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SAMMY MARSHALL

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. SAMMY MARSHALL Defendant.	No. BA 069796 **Motion to Compel Discovery Related to DNA Evidence** Hearing Date: December 1, 1995 In Department 115, Los Angeles County Superior Court

TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO THE DISTRICT ATTORNEY OF THE COUNTY OF LOS ANGELES:

Defendant, SAMMY MARSHALL, by and through counsel, hereby moves this Honorable Court for an order providing:

1. That defendant's expert, Professor William Shields, and defense counsel, be allowed to watch while a technician at the prosecution's DNA laboratory re-scores the original

"autorads" that were produced in the course of forensic DNA testing in this case. The re-scoring is to be done using a Bio-Image machine, following the standard procedure of the laboratory, and the digital image files created during the rescoring are to be down-loaded to floppy disks in the presence of defendant's expert, and the floppy disks immediately given to defendant's expert. Defendant's expert is also to be given a copy of the computer printout showing the results of the re-scoring, including the "Bio Image WBA Band List" showing the estimated size and optical density of each band detected by the Bio Image machine. Any "operator-overrides" of the machine's scoring are to be documented and said documentation provided to defendant's expert.

2. That if the prosecution, or its DNA experts, are unwilling to comply with the above order concerning re-scoring of the autorads, that the prosecution be precluded from presenting DNA evidence against defendant Sammy Marshall.

3. That the prosecution comply fully with the discovery order signed by Judge Murphy on August 21, 1995, and that if the prosecution, or its DNA experts, are unwilling to comply fully with this order by December 11, 1995 that the prosecution be precluded from presenting DNA evidence against defendant Sammy Marshall.

4. That the prosecution comply fully with informal discovery requests made by defense counsel, as enumerated in the attached Memorandum of Points and Authorities

Dated: November 21, 1995

Respectfully submitted,

William C. Thompson
Attorney for Sammy Marshall

Memorandum of Points and Authorities in Support of Defendant's Motion to Compel Discovery Related to DNA Evidence

I. Introduction

This trial has been delayed interminably while the prosecution, and its DNA experts, have stonewalled defendant's discovery requests, fed defendant false and misleading information about its DNA test procedures, and flouted a discovery order. The prosecution, and its DNA experts, seem bound and determined to prevent defendant from obtaining information necessary to evaluate whether correct procedures were used to "score" the DNA test results in this case--results that constitute the key evidence against defendant Sammy Marshall, without which the prosecution would have no case.

Defense counsel, and experts they have consulted, strongly suspect that the prosecution's recalcitrance arises from a desire to hide severe problems with the DNA evidence against Mr. Marshall. Professor William Shields, a distinguished DNA expert, who has testified for both prosecutors and defense attorneys, explains the matter succinctly in a declaration that accompanies this motion ("Exhibit 1"):

> **I strongly suspect that the [results incriminating Marshall] are either an outright fabrication or are the product of improper "fudging" ... I have advised Mr. Marshall's attorney, William Thompson, that he should view the DNA results that purportedly incriminate his client with extreme suspicion. I do not believe that Genetic Design could have obtained these results through the use of correct and honest scientific procedures.**

Declaration of Dr. William Shields (attached as "Exhibit 1")

Through this motion, defendant is seeking discovery of information that will either confirm Professor Shields' suspicions or lay them to rest. To deny defendant access to this information would be a fundamental violation of due process, would cripple

defendant's ability to confront and cross-examine the prosecution's experts, and would shroud the trial with the stench of a cover-up.

Defendant also seeks the court's assistance in compelling the prosecution to comply fully with a previous **discovery order** signed by Judge Murphy. This order was issued by Judge Murphy on August 21, 1995 after the prosecution had delayed and failed for many months to provide relevant information requested by the defendant. The order directed the prosecution to provide a number of DNA-related items by September 11, 1995. To date, the prosecution has failed to comply fully with this order. Prosecutor Irene Wakabayashi has informed defense counsel that she does not intend to comply with some provisions of the order. Defendant asks that all previously ordered discovery be provided by a date certain or, in the alternative, that the prosecution be precluded from presenting the DNA evidence against Mr. Marshall.

