

1 MR. OWMBY: We'll call Officer Glenn
2 Riddle, if he's here.

3 THE COURT: Okay.

4 MR. OWMBY: We would call Christy
5 Kim.

6 THE COURT: We're going to go ahead
7 and take our afternoon break and see if the other
8 witness gets here. We'll recess for about 10 or 15
9 minutes. Be with you then.

10 (Jury exits.)

11 (Brief recess had.)

12 THE COURT: All right. Bring the
13 jury out.

14 (Jury present.)

15 THE COURT: Call your next witness.

16 MR. OWMBY: State calls Christy Kim.

17 DIRECT EXAMINATION

18 Q. (BY MR. OWMBY) State your name for the
19 jury.

20 A. Christy Kim.

21 Q. How are you employed?

22 A. Employed by the Houston Police Department
23 Crime Laboratory.

24 Q. And what do you do for the crime
25 laboratory?

1 A. I am assigned in the serology DNA section
2 of the laboratory.

3 Q. In the DNA section of serology?

4 A. Right, DNA serology section.

5 Q. Are you a DNA analyst?

6 A. Yes, I am.

7 Q. How are you qualified to perform that
8 function? What training do you have to do DNA
9 comparisons?

10 A. I have Bachelor of Science degree in
11 chemistry, minor in biology. I've worked at the lab
12 since 1982 as a serologist. Five years ago I
13 went -- I had gotten DNA training by the company who
14 provides us the kit. I went back to school and got
15 a legal biology course. And I had attended
16 different seminars and schooling that are pertinent
17 to the DNA field.

18 Q. Now, five years ago you attended a course
19 taught by the company that, I assume from what you
20 said, the company that provides the DNA equipment
21 and analysis equipment for the Houston Police
22 Department; is that correct?

23 A. That's correct.

24 Q. What company is that?

25 A. It's Perkin Elmer.

1 Q. On what scale do they do that?

2 Nationally, locally or --

3 A. I'm sorry, I didn't --

4 Q. Are they a national company? Do they --

5 A. Right. They have the patent for the kit
6 that we use. They provide to FBI, a lot of local,
7 national, the DNA laboratory.

8 Q. They provide similar services for the FBI?

9 A. Yes, that's correct.

10 Q. How long was your training actually on
11 location with them?

12 A. I was there two weeks.

13 Q. Do they come here to give training?

14 A. No, they do not.

15 Q. All right.

16 And you also, in conjunction with
17 this training, did I understand you to say you went
18 back to school to take a course or courses in
19 microbiology?

20 A. No, a course, which is molecular biology.

21 Q. You also attend seminars. Do you do that
22 with some regularity? Do you attend teaching
23 seminars every year?

24 A. I guess on a regular basis. We have --
25 I'm a member of SWAFS, which is the Southwest

1 Forensic Association. We have a meeting twice a
2 year. Each meeting they put out different workshops
3 that are pertinent to any forensic field. And
4 they -- all the -- most of the time they do have a
5 workshop on DNA, the new technologies or the old
6 technologies that you want to get more training out
7 of. So I have attended different workshops and
8 seminars that are put out by the Southwest Forensic
9 Association meeting.

10 Q. How long has the Houston Police Department
11 Crime Laboratory been doing DNA analysis?

12 A. We have two DNA techniques that we have
13 been using. RFLP was the first one, and I want to
14 say seven years, and the PCR is the more recent one.
15 And it's been -- we have been online for maybe five
16 years.

17 Q. You have been online with PCR for five
18 years?

19 A. Yes, we have been online for five years.

20 Q. When you say the last one online, what do
21 you mean?

22 A. I was the first one to be trained for PCR.
23 There were other chemists that went on training
24 before me. And once they were proficient in doing
25 PCR analysis of -- and also we had to validate

1 instruments, and we started taking cases.

2 Q. When you say you validate instruments,
3 what does that mean?

4 A. Again, Perkin Elmer -- we had purchased
5 all these instruments and chemicals from Perkin
6 Elmer. It's a part of the -- the DNA working group
7 guidelines that we have to validate the instrument
8 to make sure it produces the same results. We're
9 looking for consistency and reproducibility on all
10 the instruments, so that we know the instrument is
11 in good standing.

12 Q. Who does that?

13 A. Us.

14 Q. You validate -- the lab itself validates
15 these instruments?

16 A. Right. Each own laboratory has to
17 validate the instruments.

18 Q. So, do you have -- I'm trying to figure
19 out, do you have standards that you go by to
20 validate these instruments? How do you validate the
21 instruments?

22 A. There is a lot of procedure that we can go
23 by, from reading different papers.

24 For example, one of the ways to
25 validate the instrument for the reproducibilities,

1 that we use different quantities of the DNA, see if
2 we can get the same DNA patterns from different
3 dilutions of samples.

4 Q. So you ran experiments on your own
5 equipment to see if you got consistent results?

6 A. That is correct.

7 Q. And there were standards that you were
8 matching, a staff of standards that you were
9 matching?

10 A. That's correct.

11 Q. Is there an agency or an association that
12 accredits laboratories?

13 A. There is an accreditation that we are
14 trying to get a credit by.

15 Q. You're working on your accreditation?

16 A. Yes, our laboratory is working on it right
17 now.

18 Q. Now, on October 25th, did you perform a
19 DNA analysis on evidence of a sexual assault kit
20 bearing the number, 137-00-9698?

21 A. Not on that day, but I did work on that --

22 Q. I'm sorry, I mentioned the wrong date.
23 But did you work on evidence submitted under that
24 Houston Police Department case number?

25 A. Yes, I did.

1 MR. OWMBY: May we approach, quickly,
2 Your Honor?

3 THE COURT: Yes.

4 (Bench conference had.)

5 MR. OWMBY: I'm not trying to be
6 facetious. I can't concentrate. I can hear you --

7 MR. MOCK: Telling him what to do?

8 MR. OWMBY: Yes.

9 THE COURT: I can hear --

10 MR. MOCK: I'm sorry.

11 THE COURT: That's all right.

12 (Bench conference ends.)

13 Q. (BY MR. OWMBY) What items did you examine
14 under that case number?

15 A. I have examined the vaginal swab, cutting
16 from the jeans, debris from the pubic hair combings,
17 known as number one, unknown sample, and also three
18 known blood samples from three different
19 individuals. Josiah Sutton is one, Gregory Adams
20 and Priscilla Stewart.

21 Q. Now, did you examine blood samples from
22 Priscilla Stewart?

23 A. Yes, blood samples and the buccal swab
24 from Priscilla Stewart's mouth.

25 Q. Now, had these items been previously

1 examined by anyone in your lab?

2 A. Yes.

3 Q. And who was that?

4 A. That would be Shae Quiroz.

5 Q. I want you to examine -- I want you to
6 look at for me, what's been marked for
7 identification as State's Exhibit No. 27.

8 Do you recognize that container?

9 A. I recognize the lab number and her
10 initials.

11 Q. All right. You mentioned -- let me do
12 this.

13 Now, did you observe me take what's
14 now been marked for identification as State's
15 Exhibit No. 27-A from inside of State's Exhibit No.
16 27?

17 A. Yes, I did.

18 Q. All right.

19 Do you recognize what's attached
20 to -- the swabs that are attached to what's marked
21 as State's Exhibit No. 27-A?

22 A. Again, I recognize the lab return number,
23 Shae Quiroz's initials, and what's written as a
24 sample number one.

25 Q. You said you examined something called

1 unknown sample number one?

