[CAPTION]

REQUEST FOR EARLY RELEASE OF INFORMATION CONCERNING DNA TESTING PERFORMED IN THIS CASE

The Defendant, by counsel, respectfully asks this Court for an Order requiring the prosecutor to provide the information regarding DNA testing that is specified below and immediately as it is necessary for the fair trial of his case, pursuant to his rights under the Fourth, Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and under Article I, Sec. 12, 13, 14, 16, 18, 19, and 23 of the Indiana Constitution. In support of this Request, Defendant states the following:

1. The Defendant expects that the State will present scientific evidence regarding DNA typing during the trial of this case.

2. The Defendant has a right to all of the information specified in paragraph 10 below for purposes of cross-examination. Denial of this information will result in denial of Defendant's federal and state constitutional rights to confront and cross-examine witnesses against him, and the denial of due process of law.

3. The information requested herein is necessary and must be disclosed to the defense immediately so as to allow the Defendant to obtain expert witnesses in his favor and to have the effective assistance of counsel, to all of which he is entitled under the United States and Indiana Constitutions.

4. The proponent [of DNA evidence] . . . must give discovery to the adversary, which must include," and there followed a list of twelve items. People v. Castro, 545 N.Y.S.2d 985, 999, 144 Misc.2d 956, 978-79 (N.Y.Sup. 1989).

5. The Minnesota Supreme Court emphasized the importance of complete discovery in a DNA case:

> Even if a laboratory has followed reliable procedures to ensure accurate test results, constitutional concerns may prevent the admissibility of such evidence. The fair trial and due process rights are implicated when data relied upon by a laboratory in performing tests are not available to the opposing party for review and cross examination. . . .

> Ideally, a defendant should be provided with the actual DNA sample(s) in order to reproduce the tests. As a practical matter, this may not be possible. Consequently, access to the data, methodology, and actual results is crucial so a defendant has at least an opportunity for independent expert review.

State v. Schwartz, 447 N.W.2d 422, 427 (Minn. 1989).

6. Schwartz went on to describe the possible consequences of failure to provide adequate discovery in a DNA case:

> Prejudicial failure to disclose information may result in the imposition of harsh sanctions, such as conviction reversal and the granting of a new trial. . . . Moreover, failure to disclose requested evidence which 'is material either to guilt or punishment' violates due process.

Schwartz, 447 N.W.2d at 427 (citation omitted) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)). The Georgia Supreme Court in Caldwell v. State, 260 Ga. 278, 393 S.E.2d 436 (1990), noted approvingly that DNA testing procedures, data, and results were made available to the defense. The Court contrasted that situation with Schwartz, supra, where "DNA test results [were] not admissible where Cellmark laboratory failed to make its testing data and results available to the defense." Caldwell, 260 Ga. at 290.

7. Discovery in DNA cases now ought to be guided by the National Academy of Sciences report, DNA Technology in Forensic Science (Washington, D.C.: National Academy Press, 1992) [hereinafter DNA Technology in Forensic Science]. The report was commissioned by scientific and legal communities including the FBI, the National Institute of Justice, and the National Science Foundation. It urges swift prosecutorial cooperation with defense discovery requests in a case where the state intends to introduce controversial and highly technical and complex DNA testimony:

> The prosecutor has a strong responsibility to reveal fully to defense counsel and [to] experts retained by the defendant all material that might be necessary in evaluating the evidence. That includes information on tests that proved inconclusive, on retesting, and on the testing of other persons. Adoption of rules or statutes that require the prosecutor to involve the defense in analysis of DNA samples at the earliest possible moment is highly recommended.
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> The committee recommends going beyond what is required by the federal rules of criminal procedure . . . in regard to disclosures concerning DNA evidence. For example, data sheets and other materials obtained from experts who are not designated to testify should be avail-

> able freely without the need for separate motions, because such materials are important for the evaluation of the scientific evidence in the case of DNA typing.

DNA Technology in Forensic Science at 146-47 (Chapter 6, Use of DNA Information in the Legal System).

8. The information sought by the Defendant, which must be provided immediately, is the following:

A. The complete protocol of the DNA procedures used in the laboratory which conducted the analyses in this case, including any memoranda regarding changes in procedures.

B. A detailed statement of the rule(s) for determining whether DNA fragment lengths from two samples are declared to be a "match" for purposes of DNA identification.