Finally, defendant seeks the court's assistance in compelling the prosecution to provide through discovery certain relevant items of information (enumerated below) that defense counsel have requested informally and that the prosecutor, or her DNA experts, have refused to provide. Defendant seeks an order compelling disclosure of these items.

II. Under California's Discovery Statute and the U.S. Constitution, Defendant is Entitled To Have An Expert Observe Re-Scoring of the Autorads.

A. Scientific Justification for this Request

Sammy Marshall faces life imprisonment because a laboratory test purportedly shows his DNA banding pattern in the "vaginal aspirate" of a rape victim. Other than this DNA test, there is little evidence to tie Mr. Marshall to the crime. The DNA test was

performed at Genetic Design Corporation, an unaccredited,[1] private laboratory in Greensboro, North Carolina. Genetic Design issued a report signed by Mr. Michael DeGuglielmo, an uncertified technician.[2] DeGuglielmo's conclusions have not been reviewed, on behalf of the prosecution, by any Ph.D.-level scientists.

At the request of defense counsel, two highly qualified Ph.D.-level scientists, both university professors with superb credentials, independently reviewed the test results in this case by examining laboratory notes and copies of x-ray plates, known as autorads, that show the "DNA banding pattern" of each sample. The two experts, Professor William Shields of the State University of New York, Syracuse, and Professor Aimee Bakken of the University of Washington, both expressed strong doubts about whether the test incriminates Mr. Marshall.

The problem is that the incriminating "DNA banding pattern" in the vaginal aspirate is extremely faint (if it exists). It is so faint that it cannot be seen in the autorad copies provided to the defense, nor detected in those copies by imaging devices.[3] Given the faintness of this alleged DNA banding pattern, both defense experts expressed serious doubts about whether this pattern could be "scored" in a reliable manner by Genetic

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[1] The only recognized system of accreditation for forensic DNA laboratories is administered by the American Society of Crime Laboratory Directors (ASCLD). A number of state and county crime laboratories, and at least one private laboratory (Cellmark Diagnostics), have received ASCLD accreditation. Genetic Design has not.

[2] DeGuglielmo does not have a Ph.D. He holds no certification for forensic DNA work. Should he be called to testify in this case, defendant will challenge his credentials and expertise in the fields of molecular biology, population genetics and statistics.

[3] As Dr. Shields notes in his declaration ("Exhibit 1"), re-scoring copies is not definitive because copies sometimes contain less detail than originals. Nevertheless, given the appearance of the copies, both Dr. Shields and Dr. Bakken expressed strong doubts about whether the originals could be scored reliably. Another expert was able to perform a cursory examination of the original autorads in this case while visiting Genetic Design in connection with a different matter. He reported to defense counsel that the copies received by the defense appear to be accurate representations of the originals.

Design.[4] They harbor these doubts even though they know that Genetic Design's personnel claim to have followed the generally accepted "scoring procedure," i.e., use of a computer-assisted imaging device to perform the scoring. As Professor Shields explains:

> I am aware that an employee of Genetic Design claims that on two occasions a banding pattern consistent with Mr. Marshall's was detected in the original autorads through the use of a computer-assisted imaging device known as a Bio Image machine. I find this claim implausible. I strongly suspect that the computer printouts that purport to show this result are either an outright fabrication or are the product of improper "fudging" by the operator of the Bio Image machine. I have advised Mr. Marshall's attorney, William Thompson, that he should view the DNA results that purportedly incriminate his client with extreme suspicion. I do not believe that Genetic Design could have obtained these results through the use of correct and honest scientific procedures.

Shields Declaration (attached as "Exhibit 1").