2 A. That is correct.

3 Q. Do you recognize either of these swabs as
4 what you have been referring to as unknown sample
5 number one?

6 A. Again, the swabs that are received for the
7 DNA analysis were in the plastic vial with the
8 label. Therefore -- I don't know.

9 Q. Thank you.

10 Could you explain to the jury what
11 DNA is?

12 A. DNA is genetic material that's in any
13 living cells in your body. DNA from your hair
14 roots, DNA from your skin cells, or any organs, from
15 blood, vaginal secretions or sperm cells. If it
16 came from one person, it should have a same exact
17 DNA pattern. No other two persons will have same
18 DNA except in the case of -- of identical twins.
19 And DNA material is transferable, meaning, the DNA
20 that's in one person, have received from the parents
21 and then again that DNA from you will be transferred
22 to your offsprings.

23 Q. All right. Now, in the science of
24 forensics, how is DNA useful for forensic
25 comparison?

1 A. In the case of sexual assault, semen is
2 deposited in the vaginal vault of the complainant.
3 That semen can be compared -- or the DNA from the
4 semen can be compared to the known -- possible known
5 donor, see if that donor could have donated the
6 semen into the vaginal vault of the complainant.
7 And the FBI have established how frequent the DNA
8 have appeared in that general population, and we can
9 compare how likely another person can have same DNA
10 pattern.

11 Q. Now, understand this is kind of hard for
12 me to understand, too.

13 You say no two people have the same
14 DNA, yet you said the FBI has established how
15 frequently these types of DNA are established.

16 Would you explain to me what you mean
17 by that, since no two people have the same DNA, why
18 would the FBI establish the frequencies?

19 A. Because we are not studying or we're not
20 analyzing the whole strain of DNA, we are only
21 interested in the areas that scientists --

22 MR. HERBERT: Objection, Judge. This
23 testimony is hearsay. The witness is saying what
24 the FBI standards are.

25 THE COURT: That's overruled.

1 Q. (BY MR. OWMBY) You say you are not
2 examining the whole DNA strain. What do you mean by
3 that?

4 A. We're not because we're all human and we
5 don't need to analyze the whole DNA. We know what
6 makes hair or what makes our nose or feet or -- so
7 over 95 percent of the DNA, everybody is the same.
8 That's what makes us as a human not a porcupine or
9 other living organism.

10 However, we are only studying only
11 certain segments of DNA that are very different from
12 one individual to another individual. And that DNA
13 pattern is associated with certain number, how
14 frequent that DNA pattern appears in the general
15 population. And that's where we get the number.

16 Q. When you say you're examining the DNA,
17 what is it that you are looking at? What is a DNA?
18 Is it a cell? What is it?

19 A. The DNA is double-stranded molecules.
20 They are made up of bases. To name a few, there are
21 AGTC. These building blocks, AGTC are just lined --
22 are -- they are in like strings. So we are
23 analyzing certain segments of it, because different
24 people have a different sequence variation or their
25 length variations. That's what we're interested in.

1 Q. Okay. So of the building blocks -- and
2 how many building blocks are there for DNA?

3 A. They are over 3,000,000.

4 Q. Over 3,000,000 --

5 A. No, there are four building blocks, but
6 just the combination of how they are arranged in
7 this DNA sequence is what makes the difference.

8 Q. So how they are arranged, and if we call
9 them A, B, C, D -- and you've named what those
10 building blocks are. But if we refer to them like
11 that, you could have DNA strings that come in AA,
12 BB, CC or ABC, any combination like that?

13 A. That is correct.

14 Q. And so is that what you are talking about
15 when you talk about there is 3,000,000 ways that you
16 can combine these in a DNA molecule?

17 A. That's correct.

18 Q. What does a DNA molecule look like?

19 A. They are double-stranded. They are
20 helical -- if you think of them as a spiral case.
21 They are in the helical form.

22 Q. Could you describe that as taking, for
23 example, taking a ladder and twisting it? If you
24 could take a ladder and just twist it, is that what
25 the DNA molecule looks like?

1 A. Yes.

2 Q. Now, the rungs on those ladders, are those
3 the building blocks that you're talking about?

4 A. When you say rungs, they are the --

5 Q. Right -- and what I'm talking about is you
6 take a -- you take a ladder that shape and you twist
7 it -- and we're going to take it from end to end and
8 imaginary twist this ladder, so we'll have what I
9 call rungs between this molecule that becomes like a
10 spiral. And the A, B, C, D, the building blocks
11 that you referred to, do they basically constitute
12 the rungs?

13 A. No, the rungs are the bonding between
14 the --

15 Q. The strains of DNA?

16 A. Between the building blocks.

17 Q. Okay.

18 So these in here are actually the
19 building blocks?

20 A. Right.

21 Q. And how those A, B, C building blocks are
22 ranged, is what -- how DNA determines whether it is
23 a nose and what that nose is to look like, right?

24 A. Right.

25 Q. Whether there is a fingerprint and what

1 that fingerprint is to look like?

2 A. That's correct.

3 Q. How do you determine how those -- how
4 those building blocks are arranged on a DNA strain?
5 I mean, when you're dealing with actual DNA, how do
6 you find out what that molecule looks like?

7 A. That's a part of testing. There's
8 something called primers. Those are just short
9 sequence of DNA. It knows where to attach, because
10 that's provided by the company. For example, you
11 want to study one sequence. They already know what
12 the sequence of the DNAs are, so that they can make
13 synthetic DNA that will attach to the area that
14 we're interested in. So the primers are the ones
15 that will look for where to bind.

16 Q. All right.

17 So you have DNA. You have these
18 extremely -- on a microlevel, extremely long strands
19 of DNA. You put what you have referred to as a
20 primer to find the sections of DNA that you need to
21 study?

22 A. Exactly.

23 Q. The sections that your studies have
24 identified as a unique section in that DNA strand?

25 A. Exactly.

1 Q. All right.

2 After you have identified the strain
3 you want to study, then what do you do then?

4 A. The procedure that we use again is the
5 PCR. Once the primer binds to the area that we're
6 interested in, we can manipulate the temperature of
7 the environment so that the DNA sequence can grow
8 to -- to make another new set of DNA, because the
9 DNAs are double stranded, as I said earlier. By
10 controlling the temperature, we can separate that
11 double stranded DNA to make a single strand.

12 Q. Right.

13 So what you do is you cut the stand.
14 Would that be fair to say? You cut this strand?

15 A. Right.

16 Q. All right.

17 A. No, I'm sorry, we're separating the stand,
18 not cutting it.

19 Q. You separate the strands in lengths like
20 this?

21 A. From a double strand we are separating to
22 two single strands.

23 Q. Right.

24 And that's what I'm saying. If the
25 DNA is a ladder that's been twisted, you cut the

1 connection; is that correct?

2 A. Right.

3 We're not using any enzymes or
4 anything. We're just, by controlling the
5 temperature, it'll separate by itself.

6 Q. It separates by itself?

7 A. Right.

8 Q. So I'm using the phrase cutting, but
9 you're saying it's not like cutting?

10 A. Right, it's not cutting.

11 Q. You use the temperature to make the DNA
12 separate. And then you say you replicate.

13 Can you explain that?

14 A. Before we replicate, primer finds where
15 it's supposed to replicate. And again, by
16 controlling the temperature, in the mixture we add
17 building blocks so that enzyme will bring in
18 different match of the DNA to grow.

