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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. SAMMY MARSHALL, Defendant.	CASE NO. BA069796 PEOPLE'S RESPONSE TO DEFENDANT'S MOTION FOR APPOINTMENT OF EXPERT AND ACCESS TO PEOPLE'S LABORATORY Hearing Date March 31, 1995 Dept. 115

TO THE HONORABLE MARY ANN MURPHY, JUDGE OF THE ABOVE ENTITLED COURT, DEFENDANT SAMMY MARSHALL, AND HIS ATTORNEYS OF RECORD, JAY JAFFE AND WILLIAM C. THOMPSON:

THE PEOPLE OF THE STATE OF CALIFORNIA oppose the defendant's motion for appointment of expert to utilize proprietary equipment in People's laboratory and respectfully submit the following points and authorities.

DATED: March 6, 1995

I.

INTRODUCTION

Pursuant to a request from the People in this case, Genetic Design laboratory conducted a DNA analysis and comparison of samples taken from both defendants with materials taken during a sexual assault examination of one of the named victims. The analysis performed by Genetic Design utilized a procedure known as restriction fragment polymorphism analysis (RFLP).

This procedure has now been the subject of numerous California appellate court cases and the specific steps involved in the process are very well detailed in many of these cases. (See in particular People v. Barney and People v. Howard (1992) 8 Cal.App.4th 798 at 806-810.)

Under the very limited focus of this motion, however, it is the "scoring" or "matching" aspect of the process that is the subject of this very unusual request. Defendant's request, which has not been the specific subject of any DNA appellate case, is to be allowed to use the sophisticated computerized machinery used by Genetic Design to score the resulting autorads. This request is both legally unwarranted and unnecessary.

II.

THE REOUEST IS A LEGALLY UNWARRANTED INVASION OF EXPENSIVE. CONFIDENTIAL. AND PROPRIETARY EOUIPMENT OWNED BY GENETIC DESIGN

Genetic Design uses a computer assisted imaging device known as a Bio Image. It is widely used by the scientific community and has gained routine acceptance by a number of laboratories. It is also commercially available through the Millpore Corporation. Bio Image is not merely a tool but a sophisticated computer capable of containing data from a number of cases.

Michael DeGuglielmo is the Director of Forensic Analysis at Genetic Design. He has

informed me that this computer system alone is worth approximately 150,000 dollars. He also states that it is linked inseparably with a corporate computer system worth several million dollars. No one is allowed to operate this system without extensive training and supervision. It is a highly sensitive item of equipment for which extensive steps are taken to ensure that it is not damaged in any way.

In addition, this computer carries two kinds of highly confidential data. The first kind deals with the thousands of cases that Genetic Design has dealt with over the years it has been using the Bio Image device. These cases include confidential paternity issues, physician-patient privileged issues involving transplant and bone marrow replacement patients, and, of course, other criminal cases in existence throughout the country. There are no safeguards on the machine that could totally prevent the deliberate or accidental alteration or destruction of data dealing with the instant case or any other.

Secondly, this computer contains proprietary data that is the property of Genetic Design. This proprietary data includes their own in-house work product as well as confidential communications with hundreds of their clients. Despite what defendant assert in his points and authorities, I at no time have stated that this confidential data includes the databases used for statistical computations.

Defendant's solution to these concerns is the farcical suggestion that a monitor sit on the other side of the room, close enough to see if anything damaging is going on, but far enough away to protect the confidentiality of the results. This suggestion betrays a lack of knowledge of the seriousness of the request. The Bio Image device is essentially, a computer. Input or commands are given from a keyboard or similar device and the results are typically preliminarily shown on a monitor or viewer. They are then reproduced on a printout. Since these "confidential" results would be appearing on such a monitor or printout, counsel presumably would not let this observer

see the monitor or printout. Therefore, such a "room monitor" would have no way of knowing whether or not proprietary data was being accessed or the software or internal workings of the machine were being injured.

These concerns are heightened by the statements contained in the Declaration of William M. Shields, Ph.D., submitted with defendant's points and authorities. By his own admission, Dr. Shields states that it is his intention not just to use the machine once but to use it "several" times (item 5) and to alter the nature of the software (item 7). In addition, he wants to use this computer in a way in which any observer could not view his alterations to the heart of the computer itself, nor in the results that were obtained. Short of perhaps preventing someone from attacking the Bio Image machine with a hammer, there would be nothing that an "observer" could do to prevent the alteration or destruction of software nor the viewing, alteration, or deletion of confidential or proprietary data.

