

**Davis, Dewey**

Testimony of  
Dr. Elbert G. Warren, III

1 follows within the hearing of the  
2 jury:)

3 MR. FRAIL: At this time Doctor  
4 Warren will be referring to medical reports which  
5 are from the hospital. At the first trial, the  
6 trial of Jerry Davis, a duly appointed  
7 representative of the hospital actually brought  
8 forth, pursuant to our subpoena, these medical  
9 reports. And just for purposes of the record, we  
10 would like to show that these are the same  
11 reports. We do not have that person back,  
12 because they were given to the court reporter at  
13 that time.

14 THE COURT: I'm sure Mr. Lester has  
15 no objection to that, those are the records.

16 MR. LESTER: I remember that. I  
17 have no objection to that.

18 MR. REVERCOMB: The point of that is  
19 they are admissible under that new statute.

20 Thereupon came DR. <sup>ELBERT G WARREN</sup> ~~ALBERT WARREN GRAHAM~~,  
21 III., a witness on behalf of the state, who after  
22 being duly sworn, was examined and testified as  
23 follows:

24 DIRECT EXAMINATION

1 BY MR. FRAIL:

2 Q Would you state your full name for the  
3 record, please?

4 A ~~Elmer G.~~  
~~Albert Warren Graham~~, III.

5 Q What is your profession?

6 A I am a medical doctor.

7 Q And are you currently practicing here in  
8 Kanawha County?

9 A I am currently completing my residency at  
10 Charleston Area Medical Center.

11 Q I want to direct your attention to  
12 February of 1986 and ask you if you were  
13 practicing at that time?

14 A I was in my residency at CAMC.

15 Q What year of your residency were you in at  
16 that time?

17 A I was in my third year.

18 Q Doctor Warren, again directing your  
19 attention more specifically to February 19, 1986,  
20 did you have the occasion to perform a sexual  
21 assault exam on a patient by the name of Ethel  
22 May Ward?

23 A Yes, I did.

24 Q Would you have prepared some type of

1 report pursuant to that examination?

2 A My general practice is to dictate a report  
3 at the time, immediately after doing the  
4 examination.

5 Q Doctor Warren, I am going to hand you what  
6 has previously been marked for identification as  
7 State's Exhibit 31 and State's Exhibit 32, and I  
8 would ask you to examine both of these exhibits,  
9 including the contents, and state whether or not  
10 you recognize them?

11 A Yes, I do.

12 Q What are those two documents?

13 A The single paper here is just a copy of  
14 the dictation I had made the night following the  
15 examination.

16 Q Would that be State's Exhibit Number 32?

17 A Right. And the other one is apparently a  
18 copy of the emergency room record from the same  
19 exam.

20 Q Doctor Warren, how did you come to be  
21 involved in this particular sexual assault exam?

22 A Well I was on call that night. And the  
23 way we have it worked out is that the third year  
24 resident in the hospital, at the time that one of

1           these exams is required, is the person who does  
2           it. So they paged me about 2:25 a.m. to do the  
3           exam and I went down to do it.

4           Q       Prior to this date, had you had occasion  
5           to perform other sexual assaults exams?

6           A       Yes, I had.

7           Q       Could you estimate how many such exams you  
8           had made up to that point?

9           A       Twenty.

10          Q       Have you had occasion to make exams since  
11          that day of this nature?

12          A       Yes, I have.

13          Q       What procedure do you as a doctor follow  
14          in making a sexual assault examination?

15          A       The procedure I normally go through is a  
16          nurse in the emergency room generally obtains a  
17          fairly detailed history from the patient. What I  
18          do prior to seeing the patient is review that and  
19          corroborate the history with the patient not as  
20          in a great detail as the nurse has just done, but  
21          particular emphasis for what I need to look for  
22          on my physical examination.

23          Q       Is it your testimony then you have some  
24          type of interview with the patient herself?

1 A Yes, I do.

2 Q Did you have such an interview with a  
3 patient in this particular case, Ethel Ward?

4 A Yes, I did.

5 Q What if anything did the patient tell you  
6 about the alleged assault?

7 A Well it's pretty much as I dictated.  
8 Would you like for me to just read that?

9 Q Sure.

10 A As I dictated at the time: "It was a 21  
11 year old, single, white female, gravida 1, para  
12 0, AB1, one previous pregnancy and one  
13 miscarriage, whose last period was around the end  
14 of December 1985. She said that on February 18  
15 at about 8:30 she went to the house of Dewey  
16 Davis to wash clothes. She said she was there  
17 approximately 15 minutes and left. She stated  
18 she then returned at approximately 10:15 p.m. to  
19 get her clothes. She said when she entered the  
20 house, a male she named as Jerry Davis was there.  
21 She said that she talked to him for a few minutes  
22 and he then told her to go into the bedroom and  
23 remove her clothes. She said she refused to do  
24 that. According to her, at that time he struck

1 her in the face with his fist several times. She  
2 said he then made her go into the bedroom, made  
3 her touch his penis and he 'stuck it all the way  
4 in.' She wasn't sure as to whether he had  
5 ejaculated or not. There was not an attempt at  
6 either oral or anal intercourse. She told him  
7 she had to go to the bathroom and had to get away  
8 at that point."

9 Q Doctor Warren, in addition to the  
10 interview, what else could you as a doctor do in  
11 a sexual assault exam? What type of examination  
12 do you make?

13 A As I say, the exam, other than the pelvic  
14 exam, I do is more directed toward if there is  
15 anything in the history which would suggest  
16 trauma, I generally do a directed exam towards  
17 those areas. She had said -- Do you want me do  
18 go into that exam.

19 Q Yes, please.

20 A She had said, as I had said, that he had  
21 struck her in the face. She did have some  
22 abrasions about her face, on her right upper lip  
23 and right cheek, and she also had some reddened  
24 areas about her neck, and that was the only

1           existence of evidence of trauma, other than on  
2           pelvic examination.

3           Q       Did you do a pelvic examination?

4           A       Yes, I did.

5           Q       What would that have consisted of?

6           A       That consisted of, again, carefully  
7           looking externally for any evidence of trauma.  
8           And following the completion of that exam, we do  
9           a vaginal examination where, again, in this  
10          particular case she had reported having some  
11          vaginal bleeding following what she described as  
12          a sexual assault. So in situations like that  
13          it's important to look closely at the vagina for  
14          any evidence of bleeding points or around the  
15          cervix for any evidence of bleeding points.