19 Q. So you put chemicals in here that actually
20 matches that DNA that's already there?

21 A. Right.

22 Q. And then that -- is that matched strand of
23 DNA what you can read?

24 A. That's correct.

25 Q. All right. So you -- you make more new

1 DNA -- you just duplicate what you already have
2 until you can read this pattern and see a
3 difference?

4 MR. HERBERT: Objection, Judge, he's
5 testifying.

6 THE COURT: Is your objection to
7 leading?

8 MR. HERBERT: He's leading the
9 witness.

10 THE COURT: Sustained.

11 Q. (BY MR. OWMBY) All right.

12 Can you explain to the jury why you
13 replicate the DNA?

14 A. So that we can increase the quantity. So
15 that we can develop the pattern of that sequence
16 that we just replicated.

17 Q. Let me see if I can understand this.

18 You have four building blocks you're
19 working with and they're in some pattern.

20 MR. HERBERT: Objection, leading.

21 THE COURT: Overruled.

22 Q. (BY MR. OWMBY) And they're in some
23 pattern; is that correct?

24 A. That's correct.

25 Q. So you need enough DNA until you see a

1 unique pattern. Would that be fair to say?

2 A. Yeah, it's fair to say.

3 Q. You need enough of a length until you see,
4 all right, here we have an identifiable pattern.
5 Would that be correct to say?

6 A. That's correct.

7 Q. And you're already in an area where you
8 know that this is a unique --

9 MR. HERBERT: Objection, Judge.

10 THE COURT: Sustained.

11 Leading?

12 MR. HERBERT: Yes.

13 THE COURT: Sustained.

14 Q. (BY MR. OWMBY) And you said you use the
15 PCR method to do this?

16 A. Yes, I do.

17 Q. Is that the method you used to analyze the
18 vaginal swabs -- the vaginal swabs, the vaginal
19 smears, and the cutting from the jeans?

20 A. The vaginal swabs, the cutting from the
21 jeans, debris from the pubic combing area and number
22 one unknown sample.

23 Q. I don't want to talk about the unknown
24 sample. Okay?

25 All right.

1 Just to be clear what I'm talking
2 about, we're talking about the swab, the debris from
3 the pubic hair and the cutting from the jean; is
4 that correct?

5 A. That's correct. Plus the three known
6 blood samples.

7 Q. You do the same process on the three known
8 blood samples, so that you have a pattern from your
9 known sample and you have patterns from this unknown
10 sample?

11 A. That's correct.

12 Q. All right.

13 From the unknown samples that you
14 have, the vaginal swabs, the debris from the pubic
15 area, and the cutting, were you able to develop
16 identifiable DNA strands?

17 MR. HERBERT: Objection, Judge.

18 THE COURT: Overruled.

19 MR. HERBERT: I have an objection.
20 It hasn't been established that this witness is
21 capable of testifying to the results of the test.

22 THE COURT: Would you approach the
23 bench, please?

24 (Bench conference had.)

25 THE COURT: Have you filed any kind

1 of motion?

2 MR. HERBERT: No, I'm objecting to
3 her testifying now. I haven't filed a motion.

4 THE COURT: Are you saying she's not
5 an expert? She's -- you feel she hadn't been proven
6 up as an expert? Is that all you're objecting to?

7 MR. HERBERT: Yes.

8 THE COURT: Overruled.

9 MR. HERBERT: So I understand, is she
10 testifying as an expert at this point?

11 THE COURT: Yes.

12 Your objection is overruled.

13 (Bench conference ends.)

14 Q. (BY MR. OWMBY) What I'm going to refer to
15 as the unknown sample, the vaginal swab, the debris
16 from the pubic area, and the cutting of the jeans,
17 were you able to develop DNA patterns from those
18 items?

19 A. Yes.

20 Q. How many different unique DNA patterns
21 were you able to develop from those unknown samples?

22 A. Six different areas of DNA was analyzed.

23 Q. Six different areas of DNA?

24 A. Yes.

25 Q. Were you able to tell how many donors

1 contributed those six different areas of DNA?

2 A. From the vaginal swab and debris from
3 pubic combings, I have at least two semen donors,
4 and also, DNA pattern of the complainant was shown.

5 Q. And by the complainant, are you meaning
6 Priscilla Stewart?

7 A. That's correct.

8 Q. That is from the vaginal swab?

9 A. The vaginal swab and --

10 MR. HERBERT: Objection. Judge. At
11 this time, I'd just like to ask for a continual line
12 of objections on this DNA analysis.

13 THE COURT: You need to approach the
14 Bench.

15 (Bench conference had.)

16 THE COURT: My understanding, and
17 I've asked you specifically, you have not filed any
18 type of motion for the Court to make any kind of
19 determination about the expert testimony; is that
20 correct?

21 You're not requesting that, you're
22 just asking me based on the questions that are asked
23 here in the courtroom -- I want to make that
24 perfectly clear for the record. You're not asking
25 me to make any kind of independent --

1 MR. HERBERT: Judge, I'll make one at
2 this time. I'll make an oral motion.

3 (Bench conference ends.)

4 THE COURT: All right. I need to
5 excuse you for a few minutes.

6 Please retire to the jury room.

7 (Jury exits.)

8 THE COURT: Do you have some type of
9 motion you need to make before the Court, outside
10 the presence of the jury?

11 MR. HERBERT: First, I'd ask the
12 Court, Judge, if I can take this witness on voir
13 dire to establish whether or not this witness can
14 testify as an expert to the DNA analysis.

15 THE COURT: You want to take her on
16 voir dire?

17 MR. HERBERT: Yes.

18 THE COURT: All right. Go ahead.

19 Under -- and you're doing this under
20 what, just voir diring the witness?

21 MR. OWMBY: Is there a motion?

22 THE COURT: That's what I'm trying to
23 find out.

24 MR. OWMBY: What is the motion, if we
25 could ask?

1 MR. HERBERT: Judge, I'm making a
2 motion to exclude this witness from testifying about
3 the DNA evidence, including any --

4 THE COURT: Are you asking for a
5 Daubert/Kelly under Rule 702?

6 MR. HERBERT: Yes.

7 THE COURT: I'm assuming that's what
8 you're asking for.

9 MR. HERBERT: Rule 702 and 104A, Your
10 Honor.

11 THE COURT: 104 --

12 MR. HERBERT: A.

13 MR. OWMBY: Let me see if I
14 understand your motion.

15 Are you objecting to this witness'
16 qualifications as an expert in this type of
17 analysis?

18 MR. HERBERT: That is what I'm
19 objecting to.

20 MR. OWMBY: On that motion, we are
21 offering the testimony that we have already elicited
22 from the witness.

23 THE COURT: All right. That
24 testimony will be admitted.

25 And do you have anything else you

1 would like to submit on that motion --

2 MR. HERBERT: I would like to voir
3 dire.

4 THE COURT: -- based on just the
5 evidence the State has already presented?

6 MR. HERBERT: Judge, I don't have a
7 problem with the evidence the State has already
8 presented.

9 THE COURT: You do what to the
10 evidence?

11 MR. HERBERT: I do not have a problem
12 with the evidence the State has already admitted.

13 THE COURT: All right.

14 So my understanding is you requested
15 a motion, and the State has in regard to that, has
16 asked the Court to consider everything that this
17 witness has already testified to; is that correct,
18 Mr. Owmbby?

19 MR. OWMBY: That is correct, Your
20 Honor.

21 THE COURT: I am now allowing you to
22 cross-examine the witness, because the State has
23 told me that's the evidence they wish to put on the
24 motion. Now you have an opportunity to
25 cross-examine the witness in regards to the motion.

