminate

8 things.

9 Okay?

10 So I'm getting to that point.

11 But let's -- I want to do this in an organized

12 fashion so you see I'm not just making it up. Because I want

13 you to be able to go like take notes, if you want, or

14 remember what I'm saying. And then when you go in the jury

15 room like check your notes and even have stuff read back, and

16 you are going to see that everything that I'm saying is just

17 exactly the way the testimony put it.

18 Okay. 1-22-96.

19 I guess I should be a left-hander.

20 1-22-96 there was Nadey's blood is received.

21 Okay?

22 And, by the -- by the 23rd, the -- Nadey's blood is  
23 there, and the vaginal and the vulva and the rectal swabs and  
24 slides are there.

25 So I'm going to put Nadey, vaginal, vulva, and  
26 rectal. Okay. All those are there by that date.

27 Okay?

28 Now on 1-23 -- and this is in order of what she did.

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1 On 1-23, she looks at the rectal slide -- this is the  
2 coroner's rectal slide -- and she finds nothing, negative for  
3 sperm.

4 Now, this is very important in my view of this case,  
5 because if you think about it, the very first thing she did  
6 was examine that rectal slide. I mean there is no chance for  
7 contamination at this point, at least by her; right?

8 Again, I'm not putting -- saying anybody dropped  
9 blood on this or that missing test tube thing. I'm saying,  
10 assuming everything came to her in one piece and she takes it

11 out of the envelope, this is the first thing she opens.

12 There is no chance for sperm to get spilled or mixed or

13 whatever. It's just really what it is.

14 And when she looks at that rectal slide, there is

15 nothing. This is about the purest result you are going to

16 get from Sharon Smith because this is one where there can't

17 be cross contamination. This is the real result.

18 The very next thing she did, okay, is look at the

19 vaginal slide.

20 Okay?

21 Okay. All right. This is the same day. I'll put a

22 number 1 here so we know that was the first.

23 The second thing she does is she looks at the vaginal

24 slide, and this is again prepared by the doctor. And at that

25 point, the rectal slide has no sperm, so there is not going

26 to be any contamination from the rectal slide to put sperm on

27 this vaginal slide. If there is going to be sperm on this

28 vaginal slide, the only place it could come from is from the

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1 slide itself.

2 And I forget the number. Maybe your notes have it.

3 I think when she looks at the slide, I think she saw about 12

4 sperm. I probably counted it in the transcript last night

5 because that's what my notes say. 12 sperm she cited in that

6 sample.

7 And, again, this is her real results folks.

8 Everything that follows in her results comes after she is

9 opening things at the same time and doing all sorts of

10 handling.

11 See, this is why I say in this case that you can feel

12 that there was a sodomy in this case because Mr. Anderson's

13 pointing out the picture, you know, is compelling in that

14 respect.

15 But what I'm saying, what you can't find in this case

16 is that Mr. Nadey's sperm was found in her rectum. And if

17 you are going to feel that Mr. Nadey is the one who committed

18 this sodomy, if you are going to feel that there was a sodomy

19 and if you feel Mr. Nadey's the one who did it, you can't

20 hang your hat on the sperm results from the DNA because this

21 is the real results.



22 And, you know, I brought up that garbage in, garbage  
23 out. Once you have a sample that's contaminated, then all  
24 the tests are contaminated.

25 And, you know, how do you contaminate?

26 I don't know if any of you have seen those test tubes  
27 with the swabs in them. If you just take one of the vaginal  
28 swabs and put it in with the rectal swabs, they all bounce

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1 around in this little test tube. And then you can pull it  
2 out and contradict (sic) or you could even just contaminate  
3 one rectal swab and put that one rectal in and it bounces  
4 around.

5 Let me show you how they look.

6 Do you have 13?

7 I know it's a little unusual, but can I pass these  
8 out to the jury so they can see?

9 THE COURT: They are going to take it upstairs. You  
10 can just hold it up to the jury and comment, and they will  
11 have those upstairs for their own examination.

12 MR. HOROWITZ: Okay. What these show, these are the  
13 tubes that they are in.

14 All right?

15 And all these are just like Q-tips, basically long  
16 Q-tip wooden sticks, and the Q-tips. And they are all in  
17 together. And, see, they are just like the one that says  
18 vulva. There's two of them in together. And the one that  
19 says vagina, there's four of them. And the one that says,  
20 you know, rectal, has whatever. And they are just stuck in  
21 here together.

22 So it's like once the swabs are in the same thing,  
23 they are all touching. I mean, you know, I didn't want to  
24 get close to your folks when I thought I had the flu, which  
25 turned out to be just a cold. It's tighter than that. It's  
26 like people packed in an elevator when you leave here at 5:00  
27 o'clock. That is how tightly these are packed.

28 So really if you contaminate one, there is a chance

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1 of contaminating them all and maybe even a likelihood as you

2 examine it in the jury room. And that's why these results  
3 are so important and the other results that follow are  
4 indications of contamination.

5 Okay. This is interesting.

6 On 1-24 -- okay. On 1-24, she starts testing  
7 Mr. Nadey's blood. That is the next day.

8 Now, this is what's interesting. This is where she  
9 didn't have the times very good, so I helped her estimate it.

10 If you remember, here is what I did:

11 Okay. I said -- well, testing the blood takes how  
12 long?

13 She says: Well, we work out about 45 minutes, you  
14 know, for cleaning up and doing all the testing of the blood.

15 So I look at her notes and I said: Okay. At 7:30,  
16 you tested Mr. Nadey's blood; is that right?

17 She said: Yeah, my notes show --

18 Her notes show testing started at 7:30, 1-24 at 7:30  
19 she starts.

20 At 1-24 at 8:10, there is her results.

21 Okay?

22 That's her results right there.

23 And then at 8:15, we presume -- we don't know. We

24 guess that at 8:15, she started Terena's blood, and we  
25 presume that because she finished that at 8:55. So that  
26 would -- you know, that would make sense. We just estimated.  
27 We didn't put the time.  
28 Now, her notes say -- okay. Her notes say that at

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1 the end of Mr. Nadey's testing, at 8:10 she made blood  
2 patches on gauze.

3 Her notes say that at the end of Terena's testing,  
4 she made blood patches on gauze.

5 She will later dispute that. She will later say, no,  
6 I actually -- even though I wrote it down at 8:55, I really  
7 did it earlier. Although I wrote it down as 8:10, I really  
8 did it earlier.

9 As we get through the notes in order, you are going  
10 to see that that's a contaminated forensic sample, because  
11 some of the swabs would have been out at the same time if she  
12 had waited to make the swab, the gauze at the end, if she  
13 poured the blood on the gauze at the end. That's what she is

14 covering up.

15 Let me try to follow the notes and let me see where I

16 go here. Hold on.

17 Oh, digestion time.

18 Let me talk about one reason Dr. Herrmann's slides

19 are so good. Because let's say you go in the jury room and

20 some people say, well, is there any difference between

21 Dr. Herrmann's slide and her slides that she made?

22 The answer is yes. Dr. Herrmann's slides are direct

23 slides. In other words, he takes the Q-tip and puts it right

24 into the opening, right into the rectum, for example, and

25 then right onto the slide and rubs it on the slide.

26 Or he takes it and right into the vagina and then

27 rubs it right on another slide or right on the vulva and rubs

28 it on the vulva and rubs it right on a slide.

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1 So what you have from Dr. Herrmann is directly from

2 the person right to the slide.

3 Now, as you may recall, the way Ms. Smith makes her

4 slides is different. By this time, the Q-tips are dried.

5 They are in those tubes. Then she takes one of them out of

6 the tube, and she snips off a piece off. Then she puts that

7 piece into liquid water of some sort and then takes that

8 liquid and then transfers a little bit of that liquid onto

9 the slide. So her method is much more in between. It's much

10 less direct. It is more steps in between. There's drying,

11 you're adding liquid, you're doing cutting.

12 You know, she is saying that she is using the same

13 scissors for cutting the gauze, for cutting the different

14 tips, the same scissors. And then she is saying that she is

15 washing it off good and that we should believe her.

16 But there is a lot more chance of contamination in

17 her process and there's a lot more chance of her not doing a

18 good job.

19 Dr. Herrmann's slides are direct from the body. That

20 is another reason that his slides are so meaningful compared

21 to what Sharon Smith's results are.

22 Okay. I want to talk about the quantities of blood

23 that are being used here in reference to the quantities of

24 DNA that are being tested by Mr. Myers. Remember I told you

25 I'm going to do a lot of digression, and this may be a little  
26 dry, but to me it's fascinating because when you realize just  
27 what type of quantity of blood of DNA this lab, Sharon Smith,  
28 had, you will realize that it takes so little blood to get

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1 into these swabs, the rectal or the vaginal swabs, to  
2 contaminate them it's unbelievable.

3 I'm going to actually run the numbers and tell you  
4 how I did the math, and if there is anybody who is a  
5 scientist, a mathematician, you can do the math yourself.

6 But here is my point. This is my end point. I'm  
7 going to cheat myself. Let me get to the end point, and  
8 you'll see where I'm going.

9 It's hot in here, too.

10 Okay. Here is my point. I say that the best results  
11 where you get really good results on these PCRs is when you  
12 are testing the blood directly.

13 Now, Mr. Myers in his testimony when he looked at the  
14 rectal swabs, he only saw -- the rectal slide he made when he

15 was going to test, he only saw like three to five sperm. And

16 I said is that enough to even test for DNA.

17 And he said: Well, maybe, yeah. Depends on the

18 concentration. We like to have a hundred sperm.

19 He never had a hundred sperm to test.

20 Folks, I'm telling you that he got a lot of trace

21 results and weak results. That's the sperm. When you have

22 so few sperm that you can hardly get enough to test, the only

23 results you get are just like a very few. And when you get

24 really good results, it's because the sample has been

25 contaminated with blood. That's what I'm telling you. I'm

26 telling you when you see a rectal sample and he says

27 Mr. Nadey, Mr. Nadey, Mr. Nadey, like it's yelling, that's

28 because it's blood and he wasn't able to separate, if you

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1 remember, the blood or the cells. Those rectal samples were

2 a mess. He was not able to extract them from each other.

3 And I'm telling you that when you see those little peeps of

4 1.3 or and 18 or something that doesn't fit, that that is the



5 sperm because you only have three to five sperm and you need

6 a hundred. He is lucky to have even gotten that.

7 That's my end game. Folks, that's where I'm going to

8 end up in this case. I just had to tell you because -- let

9 me show you how little blood, how little blood. I'm talking

10 about a pin head of blood to contaminate those rectal swabs

11 so that it creates -- that blood dwarfs the amount of DNA in

12 those sperm.

13 Let me run those numbers. I am mostly going to be

14 giving you conclusions. I'll tell you how I did it just so

15 later on you can run the math yourself. Here is what I

16 figured.

17 First of all, Sharon Smith was using -- she looked at

18 Mr. Nadey's vial, and I think she said there was about three

19 and a half milliliters of blood in the vial. When she was

20 done testing, she had used two and a half milliliters.

21 Okay?

22 Now, two and a half milliliters -- let me just show

23 you what a liter is.

24 Okay?

25 Just okay. This is a liter. That's a liter of

26 water.

27 Okay?

28 A milliliter is dividing into this a thousand parts.

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1 It's pretty small.

2 And what she used in terms of testing his blood is

3 about two and a half milliliters.

4 Probably if you think about it, it's probably

5 about -- you know, about this much if the tube is the size of

6 this pen top. Just this pen top can make that much.

7 I mean, it's a very little, but it still exists. You

8 can see it, you can test. It would stain. It's a measurable

9 quantity.

10 Now, let's look at something else.

11 Okay?

12 The DNA testing tests about a hundred and 50, 250

13 nanograms, nanograms of blood.

14 All right. A nanogram is a billionth of a gram.

15 Let me write out what a one billionth of a gram is.

16 Isn't that a billion?

17 Okay. One billionth of a gram. Okay.

18 Now remember we are talking about two and a half

19 thousandths of a liter. We are talking about dividing this

20 by a thousand and having two and a half times that amount.

21 But this is a lot more than a gram. I mean, a gram of this

22 club soda might fill the cap, and then we are talking about

23 one billionth of that. And then multiply it by 150 or 250.

24 I mean we are talking about with that DNA by the time you're

25 done having a quantity that is so small that even with a

26 normal microscope you can't see it.

27 And that's how little it is. You need an electron

28 microscope to see it.

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1 So I think that's enough. I actually did all the

2 math, and it's incredibly small, the amount of DNA you're

3 testing.

4 The bottom line is if you think about just one drop

5 of blood and how many cells are in one drop of blood, you

6 know, and how many proteins and so on, you're talking about

7 something that is smaller than the head of a pin, smaller  
8 than the point of a pin, smaller than the point of a pin, the  
9 DNA that is being tested, and giving these results.

10 And just think about how many heads of a pin you  
11 could get out of one drop of blood -- 30, 40, 50. In other  
12 words, you need less than one drop of blood to contaminate a  
13 sample to show up. And you can sit down and work the numbers  
14 yourself and come up with your own conclusions. I don't want  
15 to bore you with it.

16 But you're talking about -- I'm not talking about  
17 when she contaminates she is even putting a drop of blood on  
18 it. I'm talking about her putting in just more blood than  
19 there is DNA.

20 If the DNA is so small that you can't even see it  
21 with your naked eye and yet it shows up, if you're talking  
22 about five sperm in the whole sample, how much blood do you  
23 need -- five blood cells. You can't see blood cells under a  
24 microscope, if you had ten blood cells, et cetera. That's  
25 why I'm saying that the contamination of the blood is a lot  
26 of blood being moved around there. There is a lot of blood  
27 being moved around there by Sharon Smith.

28 Also, if these rectal and vaginal swabs are out at

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1 the same time, or if the rectal and vaginal swabs are in the  
2 same test tube, it doesn't take much for them to cross  
3 contaminate. If the rectal swab is just touched with a -- a  
4 scissor or a hand or a glove or bounces against one of these  
5 other swabs to transfer five sperms, to transfer just a few  
6 sperms is nothing. It's nothing at all.

7 And that's why, look, she couldn't see it with her  
8 eye. We couldn't see it with our eyes.

9 But what we do know is that her results switched.  
10 That rectal had nothing, and then when she was done, it did.  
11 The vaginal had, and then when it was done, it didn't. So we  
12 know something happened during her testing, and we can only  
13 make inferences, intelligent inferences, as to what happened.  
14 And part of that is by my continuing to analyze how she  
15 handled things.

16 Let me say, number one, that cutting with the  
17 scissors and washing it with water, deionized water, when I

18 made -- asked that question, come on, in the restroom at the  
19 restaurant, they don't let people serve you food after  
20 they've gone to the bathroom without washing your hands with  
21 soap and water.

22 And it was ER where the goofy guy who does the intake  
23 didn't wash his hands after he used the bathroom, and then  
24 there was an outbreak of stomach poisoning in the ER room in  
25 that TV show. I mean this is why you have to wash your hands  
26 to get rid of bacteria. That is normal. Use soap and water.

27 You know, in a medical setting you use soap and  
28 water. But she is just washing off with water and then using

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1 the same scissors on these forensic samples. So you have  
2 really got to trust she did a good enough job washing, that  
3 she is not contaminating. And you can't be sure that that is  
4 not where it happened. It may very well have happened in  
5 that cutting stage because it happened somewhere. I mean,  
6 unless you think she fudged her results and lied, which I  
7 don't think, then you have to figure out where did she

8 contaminate the rectal swabs. And that is one good place

9 right there.

10 If you don't mind, I'm going to grab her lab notes

11 because my notes as translated in here don't make sense.

12 (Brief pause.)

13 Okay. After she has looked at Donald Fermenick's

14 blood and looked at the vaginal swab and again found sperm on

15 it, then she does something which is very interesting.

16 Okay?

17 She has now done -- I'm jumping ahead to 1-25 now.

18 She's done all her testing, okay, except that she's -- she's

19 looked at the rectal swab and found sperm this time. She's

20 tested Donald's blood. It's still out there. She's tested

21 Nadey's blood. It's still out there.

22 On 1-25, she decides to make a second swab -- a

23 second vaginal slide, which would be the third one she looked

24 at. She makes that third vaginal slide. Now, here is where

25 things get put out all at once.

26 Okay?

27 On 1-25, in her testimony, she's making the vaginal

28 slide. She's got a vulva swab that she's looked at under the

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1 microscope on the 24th already, so that's done. She's looked  
2 at the vaginal swab on the 24th to 25th, like I told you  
3 about.

4 Now on the 25th, she's got Donald's blood open. So  
5 that's where we are.

6 The 24th, she's looked at the vulva sperm.

7 She's looked at the vagina, and then she stops.

8 And then the next day, she starts again at 8:15, and  
9 in between she's got Donald's blood open at 7:30.

10 And then at 10:15, without closing anything up,  
11 according to her notes, she decides to make another vaginal  
12 slide because she is again finding sperm.

13 So she prepares another vaginal slide, and at the  
14 same time, she is making labels, and at this point she is  
15 making the labels in preparation for DNA testing.

16 So she is making labels and she is labeling the  
17 vaginal swabs, the vulva swabs, the rectal swabs. All these  
18 swabs I showed you are being individually labeled. They are  
19 all out there.



20 Okay?

21 Now they are all being labeled at the same time that  
22 she is running the tests on Mr. Nadey's blood and on Donald  
23 Fermenick's blood.

24 Now she is on Donald Fermenick's blood.

25 She's already tested Nadey's.

26 But what she is doing with Mr. Nadey's blood while  
27 all this is open is she is preparing a dried whole blood  
28 patch.

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1 Okay?

2 So I was a little sloppy here, but what is going on  
3 now is that she is labeling these things with tags. They are  
4 all out there.

5 And she is at the same time taking blood with her  
6 pipet and putting it on gauze. She is moving a great deal of  
7 blood compared to everything else and wetting a gauze pad  
8 with it so that Mr. Myers can test it in the lab.

9 So right here, now, you've already got some

10 contamination because she's come up with sperm on the rectal  
11 swab at this point already.

12 But she now has the chance to contaminate these items  
13 with blood because she's got his blood and she's transferring  
14 his blood to the gauze with all these things on the table  
15 being labeled.

16 Now, this is -- is where -- this is where the blood  
17 is going to get into the samples.

18 MR. ANDERSON: I'm going to object to this. It  
19 misstates the evidence, Your Honor.

20 THE COURT: Well, the jury has heard the evidence,  
21 and they will have to sort it out for themselves. The jury  
22 has heard the evidence.

23 MR. HOROWITZ: This is where blood gets into the  
24 evidence, folks, in that packaging stage when it's all out  
25 there.

26 Now, she tries to get out of it, and this is probably  
27 what he is objecting to by saying, oh, even though I wrote  
28 that I did that gauze business at the end of the blood

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1 processing, really, I didn't. Really, even though I wrote it  
2 that way, even though there was a time right there and right  
3 after the time that's what I said I did, that is not really  
4 what I did.

5 That is what he is trying to get you to believe by  
6 his objection, but that -- and if you believe that, fine.  
7 But if you think that she is not telling you the truth, then  
8 what you've got here is where the blood gets in to one or  
9 more of the samples. And that's right there, folks, the  
10 start of garbage in, garbage out.

11 And don't believe for a minute that this is being  
12 done in different rooms. She told you that at other times  
13 like when she left the slide out over night and then she  
14 tested Donald Fermentick's blood in the meantime, that they  
15 were in separate rooms. Fine. That's probably true. The  
16 vaginal slide was in a box in the microscope room and his --  
17 and Donald Fermentick's blood was in the testing room.

18 But that excuse doesn't apply here, because if you go  
19 through her testimony -- if he thinks she is right, then I  
20 challenge him to invite you to go through her testimony.

21 Because when you go through her testimony and chart it out  
22 really carefully, you are going to see that what I said is  
23 true, that in this case when she labeled, she was labeling at  
24 the same time that she was testing that blood. And, you  
25 know, if you want to believe that she is testing the blood in  
26 one room and running it, putting labels on in the other, it's  
27 not in her notes and it's not the way anything looks. But I  
28 guess if you really want to try to convict Mr. Nadey and you

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1 want to ignore the facts, that would be your position.

2 After she preps everything, then she takes  
3 photographs of everything. And after she takes the  
4 photographs, she packages everything up. And then finally  
5 she -- after that's all done, then finally she looks at the  
6 final vaginal slide and finds no sperm.

7 And all this time, on top of everything else, the  
8 last vaginal slide is still sitting there. That's the other  
9 think. Everything is packaged and put away, and she looks at  
10 that.

11 Four days later, she takes the pants out of the  
12 freezer. Now, these pants have been sitting in that freezer,  
13 not in any sort of forensic bag, any sort of like plastic bag  
14 that's sealed. It's sitting in a -- like a paper bag in the  
15 same room where all these other forensic samples are.

16 MR. ANDERSON: Objection. There is no evidence of  
17 that, either, Your Honor.

18 MR. HOROWITZ: Oh, yes, there is.

19 THE COURT: Let's not argue. The jury has heard the  
20 evidence. I already cautioned the jury that if there is some  
21 discrepancy between what the attorneys say and their  
22 recollection of the evidence, they can abandon the attorney's  
23 version of the events.

24 And then, Mr. Anderson, in your closing argument, you  
25 can straighten them out.

26 MR. ANDERSON: I will.

27 MR. HOROWITZ: Well, they were submitted to me at the  
28 same time as the coroner's specimens, if that's what you're

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1 asking.

2 So you had them?

3 Yes, I did.

4 Where were they stored while you were doing all of

5 these other tests?

6 They would have been in the freezer.

7 And then they were in a sealed plastic bag in the

8 freezer; is that right?

9 Even though the notes don't say so, I expect it would

10 have been a paper bag because we don't -- we don't package

11 this type of evidence in plastic bags.

12 Why not?

13 To make sure it's dried, so that if sometimes the

14 clothing -- if it starts out wet and it's not dried

15 thoroughly, there's a possibility of getting some mold to

16 grow on the evidence. So we ask that it be packaged in

17 paper.

18 But isn't the stuff supposed to be dried before it

19 goes into the freezer?

20 I suppose. I mean it's supposed to, yes.

21 Doesn't anybody check?

22 All right. You use a different freezer for the

23 things in the brown bags as compared to the blood samples and  
24 other items?

25 Liquid blood samples, when they are submitted to the  
26 laboratory, they go into a refrigerator, which is different  
27 than a freezer.

28 Okay. But what about the swabs? Where do they go?

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1 They would go in the freezer.

2 In the freezer?

3 Yes, that's correct. They are in the same place.

4 Jeans that may be wet, may not be wet, they don't

5 even bother to check. You know, in a limited air space in a

6 freezer that has limited air circulation. The forensic

7 samples, people going in and out, moving things, and they are

8 sitting there for days.

9 Now, what happens to those jeans, you know, what does

10 or does not contaminate, I don't know because there is not

11 enough evidence of what happened to those jeans when things

12 went in the freezer, who put them in, who pulled them out.

13        So as to the jeans, I can't tell you that much. The  
14 notes are much better as to everything else. All I can tell  
15 you is that they were kept in a brown bag, like a Safeway  
16 grocery bag type thing in a freezer in a limited air space  
17 with everything else. It's not very professional.

18        All right. Let's talk about something else with  
19 respect to Sharon Smith.

20        Let's look at some of the things she did besides the  
21 blood work. And, again, I think a lot of this shows the bias  
22 in this case.

23        The knife exams.

24        First of all, we already know that she wasn't given  
25 the dagger.

26        Can anybody figure out why they gave her the paring  
27 knife?

28        I mean the cuts were not jagged like a paring knife

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1        would have a serrated edge. I mean I guess maybe a  
2 serrated-edged knife still could produce those kinds of cuts,



3 but I think if you had to pick between the dagger and the  
4 paring knife, if you had to pick one, you'd say the dagger is  
5 kind of more likely to do the job. But, of course, you'd  
6 want to do both. But for some reason they gave her the  
7 paring knife.

8 But even her examination of the paring knife was kind  
9 of weird. I mean, I looked at her notes, and I pointed out  
10 to her that under the stereoscope where you look for  
11 bloodstains that you say you only looked at the handle. And  
12 I cite the page in her notes.

13 And she goes, well -- basically, she says I just made  
14 a note that I didn't observe any stains on the handle.

15 Now, I'm going yeah, okay. You know. Then you only  
16 looked at the handle; right?

17 No, I think I looked at the whole thing.

18 Well, what else?

19 Because I did other tests on the blade, you see, so  
20 then I must have looked at the stereoscope.

21 And I'm going no way.

22 With respect to Mr. Nadey's Pliers Plus, your notes  
23 are replete with references that you used the stereoscope

24 from top to bottom. With respect to the paring knife, when  
25 you used the chemical, it says top to bottom. But with the  
26 stereoscope, you specifically only say that you looked at the  
27 handle.

28 Why don't you just admit that you didn't do that

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1 careful of a job on the paring knife?

2 Because that's what really happened, folks. The  
3 paring knife is given a rather one -- a quick once over, no  
4 towel, and Mr. Nadey's stuff was looked at really, really  
5 carefully. That's fine with me because they didn't find  
6 anything. And, you know, it wasn't like --

7 Remember I asked her, was there any trouble opening  
8 and closing his stuff?

9 No, it wasn't like he had cleaned it up, like he  
10 soaked it in bleach, she found carpet fibers or whatever in  
11 the Pliers Plus. It wasn't like he had stripped it clean.

12 And yet there was nothing relating to this case on  
13 his stuff.

14 And that's really all I care about. She could have  
15 just admitted, yeah, we focused on Nadey as the suspect and  
16 that's why I hardly looked at the paring knife. That would  
17 have been nice.

18 I just brought that up just to again illustrate to  
19 you how biased she is, that she is not even willing to admit  
20 the focus was on Mr. Nadey. It was not an objective exam.

21 But the bottom line is she didn't find anything.

22 Then I asked her how about the fingerprint work on  
23 the Pliers Plus?

24 You know, you did fingerprints on that.

25 Yeah, I did.

26 Why didn't you do the work on the paring knife.

27 Oh, well, no police agency told me to.

28 That's the truth. Sergeant Taranto didn't think the

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1 paring knife was involved or the dagger.

2 It's interesting that he kept the dagger out. I mean

3 I don't know what he is afraid of, to let the paring knife go

4 in and then to make tests on it. But she says about doing  
5 fingerprints, whose job is it to do the fingerprints. She  
6 says it's not something you're supposed to initiate.  
7 Usually, it would be a request by the police agency for  
8 fingerprints.

9 So that's interesting.

10 Now, the pubic hair. The pubic hair. Let me read  
11 you --

12 You know, I don't get to respond when Mr. Anderson  
13 comes after me, as is his right to do and his obligation in  
14 his rebuttal. I don't get to respond.

15 Now, a minute ago he claimed in his objection that I  
16 was saying something that is not true about the swabs (sic)  
17 being in the freezer. And I was able to read you the  
18 paragraph and cite it. And so let me do a little more  
19 reading of the paragraphs right in context so that you know  
20 that I'm accurate, because otherwise I may be subject to a  
21 collateral attack that I can't respond to.

22 I asked her why the pubic hair that was found in the  
23 comb was not examined anymore. And she says our laboratory  
24 basically discontinued some of its trace evidence type  
25 examinations in the early '90s when we had some staff cuts at

26 the laboratory. So some evidence examinations that we used  
27 to do, we had to discontinue them. And if this type of  
28 evidence was to be examined further, it would have to be sent

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1 to another laboratory to do that.

2 Well, you know, that's all it would have taken for  
3 them to prove their case. It's right and fine for  
4 Mr. Anderson, you know, to show you the pictures and to talk  
5 about the preacher's wife and so on, but it would have been a  
6 lot better if he had told you what that pubic hair matched or  
7 didn't. That would be a lot better than all the emotion in  
8 the world.

9 THE COURT: Mr. Horowitz, I think with that we'll  
10 take the afternoon recess.

11 Ladies and Gentlemen, we'll take a recess until  
12 3:00 o'clock.

13 Remember the admonition I have heretofore given you.

14 (Recess.)

15 THE COURT: All right. This is the case of People

16 versus Nadey.

17 Let the record show that the defendant is present  
18 with counsel and the jury is present in the jury box along  
19 with the alternates.

20 And then Mr. Horowitz.

21 MR. HOROWITZ: Folks, the Judge is amazing, because I  
22 am actually done with my Sharon Smith discussion. I didn't  
23 think I was, but I actually had already told you, out of  
24 order, those things. So I'm now ready to go to Mr. Myers.  
25 So we stopped at the perfect place.

26 Put back on my chart about bias because the same bias  
27 issues affected Sharon Smith also affected Steven Myers.

28 Let's look at it. He again works for a law

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1 enforcement agency. He is a young man. He is bright. He is  
2 personable. He is ambitious, which is normal and  
3 understandable. Anybody would be. This is his career.

4 The problem is that he comes to this case with a  
5 point of view, and you see that point of view reflected in

6 both the way he would struggle with me on basic points where  
7 he really should just be conceding, because what I'm saying  
8 is true, and it's also in situations where he does  
9 interpretation.

10 And, again, out of order, reading -- leaving my  
11 notes -- there was some points along this board. I'm  
12 pointing to a 1.3 trace, and he goes that's up -- he finds  
13 some reason that that is not a good result. That is an  
14 aberration in the testing.

15 And I go, well, how do you base it?

16 Well, it could be a real result, but we often find  
17 aberrations in testing at the point.

18 Well, considering the fact that you found another  
19 person in your STR results and you agreed that that's true,  
20 doesn't that kind of make you say, well, gee this could be an  
21 aberration, but given the fact that I know for sure that  
22 there's somebody else's DNA here, maybe I'd better look at  
23 that place maybe a little more carefully?

24 And he doesn't -- he doesn't say, yeah, you're right.

25 His point of view is to brush it away because it hurts his  
26 case, his case being what the law enforcement agency that he

27 works for likes.

28 I wanted to go over some of the quotations, and this

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1 is not in response to Mr. Anderson, who I picked on earlier,  
2 but really most of in fun, because I know his objection was  
3 in good faith before. But the point is I do have some quotes  
4 from him in response to my questions to illustrate to you  
5 that he does have a bias and because he wants to fight with  
6 me on basic stuff.

7 First of all, remember all the work he has ever done  
8 has been at the request of prosecutors. Twice his results  
9 worked out for the defense, apparently so, they subpoenaed  
10 him to court. But the point is that all of his work has been  
11 done for prosecutors.

12 But the key thing with Mr. Myers is that he wouldn't  
13 give me the very basic principle of garbage in, garbage out.  
14 Garbage in, garbage out is basic. Whatever he is being  
15 given, that is the best that he can come up. If he is given  
16 contaminated samples, he can't uncontaminate them. And this



17 is kind of basic whenever you're doing any sort of testing,

18 whether you're an engineer or any --

19 You know, with circuitry, you're dealing with TV

20 signals, it's a fact.

21 Here is my question: Mr. Myers, in science, kind of

22 a crude expression, but have you ever heard of the expression

23 garbage in, garbage out?

24 He goes: I heard this in the Simpson trial.

25 All right. That's cute.

26 All right. So basically if you were given samples

27 that were contaminated or otherwise inappropriately altered,

28 you would come up with the same results that you did in this

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1 case?

2 In other words, whether he was given a good sample, a

3 clean sample, he would get these results, or given an altered

4 sample, he would be getting the same results.

5 Well, he doesn't answer that yes or in any direct

6 way. Listen to his answer:

7 Well, we have to remember there are different areas  
8 of contamination. In this case, in specific where you're  
9 dealing with semen and if you were to contaminate semen with  
10 saliva, for example, then the semen, the sperm profile would  
11 still just be from the sperm. The non-sperm saliva would  
12 then go to non-sperm.

13 My question was so, basically, if you were given  
14 samples that were contaminated or otherwise inappropriately  
15 altered, you would come up with the same results that you did  
16 in this case; is that right?

17 And that was his answer to that question.

18 I mean he is not answering my question. He is very  
19 defensive is what is going on here. And defensive is not  
20 good on the witness stand when you need to hear from him the  
21 facts. I mean, if he is the expert and he is telling you  
22 facts, then it's not going when he is defensive because it  
23 means he is not giving you the facts and letting you make up  
24 your own mind. He is trying to make it up for you.

25 And, you know, let me just go on with this just to  
26 show you how much I had to struggle with him just to get a  
27 basic point.

28 Then he keeps going: But certainly what I'm testing

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1 is the swab. I don't if know anything got on that swab. I'm  
2 just merely testing the swab.

3 So finally, you know, he -- after going back and  
4 forth and back and forth, he admits that point.

5 I cut out what went in between.

6 But finally he admits that point. He could have just  
7 said, yeah, you're right. If I get a bad sample, I can't  
8 tell. But it takes pages before he'll actually concede that.

9 And it's consistent with what he finally says because  
10 it's interesting what he -- what he would rely on in terms of  
11 knowing if he got garbage in in the first place.

12 QUESTION: Hypothetically, if you had  
13 a forensic sample that you showed no sperm  
14 but you weren't the one testing it, someone  
15 else did, and then the forensic sample was  
16 tested and it did have sperm on it -- by that  
17 person, not you -- and neither of these  
18 things were told to you --

19 All right. I'm telling him what happened with Sharon

20 Smith and the rectal sample.

21 -- and heard that these things were

22 told to you, now the sample arrives in your

23 laboratory, it now has sperm on it, the first

24 time it was tested, it didn't, the second

25 time it did, when you get it, it has sperm on

26 it. Now, I'm not done. Now you test it, and

27 your test shows sperm.

