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witness.

MR. SCHWARTZ: People call Detective
DeMaio.

J O S E P H D E M A I O, called as a
witness, having been first duly sworn,
testifies as follows:

THE CLERK: Rank, name and shield
number.

THE WITNESS: Detective Joseph DiMaio.
D E M A I O. Shield 4032, assigned to New York
City Police Lab.

THE CLERK: Thank you.

THE COURT: Mr. Schwartz.

MR. SCHWARTZ: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. SCHWARTZ:

Q. Detective, by whom are you currently
employed?

A. New York City Police Department.

Q. How long have you been a New York City
police officer?

A. A little more than 18 years.

Q. What is your current rank?

A. Current rank is detective.

Direct - DeMaio

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Q. How long have you been a detective?

A. Approximately a year and a half.

Q. Where are you currently assigned?

A. I'm currently assigned to the surology section of the police laboratory and that deals with the examination of body fluids.

Q. How long have you been there?

A. Approximately 13 years.

Q. Now, can you tell us a little bit about your background and your training?

A. Well, I possess an associate degree in chemistry from New York City Community College.

I have a bachelor of science degree from John Jay College.

I've taken graduate courses at John Jay. I've been trained by the late Dr. Alexander Weiner in the office of the Chief Medical Examiner for the New York City.

I received training in the FBI Academy and training at the police lab.

Q. Approximately how many tests have you conducted over the years that you've been in the police laboratories?

A. It would number in the thousands.

Direct - DeMaio

Q. And has your testimony been accepted as that of an expert in the area of forensic surology in the State of New York?

A. Yes, it is.

Q. How many times?

A. Conservatively, 350 times.

MR. SCHWARTZ: At this time I ask that this witness be declared an expert in forensic surology.

MR. WILLIAMS: No objection.

THE COURT: At this time the Court declares this witnesses, Joseph DeMaio, an expert in the field of forensic surology.

Same instruction with respect to expert testimony will apply to this witness.

Go ahead, Mr. Schwartz.

Q. Detective, could you tell us what forensic surology is?

A. Forensic surology concerns itself with the identification and characterization of body fluids such as blood, seminal stains, saliva, perspiration.

MR. SCHWARTZ: Your Honor, may I have People's Exhibit Number One?

1 Direct - DeMaio

2 (Handing.)

3 Q. Detective, can you look at this. Do
4 you recognize what this is?

5 A. Yes, I do.

6 Q. What is it?

7 A. It is a Vetulo Evidence Kit.

8 Q. Was it examined by your office?

9 A. Yes, it was.

10 MR. WILLIAMS: Objection.

11 Did he examine it? He said by his
12 office. I would like to know whether or not he's
13 talking about this detective.

14 THE COURT: Mr. Schwartz will clarify
15 it. Go ahead.

16 Q. Who examined it?

17 A. Detective Edward Mason.

18 Q. Where is Detective Mason now?

19 A. Currently on vacation.

20 MR. SCHWARTZ: Your Honor, at this time I
21 would show the witness what has already been marked
22 into evidence for identification as People's
23 Exhibit Number 12.

24 THE COURT: Counselor, please approach.

25 (The following takes place on the record

Direct - DeMaio

at side bar:)

THE COURT: Mr. Schwartz, it appears to the Court that you intend to introduce the lab report, the results of the surology examination, through this witness.

Mr. Williams indicates that he will object. Let me know the grounds of your objection, Mr. Williams.

MR. WILLIAMS: Your Honor, I don't think that this detective has any first-hand knowledge about these examinations since he didn't perform them.

What he will be doing, I believe, your Honor, is he will be reading from the lab report as prepared by another detective. I think that that detective should have been produced for purposes of being examined.

I think that certainly the defendant would like to examine that detective, because he did, in fact, analyze the materials that were submitted.

I don't believe that the detective that is on the stand, your Honor, has any basis for making any type of observation concerning the lab reports or anything else, because he didn't do them.

Colloquy

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2 THE COURT: Let me have an offer of proof
3 as to this detective.

4 MR. SCHWARTZ: This detective, as well as
5 Detective Mason-- they worked in the labs over 12
6 years. They do the testing in a same exact way.
7 It is done in a uniformed method in which slides
8 are tested in exactly the same way.

9 The items of clothing and towels were tested
10 in the same exact way they're tested in every other
11 case.

12 Given that I will be asking the detective to
13 go over that, how the testing is done and what the
14 results are and I'm moving in the laboratory
15 reports as a business record, since they will meet
16 all the criteria of a business record--

17 MR. WILLIAMS: I believe they have to be
18 moved in if they are moved in with Detective
19 Mason's testimony.

20 In addition, your Honor--

21 MR. SCHWARTZ: Just the opposite. If I
22 had Detective Mason, by the way, I would not need
23 to put the laboratory reports into evidence.

24 THE COURT: Let me see them. Let me see
25 the lab the reports. Get them and let me take a

Colloquy

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look at it.

(There is a pause while clerk gets reports in courtroom.)

THE COURT: What are the results of the examination, Mr. Schwartz?

MR. SCHWARTZ: I believe one of the slides, either the vaginal or cervix, is negative.

MR. WILLIAMS: I believe vaginal and cervix were both positive.

MR. SCHWARTZ: I think the jogging pants were positive. Everything else was negative.

MR. SCHWARTZ: You're right.

THE COURT: Did Detective Mason testify in the first trial?

MR. SCHWARTZ: Yes, he did.

THE COURT: So, Mr. Williams your objection to this is that detective Mason isn't here and I assume that your application is to adjourn this trial for the purpose of waiting until Detective Mason comes back?

MR. WILLIAMS: That is not my application.

THE COURT: That is not?

MR. WILLIAMS: My application at this

Colloquy

point in time is that I don't think that this witness should testify.

I don't think that this witness can testify and what the District Attorney does in order to prevent from having this problem, certainly I think Detective Mason should be produced. I think that since he's a police officer, certainly he could have been notified to get here.