16          Q       During the pelvic examination that you  
17          testified that you did on Ethel May Sissy Ward,  
18          did you note any injuries at that time?

19          A       What she had was a small abrasion on her  
20          right vulva, which I described was about half a  
21          centimeter, about a forth of an inch. And other  
22          than that, I didn't see any other evidence of  
23          trauma, either externally or from her vagina or  
24          on her vagina or around her cervix.



1 Q Doctor, did you do any tests or make any  
2 determination as to whether or not the patient  
3 had any motile sperm in her vagina?

4 A Yes, I did.

5 Q What type of test did you do?

6 A Just generally a collection of immediately  
7 behind the cervix of whatever fluid has collect  
8 there and we do what is called a wet mount. It's  
9 placed in fluid and then looked at under the  
10 microscope immediately following the exam.

11 Q Explain to the ladies and gentlemen of the  
12 jury what a motile sperm is?

13 A It's a sperm -- When a male would  
14 ejaculate, there would be millions of sperm in  
15 his ejaculate. A motile sperm is a sperm that is  
16 still moving.

17 Q Do you know how long a sperm can remain  
18 motile in a vagina?

19 A Generally the quoted time would be around  
20 6 or 12 hours, although studies vary as far as  
21 what they say how long a sperm will survive.  
22 Generally you would suspect it to survive  
23 somewhere between three and six hours, depending  
24 on the vagina and the circumstances.

1 Q Did you find the presence of any motile  
2 sperm in the vagina of Ethel May Sissy Ward?

3 A No, I didn't.

4 Q Doctor Warren, do you recall what time you  
5 began this examination?

6 A It's recorded that I was paged round 2:25.  
7 The examination would have started somewhere  
8 around 2:45 a.m. I don't have it recorded, so I  
9 couldn't say exactly.

10 Q Do you have any recollection of how long  
11 the examination would have taken?

12 A The entire pelvic exam or physical exam?

13 Q Yes.

14 A Somewhere between 5 and 10 minutes.

15 Q What about the entire time you would have  
16 spent with the patient from your initial contact  
17 with her until the time you concluded your  
18 studies?

19 A With her I think it was around 25 minutes.

20 MR. FRAIL: Your Honor, if I could  
21 have just a moment.

22 (Brief Pause)

23 MR. FRAIL: That's all the questions I  
24 have.

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THE COURT: Mr. Lester.

CROSS EXAMINATION

MR. LESTER:

Q Doctor Warren, did you take any slide mounts of the material that you withdrew from the vagina?

A Yes.

Q And of what nature were they? Did you take two or more different kinds of slides or what?

A They are slides that are sent down to the pathologist for examination for sperm and also the acid phosphatase.

Q Did you make a wet mount for yourself?

A Yes, I did.

Q And did you find anything?

A As far as what?

Q Well were you looking for motile or immotile sperm on the slide?

A I did not see any evidence of sperm on the slide.

Q What about the slides that you sent to the pathology department? Were they reviewed by a pathologist?

1 A They are read by a pathologist.

2 Apparently, what they found was two poorly  
3 preserved sperm heads.

4 Q Now who was the pathologist who prepared  
5 and provided you with that information?

6 A I don't know. I would have to go back and  
7 review -- There is a report on file at the  
8 hospital.

9 Q With regard to the poorly preserved sperm  
10 heads, when were they discovered by the  
11 pathologist, if you know?

12 A Again, I would have to review it. I would  
13 assume he would have looked at the slides the  
14 next day or that day, as it came in early in the  
15 morning.

16 Q What would be the significance of finding  
17 these sperm heads on the mounts that was made?

18 A Well, what is in my dictation also is, she  
19 had apparently a boyfriend with whom she had  
20 intercourse approximately two or three days prior  
21 to this incident. The sperm heads could have  
22 been present from intercourse as long as that or  
23 even longer. It could have been a week before,  
24 two sperm heads could still be present in her

1                   vagina.

2                   Q       When we are talking about motile sperm,  
3                   we're meaning moving sperm?

4                   A       Right.

5                   Q       And when we are talking immotile sperm, we  
6                   are talking about no moving sperm?

7                   A       Right.

8                   Q       So what is the range? Give it to me once  
9                   again. About how long can sperm stay motile in a  
10                  vagina?

11                  A       Well it depends on, as I said, the  
12                  circumstances of the vagina, how long she would  
13                  have stayed, you know, prone or supine. The  
14                  general range would be somewhere around 3 to 10  
15                  hours. There are other reports that give shorter  
16                  time periods than that. As I said, there was a  
17                  small amount of blood in her vagina. What  
18                  studies also say is the sperm can stay moving for  
19                  a longer period of time if there is blood there,  
20                  but they are harder to site because there is red  
21                  blood cells in the microscopic field.

22                  Q       Have you had occasion to see or treat Mrs.  
23                  Ward since February the 18th, 19th, 1986?

24                  A       Yes, I have.

1 Q On what occasions?

2 MR. FRAIL: Your Honor, I'm going to  
3 object as being beyond the scope of direct  
4 examination.

5 THE COURT: Let's see where we are  
6 going with it. Overruled.

7 Q For what reasons have you seen her?

8 A She subsequently became pregnant.

9 Q And?

10 A And she has had a child since then.

11 Q And you were the treating physician?

12 A What she did, we have a clinic system at  
13 our hospital and her pregnancy was cared for  
14 through the clinic system. I saw her myself, but  
15 there were other physicians who were treating her  
16 during her pregnancy.

17 Q Doctor, can you state with a reasonable  
18 degree of medical certainty that the pregnancy  
19 that resulted with regard to Mrs. Barker was not  
20 a result of the activity of February the 18th,  
21 February the 19th, 1986?

22 A Yes.

23 MR. LESTER: Thank you, Doctor,  
24 that's all the questions I have. I realize you

1           have a busy schedule. I would like to thank you  
2           for coming down.

3                   THE COURT: Redirect?

4                   MR. FRAIL: No.

5                   THE COURT: Thank you, Doctor, you  
6           may step down and be excused.

7                   (Witness Warren stood aside.)