1 MR. HERBERT: May I proceed, Your
2 Honor?

3 THE COURT: Yes.

4 VOIR DIRE EXAMINATION

5 Q. (BY MR. HERBERT) Ms. Kim, are you
6 familiar with the National Academy of Sciences?

7 A. No.

8 Q. Are you familiar with the Institute of
9 Medicine?

10 A. No.

11 Q. Are you familiar with the National Academy
12 of Engineering?

13 A. No.

14 Q. Other than, I believe it's Perkin Elmer,
15 is that the name of the company that owns the patent
16 on the technology you use to test DNA?

17 A. Perkin Elmer.

18 Q. Perkin Elmer.

19 Other than Perkin Elmer, are you
20 familiar with any entities who do work in this area?

21 A. I know of many of them.

22 Q. You know many of them?

23 A. Right.

24 Q. Do you know of any of their publications?

25 A. Do I know -- I'm sorry, I didn't hear you.

1 Q. Do they have any publications about the
2 proper execution of DNA testing and the proper
3 handling of samples?

4 A. Many of them, yes.

5 Q. Can you name some of them?

6 A. I mean, they are all over forensic
7 journals. They have publications all the time. I
8 cannot name every single one of them, but --

9 Q. Can you name any of them?

10 A. The PCR methods in many different ways.

11 Q. That's fine.

12 Are you familiar with any other
13 methods of testing DNA other than PCR?

14 A. No. PCR is the only method that I know
15 how, or I'm an expert in testifying in.

16 Q. Have you ever heard of the RFLP method?

17 A. Yes.

18 Q. And that's another method, other than the
19 PCR; is that correct?

20 A. That's correct.

21 Q. Is that method more accurate than the PCR?

22 A. No, both are scientifically valid.

23 Q. But is one more accurate than the other?

24 A. I wouldn't say one is more accurate. The
25 forensic scientists have agreed that they both

1 are -- are -- both the methods are just as
2 conclusive, just as accurate.

3 Q. You said your lab is working on
4 accreditation. It's not accredited right now?

5 A. No.

6 Q. Do you know what the potential rate of
7 error in the PCR technique is?

8 A. No, I do not know.

9 Q. Have you ever done any research or reading
10 on the potential rates of error?

11 A. I have read. But I don't recall what the
12 number is.

13 Q. Now, with respect to the samples in this
14 case, you got them from the HPD property room; is
15 that correct?

16 A. The lab had gotten the -- the rape kit
17 from the HPD property room, that is correct.

18 Q. Now, while it was in the HPD property
19 room, do you have any way of knowing who came into
20 contact with those samples?

21 A. No.

22 Q. How did you get them from the crime lab?
23 Did you get them --

24 MR. OWMBY: I'm going to object to
25 this line of questioning. Because it's not relevant

1 to this motion.

2 THE COURT: That's sustained.

3 Q. (BY MR. HERBERT) Did you divide the
4 samples when you got them?

5 A. I'm sorry?

6 Q. When you got the samples from the property
7 lab, did you divide them? Did you separate part of
8 the sample here and part of the sample there?

9 MR. OWMBY: I'm going to object. The
10 question is not relevant to this motion.

11 MR. HERBERT: Judge, it's relevant --

12 THE COURT: It's overruled.

13 You may proceed.

14 Q. (BY MR. HERBERT) Do you understand that
15 there are mistakes made in DNA?

16 A. I'm sure there's always a human error
17 possible.

18 Q. And do you understand, ma'am, that it's
19 generally accepted that you cannot completely
20 eliminate the possibility of human error; is that
21 correct?

22 A. I am aware of that.

23 MR. HERBERT: At this time, Judge, I
24 would just urge that you exclude this witness from
25 testifying about the results of the DNA test.

1 THE COURT: Anything further,
2 Mr. Owmbby?

3 MR. HERBERT: If --

4 THE COURT: I'm sorry, I didn't mean
5 to cut you off.

6 MR. HERBERT: If for no other reason
7 than this witness testifying about the results,
8 without having any knowledge of what the potential
9 rate of error is for those results, which is
10 specifically to be considered under Daubert.

11 THE COURT: Anything further,
12 Mr. Owmbby?

13 MR. OWMBY: Not on the motion that
14 was originally stated, Your Honor.

15 THE COURT: Well, you have something
16 else you want to add in regards to her testimony?

17 MR. OWMBY: No, Your Honor.

18 THE COURT: All right. Then I will
19 allow the testimony. I find that the evidence will
20 assist the trier of facts; that the evidence is
21 reliable, relevant and probative, and is not -- and
22 I've made a 403 analysis and find that's admissible
23 under 403 also.

24 All right. Bring the jury out.

25 (Jury present.)

1 THE COURT: All right. You may be
2 seated and you may proceed, Mr. Owmbly.

3 REDIRECT EXAMINATION CONTINUED

4 Q. (BY MR. OWMBY) I asked you about the
5 number of donors in relation to the vaginal swab.
6 And you've already told me that you had two semen
7 donors and a female donor, the complainant; is that
8 correct?

9 A. That is correct.

10 Q. How about the -- what were the results as
11 far as the number of donors on the pubic hair debris
12 sample?

13 A. Again, two semen donors and one female
14 donor, meaning, Priscilla Stewart.

15 Q. And lastly, the cutting from the jeans?

16 A. It's -- again, two donors, semen donors,
17 and one female donor, just on the five areas or the
18 five segments of DNA, not -- not seven -- all the
19 seven areas.

20 Q. So your conclusion as to the cutting on
21 the jeans is that there was two male donors, semen
22 donors, and one female donor?

23 A. That's correct.

24 Q. How do you tell the difference in your
25 analysis between a male donor and a female donor?

1 A. Actually I -- in a -- under PCR, we cannot
2 really tell whether it's from a female or a male.
3 However, when we get a semen sample, or if the semen
4 is deposited in the -- on the -- usually on panties
5 or the underwear or even from the vaginal vault, we
6 try to separate the female cells, meaning the skin
7 cells from the male cells, because by using
8 different chemicals -- because the skin cells
9 usually break, using weak chemicals. However, the
10 semen or the DNA from the semen, it's -- I guess the
11 walls are thicker, therefore we have to use a
12 stronger chemical. So through the extraction
13 procedure, we can separate what came from a skin
14 cell versus semen.

15 Q. Right.

16 So in other words, you added
17 chemicals and the first cells that break are female,
18 and you know that from the research and the science;
19 is that correct?

20 A. That is correct.

21 Q. So you know that whatever didn't break in
22 the first addition is a male cell, and what did
23 break is a female cell?

24 A. Usually you don't get a clean separation.
25 However, you might have a little crossover. But

1 usually, because I have a known sample to compare
2 to, I know which one belongs to the complainant or
3 which one belongs to the semen donors.

4 Q. So you have this separation, and then
5 after you get what you believe to be the separation,
6 you can finalize that by comparing the known
7 samples?

8 A. Exactly.

9 Q. Did you compare the male DNA sample that
10 you obtained from the vaginal swab to a known
11 sample?

12 A. Yes, I did.

13 Q. What known sample did you compare the male
14 segments found in the vaginal swab to?

15 A. It was compared to Josiah Sutton and
16 Gregory Adams.

17 Q. What was the result as far as the known
18 sample from Josiah Sutton?

19 A. I'm sorry, I lost the question.

20 Q. What was the result of the your comparison
21 of the known male DNA sample -- from the unknown
22 male DNA sample to the known sample of Josiah
23 Sutton?