I certainly don't want to interfere with anybody's vacation, but this is a higher calling that we are having now in terms of this trial. Since he's a police officer, he certainly should have been produced.

In view of the fact that we've been on trial for an excess of seven days, he could have already been notified so that he might have been here and perhaps wouldn't have interfered with his vacation.

THE COURT: It's this Court's opinion technically that you are correct, but I cannot cite the case to you, Mr. Schwartz.

In view of the fact that this laboratory report is a bear bones report and merely gives conclusions and doesn't indicate the procedure

Colloquy

adopted, it would not be admissible as a business--
as a record kept in the regular course of
business.

Even if Detective Mason were totally and
completely unavailable, it seems to this Court that
this is not admissible as a business record unless
this detective who is on the stand now observed
Detective Mason in the performance of these tests.

If he's going to testify that he saw
Detective Mason perform these tests, there would be
no objection. Can he so testify?

MR. SCHWARTZ: They probably were in the
laboratory together, but they don't observe each
other making the test.

Again, they do the same procedures on every
single test results. They do no variations on any
tests.

THE COURT: It seems to me that we have a
leading Court of Appeals case and the police
laboratory doesn't follow the dictates of that case
and again I cannot recall it offhand, but I will
give you the case as soon as we get a break and go
back into chambers.

In addition, whether or not this detective

Colloquy

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2 testifies or whether or not these results go into
3 evidence seems to this Court is not really a
4 material element of this case. Not a material
5 element of this case whether these reports go in or
6 do not go in. There doesn't seem to be any
7 question. Nor is defendant arguing that
8 complaining witness was not raped.

9 The sole question here seems to be identity
10 rather than the fact of the commission of the crime
11 by someone.

12 So that this doesn't seem to lend too much
13 materiality to the prosecution's case.

14 I'm also mulling over in my mind whether or
15 not even if we admitted it and it was error,
16 whether that would constitute material error or
17 harmless error in this type of a case.

18 The question was whether or not the
19 complaining witness was raped, whether or not
20 consent was involved, then this might be material.

21 Considering all of these factors, it doesn't
22 seem to this court that we ought to break standard
23 evidenciary rules in a case like this where it
24 really isn't that material to the prosecution or to
25 the defense.

Colloquy

MR. WILLIAMS: Your Honor, if I might, the defendant had intended to cross examine Detective Mason if he had been produced as to whether or not blood tests were also conducted.

We think that there might very well be some Brady material if, in fact, blood tests were conducted and if they were not conducted, we would like to know certainly why they did not, in view of the fact that I'm sure the lab is set up.

MR. SCHWARTZ: This could all be done through this witness.

THE COURT: Make up your mind. Either you want this witness to testify or you don't want this witness to testify.

You cannot have him testify merely on cross examination.

MR. WILLIAMS: That is not what I'm saying.

THE COURT: Then call him as your own witness. Listen to me, if you're objecting to the introduction of these records as you have, then this witness has nothing to testify. So I am going to sustain your objection and we'll get him off the stand.

1 Colloquy

2 MR. WILLIAMS: That is Detective DiMaio
3 on the stand.

4 MR. SCHWARTZ: Wait a minute.

5 THE COURT: If you're objecting to the
6 introduction of this evidence, the reports as you
7 have, I'll sustain your objection and we'll remove
8 this witness from the stand.

9 MR. WILLIAMS: Yes, sir.

10 THE COURT: If you want to cross examine
11 him, you'll call him as your own witness.

12 If you're withdrawing your objection and
13 he'll testify then on direct, then cross
14 examination to your heart's content. Make a
15 decision.

16 MR. WILLIAMS: Detective Mason is the one
17 not before the Court. DiMaio is before the Court.
18 Mason is the one I would like to have.

19 THE COURT: This detective can testify as
20 to any items that Detective Mason could have
21 testified to. He's probably as much or probably
22 more of an expert than Mason.

23 MR. WILLIAMS: We still have our
24 objection with respect to this witness.

25 THE COURT: Okay. Then you don't want

Colloquy

him to testify. Objection is sustained. He's going on the stand.

MR. SCHWARTZ: Then, your Honor, may we have a little recess. I guess we have to move in the detective's prior testimony.

This becomes important just because we have to show there was seman present, eventhough it's an identification case.

We still have to prove that a rape occurred and although this evidence of seman was found--

THE COURT: So, if the jury believes the complaining witness' testimony that she was raped, that is not sufficient for you?

Why do you have to show that there was seman?

The fact that there was seman, does that prove it was rape? Couldn't it have been her husband or are you going to exclude him from this?

MR. SCHWARTZ: As defense attorney noted, the other part of my direct examination would be concerning the reasons that the police laboratory did not go or does not do blood typing as a matter of course on a lot of these items and I was going to ask those questions also, but again the question

Colloquy

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2 is if they believe that she was raped, they can
3 convict. But from putting the case-- the evidence
4 in, we can't say, well, they believe her now
5 because we don't know.

6 THE COURT: Over his objection I will not
7 permit that. I will not permit it into evidence.

8 MR. SCHWARTZ: Then I guess I would have
9 to move in Detective Mason's prior testimony.

10 THE COURT: On what basis? The fact that
11 he's on vacation makes him unavailable.

12 Are you going to object to that?

13 MR. WILLIAMS: Yes, sir. I don't think
14 that is the intent of the unavailability.

15 The detective is on vacation and is certainly
16 subject to recall by the District Attorney's Office
17 and I think that can be done.

18 THE COURT: Okay. We are going to take
19 five minutes.

20 (The following takes place in open
21 court:)

22 THE COURT: Ladies and gentlemen, we are
23 going to take a recess for ten minutes. Please
24 don't discuss this case. Don't form any opinions.
25 Thank you.

1 Colloquy

2 (Jury leaves the courtroom).

3 (Short recess was taken).