28 Do you have any way of knowing that

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1 the first time it was tested by someone else

2 that there was no sperm on it?

3 And he says: Without getting their

4 notes, obviously, I don't have any

5 information.

6 Well, you're lucky because we did have her notes, and

7 we did have me questioning her. And we know what Mr. Myers

8 didn't about what the first test was. So that's pretty --

9 that's very important right there because that's what garbage  
10 in, garbage out is.

11 Let me talk about -- and then I think earlier I said  
12 I'm going to go over stuff. And maybe some of you understand  
13 all this DNA business right away. It took me a long time to  
14 get it, and so let me go over the basics of the DNA as  
15 Mr. Myers described it. Let me put some of what he said in  
16 context. And for those of you who understand it already, you  
17 know, bear with me because there is going to be some people  
18 who appreciate this and et cetera. So let me just go through  
19 the basics.

20 Remember what Mr. Myers said is that you've got a  
21 huge amount of genes in the body; right?

22 You've got a billion genes in the body or something  
23 like that. And basically you have base pairs. I think --  
24 what did he say? He said you've got, oh, was it 67 billion  
25 base pairs in the human body? I think that's what he said.  
26 Base pairs, those parts of genes that are maybe susceptible  
27 to testing.

28 All right. Then what you want to basically do is

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1 look at those that they have located, that they can identify  
2 readily. By the time you do the math -- if you have his  
3 testimony read back or if you have your notes with you -- you  
4 are going to find that we are testing in this -- of all the  
5 DNA in the human body, like .000022, you know, some  
6 humongously small fraction, like there's probably -- you  
7 know, there's billions more. If we are only testing ten  
8 locations and there are 6 billion (sic) locations that could  
9 be tested, you are only testing a very small piece of the  
10 human DNA.

11 All right?

12 So that's pretty important to realize.

13 Now, let's just take a look at some of these numbers  
14 that we've been using.

15 If anybody has a garage, let me give you some advice.  
16 Don't store your boards in the garage. They get moldy. But  
17 in the interest of recycling, I'm reusing it anyway.

18 Okay?

19 Now, I don't really need you to look in detail at

20 this because I've got a bigger one to show you later. What  
21 this is actually, just so you know, is all of his PCR  
22 results. But then I added in all the ones that I found in  
23 his notes but that he didn't put on his chart. I put them  
24 in.

25 But I don't want to get into that analysis yet except  
26 to point out quickly -- because otherwise you'll wonder -- I  
27 added this column unreported, "unknown." And you can see  
28 that for the yes, yes, yes, yes, yes -- for the rectal skin,

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1 the rectal sperm, the rectal skin when he did another test,  
2 the vulva sperm, and the vulva skin, there is also evidence  
3 of Mr. Unknown in every one of those samples. But, later on,  
4 I'll show you about that.

5 But let's talk about what these numbers mean.

6 Now, first of all, you've got one, two, three, four,  
7 five, six, seven, eight -- eight tests.

8 All right?

9 Now, these two tests are the same test. I don't know

10 if he made that clear. These are the exact same tests except  
11 when he first started, only the DQA was being done, and then  
12 they developed a little bit better version called the DQA1.  
13 And the only difference between the two tests is like when  
14 you get like a 2.4, whatever that means, the 4 actually can  
15 consist of 4.1, 4.2, or 4.3. And the new test can  
16 distinguish a little bit and tell you if it's a 4.2 or 4.3 or  
17 just a 4.1.

18 What do these numbers mean?

19 For our purposes, really nothing. Just like when you  
20 name the planets. We call them Neptune, Pluto, and  
21 everything. Once they get out of our solar system, they just  
22 give them numbers. The numbers mean something to  
23 astronomers, but I don't know what the numbers mean.

24 Similarly, these are the names of the gene sites. We  
25 understand that. And then underneath there are numbers that  
26 may represent blanks or differences. But all we need to know  
27 is that the numbers are typed.

28 So within this sequence, this is DS -- D1S80. Within

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1 D1S80, there might be ten different types of genes you could  
2 have. There might be gene number 24, there could be gene  
3 number 18, there could be gene number 30, there could be gene  
4 number 16, gene number 12.

5 We don't have everything typed on here. So you  
6 measure types.

7 Another way to see is what kind of blood is there.  
8 This is just blood types. This would be A, B, AB. There  
9 would be O.

10 If you think about it, how did they come up with O  
11 for blood? Why do they call blood ABO? Why don't they just  
12 call it A, B, C, D, and E?

13 Because they wanted to make dummies like me in  
14 elementary school go crazy.

15 Same thing for this test. You have numbers like this  
16 for the DQ alpha or the DQA1. They have different numbers.  
17 They have the 1.1. You have a 1.2. You have a 1.3. You  
18 have a 4., you have a 4.2, a 4.1, a 4.3. You have different  
19 numbers.

20 Now, they are intending to tell you that when the  
21 numbers are close that the genes are close. They are trying

22 to convey that information.

23 In other words, a 1.1 is more different than -- is  
24 different from a 4.3. A 1.1 and 1.2 are much closer to each  
25 other. A 1.1 and a 4.3, they are a little bit more different  
26 looking under a microscope.

27 But the bottom line is that's all these numbers mean.  
28 These numbers are just different types. So when you see like

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1 here --

2 In the back you can't see this. I'm going to put up  
3 a big chart. I'm going to put up my bigger chart.

4 You know what I'll do?

5 I'll put this by the people in the back just so that  
6 the people in the back can see it, and then I'll put the big  
7 one up here.

8 I'll just put this... okay. You're getting all my  
9 conclusion parts early.

10 Okay. See, now let's just go to this first column  
11 here where it says Nadey 24,24.

12 Now, 24,24. Now, see how I separated the boxes,  
13 first three from the rest?

14 I did that for a reason -- because the first three  
15 are the blood.

16 And remember I told you that the blood results,  
17 everything comes out just right? It comes out real good.

18 Well, if you notice, there is no traces in the top  
19 three boxes and there is also two results per box: 24,24, a  
20 1.1, 1.2. There is always two results, and it's perfect.

21 And that's again because what I said about when you  
22 test the blood, you know, just like in a hospital, it's  
23 really easy to do it. You are able to separate stuff, the  
24 sperm from the non-sperm. You don't have fecal matter in  
25 there. You don't have bacteria in there with any great  
26 numbers. It's really easy to do.

27 So if you look at the blood numbers -- let's look at  
28 the blood numbers for Mr. Nadey so you understand what they

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1 may mean.

2        24 is the name of one of the two base pairs. In  
3 other words, you get one of the two -- not base pairs -- one  
4 of the two types. You get that from, let's say, his mother,  
5 and then the other 24 he gets from his father. So basically  
6 for this particular type, one part comes from the mother,  
7 mom, and the other part comes from dad.

8        That's all we are looking at all down these charts.  
9 You can just split them right down the middle, and whenever  
10 there's just two results, what you're seeing is what the mom  
11 gave and what the dad gave. That's all, what the mom gave  
12 and what the dad gave.

13        And Mr. Nadey's case for this particular site,  
14 one five-billionth of all of his DNA, one little fraction of  
15 those tiny fractions, you can see not under a microscope,  
16 even, but by using these tests that somehow react on a very,  
17 very complex molecular level, you can see that he gets  
18 from -- a 24 from his mother and a 24 from his father.

19        Now, let's look at Terena Fermenick for this  
20 particular location. Her mother has an 18. All right.  
21 That's what her mother gave her, an 18. And her father gave  
22 her a 25, so we call her an 18,25. That's all. It's just a

23 name.

24 And then we look at Donald. He is an 18,18.

25 Now what does this mean?

26 It's interesting. He's got the same type as Terena.

27 Okay?

28 That's what you might call, you know, like in those

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1 databases, do you match in the database or not. How many did

2 Mr. Nadey's match of those 148 people?

3 Well, that's kind of like a match if the whole

4 database was just Mr. Nadey and Terena, if we just invented

5 DNA, okay, we just invented it this moment -- I'm the

6 inventor of DNA -- we've tested only three people on earth,

7 and we've only tested this one location which I'm going to

8 call D1S80 just to make it seem really fancy.

9 At D1S80, the two people we have tested are this guy

10 named Nadey, and we find that his mother and his father gave

11 him something that looks the same. They are both identical,

12 these two pieces. I'm going to call those pieces 24s.

13 Now, this other person has a piece that's shorter  
14 than Mr. Nadey's, so I'll call that an 18 because 18 is a  
15 smaller number than 24. And then she's got a piece that's  
16 almost the same but a little longer. I'll call that a 25.

17 Those are the two people we've discovered.

18 But now we have another blood sample from this guy  
19 named Donald Fermenick. Let me test his.

20 Wow. We found a piece that's exactly the same length  
21 as Terena's.

22 Hmm. Wow. What is the chances of his 18 matching  
23 these four?

24 I mean, we know in the world of our database of two  
25 people that there is two 24s in our database, an 18, and a  
26 25. One out of every four is an 18,18. Hmm. Well, he  
27 matches her here, so the odds are one out of four.

28 Oh, and he matches her again. The odds are one out

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1 of four again.

2 We'll multiply them. The odds are 16 to one. One

3 out of 16 times he is going to match that type.

4 It's getting a little out there, but the point is

5 basically that's all we are doing. Going across this board,

6 we are discovering how many different times they find that

7 location.

8 They take -- they go along the gene road. They walk

9 down the highway and they go, okay, this is First Street or

10 this is D1S80 Street. Okay. They turn down D1S80 Street.

11 Hmm, how many different houses are there on this person's

12 D1S80 Street? Just two. Always there's two. Oh, there's a

13 white house and a green house. Oh, that's nice. Let's put

14 this in our database.

15 Let's go to this person's D1S80, make a right turn.

16 How many houses?

17 There's always two.

18 What color houses do they have?

19 There's a black one and a green one. We'll put that

20 in our database.

21 And after they decide that they have a -- that there

22 might be 16 different types or 16 different kinds of houses

23 or different color houses in the D1S80 block, 16 different

24 varieties, then you go to the DQ-alpha block, another

25 developer.

26 That project and his houses are either 1.1s -- that's  
27 the beginning model. The fancier model is 1.2. The real  
28 upgrade model is a 2, and the really fancy custom houses that

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1 that builder builds are 4.

2 But then someone comes along and says, but I'm going  
3 to look more carefully, even more at those fancy houses, the  
4 real good ones with the better carpet. There's 4.1, 4.2,  
5 4.3. And the ones that are just kind of good are 4s.

6 And that's the distinctions that you're making. That  
7 is what these numbers are basically telling you.

8 So when you look at these samples, what you do is you  
9 kind of assume that you know as much as I'm going to be  
10 critical of Steve Myers, his blood work is probably right.  
11 It's really simple to do when you have pure samples, so you  
12 figure that these are really their types and you are going to  
13 see that they share a lot of types.

14 I mean right here Terena Fermenick and Mr. Nadey are



15 the same type. That means you can't tell their genetic parts  
16 apart. They look exactly the same.

17 So if you look at the HBGG location, these two people  
18 are going to be indistinguishable from each other.

19 In other locations, like here, they are very  
20 different. Here they are very different. A 1.1 and a 1.2 is  
21 very different from a 2.4. So there is not going to be any  
22 confusion, but here is where things are a little tricky. If  
23 you find a 1.2 in the sample, you don't really know just  
24 standing alone if that 1.2 is Donald or Mr. Nadey. You  
25 really don't know. There is no way to tell Mr. Nadey's 1.2  
26 apart from Don Fermentick's 1.2 or from somebody else. You  
27 need to take a look at a whole lot of these, because if you  
28 see a 1.1 and a 1.2 together, well, then you know that it's

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1 not Donald, because Donald is a 1.2 and so is Mr. Nadey, but  
2 Don's other one is a 4 and Mr. Nadey's is a 1.1. So if you  
3 see like a 1.1 and a 1.2, then you know it's Mr. Nadey  
4 because Nadey is a 1.1 and Nadey is a 1.2. You know that is

5 going to match Mr. Nadey.

6 Now, that doesn't mean that Mr. Unknown isn't also a

7 1.1, 1.2. And, if so, you could be seeing Mr. Nadey in there

8 mixed with Mr. Unknown. And they both -- and you wouldn't be

9 able to tell that you had two people in there.

10 That's the -- same thing here. If Mr. Nadey and

11 Ms. Fermenick are tested at this location, you don't -- and

12 you've got an AA back as your result, you honestly don't know

13 whether you're getting Mr. Nadey alone, Terena Fermenick

14 alone, or the two of them combined. You really don't know.

15 And that's why it takes -- and I'll go through this

16 with you -- some analysis to figure out what you've got, some

17 logic and working things out. It can be done, and I've done

18 it, and I've run it a lot of times, so I'll show you how it

19 works.

20 I wonder if we are clear about the differences

21 between RFLP and PCR?

22 I'm not sure we were clear, so let me make it very

23 clear.

24 The -- the way to understand RFLP and PCR is to not

25 think about them for a second and instead think about just

26 really what's happening in our testing.

27 And let's think about people. How do you tell people  
28 apart?

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1 One way is you can tell them by their height. That's  
2 RFLP, how tall they are.

3 Another way would be just to see how they look, you  
4 know, how their facial features are arranged, how their body  
5 goes together as a whole. That's a little bit more  
6 complicated. So that the way you have to look at them,  
7 that's PCR. PCR is not a length difference. It's just  
8 they've -- PCR, you just look at each one and say it looks  
9 different. That's all.

10 But PCR -- I'm already confusing myself. PCR isn't  
11 what measures whether somebody looks different or not. The  
12 dots do. Remember that? The dots do. When the dots light  
13 up, they light up only in the presence of certain types of  
14 DNA.

15 In other words -- I love talking about people. Let's

16 say that 1.1 -- let's say I'm a genetic probe, and they've  
17 made me so that whenever I see my mate, a 1.1, I light up.  
18 It's like seeing my wife. So when I see 1.2, it's not my  
19 wife, I don't light up. When I see 1.1, I light up.

20 That's all those dots are that Mr. Myers is looking  
21 at. And so it doesn't matter that PCR or RFLP. That's  
22 something else, really. Really, all you're doing is you have  
23 all of these tests starting where I have these brown marks.  
24 Those are all dots that light up. And the dots are designed  
25 so that --

26 Remember what he said. You take a sheet. I take a  
27 whole sheet, and the sheet already has these dots on it, and  
28 it has one -- one, two, three, four, five, six -- six dots on

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1 it. And each one of these dots is going to light up only in  
2 the presence of its mate. So one dot lights up only with  
3 DQA1, one dot -- I mean with 1.1. One dot lights up only  
4 with 1.2. Another only with 2. Another with 4.2, 4.3. And  
5 the same thing is repeated through.

6 LDLR. Some light only with BB, some only with AA,  
7 some only with ABs, so that each one of these, you have a  
8 series of dots, and in each case the dots only light up in  
9 response to its mate.

10 And so what you do is you lay down all of this  
11 amalgamated DNA on a piece of paper or a gel or whatever you  
12 want to call it and you lay down that stuff onto these dots.  
13 And some of the dots are going to light up and some of them  
14 aren't. And that's -- that is just how it works.

15 Let's look at it in terms of DQ-alpha. And since  
16 everybody also teaches with the DQ-alpha, including  
17 Mr. Myers, that's the one people have become most familiar.  
18 But the dots for DQ-alpha would have like a 1.1, a 1.2, a  
19 1.3, a 4.1, and a -- let's see, a 4.2, 4.3. Can't  
20 distinguish between 4.2 and 4.3. It lumps them together.

21 Now, let me just tell you this. I forget whether  
22 Mr. Myers was really clear on this. But he talked about a  
23 little more complicated process: Some of the dots don't  
24 light up directly, they light up in the presence of multiple  
25 ones. This dot will light up in the presence of 1.1 and 1.3,  
26 and then another dot lights up and says, well, 1.3 isn't  
27 there. You've got to intuit and logic out a little bit more

28 what's there and what's not.

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1 For this purpose, for this illustration, just imagine

2 that now this is Mr. Nadey's blood you're testing.

3 Okay?

4 And you've made your sample in preparation, and now

5 you're putting it on this sheet. What is going to happen is

6 you have a control dot. Remember that one always lights up

7 if there's DNA present. And then hopefully the 1.1 will

8 light up, the 1.2 will light up, and the other ones won't.

9 And in that case, you go, okay, the control lit up,

10 so there is DNA. 1.1 lit up, so there must be 1.1 in the

11 sample. And 1.2 lit up. Great. That's a 1.1, 1.2.

12 The trouble is as -- and this is where you get these

13 traces -- what if 1.3 is lit up but not as much? How do you

14 report that?

15 You say, hmm, there's more than just Mr. Nadey's DNA

16 in here. Because you go, hmm, well, there's a 1.3. Now

17 there's only one dot lit up, so that could just be because of

18 some sort of deviation in the test because, after all, two  
19 things should light up.

20 But what if it's a small amount? Maybe the 1.3 lit  
21 up and there was a 4.1, but that's so unlit up that the human  
22 eye can't see it but a computer reading these dots might see  
23 it, a change of difference.

24 Or what if 1.3 is barely lit up because Mr. Nadey's  
25 1.1, 1.2 and this guy who is the 1.3 is a 1.2, 1.3? In that  
26 case, the 1.3 trace is lit up -- we find that -- but the  
27 trace on the 1.2 we don't know it's lit up because  
28 Mr. Nadey's is already lit the thing up and we don't

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1 distinguish. We can't distinguish.

2 So bottom line is when you get that 1.3 in that  
3 situation, it could be a 1.1, 1.3. It could be a 1.2, 1.3.  
4 It could be what Mr. Myers said -- the 1.3 could be just an  
5 aberration in the testing. Or it could be a 1.3 and some of  
6 these other dots that they just didn't come up because there  
7 wasn't enough DNA to trigger those.

8        So there's a lot that it could be, and this is how

9 you analyze these tests.

10        And then I just explained how it works for the

11 DQ-alpha test, but every one of these tests that used the

12 dots, it's the same way. Sometimes you are just measuring

13 looking for AA, AB, or CC or CB. But the dots tell you.

14 And, again, it's always a judgment as to what's lit up or

15 not.

16        And I think you heard Mr. Myers say sometimes, well,

17 the control dot was well lit up or not so well lit up. He's

18 deciding whether there was enough DNA to approve the test or

19 not, and a lot of this therefore comes down to his reading

20 and his interpretation.

21        Is something lit up? If there's just a slight

22 shadowing on 4.1, is it still lit up or not?

23        He may say no. I may say yes. It may matter upon

24 how you view this case and you view the samples and what you

25 want to come out of them.

26        Now, the ultimate thing is in terms of these results,

27 getting a number. But before we get into the numbers what

28 they mean, let's go away from this and go to the RFLP for a



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1 second.

2 Now, the RFLP, you saw that up on the wall. And  
3 basically what that is is a big piece of Jello. It's really  
4 just Jello. And you put an electrical charge on one end --  
5 positive -- and an electrical charge on the other end --  
6 negative. And I think we've basically all heard in school --  
7 learned in school that things go from positive to negative.  
8 Like a car battery, all right, when you want to jump start,  
9 you put the right thing on positive and the negative and try  
10 to make a circle between the two cars.

11 The same thing with this. You put a positive on one  
12 end, a negative on the other, and then the DNA is all stuck  
13 in the lanes at the beginning, and then the electrical  
14 current essentially vibrates because electrical current is  
15 moving the electrons, is essentially vibrating that gel in an  
16 electrical manner and creating a charge, and the charge is  
17 attracting or repulsing these molecules. Bottom line, you  
18 are making them move.

19 Okay?

20 You are applying the same force to each little lane

21 of DNA. Each little lane of DNA is being moved.

22 Now, when you try and move something, it's easier to

23 move something little than it is something bigger. That's

24 really all Mr. Myers was trying to tell you. You know, if

25 you have to push a car, jump start it -- which probably

26 everybody has had to do it -- it's easier to push a

27 Volkswagen Bug than it is to push a Cadillac.

28 Same thing with this. The electricity is pushing

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1 this DNA, and the Volkswagen Bug is moving faster than the

2 Cadillac. After a long period of time with this stuff moving

3 very slowly, they finally stopped the test, and they

4 basically checked -- it's like a race. They stopped the

5 race.

6 And let's say you have a lane here and a lane here

7 and a lane here.

8 Okay?

9 The first lane here is Mr. Nadey's blood, the lane  
10 here is the rectal sample, and the lane here is -- this is  
11 known. This is like a given. This is like a ruler.

12 Okay?

13 So this is like 12, 11, 10, 9, 8, 7, 6, 5, 4, 3, 2,  
14 1.

15 In other words, the first thing they use, that  
16 control -- not the control, but the ladder, that's the one  
17 that just has the numbers on it -- 12, 11, 10, 9 -- they use  
18 22,000, 21,000. This is what you can compare everything to.

19 Then you see where the dots came out.

20 Okay?

21 So you go, okay, this is the dot for the rectal swab,  
22 and I say that's like a 9200, and this one is like a 10,000.

23 Okay. Then you have Mr. Nadey's go down the pipe.  
24 Now Mr. Nadey's is blood; right? So it's not going to be  
25 these smears. His stuff comes out much better, and on one  
26 you saw it was pretty close. The one he put up there was  
27 pretty close.

28 So then you draw it across to this, and you compare

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1 it to this and also you compare it to that, and you decide if  
2 there's a match or not. Is this one close enough to this and  
3 this one close enough to this to be a match?

4 And they have certain parameters. If it is within  
5 this much percent, we indicate a match. If it's not, we  
6 don't. It's plain and simple.

7 Right?

8 Right now, let's take Juror Number 1 and Juror Number  
9 7.

10 Am I correctly in line with them?

11 No. I'm kind of close.

12 Am I a match?

13 It's close.

14 You know, now am I a match?

15 I mean, what if I was a real big guy, now am I a  
16 match? Who am I matching?

17 These are issues that these people who designed these  
18 DNA tests have to deal with, and they have to come to certain  
19 agreements as to what a match is.

20 What Mr. Myers was telling you is that even if I'm

21 not in line with these two jurors, if you take their

22 number --

23 Let's say their number is 8000.

24 Okay?

25 8000 is just how long they are, but they're 8000

26 long, and I'm 7900 long, you compare the difference. Let's

27 see. 8000 is -- and 7900, that's a hundred difference. Let

28 me do the math. 100 divided by 7900 is 1.54 percent and it

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1 has to be within 3.6 percent. That's a match. No problem.

2 That's how you do it.

3 Now, let me tell you what's wrong with his tests.

4 Okay?

5 Everything you saw up on the ceiling up there, that

6 wasn't his real results. His results that he put up on that

7 ceiling were great. They were great. But that is not what

8 he got on the gel.

9 If you remember all the fusses that I made about the

10 computers, those were the -- they adjusted those results. In

11 other words, with their computer program, they have the  
12 ability to take results that aren't good, that they call  
13 blatant errors, and then they take these blatant errors, and  
14 then manually either override the computer and place them  
15 wherever they want or they can adjust them and tell the  
16 computer to move them.

17 That's sort of like saying if right now I'm 4 percent  
18 away from Juror Number 7 and Juror Number 1 so I don't make  
19 it, a manual override only needs to move me like over to here  
20 and now it's a match. Now, that's what the manual override  
21 is, I mean the manual adjust.

22 A manual override is if I'm over here and you totally  
23 put me over, you know, here, that's a manual override.

24 A manual adjust is within that same lane parameter,  
25 just kind of moving.

26 And what happens is I'm going to show this a lot.

27 Remember when I went through the different lanes and  
28 here you've got nine lanes when you're supposed to have two.

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1 I'm going to show you that the RFLP results that he got are  
2 all manually adjusted and that they are not any good, in  
3 other words, that he is giving you a perfect picture.

4 When you look at his RFLP results, it's like he did  
5 the greatest job on earth. He is a miraculous man to take  
6 these terrible samples and have all of these errors during  
7 handling but these results are perfect.

8 But when you say to him where are your original  
9 results before Gary Sims, your boss, adjusted things, he goes  
10 they're destroyed. My computer didn't save them.

11 Well, couldn't your computer print them out?

12 No.

13 Couldn't your computer tell you what the mathematics  
14 were like, what the number were before?

15 No.

16 So you mean what you are giving us in court is just  
17 like the pictures after you made the changes?

18 Yeah.

19 And let's talk about bias.

20 When did you folks find out that the pictures that  
21 you looked at up on the wall that seem to match so well were

22 not the real results, that those were the results only after  
23 Gary Sims made the adjustments?  
24 You didn't find it out during Mr. Myers' direct  
25 testimony. It was only when I came back on cross-examination  
26 the very last day, just about the last question, and brought  
27 that out that these are adjusted pictures and that they never  
28 saved the original. I brought that out.

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1 Now, it's really important this whole business about  
2 him being able to manipulate the matches in RFLP, the length  
3 measurement, because -- and remember PCR generally uses the  
4 dot system. RFLP usually uses the length measurement system.

5 But RFLP uses a different database than the dots. In  
6 other words, length measurement goes to one database and that  
7 database gives hugely bigger numbers than the dot database.

8 It's funny. I don't remember what the number he gave  
9 for the dots for the PCR results as he called them, but I  
10 think it was like 15 million to one. You'll have to check  
11 your notes. But the numbers with the RFLP were 30 billion to



12 one the way he reported them to you, although later he backed  
13 down significantly on that.

14 But the way the RFLP works and the reason it's so  
15 important for him to get these matches is that RFLP, using  
16 what's known as that product rule, does a mathematical  
17 process that gives you huge numbers very, very quickly. And  
18 you know, RFLP has like, oh, six different markers, six  
19 different gene sites that they look at, six different places  
20 where they find differences. And the way he did it with  
21 Mr. Nadey is that he told you what the odds were of Mr. Nadey  
22 in his opinion matching each of these types. He found out  
23 what Mr. Nadey's type was at these six different locations,  
24 and then he calculated what the odds were.

25 One in 82, out of every 82 people, one of them is  
26 going to have Mr. Nadey's two genes, two types or the two  
27 numbers in this case, the two lengths.

28 For the second one, only one in 510 are going to have

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1 these two lengths.

2        These are very common on the third one. But what  
3 happened is when you take these ordinary numbers and you  
4 multiply them by each other, you end up with 32 billion.  
5 Just by multiplying six of the two billion gene sites or the  
6 two billion sites, only six of them, gives a 32 billion to  
7 one number.

8        And then I asked him questions. And I was playing  
9 dumb a little bit just to be funny or cute or maybe to see  
10 where he came from. You remember.

11       Okay. Let's say Mr. Nadey has a type, you discovered  
12 a brand new type. After all there's two billion of them out  
13 there. You only have six right now. Let's say you find  
14 another location and that location you find that Mr. Nadey is  
15 the most common type. He is so common that every other  
16 person is this type and he matches it. So the odds are only  
17 one in two. And then there's another one you discover and he  
18 is the most common again. The odds are only one in two. He  
19 is common again. He is like every man.

20       Does that make this number lower?

21       And the answer is no. It makes it higher.

22       So the next thing you know, you've got 128 billion.

23       So I said to myself, okay, now there's only 5 billion

24 people in the world. You only measured theoretically eight  
25 sites on the human being and the odds are 128 billion to one,  
26 if you measure all 22 billion sites and say you did the same  
27 as with the others, the odds would be -- like the zeros would  
28 start here, they would go around past Judge Delucchi, they'd

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1 hit his chambers, go around the room about a thousand times.

2 They're not real numbers. These are theoretical  
3 numbers.

4 Let's think about this kind of -- it's philosophical  
5 but very real.

6 What are the odds of my gene types existing in this  
7 world? If you can measure all of those two billion gene  
8 types, what would the odds be?

9 I'll tell you the odds. I can tell you. I know.

10 One in five billion, because there's five billion people on  
11 earth, and I'm one of them.

12 And if I measured yours or yours or yours, any of  
13 yours, you're each an individual. And if I knew every single

14 genetic type in you, and multiplied it by his method, the  
15 number would be one in 16 trillion, trillion, trillion,  
16 zillion, zillion, zillion, gazillion.

17 But in reality it's always one in five billion.

18 How can that be?

19 I'll tell you how it can be. These are theoretical  
20 numbers, and they assume -- they have a critical assumption.

21 The critical assumption is that everyone of these genes --

22 Well, first of all, it assumes that their database is  
23 accurate. And we'll get into that later, is it a good  
24 database that they use. But assuming that it is, they are  
25 assuming that all of these genes or these types or these  
26 portions of genes are all unrelated to the other.

27 In other words, you know, we can probably look around  
28 the room here and look at us here and guess at the ethnicity

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1 of the various people in this room to some degree and be  
2 right, depending upon whether, you know, we have certain  
3 characteristics common with that racial type.

4 For example, if I tell you that somebody has got  
5 blond hair, blue eyes, and that they are Norwegian, I don't  
6 think you would be surprised. I mean, that would fit.

7 If I told you that, you know, somebody had a big nose  
8 and brown hair, you might think that we were talking about a  
9 Jewish guy.

10 And the point is that these things go together  
11 usually.

12 Okay?

13 If you talk about your hair that's curly and dark  
14 skinned, you might think of somebody who is an  
15 African-American because those things go together.

16 Now, what they have said is that when they picked  
17 these gene types, these are totally unrelated. This is not  
18 like blond hair and this is not like blue eyes and this is  
19 not like, you know, curly hair. They say that these are like  
20 totally independent from each other.

21 But there's a little bit of a problem in accepting  
22 that because you're getting numbers so huge so quickly. You  
23 see, it's like when you say what are the odds of getting  
24 blond hair and blue eyes together. Well, maybe it's like 80

25 of their -- 700 people, 80 have blond hair. And then you go,  
26 my goodness. And only 510 have blue eyes. So the odds are  
27 82 times 510.

28 That's true only if those two characteristics totally

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1 don't occur together. Because otherwise if you go, well,  
2 this person has got blond hair and then the chances of having  
3 blue eyes are much better. It's not 510. It might be a  
4 higher number.

5 And their database assumes but is not backed by  
6 anything he cited to you as a study that these are  
7 independent markers. And, in fact, that's when you start  
8 getting into the whole weakness of their database.

9 Because here is another problem in their database.  
10 When you come up with these odds, you know, what are you  
11 really basing it on? What are these odds really based on?

12 You are talking about just 148 people to 700 people,  
13 and from that they come up with what they think is all the  
14 genetic types in the world.

15 Let me just illustrate graphically what we are  
16 talking about. We have five minutes. Let me sort of try to  
17 end on this.

18 Let's say you have a database with -- when I play,  
19 these are \$10 chips. Not really. Let's say these are \$10  
20 chips.

21 All right?

22 So we've got ten white chips. All right. That's a  
23 hundred. You've got a hundred in there. Now, out of a  
24 hundred, this is my database of chips.

25 What are the odds of pulling out a white chip?

26 One to one. It's got to be.

27 Let's say that instead of ten white chips, we had  
28 nine white chips and one blue chip. So now the odds of

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1 picking out a blue chip are one in ten. Simple.

2 If we put two blues chips in, the odds would be two  
3 in ten.

4 If we had a third blue chip, the odds would be three

5 in ten.

6 That's all they are talking about on these odds.

7 When you have 148 people, each of the people is

8 giving them two different, you know, gene types, so from 148

9 people, you basically have 298 (sic) types. And you just

10 count. You just figure out, okay, out of that 298 --

11 I'm just going to make up numbers totally out of the

12 blue.

13 Out of the 298, we have three 1.1s. So then you go,

14 okay. What is the odds of having a 1.1? Three into 298.

15 That's almost like one in a hundred. So the odds are one in

16 a hundred.

17 So if Mr. Nadey comes along now and gets tested and

18 he has a 1.1, they'll go, okay, the odds are one in a hundred

19 for that.

20 Then let's say the 1.2s are looked at, and there are

21 six people with 1.2s. Well, six into 298, that's one in 50.

22 50 times six is 300. So the odds of getting a 1.2 are one in

23 150.

24 So then you just do some sort of calculation, and

25 it's not a direct mathematical multiplication, and they

26 figure out what the odds are having these two together using



27 statistics, and they might come up with odds of, let's say,  
28 one in 193. And that's their odds. And that is how they

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1 come up with it. But that's why the database is so dependent  
2 upon who is in it.

3 Because here is the crazy thing. I mean you're  
4 talking about their database sometimes only has 296 people.  
5 And -- types. 148 people, two each is 196 (sic). Sometimes  
6 you have like 700 people, so you have 1400 types.

7 The point is a very few additions of people can  
8 change these numbers very drastically. For example, if  
9 you've got three people who are 1.1s and you change the  
10 database so that you take two of those people out, the odds  
11 have changed dramatically. If you add three more people, all  
12 of a sudden --

13 Anyway, the point is that the odds change drastically  
14 by adding just a few people. And that's -- that's scary  
15 because what you have to look at now is do these 148 people  
16 or sometimes 700 people really represent a cross-section of

17 the United States.

18 Because what Mr. Myers is telling you when he  
19 testifies is that compared to all the people in the Bay Area,  
20 compared to all the people in the United States, the odds  
21 with Mr. Nadey are one in 32 billion. But remember that is  
22 not really made up of any big numbers. It's made up of a lot  
23 of little numbers.

