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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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EXHIBIT 440
05 CF 381
DATE 03-05-07 JB
Initials

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

KEVIN COOPER,

Petitioner,

vs.

JILL L. BROWN, Acting Warden, San
Quentin State Prison,

Respondent.

CASE NO. 04-CV-656 H
*Related cases 98-CV-818 H
92-CV-427 H*

EDTA TESTING ORDER

Exhibit attached

After considering the parties' submissions and arguments, and testimony from the witnesses regarding EDTA testing of the T-shirt in this case (Trial Ex. 169), the Court **ORDERS** the following:

1.00 Introduction

1.1 On April 1, 2004, Petitioner filed in the United States District Court for the Southern District of California a successive Petition for Writ of Habeas Corpus, Civil Case. No. 04-CV-656. Respondent is Jill L. Brown ("Respondent"). The purpose of this Order is to establish the procedures and methods for conducting EDTA testing upon the T-shirt at issue in this case (Trial Ex. 169). The Court reserves judgment as to the admissibility under Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), and the Federal Rules of Evidence of such testing or opinions of experts with regards to such testing and results.

1.2 The EDTA preservative testing shall occur in three stages:

(1) The Attorney General for the State of California, or his designee, shall arrange

1 for the T-shirt at issue in this case (Trial Ex. 169) to be transferred in person or
2 by overnight mail to Dr. Peter De Forest in Ardsley, NY, to be received no later
3 than **September 7, 2004**.

4 (2) With Respondent's designee Gary Sims, or his designee, observing, Petitioner's
5 expert Dr. Peter De Forest shall prepare for double blind EDTA testing three
6 identical sets of vials, or other appropriate containers, containing fluid from the
7 area of the T-shirt to be tested (area 6G), control samples from the T-shirt around
8 area 6G, and separate positive and negative controls from a T-shirt of similar
9 cloth and color stained with approximately the same amount of blood as area 6G
10 of the T-shirt in this case (Trial Ex. 169). The stained area of the T-shirt (Trial
11 Ex. 169) to be tested, area 6G, shall be the remainder of area 6G from the post-
12 conviction DNA testing that has not been treated with a buffer or solution
13 containing EDTA. Other than area 6G and surrounding control areas, the Court
14 does not authorize further analysis or evaluation of the T-shirt (Trial Ex. 169) at
15 this time. The three sets of vials or containers shall be coded for double blind
16 testing and one set of the vials containing the fluids shall be sent to Dr. Gary
17 Suizdak of The Scripps Research Institute ("Scripps") in La Jolla, CA, and
18 another set of vials shall be sent to Dr. Kevin Ballard of National Medical
19 Service Inc. ("NMS"), in Willow Grove, PA, to be received no later than
20 **September 14, 2004**. Dr. De Forest shall retain the third set of vials for further
21 testing if ordered by the Court. Dr. De Forest and Mr. Sims, or his designee,
22 shall not disclose, except to the Court, the contents of the vials or containers or
23 the coding corresponding to the contents of the vials or containers.

24 (3) Dr. Gary Siuzdak at Scripps and Dr. Kevin Ballard at NMS, or their designees,
25 shall perform concurrent testing of the sample fluids contained in the vials they
26 receive for the presence and amount of EDTA. Dr. Siuzdak and Dr. Ballard, or
27 their designees, shall send the test results to the Court, to be received no later
28 than **September 30, 2004**. In order to maintain the integrity and confidentiality

1 of the test results, Dr. Siuzdak and Dr. Ballard shall not disclose the test results,
2 except as permitted in 7.5, until further order of the Court. Prior to performing
3 the EDTA testing, but no later than **September 14, 2004**, Dr. Siuzdak and Dr.
4 Ballard shall file with the Court their respective EDTA testing protocols, which
5 may be filed under seal.

6 **2.00 Parties and Evidence to Be Tested**

7 **2.1** For the purposes of this EDTA testing Order, the stained area of the T-shirt (Trial Ex.
8 169) to be tested for the presence and amount of EDTA shall consist only of the
9 remaining area 6G that has not been treated with solutions containing EDTA and no less
10 than five control samples around area 6G that are not part of any existing blood stain.
11 The stained area of the T-shirt (Trial Ex. 169) to be tested, area 6G, shall be the
12 remainder of area 6G from the post-conviction DNA testing that has not been treated
13 with a buffer or solution containing EDTA.