Professor Bakken notes that the use of the Bio Image machine does not necessarily make the scoring of bands objective because "[t]he Bio Image Program allows the operator to influence the scoring of bands in a number of ways." She concludes that "[w]ithout knowing the extent of such influence in this case, it is impossible to know whether the band scoring in this case was performed in a manner that is reliable and acceptable in the scientific community." Bakken Declaration (attached as "Exhibit 2")

Professors Shields and Bakken both advised defense counsel that the best way to verify that the scoring of bands in this case was done properly is to have an independent scientist re-score the <u>original</u> autorads. Re-scoring of <u>copies</u> can provide useful information, but is not definitive because copies sometimes contain less detail than

[4] Scoring is the process by which a laboratory determines the presence and position of "bands" in a DNA banding pattern. A DNA test is not considered reliable unless the laboratory uses an objective and reliable procedure for scoring the bands. Dr. Shields and Dr. Bakken both suspect that Genetic Design relied improperly on unreliable, subjective procedures to score the bands in the "vaginal aspirate" that incriminate Mr. Marshall.

originals.[5] In the alternative, these experts recommended that an independent scientist observe while Genetic Design's personnel re-scored the original autorads. This process would take only 60 minutes, or less. See Shields Declaration, at paragraph 5 (attached as "Exhibit 1").

B. History of This Discovery Request

Defense counsel have been trying for nearly a year to gain access to information needed to determine whether the autorads in this case were scored properly or improperly. In January, 1995, defense counsel sought to have the original autorads released to Professor Bakken so that she might re-score them. This idea was abandoned, however, after Prosecutor Ronald Geltz objected and Judge Murphy expressed the opinion that the original autorads should remain in possession of the prosecution.

Defense counsel next sought an order granting Professor Shields access to Genetic Design's Bio Image machine, so that he might re-score the original autorads at Genetic Design. See Points and Authorities in Support of Defendant's Motion for Appointment of Expert and Defense Access to Laboratory for Retesting (filed Feb. 14, 1995) and Defendant's Response to People's Answer to Motion for Appointment of Expert and Defense Access to Laboratory for Retesting (filed March 21, 1995). Prosecutor Ronald Geltz objected to this plan on grounds that it was a legally unwarranted invasion of expensive, confidential and proprietary equipment owned by Genetic Design. He expressed concern that Professor Shields might damage Genetic Design's computer or

[5] Defendant has already arranged for re-scoring of the autorad copies provided by the prosecution. The results of the re-scoring are reported in Professor Bakken's declaration (Exhibit 2). During the re-scoring, no bands that incriminate Mr. Marshall were detected.

steal proprietary data from it and argued that defendant had other means to examine the evidence. See People's Response to Defendant's Motion for Appointment of Expert and Access to People's Laboratory (filed March 6, 1995).[6] Judge Murphy denied defendant's motion on March 31, 1995.

Next, defense counsel negotiated an agreement with Mr. DeGuglielmo of Genetic Design under which DeGuglielmo would personally re-score the autorads in the case (without being observed) while taking various measures to document any "operator overrides" of the computer's scoring determinations. Additionally, he agreed to save the digital image files created during re-scoring on computer-readable media for review by the defense. This agreement is memorialized in a letter of May 25, 1995 from William C. Thompson to Michael DeGuglielmo and a letter of May 26, 1995 from William C. Thompson to Ronald Geltz (both attached as "Exhibit 3"). DeGuglielmo agreed to perform the re-scoring and provide it to the prosecution within two to three weeks of May 25, 1995. See Exhibit 3. Prosecutor Geltz told defense counsel on May 31, 1995, that he had no objection to defendant's discovery requests and would deliver the requested items within two weeks.