24 And those little numbers are funny because -- I'm  
25 going to make up a race for Mr. Nadey because I'm not  
26 testifying, so I'm going to make one up. Let's make believe  
27 that we find out that -- we find out he is Russian, pure  
28 Russian.

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1 Now, the iron curtain and everything, we don't have  
2 as many Russians here as we might have when they were making  
3 this database. Now there are a lot of Russians here.

4 Well, did Russians get into that database?

5 Well, let's look at the particular pathway of  
6 Russians to this country. They probably came in through New

7 York City.

8 When I asked Mr. Myers about New York City, he said  
9 that is not a good place because a lot of immigrants come  
10 from there, and they may skew the sample.

11 Well, how about Texas? You think a lot of Russians  
12 like, you know, came from Russian and landed in Texas?

13 Because two of the labs are in Texas. I don't think  
14 so.

15 I'll tell you one thing. Not many of my people are  
16 in Texas, although I like cowboy movies.

17 And then let's --

18 Where else?

19 Berkeley. Berkeley. Sure, the Berkeley lab is  
20 probably the best melting pot they had on that list in terms  
21 of different ethnicities and different groups of people.

22 Then Miami, Florida. I think basically Miami is  
23 retirees, you know, some natives and a lot of Hispanics. And  
24 that's not -- I don't think -- those sections to me are not  
25 cross sections.

26 Think about your own family history and think about  
27 how many of you have relatives, you know, in Texas or

28 Berkeley -- sort of an easy one -- Berkeley or -- or Miami.

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1 And I don't think your ethnic groups, whatever they are, are  
2 fully represented.

3 How about that of you and your friends and family?

4 I mean when I think about where my wife is from, you  
5 know, she is not in any of these groups. You know, her  
6 people aren't -- her people are from Minnesota, from Germany,  
7 not in Texas, et cetera, and yet they are saying that somehow  
8 those groups represent the whole country.

9 And I'm going to take one more minute and say this:

10 When they do public opinion polls, they are very careful to  
11 pick cross sections of the country based upon age, based upon  
12 race, based upon male, based upon female, based upon where  
13 you live.

14 Here they just based it upon where they happened to  
15 have labs. And I want to leave you with one thought. There  
16 is something in Mr. Myers' testimony where we talk about some  
17 people being repeated, like 22 people being repeated. The

18 FBI didn't find it, but the public defender's office did in  
19 Minnesota.

20 Well, guess what?

21 One of his answers talked about getting those people  
22 out of the database. If you think back on his testimony --  
23 I'll read it to you tomorrow -- there is a part where he says  
24 they don't know if they got them all out.

25 Okay. Thank you.

26 THE COURT: All right. With that, Ladies and  
27 Gentlemen of the Jury, we'll take the evening recess.

28 Mr. Giller, he can be here at 9:30.

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1 Can you folks be here at 9:30 tomorrow? Is that  
2 going to be a problem with anybody?

3 Because the sooner we get started, the quicker we'll  
4 get the case to you.

5 All right. Let's move it up to 9:30.

6 MR. ANDERSON: 9:30?

7 THE COURT: All right. Remember the admonition I

8 have heretofore given you.

9 You're not to discuss this case among yourselves or  
10 with any other persons or to form or express any opinion  
11 about this case until the matter is submitted to you.

12 We'll reconvene tomorrow morning at 9:30.

13 Okay?

14 (The following proceedings were had in open court and  
15 outside the presence of the jury. Defendant and counsel were  
16 present.)

17 THE COURT: All right. Let the record show that the  
18 jury has filed out for the evening.

19 Mr. Horowitz and Mr. Giller, I have an interrogatory.

20 Since you gentleman are quoting from the transcripts  
21 right and left during the arguments, can I take that to be a  
22 sign that we can certify 19, 20, 21, 22, 23, and 24?

23 MR. ANDERSON: Yup. From the People's point of view.

24 MR. HOROWITZ: Yes, Your Honor.

25 There was only one mistake on Connie Parchman's  
26 transcript. Kim Kruglick's name was like Ms. Kruglick. It  
27 just --

28 THE COURT: Did you let her know?

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1 MR. HOROWITZ: No, because I haven't seen her. But  
2 you know what? It's not -- it's not a matter of any meaning.  
3 It has no effect on the case. It's just the name of somebody  
4 I consulted, something like a throw away.

5 THE COURT: The record should reflect then that  
6 that's the correct denomination, if you want to call it that,  
7 of that particular person.

8 So can we certify 19 to 24 then?

9 MR. HOROWITZ: Yes, Your Honor.

10 MR. ANDERSON: Yes.

11 THE COURT: All right. Then volumes 19 to 24 may be  
12 certified.

13 All right. Then we'll be in recess until 9:30  
14 tomorrow morning.

15 THE CLERK: 19 through 24?

16 THE COURT: Through and including 24.

17 (Proceedings were adjourned and continued to  
18 Wednesday, February 17, 1999, at 9:30 a.m. for further jury  
19 trial.)

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1 WEDNESDAY, FEBRUARY 17, 1999 -- A.M. SESSION

2 PROCEEDINGS

3 ---o0o---

4 THE COURT: All right. This is the case of People  
5 versus Nadey.

6 Let the record show that the defendant is present  
7 with counsel and the jury is present in the jury box along  
8 with the alternates.

9 And Mr. Horowitz.



10 MR. HOROWITZ: Good morning.

11 Here is where I'm going to go. I'm going to try to

12 wrap it up this morning. Here is what I'd like to do:

13 Answer the question I left you with last night, hit

14 on a few points just factually about the case, go into the

15 databases one more time to kind of illustrate my position

16 that the numbers are all over the place even if everything is

17 done right, and then I want to get into the weaknesses of

18 Mr. Myers personally as a lab person in more detail, and then

19 I'm going to hit briefly on why the RFLPs is totally no good.

20 Then I want to go in detail to how the extractions

21 were done and how things got messed up.

22 I want to throw in a little thing about Sharon Smith

23 I thought of last night.

24 And then, bammo, I want to put up the charts, the PCR

25 charts, and go through them with you. Because it's not easy.

26 It's almost like a work in progress. Every time you look at

27 them it kind of comes out differently. So I just want to

28 clarify those, and then when you go into the jury room, you

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1 can do it yourself and see what you come up with.

2 Last night I left you with the question. You've got  
3 a database where there was 22 people who shouldn't be in the  
4 database. Did they ever get them all out? And when I asked  
5 Mr. Myers about it, he said in most of those situations they  
6 were actually able to track down and they removed those  
7 people. In most of those situations.

8 And that was very frightening to me in the sense that  
9 you're supposed to represent the United States, you've got so  
10 few people in there already and you can still have  
11 duplicates, the same person twice. It throws the numbers way  
12 off.

13 So let's talk about the different types of method of  
14 calculating the databases.

15 He used the 32 billion to one, the product method,  
16 just multiplying across. I said, look, the FBI computer and  
17 your lab say come up with the ceiling method, also. The  
18 ceiling method basically is a way of taking out the racial  
19 differences in the database and it does favor the defendant  
20 because what it says is, look, if I compare Mr. Nadey to all

21 the white people, his numbers will be, let's say, one in a  
22 hundred. If you compare him to only black people in the  
23 database, it's one in 500. So it's better for him to compare  
24 to white people.

25 But the trouble is you get all of these  
26 definitions -- what is a white person? If you have one  
27 relative who is black and one relative who is white, are you  
28 called black or white? These are like what Americans do.

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1 In America if somebody has got one-quarter black,  
2 they call them black. In Africa, if they are one-quarter  
3 black and three quarters white, they call them white.

4 And then you've got weird things. The Watusis, who  
5 are real tall, are lumped with the pygmies, who are very  
6 short, because their skin is black, but genetically they are  
7 different, but because their skin is black, we call them all  
8 the same. They go in the black group.

9 There are all of these weird racial classifications,  
10 and we don't really know what his race is and we don't -- so

11 those things can confuse those numbers.

12 So what the ceiling method does is say, look, you  
13 take all the different groups and then you take Mr. Nadey's  
14 numbers, and whatever group is the best for him comparing  
15 them against Hispanics is best for DNA, we'll use that  
16 number. Comparing him against blacks is best for polymarker  
17 LDLR. We'll use that, the rest of the time comparing him  
18 against whites. And that's just how it works, and with that  
19 one, you come up with a number of one in 15 million. So that  
20 deals with the problem of the racial mix.

21 The problem that none of these databases deal with is  
22 the problem of sub structuring. What that means is that  
23 within certain racial groups, because people intermarry a  
24 lot, certain gene combinations tend to go together much more  
25 than you'd expect randomly. In other words, that's why  
26 people tend to look the same in certain racial groups,  
27 because they share the same gene pool again and again.

28 And this database, the FBI database, assumes that

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1 there is no such sub structuring. It works on the concept  
2 that all of these genes are totally unrelated. But we know  
3 that if you just look at the world, we are so ethnically  
4 oriented, even within the United States, people still stay  
5 with their own. And, in fact, I asked him the question about  
6 the sub structuring, and he said, yeah, the FBI does accept  
7 that there is some sub structuring in the population, but  
8 it's not significant in terms of the effect on his database.

9 Now, you can accept that or not. That's up to you.

10 But the last thing I wanted to get into about the  
11 database is sort of how weird it is in actuality. It really  
12 is not intuitive, and it's not logical. There may be  
13 mathematical constructs and complicated formulas that they  
14 use, but it really doesn't make sense in any gut analysis.  
15 It's really almost something on faith.

16 Let me go back to my poker chip example because I  
17 didn't make that up. I really took it from his own words.  
18 And the basic concept is if you have ten white chips and no  
19 blue chips, the odds are zero that I'm going to pull a blue  
20 chip. If you've got one blue chip in there, then the odds  
21 are one in ten that I'm going to pull a blue chip. If you  
22 have two blue chips out of ten, then the chances are two in

23 ten. If you have three blue chips, chances of three in ten  
24 and so on. And that's how he said his database works.

25 Now, let me read you his words so you know that's  
26 really what he said. This is how it goes. This is what he  
27 says:

28 So the first step is you get a number of people. All

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1 right. A number of chips. Usually at least a hundred. And  
2 then you type them. All right? You decide if they're blue  
3 or white, and then you determine how rare all the various  
4 combinations are.

5 All right. I've just used blue and white chips.  
6 He's got obviously many more different color chips. It's  
7 more complicated, the same thing. And then simply once  
8 you've got your evidence, you take your evidence profile,  
9 meaning you pull the chips out of Mr. Nadey and look at what  
10 comes up. It says you do the evidence profile, and you see  
11 how often it was seen in your database.

12 How many times do you see white chips?

13 Seven times.

14 How many times do we see a blue chip?

15 You know, three times.

16 And this is giving you the frequency for that  
17 particular marker.

18 And he said it again. This time he illustrated it  
19 like a coin flip.

20 Since I used this example, let's use a coin flip.

21 You flip a coin heads ten times and he calculates the odds.

22 Every two times -- every time you flip it, it's going to be

23 one out of two heads, one out of two tails. If you flip it

24 ten times and it's heads all the time, you multiply two times

25 two times two and you get the number. So he is talking about

26 very straight mathematics, the same thing you'd use if you

27 went to Las Vegas and you wanted to know what the odds were

28 of hitting a number on the -- whatever.

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1 But then I asked him the series of questions. I said

2 basically what I said was, look, let's say you've got a

3 database of ten -- of ten people or a hundred people or a  
4 thousand people. Let's say you have your database. And  
5 let's say there's ten in there. Let's say that one of those  
6 ten is Mr. Nadey himself. He is in the database. Then  
7 Mr. Nadey comes along and you test him.

8 What is the chances of this matching that?

9 And the answer is obvious. He is in there. There's  
10 ten chips. What's the chance of this matching one of those?

11 It's one in ten. And if what he said was true about  
12 how his database worked, he followed the basic mathematics as  
13 he expressed it, that would be the answer.

14 Let me just read to you what his answer was because  
15 it's not the way his database works.

16 QUESTION: If Mr. Nadey was one of  
17 the people in your database, hypothetically  
18 if he was one of the people in your database,  
19 and then you went and tested him in this  
20 case, what would his odds be?

21 All right. That's the question.

22 ANSWER: I don't know specifically.

23 QUESTION: Even if he was in the



24 database where you tested between 150 and 700  
25 people, what would -- wouldn't the 700 people  
26 to one be the worst odds he could have if  
27 he's already in there?  
28 And Mr. Anderson objects.

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1 And then I go on.  
2 The answer is no, Your Honor. Strangely, the answer  
3 is no.  
4 And then Mr. Anderson says I'm not the one  
5 testifying. And finally -- and finally, the answer comes  
6 out.  
7 The answer would be I'm reporting expected  
8 frequencies. So, yes, actually putting him in the database  
9 probably wouldn't change the expected frequencies that much.  
10 So whatever the mathematical constructs are, they are  
11 very theoretical. They are very far removed from any  
12 practical experience, so that when he gives you these huge  
13 numbers, it's really not fair to give them the normal common

14 meaning of these numbers because they don't have that  
15 meaning. They have a vast theoretical meaning that has not  
16 been explained to you by Mr. Myers because he really doesn't  
17 understand it. And only when I tear it apart this way, you  
18 understand that those numbers really don't mean the common  
19 meaning of those words.

20 And when I really got down to it with him and I  
21 talked about, well, what databases are out there, what does  
22 the number really mean, all of a sudden that 32 billion to  
23 one number could have been as high as 350 billion or as low  
24 as 3.2 billion.

25 Here is his answer:

26 So, for example, in this case, we had  
27 a number of 32 billion. So the chance, if  
28 you used different databases, is that the

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1 number really might be somewhere between 3.2  
2 billion and 320 billion.

3 I mean that's a hundred times difference, like going

4 and getting my brakes fixed and the guy says when you come  
5 here the bill is either going to be a hundred bucks or 10,000  
6 bucks. That's a big difference. And that's assuming that  
7 everything he is doing is right in this test. It's assuming  
8 that it's got a database that's good. It's assuming that  
9 it's -- all of these calculations are right.

10 This is not really a science. And here is the most  
11 interesting thing. No matter how high or low he makes those  
12 numbers, if they discover a new DNA test site or if he used a  
13 different test that he didn't use, or if one of these tests  
14 was done wrong and Mr. Nadey doesn't match even a single  
15 site, I don't care what the odds are up to then. That's a  
16 zero match. A zero times any number is zero.

17 Remember the total thing?

18 Well, you can take the number of runs scored in  
19 today's New York Mets game -- it was a three to two loss --  
20 or I'll let you multiply all of the Met scores for the whole  
21 year by each other, and whoever has the highest number at the  
22 end, you know, wins the \$10 bet. We'd do this as kids.

23 Three and two is five. All their scores over the  
24 year. But if they get shut out once, one zero -- and it  
25 doesn't matter how many numbers you multiply. Ten times any

26 number is zero. So any single non-match, either in these  
27 tests that he did -- because you didn't think he did it  
28 right -- or in any test he had done later, throw these huge

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1 odds out the window. And you think that there's two billion  
2 markers out there, and they are only testing about eight or  
3 ten of them or 12 of them, and he is getting these huge  
4 numbers that are outlandish. It's really questionable just  
5 how much these numbers mean.

6 And let me say this. For you to rely upon his  
7 numbers to convict somebody when he has not explained them is  
8 wrong. Because let's look at whether you should take  
9 Mr. Myers on faith when he says this is right or this should  
10 be believed.

11 First of all, how qualified was Mr. Myers in 1996  
12 when he -- when he did these tests compared to now?

13 He'd only been doing DNA for three years. As I  
14 calculate it, he had only a college degree in zoology and had  
15 not yet started his master's work. He -- I had only done 35

16 to 40 tests. And he had Ph.D.s in his lab. He had people  
17 with masters.

18 I question and I suggest to you that it's a  
19 legitimate question. Why when in a death-type case, in a  
20 serious case like this, why one of the Ph.D.s didn't do the  
21 work or why one of the people with a master's degree didn't  
22 do the work or, at the very least, why they didn't supervise  
23 him step by step?

24 Now --

25 And why didn't they actually review his notes?

26 Now, we know that Gary Sims looked at the results and  
27 adjusted them so that they would work. But when I asked him  
28 whether the Ph.D.s in the lab reviewed his notes themselves,

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1 he said in this particular case I don't think any of the  
2 Ph.D.s in our laboratory reviewed my notes. So at best you  
3 have some review by Gary Sims, and you know that Gary Sims  
4 made big adjustments when he looked at the work.

5 I talked about him being a young man on a new and

6 exciting career, and I suggest to you the fact that he did  
7 not ever test the vaginal swabs is a sign that he saw himself  
8 as a team player. And being a team player is a great thing  
9 when you're on a team. But when you're supposed to give  
10 objective scientific data and not be on anybody's team, it  
11 doesn't work.

12 Why did he not look at the vaginal swabs?

13 "The submitting laboratory didn't see any sperm on  
14 their slide for the vaginal swabs, which is why I  
15 concentrated on the vulva swabs."

16 So he is going with what the team plan is, and that  
17 is not science.

18 Now, I've attacked Sharon Smith for not being  
19 truthful to you in the Grand Jury. And Mr. Anderson laid a  
20 challenge out on the table, and he is a tough guy to go up  
21 against head to head. For one thing, he gets the last word,  
22 and, for another thing, he is a tough man. Let me take up  
23 his challenge.

24 He said Mr. Myers never, ever failed a proficiency  
25 test. And let me read to you the questions and answers  
26 regarding these proficiency tests, and you tell me whether

27 Mr. Myers was honest with you or trying to give you sort of  
28 weasel words to get out of something.

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1 And despite the fact that you got  
2 what I would call simulated forensic samples,  
3 had you passed with a hundred percent score  
4 each and every proficiency test that you've  
5 taken when you've known you're taking it?

6 ANSWER --

7 And here is the words I call weasel words:

8 Yes. I have not reported any  
9 incorrect results for any of my proficiency  
10 tests.

11 Whatever that means. I don't just sit there.

12 I say: Never?

13 He answered: I have never reported  
14 any incorrect results from any proficiency  
15 tests.

16 Is that supposed to give you the impression that he

17 has never reported any incorrect results on a proficiency

18 test?

19 I think so.

20 The next day, if you remember, I came back.

21 I said: Have you had a chance to

22 think about your answers about the

23 proficiency tests over night?

24 Yeah.

25 Any changes?

26 No.

27 Then I confront him with prior testimony that I had

28 in the book, and I read it -- I let him read it, I think.

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1 And then I say: Sir, have you ever

2 come up with a result on one of your tests

3 that was not consistent with the actual value

4 of the sample that you tested?

5 And then he goes: There was one

6 quality control sample that when I was



7 writing the information down I wrote the  
8 correct results down as far as noting.  
9 Now, this is one of those dot tests. I noted  
10 correctly which dots were there, but I wrote incorrectly what  
11 type there was.

12 That's a mistake on a proficiency test.

13 Now, how does he justify not telling that to you? By  
14 the next paragraph?

15 But when I reported the results to my  
16 supervisor, I had gone back and relooked at  
17 the results, and I reported to him correctly  
18 the results. He subsequently caught that I  
19 had written the wrong time down on the typing  
20 sheet, and it was all resolved.

21 And here is the key words:

22 And it certainly never got outside  
23 our lab without being caught.

24 He made a mistake. He turned in his results. He  
25 realized what he did. He went back and fixed it, and his  
26 boss -- actually, he went back and his boss fixed it. He  
27 made a mistake. That's all. He made a mistake on a  
28 proficiency test, which is not the hardest test. Then he's

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1 caught it, and his lab fixed it. That's great.

2 But the man is not perfect, and he wrote down a wrong  
3 result. And the main thing was just to show how he is not  
4 going to admit it to you without me really pushing him. And  
5 that makes him a little suspect in terms of reporting to you  
6 each and everything he did in the case because he is a person  
7 with an agenda, which is to be liked and to do a good job,  
8 but it's also an agenda to look good in front of you and in  
9 front of his bosses.

10 Now, you are going to see a theme in the RFLP, if I  
11 haven't made it clear already, of him getting saved by his  
12 boss Gary Sims. Bad results, being saved and cleaned up by  
13 Gary Sims. And, you know, that's an -- that's a theme in his  
14 case.

15 But his bias also pervades his reading of the dots,  
16 his reading of the RFLP autorad results, because here is a  
17 guy who thinks that he really knows perhaps a little more  
18 than he should.

19 Do you remember the Sorcerer's Apprentice, that  
20 Disney thing where you've got this little apprentice, this  
21 Mickey Mouse, and the sorcerer leaves and Mickey Mouse puts  
22 the hat on and starts doing the magic and the chair moves and  
23 all of a sudden the water fills the room and he can't turn it  
24 off?

25 To a small extent, that's how I see Mr. Myers acting.  
26 For example, he is so enamored with his ability to read these  
27 dots, even though there is gradations of how well they are  
28 lit up, in his judgment he thinks that there is no need for a

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1 computer program to do the reading.

2 Now in truth anybody here who works in engineering or  
3 anything else knows that the hardware to read intensity of  
4 dots exists and all you need to do is write a computer  
5 program to work with the hardware, that CODIS program, and it  
6 will do a great job of judging intensity of dots.

7 But when I asked him about it, I go -- about the  
8 dots, I go: All right. These are people results; right?

9 It's not computerized, for example.

10 All he has to say is no, we do the best we can. I

11 wish they'd write a program, but we do the best we can.

12 But he doesn't. This particular system with the dots

13 does not have a computer to do the intensity of reading.

14 Okay. Do you know why?

15 ANSWER: Because it was unnecessary.

16 Okay.

17 QUESTION: You think the human eye is

18 better at judging intensities of dots than a

19 computer?

20 ANSWER: The human eye is an

21 incredible device.

22 That is not a real answer. The truth is with judging

23 intensities of dots, intensities of light, you have photo

24 cells and things like that that are better. Obviously, he

25 does the best he can.

26 Now, the problem with him judging whether he's

27 objective or not is that even though Mr. Myers has good

28 background in what he's been taught by the crime labs, he

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1 does not really have a good background in basic science. And  
2 that's a little scary because he presents himself as a  
3 scientist and objectivity is the first thing you look for in  
4 science courses.

5 Now, we talked earlier about the double blind study,  
6 the whole concept that the person getting the test drug  
7 doesn't know if they are getting a real drug or a placebo,  
8 and the person -- so that person's blind, and the person  
9 giving them the drug doesn't know if it's the real drug or if  
10 it's the placebo so that every effect occurring is solely  
11 representative of the drug and not to the expectations of the  
12 people involved -- you know, I'm getting the good ones, so  
13 I'm going to feel better. So if it's just a sugar pill, it's  
14 not going to do anything.

15 When I asked him what a double blind study was -- I'm  
16 not saying everyone in the world should know what it is, but  
17 if you've gone to school and studied science and you're  
18 getting your master's, you should know.

19 Here is what he said:

20 QUESTION: Are you familiar with -- I  
21 think you said you were -- with a  
22 double-blind study?  
23 He goes --  
24 ANSWER: Correct. That's again where  
25 the examiner does not realize that they are  
26 being tested.  
27 That is not a double-blind study. A double-blind  
28 study is when neither person knows what -- what the results

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1 are supposed -- what the sample is supposed to be. It's not  
2 when you don't know that you are being tested. It's weird.  
3 Now, the other is a refereed journal. We talked  
4 about a refereed journal in the questions, why a refereed  
5 journal is so important.  
6 I'll tell you why. You have publications like the  
7 Journal of Forensic Sciences. Now, who is going to be  
8 publishing in that? Forensic scientists. "Forensic" means  
9 crime. Crime scientists. These are people hired by crime

10 labs.

11 I guarantee you that when I'm home, I don't have a  
12 crime lab in my garage. I guarantee you that the public  
13 defender's office doesn't have a crime lab.

14 You know who has them are police agencies, law  
15 enforcement. These are the people who use them again and  
16 again. The people working for those labs are people like  
17 Mr. Myers. When they talk to each other, they are not  
18 objective scientists doing basic research. They are people  
19 who have a little niche that they are promoting. Whereas  
20 basic science, a basic refereed journal, reading from the  
21 dictionary, from the medical dictionary, "is a professional  
22 or literary journal in which the articles or papers are  
23 selected for publication by a panel of referees who are  
24 experts in the field. They read and evaluate each of the  
25 articles committed for publication.

26 And if you go on and start looking at the concept,  
27 it's that people are going to rely upon the science in these  
28 journals so that they have to be objective articles, they

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1 have to be well written, the research in it has to be good,  
2 so that when people read it and rely upon it, when you read  
3 something in a real scientific journal, whether it's an  
4 engineering journal or a biology journal, that's really -- if  
5 you read Lancet, the British medical magazine, or the New  
6 England Journal of Medicine, these are real studies and you  
7 can rely on it.

8       When you're reading these secondary journals where  
9 they are not refereed, you have more bias in them and it's  
10 not analyzed for science. And that's the problem. When  
11 Mr. Myers is saying, well, I read an article and in a journal  
12 and it said this database was good or this method was good,  
13 is it a refereed journal? Because if you can't tell us  
14 whether the articles are objective scientific articles or if  
15 they are just written by people like you -- with all due  
16 respect, I'm not trying to cut him down by saying that -- if  
17 you can't tell us the difference, we don't know if these are  
18 reliable.

19       And when I asked him what a refereed journal was, he  
20 didn't know. Here is the question and answer:

21               Sir, what is a refereed scientific



22 journal?

23 ANSWER: A refereed journal?

24 QUESTION: Yes.

25 ANSWER: I know what refereed labs

26 are.

27 Well, that is not a good answer for somebody who is

28 supposed to be getting a master's degree in science. And

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1 it -- you know, just to lighten up the thought process,  
2 because sometimes things go through my head, some guy on  
3 TV -- like Dr. Science is a kid show, and he says I have a  
4 degree in science, and it's kind of like that. He's talking  
5 about very serious decisions here that you're making with a  
6 guy who has got a degree in science but he doesn't know  
7 science A, B, and C. And he is citing articles, et cetera,  
8 that you can't rely on because he doesn't even know himself  
9 if they're reliable.

10 And without reading it to you, I just want to remind  
11 you that he feels that reading those bands and adjusting the

12 bands are not subjective at all.

13 I want to read you the questions and answer. You'll  
14 remember that, if you look at your notes, he's claiming that  
15 the adjustments in the RFLP are made at random.

16 Can I have exhibit 50, or have you given that to me?

17 THE CLERK: No.

18 MR. HOROWITZ: Okay. When you get a chance.

19 I forgot to ask the clerk to get me exhibit 50, which  
20 is the RFLP chart.

21 And so let me tell you about that chart. That chart  
22 is a very, very perfect chart on the RFLP. The numbers go  
23 together really well.

24 Do you remember that there was that match window when  
25 I'm standing in front of Juror Number 7 and 1 and am I in  
26 line or not and I have to be within 3.6 percent of the person  
27 to match?

28 That -- when you look at the chart that Mr. Myers

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1 drew of the RFLP results, you know, when he put them up, they

2 match really well. I mean I think I did the math on every  
3 one. And you'll have the chart in the jury room. I think  
4 they match within 2 percent, not -- not 3.6. They were  
5 really tight in there. And when you saw the bands up on the  
6 wall, they matched really nicely, also.

7       And the problem here is that those are bands that are  
8 totally based upon adjustments made by Mr. Sims and  
9 Mr. Myers. Those numbers are totally based upon adjustments  
10 between Mr. Sims and Mr. Myers. You have never seen and you  
11 never will the original numbers. You have never seen and you  
12 never will see the original pictures.

13       This is the chart that is going to go into the jury  
14 room with you. Basically, when you compare like Mr. Nadey's  
15 8517 to the rectal swabs sperm, 8528, those are the numbers  
16 they came up with. Those are very close numbers. I mean  
17 those are within probably 1 percent.

18       What I'm telling you is that all of these numbers on  
19 this chart were all actually generated not by the computer;  
20 they were generated by Mr. Sims and Mr. Myers moving those  
21 bands around until the numbers and the bands were where they  
22 wanted them.

23 I'm telling you that the original numbers were  
24 different from what's on here. And if you'll remember, he  
25 said that I only adjust those bands where there's blatant  
26 errors. That's a lab standard, blatant errors. And all of  
27 these were adjusted to make up for blatant errors.

28 What you're seeing here is after the blatant errors

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1 are not only taken out but they're adjusted to fit. They  
2 then have come up with a chart that looks good.

3 Now, I'll get back to this in some more detail later.

4 And let me just ask you a question and leave you at  
5 this point with this:

6 On direct examination or any time before  
7 cross-examination by me, did anybody tell that you these were  
8 not the actual real numbers, that these were the adjusted  
9 numbers?

10 I mean I can throw this around there, but this is  
11 evidence, so I'll treat it a little better.

12 This is an after picture. This is not the before

13 picture. This is an after picture. And they show you --

14 Maybe I'll put it on the board.

15 Can you see the little circles around the bands?

16 All right. I mean, this is one of these autorads as

17 they call it. This is the RFLP. And what you've got in this

18 is you've got the ladders that they call them the sizing

19 ladders. These are the ones that are like a ruler and they

20 know that this is supposed to be -- I'll make up a number --

21 22,000. This is supposed to be 1,000. What we are talking

22 about is the length of the little pieces of substance, of DNA

23 that make up these bands. So all the bands that are a

24 thousand go here, 2,000 go here, and that way they can sort

25 of have a known. You know this is how it's supposed to be.

26 The unknowns are in the -- these lanes.

27 And the unknowns, they go, okay, well, if I know that

28 this is -- again, I'm making up numbers -- 10,000 and then

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1 11,000, well this is just a little above 11,000. I'm going

2 to call this 11,200. And then they go to their chart and

3 they write down 11,200, you know, on the chart.

4 And let's say that that -- let's say that that is

5 Mr. Nadey's blood.

6 Then you go to this one, and this is one of the semen

7 stains.

8 And you go, well, this is 11,150. Well, that's close

9 enough. They match.

10 Okay. That's what he basically presented to you. He

11 basically said here is the picture I made. Here is

12 Mr. Nadey, and you see how close Mr. Nadey matches up with

13 the sample from the semen. So that's a match. And even

14 looking, the numbers worked really good.

15 The problem you've got is that there's a little M

16 over here, there's an M over here, there is an M over here,

17 there is an M over here. There might be some more Ms on this

18 because there's one, two, three, four, five, six, seven Ms on

19 this. Every place there's an M, there was a blatant error.

20 Now, sometimes the blatant error was that these

21 ladders, these kind of sizing ladders, the ones where you

22 know it's supposed to be, they are wrong. Sometimes the

23 blatant error is on the forensic samples, the samples that

24 might be Mr. Nadey or not Mr. Nadey. And sometimes you have

25 multiple bands in one lane, sometimes five or six, when  
26 you're only supposed to have two.

27 The trouble is that you don't know, first of all, why  
28 this sizing ladder is all messed up. I mean that is an

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1 absolutely clean sample. It's made in a pristine lab, comes  
2 from a manufacturer. It's supposed to be perfect.

3 If your cleanest known pristine sample, not something  
4 that's extracted from a human body and taken off jeans in  
5 Sharon Smith's lab -- sometimes pristine from a laboratory, a  
6 medical quality standard, if that doesn't come out right,  
7 you've got to wonder why.

8 And, second of all, wouldn't it be nice to know what  
9 the numbers were before you adjusted this ladder?

10 Because I'll tell you something. When you adjust the  
11 numbers on this ladder -- I mean let's just really be  
12 extreme. If this number here is 5,000, then this band here  
13 might be 6,000, the band that you don't know what it is. If  
14 you manually adjust the 5,000, well, that's wrong. You make

15 it 10,000, well, then this band over here that you're trying  
16 to figure out is no longer six; it's 12,000.

17 Now, that's an extreme example, but if you're going  
18 to change your sizing ladder, then the numbers that come out  
19 for your forensic unknowns also change.

20 So, if you recall, during the questioning about this  
21 CODIS software, this fellow did not know his own software.  
22 He didn't know it three years ago, and he's been using it now  
23 for six years. He still doesn't really know how it works.

24 But I have --

25 As you know, I was questioning him from the manual,  
26 and I said, don't you have a program that will tell you what  
27 the numbers are that will actually calculate the differences  
28 between your forensic sample of -- of Mr. Nadey's blood and

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1 your evidence sample, that will tell you how close these  
2 bands are?

3 Yeah, I think so. I don't know. When I was reading  
4 the manual, you know, to get ready for court or something,



5 because you made me bring the manual, I think I saw something  
6 like that.

7 Well, think about it. Wouldn't you have loved to  
8 have him run the numbers, have the computer first of all  
9 print out its results, first of all print out this picture  
10 before things were adjusted so you would see where the  
11 blatant errors were. That's number one.

12 Number two, what were the original numbers?

13 I mean we know what the numbers are after you changed  
14 them. But just humor us as a jury.

15 What were the numbers that the computer came up with?

16 Were they still within 3.6 percent, or were there  
17 numbers where there was not a match?

18 Because remember there is one not a match. Mr. Nadey  
19 is totally excluded, no matter how many other things match,  
20 and when you're making seven adjustments, that's a lot. When  
21 you have a lane with evidence in it and you have four bands  
22 and he has to choose and say, well, I think these two bands  
23 are partial digest bands, problems with the testing  
24 procedure, but these two bands are the real bands, that's a  
25 judgment call. When he changes the numbers, it's a judgment

26 call, and when it changes the picture, it's a judgment call.