4 THE CLERK: Case on trial continued.
5 Defense counsel, defendant and Assistant District
6 Attorney are present.

7 THE COURT: All right, in the short time
8 that we had to research the matter, the Court calls
9 the attention to both counsel and to the record to
10 the case in this matter. People verses Gower,
11 G O W E R, Court of Appeals, 42 New York 2nd, 117
12 at page 121 dealing with the results of testing as
13 a business record, where the Court of Appeals layed
14 down certain rules with respect to testimony by an
15 expert in the field, specifically testimony with
16 respect to lab reports by persons who did not
17 themselves perform those lab reports.

18 This court also calls the attention of
19 counsel to Imnacilina (phonetic), B as in boy,
20 First Division Appellate Division. Court does not
21 have the official citation. 477 New York, sub 2nd
22 5 and also to the case of People verses Hilton,
23 Appellate Division, First Department, no citation,
24 reported in the Law Journal of March 28th, 1985.
25 Page 12 column one.

Colloquy

It would appear that it would be necessary for people to lay the proper foundation with respect to this witness in order for this witness to testify as to the tests and the results of the tests performed by one other than himself.

This Court has suggested to counsel that in view of the fact that the minutes of the previous trial are available and that the forensic surologist who performed the testing on these slides testified at the previous trial and testified with respect to the standardized tests that he performed, that this witness be given the minutes of that trial to familiarize himself with the previous testimony with respect to the tests actually performed by the Detective Mason, the forensic surologist who actually performed the tests in this case.

So that, Mr. Schwartz, as soon as detective DiMaio finishes reading the transcript of Detective Mason's testimony, you will please then voir dire and question him with respect to establishing a foundation for the introduction of these lab reports.

MR. WILLIAMS: Your Honor, for the

Colloquy

record, the defendant at this time objected to this entire proceeding.

THE COURT: All right.

(The following takes place in open court with no jury present:)

BY MR. SCHWARTZ.

Q. Who trained Detective Mason?

A. Detective Mason was trained by the late Dr. Alexander Weiner who was the medical doctor in charge of the surology section of the Chief Medical Examiner's Office.

Q. Is that the same person who trained you?

A. Yes.

Q. How long has he been with the police laboratory, surology division?

A. Detective Mason?

Q. Yes.

A. At this point in time, I think 16 years.

Q. And did you have occasion to observe his technique?

A. Oh, yes.

Q. Do you know how he conducts his tests?

Examination - DiMiao

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2 A. Yes, I do.

3 Q. Is it the same or different from the
4 way you do?

5 MR. WILLIAMS: Objection.

6 THE COURT: I'll allow it. It's a voir
7 dire.

8 A. Detective Mason and I follow the same
9 procedure as far as the methodology of conducting
10 an examination is concerned.

11 Q. Is there any difference between the way
12 the two of you conduct your examinations?

13 A. No.

14 Q. Have you had a chance to--

15 MR. WILLIAMS: May I have a standing
16 object to this entire line?

17 THE COURT: Yes.

18 Q. Have you had a chance to read Detective
19 Mason's testimony at the prior trial?

20 A. At the prior proceeding? No, I did
21 not.

22 Q. Just a few minutes ago?

23 A. Just a few minutes ago, yes.

24 Q. Are you now familiar with the
25 techniques that he used in the testing of the rape

1 Examination - DiMiao

2 kit and the items in evidence?

3 A. Yes.

4 Q. Could you tell us, are you familiar
5 with those techniques?

6 A. Yes, those are the same techniques I
7 employ myself.

8 THE COURT: Is that a standardized
9 technique used for testing?

10 THE WITNESS: Yes, it is, your Honor.

11 THE COURT: No other tests are
12 standardized tests except the one that you and he
13 performed?

14 THE WITNESS: There are variations.

15 THE COURT: I'm talking about you-- in
16 the police lab-- are there any other techniques to
17 do those testing.

18 THE WITNESS: Yes, there are.

19 THE COURT: Does everybody perform the
20 same type of test?

21 THE WITNESS: We do, yes.

22 THE COURT: The fact that there may be
23 some other test, some other place is not relevant,
24 but with respect to the police lab that did the
25 testing on these slides, there's one standardized

Examination - DiMiao

test.

THE WITNESS: Yes, there is.

THE COURT: Is that the test Detective Mason does after you have read his testimony on the first trial?

THE WITNESS: Yes, it is.

THE COURT: And the results, from the report that was-- by the way, will you take a look at the report which is now marked for identification as People's 12 and 13, are they signed?

A. Yes, they are.

THE COURT: Are you familiar with the signature.

THE WITNESS: Yes, it appears to be the signature of Edward Mason.

THE COURT: Is it or just appears?

THE WITNESS: It is, but these are carbon copies.

THE COURT: And from looking at those reports-- by the way, those reports give us results; is that correct?

THE WITNESS: That is correct.

THE COURT: From looking at those

Examination - DiMiao

reports, can you tell from those reports what tests were done in order to achieve those reports?

THE WITNESS: Yes.

THE COURT: The Court will permit this the witness to testify with respect to both the tests and report.

MR. WILLIAMS: May I just make a record with respect to what transpired this morning.

First of all, this witness was sworn earlier this morning and we had a conference in chambers with your Honor at which point the Court instructed the District Attorney to go out and find out whether or not this witness could, in fact, testify to things which are relevant with respect to this case.

I think that in all fairness that should have been done in chambers in presence of both counsel. This witness has been sworn and I think it's highly improper at this point in time for any type of conversation to be conducted with the District Attorney and that witness out of the presence of the court as well as counsel--

THE COURT: Excuse me, let me interrupt you, whatever was discussed at side bar, bench

Examination - DiMiao

conference or in chambers, was discussed in your presence, Mr. Williams.

MR. WILLIAMS: That is not what I'm talking about. There's no question that anything that was discussed in your chambers I was present. I'm simply indicating that the Court instructed the the District Attorney to go out and speak with this witness and that was done out of the presence of the court and out of the presence of counsel and I think that was highly improper and I would like to object to that entire proceeding, your Honor.

THE COURT: Excuse me, how do you know what the Court instructed the District Attorney if you weren't present?