Defendant's reliance on United States v. Bockius (1977) 594 F.2D 1193, Fifth Cir., is clearly misplaced. Irrespective of its lack of binding authority in this jurisdiction, it is obvious that this case deals primarily with the results of extremely last minute testing done by the prosecution. In the Bockius situation, the discovery of this testing was not made until trial was already underway and the defense expert was already present in court. The only quick, available remedy for this serious breach in the rules of discovery was to let the defense expert use Government testing equipment to perform his own tests. This is *vastly* different from the situation in defendant's case where he has known about these results for almost 2 years now, one DNA expert has already been appointed and viewed the original autorads. and we are now dealing with crimes alleged to have been committed in December 1992. Defendant cites Bockius as his sole distinguishable and non-binding case for the proposition that his request is "not unprecedented."

According to Mr. DeGuglielmo, in the history of Genetic Design, no outside individual

has ever been allowed to operate their computer assisted imaging device and he is not aware of it ever being allowed at any other DNA laboratory. There are simply no safeguards or promises that can adequately protect the device or its contents when used in the manner which the defendant proposes.

III.

DEFENDANT HAS ALTERNATE MEANS TO EXAMINE THE EVIDENCE

Besides the fact that defendant's request is unwarranted it is also unnecessary. Other options exist for the defendant adequately challenge this evidence and the scoring procedures used by Genetic Design.

First of all, defendant can send a known sample to Genetic Design and personally observe them performing an RFLP analysis. This observation would include the use of the Bio Image device and the procedures followed during the scoring process. This known sample could also be submitted to other laboratories which use the Bio Image device.

Secondly, if they did not want to bear the cost of providing a sample themselves, they could watch Genetic Design personnel using the Bio Image machine on its daily, regular basis and derive information relevant to scoring from this observation.

In addition, it could be determined that a portion of the vaginal aspirate used in the RFLP analysis is still available, allowing the defendant to conduct his own DNA analysis at another laboratory using a similar scoring process. This process could be observed and the results, including the scoring process, could be compared with Genetic Design's.

But in the end, nothing precludes the defendant from his right to fully confront and cross-examine the evidence proffered by Genetic Design. The defendant is still fully free to subpena or cross-examine any or all individuals that dealt with this case, including those Genetic Design

employees involved in, or having knowledge of, the scoring process.

Defendant attempts to equate a denial of his request with examining microscopic evidence but not using a microscope. This analogy is misplaced. The evidence that Genetic Design analyzed in this case is the relevant blood and vaginal aspirate. The autorads are a product of the multi-step testing and are not the analyzed evidence itself. A DNA lab analyzes the actual evidence in the case (here, the blood and aspirate) through its own "microscope," as it were, and comes out with a result. To the extent that it is possible, defendant can obtain his own "microscope" and analyze the evidence himself.

There is no need for the defendant to submit factually inaccurate stipulations to the People to accomplish his goals. The autorads that are the product of DNA testing can be examined and questioning of personnel can occur regarding the role of these autorads in this multi-step process. However, that does not lead to a right to conduct testing using Genetic Design's equipment.

IV.

CONCLUSION

Because DNA testing involves a multi-step process, defendant apparently feels that these steps can be interrupted at any point so that the defense can use the People's equipment at that stage to conduct their own testing. In the end. however, this request is nothing different from, for example, a defense request to routinely use the People's drug lab equipment in every drug case or the People's medical lab equipment in every driving under the influence case where blood or urine is involved. In short, the defense is attempting to set a precedent whereby the defense could *always* challenge the result of any scientific testing done by the People by gaining access to the People's lab in every case.

The defendant's request is a legally groundless intrusion into the confidential, expensive,

and proprietary equipment of another. In addition, many other avenues exist for the defendant to fully exercise his right to confront and cross-examine this evidence. Based on my conversations with attorneys and geneticists familiar with these issues, this is the first time I am aware of that such a proprietary invasion has been requested in any DNA litigation.

The People of the State of California urge that this Honorable Court protect the rights of both the defendant and the People in this case and deny the defendant's expensive, time-consuming, unnecessary, and unwarranted request.

Respectfully submitted,

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