27 He had the capability computer wise with his software

28 to, number one, print out the original picture and print out

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1 the original numbers and print out the original relationship

2 between the blood of Mr. Nadey and the evidence samples.

3 He had the ability to do that and then to say here is

4 the adjustments we made and here is what we came up. But he

5 hid that from you in two ways. One is he destroyed the

6 original pictures without printing it out because he adjusted

7 it and it was lost.

8 Number two, he destroyed the original numbers because

9 he altered them without printing them out again.

10 And, thirdly, he sat in the chair and gave you his

11 results without ever letting you know that what you were

12 seeing on the wall and what you were seeing on that chart

13 were the adjusted results following the correction of what

14 they termed blatant errors.

15 Now, I'm asking you to totally disregard the RFLP

16 results because, first of all, you have the PCR results that  
17 you can look at. But you have not seen the RFLP results.  
18 You have not seen them at all. You have seen the altered  
19 results. And I think I've demonstrated to you just how  
20 biased this lab and Mr. Myers is and how they hid from you  
21 the true evidence of the RFLP results; and to rely upon  
22 altered evidence when that alteration particularly was not  
23 disclosed to you except by my cross-examination would be  
24 wrong in a case like this because you would be substituting  
25 your judgment for Mr. Myers' judgment. It would come down to  
26 him just saying "believe me," because that's all he is doing  
27 when he's destroyed the actual evidence and can't even tell  
28 you the condition it was in.

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1 But I'll even give you more than what I've given you  
2 on this because what I'm going to do now is, first of all,  
3 point out some of the differences in techniques that  
4 Mr. Myers' lab uses that could have contributed to the  
5 problems with those ladder gels, why the ladder gels always

6 had errors.

7       Number two, I'm going to point out to you in his own  
8 testimony where the process of extracting and handling this  
9 DNA caused him to have such horrendous results that he  
10 couldn't present them to you, that they had to be adjusted  
11 and thrown away. And, based upon those two things, I think  
12 you'll have an understanding that he could not present to you  
13 the original results.

14       And then I want to remind you that first he did a  
15 sample 4-B and ran the RFLP and totally rejected that himself  
16 and got rid of it, and then he ran a second set of RFLPs,  
17 which is the ones which are still adjusted, and those are the  
18 ones he presented. And I'll even show you that the results  
19 in the one he threw away were just the same as the ones he  
20 kept except that the ones he kept he then adjusted and  
21 cleaned up in the way that I've discussed. So really, in all  
22 fairness, there is no reliability to the RFLP.

23       On the PCR, I have complaints about it, and it's  
24 complex, but it is more analysis. And there's something to  
25 work with in the PCR, but we'll get to that.

26       Let me talk about some of the things that his lab did  
27 that is different from the FBI method which could have

28 affected these results.

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1 He doesn't know. Remember they are using FBI  
2 software, CODIS software, to evaluate these RFLP gels. They  
3 are using a larger gel than the FBI uses. And he talks about  
4 one problem being that the gels curve. Now, he thinks that  
5 the wider the gel is, the more the ladders curve.

6 I think of a piece of spaghetti, and if you take a  
7 piece of spaghetti and you just push it in a little bit it  
8 curves. And my friend Charlie at Colombo's buys this really  
9 long spaghetti through somebody there. It's like this tall  
10 from the ground, and obviously if you just push that a little  
11 bit, it will just move that the same quarter of an inch, it  
12 bows out more. The longer something is, even if you just  
13 move the ends a quarter inch closer, it bows out more.  
14 That's just a basic understanding of things.

15 And I think using that longer gel is interesting  
16 because when you have computer software, that software is  
17 meant to run with certain mechanical hardware. And when you

18 adjust the physical components, you assume that the software  
19 can keep up with your adjustments. And maybe it can. But  
20 maybe it can't.

21 And he never checked, according to his own testimony,  
22 with the FBI or anybody else whether any of the adjustments  
23 that they made to the CODIS software in any way -- I mean to  
24 the hardware or to the gels that they used in any way affects  
25 the functioning of the software.

26 What are the parameters of the software?

27 He uses more wash than the FBI, meaning he adds more  
28 chemicals to his samples when he tried to clean up for DNA

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1 testing. His lab does two. The FBI does one. And actually  
2 during this testing, he did five washes sometimes. This is  
3 adding more chemicals to the DNA pool. And what it does, I  
4 can't tell you. For one thing, it's not in the evidence.

5 And the third thing -- and, also, I don't know -- but  
6 the point is he is doing something different and he is not  
7 checking. He is not a Ph.D. He doesn't have a master's.

8 Particularly at this point he is leaving out the ethidium  
9 bromide, which he said is a chemical additive that lets you  
10 under black light look at the DNA bands better with the naked  
11 eye. Why he leaves that and doesn't want to be able to  
12 visually light the bands in that way, I don't know. The  
13 point is he is doing these things without checking.

14 But these are just all theories. I don't really know  
15 what he is doing so badly on the ladder bands, which should  
16 be the perfect bands. I don't know why. Maybe you'll figure  
17 it out given what you've heard and also your experiences that  
18 you folks have in your careers.

19 Let me talk about his extraction process, the process  
20 by which he got the samples for both.

21 I'm going to focus on the rectal because that's  
22 really the key to this case in a sense that -- for a sodomy,  
23 finding the DNA or not of Mr. Nadey.

24 Now, what I said to you --

25 And, by the way, with the vulva, you can -- I'll get  
26 to that, too. I'm not putting away the vulva or the jeans,  
27 but I'm focussing on the key to this case.

28 Because let me tell you how important this is. If

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1 you find a reasonable doubt or if you find that Mr. Nadey did  
2 not sodomize Terena Fermenick, then you can't convict him of  
3 the felony murder of sodomy murder. So it is very important.

4 And you remember that my theory that I'm presenting  
5 to you is that contamination with blood, just the slightest  
6 bit of blood into that rectal sample, is going to show up  
7 bright as day, whereas contamination with sperm, because  
8 there's less sperm, is going to show up very little.

9 And then I finally had the theory that there is no  
10 sperm at all based on Dr. Herrmann, but there is a piece of  
11 skin of somebody showing up in her rectum, and that piece of  
12 skin is not Mr. Nadey. It's somebody else. And it's not  
13 Ms. Fermenick.

14 I'll be really specific when we get to it. I'm just  
15 kind of road mapping for you. It will all come together. I  
16 promise you that.

17 Let me talk about 4-A and 4-B.

18 I'm going to take this down.



19 (Brief pause.)

20 Let me fold this up nicely so you get it in the jury

21 room in one piece.

22 4-A and 4-B are numbers given to these swabs, the

23 rectal swabs by Sharon Smith. And let me remind you how that

24 happened.

25 I remember. She is in her lab on the 25th, and what

26 she does is she's -- she opens Donald Fermenick's blood at

27 7:30. At 8:10, she looks at a vaginal slide that she had

28 sitting around overnight. Then she opens up all of the

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1 evidence samples, takes them out, and starts labeling them.

2 And then she starts testing Mr. Nadey's blood. Then she

3 tests Terena Fermenick's blood. Then the next morning she

4 closes everything up and ships it to Sergeant Taranto.

5 And I hope I remember to tell you something about

6 those envelopes. Let me quickly throw this out off the

7 topic.

8 With the jeans, I don't understand. Because if you

9 look at the evidence envelopes that will come to the jury

10 room, it tells you when the samples are arriving in her lab.

11 It's always like 1-22-96.

12 But when you look at the jean samples, the same

13 envelope I think says April 16th. And that didn't make sense

14 to me because she said she tested them January 30th.

15 So this is just like I was in my doctor's office this

16 morning, and I was looking through -- it just came to me.

17 This could be totally nonsense, so please check that out. It

18 didn't make sense to me, and you'll see the evidence

19 envelope.

20 Getting back to 4-A, 4-B, and so on.

21 So, anyway, she now labels all of these swabs and

22 closes them up on the 26th. Taranto takes them and brings

23 them to Mr. Myers.

24 So Mr. Myers now opens up the test tube, and he pulls

25 out the swabs. And the first one he decides to test or work

26 with, you think it would be 4-A because A comes before B.

27 But that is not the way it worked. He picked 4-B.

28 And if you remember the day he drew the diagram and

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1 the extractions and the centrifuge clogging and all that,  
2 first he worked with 4-B, and then he went and worked with  
3 4-A. And the way it worked, here is the thumbnail of it.  
4 The guy takes 4-B, and he tests it for PCR, and he tests it  
5 using the RFLP. Then as this PCR is percolating, he is  
6 looking at his RFLP results. And he goes, these are  
7 terrible. I'm throwing them in the garbage. And 4-B is  
8 still out there for the PCR, but he -- it's so bad he won't  
9 use it for RFLP.

10 Then he takes the 4-A rectal swab and he does the  
11 same process. He gets all the same mistakes that he had with  
12 the other one. He runs the 4-A on PCR, and it's so bad he  
13 throws all the results out.

14 But he uses those 4-A results for his RFLP, which are  
15 the ones that had all the blatant errors that had to be  
16 adjusted, et cetera. So what he is doing is in PCR he is  
17 throwing out 4-A and using 4-B. And in RFLP, he's throwing  
18 out 4-B and using 4-A. So in each test you have a discard  
19 which wasn't good enough for the other test and --

20 Let me talk in more detail about, you know, just how

21 that occurred.

22 Sort of going through -- let me go through his bench

23 notes. What I'm going to do, I've got his testimony here.

24 But in case I forget, I'm going to have my book here and look

25 in it because I want to be accurate.

26 I'm not going to go into this, but I want you to bear

27 in mind, rather than have me do it, that all the

28 contamination instances this guy had in the few years --

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1 Remember he's only doing this three years with DNA

2 and he already had four instances of contamination.

3 Remember, contamination to him is not a little mistake.

4 Turning those trays blue with -- because the wrong water was

5 used was not contamination. He defined contamination as

6 getting DNA that shouldn't be in a sample into the sample.

7 Now, these charts aren't going up with you to the

8 jury room because just remember that in each case, sample

9 handling was the mistake that he made. That was how he had

10 to improve himself. And remember in this case there was not

11 only the trays turning blue. There was actually an instance  
12 of contamination where he slopped DNA from one well to  
13 another well. And it's because, again, he was handling  
14 things wrong. He said, well, yeah, all the DNA -- all the  
15 different samples or one tray and the little -- and even when  
16 you hold it and shake it, the cover pops up, that things  
17 spilled. But he didn't think it mattered. It was minor. It  
18 didn't affect my results. That's his judgment. So that's my  
19 contamination speech. I saved us about 15 minutes with that.  
20 I know you'll remember it.

21       Okay. Let's actually look at the bench notes. The  
22 first thing he did was he took that rectal swab, 4-B, cut a  
23 piece of it, you know, liquified it, and then he made a  
24 slide. And he saw about five to ten sperm.

25       Now, he then takes -- he also looks at the vulva swab  
26 and looks at the sperm. But I want to simplify it, not get  
27 into the vulva swabs at the same time.

28       Okay. Now he tells you that five to ten sperm is

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1 border line as to what he can test.

2 Now, he is not testing what's on that slide. He is  
3 going to take another sample from the same test tube and use  
4 that for the DNA testing. But he is not using the full  
5 contents of the test tube, either.

6 Remember what he is doing is taking a test tube with  
7 water, cutting a piece of the swab, dropping it in the test  
8 tube. First he takes a little bit of it off and looks under  
9 a microscope, and then he equally takes a little bit off and  
10 puts it in his DNA testing kit.

11 So he is using little bits of that test tube of  
12 liquid for all his tests, and he is only seeing on the slide  
13 five to ten sperm.

14 And I say to him, is five to ten still enough to test  
15 using the PCR method? Is that right?

16 He goes that's correct.

17 I go even five you could do?

18 And then he says, well, only if there is a small  
19 proportion of the total sample. It really would take  
20 something more like a hundred sperm to run any of the tests  
21 that we run in PCR.

22 So what he's saying, if he sees five sperm in a dot,  
23 that's great. If he sees five sperm in, you know, three  
24 drops, not so great.

25 And he is not actually clarifying for you on the  
26 stand at all just how much liquid he actually used in the PCR  
27 test compared to what's on that slide. But he's essentially  
28 conceding by the questions and answers that he is pretty

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1 close right there to a limit.

2 Okay. Then he has big problems processing his  
3 sample. Remember, he's got to basically take that sample and  
4 use chemicals which are supposed to blow up the blood cells.  
5 If Mr. Nadey's blood contaminated the sample, this wash is  
6 supposed to take care of that because it's supposed to blow  
7 up the blood cells and disintegrate them. If there is any  
8 skin from anybody, it's supposed to eat that skin away.

9 But sperm is tough, and the sperm is heavier, and it  
10 doesn't get eaten up by his chemicals.

11 Now, the FBI does this washing process once. His lab

12 does it twice. But he can't clean this thing up, and he does

13 it five times, five washes to try to clean this sample up.

14 And you know what?

15 He still can't do it. He ends up with -- still he

16 calls it a wheat-colored sample, a brown-colored sample. He

17 can't just extract the sperm with these chemicals.

18 And he's got another problem. This is really

19 critical. He's got two test tubes, and he's got the fecal

20 material floating to the bottom. And in that fecal material

21 is most of the sperm that he wants to test. And the lighter

22 stuff, meaning the skin cells, the blood cells, are floating

23 to the top. He tries to suspend everything and makes a

24 solution so it's all mixed evenly. He can't do it. And what

25 happens is instead of really mixing it up good and getting a

26 representative sample with a lot of sperm in it, assuming

27 that there is any in it at the bottom, he just takes from the

28 top.

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1 This is not in his lab manual. And what he is



2 doing -- and you can think about the logic -- if all the  
3 sperm and the fecal material are going to the bottom and all  
4 the lighter things float to the top, like the skin cells and  
5 any blood contamination, if there was any, then when you take  
6 your little pipet or whatever you use to remove and you take  
7 it just from the top, you're essentially doing an extraction.  
8 You're extracting the skin and the blood cells and leaving  
9 the sperm cells. And this is at the stage where he is  
10 supposed to be doing just the opposite.

11       And he goes, but because the pellet from the fecal  
12 material was so large and I could not get it into solution --  
13 so that is in that pellet would also be where the majority of  
14 the sperm would be -- and it was so difficult and I was not  
15 able to get that all into solution, so I merely got the top  
16 portion of it into solution and looked at a slide based upon  
17 only the top portion of the pellet.

18       So he's got a solution where all the top portion of  
19 that pellet is mixed in with the liquid. What he is getting,  
20 therefore, is a mixture with an awful lot of blood and skin  
21 cells, too much.

22       And, again, when I'm saying "blood," I'm not  
23 presuming that there's blood contamination. I'm using blood,

24 skin. There is going to be other things in there. You  
25 decide what is in there. And he is getting some sperm, but  
26 he is not getting the right proportions. And that's a  
27 problem because at this point he is assuming that he's got  
28 all sperm. In other words, when he tells you this is the

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1 sperm fraction, this is what we call 4-BS, or 5-BS, when he  
2 says something is an S, he is telling you it's all sperm.  
3 When he's telling you it's 5-BE or 4-BE -- the E means  
4 epithelial skin -- he is telling you that's all skin.

5 He doesn't know. He is assuming that because of the  
6 extraction process where you use the chemical washes that  
7 everything is going right so that now all he's testing is the  
8 sperm. Therefore, he reports all of his results as if this  
9 is the sperm.

10 Now, if he didn't do a good job, like he didn't in  
11 this extraction, what -- in what he is calling the sperm,  
12 there may be sperm, but there could also be blood instead.  
13 And he is going blood and skin, and he is going to call them

14 all sperm.

15 Now, I can tell you that I'm absolutely right in  
16 saying that he mixed non-sperm into his sperm samples.

17 And, you know, how I can say it's absolutely right?

18 Because when we finally put the boards up -- either  
19 I'll tell you or you'll remind me or you'd look in the jury  
20 room -- you are going to see in what is the sperm fraction  
21 numbers that can only be Terena Fermentick's. You are going  
22 to see numbers in his -- what he calls the sperm that can  
23 only be Terena's numbers.

24 Therefore, there had to be mixing of skin cells, and  
25 when you have mixing of skin, you have mixing of blood cells,  
26 all the lighter cells.

27 So I'm right about that. He did not do a complete  
28 extraction. So when that board goes up -- I hope I remember

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1 to tell you. If not, you'll see it clear as day yourself,  
2 and it's there.

3 Okay?

4 Now, the importance of that is that once you get --

5 You remember I talked about the proportions of DNA

6 and how little blood it takes to contaminate and how the

7 blood is the cleaner sample?

8 If you really are getting blood into the sperm

9 sample, then you cannot be sure whether any of those findings

10 for sperm are Mr. Nadey's sperm, Mr. Nadey's blood, or even,

11 worst case for me, Mr. Nadey's sperm from one place that was

12 contaminated in the other.

13 But you don't know what's what. You really don't

14 know what's what because he didn't do good extraction.

15 What I can tell you and what I will show you is that

16 when you look at some of the unreported results of Mr. Myers

17 in the rectal results, in the PCR, in the skin sample, there

18 is an allele. There is a marker that does not belong to

19 Mr. Nadey, does not belong to Terena Fermenick. There is

20 evidence in the skin portion of that rectal swab that is

21 nobody who I can say who it is. I mean it's certainly not

22 Mr. Nadey, and that should raise and I hope it raises some

23 serious discussion as to whether it's really clear that

24 Mr. Nadey's penis was in this person's rectum or not.

25 Because that is a very, very critical issue here.

26 You know, let me put up the PCR results. I'm going  
27 to put up my adjusted results because my adjusted results  
28 show what his original ones were, and they also show the ones

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1 that were in his book, in his bench notes but which he didn't  
2 report to you. So by putting up my chart, you are going to  
3 get both. And when you go in the jury room -- unfortunately,  
4 for me, I guess --

5 Did I mark it?

6 No, I marked mine. Mine is in evidence, so you are  
7 going to get both my adjusted chart with all the handwriting  
8 on it and you're also going to get his original chart. But  
9 the one that I'm going to put up now, the nice clean  
10 beautiful chart, you don't get this in the jury room. And,  
11 again, I'll put this up so people can see it.

12 Okay. Let me start by saying that I do not pretend  
13 here to have all the answers. I'm not saying that what I am  
14 seeing is the only way to do things. But what I am saying is

15 that what I'm going to present to you makes sense. It's a  
16 fair reading of this, and I may be right. And you've got a  
17 lot of smart people on this jury, and all I'll say is that  
18 everything I'm about to say needs to be seriously addressed  
19 and dealt with. You've heard Mr. Myers' point of view. Let  
20 me show you mine.

21 Let's just start with one of the markers. Let's just  
22 work with D1S80, the first marker.

23 Okay. Everybody see it there?

24 What I'm going to work with is I'm going to work with  
25 this, and I'm going to look at Terena's numbers, and I'm  
26 going to see where it shows up down the line. I'll mark this  
27 big one, too. This is more so I want everyone to see what I  
28 circled on the little board is this, 18,25. That's what

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1 Terena has. She has one 18 marker and she has one 25 marker.

2 Remember the top three lines, they are from blood,  
3 and they are clean, and they are done right. There is no  
4 problem.

5 Okay?

6 These numbers are correct, 18,24.

7 And, as you can see, there is no Mr. Unknown in

8 there. There is only two numbers per box.

9 Now, remember I told you when you look at the rectal

10 sperm, you are going to see Terena's numbers. And it

11 shouldn't be there because she doesn't have sperm.

12 First of all, as -- let me stop for a second.

13 Note -- that always happens.

14 Note: If multiple findings, major is on top and

15 minor or trace on the bottom.

16 In other words, if Mr. Myers reported more than one

17 number, more than two numbers, whatever he called the major

18 number I put on top, and then the number he called the minor

19 number I put on the bottom.

20 But then I put "findings not reported by Mr. Myers

21 are in bold type." I made them darker.

22 So when you see things that are darker, like this

23 number, the 18,18 or the 18,25, or the 18 and the 25, or the

24 18,trace --

25 Everybody following me?

26 -- or the 18,18 at the bottom.

27       The 18,18 at the bottom, that is my own. I made that  
28 up from -- from logic.

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1       But all the other numbers that are in bold, he left  
2 them out of his chart. You won't see them on his chart.  
3       But these are ones where I found them in his notes.  
4       And he had his various reasons for not reporting  
5 them. You know, sometimes he would say, well, that's a cross  
6 hybridization.

7       I go what else could it be?

8       Well, particularly another person.

9       Well, that's my theory of the case is what he's  
10 essentially saying.

11       Okay. Cool. If that's your theory, let me put them  
12 on the chart and see what the jury thinks.

13       Terena is an 18,25. Mr. Nadey is a 24,24.

14       Very different numbers; right?

15       Donald Fermenick is an 18,18.

16       So here is how this works. Whenever you go down here



17 and you see an 18, you don't know if the 18 came from Terena  
18 or if it came from Donald. It could have come from either of  
19 them. And, truthfully, just to make it a little more  
20 complicated, it could have come from someone else who just  
21 happens to have an 18. But it doesn't come from Mr. Nadey  
22 because the only numbers he has, meaning Mr. Nadey, is 24,24.

23 Now, the second number is a 25. If you see a 25  
24 there --

25 There is no 25s in Mr. Nadey's. There is no 25s in  
26 Donald F's. And -- but there is a 25 in Terena's.

27 So if you see an 18 and a 25, what does that tell  
28 you?

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1 Well, it tells you that most likely Terena is there  
2 because you've got her 18 and a 25.

3 So let's look down here. And if you go to 4-B rectal  
4 sperm --

5 Does everybody see 4-B rectal sperm?

6 Okay. Where it says 4-B rectal sperm, you see a

7 24,24. Now, that would match Mr. Nadey because he is a  
8 24,24. And you remember my argument. I don't want to make  
9 this repeatedly. I want you to keep this in mind, though.  
10 I'm not arguing that that is not his sperm, that that is  
11 contamination, that that's blood from Sharon Smith's lab and  
12 the basis of my argument is going to be that his numbers  
13 always come across just as loud and clear as his blood  
14 numbers when given the trouble that they had with the  
15 extraction process, which I haven't even gotten into yet. It  
16 couldn't have been that good a number. If there was any real  
17 sperm there, his numbers have to be shaky on it because he  
18 had such trouble getting it.

19 But, anyway, remember I told you I was going to  
20 explain to you and -- this is the only reason that I was up  
21 here now -- that definitely I can show you in the sperm  
22 samples that there's contamination with cells that are not  
23 sperm.

24 He didn't report this, but I got him to look through  
25 his notes. And what he left out of his notes -- it was on  
26 his charts. In other words, when they read the dots and they  
27 wrote on the chart what numbers they found, this was on the

28 chart.

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1 But when it came time to transfer what was on the  
2 chart to his board, he left it out. And what he left out in  
3 the rectal sperm was an 18,25. And if you go, say, what does  
4 that match? 18,25 matches only Terena Fermentick. And that's  
5 why I say I can absolutely show you, absolutely demonstrate  
6 to you that he did not get those samples really separated.

7 And, truthfully, this result is reported by him as a  
8 rectal sperm result. He doesn't call it her skin. He calls  
9 it rectal sperm because once it's in that sperm fraction, as  
10 they call it, he -- everything is to him sperm. It's only by  
11 our logic that we know, hey, guy, I know you like to call it  
12 sperm. Actually, I know you'd like to leave it off your  
13 chart. But we caught you. We got it. You didn't do a  
14 complete separation of those samples. There is evidence to  
15 that right there.

16 I'm going to go back. I'm going to go through the  
17 extraction process in two ways now. I want to go through

18 some more of the problems that he had in these extractions,  
19 particularly with respect to RFLP and to why he rejected the  
20 first sample for RFLP, the 4-B, thinking that it was such a  
21 bad sample, and yet 4-B is what you're looking at on that  
22 board. That's what he reported to you.

23 And then I want to compare his RFLP results with 4-A,  
24 which he used, compare it to 4-B, which he threw out to show  
25 you that both are just as bad. At that point, then, you'll  
26 see how bad his processing is and how the RFLP results got so  
27 screwed up.

28 And then I'm going to wrap it up by going up to that

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1 board and talking to you about the jeans and the rectal and  
2 everything else. And I'm not going to have all the answers  
3 that I want in this case, but I'm going to be very strong in  
4 showing you what I think you need to discuss seriously that  
5 the 4-B sperm is just blood contamination, that there is no  
6 sperm and -- and that the only thing you can rely on perhaps  
7 is that there was somebody else's skin found in her rectum.

8 But I'll get to that. Let's put that aside.

9 I feel if I do it this way, we'll have enough common  
10 language that at least what I'm saying will make sense, so  
11 you can either accept it or reject it based on how I'm  
12 presenting it.

13 All right. So I talked -- I've stopped at the point  
14 where he is trying to extract different sperm epithelial  
15 samples. And you know he has problems with the centrifuge  
16 clogging. Here is the next thing that happens.

17 He starts to realize that he's got some problems with  
18 these samples, the 4-B sperm and the 4-B regular. But he's  
19 just going to take a shot anyway. I say now eventually you  
20 go to the sample purified to a point where you felt both the  
21 4B, which is the skin, and the 4B-S, sperm, were sufficiently  
22 cleaned up, so to speak, so that you can run some tests; is  
23 that right?

24 He goes, well, they are as clean as I was going to  
25 try and get them on the first pass. I did note in my notes  
26 that the 4B-S, the sperm fraction, had a wheat coloration and  
27 4B-E has a light to medium brown coloration which I'm noting  
28 that in my notes to register in my head and be prepared in

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1 case this is co-extracted matter -- this co-extracted matter  
2 should affect the results because the extracts should be  
3 clear. So he is going -- he knows that he is not okay, but  
4 he is going to try it anyway.

5 And then he runs the 4B sperm and the 4B epithelial  
6 results. And what he comes up with is the 4B epithelial  
7 results are in his mind inconclusive.

8 I've got them on the chart reported out there.

9 You see where it says 4B rectal skin and almost  
10 everything is bold? You know, it's three lines down on the  
11 chart. See where it says 4B rectal skin? Almost everything  
12 is in black bold because 4B skin was so bad he couldn't get  
13 results from it on the PCR. 4B, when he did it on the RFLP,  
14 was a total dump in the garbage.

15 So the only results he really reported to you were  
16 the 4B rectal sperm results. Those are the only ones where  
17 he thought he got anything.

18 So that is part of my argument, too, if you think  
19 about it, that he's got such bad samples that he is rejecting

20 all of 4A for the PCR, he is rejecting half of 4B of the 4B  
21 sample. The whole epithelium section, he is rejecting it.  
22 And then magically in the 4B sperm, even though you know that  
23 there's hardly any sperm there, even though you know that  
24 that extraction process really favored blood and skin over  
25 sperm when it should have been the other way, all of a  
26 sudden, magically, in the sperm thing Mr. Nadey shows up as  
27 brightly as on the blood sample.

28 And what he doesn't report to you in the 4B sperm is

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1 what I think the real sperm results are, because if you are  
2 accepting the argument that he extracted very little sperm  
3 and a lot of blood and skin cells, then you still want to  
4 say, well, where are the sperm results. There must have been  
5 some. Hey, Horowitz, if you're right, and the blood is  
6 contaminated and since there is so much more blood than the  
7 little bits of sperm DNA and you're saying that Mr. Nadey's  
8 sperm is not there but his blood is showing through clear as  
9 blood, then where is the sperm? Is there some sperm there?

10 Well, he didn't put it on his chart, but by  
11 questioning him based upon his own notes, what we did find --  
12 Again, 4B rectal sperm, that's the second column.  
13 Okay?  
14 You found Terena, the 18,25. You know that's hers.  
15 But you've got also two traces of the 1.3.  
16 Everybody see the two traces of the 1.3 under the DNA  
17 heading moving to the right?  
18 Now, we haven't looked at DNA. Remember this is the  
19 same test repeated twice. This is the old version, and then  
20 there's the newer version.  
21 Now, if you look at -- let's look at the newer  
22 version. It doesn't really matter.  
23 DQA1, everybody see that Mr. Nadey is a 1.1, 1.2?  
24 That's what his blood is. And they find the 1.1, 1.2 there.  
25 Again, I'm saying that's blood.  
26 Okay?  
27 Terena Fermerick is a 2, comma and then she is a  
28 4.2/4.3. She is one of those 2,4 groups.

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1 Okay. Let's look down. Here is -- Mr. Nadey is 1.3.

2 Now look at Terena. Does she have any 1.3s?

3 No.

4 Does Donald Fermenick have any 1.3?

5 No. He is a 1.2, 4.1.

6 So this 1.3 matches nobody.

7 Now, Mr. Myers is arguing that there is no extra  
8 person and that that number is just an aberration in the  
9 testing apparatus, the way that things sometime work. Okay.

10 That is his opinion.

11 But I want to point out that this 1.3 shows up in the  
12 rectal skin sample. It shows up in the vulva sperm sample.  
13 It shows up in the vulva skin sample. It shows up a lot.

14 Now, if this 1.3 was the only totally unrelated  
15 finding on this whole chart, he might have a good argument  
16 that it's just cross hybridization. But that is not the  
17 case.

18 Let's look at some of these other results. And let's  
19 look at the things that he doesn't get a result on, like the  
20 GYPA.

21 See that?

22 The GYPA or GYPA, on that one, there is not too many  
23 choices. I think he said you're either an A or a B.

24 Well, there's trace results that he didn't report to  
25 you in the vulva sperm with an A. That could be a trace of  
26 Donald Fermenick. It could be just Terena's A. We don't  
27 know. We don't know.

28 But it's not Mr. Nadey. Mr. Nadey's a B,B.

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1 Same thing with the LDLR. Mr. Nadey is a B,B.

2 But there's a trace again of an A, and that A could  
3 match Terena, could match Donald, or could match someone  
4 else.

5 So there's other results in there that don't seem to  
6 match properly.

7 But what's most interesting, I think, on this chart  
8 is that this chart with all of these stray things that may --  
9 that don't match Mr. Nadey and may match Donald and Terena or  
10 don't match at all, it's most interesting that this is not

11 the only evidence in this case, that there are real markers  
12 of someone else in this case.

13 The first evidence of this came from these STR  
14 results which Mr. Myers and his lab came up with. And  
15 Mr. Anderson did a good job presenting these results to you  
16 in his case in chief to take the sting out of it, but it  
17 shouldn't take the sting out of it because when you have to  
18 decide whether the 1.3 is an aberration and whether the A  
19 trace is just Terena or Donald or what, you know, these  
20 things --

21 And it depends upon logic. And one of the decisions  
22 that you need to make is whether or not there is DNA in this  
23 case unrelated to Donald, unrelated to Terena, and unrelated  
24 to Mr. Nadey. That's what you have to decide.

25 If you think that there really is somebody else's DNA  
26 here, then when you interpret the results on the PCR chart,  
27 you've got to start saying, well, I know that there's  
28 somebody else here. Where is it showing up?

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1 And there are some facts in this case that are not  
2 disputed whatsoever.

3 And what is not disputed is that on these STR tests,  
4 looking at the vulva sperm, there are one, two, three results  
5 that cannot be anyone in this case that you know and at the  
6 same time which are really results, not aberrations.

7 Now that's what they said in their testimony. That's  
8 what Mr. Myers said.

9 And do you realize how important this is?

10 Because this isn't a sperm fraction. And you  
11 remember how you keep saying that the sperm, if it's really  
12 in there, is not going to show up a hundred percent, that  
13 there's really somebody else's sperm there, that there is  
14 going to be so little that it's going to barely show up?

15 Well, when they concede that really is the sperm  
16 numbers of someone other than Mr. Nadey, other than Donald,  
17 and not related, you know, DNA wise to Terena, when they  
18 admit that that person's in the sperm, look. He doesn't show  
19 up in every one. He shows up in three of the seven, which is  
20 exactly what I've been telling you would happen with real  
21 sperm.

22 Let's look how they logic it out.

23 On this test -- I'll just call it the first column --  
24 I'm sorry. Let me get a small blowup of this.  
25 Is that good, the small blowups?  
26 Okay. Let me get that.  
27 Okay. Going to the first column, D3S1358, Mr. Nadey  
28 is a 16,16.

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1 And let's just glance across the top. There is all  
2 Mr. Nadey's numbers there. These are all from blood. The  
3 top column is all from blood.  
4 And as I predicted, because there's contamination in  
5 this case --  
6 I say that's my theory. Okay. They disagree.  
7 My theory is because there's contamination, his  
8 results in the vulva sperm show up clear as day, clear as day  
9 just like the blood.  
10 But when you look at the 17,30 --  
11 Let's break that apart.  
12 Okay. We know the 16,16, matches Mr. Nadey in the

13 first column.

14 Now, let's look at the 17,30. Now, the 17, we can't

15 match Mr. Nadey. We can't match Donald because he is a

16 14,15.

17 Now, the 17 could match Terena.

18 Right?

19 She is a 17.

20 So we've got to put aside in our heads that the 17

21 may be Terena, even though it's vulva sperm, but it could be

22 somebody else, too. I mean she is not the only person on

23 earth who has got a 17, so we know, you know, that's either

24 Terena or someone other than Donald and other than Giles

25 Nadey.

26 Now, let's look at the other number. The other

27 number is a 30.

28 We just look up at the chart. It's not Nadey.

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1 Right?