MR. WILLIAMS: Your Honor, I heard everything that the Court instructed the District Attorney to do. There's no question of that. I'm simply saying what was done was done out of the presence of your Honor and myself.

The District Attorney came to say things to this witness that was not in chambers. That is all.

THE COURT: All right. Anything else?

MR. SCHWARTZ: Nothing else?

1 Examination - DiMiao

2 THE COURT: Let's proceed. Bring the
3 jury in.

4 THE CLERK: Jury is present. Both sides
5 waive your role call?

6 MR. SCHWARTZ: So waived.

7 MR. WILLIAMS: So waived

8 BY MR. SCHWARTZ:

9 Q. Detective, could you look at People's
10 Exhibit 12 and 13, are they made in the regular
11 course of business?

12 A. Yes, they are.

13 Q. Is it the regular course of business to
14 make such records?

15 A. Yes, there is.

16 Q. Are these records contemporaineously
17 made?

18 A. Yes.

19 MR. SCHWARTZ: At this time I move them
20 into evidence as People's Exhibits 12 and 13.

21 MR. WILLIAMS: May I inquire.

22 VOIR DIRE EXAMINATION

23 BY MR. WILLIAMS:

24 Q. Did you prepare these documents,
25 Detective?

Examination - Di Miao

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A. No, I did not.

Q. Do you know when these documents were prepared?

A. They were prepared at the conclusion of an examination of evidence submitted to the laboratory in December of 1983, I believe.

Q. And that examination was conducted by someone else?

A. Yes.

Q. Do you know the date that this report was prepared?

A. I would have to refer to the document.

Q. You happen to have no independent recollection of it?

A. No.

THE COURT: Let the record be marked People's 12 and 13 in evidence.

(So marked.)

Q. Detective, are you familiar with the methodology of Detective Mason?

A. Yes, I am.

Q. How are you familiar with it?

A. Well, Detective Mason and I were both trained by the same physician at the Medical

Examination - Di Miao

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2 Examiner's Office. That being the late Dr.
3 Alexander Weiner. We both received on-the-job
4 training by a Detective Jerry Mattes who since
5 retired and currently senior members of the unit,
6 we have occasionally to train new personnel and as
7 part of that personnel's training, Detective Mason
8 and I demonstrate and explain the methodology that
9 is employed by the police laboratory.

10 Q. Now, can you take a look at the kit,
11 People's Exhibit Number One. Start with the
12 slides. How many slides were there?

13 A. There were three containers of slides--
14 there were six slides.

15 Q. Where were the six slides taken from?

16 A. Two slides were taken from the vaginal
17 canal. Two slides were taken from the cervical
18 area and two slides were oral slides.

19 Q. Now, could you tell us what tests, how
20 the testing was done on these slides?

21 A. Yes. The slides number one are fixed
22 in an alcohol bath and that is done to make any
23 material that is on the slides adhere to the glass
24 more tenaciously.

25 Q. When you say "more tenaciously," what

Examination - Di Miao

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do you mean?

A. When material is placed on glass, it's possible to have graded off or if you would then introduce a solution to it like water or a stain without fixing it, you stand an excellent chance of watching the material off the glass.

What the alcohol does is make that material stick to the glass better.

So, the six slides were fixed in an alcohol bath. They were stained with a particular stain called giemsa and that stain stains human sperm cells or the productive cell in a male differentially.

What I mean by that, the cell essentially looks like a tear drop and the head portion or anterior portion stains a lighter blue or purple color and the posterior portion to which the tail would be attached stains much deeper in color and this differentiation in staining aids in the identification of that cell as a human sperm cell.

Q. What is then done next?

A. Upon the completion of the sustaining procedure this slide is placed under on an optical microscope.

Examination - Di Miao

It is a microscope that uses, like rather than electrodes and the magnification of it is approximately one thousand times and one.

In this instance Detective Mason visually searched the surface of the slide under the microscope looking for sperm cells or reproductive cell unique to the male.

MR. WILLIAMS: Objection, your Honor.

THE COURT: Allow it.

Q. What was the results?

A. May I refer to the report?

THE COURT: Yes.

A. With regard to the two vaginal slides, Detective Mason found sperm cells or spermatazoa present on those. Two cervical slides also had spermatazoa on them and oral sides he was unable to visualize any sperm cells or spermatazoa.

Q. Were the swabs tested next?

A. Yes.

Q. Could you tell us how those tests were done?

A. The swabs essentially are placed into a chemical bath called acid phosphotase and it's a chemical that is slightly amber in color and when

Examination - Di Miao

it comes in contact with a suspect human seminal stain or sperm stain, it changes from amber to a very dark blue or deepish purple color and the test is presumptive.

In other words, it suggests that the material that is on that swab might be sperm, but then again it might be something else.

So what Detective Mason then did was make a slide from that swab by taking the swab and putting it onto a microscope slide which is a piece of glass about three quarters of an inch wide by three inches wide and he mechanically scrapes the surface of this swab which is like a big Q-Tip onto the glass slide.

It's then fixed in an alcohol bath. It's stained and then placed under a microscope and he looks for sperm cells.

Q. And what were the results?

A. Well, there were three swabs submitted. One was a vaginal swab. One was a surgical swab and an oral swab and the vaginal and cervical swabs had sperm cells on them and the oral slide did not.

Q. Oral slides or swab?

Examination - Di Miao

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A. Oral swab. I am sorry.

MR. SCHWARTZ: May I have the other evidence.

Q. Now, I am going to show you these items, Detective.

Detective, are they marked with anything?

A. Yes. The towel has a piece of tape. It's the same tape supplied by the Police Department in the laboratory and it bears the letters EM.

Q. What does that stand for?

A. Edward Mason and it has a voucher number and laboratory number.

Q. Is that tape on all those items?

A. Just a moment and I'll look.

MR. WILLIAMS: I object to all of the additional items.

THE COURT: Objection.

MR. SCHWARTZ: Except for that item. That wasn't one of the items I asked him to observe.