14 **2.2** Separate positive and negative controls shall also be tested for the presence and amount
15 of EDTA. The positive control shall have a known concentration of EDTA and the
16 negative control shall not have EDTA. In order to maintain the integrity and
17 confidentiality of the double blind testing, the positive and negative controls shall be
18 similar in appearance to area 6G such that the fluid produced from the positive and
19 negative controls is similar in appearance to the fluid produced from area 6G. The
20 separate positive and negative controls shall be from a T-shirt of similar cloth and color
21 stained with approximately the same amount of blood as area 6G of the T-shirt in this
22 case (Trial Ex. 169).

23 **2.3** The testing shall test only for the presence and amount of EDTA and no other
24 anticoagulant.

25 **2.4** Dr. Peter De Forest and Dr. Kevin Ballard, or his designee, are designated as expert
26 consultants on behalf of Petitioner and shall participate as detailed below. If Dr. Peter
27 De Forest is not available, the Court will appoint another appropriate criminologist and
28 lab.

1 2.5 DOJ (Richmond) Senior Criminalist and Laboratory Director Gary Sims, or his designee,
2 is Respondent's designee and shall participate as described below. Respondent's
3 designee or Mr. Sims' designee may be from outside the DOJ.

4 2.6 Dr. Gary Siuzdak of The Scripps Research Institute in La Jolla, CA, or his designee, shall
5 perform testing at the Scripps lab for the presence and amount of EDTA on the samples.

6 2.7 Dr. Kevin Ballard of National Medical Services in Willow Grove, PA, shall perform
7 testing at the NMS lab for the presence and amount of EDTA on the samples.

8 2.8 All of the parties involved shall maintain the integrity of all items of evidence received
9 pursuant to this Order. It is understood that some evidence may be consumed through
10 the testing authorized by this Order.

11 **3.00 Evidence Documentation and Transfer of Evidence**

12 3.1 The Attorney General of California, or his designee, shall arrange for the T-shirt (and any
13 fragments thereof) at issue in this case, identified as Trial Ex. 169, to be transferred in
14 person or by Federal Express or UPS overnight delivery to Dr. Peter De Forest at 16
15 Bryant Street, Hartsdale, NY 10530. If needed, counsel will provide the telephone
16 number of Dr. De Forest to the California Attorney General, or his designee. Dr. De-
17 Forest is to receive these items no later than **September 7, 2004**. The T-shirt (and any
18 fragments thereof) shall be transferred in a sealed container or containers clearly marked
19 with the case name, exhibit number, and date of release of each evidence item released.

20 3.2 Dr. De Forest shall document, photograph, and log receipt of all evidence and shall
21 document and photograph the preparation of the T-shirt (Trial Ex. 169) and the separate
22 positive and negative controls for EDTA testing as outlined in 4.00 and 5.00.

23 **4.00 Preparation of the T-shirt (Trial Ex. 169) for EDTA testing**

24 4.1 Respondent's designee Gary Sims, or his designee, shall observe Dr. De Forest in his
25 preparation of the T-shirt (Trial Ex. 169) for EDTA testing as outlined below.

26 4.2 Dr. DeForest shall inspect the T-shirt (Trial Ex. 169) at area 6G for appropriate areas to
27 test the remainder of stain 6G that have not been treated with solutions containing EDTA
28 and appropriate control areas to test around stain 6G to be tested for EDTA in a double

1 blind fashion. There shall be no fewer than five control areas that are not part of any
2 existing blood stain on the T-shirt. The purpose of the control areas is to establish the
3 background EDTA levels, if any, in the T-shirt. Other than area 6G and surrounding
4 control area, the Court does not authorize further analysis or evaluation of the T-shirt
5 (Trial Ex. 169) at this time.

6 **4.3** After selection of the areas to be tested, Dr. DeForest shall record the position and size
7 of the area, cut out the appropriate pieces of the T-shirt, and place the cut out pieces into
8 a plastic micro centrifuge tube, or other appropriate container. All test tubes shall have
9 their size recorded and shall be coded to identify the source of the cloth cut-out on the
10 T-shirt.

11 **4.4** Dr. DeForest shall then place into each test tube with an equal amount of phosphate
12 buffered saline ("PBS") containing no EDTA or other anticoagulant, and allow the cloth
13 cut-out to soak for 30 minutes. The test tubes shall then be placed in a centrifuge which
14 shall be run at maximum r.p.m. for 5 minutes.

15 **4.5** The liquid from each test tube shall be drawn off and put in equal amounts into three
16 separate vials, or other appropriate containers, by Dr. De Forest in the same manner as
17 is done with DNA testing and coded to correspond to its cut out. This is to be repeated
18 for each test tube, resulting in three identical sets of vials, each containing an equal
19 amount of fluid from the soaks.