2 Nadey is a 16,16.

3 It's not Donald. He is a 15 -- 14,15.

4 And we know it's not Terena Fermenick because she  
5 doesn't have any 30. In fact, nobody has got a 30.

6 So now here is what we know. We know that this  
7 person, whoever it is, is in there. We know someone else is  
8 in there. And that's what Myers admitted.

9 Now, we know that this person who is in there is  
10 either a 30,30, and a 15 is coming from Terena, or could be  
11 the 17,30. We don't really know. We know that one of these  
12 guys has a marker of 30 for sure. That we know.

13 Whether they are both 30's and the 17 belongs to  
14 Terena or whether he is a 17,30, we don't know for sure. But  
15 we do know that he is in there right here. You've got  
16 somebody else for sure.

17 Now, the same process occurred with the FGAs.

18 Now, this 21 was identified by Mr. Myers as not  
19 matching anybody. Well, it doesn't match Mr. Nadey. We know  
20 that. It doesn't match Terena. Donald does have a 21, but  
21 what Mr. Myers did was he calculated that because it's a 21  
22 alone, not a 21,22, that this is a pure 21 type. In other  
23 words, he can have written it 21 comma 21. And that doesn't

24 match Donald. And also because there's these other aberrant  
25 findings, he concluded that this was a 21,21 type and also  
26 didn't match. In fact, that is how he arrived at that.

27 He had Mr. Nadey pure at 20,22, and he felt that the  
28 21 -- that is not really the only conclusion he could have

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1 reached, but one that's really unequivocal is this one right  
2 here.

3 Under the THO1, you've got a finding of 6/7. Now, 7  
4 could match Terena. She is a 7. Right? Terena is a 7.  
5 That could be one of her 7s.

6 But the 6 matches nobody. Okay. The 6 matches  
7 absolutely nobody.

8 Now, these are all minor findings. In other words,  
9 the major finding is Mr. Nadey, and again he's screaming out  
10 like there's blood contamination in my theory. They  
11 disagree. But the minor findings are clearly somebody who is  
12 not Mr. Nadey and not Terena, not Donald.

13 This 11 can either be Terena or it could be one of



14 the other types. It could be an 11,11 for this Mr. Unknown,  
15 also.

16 Anyway, that's how that works.

17 And so you know when you look at this that there is  
18 another person in the sample, in the vulva sample.

19 THE COURT: Mr. Horowitz, excuse me. This would be a  
20 good time for a recess.

21 Ladies and Gentlemen, we'll take a 15-minute recess  
22 until ten after 11:00.

23 Remember the admonition I have heretofore given you.

24 (Recess.)

25 THE COURT: All right. This is the case of People  
26 versus Nadey.

27 Let the record show the defendant is present with  
28 counsel and the jury is present in the jury box along with

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1 the alternates.

2 Go ahead, Mr. Horowitz.

3 MR. HOROWITZ: Thank you. Moving back to the RFLP.

4 If you remember --

5 So I'm putting that aside. I'm going back to the  
6 processing.

7 You had a situation where you extracted that 4B, and  
8 you know that you had the wrong colors and so on. But he ran  
9 what was known as a digest gel. That's where he has now  
10 added more chemicals and tried to cut the little pieces that  
11 he is then going to put on the gel and with electricity make  
12 it move along the gel and measure it. So he runs this gel  
13 that says did I cut things correctly, and now 4B, he says  
14 yeah, it looks okay.

15 But then when he ran the actual tests on 4B, he said,  
16 no, I didn't cut the bands correctly. The test didn't work.

17 Then he goes back to the other sample, the sample he  
18 will eventually report, and he does the same process, puts  
19 new chemicals in, tries to cut it into pieces, and he runs  
20 that digest gel. Now this time he is more careful. He says  
21 it looks exactly the same as the first one that didn't work.  
22 It has the same problems or the same appearance, but I'm  
23 going to take a chance hoping that it works. And that's how  
24 he went ahead and ran the second set of tests.

25 Now, I'm feeling that you're getting this, so I'm

26 moving more quickly than I would, and I'm trusting that --  
27 you know, that you'll figure out anything I've left out. And  
28 I know you will.

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1 But what I want to do now is compare the RFLP  
2 problems that his notes report between the 4B-S, the first  
3 one that he did that he threw in the garbage, compared to the  
4 4A-S, the one that he had to correct but he kept and reported  
5 to you. And my point is you have the same kind of problems  
6 cropping up. I'm going to do this quickly. It's in the  
7 testimony, so if you need to, you can have it read back.

8 D1S7, that's just one of the markers. And I just say  
9 that so that if you need to go back and read it, you can look  
10 it up yourself.

11 This is for the B. This is the one he threw out.

12 D1S7, no bands in lane nine. He was supposed to have  
13 bands. He had none.

14 D4S139, no bands.

15 D5S110, he had bands, but there were additional

16 results that he did not size, did not judge, because the  
17 definition was poor.

18 D10S28 had eight bands in the lane where he is  
19 supposed to only have two.

20 D17S79, seven bands where he should only have had  
21 two.

22 Now, let's look at 4A-S, the one he used.

23 For D2S44, in lane five, he got three bands when he  
24 was supposed to only have one.

25 D2S44 done on December 5th, 1996, did it again. Four  
26 bands in lane five, which was the male fraction. And Gary  
27 Sims did five overrides on that one, by the way.

28 D4S139, they find a possible doublet, and there is an

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1 override done on that one, and that is in the evidence lane.

2 And this is every one that he kept. This is on the  
3 sample that he's reported to you. D5S110, there were seven  
4 manual assists. That is the one I put up on the board.

5 D10S58, there was no quality on one of them, and --

6 but the bands were not sized, and there were manual assists  
7 and the manual override.

8 D17S79N, lane five, one of the evidence lanes, there  
9 was six bands and there were several manual assists and  
10 overrides and two possible extra bands in the evidence lane.

11 DYZ1, he had unstripped DNA in the lanes when they  
12 are all supposed to be stripped.

13 And if you just go through all of his testimony, it's  
14 constantly like that. There is constant overrides and  
15 constant multiple lanes.

16 And then you get to the final one where the computer  
17 crashes when Gary Sims is resizing it.

18 Now understanding that until Gary Sims is resizing  
19 it, his original results are there. Before Gary Sims does  
20 the resize, they could have printed those results out, and  
21 they didn't. On the resizing, the computer crashes.

22 Now, I made a fuss about the computer crash with  
23 respect to this computer because they are using this computer  
24 for the original sizing, they are use it for the resizing.

25 They are using it in many ways not knowing what's in the  
26 manual.

27       And then they have a cockamamy idea that -- I mean  
28 anybody who owns a computer, has owned it for a while -- he

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1 said this was not Windows 95, which was a Windows 3.11  
2 probably. This was before Windows was a whole, complete  
3 operating system. It was just a shell on top of DOS. And  
4 what you've got is basically a very unstable platform, and  
5 it's -- it crashed a lot. You had a Macintosh platform, an  
6 Apple platform, which was very stable, which they used for  
7 the STR, and then you've got an unstable platform on  
8 basically a DOS-based program running in a Windows  
9 environment, and it's crashing, and he doesn't know why. I  
10 mean he doesn't know if you've got a problem with your CPU  
11 overheating, which is unlikely but possible, memory chip  
12 problems, which is very possible, or memory conflicts, and he  
13 doesn't know how it interacts with the results of his  
14 program, if at all.

15       And I say "if at all" because I don't know. I'm not  
16 a programmer.

17 But it's just another thing that kind of shows you  
18 that he is not really caring because it doesn't matter  
19 because you're not going to see the results anyway. All you  
20 ever saw were the results after he adjusted them.

21 And, again, I'm going to remind you one more time,  
22 because now I'm done with RFLP, you saw those adjusted  
23 results. And the last day on redirect (sic) when I came back  
24 and I said, wait a minute, are you telling me that you  
25 destroyed the original results and what you showed us on the  
26 wall were the adjusted results after you manipulated them,  
27 yeah, and he had no guilt about it.

28 So, in conclusion on the RFLP, just those few

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1 results, you know he had that terrible problem with the  
2 extraction and threw one in the garbage. And then he took  
3 the next one, which is just as bad as the one he threw in the  
4 garbage, and took those results -- there were constant  
5 problems, multiple bands, multiple overrides -- he destroyed  
6 the original pictures, he destroyed the original numbers,

7 adjusted them to suit himself, and presented that to you as  
8 if they were real. That's why the RFLP is totally  
9 unreliable.

10 Quick point in response to what Mr. Anderson said,  
11 totally unrelated to the DNA.

12 First of all, in terms of that magazine, the porno  
13 magazine, I think at page 72 it had the sodomy article.

14 You'll notice that it kind of flops at that page, and  
15 it actually seems like the page -- corner of the page is  
16 bent. That is not from Mr. Nadey. I'm authorized to say  
17 that. But that's because we as attorneys in court paper  
18 clipped one of the corners and looked at it as part of our  
19 preparation for this case. So if it pops up to that page or  
20 you see where the paper clip was, don't draw any conclusion  
21 from that. We did that.

22 In terms of the abrasion on Mr. Nadey's penis, I'd  
23 like you to consider the description of it, how many days  
24 after this incident the abrasion was seen, and whether it was  
25 a fresh abrasion, you know, with blood on it, right that day  
26 or whether it was actually something that was healing from  
27 the time of this incident.

28 I mean we all have experience with abrasions. I



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1 don't have to give you the conclusion. See what the evidence  
2 said and please make a judgment on that.

3 And the writing tablet where he says "sodomy is my  
4 specialty," it does say that. Please perhaps consider the  
5 whole of what he wrote, not just that line out of context,  
6 but everything that he was writing to see if it is as  
7 horrible as Mr. Anderson would like you to think.

8 And also I'll just say this: Mr. Anderson said that  
9 in terms of motive, once -- once Ms. Fermenick knew who  
10 was -- who it was who did this, he had to kill her, and  
11 that's why it was Mr. Nadey.

12 Okay. You can accept that if you want, but I want  
13 you to also consider that if a person didn't want to get  
14 caught because he was going to kill the person, he wouldn't  
15 leave his sperm there, either, if he was Mr. Nadey, having  
16 cleaned the carpet.

17 So, you know, that doesn't mean that he didn't do it.  
18 It certainly means that it wasn't a thought-out crime if he

19 did do it. And you know that it is something to think about,  
20 that if he knew that people would figure he was there because  
21 she wrote him a check, he was going to, you know, sodomize  
22 her and kill her, maybe he wouldn't leave his DNA.

23 So things to think about. I'm not arguing these  
24 points. Really I'm just suggesting. He argued one point.  
25 I'm throwing other possibilities out there.

26 I want to really focus on this because you can deal  
27 with the facts of this case without me.

28 Going back to PCR --

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1 Really I'm just about done.

2 I want to talk about the jeans a little bit, and I  
3 want to talk about -- I really want to talk about the jeans a  
4 little bit.

5 I don't have the jeans. The jeans I don't have that  
6 much to say about.

7 I would like you to kind of figure out those evidence  
8 envelopes that seem to indicate that the jeans swabs came

9 into her lab on April 30th but she said the testing was  
10 January 30th. And you can deal with the issue of whether  
11 there's contamination or not. I'm not going to deal with  
12 that because there is not much here for me to add to your  
13 discussion. Let me just tell you what there is for you to  
14 throw into the mix.

15 These are the same numbers, PCR numbers as on the PCR  
16 chart. And, if you don't mind, I'm going to grab the PCR  
17 chart so I can have Mr. Nadey's and Ms. Fermenick's and  
18 Mr. Fermenick's numbers right in front of me as I talk.

19 Now, you're getting -- he didn't do the DQ-alpha test  
20 on the jeans.

21 Okay?

22 He only used the more modern test. That's fine.

23 Okay. Mr. Nadey comes across in this -- in the gene  
24 14A stain sperm, he comes across with nobody else there, you  
25 know, nothing as far as the lab notes show that I can find.  
26 There is nothing for me to say about that. Those are the  
27 results.

28 And I've criticized his lab this way and the

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1 statistics, but I don't have anything to say that he left out  
2 there or anything to go beyond that.

3 In terms of the skin portion of that stain, well, he  
4 reported interesting results. He reported an 18,24, and a  
5 25. He had a mixture in that skin portion.

6 Now, the 18,25, that matches Terena Fermenick.

7 Okay?

8 A 24 would match Mr. Nadey.

9 And an 18 could match Donald Fermenick since he is an  
10 18,18.

11 Bottom line is you can't tell what this is but it's  
12 consistent with all three of them. So that doesn't mean too  
13 much.

14 This number, this skin portion is consistent with  
15 Mr. Nadey as the major, and the 24,24, that's Ms. Fermenick.  
16 That's consistent.

17 Now, the LDLR is a little interesting because you  
18 will see where I have the bold print. He reported it. It's  
19 an A/B. An A/B is consistent with none of the people because

20 Nadey is a BB and the other two, the Fermenicks, are AAs.

21       So in A/B, I think he is saying it's really a mixture  
22 of As and Bs. But he didn't tell you that. Apparently what  
23 he found was a BB and an A and just a single A. So he didn't  
24 really quite understand what he was finding. He just wrote  
25 it as an A/B, and that -- a double B would match Mr. Nadey.  
26 Might as well use this top line for Mr. Nadey because it  
27 matches him.

28       The G-Y-P-A, GYPA, he reports it as an A/B, and what

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1 it is, it's a BB with an A thrown in. And he doesn't really  
2 know where that A matches, so he left -- he left that out.

3       Now, here is an interesting one. He finds an AA  
4 which matches that. But this time he doesn't tell you that  
5 there's a B in there, also. I mean all of these other times  
6 like he is telling you it's an A/B, really what he is finding  
7 is two Bs and an A. He is being honest. On this one he  
8 finds an AA with a trace of B, and he doesn't tell you that  
9 in his results that he finds that trace of B.

10 Donald is a B. It could be him, or it could be

11 somebody else.

12 And nothing else to say about these results.

13 Is there an unknown?

14 Yes. The 18 is an unknown because, theoretically,

15 now we are not finding Donald in these samples, any of these

16 the other samples, as far as we know. But it could be

17 Donald's DNA. We don't really know much here. There is not

18 much here that's, you know, helpful to my arguments in any

19 way. I just point out what's here.

20 Going down to the second time he did the analysis,

21 again Mr. Nadey comes through in the D1S80 and in the DNA.

22 But when you get to the LDLR on the second sperm

23 stain as to the jeans, it's a little more complicated. He

24 writes A/B, and when I break it down, I actually help him a

25 little bit because there's a BB that matches Mr. Nadey and

26 again that random A.

27 When you look at the GYPA, he says A/B, but it's --

28 really it's a BB that matches Mr. Nadey and a random A.

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1 And the HBGG matches and the D7S8 matches. And the  
2 GC matches. So forgetting we are getting pretty good matches  
3 there, although you do have these random As and even though  
4 they could match with Terena Fermenick and Donald, you don't  
5 know who they match, so I put that as a possible unknown.  
6 Because, after, there are so few times they are just doubling  
7 an A. It's just A/B, B/C. Anything unknown you have to  
8 leave open the possibility it belongs to someone.

9 When you go to the skin stains, strangely, they also  
10 seem to match possibly Mr. Nadey. And then you've got that  
11 same mixture again at the beginning which could be any or all  
12 of the three of them.

13 So, for whatever reason, this throws not that much  
14 here in terms of, you know, Mr. Unknown. There is some  
15 aberrant findings, called maybe unexplained findings that  
16 he's noting. But whether they have any import to your  
17 deliberations or not, I can't say that they do. You could  
18 pretty much dismiss them as just being, you know, mixtures on  
19 jeans of various different people.

20 Now, on the substrates, meaning the jeans themselves,  
21 he does find various traces. I didn't put them in the chart

22 because I didn't feel like tracking them through the  
23 testimony. He does find people who don't match any of them  
24 on the jeans substrate, the unstained portion.

25 But, you know, genes are something that's all around  
26 the house. You know, Mr. Nadey's cleaning the house. She  
27 lives with Donald. She comes into contact with people  
28 through her life. What's on the jeans I don't feel is as

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1 meaningful in terms of the defense theory as what's in the  
2 vulva or the rectal swabs because those are not going to just  
3 get there by chance. So that's why I didn't bother to put  
4 the unknowns on the substrate on this chart. I don't think  
5 it's really something that helps the defense. I didn't want  
6 to waste your time with it.

7 I'm just about -- just about wrapped up here. I want  
8 to finish my work on the PCR, and then I'm going to be done.

9 This is a very interesting finding right here.

10 On his D1S80, 4A, rectal skin.

11 Now, he did not report any of the 4A results to you



12 for PCR. I brought them out. They were in his notes. He  
13 chose not to tell you about them. But what I found is very  
14 interesting. Remember I told you that there was skin of  
15 somebody found in the rectum of Ms. Fermenick and that skin  
16 was not hers and it was not Mr. Nadey's?

17 Here is where it is. Mr. Nadey is a 24,24, but what  
18 they found was an 18.

19 Okay?

20 They found a strong 18, and he found a weak 24, weak  
21 25.

22 The weak 25 is probably a trace of Ms. Fermenick, or  
23 it could be -- it probably is a trace of Ms. Fermenick. The  
24 24 is possibly or probably a trace of Mr. Nadey. Or it could  
25 be somebody else who is a 24,25 that doesn't match either of  
26 them. That's the other possibility.

27 There is nobody who can tell you which of those two  
28 things it is. When I first said it, a trace of her, trace of

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1 him, that made sense. When I tell you that since they are

2 both traces in equal strength, they could go together, that  
3 also makes sense. That's one thing to think about.

4 But what I found most compelling was the very strong  
5 solid 18. He found an 18 that was a regular, real finding,  
6 not a trace, not a tiny bit but a real 18. That 18 does not  
7 match Mr. Nadey at all, and that 18, it matched Terena. But  
8 it would match her. But her 25, if that's her in there, is  
9 weak, and the 18 is so strong. There is one person who  
10 matches the 18 who is a solid 18, 18. That's Donald  
11 Fermenick. That doesn't mean that this is Donald Fermenick's  
12 skin. We are talking about just one of these markers, and  
13 that 18,18 could match that person who on the STR chart is a  
14 21 and is the 6/7 and is the 18,30, which is not Donald  
15 Fermenick.

16 Just because you have an 18, an 18 and it matches  
17 Donald, doesn't mean that necessarily it is Donald.  
18 Remember, they might have only tested 148 people for this  
19 marker, and the odds might -- of that match would be one in a  
20 hundred. So I'm not implying who that is. I'm saying that  
21 there is a strong number here that does not match Mr. Nadey,  
22 and he left that one off.

23 I did not get any other results on that rectal skin  
24 from his notes. Whether there were any and he wrote them  
25 down or didn't, I don't know.

26 Looking at the rectal sperm -- this is why it's so  
27 important. This is now going from 4A, because he didn't  
28 report 4A. He did report 4B.

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1 Now, look at this 18,24 one. You are getting an 18  
2 and a 25 of equal strength, which matches Terena Fermenick.  
3 That is how I explained when her skin is in the sample.  
4 You're getting the 18 and 25 in the same strengths, and it's  
5 clearly her. That's how you know he didn't do a good  
6 separation.

7 But, again, you get a trace of the 1.3 which belongs  
8 to none of them when you look at the DQA test.

9 And he did that DQ-alpha test twice, folks. Remember  
10 he had the old version and the new version? And he did those  
11 tests twice. And if he had this cross hybridization or a  
12 problem, it's interesting that it came up twice and it came

13 up in a sample, a sperm sample where we are at least  
14 suspecting that there is another person potentially involved  
15 in this case.

16 And that trace is coming out not just in the rectal  
17 sperm. It's coming up when he did the rectal skin, also.  
18 Remember, he didn't report out to you these results in bold  
19 on the rectal skin, but I found them in his notes.

20 And, again, you've got a 1.3 down there, and you've  
21 got a 1.3 in the DQA test again. And once again you're  
22 getting a mix of different things here. This time you have  
23 an 18 and a 25 which were not reported and a 24, and they are  
24 all of different intensities. None of them are the same  
25 intensity. So you don't really know what is going on there.  
26 You don't have any two of the same intensity to give you any  
27 meaning.

28 But when you go down to the vulva skin, once again

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1 you're getting evidence of skin that's not fitting the chart.  
2 Look at the major finding. He found in the vulva skin an

3 18,25. That's Terena Fermenick. That is not a surprise.

4 But look at what the minor results were he found. He  
5 found a 24,30. 24,30 matches nobody up there. So, again,  
6 you're getting somebody who is not matching these people.

7 Now, 24,30 is different from an 18,18.

8 And you think these markers would be the same for  
9 Mr. Unknown. He is not going to change markers. So you've  
10 got a lot going on here.

11 Now, I've given you I think the basic tools for  
12 analyzing this. And you are going to have to sit down and  
13 logic out what happened because there are a lot of things  
14 wrong with his PCR is what I'm showing you. But, you know,  
15 the thing that's -- and let me just keep going for a second.  
16 You have an AA result on the vulva skin but you have a trace  
17 of B. Well, there are no BBs up here. Maybe he is an A/B.  
18 Nadey is an A, but if you find a trace of his A, I think you  
19 might find a trace of his A. Except this is a trick that you  
20 make sure you don't fall into. His AA might have masked his  
21 trace of A.

22 So remember that masking thing.

23 And here with the CC, their CCs -- Donald and Terena  
24 are CC, Nadey is a BC -- there is a trace of B. And again

25 the C might have been involved with their C.

26 So what I'm saying is that every time you find a  
27 trace doesn't mean it's Mr. Unknown. When you're looking for  
28 Mr. Unknown, you really want to find times like the 18,18,

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1 where it does match Nadey and Terena and might match Donald  
2 or where -- the 24,30, where it matches none of those people.  
3 You want to look for the 1.3 which matches none of those  
4 people.

5 Those are the results you want to look for, you know,  
6 in trying to find the unknown person. And it's absolutely  
7 critical and --

8 All right. It's absolutely critical to remember that  
9 when you're looking at the PCR for these traces, that there  
10 really is solid finding of the unknown person in this chart.

11 Now here is -- here is an interesting thing. I made  
12 a mistake, and I'm going to correct it.

13 See how I put 18,18 at the bottom corner for the very  
14 first column? I decided that the profile of the unknown

15 person is an 18,18. That is a mistake. This person that  
16 doesn't match is a 17,30. I was thinking that because this  
17 vulva skin was a 24,30, that the 30 was matching on both  
18 tests. But I caught myself. These are different tests and  
19 30 on the D3S15 there is a different 30 than the other one.  
20 But the point is that in the sperm samples you are  
21 consistently finding undisputed Mr. Unknown.

22       So let me leave you with this: And now this is just  
23 my wrap up.

24       I think it's very, very important to recognize that  
25 Dr. Herrmann when he made the rectal swab and the vaginal  
26 swab and the vulva swab was very, very unassociated with any  
27 lab or any prosecution theory of the case. He was just doing  
28 what the pathologist does.

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1       I think it's very important to remember that the  
2 first sperm slide did not have sperm and the vaginal slide  
3 did have sperm. And by the time things left Sharon Smith's  
4 lab, things had switched around.

5 And, in the meantime, remember that on that day she  
6 was preparing the forensic samples to go to the DNA lab, she  
7 did have everything out on the same table labeling things.  
8 And it wasn't until the next day that she sealed everything  
9 in the tubes. She had things out during the workday, and  
10 then the next day she makes a note that she sealed things to  
11 go to the DNA lab.

12 So you have multiple contaminations in her lab.  
13 Please remember the proportions of DNA when measuring are so  
14 small that the smallest fraction of blood can contaminate a  
15 sample with thousands and thousands of DNA nanograms and even  
16 outweigh the sperm that are actually on the vaginal swabs.

17 Consider that there is sperm found in this case, but  
18 that when you were looking at these sperm fractions, as they  
19 call them, the sperm samples, that they are not only sperm.  
20 In other words, how well he extracts things -- it's sperm,  
21 skin -- and if you think blood got in, it's blood, also.

22 Bear in mind my theory, please, that the blood will  
23 also show up really well because you've got a lot of it.  
24 Even with contamination, you still have a lot of it relative  
25 to these forensic samples. And my theory being proven out by



26 that STR chart, that when you definitely have sperm of  
27 another person coordinated to go to Mr. Myers's own  
28 concession, and that's a prosecution concession, it's come up

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1 not in every marker. It comes up just in some of the people

2 because the sperm is not as frequent as the contamination.

3 You will look at it. And the key, folks, in this

4 case is not whether Mr. Nadey had sex with Terena Fermenick,

5 not whether Mr. Nadey did things at different times. It

6 really ultimately is a legal issue, comes down to whether you

7 are convinced -- not convinced or convinced beyond a

8 reasonable doubt or not -- of each and every fact necessary.

9 You see the way that reasonable doubt works is you

10 can't just say, well, I'm kind of -- this is a key fact and I

11 kind of believe it. Every fact essential -- and if I'm

12 wrong, you know, I will be interrupted now with an objection.

13 And I invite it because I want you to know I'm right, and if

14 there is any question, then there is the raw data. You can

15 write a note to Judge Delucchi and ask him.

16 Every fact necessary to establish a key element of  
17 the prosecution's case must be proven beyond a reasonable  
18 doubt. Every fact necessary to establish the elements.

19 What that means is that when you look at this DNA and  
20 the way it plays out, if you think that either Mr. Unknown is  
21 the person whose sperm is in the rectum or if you think that  
22 there is no sperm in the rectum and Mr. Unknown's penis was  
23 in there dropping off his skin, as that 18,18 shows, if you  
24 have a reasonable doubt that Mr. Nadey's penis was ever in  
25 Terena Fermentick's rectum or if you think it wasn't, then you  
26 cannot vote to convict on the theory that the prosecution has  
27 chosen to give you, which is a sodomy murder.

28 You see, you have to find a sodomy in order to find

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1 the sodomy murder.

2 And I suggest to you, folks, that there is a lot of  
3 unanswered police work in this case, things that they should  
4 have done that could have made this an easy case one way or  
5 the other, particularly the footprints or lack of them in the

6 house, that the DNA was botched terribly, that many things  
7 were deliberately kept from you, that I've done my best to  
8 bring out. And I think and I hope that I've presented the  
9 charts to you in a way that allows you to intelligently look  
10 at this case and to make the proper and a rational judgment.

11 And I thank you all for your time because I know it  
12 was very time consuming and concentration consuming to listen  
13 to me.

14 Thank you.

15 THE COURT: All right. Thank you, Mr. Horowitz.

16 All right. Ladies and Gentlemen, we are going to  
17 take the noon recess because Mr. Anderson will be arguing at  
18 1:30 this afternoon, and he has to have some time to prepare  
19 his response.

20 Juror Number 7 handed me a question, and I can tell  
21 Juror Number 7 that I do believe that that question will be  
22 answered for you this afternoon.

23 JUROR NUMBER SEVEN: Thank you.

24 THE COURT: Okay.

25 All right. So the admonition is you're not to  
26 discuss this case among yourselves or with any other persons  
27 or to form or express any opinion about this case until the

28 matter is submitted to you.

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1 We'll reconvene at 1:30, we'll hear from

2 Mr. Anderson, and then I will instruct you.

3 (The following proceedings were had in open court and  
4 outside the presence of the jury. Defendant and counsel were  
5 present.)

6 THE COURT: The note from the juror was this:

7 Does the defense have access to a DNA expert which it  
8 could have had as a defense witness, or is there a limitation  
9 of funds to prevent this?

10 Signed Juror Number 7.

11 I do believe I'm safe in saying that that issue will  
12 be addressed by the prosecutor this afternoon.

13 MR. HOROWITZ: I don't think so. I think --

14 THE COURT: You don't think so?

15 MR. HOROWITZ: I'll tell you why. It's impermissible  
16 for him to talk about our access to labs or funding. It's  
17 not in evidence.

18 THE COURT: Wrong. It certainly is.

19 MR. HOROWITZ: Well, first of all, the truth is we  
20 have limited funding.

21 THE COURT: Mr. Horowitz, wait a minute. Don't give  
22 me that snow job. You've got an expert in this case. We  
23 know his name. We know there's a letter there.

24 And he has a right to comment on the fact that the  
25 defense didn't call a particular witness.

26 So that's the law. I'll give you the citation if you  
27 want.

28 Now --

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1 MR. ANDERSON: I have it right here, Your Honor, if  
2 you want it.

3 THE COURT: Now, don't tell me, Mr. Horowitz. I'm  
4 not the jury. Don't tell me that you didn't have an expert.

5 MR. HOROWITZ: Well, I object to any comments in  
6 closing which implies what the funding is or is not --

7 THE COURT: It's not an issue of funding. He is not

8 going to argue about funding. The question is whether or not  
9 you had a defense expert.

10 MR. HOROWITZ: Well, then he can say that the defense  
11 apparently --

12 THE COURT: He can say whatever he wants. You can't  
13 tell him what he is going to say. If he says something, you  
14 don't like it, object.

15 MR. HOROWITZ: I object now. I object now and ask  
16 that he be limited to saying that defense hired Ed Blake to  
17 review some records and that's it, because that's all that's  
18 in evidence.

19 THE COURT: No.

20 MR. HOROWITZ: And if there is anything else, then I  
21 ask that we call Mr. Giller as a witness to explain the  
22 funding issue.

23 THE COURT: We are not going to turn this into a  
24 circus. Your objection is overruled. The DA can argue the  
25 way he wants. Overruled.

26 See you at 1:30.

27 MR. HOROWITZ: Your Honor, can I just say one more  
28 thing?

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1 THE COURT: Yes.

2 MR. HOROWITZ: That note was read after I was done  
3 with my argument, and that means that Mr. Anderson has the  
4 ability to address a specific concern of a juror when I  
5 didn't.

6 So I'd ask to be allowed to reopen for just the  
7 limited purpose of explaining to the juror my point of view  
8 about hiring the expert because otherwise it's an unfair  
9 advantage.

10 THE COURT: Mr. Horowitz, you argued for five hours  
11 and 15 minutes. If you didn't see fit to cover that issue in  
12 your argument, you're not going to deal with it now. Denied.

13 MR. GILLER: Well --

14 THE COURT: That's it. That's it, guys.

15 All right. I mean --

16 MR. GILLER: It's outrageous.

17 THE COURT: What's outrageous?

18 MR. GILLER: It's outrageous because the note came

19 after he finished his argument. You bring it up. There was  
20 no need. And the juror called attention to it, and  
21 Mr. Anderson is going to be able to argue it without our  
22 being able to make any response.

23 THE COURT: He argued for five hours and 15 minutes.

24 MR. GILLER: Well, let's make it --

25 THE COURT: Wait a minute, Mr. Giller. I'm not going  
26 to tell Mr. Horowitz how to argue his case. He argued for  
27 five hours and 15 minutes. He didn't see fit to cover that  
28 issue. That is not my problem.

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1 That doesn't mean that the district attorney cannot  
2 argue it in his closing argument. You should have  
3 anticipated -- you've been around the courthouse for a long  
4 time. This should not come as a surprise to you. This  
5 should not come as a surprise.

6 You know, we didn't just get off the hay wagon. So  
7 if you find it so outrageous, then you have a good ground for  
8 an appeal.



9 But we are not going to reopen the argument. We are  
10 going to let the district attorney argue.

11 We are going to instruct this jury today, and it's  
12 over.

13 Okay. That's the ruling.

14 (Noon recess.)

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1 TUESDAY, FEBRUARY 17, 1999 -- P.M. SESSION

2 PROCEEDINGS

3 ---o0o---

4 THE COURT: All right. This is the case of People  
5 versus Nadey.

6 Let the record show the defendant is present with  
7 counsel, and these proceedings are taking place out of the  
8 presence of the jury at the request of defense counsel.

9 And who is going to address the Court?

10 Is that you, Mr. Giller?

11 MR. HOROWITZ: You're talking.

12 THE COURT: All right. Go ahead.

13 MR. GILLER: Okay. Well, we wanted to bring up was  
14 the fact is that there was a note from a juror and prior to  
15 the end of the recess, before Mr. Horowitz opened, did his  
16 final argument.

17 THE COURT: Wrong.

18 MR. GILLER: Well, I'm basing that on what you told  
19 me when you got it.

20 THE COURT: What happened was when the juror came

21 down from the recess, she handed a note to my clerk. The  
22 clerk handed the note to me. And Mr. Horowitz was in the  
23 middle of his final phase of his argument.

24 MR. GILLER: All right. At any rate --

25 THE COURT: That was the sequence.

26 MR. GILLER: Okay. He was still -- he had just  
27 started arguing, apparently.

28 THE COURT: Not started arguing. This was -- this

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1 was -- this was after the recess this morning. He was  
2 winding down his argument.

3 MR. GILLER: Yeah, but he --

4 THE COURT: He was still arguing.

5 MR. GILLER: He was still in the process of arguing.

6 THE COURT: No question.

7 MR. GILLER: And we think that in all fundamental  
8 fairness that the attorneys, both the district attorney and  
9 ourselves, should have been made aware of what that juror's  
10 note was, was that -- when you made a comment.

11 Now, I don't know whether it was because of this  
12 note. You made a comment in the sequence of things: You  
13 said that the attorneys will cover that. That had to do with  
14 somebody else.

15 THE COURT: No. I told the juror that this question  
16 would be answered for her this afternoon, implying that the  
17 district attorney intended to address that issue.