A. There's a bra that bears the same tag and same markings. The initial Edward Mason laboratory number and voucher number. There's a

Examination - Di Miao

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2 bed sheet which again is tagged and marked in the
3 same fashion and the pair of jogging pants that has
4 a tag with the voucher number and a laboratory
5 number and again the initials Edward Mason.

6 Q. Could you tell us how the testing was
7 done with these items?

8 A. Yes. Essentially, each one of these
9 items were examined visually for stained areas or
10 they were examined for changes in texture of
11 fabric.

12 In other words, was the fabric or areas of
13 that fabric stiff and stretchy as compared to the
14 rest and if they were, Detective Mason would cut
15 them out with a pair of scissors and introduce that
16 into ceramic slides which has depressions about the
17 size of a man's thumb and two each one of these
18 depressions he would add this chemical acid
19 phosphotote.

20 Q. Could you hold up the brown towel and
21 show us what the cutouts look like?

22 A. You could see areas in the towel that
23 are holes and those are the areas that Detective
24 Mason tested.

25 Q. So, in other words, the entire towel is

Examination - Di Miao

not tested?

MR. WILLIAMS: Objection.

THE COURT: Allow it--

A. Selected areas which either have a visual stain or exhibit some degree of stretchiness or stiffness would be tested.

Q. Why isn't the entire towel or sheet or jogging pants tested?

A. Well, one would look for areas that are characteristics of a dried seminal stain.

In other words, dried seminal stains typically make fabric stiff or stretchy in texture. They sometimes on a white substance leave amber colored stains. Slightly amber colored stains.

So, it's reasonable to examine those areas first, then an area that doesn't exhibit stretchiness or stiffness and does not have a visual stain.

Q. Now, what were the results of the test done on the jogging pants?

A. The jogging pants examined by Detective Mason found spermatazoa to be present in the crotch area.

Examination - Di Miao

Q. Could you look at the report and tell us the result of the examination done on the bed sheet, the brown towel and the bra?

A. Okay, the sheet, the towel and the bra were examined and no spermatazoa was found.

Q. Now, Detective, is the police laboratory equipped to do blood typing?

A. Yes, we are.

Q. Did you do blood typing in this particular situation?

A. No, Detective Mason did not.

Q. Could you tell us-- by the way, some of the problems you have in the police laboratory with doing blood typing.

MR. WILLIAMS: Objection.

THE COURT: Sustained as to form.

Q. Why wasn't it done in this situation?

MR. WILLIAMS: Objection, your Honor.

Q. If you know.

THE COURT: I'll allow it.

A. To the best of my knowledge the blood typing tests were not done at the police laboratory because the Brooklyn District Attorney's Office wanted the Medical Examiner's Office to conduct

Examination - Di Miao

those exams.

Q. Do you normally do blood typing there?

A. Yes.

Q. When you do it, do you ever have any problems with contaminants?

MR. WILLIAMS: Objection. Relevancy.

THE COURT: Objection sustained.

Q. When you're doing testing on these items, are these, shall we say, clean items?

MR. WILLIAMS: Objection.

THE COURT: Are these what?

MR. SCHWARTZ: Clean.

THE COURT: I don't follow the question. Do you understand the question?

THE WITNESS: No.

MR. SCHWARTZ: Withdrawn.

Q. When you examine, let's say the jogging pants, for example, would sweat or bacteria affect test results?

A. They may possibly very well affect the results.

Q. Could you explain why?

A. Well, I'd have to explain number one what blood grouping as it relates to a seminal

Examination - Di Miao

stain.

Number one it is not really the same as typing a whole blood sample. What essentially happens is we have a group of people that we call secreters and these people are able to express their blood type in their body fluid and technically what happens is their body generates substances very much like blood factors and they're secreted into their body fluids.

It could be saliva, perspiration or seminal you fluid and these substance is chemically not as reactive as a real blood factor, number one, and, number two, the concentration of them is not as high as in a real blood sample.

So, before you attempt to arrive at a blood type from a seminal stain, there's a certain protocol that has to be followed and what has to be done is, number one, obtain samples of saliva and whole blood from the people involved and this is done to determine their secrete status.

In other words, we have to find out if these people are among those 80 percent of the population who could express their blood type in body fluids and classically it's done on a saliva sample from

Examination - Di Miao

1
2 the person and the whole blood sample is used to
3 arrive at his true type and both are compared to
4 see if the blood types are the same. Because some
5 individuals don't secrete the entire compliment of
6 blood factors and if you only tested the saliva,
7 you might get the wrong blood type.

8 MR. WILLIAMS: Objection to the term
9 might.

10 THE COURT: Allow it.

11 A. So it controls, number one. Number two
12 the evidence has to be evaluated as to suitability
13 to this testing.

14 Q. What would be suitable?

15 A. What is suitable in my opinion is a
16 piece of clothing that is not from the crotch area,
17 because on a garment such as a pair of jogging
18 shorts.

19 It's reasonable to expect perspiration which
20 is contaminated with bacterior that normally lives
21 on the skin and that gives rise to false blood
22 types.

23 You also have bacterior in the instance of a
24 female. The bacterior that is normally present in
25 her vaginal canal tests a very particular blood

Examination - Di Miao

1
2 type and that may give rise to a false result.

3 So what we are really looking for is a piece
4 of garment, let's say on a thigh or away from the
5 crotch area that is visually clean. Not
6 contaminated with soil or dirt or a nice clean bed
7 sheet.

8 Q. Contaminants may throw off the test
9 results?

10 A. Absolutely.

11 Q. Like bacterior?

12 A. Yes.

13 Q. What about water, is that an usual
14 chemical?

15 A. Some chemicals tend to interfere with
16 it. They may mask test reactions or inflict them
17 altogether.

18 Q. Would it be fair to say, let's say,
19 powder, from dusting powder that they would get
20 fingerprints from? Would that may or may not throw
21 off--

22 MR. WILLIAMS: Objection.

23 THE COURT: Allow it.

24 A. To be quite candid, I don't know if
25 fingerprints would have any adverse affect on blood

Examination - Di Miao

grouping, because I know of no studies or any of my work that is investigated in that area. I really don't know.