8                   THE COURT: Call your next witness.

9                   MR. REVERCOMB: The state would call  
10          Rose Shaffer.

11                   Thereupon came ROSE SHAFFER, who was  
12          called as a witness on behalf of the state, who  
13          after being first sworn according to law, was  
14          examined and testified as follows:)

15          DIRECT EXAMINATION

16          BY MR. REVERCOMB:

17          Q        Please state your name?

18          A        Rose Anna Shaffer.

19          Q        Rose, where do you live?

20          A        At the present time?

21          Q        No. Strike that. Where did you live in  
22          February of 1986?

23          A        Coal River Road in St. Albans.

24          Q        Where on Coal River Road?

**Davis, Dewey**

Testimony of  
Fred Zain



1 DIRECT EXAMINATION

2 BY MR. REVERCOMB:

3 Q Please state your name?

4 A Fred Salem Zain.

5 Q Where are you employed?

6 A I am a member of the Department of Public  
7 Safety, stationed at the Criminal Identification  
8 Bureau in South Charleston, West Virginia, where  
9 I am in charge of the section which receives and  
10 examines physical evidence for the presence of  
11 blood, body fluids, and hair examinations.

12 Q What is your title?

13 A I am sergeant and section supervisor of  
14 the section that deals with serology. I have  
15 been with the department a little over ten and a  
16 half years.

17 Q Would you tell us about your educational  
18 background?

19 A I have a Bachelor of Science degree in  
20 biology and a minor in chemistry. I have an  
21 associate degree in applied sciences from  
22 Marshall. I have also got a master's degree in  
23 biological sciences from Marshall University. I  
24 have worked in this specific capacity with the

1 Department of Public Safety a little over 10  
2 years. Prior to the employment with the  
3 Department of Public Safety, I was employed by  
4 the Department of Natural Resources as a chemist.  
5 I have trained other people in the section in  
6 forensic sciences and given lectures and seminars  
7 at the WVU Medical Center. Other specialized  
8 classes and seminars around the country that I  
9 have attended that have been at the FBI Academy  
10 in Virginia. I have given lectures at the bar  
11 and medical association meetings, prosecuting  
12 attorney association meetings and other public  
13 engagements. I am a member of the Southern  
14 Association of Forensic Scientists. I am a  
15 member of the Canadian Society of Forensic  
16 Scientists. I am a member of the American  
17 Academy of Forensic Scientists, also a member of  
18 the International Society of Haemogenetics, the  
19 International Society of Electrophoresis, and a  
20 member of the American Blood Banking Association.  
21 I also have several papers that are and have been  
22 submitted for publication as of the first of the  
23 year. That basically is it.

24 Q Sounds like a lot. Have you been

1 qualified as a expert in forensic serology in  
2 circuit court before?

3 A Yes, sir. I have. I have testified in  
4 approximately 44 counties in the State of West  
5 Virginia, as well as testified in Florida and  
6 Virginia.

7 Q You have testified in this circuit before?

8 A Yes, sir. I have.

9 MR. REVERCOMB: Your Honor, I would  
10 submit this witness as an expert in forensic  
11 serology.

12 THE COURT: Any questions regarding  
13 his qualifications, Mr. Lester?

14 MR. LESTER: No, sir. I will except  
15 Sergeant Zain's qualifications.

16 THE COURT: You made proceed.

17 BY MR. REVERCOMB:

18 Q Does your field of expertise require you  
19 to make blood groupings?

20 A Yes, sir. Part of the examinations which  
21 are performed at the bureau deal with: One, the  
22 examination of items for the presence of blood or  
23 other body fluids; such as seminal fluid, saliva,  
24 urine, fecal material, biological materials and

1 substances, also hair examinations; not only the  
2 examination for the presence of these types of  
3 secretions, but also the identification of  
4 possible blood characteristics from the  
5 secretions we may identify.

6 Q And these blood groupings, do you break  
7 them down into genetic markers?

8 A Blood characteristics are synonymous with  
9 genetic markers or blood typings.

10 Q What types of articles do you conduct  
11 these analyses on?

12 A Excuse me.

13 Q What kinds of articles do you conduct  
14 these tests on?

15 A Types of materials would range from, for  
16 example, carpet, clothing, all sorts of clothing,  
17 samples from any types of materials where blood  
18 or any other body fluid may have been deposited.  
19 Common items of examination would be sex crime  
20 evidence kits. These are kits which are used by  
21 examining physicians in sexual assault cases  
22 where evidence is taken at the time of the  
23 examination by the examining physician.

24 Q Could you explain the difference between

1           what you do as a forensic serologist and a  
2           clinical pathologist?

3           A           Basically in the realm of biological  
4           examinations, pathologists primarily deal with,  
5           clinical pathologists, for example, deal with  
6           samples needed for clinical analysis. You go to  
7           a hospital, you have blood drawn, they will do  
8           what is called a blood work up on you. These  
9           blood workups are to check your electrolytes.  
10          A forensic pathologist deals with applications of  
11          evidence in criminal cases that may apply to  
12          information that may be helpful in an  
13          investigation. Say, for example, medical  
14          examiners are forensic pathologist really, doing  
15          autopsies to try to obtain information that may  
16          be helpful in a criminal investigation.

17          Q           In other words you are required to take  
18          the samples of articles as they are, rather than  
19          having a perfectly preserved sample?

20          A           That's correct. The types of materials  
21          which are examined by myself and other members in  
22          the serology section, there's no way to control  
23          what type of evidence we may receive.

24          Q           Sergeant Zain, I want to recall your

1 attention to February 20th, 1986, and ask you if  
2 you had occasion to receive articles from one  
3 Randy West?

4 A Yes, sir. I did. On February 20, 1986, I  
5 received from Detective West of the Kanawha  
6 County Sheriff's Department a sex crime evidence  
7 kit. Also listed on the submission is clothing  
8 of the victim; such as a shirt, jeans, bra and  
9 panties. Also marked is a pair of jeans of the  
10 accused, shirt of the accused, briefs of the  
11 accused, blue blanket, white bed pad, the white  
12 sheet and towel, two pillow cases, white shirt  
13 and T-shirt, and another towel.