18 MR. GILLER: Okay.

19 THE COURT: That's what I said.

20 MR. GILLER: All right. Well, the fact is that in  
21 fundamental fairness, Mr. Horowitz should have had an  
22 opportunity to look at that note before he finished his  
23 argument. The fact that we wouldn't have been the least  
24 concerned if you had interrupted his argument to show him the  
25 note and Mr. Anderson has the opportunity and the benefit of  
26 having the note and certainly can now -- he can address in  
27 whatever manner he chooses fit to one particular juror, which  
28 we -- who has a question about this issue, and we have been

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1 given no opportunity to speak to it, and we think that that  
2 is unfair.

3 THE COURT: Okay. Are you done?

4 MR. HOROWITZ: I could --

5 THE COURT: Wait. One at a time. I'm going to argue  
6 with one lawyer at a time.

7 MR. HOROWITZ: To just give you a fact, I can address  
8 it, if you let me, in probably two, three minutes.

9 MR. GILLER: And nothing else would be covered at  
10 all.

11 THE COURT: Okay. Well, first of all, I can't  
12 believe that you could take the position that I have not  
13 given the defense an opportunity to be heard. As I pointed  
14 out this morning, Mr. -- which is neither here nor there, but  
15 Mr. Horowitz argued for five hours and 15 minutes.

16 Now, it's in the record that there was a defense  
17 expert in this case. It was addressed by Mr. Myers.

18 Right?

19 I can't believe that the defense in this case would  
20 not anticipate the fact that the district attorney would  
21 address that issue in his argument. I'm not here to

22 orchestrate the defense argument in this case. You're free  
23 to argue whatever the record shows. If you left something  
24 out, I don't think it's my responsibility to let you reopen  
25 because you left something out of your argument.

26 Now, that's the Court's position.

27 And maybe you wouldn't take umbrage if I interrupted  
28 your -- your -- your argument to this jury. But this is --

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1 this is a simple question whether or not the defense had a  
2 defense witness. It's in the record.

3 It was never alluded to by defense in their argument.  
4 You know, you guys pick and choose whatever you think is  
5 important for your case. If you saw fit not to address this  
6 issue, I don't think it's incumbent upon the Court to tell  
7 you that this is something that you should address. Maybe  
8 it's a decision you should make.

9 What's your position, Mr. Anderson?

10 MR. ANDERSON: Your Honor, the fact that I get the  
11 benefit of anything is absolutely ludicrous beyond all

12 possibilities. I was ready to argue this case -- had  
13 Horowitz finished, I was ready to argue it this morning had  
14 he finished.

15 And that reference to Mr. Ed Blake is on page 4508 of  
16 the transcription as advanced volumes that we have had. And  
17 I've been prepared for this issue the whole time since they  
18 told me Ed Blake wasn't going to be a witness. So by them  
19 saying I get an unfair advantage is absolutely garbage.  
20 Garbage in, garbage out.

21 THE COURT: That sound has a familiar ring to it.

22 MR. GILLER: But the scenario is different now  
23 because the juror before the arguments were concluded  
24 specifically gave you a note and on a particular issue that  
25 she wanted addressed.

26 THE COURT: Okay.

27 MR. GILLER: And what difference it makes to take two  
28 more minutes and --

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1 THE COURT: The difference is the orderly

2 presentation of this trial.

3 Now, he -- well, you may laugh, Mr. Giller, you know,  
4 but you guys have spent five hours and 15 minutes arguing in  
5 this case. Now, a juror has a question. Now you didn't  
6 address it, so now you want to have to reopen.

7 Now supposing the juror asks another question? Are  
8 we supposed to reopen again?

9 MR. GILLER: No.

10 THE COURT: The point is what difference does it  
11 make, because the district attorney is going to argue it  
12 anyway.

13 MR. GILLER: Well, certainly, the argument now is you  
14 have a juror before the argument was concluded who asked a  
15 specific question, and it would not be undue consumption of  
16 time to respond to that question. And then Mr. Anderson  
17 still is free to go on to his heart's content in dealing with  
18 the issue.

19 MR. ANDERSON: Your Honor, they said they were  
20 through. Through is through. I don't know how you spell it.

21 THE COURT: Wait. Let's not --

22 MR. GILLER: We have -- Mr. Anderson --

23 THE COURT: Let's not raise our voices.



24 MR. GILLER: Mr. Anderson has tried cases for many,  
25 many years. I've tried cases for many years. It is not  
26 unusual in the course of a trial to reopen -- for example,  
27 when you rest, to even reopen. Whether it's an argument or  
28 evidence or what, it's not unheard of in the courses of

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1 trial.

2 THE COURT: I know it's not unheard of. But I sound  
3 like a broken record.

4 There was plenty of time allotted to the defense to  
5 argue this case. If for whatever reason the defense didn't  
6 anticipate that maybe the prosecutor was going to argue the  
7 fact that you guys had a defense witness and you didn't call  
8 him, to me, that is so elementary in this case, so elementary  
9 that I felt that you deliberately left that out because you  
10 didn't want to touch that issue.

11 But you should know that this is coming. We've had a  
12 DNA hearing on this case. There is reference to Ed Blake as  
13 being the defense witness.

14 We've had -- we've had the testimony by Mr. Myers  
15 where he kept part of the samples, to turn those over to  
16 Mr. -- to your witness, if your witness was so inclined.  
17 That's all in the record.

18 Now, you didn't argue it. You know. And so I'm not  
19 going to let you reopen. That's the way it is.

20 Somewhere along the line, we have to draw the line  
21 here.

22 Now, if you're unhappy with that, I'm sure that if  
23 your client is convicted, there is going to be 10,000 issues  
24 that are going to be raised. This will be one of them.

25 MR. GILLER: Well, I just ask what is the harm?

26 We've already --

27 THE COURT: I don't answer --

28 MR. GILLER: He would take --

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1 THE COURT: I don't answer questions, Mr. Giller.

2 All right. I already made my ruling.

3 MR. GILLER: It's a rhetorical question.

4 THE COURT: And I've given you a rhetorical answer.

5 Mr. Horowitz, I'm going to argue with only one of

6 you. There's one of me, two of you.

7 Now, I asked who is going to address the Court.

8 Mr. Giller said he was going to address the Court, so I'm not

9 here to keep going back and forth.

10 I will let you speak once more because you left

11 something out.

12 MR. HOROWITZ: I just wanted to propose a compromise

13 position that might be acceptable.

14 MR. ANDERSON: Nothing is acceptable in a compromise

15 to the People.

16 MR. HOROWITZ: Well, could I just state --

17 THE COURT: Say it on the record.

18 MR. HOROWITZ: The juror sent the note to you and

19 asked you a question. Perhaps you could answer the question

20 just reading one of the appropriate jury instructions that's

21 responsive and then --

22 THE COURT: What would you suggest is the appropriate

23 jury instruction?

24 MR. HOROWITZ: Not everybody has to call every

25 witness.

26 THE COURT: That is going to be read.

27 MR. HOROWITZ: Well, maybe in response to her

28 question so that she doesn't feel that a question to a Judge

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1 is delegated to the prosecutor.

2 THE COURT: I don't think that's the case.

3 MR. HOROWITZ: All right.

4 THE COURT: I don't think that's the case. I don't

5 think -- I don't think -- I don't think that's the case.

6 We are going to go ahead now with this trial. The

7 jury had that issue. I'm sure there is a lot of other jurors

8 that may have the same issue. And this is like a ping pong

9 match. Once you've made your argument, you went on. It's

10 completed. You covered everything you wanted to cover. This

11 came up. That's obvious that the district attorney is going

12 to address it in his closing argument.

13 Like I said, you've got to -- that's a kindergarten

14 rule. You know that is going to happen. You guys have tried

15 cases in this courthouse for years. You should have known  
16 that.

17 So we are not going to go back, piddle around with  
18 this again. This is crucial for the prosecution. It's  
19 crucial for the defense. We spent all this time analyzing  
20 the DNA. You've made your point.

21 Now, the district attorney has a right to rebut it if  
22 he sees fit, and then it's for the jury to decide. But you  
23 had the opportunity.

24 In any event, bring the jury down.

25 MR. HOROWITZ: Your Honor, I have just one question.

26 In terms of making the proper objections, he is not  
27 going --

28 THE COURT: He will not discuss finances. He will

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1 discuss the fact that you -- you guys know that. You had the  
2 doctor. We know this. You have Ed Blake. I mean it's  
3 obvious we've had a hearing back in October on this issue.  
4 You know, what else can I tell you?

5 Bring the jury down.

6 We'll also file this note, make it Roman Numeral next  
7 in order.

8 THE CLERK: You want it as an exhibit?

9 THE COURT: Yes.

10 THE CLERK: I think it's Roman Numeral 25.

11 (Whereupon, A NOTE FROM JUROR  
12 NUMBER SEVEN was marked as  
13 Court's Exhibit No. XXV for  
14 identification.)

15 (Brief pause.)

16 THE COURT: All right. This is the case of People  
17 versus Nadey.

18 Let the record show that the defendant is present  
19 with counsel and the jury is present in the jury box along  
20 with the alternates.

21 And proceed, Mr. Anderson. Go ahead.

22 MR. ANDERSON: Your Honor, Counsel, Ladies and  
23 Gentlemen of the Jury:

24 Yesterday in my opening statement, I gave you one  
25 little admonition. I implored you please don't forget, and I  
26 implored you to not forget the fact that what attorneys say

27 to you is not evidence in this case.

28 I think you now know why that law is a rule of law.

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1 Because for the last five and a half hours we've been in  
2 court, you've been fed the biggest line of garbage since  
3 Farmer Jones fed his pigs.

4 Mr. Horowitz started out in his epic attempt to put  
5 his own spin on the evidence in this case, and the problem  
6 with his version is that it's way beyond the factual  
7 situation that we have proven from the witness stand and the  
8 documentary evidence.

9 Don't forget he told you at least five times -- and I  
10 lost count -- that this is my theory of the case. Theory.  
11 Attorney's theories aren't evidence, yet he will shove that  
12 down your throat every chance he gets.

13 Now he started out yesterday by telling you -- and  
14 I'm going to quote him word for word, because I had Madam  
15 Court Reporter give me the first page of his opening  
16 statement to you.

17 Okay?

18 This is word for word now.

19 And keep in mind, too, when he was  
20 arrested, he started retching. That's what  
21 the officer says. He was so frightened, he  
22 started to retch like he was going to vomit.  
23 So he was emotionally upset about this  
24 situation. And, yeah, when he went to see  
25 Nurse Wilson, he looked like hell. He looked  
26 like a raggedy man. He looked like a street  
27 person because this was very upsetting to  
28 him. But, remember, he looked good when he

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1 did these jobs. I mean remember Paul Miller  
2 made it clear that these -- Paul was with him  
3 that morning at the Southern Pacific, and  
4 Paul saw him coming back. He looked good to  
5 start. And then he went downhill when the  
6 police had taken his samples and were



7 following him. He thinks he is going to be  
8 arrested. He doesn't run, but, yeah, he  
9 degrades. He de-something. That's not  
10 unexplainable or ununderstandable, but it is  
11 pretty important to realize that at the time  
12 of this incident, he looked good.

13 Oh, really? He looked good?

14 Well, now, let's look at what the evidence shows as  
15 opposed to the wishful thinking of Mr. Horowitz.

16 Now, when he was arrested, he started retching.

17 Those are the words that Mr. Horowitz told you.

18 Okay?

19 This was Sergeant Taranto's direct examination.

20 Okay. When you -- when you were at  
21 Mr. Nadey's house serving the search warrant,  
22 you went -- there was about eight officers  
23 there together; correct?

24 ANSWER: There were many officers. I  
25 have to check the report to tell you how  
26 many.

27 QUESTION: There were several

28 officers there?

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1 ANSWER: Yes.

2 QUESTION: And you went and you -- I  
3 guess it was Detective Miller went into the  
4 bedroom where Mr. Nadey was at the time?

5 ANSWER: I don't recall whether  
6 Detective Miller actually went into the  
7 bedroom when I was in the bedroom.

8 QUESTION: And you talked to him and  
9 told him why you were there, showed him the  
10 search warrant, all those things?

11 ANSWER: Talked to who?

12 QUESTION: Nadey. Talked --

13 ANSWER: Yes.

14 QUESTION: Albert. And at that point  
15 he, during at least some of the time while  
16 you were there, he got, you know, very --  
17 well, upset to the point he vomited or almost

18 vomited?

19 ANSWER: As soon as I told him why I  
20 was there, he stood up and retched like he  
21 was going to vomit.

22 QUESTION: And he did that a couple  
23 of times; isn't that right?

24 ANSWER: Yes. After we handcuffed  
25 him and moved to the living room, he did it  
26 again.

27 So now don't forget this search warrant was served on  
28 January 20th at about 10:30 in the evening, some two days

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1 after the incident.

2 Okay?

3 But his arrest didn't occur until January 30th.

4 This is Sergeant Taranto again. They are talking  
5 about the surveillance. But --

6 QUESTION: But surveillance, your  
7 surveillance started when?

8 ANSWER: I believe it was around the

9 20th of January.

10 QUESTION: Okay. And then that

11 surveillance continued until his arrest?

12 ANSWER: Correct.

13 QUESTION: And that was -- his arrest

14 was January 30th?

15 Correct. Correct.

16 Now, wait a minute. Mr. Horowitz says --

17 See, attorneys, what they say, isn't evidence.

18 And he hasn't got a clue. He has his retching on the

19 20th. He has his retching on the 20th.

20 Why?

21 This is just two days after the incident.

22 Why would Mr. Nadey get sick, retch two days after

23 the incident?

24 He hasn't even had his blood drawn yet, nothing has

25 been seized from his house yet, and he is starting to get

26 sick.

27 Why? Why?

28 He hasn't given the bodily fluid sample.

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1       Isn't it reasonable to infer that he is sick because  
2 he knows what is forthcoming?

3       Another small fact that Mr. Horowitz tries to spin  
4 doctor the evidence regarding Mr. Nadey occurs when he tells  
5 you at the time of the incident he, Mr. Nadey, looked good.

6       At the time of the incident he looked good?

7       He didn't start to go downhill until the police took  
8 his samples and were following him?

9       Well, that's a crock. That's a crock.

10      Let's look at the truth.

11      Mind you now, this was on January 20th, 1996, only  
12 two days after the murder.

13      Okay?

14      This was Nurse Wilson, direct examination.

15            QUESTION: Mr. Wilson, could you  
16 indicate to the Court and jury what you do  
17 for a living?

18            ANSWER: I'm a nurse.

19            QUESTION: And where were you

20 assigned for your nursing duties?

21 ANSWER: I work part-time at Highland

22 Hospital in the emergency room and full-time

23 as manager at Kaiser Hayward ICU nights.

24 QUESTION: Okay. Directing your

25 attention to the late hours and the evening

26 of January 20th, 1996, to the early morning

27 hours of January 21st of '96, about 1:30 in

28 the morning, were you working as a nurse at

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1 Highland Hospital?

2 ANSWER: Yes, I was.

3 QUESTION: Can you describe the

4 appearance of the genital area when you

5 performed this examination?

6 Now, this is, you know, the 20th to the 21st, 10:45

7 or so until 1:30.

8 Well, I didn't recognize him at

9 first. He was very first disheveled. He --

10 the area, scrotum was crusty, unkempt.

11 Obviously, there was no hygiene.

12 QUESTION: When you say crusty, what

13 do you mean by that?

14 ANSWER: Flaky, kind of foreign

15 material.

16 QUESTION: So generally just kind a

17 filthy, unkept appearance?

18 ANSWER: Yes. The shirt unwashed.

19 QUESTION. Okay. And all I'm getting

20 at is it's hard to differentiate one from the

21 other precisely years later. Is that fair?

22 ANSWER: Well, he sort of stood out.

23 This was cross-examination by Mr. Giller, by the way.

24 Well, he sort of stood out because of

25 a general affect. The general way he carried

26 himself, very quiet, the tattoos on his

27 forearm, fingers, and things like that.

28 Is there any doubt who we are talking about?

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1           QUESTION: And did you have any since  
2           now as a nurse, as a professional, how long  
3           he had this almost bum like, for lack of a  
4           better word, appearance?

5           ANSWER: At least three, four days,  
6           maybe.

7           Okay. That puts him looking like a bum, unkempt,  
8           filthy, pig swine three to four days prior to this medical  
9           examination taking place.

10          Okay?

11          And yet Mr. Horowitz tells us that he looked good.  
12          That's why what attorneys say isn't evidence.

13          And if Paul Miller thinks he looked good, Mr. Miller  
14          is a living example of the old proverb "Don't judge a book by  
15          its cover."

16          Nevertheless, Nadey's hygiene was repugnant, at least  
17          within two days prior to the murder. He looked bad.

18          Or was that more defense spin?

19          Once again, that's why what lawyers say isn't  
20          evidence.



21 Another point of contention Mr. Horowitz made about  
22 stuff getting on the cuffs of his shirt when he had cut the  
23 victim's throat. Where is there any evidence that Mr. Nadey  
24 wore a long-sleeved shirt?

25 Remember Mr. Horowitz came up with the cuffs, long  
26 sleeves.

27 I looked over this entire record. There is no  
28 reference whatsoever as to the length of the sleeves of the

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1 shirt, the Skyline Chem Dry shirt, that was worn by the  
2 defendant.

3 So for Mr. Horowitz to get up there and say blood, if  
4 it got it on his jacket, would have gotten on the cuffs of  
5 his shirt, too, that's wishful thinking. It's not evidence.  
6 There is nothing in the record about long or short sleeves.  
7 No evidence. Just defense spin.

8 Mr. Horowitz goes on and on and on about not running  
9 any tests on the hunting knife found in the master bedroom,  
10 wanting you to believe that the police were inept, were lazy,

11 are trying to keep the evidence from pointing to somebody  
12 else in lieu of Mr. Nadey, in other words, setting up  
13 Mr. Nadey.

14 I can't tell you -- or I can tell you that the police  
15 don't test everything in sight, especially when it's obvious  
16 that there is no evidentiary value to such.

17 Remember Technician Elizabeth Nice?

18 This was direct examination.

19 First of all, the hunting knife or the one in the  
20 sheath, that's the one displayed in People's Number 26,  
21 that's the photograph. I'll show you again.

22 QUESTION: The knife you testified  
23 was found on the ledge of the window behind  
24 the bed in which the blood was contained on.

25 Is that correct?

26 ANSWER: Yes, sir.

27 QUESTION: It was behind the mini  
28 blinds?

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1 ANSWER: Yes, sir.

2 QUESTION: Now, did you have to pull  
3 the mini blinds up to observe that knife and  
4 retrieve it?

5 ANSWER: Yes.

6 QUESTION: So that wasn't visible  
7 then to the naked eye if somebody went in the  
8 room initially; is that correct?

9 ANSWER: No, sir.

10 QUESTION: Only by pulling up the  
11 blinds were you able to see it?

12 ANSWER: Yes, sir.

13 QUESTION: When you examined the  
14 knife, did it ever appear to have any  
15 bloodstains on it at all?

16 ANSWER: No, sir.

17 QUESTION: Was there any moisture or  
18 dampness on it?

19 ANSWER: No, sir.

20 Now, if that knife had to have been used in this  
21 case, and it has been washed off, there would have been --  
22 there would have been moisture stains, there would have been

23 some evidence that that was the knife used.

24 It wasn't even visible to the naked eye when Nadey

25 took her into that bedroom. Yet the defense wants us to

26 think that we are afraid to test it. But it gets better.

27 But it gets better.

28 This was Donald Fermenick, and I think it was

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1 redirect examination.

2 I'm sorry. It was cross-examination by Mr. Horowitz.

3 QUESTION: And when did you touch

4 that knife?

5 ANSWER: Two days prior to the

6 incident, the 16th.

7 QUESTION: And how did you handle the

8 knife? Did you touch the blade part and the

9 handle, one or the other?

10 ANSWER: I don't remember. I just

11 remember being a little surprised that I

12 found it, and I just set it -- I set it up

13 above where it couldn't be touched.

14 And then we go to Sergeant Taranto.

15 QUESTION: Okay. Was there any  
16 reason that that knife was not processed for  
17 fingerprints?

18 ANSWER: Yes.

19 QUESTION: What was the reason?

20 ANSWER: I received a call, as best I  
21 can recall, from Technician Nice telling me  
22 there was a knife there. I told her I'd come  
23 down, I'd take a look at it. I did respond  
24 and looked at it. She had told me on the  
25 phone that she discovered this knife on a  
26 window sill behind some closed venetian  
27 blinds in the bedroom where the assault  
28 occurred and that she did not believe it to

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1 be involved, that there was dust around the  
2 knife and some dust on the knife. It looked

3       like it had been there for some time, so I  
4       responded and looked at it. I agreed with  
5       her assessment, and I told her to, aside from  
6       that, collect it and preserve it in the event  
7       that we ever wanted to proceed to process it  
8       at a later time. And that was done to my  
9       knowledge.

10       Mr. Horowitz would have you think that we are afraid  
11 to test that knife.

12       Well, you know what?

13       You know, you don't stoop to trifles. You don't test  
14 something you know darn well isn't going to be fruitful. And  
15 if there is doubt about that knife and it had been there for  
16 a while, why go through the futility of doing it?

17       But Mr. Horowitz claims that the police were afraid  
18 to do it. But that's just a smoke screen, a red herring  
19 thrown out for you, hoping you'll bite on it to confuse you.  
20 But it truly is a non-issue.

21       Now, Mr. Horowitz really doesn't like to -- or  
22 doesn't like Sharon Smith at all. In fact, Mr. Horowitz, the  
23 self-anointed DNA expert, the self-anointed criminalistic

24 expert, the self-anointed computer expert, errs a little too

25 much in his own background check on people.

26 Do you remember this little gem? Do you remember

27 this little gem?

28 This was Sharon Smith on cross-examination.

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1 QUESTION: And what was the nature of

2 the error that you made?

3 ANSWER: One of them was a clerical

4 error. It was a typo on a reported result.

5 QUESTION: Okay. Okay. And the

6 other?

7 ANSWER: One of them was a mistype on

8 one of the enzymes that we type as a genetic

9 marker that can be typed in blood. The

10 actual sample was a rare type that we hadn't

11 seen before, and we miscalled it.

12 QUESTION: And the Alan Keel

13 incident, do you recall that Alan Keel mixed

14 two samples together, got the wrong result,  
15 and then you reviewed his results and okayed  
16 them?

17 ANSWER: I've never worked with Alan  
18 Keel.

19 QUESTION: Didn't Alan Keel work with  
20 your lab when your name was Brinkley?

21 ANSWER: Alan Keel has never worked  
22 in the Alameda County Laboratory.

23 Does this mean that Mr. Horowitz has failed his own  
24 proficiency test in getting the facts straight? Where did  
25 that little gem come from?

26 He is in error, and that is not the first time.

27 He makes the bald assertion that Sharon Smith lied,  
28 she contaminated the rectal swabs with Nadey's blood, and at

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1 one point in time, quote, "there was lots of blood being  
2 moved around by this infamous woman. Swabs, whole blood,  
3 slides were open together and hence contamination."



4 Oh, really?

5 This was cross-examination -- direct examination by  
6 me of Ms. Sharon Smith. Sharon Smith. I'm sorry.

7 QUESTION: I don't know if I  
8 understood you correctly on one of the  
9 answers you gave.

10 Do you remember your  
11 cross-examination?

12 You indicated that when the vaginal  
13 slides of Terena Fermenick were on the bench  
14 that you were working on, you then went, you  
15 left that, and did some work on the blood of  
16 Donald Fermenick.

17 Do you recall that series of questions?

18 ANSWER: Are you talking about the  
19 vaginal slides specifically?

20 QUESTION: Yes. Mr. Horowitz asked  
21 you a question, did you have the slide of one  
22 person and the whole blood of another person  
23 working at the same time on the same bench?

24 My question to you is did that occur?

25 ANSWER: That would not occur. The

26 liquid blood samples are examined in a room  
27 that's separate from the other examinations.  
28 Those are done in a different room.

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1 QUESTION: So even though you might  
2 be working on slides of one person, the whole  
3 blood of another, this would be in a separate  
4 room that you were doing these examinations?  
5 Would that be fair?

6 ANSWER: That's correct.  
7 This is Mr. Horowitz on his cross-examination.

8 QUESTION: So what happens to the  
9 butcher paper?

10 ANSWER: It gets thrown in the trash  
11 if it's not contaminated, just folded up and  
12 put it in the trash.

13 QUESTION: Trash next to your work  
14 area?

15 ANSWER: I think one thing that we --

16 I think we need to make clear that I have  
17 separate work areas for this work. The blood  
18 typing is done in one room, the evidence  
19 examinations are done in a second room, and  
20 the microscope where the semen stains are  
21 looked at is done in a third room.  
22 Now, where is all this contamination coming from,  
23 this evil, vile, lying purging criminalist? Defense spin?  
24 I just read her testimony. A lot different than what  
25 Mr. Horowitz told you.  
26 Let's put this contamination defense garbage to bed  
27 once and for all.  
28 Now, Mr. Horowitz made another attempt to spin a tail

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1 from actual evidence.

2 Remember his first question to Steve Myers on  
3 cross-examination?

4 This was his first question out of his mouth to Steve  
5 Myers.

6           QUESTION: Mr. Myers, science, kind  
7           of a crude expression, but have you ever  
8           heard of the expression garbage in and  
9           garbage out?

10          ANSWER: I heard it in the Simpson  
11          trial.

12          QUESTION: All right. So basically  
13          if you were given samples that were  
14          contaminated or otherwise inappropriately  
15          altered, you would come up with the same  
16          results that you did in this case; isn't that  
17          right?

18          ANSWER: Well, we have to remember  
19          that there are different areas of  
20          contamination. In this case, in specific, we  
21          are dealing with semen, and if you were to  
22          contaminate semen with saliva, for example,  
23          then the semen, the sperm profile, would  
24          still be from the sperm. The non-sperm  
25          saliva would go to the non-sperm.

26          QUESTION: Are you saying you can't

27 contaminate semen with another bodily fluid?

28 ANSWER: Saliva, urine, it's not

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1 going to work. It's not going to work.

2 Here was redirect examination.

3 QUESTION: How would you contaminate  
4 a sperm fraction if you so desired?

5 ANSWER: Again, as long as separation  
6 is complete, really the only way to  
7 contaminate a sample prior to extraction  
8 would be to add sperm.

9 And then I asked him:

10 QUESTION: Do you have in your  
11 laboratory as a matter of course little vials  
12 of sperm that you can contaminate samples  
13 that you have in your lab?

14 ANSER: No, we don't keep that.

15 So, how are you sitting there going to contaminate  
16 semen with any other bodily fluid?

17 It can be extracted, and the hard tough sperm is

18 going to be left.

19 You cannot contaminate it unless you want to

20 contaminate it with sperm, and I don't think the state DOJ

21 lab is acting as a sperm bank.

22 I want to point out some of Mr. Horowitz's quotes

23 regarding the DNA, and I'll put this dead horse to sleep once

24 and for all.

25 Here are some of the things he said to you:

26 "I have a problem of accepting RFLP."

27 Well, that is not his prerogative.

28 Another quote, "The only person catching these

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1 mistakes is me."

2 Quote, "I'm telling you that the RFLP results are not

3 real and that you were bamboozled."

4 "I'm telling you of all the harm that Sharon Smith

5 did."

6 I think you get the idea. He is arguing to you. He

7 is not doing that as an attorney. He is testifying as if he  
8 were the expert. It's just amazing. Like they say, a little  
9 knowledge is a dangerous thing.

10 He is saying things to you as if they were proven  
11 facts, and yet he's admitted they are just his theories.

12 Now, do you recall what he told us about the law  
13 enforcement bias that Mr. Myers has?

14 Bias, law enforcement.

15 This was redirect examination.

16 QUESTION: Sir, from the years 1992  
17 to '95, before you began any work in this  
18 case whatsoever, how many people were  
19 suspects in a case that you were working on?  
20 I'm talking -- strike that, I'm talking DNA.

21 ANSWER: In cases that have calendar  
22 years '92 through '95, I worked on cases that  
23 involved approximately a total of 80  
24 suspects.

25 Remember this?

26 80 suspects.

27 QUESTION: And because you're a law  
28 enforcement agency representative, sir, did

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1       you make inclusions of all 80 as being  
2       suspects as including them in your reference  
3       group?

4             ANSWER: No. I excluded  
5       approximately 60 of them.

6             QUESTION: So three out of four  
7       people that you were looking at evidence on  
8       through your work were excluded in a criminal  
9       matter; is that correct?

10            ANSWER: Correct.

11       Boy, there is a big time bias, huh?

12       Three guys out of four that he looked at in cases  
13 that he worked prior to this one he excluded.

14       Where is this pervasive law enforcement bias?

15       You remember his testimony. I'd much rather find an  
16 exclusion. It makes my life a whole lot more simple.

17       And now you know why.

18       Now, the defense makes all of these allegations



19 regarding DNA: It's contaminated. It's got poor databases.

20 It's got faulty machines. Myers only has a master's degree

21 (sic) and on and on and on.

22 But what do we know? What do we know?

23 One thing we do know is that they have hired their

24 own expert.

25 Remember the testimony?

26 One Dr. Edward Blake, and he has access to all of

27 Steve Myers' work, including his notes and the evidence. If

28 Myers is wrong in anything he has done, then they certainly

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1 would have picked up on it and retested the evidence to

2 exclude Mr. Nadey.

3 Wouldn't they? Isn't that right?

4 You've got your own expert. You have access to all

5 of Myers' lab notes, as Mr. Horowitz had. Certainly they

6 shared them with their expert.

7 Why then didn't we see any defense expert here to say

8 that Steve Myers was wrong or to show by their own expert,

9 the famous Dr. Blake -- not master (sic), as Mr. Myers was,  
10 but a doctor -- why didn't they call him to say that Myers is  
11 wrong and that we've got the wrong guy; Nadey is excluded?

12 And you all know the answer to that. You all know  
13 the answer. They can't.

14 Let's look at the testimony relative to this issue.

15 First question:

16 QUESTION: Sir, okay. We are talking  
17 about a Dr. Blake, Dr. Ed Blake. He is a  
18 Ph.D.; is that right?

19 ANSWER: Actually, he is not  
20 technically a Ph.D. I believe it's a doctor  
21 of criminalistics, what they call a D. Crim.

22 Mr. Horowitz -- this was his question and answer:

23 QUESTION: Do you have that degree?

24 This is Mr. Myers' answer: No.

25 It's already he is differentiating Ed Blake, D. Crim.  
26 as opposed to the local person with the master's (sic).

27 Okay?

28 And that was in direct response to this series of

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1 questions.

2           Question by me: Sir, did you consume  
3 all of the evidence which was sent to you for  
4 DNA testing?

5           ANSWER: No. In each case -- so for  
6 the rectal swabs, the vulva swab, the pants  
7 stains -- I make sure to leave evidence for  
8 retesting by the defense.

9           Okay.

10          ANSWER: If at all possible. And in  
11 this case for every sample there was, I  
12 believe, at least half of what was present  
13 when I received the evidence was maintained  
14 for potential defense retesting because,  
15 really, the best way to take care of any risk  
16 of sample mixup is to retest the evidence,  
17 and so we always try and gear towards having  
18 that available for the defense.

19          QUESTION: So if the defense for

20 Mr. Nadey wished to hire another lab to do  
21 their own independent testing, there is  
22 enough evidence remaining so that they can do  
23 that?

24 ANSWER: Yes. There are labs  
25 throughout the state, well, throughout the  
26 state and the country, that are capable of  
27 recreating every test that we performed in  
28 this case that could be hired.

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1 QUESTION: Did you as a matter of  
2 fact provide your entire work notes --  
3 And there was an objection by Mr. Horowitz.

4 QUESTION: Entire work notes and  
5 copies of everything up in this case to a man  
6 described as Dr. Edward Blake, who was hired  
7 by the defense in this case?

8 Again, Mr. Horowitz posed an objection. It was  
9 overruled.

10 THE WITNESS: Copies of all my notes  
11 were provided to Dr. Blake of Forensic  
12 Science Associates. It's a private forensic  
13 firm in Richmond, California. He also came  
14 over to our lab and took his own photographs  
15 of photos in my notes.

16 And then I asked him:

17 Was there any correspondence between  
18 you and Dr. Blake?

19 People's Number 51. Okay.

20 This is on the letterhead of Dr. Blake's, their  
21 expert, who was hired by them:

22 On August 3rd of last year, he wrote to Steve Myers  
23 at his lab, People versus Giles Nadey.

24 And it even gives Mr. Blake's file number, 97254.

25 Okay?

26 So he's hired. There is no question about that.

27 These guys have hired a defense expert.

28 Okay?

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1 Everything is there to be retested.

2 Dear Steve:

3 There are two and possibly three  
4 additional documents needed for review of the  
5 work in the Nadey case. First the photograph  
6 was not obtained of the DQ-alpha typing  
7 strips described on page 130.

8 And he goes on and on, and he signs it.

9 If you can call me to discuss the  
10 problem, that would also be helpful.

11 Sincerely, Ed.

12 Carbon copy to Mr. Giller.

13 Gee, doesn't something strike you as really kind of  
14 funny?

15 They have all this evidence that Mr. Horowitz had,  
16 each and every page, documentation, and we get a D. Crim.,  
17 not just some master (sic), and we don't see him. And for  
18 five and a half hours Mr. Horowitz is railing on the People's  
19 contaminated evidence, on the faulty databases, calling my  
20 case garbage in and garbage out, when they've got a D. Crim.  
21 sitting there who has examined this and we don't see him.