Q. If it was water that is an usually-- would it be fair to say it may do it?

A. It may, yes.

Q. And how about substances found in a cigarette, would that throw off test results?

A. Quite possibly, yes.

Q. What type?

A. Tobacco usually is treated by the manufacturer with excellerants to keep it smoldering so it doesn't go out. Some manufacturers add things like menthaul. Other companies put things like licorish flavoring to enhance flavor and so on and so forth and these chemicals may interfere with your tests.

Q. One final question, Detective. Detective, if you did not receive a request from the Police Department to do testing, I assume that is how you would normally?

MR. WILLIAMS: Objection.

MR. SCHWARTZ: Let me rephrase.

Q. How do you normally do testing? Do you

Examination - Di Miao

1
2 normally get a request from the Police Department?

3 THE COURT: When you say testing--

4 Q. Let's say the rape kit. How would you
5 receive the rape kit?

6 A. Well, I would normally receive a rape
7 kit with a request for analysis that sometimes has
8 very sparse directions as far as examinations go.

9 It would read a semen test or examine for
10 sperm. Some offices are more sophisticated and ask
11 for very specific tests.

12 Q. Those request forms are filled out by
13 the officer who vouches the property?

14 A. Normally, yes.

15 MR. WILLIAMS: Objection.

16 THE COURT: I'll allow it.

17 Q. Detective, if you receive property or
18 vouchers or requests, would you normally call up
19 the local precinct to find out why?

20 MR. WILLIAMS: I am going to object to
21 this question.

22 This officer did not perform this test.

23 THE COURT: Withdrawn.

24 MR. SCHWARTZ: No further questions.

25 CROSS EXAMINATION

Cross - Sciallo

BY MR. WILLIAMS:

Q. Officer, could you look at those laboratory reports and tell me when they were prepared, please?

A. Sure. The one report that is deemed People's Exhibit 12 was dated December 7th, 1983.

Q. What is that a report on, Officer?

A. The report reflects the findings of the Votulo Evidence Kit.

Q. Do you know when that was received in the police laboratory?

A. It was received at the laboratory on December 1st, 1983.

Q. And the other report you have there?

A. The other report was also dated December 7th, 1983 and was also received at the laboratory on December 1st, 1983.

Q. So, for six days this report-- so for six days these bits of evidence were not tested?

A. That is correct.

Q. Do you know where they were during that time?

A. They were stored in the surology section of the laboratory on shelves that we'll

Cross - Sciallo

provide for the storage of that material.

Q. Who stored them there, do you know?

A. They were either put on the shelf by Detective Mason or myself because parts of our duties are to arrange the evidence chronologically on these shelves and assign them to the other members of the unit.

Q. Now, did there come a time that you received information concerning the incident surrounding these tests that were being ordered?

A. Specifically.

Q. Yes.

A. Well, I personally have had very little information that surrounds this case.

Q. Do you know whether or not the lab received information that the perpetrator allegedly sucked on Mrs. Scotti's breasts through her bra?

A. No, I do not.

Q. And you were not requested to perform anything except a test for sperm on the bra?

A. To the best of my knowledge, yes.

Q. And a test for sperm was conducted on the bra?

A. Yes.

Cross - Sciallo

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Q. And of course it came back negative?

A. Yes.

Q. Did you have occasion to test the white towel that was also submitted?

MR. SCHWARTZ: Objection, your Honor.
May we approach for a second?

(There is a discussion at the Bench off the record.)

Q. Now, do you know whether or not a white towel was also tested, Officer

(There is a discussion at the Bench off the record).

Q. Do you know whether or not any tests were performed on the white towel?

A. Yes, I do.

MR. WILLIAMS: At this time, your Honor, might the record reflect that the District Attorney and I have entered into a stipulation whereby we are stipulating that a white towel--

MR. SCHWARTZ: You'll move the white towel into evidence as a defense exhibit. I have no objection.

THE COURT: Ladies and gentlemen, I don't know if you're getting the drift. The white towel

Cross - Sciallo

is not here right now. It will be produced after a recess, either lunch or some other recess.

It happens not to be in the courtroom. Counsel are stipulating that the white towel will now be a defense exhibit, introduced into evidence and will be produced later. Go ahead.

Q. Now, Officer, do you know whether or not tests were performed on that towel?

A. Yes, I do.

Q. What were the results of that test?

A. The results were that spermatazoa was found to be present on that white towel.

Q. Were there any other tests that were performed on that white towel that you know about?

A. To my knowledge, no.

Q. Now, you have testified on direct examination that you were trained by personnel of the Chief Medical Examiner's Office?

A. Yes.

Q. Detective Mason was likewise trained by the individual of the Medical Examiner's Office?

A. That is correct.

Q. Do you use the same procedures that the Medical Examiner's Office uses in testing for

Cross - Sciallo

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2 sperm?

3 A. Well, the procedures that we employ
4 were the ones that were used by the Medical
5 Examiner's Office when Detective Mason and I were
6 trained by Dr. Weiner who was the head of
7 surology.

8 I do not know if the methodology in 1984 is
9 the same.

10 Q. Now, you indicated I believe that there
11 were two slides prepared of the vaginal area and
12 two slides prepared of the cervix and two slides I
13 believe of the mouth; is that right?

14 A. That is correct.

15 Q. Now, the tests that were done on the
16 slide from the cervix, what tests exactly were
17 performed?

18 A. The test was--

19 Q. On the slides now?

20 A. On the slides was essentially a
21 microscopic examination and the pre-exam treatment,
22 okay, was affixation process, a staining process
23 and then the slide was put under a microscope and
24 one looks for sperm cells.

25 Q. So that slide is placed under the

Cross - Sciallo

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2 microscope and you could actually see this sperm
3 cell because you have been trained to identify
4 them?