24 MR. HERBERT: Objection, Judge. I
25 would like a running objection on this line of

1 questioning.

2 THE COURT: Your objection is
3 overruled.

4 You may answer.

5 THE WITNESS: Josiah Sutton's DNA
6 pattern was -- was detected from the DNA patterns
7 that were detected from the vaginal swab of the
8 male -- male pattern.

9 Q. (BY MR. OWMBY) Did you detect the pattern
10 attributable to the known sample of Gregory Adams,
11 in the DNA sample?

12 A. No, I did not.

13 Q. What was the result of your comparison of
14 known male samples, extracted from the debris, the
15 pubic hair debris?

16 A. Again, Josiah Sutton's pattern was
17 detected.

18 Q. Was Gregory Adams's pattern detected in
19 that sample?

20 A. No, he was not.

21 Q. And what was your -- what was the result
22 of your examination of the cutting from the jeans,
23 as far as the comparison between the known and
24 unknown male samples?

25 A. Again, Josiah Sutton's pattern was

1 detected.

2 Q. And as far as Gregory Adams' pattern?

3 A. His pattern was not detected.

4 Q. After you collected the samples and made
5 this comparison to the sample of Josiah Sutton and
6 you detected that pattern, what did you do with the
7 samples you had examined?

8 A. I stored them back in our laboratory
9 freezer.

10 Q. Did you have sufficient sample left for
11 you or someone else to conduct tests?

12 A. Yes.

13 Q. Were you asked to send them anywhere?

14 A. Yes, I was.

15 Q. Did you send these samples anywhere?

16 A. Yes, I did.

17 Q. Where did you send them?

18 A. The DNA samples were sent to -- to a
19 private DNA testing laboratory called Gene Screens
20 in Dallas.

21 Q. I want to be clear about that.

22 Did you do that on your own? Was
23 that a test you requested?

24 A. It was requested.

25 Q. Did you -- you request that that test be

1 done?

2 A. No, I did not make that request, no.

3 Q. It was requested by someone else that you
4 send that sample to Gene Screen?

5 A. That is correct.

6 Q. Did you verify that Gene Screen received
7 that sample?

8 A. Yes.

9 MR. OWMBY: I'll pass this witness.

10 THE COURT: All right. Mr. Herbert?

11 CROSS-EXAMINATION

12 Q. (BY MR. HERBERT) Ms. Kim, you testified
13 that it was five years ago that you started
14 receiving DNA training?

15 A. Yes.

16 Q. And your training was given by Perkin
17 Elmer?

18 A. That's correct.

19 Q. And since that time, maybe twice a year
20 you have been doing seminars and workshops to keep
21 up with DNA?

22 A. Plus doing a lot of casework, yes.

23 Q. Did you keep up with the current state of
24 DNA research?

25 A. That's correct.

1 Q. And the HPD crime lab has been online for
2 seven years; is that correct?

3 A. For RFLP.

4 Q. Online means that there is a database that
5 carries DNA strands?

6 A. Actually, we use FBI database and also
7 Perkin Elmer database, because they are a much
8 bigger databases. We have our own database, yes.

9 Q. So Perkin Elmer's database is different
10 from the FBI database?

11 A. Yes, one is maybe bigger than the other
12 one.

13 Q. Do you have any idea -- do you have any
14 idea how Perkin Elmer established their database?

15 A. Well, just like any other laboratory,
16 getting a database. They just get blood samples
17 donated to them, and they analyze the DNA sequence
18 they're interested in. That's how you build up the
19 database.

20 Q. You have no knowledge of whether or not
21 their database is made up of a sampling from the
22 general population, do you?

23 A. I cannot recall. I could provide the
24 papers for you. There are some numerous papers
25 about how they built up their own database of

1 different racial groups.

2 Q. As you sit there on the stand, and indeed
3 as you are interpreting the results in this case,
4 you had no idea whether or not that database
5 consisted of a statistical sampling of the
6 population at large, do you?

7 A. Again, I don't exactly understand your
8 question. But Perkin Elmer has databases of the
9 south population -- gender population, they have
10 Southwest -- Hispanic populations, Black
11 populations, Asian populations and Caucasian
12 populations.

13 Q. Okay. Now, when your lab does whatever
14 procedures it does to ensure that -- to ensure the
15 accuracy of your results, there's no outside
16 verification of that, is there?

17 A. Again, we have -- each chemist has to be
18 proficient in outside laboratory -- proficient --

19 Q. Let me ask you another question.

20 Who decides whether or not a chemist
21 in your lab is proficient in the operation of these
22 machines that compare the databases?

23 A. Again, we -- each chemist goes through the
24 proficiency testing twice a year. We have to --
25 each chemist has to send in the results,

1 individually, and see if our results are correct.
2 And we each other check our reports and -- before we
3 release to the DA's Office or to the other agencies,
4 our supervisors, they check our cases all the time.
5 So we -- we know we're proficient in what we do.

6 Q. So it's your supervisors who gage whether
7 or not you're proficient in what you do?

8 A. Right. He's one of them.

9 Q. And your lab is not accredited; is that
10 correct?

11 A. Right. We are not accredited yet.

12 Q. Yet you have been online for seven years?

13 A. With the PCR, five years.

14 Q. Okay. You have been online with the PCR
15 method DNA for five years?

16 A. That's correct.

17 Q. Now, you just told this jury that there
18 was enough sample left that if you had wanted to do
19 another test, or if someone else wanted to do
20 another test, you could have done it; is that
21 correct?

22 A. That's correct.

23 Q. Did you ever speak with anyone from Gene
24 Screen?

25 A. Yes, I did.

1 Q. Do you remember who you spoke with?

2 A. I forget his first name, but his last name
3 is Watson.

4 Q. And did you and Mr. Watson discuss the
5 samples you had remaining in this case?

6 A. Yes.

7 Q. Now, were there any samples remaining in
8 this case that your lab had not had contact with?

9 A. I don't understand what your question is.

10 Q. Well, if I may, let's say that this sheet
11 of paper is a sample of DNA. If you take this
12 entire sample and put it over here and test it and
13 get a result, and then you take what's left and put
14 it over here, what's left is, for all practical
15 purposes -- whatever you do to this sample over here
16 is going to replicate what happened to the entire
17 sample right here; is that correct?

18 A. That's correct.

19 Q. So if there is a problem with this test,
20 where you started it, the whole thing, if there is a
21 problem here, you would only replicate that problem
22 when you tested what's left here; is that right?

23 A. I guess that's possible.

24 Q. Now, if you started with this same sample,
25 and you tore it in half, put it over here and tested

1 it, and you wanted to retest it, you have this left
2 to retest it; is that correct?

3 A. Okay. If I divided the sample, doesn't
4 mean that half of the portion will be all consumed.
5 There should still be DNA sample left on that half
6 of the portion, that may not be contaminated.

7 Q. There should be.

8 Is there a way that you can be
9 absolutely certain that half of the sample is still
10 there?

11 Well, let me ask you another question
12 then.

13 If I had a cutting from a jean, and
14 this is -- this is that same cutting, if I wanted to
15 save half of the sample, could I not do so by
16 cutting that in half, and just testing what's over
17 here, and isolating this?

18 A. I'm sorry, I lost the question.

19 MR. HERBERT: May I approach the
20 witness, Judge?

21 THE COURT: Yes, sir.

22 Q. (BY MR. HERBERT) I am going to hand you
23 what's marked Defendant's Exhibit No. 1, and can you
24 identify what that is?