22 Oh, my. As Dick Enberg (phonetic) said on the Wide  
23 World of Sports, "Oh, my."  
24 Why not? Why don't we see this expert?  
25 What attorneys say isn't evidence, Ladies and  
26 Gentlemen.  
27 In 1996, Mr. Horowitz says that he was only a  
28 criminalist for three years, he being Mr. Myers.

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1 Again, Mr. Horowitz fails his proficiency test for  
2 being wrong, because the question was when did you begin your  
3 work in the Department of Justice? He said since 1991.  
4 By my math -- and I certainly am not a D. Crim. --  
5 '91 to '96 is five years. But, again, Mr. Horowitz attempts  
6 to trivialize the qualifications of Mr. Myers.  
7 Mr. Horowitz tells us that Mr. Myers doesn't really  
8 understand DNA, and it's only when Mr. Horowitz explained it  
9 does it become clear. Oh, my. How the ego can embellish the  
10 facts. More defense spin.  
11 Let's take a look at this unknown donor. And I find

12 it very interesting Mr. Horowitz seems to think DNA is good  
13 enough to find an unknown donor in all of these samples, the  
14 vulva swabs. It's good enough to do that, but when it finds  
15 and points the finger of guilt to Mr. Nadey, it's flawed.  
16 It's good for finding somebody else, but it's flawed when you  
17 find my guy.

18 Well, there's a defense lawyer talking. That's just  
19 wonderful.

20 We are going to talk about this person, this unknown  
21 person who was a minor donor on the PCR vulva swabs. There  
22 is no question. I brought that out. There is a third donor,  
23 a minor donor. No question about it.

24 I asked, though, Mr. Myers a question:

25 Hypothetically, could a minor donor  
26 have been a contributor to the vulva swab  
27 if -- and I am saying only if --  
28 Mrs. Fermenick had had unprotected sex with

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1 another person?



2           ANSWER: I certainly couldn't  
3           eliminate that as a potential. That would be  
4           one way to have semen on the vulva.  
5           Okay. No question. That is a possibility. I follow  
6 it up with a second question now.

7           QUESTION: Hypothetically, sir, would  
8           another explanation be if a person has  
9           unprotected sex with a female and then  
10          another person has unprotected sex with that  
11          same female and then forcibly sodomized the  
12          victim in this case, is it possible for the  
13          transfer of sperm cells in that scenario I've  
14          just described to account for the minor  
15          donor?

16          ANSWER: I certainly couldn't  
17          eliminate that scenario.

18          I'm not really being a proponent in  
19          any scenario such as this. I know that  
20          there's an extra donor. I'm not sure how it  
21          got there, but I certainly couldn't eliminate  
22          that scenario.

23           QUESTION: So is there any other  
24 possible scenario then other than, one,  
25 contamination that you seemed to have taken  
26 by your reagent testing, two, the victim  
27 having sex with a third party who is not  
28 listed on the reference blood samples, or,

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1           three, Mr. Nadey having sex with a woman who  
2 had sex with somebody else and then he  
3 transferred this to the victim? Is there any  
4 other scenario that you can think of that  
5 would produce the unknown minor donor on the  
6 vulva swab?

7           ANSWER: Assuming this minor donor is  
8 definitely from sperm, then there aren't any  
9 other real scenarios that I can think of.

10          Well, now, doesn't that really bring into closer  
11 focus the filthy hygiene of Mr. Nadey? Doesn't that all  
12 become really relevant now? Huh?

13 We know from Nurse Wilson that some three days, three  
14 to four days prior to 1-20-96 -- so that puts us well within  
15 the day or two before that -- Mr. Nadey had a filthy,  
16 unwashed condition. And when Nadey got his blood drawn, it  
17 was filthy, it was crusty, it was unhygienic. And that is  
18 according to Nurse Wilson.

19 I guess Mr. Horowitz would have you think that he's  
20 got a bias, too.

21 Ask yourself this: You saw the thoroughness of  
22 Mr. Horowitz on his cross-examination of Mr. Myers. And he  
23 did. He put a lot of effort into that. He even found the  
24 times in the past when Mr. Myers had handling accidents in  
25 the lab. No question that was good work. That was good  
26 work.

27 Don't you think, though, if Mr. Myers ever had scored  
28 less than a hundred percent on any of these proficiency exams

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1 we would have seen it up on the board all blown up as a nice  
2 defense exhibit? Wouldn't we have seen that? Because you

3 know they went over his background real thoroughly.

4 I'm telling you why they refused to hire Ed Blake to  
5 come to court and testify.

6 One, he found no errors in Steve Myers' work, his  
7 methods, his samples, his statistical data or his results;  
8 and,

9 Two, they did not retest because then there would  
10 have been a second finger of DNA evidence of guilt pointing  
11 at Mr. Nadey.

12 That's why they didn't do it.

13 Here is something else to consider: We have all had  
14 dealings with insurance companies; right? Everybody has  
15 insurance -- home, a car, personal liability.

16 Do insurance companies just give money away? Do they  
17 just come out and hand over a couple of hundred thousand  
18 here, a couple of hundred thousand there?

19 Hey, they are in the process of making money. They  
20 are just going to give it away?

21 Right. They fight over every nickel. Every  
22 miserable little nickel. They don't give up the ghost one  
23 iota.

24 Or have you forgotten your last homeowner's claim?

25       Let's take a look at something. This is Mr. Horowitz  
26 in his cross-examination of Minister Don Fermebeck.

27               This was the Court: Did Mr. Miller  
28 also settle a part of this lawsuit?

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1               ANSWER: I believe as part of the  
2 Skyline.

3               MR. HOROWITZ: Q. Okay. And how  
4 about Harris Research, Utah Corporation, did  
5 they also settle?

6               ANSWER: Yes.

7               QUESTION: And how about Labor  
8 Connection, did they also settle?

9               ANSWER: Yes.

10              QUESTION: And, in fact, Thomas  
11 Hannigan and Celeste Hannigan also settled;  
12 right?

13              ANSWER: Yes. They are the owners of  
14 the company.

15 QUESTION: Okay. And they paid

16 \$375,000; is that right?

17 ANSWER: I don't remember who each of

18 the parties represented.

19 QUESTION: And your daughter also

20 gets payments totaling \$1789 on top of the

21 lump sum payment; is that correct?

22 ANSWER: Over the course of time, my

23 daughter -- I'm sorry.

24 QUESTION: Yes. Isn't it true that

25 in just the settlement involving you and your

26 daughter, the Skyline Chem Dry on Thomas

27 Hannigan and Celeste Hannigan and Paul Miller

28 and Pacific Shellback Corporation, there is a

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1 lump payment of \$375,000?

2 Yes. Yes.

3 Now, I don't think insurance companies are going to,

4 you know, be called the most charitable people in the world.

5 And for them to settle a claim such as that, don't you think  
6 they took a little peek at the DNA evidence in this case?

7 Huh?

8 Don't you think that they might have had somebody  
9 take a look at that and see if there is anything wrong with  
10 it so they wouldn't be shelling out those huge amounts of  
11 money?

12 Don't you think they would if they found the DNA to  
13 be in error object to it being wrong or to have any question  
14 about it? Do you think these Good Samaritans are just going  
15 to hand over that kind of money?

16 No, no.

17 So let me ask you this. If Dr. Blake isn't called to  
18 testify, the insurance companies shell out, you know, over a  
19 million dollars for the role they had in the wrongful death  
20 of Terena Fermenick, ask yourself this: Is the defense in  
21 this case smarter than all the lawyers in the insurance  
22 companies, or are they just more desperate?

23 And that's a no-brainer.

24 It's a no-brainer.

25 Mr. Horowitz wants you to disregard the RFLP, and he

26 wants you to pay more importance to the semen on the jeans.

27 Why?

28 I don't know. It hurts him. I don't know why he

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1 would want you to say ignore the jeans. That was part of the

2 RFLP.

3 How can anybody contaminate the jeans with semen

4 stains?

5 Where is Sharon Smith going to get a vial of

6 Mr. Nadey's semen?

7 How?

8 It's impossible. Those were delivered --

9 Don't forget Mr. Horowitz is a little confused upon

10 the dates on which things were received into the lab and so

11 forth and when the work was done.

12 On 1-19, after the coroner -- after the autopsy, all

13 the vulva swabs, and the jeans and everything else went to

14 the coroner's evidence locker.

15 On January 22nd of the year 1996, Taranto picked up



16 and took it down to the ACSO lab where she started work on  
17 it.

18 On 1-26, after she had done her work on it, she  
19 packaged it up -- that is the swabs, the whole blood samples,  
20 and the gauze pads that she made from the whole blood  
21 samples -- and Taranto took that back to the DOJ lab on 1-26.

22 You can look at the envelopes.

23 Okay?

24 The vulva swab envelopes, they all give the chain of  
25 custody when they got them.

26 However, she didn't work on the jeans until  
27 January 30th, four days after all of the other stuff is up in  
28 the lab in Berkeley.

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1 And then on 4-30, after she made the cutouts of the  
2 jeans -- 4-30-1996, about four months later -- that's when  
3 Steve Myers gets the jeans cutouts and then completes the  
4 RFLP.

5 Tell me how those jeans and the semen stains were

6 contaminated. Tell me how. Tell me.

7 Defense spin.

8 Basically, the defense has shown us their true

9 desperation and venom for the way they attacked Elizabeth

10 Nice.

11 Quote, "I've got it in for her."

12 Sharon Smith, a liar who deliberately contaminated

13 the evidence because she is pro law enforcement.

14 Steve Myers, a biassed law enforcement criminalist

15 who dances to whatever tune the police want him to.

16 But, you know, the one thing which really showed the

17 defense in this case and their feelings of desperation is the

18 manner in which they treated Donald Fermenick, the minister

19 who found his wife, his companion, sodomized and murdered.

20 Remember this low point of the trial?

21 Perhaps Mr. Horowitz had it in for the minister, too,

22 just like he did Elizabeth Nice.

23 QUESTION: Did you ever tell anybody

24 that the dagger that was found in the house

25 was one of your cousin's toy knives?

26 ANSWER: During the statement?

27 QUESTION: At any time?

28 ANSWER: I may have in the last three

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1 years at some point. I didn't know at that  
2 point until somebody told me.

3 QUESTION: But did you consider it a  
4 toy knife?

5 ANSWER: No.

6 QUESTION: Did you ever call it a toy  
7 knife?

8 ANSWER: No.

9 QUESTION: Well, let me ask you was  
10 the following question and was the following  
11 answer given?

12 Question directed to you: What is  
13 that?

14 This is at the Grand Jury.

15 That is one of my cousin's toy  
16 knives. Actually, it's not a toy, but he  
17 collects knives.

18 That was the one that was left in the house at  
19 Alameda.

20 QUESTION: Do you recall -- do you  
21 recall being asked that question and giving  
22 that answer?

23 ANSWER: I don't recall being asked  
24 that question or giving that answer.

25 QUESTION: Sir, you had an interest  
26 in establishing that Mr. Nadey was  
27 responsible for your wife's death  
28 financially, didn't you?

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1 ANSWER: I wasn't trying to establish  
2 anything. I just wanted to make sure the  
3 person who killed my wife is brought to  
4 justice.

5 QUESTION, Mr. Horowitz: But, in  
6 fact, you received a million dollars or so in  
7 settlement of your civil lawsuit against the

8 Skyline Chem Dry, against Paul Harris, and  
9 the various entities having financial  
10 relationships with the Chem Dry Company; is  
11 that correct?

12 ANSWER: That's correct

13 QUESTION: And, in fact, you could  
14 not have won that lawsuit if Mr. Nadey was  
15 not responsible for your wife's death; isn't  
16 that right?

17 ANSWER: That's correct.

18 What has that lawsuit got to do with anything in this  
19 case?

20 Is he trying to show that he was happy that Terena  
21 Fermenick died and he got some financial benefit for having  
22 his wife and companion killed?

23 What is the relevance of that?

24 But they just made him endure a little bit more  
25 grief.

26 What, are they going to try and pin this thing on  
27 him?

28 They are -- if they are, it sounds like they changed

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1 their trial strategy in midstream.

2 Okay. Enough of the DNA. Enough for the spin

3 doctoring. Let's forget that.

4 Let me tell you what the defense did not tell you,

5 which proves the defendant is guilty beyond a reasonable

6 doubt.

7 Okay?

8 First of all, the defendant lies to Sergeant Taranto

9 about his jacket.

10 Did he lie to the police?

11 You betcha he did. You betcha.

12 Here is what he told Sergeant Taranto, okay, about

13 the jacket. This was People's 38A, the transcript of the

14 tape. This is Taranto questioning him.

15 QUESTION: Do you remember what the

16 weather was like then?

17 ANSWER: It was raining.

18 QUESTION: Okay. And how were you

19 dressed yesterday?

20 Now, don't forget this is on the 19th. He is brought  
21 into the department in the afternoon when he and Paul Miller  
22 came in together. Detective Miller talked to Paul Miller.  
23 Sergeant Taranto talked to Giles Nadey.

24 QUESTION: And how were you dressed  
25 yesterday?

26 ANSWER: I was dressed in blue pants,  
27 white company shirt, Skyline Chem Dry jacket.

28 QUESTION: Okay.

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1 QUESTION: Is that the same thing  
2 you're wearing now?

3 ANSWER: Yes.

4 QUESTION: Okay.

5 ANSWER: With the exception of the  
6 jacket.

7 QUESTION: Okay. With the exception  
8 of the jacket.

9 QUESTION: And the jacket is --

10 And here is Mr. Nadey's description of the Skyline

11 Chem Dry jacket he tells Taranto he was wearing on 1-18-96.

12 And the jacket is --

13 QUESTION: And the jacket is --

14 ANSWER: -- is blue and it has Skyline

15 Chem Dry on the back and on the front.

16 Okay. Okay. That's what he tells Taranto. Okay.

17 That's real good.

18 Now, let's see how his boss describes the attire of

19 Mr. Nadey.

20 QUESTION: Do you remember what

21 clothing Mr. Nadey was wearing on that

22 January 18th date as he departed for Alameda?

23 ANSWER: Yes. He was wearing white

24 canvas shoes, I remember that, blue pants,

25 like Biggie work pants, and then a white work

26 shirt and, well, that we supply, and a

27 raincoat, as well.

28 QUESTION: Can you describe this

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1 coat?

2 ANSWER: It was old, yellow, raggedy  
3 raincoat, falling apart.

4 QUESTION: And he definitely had that  
5 with him as he departed for Alameda?

6 ANSWER: Yes.

7 QUESTION: What occurs when one of  
8 your employees is through with their job?

9 ANSWER: You call the office when  
10 you're complete. After you do the walk  
11 through with the customer, explaining what  
12 didn't come out of the carpet or whatever,  
13 you call the office when you are completed  
14 with your job and let them know you are done  
15 and you're on your way back or whatever.

16 QUESTION: Were you back at the  
17 office at 4:00 o'clock that afternoon?

18 ANSWER: Yes, I was.

19 QUESTION: And did you receive a  
20 phone call from Mr. Nadey about that time?

21 ANSWER: Not at 4:00 o'clock, no.

22 QUESTION: Did you receive a phone

23 call from him at 4:15?

24 ANSWER: No.

25 QUESTION: Did you receive a phone

26 call from him at 4:30?

27 ANSWER: Right around 4:30, yes, sir.

28 QUESTION: And where was it that you

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1 saw him after that?

2 ANSWER: At the office. He returned

3 to the office.

4 QUESTION: Okay. And when you saw

5 him at this time, did he have his raincoat

6 with him?

7 ANSWER: Not at that time, no

8 QUESTION: Did you ever see that

9 raincoat again?

10 ANSWER: No, sir.

11 QUESTION: Did you ever ask him where  
12 is your raincoat?

13 ANSWER: I believe, yes.

14 QUESTION: And what did he respond?

15 ANSWER: He left it at the Jack in  
16 the Box restroom.

17 QUESTION: I'm sorry?

18 ANSWER: Jack in the Box restroom in  
19 Oakland.

20 QUESTION: He left it at a Jack in  
21 the Box restaurant in Oakland?

22 ANSWER: Yes.

23 The Court asked a question: Can you  
24 keep your voice up?

25 And Mr. Miller says: He said he left  
26 it at the Jack in the Box restroom in  
27 Oakland.

28 ANSWER: Yes, sir.

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1           QUESTION: At some point in time  
2           after the 18th, were you and Mr. Nadey  
3           summoned to go to the Alameda Police  
4           Department by Sergeant James Taranto?

5           ANSWER: Yes, the following day, the  
6           19th.

7           Okay. Okay. Okay.

8           QUESTION: And how did you get to  
9           Alameda PD at that time?

10          ANSWER: I drove Albert. Albert and  
11          I drove together to Alameda.

12          QUESTION: And on the way over, did  
13          Mr. Nadey say anything to you about the job  
14          that he had done the day before?

15          ANSWER: That she was a nice lady,  
16          nothing out of the ordinary.

17          QUESTION: Did you ask Mr. Nadey  
18          about his raincoat?

19          ANSWER: Yes, I believe I did.

20          QUESTION: And did he say where it  
21          was lost?

22           ANSWER: At the Jack in the Box on  
23           East 14th. He went to the restroom and left  
24           it hanging on the hook.

25           QUESTION: Now, you've identified a  
26           procedure required by a call when they are  
27           complete with a job?

28           ANSWER: Yes.

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1           QUESTION: Is the Jack in the Box --  
2           remember he told you he left his raincoat on  
3           the way back to Emeryville?

4           ANSWER: Not on the way back, sir,  
5           no.

6           QUESTION: Let me ask you. Is 2424  
7           East 14th the most direct way back to  
8           Emeryville?

9           ANSWER: No, not the most direct way.

10          QUESTION: Did he say where he was  
11          calling from when he made the phone call at

12 4:30 or so?

13 ANSWER: By Jack in the Box.

14 Now, this -- he is asking him, going over I lost my

15 rain coat. And Mr. Miller knows the kind of raincoat it is.

16 And yet right after they get there, Mr. Nadey tells Sergeant

17 Taranto that the coat he had on, the jacket, was a Skyline

18 Chem Dry jacket: It's blue and it's got Skyline Chem Dry on

19 the back and the front.

20 Why?

21 I'll tell you why. He obviously dumped that coat

22 somewhere in Oakland and not Alameda. Nadey doesn't know if

23 that coat was found, so he has to disavow any knowledge of

24 any coat being found with blood on it, ergo, lie. He lied to

25 Taranto about the attire he was wearing because he doesn't

26 know if that coat was found or not.

27 And that's real cute when he goes some two miles out

28 of his way to make a phone call to his office, passing up

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1 those 18 other public telephones, two gas stations, and then

2 many restaurants to make a phone call to do his duty. That  
3 is a crock. He's got to get out of Alameda right now, and he  
4 doesn't know when the body is going to be found, and he  
5 doesn't want to be stopped with that rain jacket with the  
6 blood on it. That's why he lies to Taranto.

7 Now, the Court is going to tell you as a jury  
8 instruction about consciousness of guilt.

9 If you find that before the trial the defendant made  
10 a willfully false or deliberately misleading statement  
11 concerning the crime for which he is now being tried, you may  
12 consider that statement as a circumstance tending to prove a  
13 consciousness of guilt. However, that conduct is not  
14 sufficient by itself to prove guilt, and its weight and  
15 significance, if any, are for you to decide.

16 Another real interesting part of this trial came out.  
17 I don't know how many people picked up on it. I didn't  
18 initially until I started looking at the transcripts.

19 But remember that work order, People's 37A and 36A,  
20 the yellow one that was found?

21 This is 36A. He compared it. It was the same as the  
22 original that was turned in with the check, carpets cleaned,  
23 area: The living room, the dining room, and the master

24 bedroom.

25 That work order was completed prior to Terena getting  
26 back to Walnut Street, and all that was needed was for her to  
27 sign that form and pay with the check and depart. That's why  
28 she left her baby in that Saturn car of hers. It was going

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1 to be a quick pay and go.

2 Remember testimony from Mr. Fermenick?

3 She would never leave that baby alone. Just for the  
4 blink of an eye. It was going to be a quick pay and go.

5 All right. Here is where Mr. Nadey makes another  
6 major blunder.

7 Okay?

8 Now, you're all looking at me like what in God's name  
9 are you talking about?

10 He was through with that cleaning job at around 3:07,  
11 3:08, because that's when he made those 1-900 phone calls.  
12 He is trying to get a little sex in his life. He is trying  
13 to call those sex talk phone numbers while at the church



14 house.

15 So where do you think his mind is from 3:07 to 3:08

16 on when those phone calls are made?

17 He's planned this sexual assault from the get go.

18 Okay?

19 He knows she is due to return around 4:00 o'clock.

20 And do you remember what the boss said?

21 This job should have taken about an hour. And he

22 said he started about 2:06.

23 Remember that?

24 The job should have taken an hour.

25 And we find about 3:07, after the job was completed,

26 he is making those phone calls.

27 Okay. That's uncontroverted. You've got those phone

28 records. They're there. They're there.

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1 The job should have taken an hour, and at 3:07 he is

2 making the phone calls. So he's got sex on his mind right at

3 that point. He is working up a sexual appetite.

4 Now, he's checked out the house and the location that  
5 he's planned to do it in, and he discovered the master  
6 bedroom. He also knows --

7 And I just read you the passage that he is supposed  
8 to phone in the office as soon as possible. So he needs to  
9 do something. He needs to do something to account for the  
10 unexpected delay. So he includes on the work order the  
11 master bedroom.

12 But you know what? Guess what?

13 There is no rug on the floor of the master bedroom.

14 Okay?

15 Here is the master bedroom right here.

16 See this? See that?

17 That's the master bedroom. Here is the left side of  
18 the bed where I said she slid off on the left side and walked  
19 and left the blood on the floor.

20 Right?

21 And then she goes out into the hallway, and she goes  
22 on down.

23 There is the master bedroom.

24 Okay?

25 Ladies and Gentlemen, this is the room that that  
26 filthy pervert with the tattoos all over his arms and hands  
27 says he cleaned. He cleaned this, and he billed her for it.  
28 You tell me how he cleaned this. He put it right on the work

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1 order that was prepared before she even got back, and he is  
2 telling us that he cleaned the master bedroom.

3 And you know what?

4 That ruse, it almost worked.

5 Remember the cross-examination of Paul Miller, the  
6 defendant's boss, by Mr. Giller?

7 I won't forget it, and I'm going to read it to you so  
8 you don't forget it now, either.

9 This is cross-examination of Mr. Miller.

10 Okay?

11 Now don't forget he said this job should have taken  
12 an hour.

13 QUESTION: Okay. Now in this job

14 originally, it was your understanding that

15 that job small, just a living room, dining

16 room, and hallway?

17 ANSWER: That's correct.

18 QUESTION: Okay. So you thought that

19 job should take maybe like a little over an

20 hour; right?

21 ANSWER: Yes. If that, yes.

22 QUESTION: But as it turns out and as

23 you can see from the work order, that he did

24 more than was originally contemplated?

25 ANSWER: Yes.

26 QUESTION: He ended up doing the

27 living room, dining room, and a master

28 bedroom?

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1 ANSWER: That's correct.

2 QUESTION: Correct?

3 ANSWER: That's correct.

4 QUESTION: So that job would take a

5 much, you know, longer period of time,  
6 certainly, than what you had originally  
7 contemplated?

8 ANSWER: Yes.

9 QUESTION: All right. And as a  
10 matter of fact, the master bedroom wasn't  
11 included in the original thinking, but it  
12 turns out that not only was it included but  
13 that was by far the larger area?

14 ANSWER: That's true.

15 QUESTION: Yeah. That was the total  
16 job that was how many square feet?

17 ANSWER: 528.

18 QUESTION: Okay. But the master  
19 bedroom itself was 288, is it?

20 ANSWER: 86. 266 feet.

21 QUESTION: So that certainly would  
22 have taken longer than you thought  
23 originally?

24 ANSWER: Yes.

25 What is going on here, Ladies and Gentlemen?

26 He cleaned the master bedroom?

27 He makes this out before she even gets back.

28 And then he drags her in there to the master bedroom

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1 where he knows the bed is and does the dirty deed.

2 And then he has the gall to put down that he cleaned

3 this room which has got no rugs on the floor and he even

4 charged her for it.

5 What a hero.

6 You starting to get sick?

7 In case there is no doubt about that being the master

8 bedroom, let's go back to Elizabeth Nice. This was my direct

9 examination.

10 QUESTION: Okay. Showing you what's

11 been marked previously as People's 26, would

12 you look at that, please?

13 ANSWER: Yes, sir. This is a knife

14 and a sheath that was photographed on the

15 west window sill of the master bedroom and

16 the structure at 1515 Walnut.

17           QUESTION: Now this master bedroom,  
18       is that the bedroom portrayed in People's 9,  
19       the bedroom over there marked as number 5?  
20       And if you recall, that was the room that Eileen  
21       Bartosz said where the bow is found.  
22       Who is kidding who?  
23       He puts down he cleans the rugs in a room with no  
24       rugs. Give me a break.  
25       He lies to the cops. We got the DNA.  
26       Gee, you starting to see a little finger of guilt  
27       saying that guy right there? Is that a no brainer for you?  
28       Remember consciousness of guilt. He didn't testify,

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1   but he lied on that work order. He didn't clean that master  
2   bedroom.  
3       He is guilty beyond not only a reasonable doubt but  
4       beyond any shadow of a doubt. He is the last to see her  
5       alive. The victim was sodomized, and sodomy is his  
6       specialty. He lied about cleaning the master bedroom, and

7 that lie was to cover up the extra time he would be away from  
8 calling in to his boss.

9 He lies about the rain jacket to the police. Because  
10 he was known to the sexual assault victim, he has to kill her  
11 to prevent her from going to the police. That is his motive.  
12 If he were just some kind of rapist unknown, he would have  
13 done it and gone on his way and there would have been no  
14 evidence. But he's got to kill her because she knows who it  
15 is.

16 The DNA is one in 32 billion. Rectal swabs and  
17 jeans.

18 If you don't like it, call your own defense expert to  
19 do it. But, whoops, they don't want to do that, and they  
20 don't want to retest it because they know Myers is correct,  
21 and they don't want another DNA finger of guilt pointing  
22 their way.

23 We have the now uncontroverted testimony of Steven  
24 Myers when they have hired an expert and refused to call him.  
25 That makes his testimony uncontroverted.

26 Once again, Ladies and Gentlemen, the unlawful  
27 killing of a human being, whether intentional, unintentional,



28 or accidental, which occurs during the commission of the

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1 crime of sodomy is murder of the first degree when the  
2 perpetrator had the specific intent to commit the crime of  
3 sodomy. The specific intent to commit sodomy and its  
4 commission must be proven beyond a reasonable doubt.

5 And to find the special circumstance case involved in  
6 these instructions to be true, the murder in the commission  
7 of the crime of sodomy, it must be proved that the murder was  
8 done while the defendant was engaged in a sodomy, the murder  
9 was committed during the immediate flight after the  
10 commission of a sodomy, or it was committed in order to carry  
11 out, advance the commission of the crime of sodomy, or to  
12 facilitate the escape therefrom or to avoid detection.

13 We have proven each and every one of those elements  
14 of the crime that Mr. Horowitz said that I must prove.

15 Ladies and Gentlemen, this is a first-degree felony  
16 sodomy murder.

17 People's 8 and 11. It's ugly. It's brutal. It's

18 unpleasant. It's not the nicest thing you are ever going to  
19 see. That was done by that tattooed man. No questions  
20 asked.

21 So not only does the DNA point the finger of guilt to  
22 him, but the lying to the police about the jacket, the work  
23 order falsification, everything else shows us that the  
24 defendant is the sodomite and the killer.

25 I'm asking you all after you get instructed by the  
26 Court to go upstairs and do your duty and find this hideous,  
27 depraved pervert guilty of these crimes as charged. The  
28 evidence is just overwhelming.

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1 Thank you.

2 THE COURT: All right. Thank you, Mr. Anderson.

3 All right. Ladies and Gentlemen of the Jury, I'm  
4 going to give you a ten-minute recess, and then I'm going to  
5 bring you back down and I'm going to instruct you and submit  
6 the case to you.

7 The instructions will take maybe a half an hour, and

8 we'll get the case to you today.

9 So we'll send you upstairs. We'll call you back down  
10 at ten minutes to 3:00.

11 Remember the admonition I have heretofore given you.

12 (Recess.)

13 THE COURT: All right. This is the case of People  
14 versus Nadey.

15 Let the record show the defendant is present with  
16 counsel and the jury is present in the jury box along with  
17 the alternates.

18 And, Ladies and Gentlemen of the Jury, I'm going to  
19 read to you these jury instructions now. I don't think you  
20 are going to have any probable understanding these  
21 instructions.

22 Ken, would you move this thing out of the way,  
23 please?

24 Just for your convenience, I've separated these  
25 instructions into three parts.

26 The first part are the introductory instructions  
27 which deals -- that deals with the way you are to evaluate  
28 the evidence, give you some tips, includes how you should

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1 evaluate the evidence, you are the decider of what took place  
2 in this case in any event.

3 And then the middle part, I've defined for you  
4 homicide, the definition of sodomy, and so forth.

5 And then in the final part are the -- the remaining  
6 instructions with -- tells you how you should go about your  
7 deliberations upstairs.

8 And so they are in three parts, so if you want to  
9 look at something, you'll know -- sort of have a clue.

10 Now just sit back now. I'll read these to you now.  
11 I should be done, I suspect, right around 3:30.

12 Okay?

13 Members of the Jury:

14 You have heard all the evidence and the arguments of  
15 the attorneys, and now it is my duty to instruct you on the  
16 law that applies to the case.

17 The law requires that I read the instructions to you.

18 You will have these instructions in written form in the jury  
19 room to refer to during your deliberations.

20 You must base your decision on the facts and the law.

21 You have two duties to perform.

22 First, you must determine what facts have been proved

23 from the evidence received in the trial and not from any

24 other source.

25 A "fact" is something proved by the evidence or by

26 stipulation.

27 A "stipulation" is an agreement between attorneys

28 regarding the facts.

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1 Second, you must apply the law that I state to you to

2 the facts as you determine them and in this way arrive at

3 your verdict and any finding you are instructed to include in

4 your verdict.

5 You must accept and follow the law as I state it to

6 you regardless of whether you agree with the law. If

7 anything concerning the law said by the attorneys in their

8 arguments or at any other time during the trial conflicts

9 with my instructions on the law, you must follow my

10 instructions.

11       You must not be influenced by pity for or prejudice  
12 against the defendant. You must not be biased against a  
13 defendant because he has been arrested for this offense,  
14 charged with a crime, or brought to trial. None of these  
15 circumstances is evidence of guilt, and you must not infer or  
16 assume from any or all of them that a defendant is more  
17 likely to be guilty than not guilty.

18       You must not be influenced by mere sentiment,  
19 conjecture, sympathy, passion, prejudice, public opinion, or  
20 public feeling. Both the People and the defendant have a  
21 right to expect that you will conscientiously consider and  
22 weigh the evidence, apply the law, and reach a just verdict  
23 regardless of the consequences.

24       If any rule, direction, or idea is repeated or stated  
25 in different ways in these instructions, no emphasis is  
26 intended, and you must not draw any inference because of its  
27 repetition. Do not single out any particular sentence or any  
28 individual point or instruction and ignore the others.

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1 Consider the instructions as a whole and each in light of all  
2 the others.

3 The order in which the instructions are given has no  
4 significance in their relative importance.

5 Statements made by the attorneys during the trial are  
6 not evidence. However, if the attorneys have stipulated or  
7 agreed to a fact, you must regard that fact as proven as to  
8 the party or parties making the stipulation.

9 If an objection was sustained to a question, do not  
10 guess what the answer might have been. Do not speculate as  
11 to the reason for the objection. Do not assume to be true  
12 any insinuation suggested by a question asked a witness. A  
13 question is not evidence and may be considered only as it  
14 helps you to understand the answer.

15 Do not consider for any purpose any offer of evidence  
16 that was rejected or any evidence that was stricken by the  
17 Court. Treat it as though you had never heard of it.

18 You must decide all questions of fact in this case  
19 from the evidence received in this trial and not from any  
20 other source. You must not independently investigate the

21 facts or the law or consider or discuss facts as to which  
22 there is no evidence. This means, for example, that you must  
23 not on your own visit the scene, conduct experiments, or  
24 consult reference works or persons for additional  
25 information.

26 You must not discuss this case with any other person  
27 except a fellow juror and then only after the case is  
28 submitted to you for your decision and only when all 12

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1 jurors are present in the jury room.

2 Evidence consists of testimony of witnesses,  
3 writings, material objects, or anything presented to the  
4 senses and offered to prove the existence or nonexistence of  
5 a fact.

6 Evidence is either direct or circumstantial.

7 Direct evidence is evidence that directly proves a  
8 fact. It is evidence which by itself, if found to be true,  
9 establishes that fact.

10 Circumstantial evidence is evidence that, if found to



11 be true, proves a fact from which an inference of the  
12 existence of another fact may be drawn.

13 An inference is a deduction of fact that may  
14 logically and reasonably be drawn from another fact or group  
15 of facts established by the evidence.

16 It is not necessary that facts be proved by direct  
17 evidence. They may be proved, also, by circumstantial  
18 evidence or by a combination of direct and circumstantial  
19 evidence. Both direct and circumstantial evidence are  
20 acceptable as a means of proof. Neither is entitled to any  
21 greater weight than the other.