5 A. That is correct.

6 Q. What was the procedure utilized with
7 respect to the slides from the vaginal area?

8 A. The procedure was exactly the same.

9 Q. It's fair to say that all of the
10 procedures on the slides were the same?

11 A. That is correct.

12 Q. And the procedures on the slides, if I
13 understand them, were to determine whether or not
14 there was sperm present?

15 A. That is correct.

16 Q. Now, was it necessary for you to use
17 both slides to determine whether or not sperm was
18 present?

19 A. Technically, no.

20 Q. Let me ask you another question. What
21 about the swab, was it necessary for you to test
22 the swab for the presence of sperm?

23 A. Yes, it was.

24 Q. Okay, in other words, it is not
25 necessary to do both of the slides though; is that

Cross - Sciallo

correct?

A. Well, we are required to examine the slides for spermatazoa and it's at this point that the laboratory would allow us to finish our examination.

However, based on prior experience as far as court testimony is concerned, defense counsel usually objects when only one lighter is examined and one is not.

So, the laboratory has adopted a policy if we get four slides, we look at four slides. We look at four. If we get six, we look at six.

Q. Detective, is it fair to say that the swab that you received from the rape kit, the swabs, the three of them?

A. Yes.

Q. Could you have prepared more slides with that swab?

A. Yes.

Q. And could you have tested one of the slides for the presence of blood grouping?

A. A slide for blood grouping, no. No.

Q. What would it have required for you to test for blood grouping?

Cross - Sciallo

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2 A. What would have been required would
3 have been blood and saliva samples from the
4 defendant or suspect in the case as well as blood
5 and saliva samples from the complainants in the
6 case.

7 Q. Assuming we got all those, could you
8 perform the test with just the material on the
9 slides. Is that enough material to determine the
10 blood grouping?

11 A. No, it isn't.

12 Q. But with the swab you could have made
13 more slides, could you have not?

14 A. You probably could have-- essentially
15 we did make another slide because Detective Mason
16 found sperm to be present on two out of the three
17 swabs and he effectively made a slide directly from
18 that swab which he then examined under the
19 microscope, but, again, it's questionable whether
20 or not enough material would remain on that swab to
21 conduct blood grouping tests and there's also some
22 question as to the suitability of a swab that is
23 inserted into the vaginal vault for blood grouping
24 tests.

25 Q. Detective, can you tell me why there

Cross - Sciallo

was a test performed on the bra, test for sperm?

A. Well, the best answer I could give was it was part of a package of evidence that was involved in an apparent sexual crime and not knowing the details of what transpired at the place of occurrence, the material was examined for sperm.

Q. Now, is it fair to say that it is not impossible to test a slide for the presence of the blood grouping?

A. Well --

Q. I mean it may be difficult, but it is not impossible?

A. Well, the problem you have, counselor, is if you take a slide and you attempt to arrive at a blood type which is says essentially a characterization, you're going to give his material some quality. You run into a problem, you're going to talk about a quality or characteristic of something that you have not identified yet.

So, you would have to look at the slide to find out what is on it and in this instance let's make an assumption it is a seminal slide and there's sperms on it.

The process that allows you to make that

Cross - Sciallo

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2 identification totally negates the possibility of
3 doing a subsequent blood type, because the stain
4 procedure and its fixation period that one employs
5 to see the sperm chemically alters the factors to
6 give rise to a blood type.

7 Q. Could that be because you're using the
8 procedure that is taught to you by the old head of
9 surology, Dr. Alexander Weiner?

10 A. No. It's because of the inherrent
11 nature of the material that we have.

12 Q. So, in other words, even if you were
13 utilizing the new procedures, assuming there are
14 maybe new procedures, you feel that the new
15 procedures would also not be conducive for a test
16 of blood groupings?

17 A. Not on slides, no.

18 Q. You can't test a slide for sperm?

19 A. Yes.

20 Q. And once you have made that test for
21 the presence of sperm and it comes back positive
22 that there is sperm there, is there any way that
23 you can further test that sperm to see what the
24 blood groupings are?

25 A. No.

Cross - Sciallo

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2 Q. All right, not that sperm and that
3 slide, but the sperm that was taken-- withdrawn.

4 In this instance there was a swab prepared.
5 Was there enough of whatever was on that swab to
6 prepare another one?

7 A. Again, we are posed with this problem,
8 since we don't have any direct knowledge that that
9 swab was used to make any other slides, okay. I
10 was not there, nor was Detective Mason, when the
11 doctor used or allegedly used that swab to make his
12 slides.

13 As a forensic surologist you can't make the
14 assumption.

15 Then-- well, this was the instrument that
16 made the slide, so I am going to do a blood group
17 grouping test on it.

18 We identify what is on the swab first because
19 there may not be any sperm on it.

20 Q. Isn't it true that if you prepared the
21 slides using that swab and the slides come back
22 positive for sperm, isn't it fair to say then that
23 the swab that prepared the slides also must have
24 sperm?

25 A. No, not necessarily. My personal

Cross - Sciallo

1
2 experience has been I had many cases with three and
3 four slides with two swabs.

4 The slides come up positive as far as
5 spermatazoa is concerned and the swabs that were
6 allegedly used to make those slides are negative.

7 I had cases where I don't even get a
8 presumption chemical test that is positive on the
9 swabs.

10 Q. Now, were you aware of the fact that
11 saliva samples had already been taken from Mr.
12 Foppiano?

13 A. No, I was not.

14 Q. Was Detective Mason aware of that?

15 A. I don't know.

16 Q. Do you know whether or not Detective
17 Mason prepared any documents pursuant to his
18 tests?

19 Anything with the exception of what has
20 already been moved into evidence?

21 A. To my knowledge, no.

22 Q. When you conduct a laboratory test, are
23 your only notes that you use the only notes
24 prepared?

25 Is it fair to say that those are the lab

Cross - Sciallo

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reports that are prepared after all the tests are done?