C. Any and all documentation, data and statistical analysis of results from all human control samples used in conjunction with the collection of the population databases and/or in conjunction with case work.

D. Any and all relevant published papers generated by the laboratory or any personnel employed by the laboratory.

E. Any and all relevant manuscripts generated by the laboratory or any personnel employed in the laboratory that have been submitted for publication.

F. The DNA sequence of each of the DNA probes used in the laboratory. (The names and addresses of the vendors of these probes is not responsive to this request.)

G. All correspondence associated with the case.

H. All autoradiograms associated with the case; that is, all autoradiograms containing samples from the victim(s) in this (these) case(s), and/or containing samples from **any and all** suspects who were tested in this case, and/or containing **any and all** evidentiary samples in this case.

I. All laboratory notes associated with the case, including, but not limited to, all notes associated with all the autoradiograms described in item H above.

J. All computer programs (both on computer disk and in hard copy), including all source codes,

used in the analysis of the DNA fragment lengths in this case.

K. A photographic copy (not "photocopy") of each and every computer image generated from the autoradiograms in this case.

L. Any computer manuals related to computer programs used in the analysis of DNA fragment lengths in this case.

M. The entire set of population databases from which the laboratory calculates population frequencies for DNA fragment lengths.

N. Any and all documentation describing the sources of samples in the population databases, referred to in item M above.

O. Any and all documentation describing the method(s) of sampling by which the randomness or representativeness of the population database samples described in items M and N, above, was assured.

P. Any and all statistical analyses that the laboratory or personnel employed by the laboratory, have conducted on any population databases.

Q. Any and all statistical analyses that any other individual has performed on any population database at the request of the laboratory or on behalf of the laboratory.

R. Any and all genotypic information compiled from the population databases referred to in item O, above, in machine readable form.

S. Any and all computer programs (both on computer disk and in hard copy), including all source codes, used to statistically analyze any characteristics or properties of population databases.

T. Any and all computer programs, computer manuals, and protocols which describe the processes by which the migration distances of Kb-ladder known-size markers are used to estimate the sizes bands from unknown samples, including, but not limited to, the choice of the specific Kb-ladder known-size markers to be used to measure each unknown sample band.

U. Any and all documents specifying and/or describing, including manufacturer and model number, all electric or electronic instruments used to measure DNA band migration and to convert migration to fragment length in this case and in the compilation of the population database.

V. Any and all published literature, studies conducted by individuals or organizations external to the laboratory, and internal studies relied upon in the determination of the mathematical transformation of band migration into fragment length used in this case and in the compilation of the population.

W. Any and all descriptions of the mathematical equation(s) or algorithm(s) used to describe the relationship between DNA band migration and DNA fragment length in this case and in the compilation of the population database.

X. All data, autoradiograms, laboratory notes and/or memoranda gathered with respect to contamination effects.

Y. All data, autoradiograms, laboratory notes and/or memoranda gathered with respect to band shifts.

Z. All data, autoradiograms, laboratory notes and/or memoranda gathered with respect to the establishment of a "match window" or "match" rule.

AA. All data, autoradiograms, laboratory notes and/or memoranda gathered with respect to fragment mobility and sizing.

BB. All data, autoradiograms, laboratory notes and/or memoranda concerning the effects of ethidium bromide on mobility.

CC. All data, autoradiograms, laboratory notes and/or memoranda concerning the effects of differing amounts of DNA on mobility.

DD. All proficiency testing, conducted either internally or externally, including autoradiograms, laboratory notes and/or memoranda.

EE. The resumes of all laboratory personnel who are associated with this case.

FF. The names of all geneticists, molecular biologists, statisticians, and forensic scientists with whom the laboratory consults.

WHEREFORE, the Defendant requests early and immediate release of the listed information so that he may prepare for trial.

(Signature)

NOTE

Since the drafting of this Motion, there have been technological advances made in the DNA scientific community. Thus, portions of this Motion may be outdated. For instance, RFLP DNA typing is rarely used anymore. Most Labs use PCR amplification of STR (short tandem repeats). For a detailed overview of the progression of DNA technology, see State v. Traylor, 656 N.W.2d 885 (Minn. 2003).

REFERENCES

I.C. 35-37-4-13(b) (making DNA results generally admissible without antecedent expert testimony that DNA analysis is trustworthy and reliable).