20 **4.6** The vials shall be coded to achieve double blind testing. The coding shall be by number
21 and/or letter and shall not relate in any way to prior designations used in connection with
22 the T-shirt and the meaning of each designation shall be unknown to the person
23 conducting the testing. For delivery by Federal Express or UPS overnight delivery no
24 later than **September 14, 2004**, one set of the coded vials shall be sent to (1) Dr. Gary
25 Siuzdak, or his designee, at The Scripps Research Institute, Center for Mass
26 Spectrometry, 10550 North Torrey Pines Road, La Jolla, CA 92037, and another set of
27 vials shall be sent to (2) Dr. Kevin Ballard, or his designee, at National Medical Services,
28 3701 Welsh Road, Willow Grove, PA 19090. If needed, counsel will provide the

1 telephone numbers of Dr. Siuzdak and Dr. Ballard to Dr. De Forest. Dr. De Forest shall
2 retain the third set of vials for further testing if ordered by the Court.

3 **4.7** Dr. De Forest and Mr. Sims, or his designee, shall not disclose, except to the Court, the
4 contents of the vials or containers or the coding corresponding to the contents of the vials
5 or containers. The Court **ORDERS** Dr. De Forest and Mr. Sims, or his designee, to
6 maintain the integrity and confidentiality of the double blind testing until further order
7 of the Court.

8 **4.8** The remainder of the T-shirt (Trial Ex. 169) and remaining fragments thereof shall be set
9 aside and maintained by Mr. Sims, or his designee, until further order by the Court.

10 **4.9** The residual fluid from the preparation of the T-shirt for EDTA testing, the test tubes
11 with the cut-outs, any raw data, and other residual testing material is to be maintained by
12 Dr. De Forest for further testing if ordered by the Court.

13 **5.00 Preparation of separate positive and negative controls for EDTA testing**

14 **5.1** Respondent's designee Gary Sims, or his designee, shall observe Dr. De Forest in his
15 preparation of the separate positive and negative control samples as outlined below.

16 **5.2** When Dr. DeForest prepares the T-shirt at issue in this case (Trial Ex. 169) for EDTA
17 testing, he shall also prepare vials having fluid from separate positive and negative
18 controls to be sent with the vials of 4.00 and tested for EDTA in a double blind fashion.
19 The positive control shall have a known concentration of EDTA. The negative control
20 shall have no EDTA. In order to maintain the integrity and confidentiality of the double
21 blind testing, the positive and negative controls shall be similar in appearance to area 6G
22 such that the fluid produced from the positive and negative controls is similar in
23 appearance to the fluid produced from area 6G. The separate positive and negative
24 controls shall be from a T-shirt of similar cloth and color stained with approximately the
25 same amount of blood as area 6G of the T-shirt in this case (Trial Ex. 169).

26 **5.3** Dr. DeForest shall then select and cut out appropriate positive and negative controls and
27 prepare the vials with the same procedure as outlined in 4.3-4.6. Dr. De Forest shall
28 prepare three sets of vials each having a positive and negative control and shall code the

1 vials for double blind testing as was done in 4.6. The meaning of each coding
2 designation shall be unknown to the person conducting the testing. For delivery by
3 Federal Express or UPS overnight delivery no later than **September 14, 2004**, one set
4 of the coded vials shall be sent to (1) Dr. Gary Siuzdak, or his designee, at The Scripps
5 Research Institute in La Jolla, CA, and another set of vials shall be sent to (2) Dr. Kevin
6 Ballard, or his designee, at National Medical Services in Willow Grove, PA.

7 **5.4** Dr. De Forest and Mr. Sims, or his designee, shall not disclose, except to the Court, the
8 contents of the vials or containers containing the positive and negative controls or the
9 coding corresponding to the contents of those vials or containers.

10 **5.5** The remainder of the positive and negative controls, including the third set of vials, the
11 residual fluid from the preparation of the separate positive and negative controls, any raw
12 data, and other residual control material shall be maintained by Dr. De Forest for further
13 testing if ordered by the Court.

14 **6.00 Disclosure to the Court of the analysis, selection, and preparation of the coded samples**

15 **6.1** When Dr. De Forest ships the coded vials to Dr. Siuzdak and Dr. Ballard, he shall send
16 only to the Court a report outlining the contents of the vials and the corresponding coding
17 to the vials. This shall be shipped and faxed no later than **September 14, 2004**, to Chief
18 Judge Marilyn L. Huff, United States District Court, Southern District of California, 940
19 Front Street, San Diego, CA 92101. If needed, counsel will provide the telephone and
20 fax numbers of the Court to Dr. De Forest.