The prosecution did not follow through on its promises. The materials were not delivered in June. They were not delivered in July. In August, defense counsel, frustrated by the long delay, sought an order compelling production of information about DeGuglielmo's re-scoring of the autorads, as well as various other items that had been

[6] Interestingly, the prosecution did not, at that time, object to Professor Shields observing while Genetic Design re-scored the autorads. In other words, the prosecution did not, at that juncture, object to the

requested. Judge Murphy signed the order on August 21, 1995. The order specified that the materials were to be delivered by September 11, 1995. A copy of the order is attached as "Exhibit 4".

On September 7, 1995, defense counsel finally received some discovery materials. However, the prosecution failed to comply with the discovery order in several respects (some of which will be explained in the following sections).

With respect to the re-scoring of autorads, there were several problems with the prosecution's response. First, Mr. DeGuglielmo did not perform the re-scoring in the agreed-upon manner. He did not do the re-scoring himself; it apparently was done by another technician whose identity has yet to be disclosed to the defense. More importantly, "operator overrides" were not documented in the manner DeGuglielmo had agreed. Second, DeGuglielmo failed to provide copies of the image files on computer-readable media and provided false and misleading information about the feasibility of doing so. He falsely claimed, in a letter dated August 24, 1995 (attached as "Exhibit 5"), that the files could only be saved on exotic and expensive "optical disks" -- a fact which (had it been true) would have precluded defendant's experts from examining such files because they do not have "optical disk" readers. Defense counsel has recently determined, and Mr. DeGuglielmo has acknowledged, that the image files can be saved on standard floppy disks. Third, and most important, the results of the "re-scoring" seem to defendant's experts to be implausible and highly suspicious. These results are simply too

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procedure that defendant now seeks to follow. The objection was to Professor Shields performing the re-scoring himself using Genetic Design's equipment.

good to be true given the poor quality of the autorads in this case. See Shields Declaration, Exhibit 1.

Acting upon the recommendation of the experts, defense counsel then made the request that is the subject of this motion. The request is simply to have Genetic Design re-score the autorads while Professor Shields observes the process. Defense counsel anticipated no objection to this proposal, as Genetic Design had essentially agreed to it earlier, and indeed had offered it as an alternative when defendant sought to have his expert perform the re-scoring himself. In informal discussion on October 23, 1995, prosecutor Irene Wakabayashi indicated that she understood the request and that it made sense to her. Shortly thereafter, however, she informed defense counsel that Mr. DeGuglielmo is now unwilling to re-score the autorads while a defense expert observes. When pressed for reasons for DeGuglielmo's refusal, Ms. Wakabayashi offered none other than that Mr. DeGuglielmo is reluctant to repeat the scoring process a third time. She could not explain why he should be reluctant to perform this task when he would be well compensated for doing so.

Needless to say, defendant's experts can readily imagine reasons for DeGuglielmo's new-found reluctance to score the autorads while someone else watches. With the second scoring, he has committed himself to the position that all of the bands were scored by the computer, without any bands being added through "operator overrides." If a subsequent scoring fails to replicate this finding, it will be clear that Genetic Design "fudged" the results. In this light, DeGuglielmo's new-found reluctance to

have someone watch a rescoring takes on an ominous meaning, as Professor Shields explains:

> I have been informed that Genetic Design has refused Mr. Thompson's request that its technician re-score the autorads in the Marshall case while I watch to verify that correct procedures are followed. This refusal makes me even more suspicious about fabrication or fudging of the scientific data in this case. I see no reason for Genetic Design to refuse this request unless they have something to hide. Honest, competent scientists welcome outside scrutiny of their work. Genetic Design's position is inconsistent with the norms of the scientific community and will be viewed by most scientists as highly suspicious and utterly unacceptable. Replication is the heart of the scientific method. If Genetic Design cannot replicate its computer scoring while someone watches, then its results have little or no credibility.

Shields Declaration, attached as "Exhibit 1"

C. Legal Grounds for This Discovery Request

Criminal defendants have traditionally been granted broad rights of discovery.

> [It is an] established principle that in a criminal prosecution an accused is generally entitled to discover all relevant and material information in the possession of the prosecution that will assist him in the preparation and presentation of his defense.