22 However, a finding of guilt as to any crime may not  
23 be based on circumstantial evidence unless the proved  
24 circumstances are not only, one, consistent with the theory  
25 that the defendant is guilty of the crime, but, two, cannot  
26 be reconciled with any other rational conclusion.

27 Further, each fact which is essential to complete a  
28 set of circumstances necessary to establish the defendant's

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1 guilt must be proved beyond a reasonable doubt. In other  
2 words, before an inference essential to establish guilt may  
3 be found to have been proved beyond a reasonable doubt, each  
4 fact or circumstance on which the inference necessarily rests  
5 must be proved beyond a reasonable doubt.

6 Also, if the circumstantial evidence as to any  
7 particular count permits two reasonable interpretations, one  
8 which of which points to the defendant's guilt and the other  
9 to his innocence, you must adopt that interpretation which  
10 points to the defendant's innocence and reject that  
11 interpretation which points to his guilt.

12 If, on the other hand, one interpretation of the  
13 evidence appears to you to be reasonable and the other  
14 interpretation to be unreasonable, you must accept the  
15 reasonable interpretation and reject the unreasonable.

16 If you find that before this trial the defendant made  
17 a willfully false or deliberately misleading statement  
18 concerning the crimes for which he is now being tried, you  
19 may consider that statement as a circumstance tending to  
20 prove a consciousness of guilt. However, that conduct is not  
21 sufficient by itself to prove guilt, and its weight and  
22 significance, if any, are for you to decide.

23 Certain evidence was admitted for a limited purpose.  
24 At the time this evidence was admitted, you were instructed  
25 that it could not be considered by you for any purpose other  
26 than a limited purpose for which it was admitted. Do not  
27 consider this evidence for any purpose except the limited  
28 purpose for which it was admitted.

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1 Neither side is required to call as witnesses all  
2 persons who may have been present at any of the events  
3 disclosed by the evidence or who may appear to have some  
4 knowledge of these events.

5 Neither side is required to produce all objects or  
6 documents mentioned or suggested by the evidence.

7 Evidence that at some other time a witness made a  
8 statement or statements that are inconsistent or consistent  
9 with his or her testimony in this trial may be considered by  
10 you not only for the purpose of testing the credibility of  
11 the witness but also as evidence of the truth of the facts as  
12 stated by the witness on that former occasion.

13 If you disbelieve a witness's testimony that he or  
14 she no longer remembers a certain event, that testimony is  
15 inconsistent with a prior statement or statements by him or  
16 her describing that event.

17 Every person who testifies under oath is a witness.  
18 You are the sole judges of the believability of a witness and  
19 the weight to be given the testimony of each witness.

20 In determining the believability of a witness, you  
21 may consider anything that has a tendency to prove or  
22 disprove the truthfulness of the testimony of the witness,  
23 including but not limited to any of the following:

24 The extent of the opportunity or ability of the  
25 witness to see or hear or otherwise become aware of any  
26 matter about which the witness has testified;

27 The ability of the witness to remember or to  
28 communicate any matter about which the witness testified;

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1 The character and quality of that testimony;

2 The demeanor and manner of the witness while

3 testifying;

4       The existence or nonexistence of any bias, interest,

5 or other motive;

6       The existence or nonexistence of any fact testified

7 to by the witness;

8       The attitude of the witness toward this action or

9 toward the giving of testimony;

10       And a statement previously made by the witness that

11 is consistent or inconsistent with his or her testimony.

12       Discrepancies in a witness's testimony or between a

13 witness's testimony and that of other witnesses, if there

14 were any, do not necessarily mean that the witness should be

15 discredited. Failure of recollection is common. Innocent

16 misrecollection is not uncommon. Two persons witnessing an

17 incident or a transaction often will see or hear it

18 differently. Whether a discrepancy pertains to an important

19 matter or only to something trivial should be considered by

20 you.

21       A witness who is willfully false in one material part

22 of his or her testimony is to be distrusted in others. You

23 may reject the whole testimony of a witness who willfully has

24 testified falsely as to a material point unless from all the  
25 evidence you believe the truth favors his or her testimony in  
26 other particulars.

27       You are not bound to decide an issue of fact in  
28 accordance with the testimony of a number of witnesses which

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1 does not convince you as against the testimony of the lesser  
2 number or other evidence which appeals to your mind with more  
3 convincing force.

4       You may not disregard the testimony of the greater  
5 number of witnesses merely from caprice, whim, or prejudice  
6 or from a desire to favor one side against the other.

7       You must not decide an issue by the simple process of  
8 counting the number of witnesses who have testified on the  
9 opposing sides.

10       The final test is not in the relative number of  
11 witnesses but in the convincing force of the evidence.

12       You should give the testimony of a single witness  
13 whatever weight you think it deserves. Testimony by one

14 witness which you believe concerning any fact is sufficient  
15 for the proof of that fact. You should carefully review all  
16 the evidence upon which the proof of that fact depends.

17 Motive is not an element of the crime charged and  
18 need not be shown. However, you may consider motive or lack  
19 of motive as a circumstance in this case. Presence of motive  
20 may tend to establish the defendant is guilty. Absence of  
21 motive may tend to show the defendant is not guilty.

22 A defendant in a criminal trial has a constitutional  
23 right not to be compelled to testify. You must not draw any  
24 inference from the fact that a defendant does not testify.  
25 Further, you must neither discuss this matter nor permit it  
26 to enter into your deliberations in any way.

27 In deciding whether or not to testify, the defendant  
28 may choose to rely on the state of the evidence and the upon

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1 the failure, if any, of the People to prove beyond a  
2 reasonable doubt every essential element of the charge  
3 against him.

4 No lack of testimony on the defendant's part will  
5 make up for a failure of proof by the People so as to support  
6 a finding against him on any such essential element.

7 An admission is a statement made by the defendant  
8 which does not by itself acknowledge his guilt of the crimes  
9 for which the defendant is on trial but which statement tends  
10 to prove his guilt when considered with the rest of the  
11 evidence.

12 You are the exclusive judges as to whether the  
13 defendant made an admission and, if so, whether that  
14 statement is true in whole or in part.

15 Evidence of an oral admission of the defendant not  
16 made in court should be viewed with caution.

17 This rule does not apply to a taped statement.

18 Witnesses who have special knowledge, skill,  
19 experience, training, or education in a particular subject  
20 have testified to certain opinions. Any such witness is  
21 referred to as an expert witness.

22 In determining what weight to give to any opinion  
23 expressed by an expert witness, you should consider the  
24 qualifications and believability of the witness, the facts  
25 and materials upon which the opinion is based, and the



26 reasons for each opinion.

27       An opinion is only as good as the facts and the  
28 reasons on which it is based. If you find that any fact has

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1 not been proved or has been disproved, you must consider that  
2 in determining the value of the opinion. Likewise, you must  
3 consider the strengths and weaknesses of the reasons on which  
4 it is based.

5       You are not bound by an opinion. Give each opinion  
6 the weight you find it deserves. You may disregard any  
7 opinion if you find it to be unreasonable.

8       In determining the weight to be given to an opinion  
9 expressed by any witness who did not testify as an expert  
10 witness, you should consider his or her believability, the  
11 extent of his or her opportunity to perceive the matters upon  
12 which his or her opinion is based, and the reason, if any,  
13 given for it.

14       You are not required to accept an opinion but should  
15 give it the weight, if any, to which you find it entitled.

16 In examining an expert witness, counsel may ask a  
17 hypothetical question. This is a question in which the  
18 witness is asked to assume the truth of a set of facts and to  
19 give an opinion based on that assumption. In permitting such  
20 a question, the Court does not rule and does not necessarily  
21 find that all the assumed facts have been proved. It only  
22 determines that those assumed facts are within the possible  
23 range of the evidence.

24 It is for you to decide from all the evidence whether  
25 or not the facts assumed in a hypothetical question have been  
26 proved. If you should decide that any assumption in a  
27 question has not been proved, you are to determine the effect  
28 of that failure of proof on the value and weight of the

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1 expert opinion based on the assumed facts.

2 A defendant in a criminal action is presumed to be  
3 innocent until the contrary is proved. And in case of a  
4 reasonable doubt whether his guilt is satisfactorily shown,  
5 he is entitled to a verdict of not guilty. This presumption

6 of innocence places upon the People the burden of proving him  
7 guilty beyond a reasonable doubt.

8 Reasonable doubt is defined as follows:

9 It is not a mere possible doubt because everything  
10 relating to human affairs is open to some possible or  
11 imaginary doubt. It is that state of the case which, after  
12 the entire comparison and consideration of all the evidence,  
13 leaves the minds of the jurors in that condition that they  
14 cannot say they feel an abiding conviction of the truth of  
15 the charge.

16 Okay. Now, I'm going to get into the definitions of  
17 the crimes that have been alleged.

18 Homicide is the killing of one human being by  
19 another.

20 Homicide includes murder, which is unlawful.

21 Defendant is accused in Count One of having committed  
22 the crime of murder, a violation of Penal Code Section 187.

23 Every person who unlawfully kills a human being  
24 during the commission or attempted commission of unlawful  
25 sodomy is guilty of the crime of murder in violation of  
26 Section 187 of the Penal Code.

27 In order to prove this crime, each of the following

28 elements must be proved:

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1 One, a human being was killed;

2 Two, the killing was unlawful; and

3 Three, the killing occurred during the commission of  
4 the unlawful sodomy.

5 The unlawful killing of a human being, whether  
6 intentional, unintentional, or accidental, which occurs  
7 during the commission of the crime of unlawful sodomy, is  
8 murder of the first degree when the perpetrator had the  
9 specific intent to commit that crime, that is sodomy.

10 The specific intent to commit unlawful sodomy and the  
11 commission of such a crime must be proved beyond a reasonable  
12 doubt.

13 If you find the defendant in this case guilty of  
14 murder of the first degree, you must then determine if the  
15 following special circumstance is true or not:

16 That the defendant, Giles Albert Nadey, Jr., while he

17 was engaged in the commission of a felony, to wit, unlawful  
18 sodomy, in violation of Section 286 of the Penal Code, did  
19 kill Terena L. Fermentick.

20 The People have the burden of proving the truth of a  
21 special circumstance. If you have a reasonable doubt as to  
22 whether a special circumstance is true, you must find it to  
23 be not true.

24 If you are satisfied beyond a reasonable doubt that  
25 the defendant actually killed a human being, you need not  
26 find that the defendant intended to kill in order to find the  
27 special circumstance to be true.

28 In order to find the special circumstance alleged in

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1 this case to be true or untrue, you must agree unanimously.

2 You will state your special finding as to whether the  
3 special circumstance is or is not true on the form that will  
4 be supplied.

5 To find the special circumstance referred to in these  
6 instructions as murder in the commission of unlawful sodomy

7 is true, it must be proved:

8 One, the murder was committed while the defendant was  
9 engaged in the commission of unlawful sodomy; and,

10 Two, the murder was committed in order to carry out  
11 or advance the commission of the crime of unlawful sodomy or  
12 to facilitate the escape therefrom or to avoid detection.

13 In other words, the special circumstance referred to  
14 in these instructions is not established if the unlawful  
15 sodomy was merely incidental to the commission of the murder.

16 You are not permitted to find a special circumstance  
17 alleged in this case to be true based on circumstantial  
18 evidence unless the proved circumstances not only are  
19 consistent with the theory that a special circumstance is  
20 true, but, two, cannot be reconciled with any other rational  
21 conclusion.

22 Further, each fact which is essential to complete a  
23 set of circumstances necessary to establish the truth of a  
24 special circumstance must be proved beyond a reasonable  
25 doubt. In other words, before an inference essential to  
26 establish a special circumstance may be found to have been  
27 proved beyond a reasonable doubt, each fact or circumstance  
28 upon which that inference necessarily rests must be proved

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1 beyond a reasonable doubt.

2       Also, if the circumstantial evidence is susceptible  
3 of two reasonable interpretations, one of which points to the  
4 truth of the special circumstance and the other to its  
5 untruth, you must adopt that interpretation which points to  
6 its untruth and reject the interpretation which points to its  
7 truth.

8       If, on the other hand, one interpretation of that  
9 evidence appears to you to be reasonable, the other  
10 interpretation to be unreasonable, you must accept the  
11 reasonable interpretation and reject the unreasonable.

12       The specific intent or mental state with which an act  
13 is done may be shown by the circumstances surrounding its  
14 commission, but you may not find the special circumstance  
15 alleged in this case to be true unless the proved surrounding  
16 circumstances are not only, one, consistent with the theory  
17 that the defendant had the required specific intent or mental  
18 state, but, two, cannot be reconciled with any other rational

19 conclusion.

20 Also, if the evidence as to any specific intent or  
21 mental state is susceptible of two reasonable  
22 interpretations, one of which points to the existence of the  
23 specific intent or mental state and the other to the absence  
24 of the specific intent or mental state, you must adopt that  
25 interpretation which points to the absence of the specific  
26 intent or mental state.

27 If, on the other hand, one interpretation of the  
28 evidence as to the specific intent or mental state appears to

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1 you to be reasonable, the other interpretation to be  
2 unreasonable, you must accept the reasonable interpretation  
3 and reject the unreasonable.

4 In your deliberations, the subject of penalty or  
5 punishment is not to be discussed or considered by you. That  
6 is a matter which must not in any way affect your verdict or  
7 affect your finding as to the special circumstance alleged in  
8 this case.



9 It is alleged in Count One and Count Two that in the  
10 commission of the crimes charged, the defendant personally  
11 used a deadly or dangerous weapon.

12 If you find the defendant guilty of the crimes thus  
13 charged, you must determine whether the defendant personally  
14 used a deadly or dangerous weapon in the commission of the  
15 crimes.

16 A deadly or dangerous weapon means any weapon,  
17 instrument, or object that is capable of being used to  
18 inflict great bodily injury or death.

19 The term "personally used a deadly or dangerous  
20 weapon" as used in this instruction means the defendant must  
21 have intentionally displayed a weapon in a menacing manner or  
22 intentionally struck or hit a human being with it.

23 The People have the burden of proving the truth of  
24 this allegation. If you have a reasonable doubt that it is  
25 true, you must find it to be not true.

26 Include a special finding on that question in your  
27 verdict using a form that will be supplied for that purpose.

28 Defendant is accused in Count Two of having committed

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1 the crime of unlawful sodomy in violation of Section 286  
2 subdivision (c) of the Penal Code.

3 Every person who participates in an act of sodomy  
4 when the act is accomplished against the victim's will by  
5 means of force, violence, duress, menace, or fear of  
6 immediate and unlawful bodily injury on the alleged victim,  
7 is guilty of the crime of unlawful sodomy in violation of  
8 section 286 subdivision (c) of the Penal Code.

9 Sodomy is sexual conduct consisting of contact  
10 between the penis of one person and the anus of another.

11 Any sexual penetration, however slight, is sufficient  
12 to complete the crime of sodomy.

13 "Against the will" means without the consent of the  
14 alleged victim.

15 In order to prove this crime, each of the following  
16 elements must be proved:

17 One, a person participated in an act of sodomy with  
18 an alleged victim; and,

19 Two, the act was accomplished against the alleged

20 victim's will by means of force, violence, duress, menace, or  
21 fear of immediate and unlawful bodily injury on the alleged  
22 victim.

23 In the crime charged in Count Two, namely unlawful  
24 sodomy, there must exist a union or joint operation of act or  
25 conduct and general criminal intent.

26 General intent does not require an intent to violate  
27 the law. When a person intentionally does that which the law  
28 declares to be a crime, he is acting with general criminal

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1 intent even though he may not know that his act or conduct is  
2 unlawful.

3 All right. Now these are the concluding  
4 instructions.

5 Okay?

6 I have not intended by anything I have said or done  
7 or by any question that I may have asked or by any ruling I  
8 may have made to intimate or suggest what you should find to  
9 be the facts or that I believe or disbelieve any witness. If

10 anything I have done or said has seemed to so indicate, you  
11 will disregard it and form your own conclusion.

12 The purpose of the Court's instructions is to provide  
13 you with the applicable law so that you may arrive at a just  
14 and lawful verdict. Whether some instructions apply will  
15 depend on what you find to be the facts. Disregard any  
16 instruction which applies to facts determined by you not to  
17 exist. Do not conclude that because an instruction has been  
18 given I am expressing an opinion as to the facts.

19 The People and the defendant are entitled to the  
20 individual opinion of each juror. Each of you must consider  
21 the evidence for the purpose of reaching a verdict if you can  
22 do so. Each of you must decide the case for yourself but  
23 should do so only after discussing the evidence and the  
24 instructions with the other jurors.

25 Do not hesitate to change an opinion if you are  
26 convinced it is wrong. However, do not decide any question  
27 in a particular way because the majority of the jurors or any  
28 of them favor that decision. Do not decide any issue in this

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1 case by the flip of a coin or by any other chance

2 determination.

3 Several of the jurors have taken notes throughout the

4 trial. You will be permitted to take those notes to the jury

5 room during your deliberations.

6 I caution you, however, that your notes are not a

7 substitute for the record and are not entitled to any greater

8 weight than the recollection or the impression of any juror

9 as to what the testimony may have been or what conclusion

10 should be arrived at. You should limit the use of your notes

11 to refresh your recollection of the testimony. If there is

12 any question about the testimony among you, you are permitted

13 to have that portion of the record reread to you.

14 In addition, each of you are to keep your own notes

15 with you at all times and are not to leave them in the jury

16 room during recesses in your deliberations.

17 The attitude and conduct of jurors at all times is

18 very important. It is rarely helpful for a juror at the

19 beginning of deliberations to express an emphatic opinion on

20 the case or to announce a determination to stand for a

21 certain verdict. When one does that at the outset, a sense

22 of pride may be aroused, and one may hesitate to change a  
23 position even if shown it is wrong. Remember that you are  
24 not partisans or advocates in this matter. You are impartial  
25 judges of the facts.

26 During deliberations, any question or request a jury  
27 may have should be addressed to the Court on a form that will  
28 be provided.

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1 Please understand that counsel must first be  
2 contacted before a response can be formulated. If a read  
3 back of testimony is requested, the reporter will delete  
4 objections, rulings, and sidebar conferences so that you will  
5 hear only the evidence that was actually presented. Please  
6 understand that it may take some time to provide a response.  
7 Continue deliberating until you are called back into the  
8 courtroom.

9 The instructions which I am now giving to you will be  
10 made available in written form for your deliberations. They  
11 must not be defaced in any way.

12 You will find that the instructions may be typed,  
13 printed, or handwritten. Portions may have been added or  
14 deleted.

15 You must disregard any deleted part of an instruction  
16 and not speculate as to what it was or as to the reasons for  
17 its deletion. You are not to be concerned about the reason  
18 for any modification. Every part of the text of an  
19 instruction, whether typed, printed, or handwritten, is of  
20 equal importance. You are to be governed only by the  
21 instruction in its final wording.

22 Do not disclose to anyone outside the jury, not even  
23 to me or any member of my staff, either orally or in writing,  
24 how you may be divided numerically in your balloting as to  
25 any issue unless I specifically direct otherwise, bring you  
26 down and ask you.

27 Okay?

28 In this case, there are four possible verdicts. I'm

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1 going to explain them to you now.

2        These various possible verdicts are set forth in the  
3 forms of verdict which you will receive. Only one of the  
4 possible verdicts may be returned by you as to any particular  
5 count.

6        If you have all agreed upon one verdict as to a  
7 particular count, the corresponding form is the only verdict  
8 form to be signed as to that count. The other forms are to  
9 be left unsigned.

10       I'm going to take two minutes here to explain these  
11 verdict forms. They are self-explanatory, but just in case.

12       I don't mean to infer or suggest how you will vote by  
13 the order in which I read these to you, either. I'm just  
14 going to read them to you just to make it simple.

15       First, I'll read to you the not guilty verdicts.

16       We, the jury in the above-entitled cause, find the  
17 defendant, Giles Albert Nadey, Jr., not guilty of the crime  
18 of a felony, to wit, murder, a violation of Section 187 of  
19 the Penal Code as charged in Count One of the Indictment.

20       Dated.

21       Signature of the foreperson.

22       If you think he is not guilty, that's the one you



23 bring me back.

24 And then there's a Second Count.

25 We, the jury in the above-entitled cause, find the

26 defendant, Giles Albert Nadey, Jr., not guilty of the crime

27 of a felony, to wit, unlawful sodomy, a violation of Section

28 286(c) of the Penal Code of the State of California as

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1 charged in Count Two of the Indictment.

2 So those are simple.

3 Okay?

4 These are the guilty verdicts.

5 Let's start with Count One.

6 We, the jury, in the above-entitled cause, find the

7 defendant, Giles Albert Nadey, Jr., guilty of the crime of a

8 felony, to wit, murder of the first degree, a violation of

9 Section 187 of the Penal Code of California as charged in

10 Count One of the Indictment.

11 Dated.

12 Signed by the foreperson.

13 Then we've got these clauses. You've got to address

14 these clauses for me.

15 We, the jury, further find that in and during the

16 commission of the above offense, the defendant, Giles Albert

17 Nadey, Jr., did or did not personally use a deadly and

18 dangerous weapon, to wit, a knife.

19 Dated.

20 Signature for the foreperson.

21 Then there's a special circumstance.

22 We, the jury in the above-entitled cause, find to be

23 true or not true the special circumstance pursuant to Section

24 190.2(a)(17)(iv) of the Penal Code of California as charged

25 in the Indictment, that the killing of Terena L. Fermenick

26 was committed while the defendant, Giles Albert Nadey, Jr.,

27 was engaged in the commission or the immediate flight

28 thereafter of a felony, to wit, unlawful sodomy, in violation

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1 of Section 286 of the Penal Code of California.

2 Date.

3 Signature of the foreperson.

4 So with every verdict, the foreperson, whoever that

5 is, has to date it and sign it.

6 Okay?

7 That's the murder count with the special

8 circumstance.

9 The Second Count, as you recall, is unlawful sodomy

10 with a use clause. This s the verdict for Count Two.

11 We, the jury in the above-entitled cause, find the

12 defendant, Giles Albert Nadey, Jr., guilty of the crime of a

13 felony, to wit, unlawful sodomy, a violation of Section

14 286(c) of the Penal Code of California, in that said

15 defendant did then and there compel Terena L. Fermenick

16 against her will, by force, violence, duress, menace, or fear

17 of immediate and unlawful bodily injury on the said Terena L.

18 Fermenick and by threatening retaliation in the future

19 against said victim, such retaliation appearing reasonably

20 possible of execution, to participate with said defendant in

21 an act of sodomy as charged in Count Two of the Indictment.

22 Dated.

23 Signature of the foreperson.

24 Then there's a use clause.

25        We, the jury, further find that in and during the  
26 commission of the above offense, the defendant, Giles Albert  
27 Nadey, Jr., did or did not personally use a deadly and  
28 dangerous weapon, to wit, a knife.

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1        And then date and signature of the foreperson.

2        Okay?

3        That's it. That's the four verdicts.

4        As for the alternate jurors, you are still bound by  
5 the admonition that you are not to converse among yourselves  
6 or with anyone else on any subject connected with this trial  
7 or to form or express any opinion on it until the case is  
8 submitted to you, which means until such time as you are  
9 substituted in for one of the 12 jurors now deliberating on  
10 the case.

11       This also means that you are not to decide how you  
12 would vote if you were deliberating with the other jurors.

13       You shall now retire and select one of your number to  
14 act as foreperson. He or she will preside over your

15 deliberations. In order to reach a verdict, all 12 jurors  
16 must agree to the decision and to any finding you have been  
17 instructed to include in your verdict.

18 As soon as you have all agreed upon a verdict, have  
19 them dated and signed by your foreperson and then return with  
20 them to this courtroom. Return any unsigned verdict forms.

21 All right. Jennifer, will you swear them in?

22 MR. GILLER: Your Honor, may we approach the bench  
23 for a minute?

24 THE COURT: Yes.

25 (Discussion had at the bench; not reported.)

26 THE COURT: Okay. You want to swear the bailiff,  
27 please?

28 (Bailiff sworn.)

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1 THE COURT: All right. Ladies and Gentlemen, we are  
2 going to have you begin your deliberations now. We are going  
3 to ask you to up upstairs in just a minute.

4 Before I send the jury upstairs to begin their

5 deliberations, can I have a stipulation, number one, that if  
6 the jury requests any of the exhibits, they can be sent up  
7 without requiring the attorneys and the defense to be  
8 present?

9 MR. HOROWITZ: Yes.

10 MR. ANDERSON: Yes, Your Honor.

11 THE COURT: Okay. So that if you want something,  
12 they will just send it up to you.

13 Okay?

14 Second thing is tonight --

15 I'm going to send you upstairs. If you're pooped  
16 out, just let the bailiff know.

17 I'm going to bring you down tonight and excuse you  
18 from the courtroom. I won't do that after tonight because if  
19 you're still deliberating, I'm going to see if the attorneys  
20 will stipulate that the bailiff can excuse you from the jury  
21 room without having to bring you down every night.

22 Okay?

23 So may we have a stipulation that after tonight if  
24 the jury is still deliberating, that when they indicate to  
25 the Court that they want to go home that the bailiff can

26 excuse the jury, advise them when to return to begin their

27 deliberations and with the standard admonition?

28 MR. GILLER: So stipulated.

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1 MR. ANDERSON: Yes.

2 THE COURT: Okay. All right.

3 Okay. Pardon me.

4 JUROR NUMBER TWO: Are we coming back tomorrow?

5 THE COURT: He is going to tell you what to do in

6 just a second.

7 I'll cover that.

8 He is going --

9 When you go upstairs now, Ken will tell you what

10 you're supposed to do with respect to when you want to come

11 back tomorrow.

12 When I bring you down, you can tell me.

13 Maybe between now and 4:00 o'clock or so you may get

14 a foreperson elected, and I'll deal with the foreperson.

15 You can set your own hours for deliberations. If you

16 want to start at 9:00, that's okay because I'm doing  
17 something down here. You are going to be up there. You can  
18 start at 10:00. Most jurors go 10:00 to 12:00, and when they  
19 come back from lunch like 1:30 to around 4:00, 4:15. But you  
20 can set your own hours.

21 That reminds me. Starting tomorrow, we'll take you  
22 to lunch every day. So don't bring your lunch tomorrow. Ken  
23 will make arrangements with the marshal's office, and they  
24 will take you to lunch until you either tell me that you've  
25 arrived at a verdict or you can't agree.

26 ALTERNATE JUROR NUMBER ONE: Yes. What about us?

27 THE COURT: You guys go -- you won't be in the jury  
28 room during deliberations, so you may --

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1 I'm addressing, for the record, the alternates.

2 You might want to bring a magazine or book to read.

3 You cannot deliberate with the other jurors. You are going  
4 to be separated now. And so tomorrow you may want to bring a  
5 book or something. And Ken will direct you to where to be.



6 And every time we bring the jury back, we will bring you

7 back. If there's read back, you'll be back.

8 Okay?

9 But you get to go to lunch, too.

10 ALTERNATE JUROR NUMBER FOUR: That was our question.

11 THE COURT: Okay. The attorneys have requested that

12 I delete some surplusage words in these instructions, and I'm

13 going to do that in your absence. And then when you want to

14 go home, you let us know. We will bring you down, and

15 tonight we'll excuse you from the courtroom.

16 Remember Friday -- you won't be in session Friday

17 because I've got other commitments.

18 But then Monday and I think next Friday I'll be here.

19 Okay?

20 All right. We'll see you.

21 (Jury deliberates.)

22 (The following proceedings were had in open court and

23 outside the presence of the jury. Defendant and counsel were

24 present.)

25 THE COURT: All right. The record should reflect

26 that the jury has filed out to begin their deliberations.

27 There was a sidebar conference where counsel

28 approached the bench. There was some surplusage in 8.10

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1 modified, the words "or attempted commission of unlawful  
2 sodomy."

3 You want to stipulate that the Court can redact that  
4 from the instructions so it says "every person who unlawfully  
5 kills a human being during the commission of unlawful sodomy"  
6 and redact the words "or attempted commission"?

7 MR. ANDERSON: Yes.

8 MR. GILLER: Yeah, we had agreed, I think.

9 THE COURT: Okay. I may have -- that is the words,  
10 but I may have missed that, so I'll redact that.

11 Also, the verdict form talks about "fear of  
12 retaliation" and so forth.

13 You want that part redacted, also, because that is  
14 not an issue in this case. But that's the way the section  
15 reads.

16 MR. ANDERSON: Fine.

17 THE COURT: You want to do that?

18 MR. ANDERSON: Sure.

19 MR. GILLER: Yeah, that's okay.

20 THE COURT: Well, I tell you what. Rather than  
21 blacking it out, I'll just have my clerk redo a new one, and  
22 I'll just redact it, "for fear of immediate and unlawful  
23 bodily injury to participate." I'll just have her type up a  
24 new verdict. I'll just leave that out.

25 MR. ANDERSON: All right.

26 THE COURT: Now, you guys want to hang around here  
27 for a little while?

28 MR. GILLER: Well, if you are going to call them

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1 down --

2 THE COURT: They may come down here at 4:00 o'clock.  
3 I'd like to see if they are going to elect a foreperson, and  
4 then they'll probably buzz then, and then I'll -- they can  
5 tell me when they are coming back so then you guys will know  
6 when to keep your pagers on or whatever for tomorrow.

7 MR. ANDERSON: Sure.

8 THE COURT: Why don't you stick around for a few  
9 minutes?

10 MR. ANDERSON: I'll be in my office.

11 (Recess.)

12 (The following proceedings were had in open court and  
13 in the presence of the jury. Defendant and counsel were  
14 present.)

15 THE COURT: All right. This is the case of People  
16 versus Nadey.

17 Let the record reflect the defendant is present with  
18 counsel and the jury is present in the jury box along with  
19 the alternates.

20 And we are going to refer to you by number so we  
21 don't use your name.

22 So you're the foreperson, and you're Juror Number 12.

23 THE FOREPERSON: Okay.

24 THE COURT: Okay. Juror Number 12, first thing I  
25 want to know is when will you be back tomorrow?

26 THE FOREPERSON: We agreed on 10:00 a.m.

27 THE COURT: Okay. Okay. Fair enough.

28 All right. We will send you all the evidence for

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1 tomorrow at 10:00.

2 We've got a couple of markers. That -- I'll give --  
3 you want to hand that to Juror Number 12 when they go  
4 upstairs?

5 And we are also going to hand you the jury book, jury  
6 instruction book, because you'll probably ask for it  
7 tomorrow.

8 Whoever we used to hand this to ended up being the  
9 foreperson. But since -- that is just by coincidence. But  
10 since you have a foreperson, anybody can take it. Usually  
11 whoever ended up taking it up the stairs ended up being the  
12 foreperson.

13 MR. ANDERSON: You want to pass that, too?

14 THE COURT: Hand that to Juror Number 12.

15 All right. We are going to send you home now.

16 And remember the admonition I have heretofore given  
17 you. You're not to discuss this case among yourselves or  
18 with any other persons or to form or express any opinion

19 about this case until the matter is submitted to you (sic).

20 And then we'll see you tomorrow morning at 10:00. At

21 least I'll know you're here. You'll buzz and let us know.

22 Have a nice evening.

23 Jennifer, you want to file this, please?

24 (The following proceedings were had in open court and

25 outside the presence of the jury. Defendant and counsel were

26 present.)

27 THE COURT: All right. The record should reflect now

28 that the jury has filed out for the evening.

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1 Will counsel be in the near proximity tomorrow, or

2 are you going to call in, or how do you want to deal with

3 this?

4 MR. HOROWITZ: I'll give your clerk my pager number,

5 and since I'm so close anyway, I'll be here.

6 THE COURT: You're going to be in your office?

7 MR. HOROWITZ: Yes, Your Honor.

8 MR. GILLER: I'll be in Napa first thing in the

9 morning.

10 THE COURT: When are they going to let you out?

11 MR. GILLER: Oh, it's subject to the doctor's

12 discretion.

13 THE COURT: Well, okay.

14 MR. ANDERSON: What was the diagnosis?

15 MR. GILLER: I should be back by 10:00 o'clock.

16 MR. HOROWITZ: He had to listen to me for five hours.

17 THE COURT: Are you going to go to your office?

18 MR. GILLER: Yeah.

19 THE COURT: Will you call Jennifer and tell her when

20 you're back in town?

21 And in the meantime, if the jury has any questions,

22 I'll defer it until you get back.

23 MR. ANDERSON: Aren't you going to ask me where I'm

24 going to be?

25 THE COURT: I know where you're going to be, on the

26 9th floor, and you're not going to take the elevator

27 tomorrow.

28 MR. ANDERSON: That's right. I never walk.

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1 THE COURT: Never walked in 27 years.

2 MR. ANDERSON: 29.

3 THE COURT: 29 years.

4 MR. ANDERSON: 27 was last trial.

5 THE COURT: Okay. Okay. Are we all in accord for  
6 tomorrow then?

7 Mr. Horowitz, you are going to be in your office.

8 Mr. Giller should be back from Napa by 11:00.

9 And then just call in and let us know where you are.

10 Okay?

11 We'll be recess until you hear from me.

12 (Proceedings were adjourned and continued to  
13 Wednesday, February 18, 1999, at 10:00 a.m. for further jury  
14 deliberations.)

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11 notes taken in the above-mentioned matter.

12 IN WITNESS WHEREOF, I have hereunto subscribed my

13 name this 20th day of February, 1999.

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Jessica Barry Lee, CSR #5428

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