25 A. It's the National Research Counsel News,

1 from National Academy of Sciences, National Academy
2 of Engineering, the Institute of Medicine.

3 Q. Have you ever heard of any of those --

4 A. No.

5 Q. -- organizations?

6 A. No.

7 Q. Okay.

8 Can you turn to page three for me?

9 Now, on page three, there is a
10 list -- there is a list of scholars, if you will; is
11 that correct?

12 A. That is correct.

13 Q. And there are scholars there from the
14 University of Houston School of Medicine, correct?

15 A. Yes, I see that.

16 Q. And just below that down there is a
17 professor of genetics from the University of
18 Chicago; is that correct?

19 A. That's correct.

20 Q. And going on to the next page, there's
21 somebody from the University of California at
22 Berkley and somebody from Stanford University in
23 California and someone else again, a professor of
24 statistics at the University of Chicago; is that
25 correct?

1 A. That's correct.

2 Q. And there are other names on there, too?

3 A. Right.

4 Q. And this is a newspaper published by the
5 National Academy of Science, the National Academy of
6 Engineering and the Institute of Medicine; is that
7 correct?

8 A. That is correct.

9 Q. Now, if you would go to page two with me.
10 And under the first paragraph,
11 there's a heading that says, "Independent Retest."

12 Are you with me?

13 A. Did you say the second paragraph or the
14 first paragraph?

15 Q. Well, the first paragraph under the
16 heading, "Independent Retest".

17 A. I see that.

18 Q. Now, can you read that --

19 A. Independent --

20 Q. Well, wait a minute. I want you to start
21 somewhere in particular.

22 Let's just start with the second
23 sentence.

24 And can you read that from there?

25 A. "Judging that it is --

1 MR. OWMBY: Can I ask the witness to
2 read it to herself, which is what I think he
3 intends?

4 THE COURT: Yes.

5 MR. HERBERT: I'm sorry.

6 THE WITNESS: Okay.

7 Q. (BY MR. HERBERT) From what you just read,
8 is there any information in there that surprised
9 you?

10 A. No.

11 Q. And that paragraph specifically said that
12 no amount of effort can eliminate the risk of
13 laboratory error; is that correct?

14 A. Right. The error is always possible.

15 Q. Okay.

16 And that paragraph goes on to say
17 that "The best protection an innocent suspect" --

18 MR. OWMBY: I'm going to object to
19 him reading from this document.

20 THE COURT: That's sustained.

21 MR. HERBERT: Judge, I would like to
22 tender Defendant's Exhibit No. 1.

23 MR. OWMBY: We object, it's hearsay.

24 THE COURT: Sustained.

25 MR. HERBERT: Judge, under 801.13,

1 this is a learned treatise.

2 THE COURT: Approach the bench,
3 please.

4 (Bench conference had.)

5 THE COURT: The witness is saying
6 that she never heard of it before.

7 MR. HERBERT: She just said she's
8 heard of all the schools that these people signed
9 off on.

10 THE COURT: She's heard of these
11 schools?

12 Let me see the document.

13 MR. HERBERT: It's a newsletter.

14 THE COURT: The objection is
15 sustained.

16 (Bench conference ends.)

17 Q. (BY MR. HERBERT) Ms. Kim, from what you
18 just read, what's the best way for an innocent
19 suspect to prove his innocence?

20 MR. OWMBY: We object to the part of
21 the question that asks, "from what she just read."
22 If she has an opinion on that, she is an expert.

23 THE COURT: Sustained.

24 Q. (BY MR. HERBERT) Well, do you have an
25 opinion on what the best way for an innocent

1 suspect -- what is the best opportunity, someone who
2 is wrongfully accused, based on unreliable DNA
3 results, is to prove their innocence?

4 Let me ask you a plainer question
5 than that.

6 Can you think of a way for someone
7 who's innocent to call into question, unreliable DNA
8 results?

9 A. From my experience in the laboratory, we
10 have exonerated many suspects as innocent.

11 DNA is not only to accuse somebody.
12 It also helps somebody to be not guilty.

13 We have a lot of cases like that. I
14 don't understand --

15 MR. HERBERT: Objection, Judge.
16 That's nonresponsive. I'll rephrase the question.

17 Q. (BY MR. HERBERT) You do acknowledge that
18 the possibility of error exists, don't you?

19 A. Possibility of error exists in anywhere,
20 not only just in DNA work, but it could happen in
21 drug testing or any other testings.

22 Q. And you acknowledge that there is no way
23 to eliminate, completely eliminate the possibility
24 of error; is that correct?

25 A. But we use different safeguards to --

1 MR. HERBERT: Objection, Judge,
2 that's nonresponsive.

3 THE COURT: Overruled.

4 You can finish your answer, Ms. Kim.

5 THE WITNESS: We use different
6 precautions, different safeguards to eliminate any
7 human errors. One thing we participate in is the
8 Texas DNA working groups, proficiency testing
9 laboratory -- proficiency laboratory testing, just
10 to name a few. And we also use positive controls
11 and negative controls and planning controls when we
12 do DNA testing to eliminate possible contaminations
13 of the reagents or cross contaminations of the
14 testing samples that we have.

15 Q. (BY MR. HERBERT) Is it your testimony to
16 this jury that there are no -- that the possibility
17 of error in your lab is completely eliminated?

18 A. I'm not saying that it's -- it's a hundred
19 percent eliminated. But we take all the precautions
20 that we have. We use those precautions so that we
21 do not make human errors. And if we did, the end
22 results will tell us that we have a contamination,
23 because the plan control should not have any DNA
24 patterns. If there is any patterns, then we know
25 that something happened along the line. If the

1 positive control does not come back the way that it
2 is suppose to be, then we know there is error
3 involved. So we have to -- it hasn't happened so
4 far, but if it happens, we have to abolish the whole
5 procedure. We have to start all over from the
6 beginning.

7 Q. So in spite of all of these precautions,
8 after five years, your lab is still unaccredited; is
9 that right?

10 A. Right, we have not been accredited because
11 of the money issue.

12 MR. HERBERT: Objection, Judge,
13 nonresponsive.

14 THE COURT: Overruled.

15 Q. (BY MR. HERBERT) Is it the practice of
16 your lab, when you get a DNA sample, to divide them?

17 A. No, it's not the practice of the
18 laboratory at all.

19 Q. So if you do not divide the sample,
20 anything that happens to contaminate or compromise
21 the integrity of that sample, is going to be
22 repeated in a retest; isn't that correct?

23 A. I guess that's possible.

24 Q. So anything that you sent to Gene Screen,
25 the independent lab in this case, would only have

1 replicated the same process that you had -- and any
2 lack of integrity the original sample had would be
3 reproduced with what Gene Screen did; is that
4 correct?

5 A. That is not true. Because I have sent the
6 raw sample of all the three known blood samples. I
7 have sent a raw sample of the jean cuttings. The
8 only DNA sample that I sent to them was the vaginal
9 swab and the pubic combing, the debris from the
10 pubic combing.

11 Q. I guess from the vaginal swab and the rest
12 of the evidence that you had originally, you still
13 didn't have enough to test Ms. Stewart's DNA; is
14 that correct?

15 A. No. I sent the raw sample --

16 MR. HERBERT: Objection,
17 nonresponsive.

18 THE COURT: It's overruled.

19 You can answer the question, Ms. Kim.

20 THE WITNESS: I sent the blood sample
21 that was made on the stain card for the --
22 Ms. Stewart, Josiah Sutton and the -- Gregory Adams.