Hines v. Superior Court (1993) 20 Cal.App.4th 1818, n. 2, 25 Cal.Rptr.2d 712 (quoting Murgia v. Municipal Court (1975) 15 Cal.3d 286, 293, 124 Cal.Rptr. 204). Accord People v. Williams (1979) 93 Cal.App.3d 40, 64, 155 Cal.Rptr. 414.

Criminal discovery in California is now governed exclusively by the statute enacted by Proposition 115 (Penal Code Sec. 1054 et seq.). However, this statute has had little effect on defendants' rights to discovery because it authorizes (as it must) discovery that is "mandated by the Constitution of the United States." Sec. 1054(e). "Much of the discovery available to a defendant under pre-Proposition 115 law was based on federal constitutional concepts, and hence specifically remains applicable." Hines v. Superior Court, supra, 20 Cal.App.4th at p. 1824.

> For example, a defendant is entitled to any exculpatory evidence. (Brady v. Maryland (1963) 373 U.S. 83). The prosecution must disclose all substantial material evidence favorable to the accused including evidence bearing on credibility of a prosecution witness (People v. Morris (1988) 46 Cal.3d 1, 30, 249 Cal.Rptr. 119, 756 P.2d 843) which right has been specifically affirmed post-Proposition 115 (People v. Hayes (1990) 52 Cal.3d 577, 611, 276 Cal.Rptr. 874, 802 P.2d 376; People v. Hayes (1992) 3 Cal.App.4th 1238, 1244-45, 5 Cal.Rptr.2d 105).

Hines v. Superior Court, supra, at n. 4.

Evidence that may impeach the reliability of a prosecution expert by showing that the expert used faulty methods falls squarely within the statutory requirement that "exculpatory evidence" be disclosed to the defense[7]. People v. Garcia (1993) 17 Cal.App.4th 1169, 22 Cal.Rptr.2d 545. In Garcia, the prosecution failed to make available to the defense information that might have supported a claim that the prosecution's accident reconstruction expert had relied upon faulty and improper calculations. The Court of Appeal found that this failure violated the discovery statute and the requirements of Brady and therefore required reversal of defendant's conviction.

In the present case, defendant's request to have an expert observe re-scoring of the autorads appears reasonably likely to yield exculpatory evidence, and hence falls within the purview of Penal Code Sec. 1054.1(e) and Brady. Specifically, defendant's request could yield evidence that Genetic Design's procedure for scoring the autorads in this case is unreliable, and that Genetic Design "fudged" its results. Either finding would be devastating to the prosecution's case against Mr. Marshall, and could well lead to dismissal of all charges against him. To deny him the opportunity to discover such evidence would be unthinkable. If due process means anything, it means that the state

[7] Penal Code Section 1054.1(e)

may not prevent an accused man from gathering evidence that could well prove him innocent.

Denial of defendant's request would also violate his constitutional right to retest the evidence against him. "The right to retest is so basic that some courts have declared it constitutionally based and a violation of fundamental fairness when denied." P. Giannelli, Criminal Discovery, Scientific Evidence and DNA, 44 Vanderbilt.L.Rev. 791, 817 (1991); U.S. v. Butler, 988 F.2d 537, 543 (5th Cir.)(fundamental fairness is violated when defendant is denied opportunity to retest critical evidence).

In this case, the critical evidence is the autorads produced by Genetic Design.[8] These autorads were tested for the presence of incriminating bands through the "scoring" procedure. Defendant seeks the right to retest by repeating the scoring procedure. Having been denied the opportunity to have its own experts do this re-scoring, defendant at least wants his experts to see it done.