14 Q And for what purposes did you receive  
15 these articles?

16 A The items were submitted to me by standard  
17 protocol to examine them for presence of blood,  
18 body fluid or any hair specimens that may be  
19 apparent, also compare any of the unknown  
20 secretions or blood that may be identified with  
21 the known blood specimen of the victim, which was  
22 stated as being Ethel May Ward.

23 Q Where were these articles kept while you  
24 were not examining them?

1           A       All items, when they are received in the  
2           bureau, are assigned a particular number. This  
3           number designates the time and the analyst who  
4           may be working and examining the particular  
5           items. And in this particular case the number  
6           which was assigned by me was S-8675. The items  
7           remain in the sole care and custody of the  
8           individual analyst. They are preserved in the  
9           best means possible, either by freezing or by air  
10          drying, if they are wet, for example. Then they  
11          are retained in individual evidence lockers which  
12          only the individual analyst has keys to.

13          Q       Sergeant Zain, I am now handing you what  
14          has been marked for identification purposes as  
15          State's Exhibits 11, 11A, B, C, D, E, and F, and  
16          ask you to examine those exhibits?

17          A       These items all have the case number,  
18          which I spoke of earlier, of S-8675 on the  
19          outside of the envelopes. These items would be  
20          the standard items found in a sex crime evidence  
21          kit. For the jury's information, the blue  
22          marking is the laboratory case number and below  
23          that are my initials FSZ. These appear to be in  
24          the same condition or similar condition anyway

1 than the last time I saw them.

2 Q And you received those from Randy West on  
3 February 20th?

4 A These are the items which were listed as a  
5 sex crime kit.

6 Q Who did you return them to?

7 A They were returned to Detective West.

8 Q I likewise hand you what has been marked  
9 for identification purposes as 9A and ask you to  
10 examine first the container and ask you if you  
11 can identify that for us?

12 A On the outside of the container, there  
13 again, briefly it has the same case number, my  
14 initials. This was the paper bag which was  
15 marked as containing clothing of Miss Ward, which  
16 was the shirt, jeans, bra and underwear or  
17 panties. The jeans, and likewise on the other  
18 items, will be marked with the same case number  
19 and my initials. These items appear to be in the  
20 same condition as the last time I saw them.

21 Q You got these from Randy West?

22 A Yes, I did. And after the examination was  
23 complete, these items were returned to Detective  
24 West after the examinations were complete.



1 Q I am now handing you what has been marked  
2 for purposes of identification as State's Exhibit  
3 26A and ask you if you can identify that for us?

4 A There again on the outside of that in blue  
5 lettering is the same case number and my  
6 initials. This was the container which was  
7 marked as being a pair of pants from the accused.  
8 The blue jeans are also marked in the inside with  
9 the same case number and initials. They also  
10 appear to be in the same condition which the last  
11 time I saw them and were returned to Detective  
12 West at the same time as the other items.

13 Q I now hand you what has been marked for  
14 identification purposes as State's Exhibit  
15 27A, and inside I believe is 27.

16 A This was the container which was marked as  
17 having a shirt belonging to the accused; there  
18 again, the same case number and initials.  
19 Jean fatigue type shirt also was marked the same  
20 case number and initials. It also appears to be  
21 in similar condition which the last time I saw it  
22 before I returned it to Detective West with the  
23 other evidence.

24 Q I now hand you what has been marked for

1 purposes of identification as State's Exhibit  
2 18A, and inside State's Exhibit 18 and 19 for  
3 identification.

4 A This container which is marked with the  
5 case number and initials on the outside is marked  
6 containing two pillow cases which were submitted.  
7 They both are marked, a little bit easier to see  
8 on this background, with the blue lettering of  
9 the case number and my initials. The pillow  
10 cases were also returned to Detective West with  
11 the other items as the examinations were  
12 complete.

13 Q I now hand you what has been marked as  
14 State's Exhibit 16A, and inside State's  
15 Exhibit 15 and 16 for identification.

16 A This container, marked with my initials  
17 and case number, is marked containing a sheet and  
18 towel. They also after examination were returned  
19 to Detective West and appear to be in a similar  
20 condition which I returned them to him.

21 Q I likewise hand you what has been marked  
22 as State's Exhibit 21A for identification and  
23 inside State's Exhibit 21.

24 A There again, my initials and case number

1           on the outside of the container, which is marked  
2           as being the bed pad, and it also appears to be  
3           in a similar condition when I last saw it and  
4           returned it to Detective West.

5           Q       I now hand you what has been marked for  
6           purposes of identification as State's Exhibit  
7           29A. I believe that's 29A?

8           A       Yes.

9           Q       And inside State's Exhibit -- What  
10          Exhibit Number is that exhibit? Number 29 for  
11          identification.

12          A       This was a blanket which was submitted or  
13          large towel. It also appears to be in a similar  
14          condition which I returned it to Detective West  
15          with the other items.

16          Q       I now hand you what has been marked for  
17          purposes of identification as State's Exhibit  
18          20A and ask you to look inside that to State's  
19          Exhibits 19 and 20 for identification.

20          A       Outside of this container, marked with the  
21          same case number and my initials, is marked  
22          containing two shirts of the accused. These  
23          items also appear to be in a similar condition  
24          which the last time I saw them and returned them

1 to Detective West.

2 Q I now hand you what has been marked for  
3 identification purposes as State's Exhibit 28A  
4 and inside Exhibit 28 for identification.

5 A Also again on the outside of the bag, the  
6 same case number and my initials, which is marked  
7 as being a pair of underwear and briefs from the  
8 accused. It also has the case number and  
9 initials on the item examined. This item was  
10 also returned with the other items. It appears  
11 to be in a similar condition which I last saw it.

12 Q I now hand you what has been marked as  
13 State's Exhibit 14A, but it's been torn up. It's  
14 reported to hold State's Exhibits 12, 13, and 14.

15 A Okay. This particular bag, what is left  
16 of it, also has the same case number and initials  
17 on the outside. This is marked as containing the  
18 blanket, which was submitted to me by Detective  
19 West. I also have one of the sheets which were  
20 submitted, and the second sheet which was  
21 submitted. They appear to be in a similar  
22 condition when I returned them to Detective West.