23 Q. (BY MR. HERBERT) Let me ask you this,
24 then.

25 Were there any completely -- you

1 start with a sample and you test it. That sample is
2 adulterated at that point, isn't it?

3 A. I don't understand what you're talking
4 about.

5 Q. Well, can you test the exact same sample
6 of DNA again and again, or is it consumed by the
7 test?

8 A. Right, when you repeat the testing, it's
9 going to consume, right.

10 Q. So if you have, once again, a sample this
11 size, and you test it before you divide it, then the
12 entire sample is really not helpful for a retest, is
13 it?

14 A. I'm sorry. You have to make it simple for
15 me, because I really don't understand what you're
16 trying to get at.

17 Q. When you got the cuttings from the jeans,
18 you extracted the DNA from that cutting; is that
19 correct?

20 A. I did not use all the cuttings. I only
21 used a portion of the cuttings.

22 Q. Did you separate the cuttings? I'm
23 asking --

24 A. Yes. The remaining was in a Ziploc in the
25 lab freezer, if you call that as a separation.

1 Q. So you take the cuttings, and how did you
2 separate them?

3 A. I removed a portion of the cuttings for my
4 testing. The remaining was put back in a freezer in
5 a Ziploc.

6 Q. When did you originally do a DNA test on
7 these samples?

8 A. I received all the known and unknowns on
9 the 18th of February. And I started the testing
10 immediately after that.

11 Q. That's the 18th of February?

12 A. Of this year.

13 Q. How long did it take you to test it?

14 A. Usually takes a couple of weeks.

15 Q. A couple of weeks?

16 A. Yes.

17 Q. Even when kept under refrigeration, isn't
18 it true that DNA degrades over time?

19 A. It's going to degrade to a certain extent,
20 yes.

21 Q. Now, the original samples in this case
22 were taken around October 28th or October 26th; is
23 that correct?

24 A. The original sample of the blood or the
25 rape kit?

1 Q. Rape kit.

2 A. The rape kit in this case was performed on
3 October the 26th, 1998.

4 Q. When were the samples from the rape kit
5 tested?

6 A. December the 1st of 1998.

7 Q. So they sat around for a little over a
8 month before they were tested?

9 A. They were kept in a freezer for that
10 length of time.

11 Q. Would that freezer have been in the HPD
12 property room?

13 A. The rape kit was at the property room
14 freezer until November the 17th. The lab retrieved
15 it on that day and was brought to the laboratory,
16 and it was kept in a freezer until the chemist
17 opened the rape kit.

18 Q. Okay. So the rape kit was in the HPD
19 property room from one to two weeks. I'm saying
20 from October the 26th to November the 17th?

21 A. I think it's more than two weeks.

22 Q. And from November 17th to December 1st it
23 sat in your lab?

24 A. It was kept in our laboratory freezer.

25 Q. In your laboratory freezer?

1 A. That's correct.

2 Q. Are you the only one with access to that
3 freezer?

4 A. Each chemist has his or her own lockbox
5 with a lock and key for each chemist.

6 Q. Do you have any way of knowing who had
7 access to the rape kit from October 26th to
8 November 17th?

9 A. No.

10 Q. When did you get samples of Josiah
11 Sutton's DNA?

12 A. Again, all the unknown and known samples
13 of the blood were received on the 18th of February.

14 Q. So is it fair to say that from
15 October 26th, 1998, to February 18th, 1999, you had
16 samples from the rape kit, or from HPD
17 investigators, by way of the truck, and nothing to
18 compare them to -- no known samples to compare them
19 to, until February 18th?

20 A. We received Josiah Sutton and Gregory
21 Adams on January 26th, so we could have started the
22 DNA right then.

23 Q. So from January 26th to February 18th, you
24 had Josiah Sutton's samples?

25 A. Yes, the lab had them, right.

1 MR. HERBERT: Pass the witness, Your
2 Honor.

3 THE COURT: Any questions, Mr. Owmbly?

4 MR. OWMBY: Just a few questions.

5 REDIRECT EXAMINATION

6 Q. (BY MR. OWMBY) If you take a look at
7 Exhibit 22 for me, are you familiar with the bar
8 codes that the property room uses?

9 A. Somewhat, yeah.

10 Q. Is there anything about those bar codes
11 that designates whether an item is potentially
12 perishable or not?

13 A. Not that I know of.

14 Q. Okay.

15 Is that -- how does the property room
16 know whether an item is perishable or not when they
17 receive it?

18 A. They were educated. When they receive
19 rape kits, it should go to the freezer, because they
20 have a big walk-in freezer in the back, or the
21 officer, usually it'll be a crime scene unit
22 officer -- or patrol officer are the ones that are
23 trying to tag the evidence in, they will tell the
24 employees at the property room to properly store the
25 evidence.

1 Q. All right.

2 Now, the effect -- we've been talking
3 about -- or there's been some talk about samples
4 being degraded, because they possibly weren't in a
5 freezer or what would happen.

6 Wouldn't that just destroy the
7 sample?

8 If we left the sample outside, in the
9 environment, subject to the elements, to say it
10 degrades the sample means that the sample will
11 eventually be destroyed, it would be useless for any
12 type of testing; isn't that correct?

13 A. Right, if it is left out in the hot sun, a
14 lot of humidity, then yes, it will eventually
15 destroy all the DNA.

16 Q. The effect is not to mutate, change the
17 DNA, it is to destroy the DNA; is that correct?

18 A. That's correct.

19 Q. You talked about a blind-control test.
20 That is running a -- when you run a DNA test, you
21 run a control test that should result in nothing; is
22 that correct?

23 A. That's correct.

24 Q. And that is your control so that you know
25 that you are not contaminating the sample that you

1 are using; is that correct? Is that your control?

2 A. Right. During the extraction procedures
3 or during typing procedures, if the -- if any of the
4 reagent that I am using has been contaminated, then
5 all the tubes or all the DNA, including the planning
6 controls could have that possible contaminant.

7 Q. If the chemicals you are using are
8 contaminated, it's going to show in this blind
9 control. You are going to get DNA over here, right?

10 A. That is correct.

11 Q. Did you run the blind-control test when
12 you did the procedure on the DNA in this case?

13 A. Yes, I did.

14 Q. Were the results satisfactory, that is, no
15 contamination was shown?

16 A. That's correct.

17 Q. You talked about the lab not being
18 accredited. You received proficiency testing how
19 many times -- what is the frequency of proficiency
20 testing?

21 A. Twice a year.

22 Q. Who is responsible for administering those
23 proficiency tests?

24 A. Well, one is from a private agency,
25 another one is from Texas DNA Working Group. And my

1 supervisor is the one that would -- I guess
2 administer the proficiency testing samples to us.

3 Q. Your supervisor gives you the samples, and
4 then you send them off to this -- these companies
5 for them to check?

6 A. That is correct.

7 Q. So a company sends your supervisor a known
8 sample to see if you can define -- see if you can
9 extract the DNA and come out with a correct result.

10 Is that what a proficiency test is?

11 A. That's correct.

12 Q. And you do that twice a year?

13 A. That's correct.

14 Q. And have you passed your proficiency test?

15 A. Yes, I have.

16 Q. You sent Gene Screen -- for example, we've
17 been talking about a vaginal swab. Actually,
18 there's more than one vaginal swab, isn't there?

19 A. Usually we get two or more vaginal swabs,
20 yes.

21 Q. So you can send Gene Screen a vaginal swab
22 and conduct your test on another vaginal swab; is
23 that correct?

24 A. That's possible.

25 Q. You talked about the cutting from the

1 jeans. You can take that jean cutting, you can cut
2 it in half, you test one half and you send the other
3 to Gene Screen; is that correct?