A number of courts have recognized a defendant's right to have an expert present during critical phases of a scientific testing procedure. For example, the Colorado Supreme Court has commented that it "may be incumbent on the state to contact the defendant to determine whether he wishes to have his expert present" during critical phases of testing. People v. Gomez (1979) 198 Col. 105, 112, 596 P.2d 1192, 1197. Accord, Commonwealth v. Gliniewicz (1986) 398 Mass. 744, 749, 500 N.E.2d 1324,

[8] Genetic Design exhausted the sample of vaginal aspirate that it received from the LAPD. A small amount of vaginal aspirate is retained by LAPD, but its quantity is too small, in the opinion of defendant's experts, to replicate Genetic Design's DNA test.

1327 (defendant's expert entitled to be present to provide opinion on subjective aspects of scientific test).

Finally, denial of Defendant's request will cripple his ability to confront and effectively cross-examine the prosecution's experts. To expect the prosecution's experts to be completely forthcoming about the nature of the "scoring" in this case, in the face of charges that they may have "fudged" the data, is to expect too much. Even if defense counsel trusted the prosecution expert's honesty, the accuracy of their memory is suspect. Mr. DeGuglielmo has told defense counsel that he does not remember the initial scoring of the autorads in this case[9], so cross-examination on that issue would be pointless. The Sixth Amendment Right of Confrontation entails the opportunity to gather critical evidence with which to challenge the conclusions of the prosecution's scientific experts.

The prosecution has offered no reason for denying defendant's request, other than the fact that Mr. DeGuglielmo would, at this point, prefer not to score the autorads a third time. There is no state interest, vital or otherwise, to countervail against defendant's constitutional claims. If the prosecutor were truly interested in getting at the truth in this matter, she would be eager to see the re-scoring done. Indeed, if the re-scoring verifies the claims of her experts, it will strengthen her case to have that fact demonstrated while defendant's expert watches. The prosecution has everything to gain and nothing to lose, unless Professor Shields' suspicions about "fudging" of the data are confirmed. In that event, however, it is the state's interest, and the prosecutor's duty, to find out about it as quickly as possible in order to prevent further injustice to Mr. Marshall. The prosecution

should not be opposing this request. The court is obligated by the U.S. Constitution, California's discovery statute, and the cause of justice, to grant it.

III. The Prosecution Has Not Fully Complied With The Court's Discovery Order

The prosecution has failed in the following respects to comply with the Court's August 21, 1995 Order for Production of Discovery Re: DNA Evidence:

1. Database Diskette -- Item #3 of the Court's Order requires production of copies of "all data that Genetic Design has sent to outside consultants for the purpose of Hardy-Weinberg/linkage studies..." and specifies that "[t]he data is to be provided in the same form that it was provided to outside consultants (i.e., on computer diskettes). (See Exhibit 4). This material was initially requested by defendant on March 21, 1995. (See Letter from William Thompson to Ronald Geltz of March 21, 1995, attached as "Exhibit 6").

The prosecution on September 7, 1995 provided a copy of a report prepared by P.L. Reading and B.S. Weir that provides certain conclusions regarding their analysis of Genetic Design's data bases. The prosecution did not provide a copy of the data itself in the form that it was provided to Reading and Weir.

Without access to the data itself (in the requested format), the defense has no way to check the conclusions of Reading and Weir regarding the appropriateness of Genetic Design's data bases, and will be unable to perform additional analyses to address the Hardy-Weinberg/linkage issue, which is crucial to evaluating the scientific foundations of

[9] See Thompson's letter to DeGuglielmo of May 25, 1995, attached as "Exhibit 3", which memorializes

the statistical estimates proffered by the prosecution in connection with the DNA evidence in this case. Although Reading and Weir provide data tables in their report, they do not provide sufficient information to allow other experts to check their conclusions.

Prosecutor Wakabayashi has informed defense counsel that she does not intend to provide the data in the format specified in the court order, i.e., on computer disks. Although the data currently exist in files on Genetic Design's computer, and could easily be placed on disks, Genetic Design will disclose the data only in the form of a hard-copy, i.e., paper printout. In other words, Genetic Design is unwilling to place the data on a floppy disk (which would take 10 seconds) but is willing to print out the numbers on paper, which would take much longer. The paper printout may run hundreds of pages, depending on how densely the numbers are printed.