23 Q Finally, Sergeant Zain, I hand you what  
24 has been marked for identification purposes as

1 State's Exhibit 31.

2 A On this particular item it will have a  
3 different case number. It will have a different  
4 case number because the item was submitted to the  
5 laboratory at a different time. The case number  
6 on this styrofoam container is S-86340. It also  
7 has my initials, FSZ, and this was marked as  
8 being a vial of blood from Gerald Davis. And you  
9 can't see it, but my name, my initials, and the  
10 case number are also on the vial of blood.

11 Q When did you receive that?

12 A 7-14 of '86.

13 Q Do you remember where you went to obtain  
14 that blood sample?

15 A I believe it was Saint Francis Hospital  
16 and I was present at the time the blood was  
17 withdrawn.

18 Q Finally, also I hand you what has been  
19 marked for identification purposes as State's  
20 Exhibit 33 and ask you to examine that and tell  
21 us just what it is?

22 A State's Exhibit 33 is a subpoena duces  
23 tecum. It's addressed to myself, F.S. Zain,  
24 Forensic Biologist, Department of Public Safety,

1 Chemistry Laboratory, 725 Jefferson Road, South  
2 Charleston, West Virginia, 25309, telephone  
3 number: 746-2175. This subpoena asks me to  
4 bring to court any medical reports, records,  
5 notes, memorandums or other written materials,  
6 including forensic findings relating to Mr.  
7 Gerald Wayne Davis, suspect, and Miss Ethel May  
8 Ward, victim, report number S-8675.

9 Q Thank you, Sergeant. These articles that  
10 you have just testified in a lengthy manner to,  
11 did you examine them for the presence of seminal  
12 fluid and blood?

13 A Yes, sir. I did.

14 Q What were your findings?

15 A In reference to the case number S-8675, I  
16 identified seminal fluid on the vaginal swabs,  
17 which were contained within the sex crime  
18 evidence kit, the pair of panties, the T-shirt.  
19 In particular, where I held up two shirts from  
20 the accused, there was a T-shirt and a white  
21 shirt - I identified seminal fluid on the T-shirt  
22 and briefs of Gerald W. Davis, also on the purple  
23 sheet and the bed pad. Seminal fluid and blood  
24 were identified on the vaginal swabs, panties,

1 and the briefs of Gerald W. Davis.

2 Q I hand you again what has been marked for  
3 identification purposes as State's Exhibit 19.

4 Is this the T-shirt you speak of?

5 A Yes, sir. That's it.

6 Q And again, I hand you what has been marked  
7 for identification purposes as State's Exhibit  
8 28. Are those the briefs of the defendant that  
9 you speak of?

10 A Yes, sir. That's correct.

11 Q And it's your testimony you found seminal  
12 fluid and blood on these?

13 A On the pair of briefs there were smears of  
14 blood, as well as seminal fluid.

15 Q Sergeant Zain, can you explain the  
16 difference between seminal fluid and sperm?

17 A Quite frankly, and the most simple way of  
18 explaining is that semen is the combination of  
19 the seminal plasma or seminal fluid and the male  
20 sperm cell. If an individual has had a  
21 vasectomy, when ejaculation occurs, there will be  
22 just the excretion of seminal fluid. If a person  
23 were to say that semen is the total sum of the  
24 mixture of the sperm cell and seminal fluid,

1           seminal fluid is primarily a transfer fluid for  
2           the sperm cell.

3           Q           And seminal fluid can only come from a  
4           male?

5           A           Basically, yes.

6           Q           I hand you again what has been marked as  
7           State's Exhibit 8, being the panties of the  
8           victim. Is it your testimony you found seminal  
9           fluid and blood on those?

10          A           Yes, sir. That's correct.

11          Q           I believe you have also testified you  
12          found seminal fluid on the bed pad and on the  
13          purple sheet?

14          A           That's correct.

15          Q           Sergeant Zain, were you ever able to get a  
16          blood typing, genetic markers, from these seminal  
17          fluid stains?

18          A           Yes, sir. I was. As I reported in the  
19          first report of S-8675 where I stated that  
20          mixture of blood and seminal fluid identified on  
21          the vaginal swabs and panties contained the  
22          following genetic markers: The system list as,  
23          one, the ABO blood type as being a blood type A  
24          and O. I also have an H in parenthesis. The H



1 in parenthesis designates the O came from a  
2 secretion and is designated as such because of  
3 what is called H antigens. The second blood type  
4 which I identified from the secretion was what we  
5 call a PGM blood type. PGM stands for  
6 phosphoglucomutase. And the type of PGM  
7 identified was two plus, one plus. I also  
8 identified seminal fluid on the T-shirt. There  
9 were a variety of staining on the T-shirt and the  
10 stains that were present on the T-shirt were  
11 seminal fluid. Also on the purple sheet and the  
12 bed had the blood typing or findings identified  
13 from the these items was an ABO typing A and O, H  
14 in parenthesis. There again, that's just to  
15 designate that the O identified came from a  
16 secretion, not from a whole blood.

17 I also on the known blood specimen of Miss  
18 Ward identified that her ABO blood type from her  
19 known blood specimen was an O, that her PGM blood  
20 type was a two plus, one plus, and that she was a  
21 Lewis blood type of A minus, B plus. I will  
22 explain that the Lewis blood type is for the  
23 purpose of identifying whether an individual can  
24 be classified as a secretor or non-secretor.

1           That simply means that all individuals, everyone  
2           in this room, will secrete their known ABO blood  
3           type in their body fluids. The amount of your  
4           secretion of your ABO blood type varies. When an  
5           ABO blood type can be identified from your body  
6           fluids, you are classified as a secretor and are  
7           a part of 80 percent of the general population.  
8           If your ABO blood type cannot be identified in  
9           your body fluids, you are classified as a  
10          non-secretor, and would fall into 20 percent of  
11          the general population. No seminal fluid was  
12          identified on any of the remaining items which I  
13          have looked over here this afternoon.

14         Q           Sergeant Zain, you received a known blood  
15          sample of Gerald Davis last summer?

16         A           Yes, I did.

17         Q           What is his genetic makers?

18         A           From the known blood specimen of Gerald  
19          Davis the same tests and the results were  
20          recorded in a second report of S-86340. As  
21          stated in the results of the examination, that  
22          the known blood specimen of Gerald W. Davis  
23          contained the following genetic makers: His ABO  
24          was type O. His PGM was type two plus, one plus.