21 **6.2** Along with the report indicated in 6.1, Dr. De Forest and Mr. Sims, or his designee, shall
22 each file with the Court a signed declaration under penalty of perjury stating that they
23 have not disclosed, except to the Court, and shall not disclose absent further order of the
24 Court the contents of the vials or containers containing the positive and negative controls
25 or the coding corresponding to the contents of those vials or containers.

26 **7.00 EDTA testing by Dr. Gary Siuzdak at Scripps and Dr. Ballard at NMS**

27 **7.1** Upon receipt of the coded vials, Dr. Siuzdak and Dr. Ballard, or their designees, shall
28 each document, photograph, and log the evidence and perform EDTA testing as

1 described below. Dr. Siuzdak and Dr. Ballard, or their designees, shall each document
2 their testing procedure as they perform the EDTA tests. Prior to performing the EDTA
3 testing, but no later than **September 14, 2004**, Dr. Siuzdak and Dr. Ballard shall each file
4 with the Court their respective EDTA testing protocols, which may be filed under seal.
5 The Court reserves the right to unseal the protocol as appropriate in this case.

6 **7.2** Dr. Siuzdak, or his designee, shall perform EDTA testing on the contents of the coded
7 vials received at the Scripps lab in La Jolla, CA. Dr. Ballard, or his designee, shall
8 perform EDTA testing on the contents of the coded vials received at the NMS lab in
9 Willow Grove, PA. The EDTA testing shall consist of testing for the presence and
10 amounts of EDTA using mass spectrometry instrumentation.

11 **7.3** The findings and results of each set of EDTA tests shall be set forth separately by Dr.
12 Siuzdak, or his designee, and Dr. Ballard, or his designee, in the form of written reports
13 to be sent no later than **September 30, 2004**, to the Court. These reports shall be shipped
14 and faxed to Chief Judge Marilyn L. Huff, United States District Court, Southern District
15 of California, 940 Front Street, San Diego, CA 92101. If needed, counsel will provide
16 the telephone and fax numbers of the Court to Dr. Siuzdak and Dr. Ballard.

17 **7.4** In order to maintain the integrity and confidentiality of the test results, Dr. Siuzdak and
18 Dr. Ballard are not to disclose the test results, except as permitted in **7.5**, until further
19 order of the Court.

20 **7.5** Dr. Siuzdak may discuss the testing procedure or the testing results only with
21 representatives of the Attorney General. Dr. Ballard may discuss the testing procedure
22 or the testing results only with representatives of Petitioner. The Attorney General, or
23 his designee, may disclose the testing procedure or testing results of Dr. Siuzdak to
24 retained experts. There is to be no communication between Dr. Siuzdak, Dr. Ballard, Dr.
25 De Forest, or their designees during the testing, before the results are sent to the Court,
26 or absent further order from the Court. The Court **ORDERS** the experts to maintain the
27 confidentiality of the test results until further order of the Court. At an appropriate time
28 the Court will decide whether to conduct further testing, release the test results to the

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public, or lift the confidentiality requirement.

7.6 Dr. Siuzdak and Dr. Ballard shall maintain the remainder, if any, of the testing materials and the raw data in their possession until further order by the Court.

7.7 Once the Court receives both reports, the Court will mail and fax the results to counsel for the parties.

IT IS SO ORDERED.

Dated: 8/27/04



MARILYN L. HUFF, Chief Judge
UNITED STATES DISTRICT COURT

1 Copies to:

2 Norman C. Hile
3 Orrick, Herrington, & Sutcliffe LLP
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14 110 West A Street
15 Suite 1100
16 San Diego, CA 92101-5266

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T-Shirt

(CC-1/D0J-6/169)

- CC-1 (Smear): Doug Ryen
- 6A (Spatter): insufficient DNA
- 6B, 6C, 6D, 6E (Habitual Wearer): No DNA
- 6F (Spatter): Mixture Cooper, Peggy Ryen & ?
- 6G (Smear): Cooper
- 6H (Fluorescent Stains): No DNA
- 6I (Smear): Mixture Cooper & Doug Ryen
- 6J (Smear): Mixture Cooper (major) & Doug Ryen (minor)
- 6K (smear): Mixture Cooper (major) & Doug Ryen (minor)