The sole purpose of providing the data on paper, rather than computer diskette (as ordered), is to obstruct and hinder the defendant's effort to examine and reanalyze Genetic Design's data base. Before defendant's experts can do computer analyses of the data on the paper printout, the numbers will need to be laboriously re-typed into a computer, simply to put them back into the machine-readable form in which they currently exist. The prosecution has no reason for insisting on paper rather than diskette, other than pure obstinance. The real goal is to force defendant to exhaust his meager resources on a wholely unnecessary data entry task. The Court should not allow it.

If the prosecution insists on flouting the Court's order, and provides the data in paper form, the defendant asks the Court to award sanctions of $500.00, which is the

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this conversation.

estimated cost of data-entry. Thus far, of course, the prosecution has provided no data in response to this request. Defendant asks that the prosecution be precluded from presenting DNA evidence in this case if the prosecution fails to disclose the material covered by the Court order by December 11, 1995.

2. Proficiency Test Results--Item #4 of the Court's Order covers the results of proficiency tests undertaken at Genetic Design. The prosecution has failed to provide several items, which Genetic Design is known to possess, which are responsive to Item #4. The items are: (a) documents that were provided to Genetic Design by the College of American Pathologists (CAP) concerning the results of CAP proficiency test number 1993 FID-C (in which Genetic Design was a participant). (b) correspondence between Genetic Design and the agencies or organizations that submitted samples to Genetic Design for the purpose of proficiency testing of its forensic laboratory during 1994 and 1995. These materials were initially requested by the defense on March 21, 1995 (see Exhibit 6), and are discussed in a follow-up letter from William Thompson to Ronald Geltz dated September 18, 1995 (attached as "Exhibit 7")

Genetic Design has participated in only a handful of external proficiency tests. Because it is a small, unaccredited lab without an established track record, however, its performance on those few proficiency tests is of great interest to defense counsel and is obviously relevant to an evaluation of the credibility of its test results in this case. Other private laboratories, such as Cellmark Diagnostics, and government labs, such as the FBI laboratory, have made full disclosure of all proficiency results. There is no excuse for

failure to turn over the same data for Genetic Design when disclosure has been ordered by the Court.

Defendant asks that the prosecution be precluded from presenting DNA evidence in this case if the prosecution fails to disclose the materials covered by the Court order by December 11, 1995.

3. Image Files--Item #6 of the Court's Order requires that the prosecution provide copies of the image files produced when the autorads were re-scored (i.e., when they were scored the second time). These copies have not been produced.

In a letter to prosecutor Ron Geltz, dated August 24, 1995 (Exhibit 5), Mr. DeGuglielmo states "it is not possible for us to save these images on a floppy disk. We can; however, save, copy and export these images to an optical disk..." His letter did not specify the type of optical disk that could be used. In response to phone calls from defense counsel seeking this information, Mr. DeGuglielmo responded with a message indicating that he wished no further communication with defense counsel and requested that all communication be through the prosecutor. See Exhibit 7.

On September 18, 1995, defense counsel wrote to Mr. Geltz seeking, among other things, information about the "type (i.e., manufacturer, capacity, format, etc.) of the optical disks" so that defense counsel might seek an expert who had the equipment needed to read them. (See Exhibit 7). This information has never been provided. There has been no response to defense counsel's letter of September 18, 1995.

In the meantime, new information has emerged indicating that Mr. DeGuglielmo was mistaken about the need for optical disks and that the image files can be saved onto

standard floppy disks.[10] Defendant needs these files to help assess the accuracy and reliability of the "scoring" process. As Professor Shields explains in his declaration (See paragraph 7, Exhibit 1), these files are not an adequate substitute for having an expert observe the scoring process. Nevertheless, these files are clearly relevant, their disclosure has been ordered, and the specter of technical problems in saving these files to disks has been laid to rest. Refusal to provide these files at this juncture would simply provide additional evidence that Genetic Design has something to hide.