1 And his Lewis blood type was A minus B plus. So,  
2 there again, he would be classified as a secretor  
3 individual. The conclusion which I gave strictly  
4 based on the blood findings was, one, that the  
5 genetic makers of Gerald W. Davis were consistent  
6 with the genetic markers previously identified  
7 and reported on items previously submitted and  
8 reported as S-8675.

9 Q Gerald Davis and the victim, Sissy Ward,  
10 have the same blood type as far as ABO and PGM,  
11 is that true?

12 A ABO blood type are both O. Their PGM  
13 blood type are both two plus, one plus, and they  
14 are both secretor individuals.

15 Q Yet in your analysis you got an A factor?

16 A Yes, sir. That's correct.

17 Q Can you explain?

18 A In the initial examinations of the items  
19 which were submitted as S-8675, on the test  
20 results there was an indication of an A blood  
21 typing present on the secretions or body fluids  
22 which were being examined. This was recorded.  
23 Even though in my results or record sheets, which  
24 have been previously submitted in State's Exhibit

1           33, I had indicated that the A could possibly be  
2           a false positive and be due to bacterial  
3           contamination because of the condition of the  
4           evidence when it was submitted, not so much the  
5           way it was submitted, but because of the  
6           condition the materials were in and the stains  
7           deposited on them. I did not exclude that in the  
8           first report when I gave my results, simply  
9           because I could not totally eliminate the  
10          possibility of the A blood type as being either a  
11          false positive or possibly from an A secretor  
12          individual.

13         Q        But you made those findings back in March  
14         in your initial examination, the possibility  
15         existed of a false A?

16         A        Yes, sir. That's correct.

17         Q        That's before you had the known blood  
18         sample of Jerry Davis?

19         A        Yes, sir.

20         Q        Once again, I want to ask you to make it  
21         clear to the jury. What could cause a false  
22         positive on the A factor?

23         A        In the examination of certain items in  
24         forensics you use controls and standards of

1 course on all examinations. Say, for example,  
2 the T-shirt, you use what we call as close a  
3 control as you can obtain from a certain item.  
4 If a T-shirt, for example, the one which I have  
5 shown you is in a soiled type of condition, as  
6 well as having certain particular stains on that  
7 shirt, you try to obtain a control as close to  
8 the stain which your analyzing, but yet not  
9 contain part of the stain which you are testing  
10 for. The results of the testing were that there  
11 was an indication of an A blood group substance  
12 or blood type substance, as well as a strong O  
13 type indication. There was no way at the time or  
14 now for me to eliminate the A as being a real or  
15 possibility as having been derived from the  
16 seminal fluid. I can state that the A control,  
17 that the control from the T-shirt, excuse me, did  
18 give a weak positive for A blood type. If I  
19 would have eliminated the A at the time of the  
20 examination, then the report would have simply  
21 read that the blood type identified, the ABO  
22 blood type identified would have been strictly an  
23 O. The PGM blood type would have been  
24 specifically two plus, one plus, and there would

1           have been no A in the report. I felt at the  
2           time, even though with justification as I do now,  
3           that due to certain possibilities, that it would  
4           be an injustice not to give the information which  
5           I had identified.

6           Q       These controls you speak of, the area that  
7           you cut outside the actual seminal fluid stain,  
8           did you find any O factor in the control?

9           A       No, sir. I did not.

10          Q       But you did find a weak A factor?

11          A       Yes, sir.

12          Q       And you found the same weak A factor  
13          inside the stain?

14          A       That's correct.

15          Q       And you have testified it's a possibility  
16          that that A factor came from an A secretor?

17          A       Yes, sir. It could be.

18          Q       How probable is that?

19          A       The indication of an A blood type from the  
20          secretions on the items which I have mentioned  
21          was a mild indication, say, on a scale of one to  
22          ten, it would be a two. Whereas, the O  
23          identified from the seminal fluid would be a 10.

24          Q       Once again, the A factor, are you saying

1           it could have been a false positive because of  
2           some sort of bacterial contamination?

3           A        The A blood type which I identified and  
4           reported could have been of two means: One, the  
5           blood type A could have originated from the  
6           articles of which the stains were deposited on  
7           due to contamination; Secondly, the A could have  
8           come from an A secretor individual.

9           Q        You had the exact same results as far as  
10          your analysis and the factors you found between  
11          the defendant's underwear and the victim's  
12          panties, is that true?

13          A        Yes, sir. That's correct.

14                   MR. REVERCOMB: May I have a moment,  
15          your Honor?

16                   (Brief Pause)

17                   MR. REVERCOMB: I believe that's all  
18          I have, your Honor.

19                   THE COURT: Mr. Lester?

20          CROSS-EXAMINATION.

21          BY MR. LESTER:

22          Q        Sergeant Zain, you might have to help me  
23          out a little bit. Blood work is not exactly  
24          something I deal with everyday. Now let me get

1           an idea because, you know, I appreciate your  
2           testimony, but I don't know about everybody else,  
3           but I kind of got left by the wayside about five  
4           or ten minutes ago. Let's say for instance that  
5           if I wanted to take a piece of this carpet and I  
6           said a piece of this carpet had a hypothetical  
7           body substance on it - we won't go into what  
8           substance it might be - and I cut it out of the  
9           floor and brought it down to South Charleston and  
10          handed it over to you. Let's say I was a member  
11          of a licensed police department or something like  
12          that that you would do work for, how would you go  
13          about it anyway? What would you do?

14          A           It depends on the type of body fluid.

15          Q           Since we are talking about seminal fluid,  
16          let's talk about seminal fluid?

17          A           Okay. First of all, the item would be -  
18          after the case would be logged in, given a  
19          specific number, go through the protocol which I  
20          mentioned previously, the item would be examined  
21          by UV light.

22          Q           Ultraviolet light?

23          A           That's correct. The item would be held,  
24          if it's small enough, underneath the UV light.



1           If it's too large to put under the UV light, we  
2           have a hand held light we have that can plug in.  
3           We use it for crime scene identifications. If we  
4           see any type of florescence, it gives us one  
5           indication of the possiblity of seminal fluid.  
6           First of all, you would look over the item  
7           individually with the naked eye, feeling the item  
8           for any type of secretions that might be present  
9           for chemical testing.