4 A. That's possible.

5 Q. Isn't that what you did in this case?

6 A. No, the vaginal swab -- a lot of times in
7 a sexual assault case --

8 Q. Wait, let me --

9 MR. HERBERT: Objection, Your Honor.
10 I'd like to hear the answer to the
11 question he asked.

12 THE COURT: You can rephrase your
13 question.

14 Q. (BY MR. OWMBY) Right.

15 Did you have more than one swab?

16 A. Yes, I did.

17 Q. Did you have to use all the swabs in your
18 testing?

19 A. Yes, I did. I had to use -- I had to use
20 all the swabs for my testing, yes.

21 Q. Did you have more than one cutting on the
22 jean.

23 A. There is more than one cutting, yes.

24 Q. Did you have to use all the cuttings in
25 your testing?

1 A. No, I did not have to use all the
2 cuttings.

3 Q. The other cutting is available for Gene
4 Screen; is that correct?

5 A. It's already at the Gene Screen.

6 Q. So the cutting that you divided, you sent
7 Gene Screen a cutting and you kept a cutting?

8 A. That is correct.

9 MR. OWMBY: No further questions of
10 this witness.

11 THE COURT: Anything further,
12 Mr. Herbert?

13 MR. HERBERT: Yes, Judge, briefly.

14 RE CROSS-EXAMINATION

15 Q. (BY MR. HERBERT) Ms. Kim, during the
16 course of your doing the DNA work in this case, you
17 and I spoke on the phone several times, did we not?

18 A. Yes.

19 Q. I spoke with you both before you sent the
20 samples to Gene Screen, and after, didn't I?

21 A. I think so.

22 Q. And it wasn't just a couple of times. I
23 spoke with you more than -- maybe several times?

24 A. I think so.

25 Q. And isn't it true that I spoke on one

1 occasion, after speaking with Mr. Watson at Gene
2 Screen, and told you that he cannot test the sample
3 you sent him; is that correct?

4 A. I don't remember you talking to me about
5 Mr. Watson not having enough sample.

6 Q. You remember me coming to you and saying
7 I'd like for you to send the samples to Mr. Watson
8 at Gene Screen, right?

9 A. Yes, I received the court order.

10 Q. And you remember me calling -- making a
11 follow-up phone call to you saying, have you sent
12 the samples? Is that correct?

13 A. As far as I remember, you showed up with a
14 another court order, and I remember you asking me
15 about the follow-up of the DNA testing.

16 Q. Okay.

17 That second court order was asking
18 you to send your case file to Gene Screen; is that
19 correct?

20 A. That's not how I understood you. The
21 court orders ask for the copies, all the DNA
22 materials and protocols. And my supervisor had
23 asked you to bring a check so that we could release
24 all the copies. And you never showed up.

25 Q. Your supervisor asked me to bring a check.

1 Who is your supervisor?

2 A. James Bolden.

3 Q. You don't remember me talking to you and
4 Jim Bolden in the lobby of the crime lab?

5 A. Yes, I remember.

6 Q. And do you remember asking -- do you
7 remember Mr. Bolden asking me, why do I need a copy
8 of that -- of the things you just said?

9 A. Yes, I remember him asking you that
10 question.

11 Q. And do you remember what the response was?

12 A. That you -- Gene Screen wanted to know
13 what our laboratory did so that they could do the
14 same DNA testing, because there are many different
15 testings, and --

16 Q. Isn't it true that we spoke at that time
17 saying that what you sent Gene Screen was useless
18 without that information?

19 A. And also -- yes.

20 And also we -- my supervisor told you
21 that we had spoken to Mr. Watson on a previous day,
22 what we have already done -- what kind of testing we
23 have done. And my supervisor said, if you want to
24 save money, this information is not really
25 necessary, because we already told the Gene Screen

1 what kind of testing we did. And your response was
2 that you will call later to let me know whether you
3 want the copies or not.

4 Q. So is it your testimony to this jury that
5 you and I never discussed your lab consuming the
6 samples, and making what was left useless for Gene
7 Screen?

8 A. No, I don't remember that.

9 Q. All right.

10 When I initially spoke to you, you
11 didn't need to discuss what I needed with Jim
12 Bolden, did you?

13 A. I'm sorry?

14 Q. Well, you've already -- you just told this
15 jury that I came with two court orders; is that
16 correct?

17 A. Yes.

18 Q. The first court order you followed without
19 my having to go through your supervisor, Jim Bolden;
20 is that correct?

21 A. No. He was -- he may not be present --

22 Q. Well, what I'm saying is, I did not have
23 to go through Jim Bolden myself, did I?

24 A. I guess not. I -- if I remember
25 correctly, I was not even at the lab the day you

1 brought the court order -- the first court order.

2 Q. Okay.

3 But when I brought the second court
4 order, you consulted with Jim Bolden before acting
5 on it; is that correct?

6 A. Yes, I --

7 Q. And before acting on it, you and myself
8 and Jim Bolden had a very brief meeting in the lobby
9 of the crime lab; is that correct?

10 A. That's correct.

11 Q. And that did not have to happen with the
12 first court order, did it?

13 A. Again, when the first court order --

14 Q. I need yes or no, Ms. Kim. That didn't
15 happen with the first court order, did it?

16 A. Right. The three of us did not have a
17 meeting about the first court order.

18 Q. And you did abide by what that court order
19 said; is that correct?

20 A. That's correct.

21 Q. And you said in this case you had to use
22 all of the vaginal swabs?

23 A. To remove the DNA.

24 Q. But there was more than one swab?

25 A. That is correct.

1 Q. And you used all of it?

2 A. That is the lab policy.

3 Q. It's the policy to use whatever swabs you
4 have, or in this case, you needed all the swabs?

5 A. No, usually, again, there are more than
6 two swabs that are collected for the rape kit. And
7 we use all of it to get the results, and that is the
8 lab policy.

9 Q. Would that be considered consuming the
10 entire sample?

11 A. Consuming the raw sample, yes.

12 Q. And that's what you did in this case, and
13 that is the lab's policy?

14 A. That's correct.

15 MR. HERBERT: That's all I have,
16 Judge.

17 MR. OWMBY: We have no further
18 questions of this witness.

19 State rests.

20 (State rests.)

21 THE COURT: All right. Defense ready
22 to proceed?

23 We're going to work a little later
24 tonight. I find that it's no use everyone running
25 out of the building at 5:00 just to get caught in

1 traffic. So we're just going to work a little bit
2 later.

3 You may proceed.

4 MR. HERBERT: Judge, may we remove
5 the jury for the purpose of a motion?

6 THE COURT: Retire the jury.

7 (Jury exits.)

8 THE COURT: All right. You may
9 proceed.

10 MR. MOCK: Your Honor, we have a
11 motion for instructed verdict based on lack of
12 sufficient evidence to prove guilt beyond a
13 reasonable doubt.

14 THE COURT: All right. Denied.
15 Bring the jury out, please.

16 (Jury present.)

17 THE COURT: Call your next witness.

18 MR. HERBERT: Josiah Sutton.

19 THE COURT: You may proceed.

20 JOSIAH SUTTON,
21 having been first duly sworn, testified as follows:

22 DIRECT EXAMINATION

23 Q. (BY MR. HERBERT) State your full name for
24 record.

25 A. Josiah Elijah Sutton.