Defendant asks that the prosecution be precluded from presenting DNA evidence against Mr. Marshall if floppy disks containing the image files are not provided to defense counsel by December 11, 1995.

IV. The Prosecution Has Not Fully Complied with Defendant's Informal Discovery Requests

The prosecution has also failed to respond to several informal discovery requests made by defendant in the letter of September 18, 1995 from William Thompson to Ronald Geltz (Exhibit 7). Defendant seeks a court order compelling the prosecution to comply with these requests. The following information is requested:

1. Who Re-Scored the Autorads? Genetic Design re-scored the autorads in this case on August 19, 1995. A printout showing the purported results of that re-scoring was

[10] In October, defense counsel William Thompson attended a forensic science conference in Arizona, at which he had occasion to discuss with representatives of the Bio Image Corporation the issue of downloading image files onto computer-readable media. By felicitous coincidence, Mr. DeGuglielmo happened to walk by just as the Bio Image representative was explaining that, contrary to DeGuglielmo's representation, the image files can indeed be downloaded to floppy disks. At defense counsel's prompting, the Bio Image representative explained to DeGuglielmo how to download the image files to floppies using Genetic Design's equipment. DeGuglielmo, who seemed less than delighted to receive this information, acknowledged that his earlier representation had been in error.

provided to defense counsel on September 7, 1995. Examination of this printout led defense counsel to propound the following request in the letter of September 18:

> "[P]lease provide the following information: a) the name and phone number of the individual who performed the rescoring; b) a resume or vita of that individual, indicating his or her qualifications; and c) a list of all other individuals who witnessed or participated in the re-scoring.

This information is clearly relevant and falls within the scope of the discovery statute. More than 30 days have passed since the request was made and the prosecution has not responded to it. Defendant asks that the prosecution be ordered to respond by December 11, 1995.

2. Operator Overrides When Re-scoring the Autorads. Defense counsel's agreement with Mr. DeGuglielmo concerning the re-scoring of the autorads in this case provided that DeGuglielmo would perform the rescoring "making note of any operator overrides." (See Exhibit 3). The materials provided by the prosecution on September 7, 1995 include notations regarding the addition of bands but do not indicate whether there were any operator overrides to delete bands or to change the placement of bands. To evaluate the evidence in this case, defense counsel need to know whether there were any operator overrides of any sort. Accordingly, defense counsel requested in the letter of September 18, 1995, that the prosecution provide this information. It has not been provided. It is obviously relevant and covered by the discovery statute. Defendant asks that the prosecution be ordered to respond to this request by December 11, 1995.

3. Internal Proficiency Tests. Based on the materials disclosed by the prosecution on September 7, 1995, it appears that Genetic Design's forensic laboratory has participated in a grand total of two (2) externally administered proficiency tests of its forensic laboratory. Because this small number of external tests provides an inadequate basis for judging the reliability of the laboratory, defense counsel are curious to find out whether there have been any internal tests at Genetic Design, and, if so, how the laboratory has performed.[11] Accordingly, defense counsel made the following request in the letter of September 18, 1995 (Exhibit 7):

> Please provide copies of any documents possessed by Genetic Design that describe or summarize the nature and results of any internal proficiency testing of Genetic Design's forensic laboratory. For purposes of this request, the term internal proficiency testing means proficiency tests that are set up and scored by personnel of Genetic Design itself, rather than an outside agency.

This information is obviously relevant to evaluating the DNA evidence produced by this unaccredited laboratory in this case. It is covered by the discovery statute. There has been no response to the request. Defendant asks that the prosecution be ordered to produce the requested information by December 11, 1995.

Respectfully submitted,

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William C. Thompson
Attorney for Sammy Marshall

[11] External tests are administered and scored by outside agencies; internal tests are administered and scored by the laboratory itself.

Dated: November 21, 1995