10          Q       Let me ask you a question on all of this  
11           various stuff here. What led you to believe that  
12           when you were holding this stuff up to the  
13           florescent light, that this particular material  
14           that you were holding up, and maybe you were  
15           getting a reflection back or whatever you want to  
16           call it from the ultraviolet light, what was it  
17           that made you think that maybe this had something  
18           to do with the stuff on the T-shirt, had  
19           something to do with Gerald Wayne Davis? Maybe  
20           he was just a slob, if you know what I mean.

21          A       I really don't understand the question.

22          Q       Let me put it another way then. You have  
23           taken a T-shirt and you have taken it up to the  
24           ultraviolet light and you have looked at it and

1           you have evidently seen something at one point in  
2           time. What was it that made you say to yourself,  
3           ah ha, this material right here belongs to the  
4           body fluid of one individual, that individual  
5           being Gerald Wayne Davis?

6           A           I have not made that statement.

7           Q           Oh, okay. Well that's where I thought we  
8           were headed. So then it just could be somebody  
9           else?

10          A           As I stated earlier, if you wanted an  
11          explanation of the scientific basis of the  
12          examination, I can go on with that because there  
13          are other procedures to go through.

14          Q           Keep on going through the procedures. We  
15          are back at the ultraviolet light.

16          A           The items are examined individually. They  
17          are examined by UV light. And then if stains are  
18          present, which under UV light you will have  
19          apparent yellowish or white yellowish staining.  
20          As far as a T-shirt, say, the T-shirt in this  
21          particular instance has a variety of stains on it  
22          which are visual by the naked eye, portions of  
23          the stained material were identified chemically  
24          as being positive for seminal fluid.

1 Q Let me ask you a question. How did you  
2 identify them chemically as being positive for  
3 seminal fluid?

4 A First of all, one test is what is called  
5 alphanaphtal phosphate test, you take a portion  
6 of, a very small portion, possibly even one tiny  
7 shread of the stain, subject it to chemical  
8 alphanaphtal phosphate test and a fast blue B dye  
9 solution, and in the presence of seminal fluid it  
10 will turn from a clear color to a purple color.  
11 After this is done, another small portion is  
12 used.

13 Q Sergeant Zain, can I ask you a question?  
14 Is there anything else from the human body that  
15 might be sold commercially that might turn purple  
16 upon going through this test?

17 A The only reaction that will occur with the  
18 acid phosphatase test is acid phosphatases that  
19 are found in the the human body. That is why  
20 this is a preliminary chemical test. Because the  
21 second test we use is by the name of P-31. P-31  
22 relates to a chemcial that is only found in a  
23 male individual. The P-31 test is called  
24 across-over electrophoresis test. What it does

1 is a portion of the stain material reacts with  
2 P-31. If it is negative, there will be no visual  
3 positive reaction. If it is positive, there will  
4 be a positive reaction which is only specific for  
5 seminal fluid, human seminal fluid. It will not  
6 react with any other body fluid of any kind.

7 Q Sergeant Zain, I don't want to get into  
8 specifics, but you know we are kind of talking  
9 about a T-shirt here. About how big of a spot  
10 are we talking about on this T-shirt?

11 A If you can hand me the T-shirt, I'll show  
12 you the seminal stains.

13 Q Is it as big as a bread box?

14 A There are a variety of seminal stains all  
15 over the T-shirt.

16 Q Are we talking about the size of dimes?

17 A I think they range anyway from a half  
18 dollar on up.

19 Q Half dollar on up, okay. I've got a  
20 question for you with regards to your statement  
21 earlier about contamination. Tell us a little  
22 bit about contamination.

23 A Contamination can be due to one or two  
24 things: Primarily, one, you can have soiled or

1           dirty clothing. As most everyone knows, that's  
2           why we wash clothes routinely. You can also have  
3           contamination from detergent. Detergents will  
4           stay in clothing most often than none. They will  
5           destroy body fluids and stains. That's why we  
6           wash clothes. That's why they make protein  
7           soluble wash detergents, so you can get blood and  
8           different types of stain out of clothing.  
9           Secondly, you have contamination possibilities of  
10          the stain or stains themselves.

11          Q           We are talking about two different kinds  
12          of contamination then?

13          A           That's correct.

14          Q           We are talking about contamination when  
15          somebody, for instance, changing a tire and  
16          getting their shirt contaminated with road grit,  
17          and on the other hand we are talking about  
18          contamination with body fluids?

19          A           Well, you can hold them separately or you  
20          can combine them, because all in one, if you have  
21          a soiled - while we are using a T-shirt, that  
22          has a lot of perspiration on it, body secretions,  
23          just from wearing it, and then you have seminal  
24          fluid stains also on that T-shirt. While the

1           seminal fluid would have remained in a liquefied  
2           state and not have become dried, it could have  
3           caused and the possibility exists of bacterial  
4           activity inside that body fluid. Because anytime  
5           time a body fluid leaves an individual's body,  
6           there is an automatic contamination of whatever  
7           the body fluid might be up to and including the  
8           time that that stain becomes dried. When a stain  
9           becomes dried, bacterial degradation will cease,  
10          because it's like in a fixed state. Say you have  
11          a lot of the bacterial activity and the quicker  
12          it dries, the less that activity becomes. But on  
13          the other hand, if it becomes moist again, you  
14          can have bacterial activity start up again, like  
15          food.

16         Q        Let me ask you a question. Let's say for,  
17         instance, we had a particular piece of clothing  
18         and we incubated it on something like a warm  
19         water bed, then the material we got on the  
20         material that we are attempting to do the test  
21         on, we might have a heightened amount of  
22         bacterial degradation, I think you called it?

23         A        Theoretically, if the stain was in a  
24         liquefied state, not in a dried state, it might

1 enhance it to some degree. When bacteria get  
2 started, nothing seems to stop it until its  
3 either dried or frozen or whatever. For  
4 relationship to the jury here, the easiest way, a  
5 lot of times when we are talking about blood and  
6 body fluids, it's just like blood and body fluids  
7 are protein. Everybody can relate to protein.  
8 As far as from the standpoint if you have a piece  
9 of meat and you fry it, you denature the protein  
10 in meat. That's why it makes it taste better.  
11 You have foods that once you open a can -- I'm  
12 sure most of the ladies on the jury have done  
13 some canning at one time or another. Once you  
14 open that up, you have to either keep it in a  
15 refrigerator or you have to have it in sort of a  
16 preservative to keep bacterial activity from  
17 happening. If you have something in a  
18 refrigerator, you use it, you set it outside, you  
19 are going to have mold grow on it or fungus. You  
20 are going to have bacterial activity. Blood and  
21 body fluids are the same thing. They are  
22 biological materials and can have, depending on  
23 varying degrees of temperature, varying degrees  
24 of moisture, will vary according to the type of

1 of bacteria that could possibly be present.