A. Yes.

Q. No other notes?

A. Some people keep a separate notebook.

Q. What about you and Detective Mason, do you or Detective Mason keep a separate notebook?

A. Detective Mason does not, to my knowledge, keep a note book any more. There was a period of time when he did.

Q. When did he stop?

A. Oh, years ago. Five or six years ago. I myself do not keep a notebook.

Q. Do you think that the procedure that is used by the police laboratory is the best procedure at this point?

A. Well, I don't know what you mean by "best".

Q. Well, would it be better if these tests were performed in the hospital, the hospital that took the samples from the patient?

MR. SCHWARTZ: I am going to object to this.

THE COURT: If you know.

Cross - Sciallo

MR. WILLIAMS: He's an expert, Judge.

A. But I don't know--

THE COURT: In other words, I think the question is, is there any particular advantage to doing the testing immediately at the hospital rather than waiting for either the next day or six days later?

A. The quicker, the wetter. The problem is you still need these control samples. You cannot do any blood grouping without the controls and they have to be run along with your test sample symultaineously. You can't from a good scientific point of view by running the controls today and look at the unknown samples tomorrow and conduct the exam the following day. They have to be done symultaineously.

Q. Now, the slides that were in the Votulo Rape Kit today, do you know which of those slides were prepared from which area of the patient's body?

A. May I look at them again?

Q. Sure.

A. (Pause) Yes, I can tell you which ones.

Q. Can you tell us which of the slides

Cross - Sciallo

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2 were prepared from the vaginal swab and which, of
3 course, from the cervical and from the mouth?

4 A. Okay, these two slides here are marked
5 vagina.

6 Q. I am sorry. You said they're marked?

7 A. They're marked vagina. Okay.

8 Q. By the way, do you know who marked
9 them?

10 A. No, I do not. Those two slides have
11 the initials E M for Edward Mason and it was done
12 with a diamond marking pen so the E M is actually
13 scratched in the glass and under that is
14 abbreviations C E R for cervix and this was done by
15 Detective Mason.

16 These two are cervical slides and the last
17 two slides again were scratched with that diamond
18 marker. They have initials E M for Edward Mason.
19 One is marked oral and the other one is also marked
20 oral.

21 Q. Detective, isn't it a fact that blood
22 and saliva were taken from Scott Foppiano?

23 A. To my knowledge, counselor, I have no
24 knowledge of that.

25 Q. Now, you were talking about secreters

Cross - Sciallo

and non-secreters?

A. Yes.

Q. Were you ever told whether or not Scott Foppiano was a secreter or not?

A. No, I was not.

Q. Does your lab report somehow indicate whether or not he is?

A. No. The two lab reports that I have essentially list the evidence submitted and the results of tests that Edward Mason does and there is no mention on either one of these reports about secreter status or blood grouping the tests.

Q. It is difficult to do a blood grouping from let's say the piece of material from the crotch of those jogging pants, was it tried?

A. To my knowledge, no.

Q. And to your knowledge was that test tried on any of the other evidence?

A. Not at the police laboratory, no.

MR. WILLIAMS: No further questions.

Redirect.

REDIRECT EXAMINATION

BY MR. SCHWARTZ:

Q. Detective, when you say that the blood

Redirect - Sciallo

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2 typing may be chemically altered, what do you mean
3 by that?

4 A. Well, the substance is given rise to a
5 blood type proteins. They're biochemical
6 substances. Degrade as a function of time. They
7 degrade when bacteria attacks them. They will
8 degrade when chemicals are placed in contact with
9 them. It's essential. I think it's something like
10 a stake which is essentially protein and if you
11 leave it outside exposed to the air on a warm
12 summers day it changes and it becomes rancid.

13 MR. WILLIAMS: Objection

14 THE COURT: Allow it.

15 Q. How would this affect the test results?

16 A. Sometimes the agent that denatures or
17 chemically alters these proteins also affects the
18 proteins that were used in the tests, known blood
19 cells.

20 Q. Would it leave you with the wrong
21 results?

22 MR. WILLIAMS: Objection.

23 THE COURT: Sustained.

24 Q. Please, explain how would the chemical
25 chemically alter and affect the results?

Redirect - Sciallo

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2 A. Well, suppose we hypothetically took--
3 an example, a pair of underpants that were in
4 intimate contact with the woman's vaginal area and
5 she secreted normal vaginal secretions on it and it
6 was put into a plastic bag and kept for several
7 days. The bacteria that is normally spent from her
8 vaginal canal would multiply on the secretion that
9 she put on the garment and if you tested it without
10 any controls in all probability it would test as
11 though it's a blood type B and it's been
12 established time and time again in scientific
13 journals in papers that the bacteria from the
14 vaginal canal tests as though it were a B which may
15 not be her true blood type. She might be an A or
16 an O.

17 Q. The bacteria might very well change the
18 blood type?

19 A. Absolutely.

20 Q. You talked about a stake laying out for
21 a period of time and because of the imagine you're
22 saying because of the surrounding area and other
23 things that decompositon might change somewhat?

24 A. Sure.

25 Q. How long would that usually take when

1 Redirect - Sciallo

2 we are talking about a swab let's say?

3 A. Well, assuming that the swabs were
4 kept, you know, in a plastic container such as a
5 Votulo kit and were allowed to air dry, you could
6 probably test them for a period for an ABO type if
7 that would be possible for about a year. If you
8 were looking for more laboring tests, genetic
9 markers and such approximately a month.

10 MR. WILLIAMS: No further questions. One
11 question.

12 Q. Did you test for underpanties?

13 A. To my knowledge, no underpanties were
14 submitted.

15 MR. SCHWARTZ: Nothing.

16 MR. WILLIAMS: Nothing.

17 THE COURT: Thank you very much. You may
18 step down.

19 (WITNESS EXCUSED).

20 THE COURT: Mr. Schwartz.

21 MR. SCHWARTZ: People rest, your Honor.

22 (There is a side bar discussion on the
23 record:).)

24 THE COURT: Motions.

25 MR. WILLIAMS: Yes, at this time in