2 Q Then help me out with this then. There is  
3 different types of bacteria out there that are  
4 effecting these proteins that are part of your  
5 body secretions?

6 A Oh, there is quite a variety of bacteria  
7 in the world.

8 Q With regards to all of these different  
9 kinds of bacteria, do you ever run into  
10 situations where you start out with tests and it  
11 kind of looks like, for instance, one type of  
12 material, such as you got listed out here and  
13 later on it looks like maybe it's another kind of  
14 materials rather than the first type? Let me  
15 strike that. Let me rephrase that question.  
16 From a scientific standpoint can you be put in  
17 the position whereby that if you don't know what  
18 bacteria acted upon a particular substance from  
19 the body, you don't know what it was when you  
20 started out, you only know what it is when you  
21 ended up with it?

22 A As I stated earlier, that's one reason why  
23 we use controls and standards for all testing.  
24 Secondly, bacterial contamination, to whatever



1 degree it may be, will more likely than not  
2 destroy blood typings rather than enhance blood  
3 typings. When I explained that the A blood typing  
4 which I identified could have originated either  
5 from the material due to contamination of the  
6 material, the possibility exists that it could  
7 have originated from an A secretor individual. I  
8 could not eliminate that interpretation from the  
9 standpoint of the information which I had gained  
10 from the evidence that I examined.

11 Q Then are you telling me in so many words  
12 that you can only state with regards to  
13 percentages what the possibilities are of your  
14 results, rather than with any degree of  
15 exactitude?

16 A I don't believe that you and I have talked  
17 about any percentages, other than  
18 secretor/non-secretor status. What I did state  
19 earlier is that from the standpoint of the  
20 examination, the tests which were performed, that  
21 there was an indication of an A blood type being  
22 present in the secretions which I identified, the  
23 extreme of the identification was minimal, but I  
24 did not feel that I could exclude it from my

1 report. On a scale of 1 to 10, I had an  
2 indication of an A blood type which was probably  
3 a two. But, there again, the identification of  
4 the blood type as far as the ABO blood typing  
5 from seminal fluid was definitely 100 hundred  
6 percent A, O, due to being on a scale of 1 to 10,  
7 would be 10.

8 Q Well let me ask the next question. If you  
9 got a control, how can you be sure that it's a  
10 control, because it might too be bacterially  
11 contaminated?

12 A That's exactly what I stated earlier.  
13 That I got a two plus scale on the control for an  
14 A blood type and I got two plus on the stain.  
15 And that at that time, if I would have eliminated  
16 the A blood type which I was seeing, being due  
17 directly to bacterial contamination, then the  
18 blood typings which were reported would have been  
19 consistent with Miss Ward's and also consistent  
20 with Mr. Davis'.

21 Q And they could also be consistent with  
22 just about a whole lot of other people?

23 A Well if you want to get into percentages,  
24 as far as in a two plus one plus and a secretor,

1           that's something different. Because you say a  
2           whole lot of other people -- For example, an ABO  
3           O individual is approximately 43 percent of the  
4           general population of West Virginia. A PGM two  
5           plus, one plus is approximately 25 percent of the  
6           general population of West Virginia. And of  
7           course a secretor individual is 80 percent of the  
8           general population. So 43, 25 of that, about 10  
9           percent, 8 percent of that, we'll say probably  
10          around the realm of 7 percent of the general  
11          population of West Virginia.

12          Q           That's assuming there is no contamination?

13          A           It would be the same for an A, two plus,  
14          one plus, secretor as it would for an O. And you  
15          are theoretically saying in percentage-wise it  
16          would mean a lot of people. What I am saying is  
17          that it would be approximately 7 to 8 percent of  
18          the general population of West Virginia, and half  
19          of that would be approximately three and a half  
20          percent of the male population of West Virginia.  
21          So you would exclude ninety-six and a half  
22          percent of the male population of West Virginia  
23          as having deposited an O blood type, two plus,  
24          one plus, secretor individual from seminal fluid.

1 Q That is if there was no contamination  
2 involved?

3 A It's from the standpoint if it's an A, two  
4 plus, one plus, secretor individual, it would be  
5 the same percentage.

6 MR. LESTER: I don't have any  
7 further questions of this witness.

8 MR. REVERCOMB: I just have one last  
9 question.

10 REDIRECT EXAMINATION

11 BY MR. REVERCOMB:

12 Q Basically what you are saying is the fact  
13 you got this weak A factor does not exclude Jerry  
14 Davis from being the donor of that seminal fluid?

15 A That's correct

16 RECROSS EXAMINATION

17 BY MR. LESTER:

18 Q If I might ask one further question, and  
19 it doesn't particularly point towards him as  
20 being the donor of that particular fluid?

21 A All these reports do are to give the  
22 scientific information for what they are. It's  
23 not my job to give information to point to any  
24 one individual or another, only to show or to

1 explain that it either can include an individual  
2 or that it 100 percent excludes that individual.  
3 And in this particular instance it does not 100  
4 percent exclude Mr. Davis as having deposited  
5 that seminal fluid on the items which I have  
6 testified to over here.

7 MR. LESTER: I have no further  
8 questions, your Honor.

9 THE COURT: Anything else of this  
10 witness?

11 MR. REVERCOMB: No, your Honor.

12 THE COURT: I understand this  
13 witness has to be in another location. Is there  
14 any objection that he be excused from this trial?

15 MR. LESTER: No, your Honor. I have  
16 none.

17 THE COURT: Thank you, officer, you  
18 may step down and be excused.

19 (Witness Zain stood aside.)

20 THE COURT: Ladies and gentlemen, we  
21 are going to recess for the day. We thank you  
22 for your patience during the day, particularly  
23 this last period of time. This officer has to be  
24 in another court somewhere in the state, as I