CASE NO. CR 29-22-2805
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LATAH COUNTY
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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO, Plaintiff, V. BRYAN C. KOHBERGER Defendant.	Case No. CR29-22-2805 REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

The State submits this reply to address several of Defendant's arguments in his Objection to State's Motion for Protective Order, as well as the two declarations filed by Defendant in support of his Third Motion to Compel Discovery.

A. Defendant has not demonstrated that any subsection of Rule 16 requires the disclosure of the IGG information.

Rule 16 contains several discrete categories of information that the State must disclose to a defendant in a criminal case. It follows that the State need not disclose information that does not fall into one of the discrete categories—at least absent an order from the court upon motion from the defendant "showing substantial need in the preparation

of the defendant's case . . . and that defendant is unable without undue hardship to obtain the substantial equivalent by other means." I.C.R. 16(b)(10). The State explained in its motion why subsections (a), (b)(4), (b)(5), and (b)(8) do not apply to the IGG information. Defendant objects on the basis that the IGG information falls within subsections (b)(4), (b)(5), (b)(6), and (b)(8). Defendant's assertions do not withstand scrutiny.

First, Defendant baldly asserts that the IGG information "rather obviously falls within the ambit of Rule 16(b)(4)," but fails to explain how that conclusion results from the language of the rule. (Obj. at p.3). Rule 16(b)(4) requires disclosure of documents and tangible objects *only* when those documents or tangible objects:

> (A) are material to the preparation of the defense,
>
> (B) are intended for use by the prosecutor as evidence at trial, or
>
> (C) were obtained from the defendant or belong to the defendant.

I.C.R. 16(b)(4). As best the State can tell, Defendant is not asserting that B or C apply to the IGG information. Presumably, then, Defendant was attempting to show how the IGG information is material to the preparation of his defense when he asserted that someone other than Defendant may have placed his DNA on the Ka-Bar knife sheath. (Obj. at 4.) But the State is at a loss as to how that theory supports a claim that the IGG information is material to the preparation of his defense. The SNP profile used in the IGG was created from the same DNA used for the STR analyses, and the State is providing the SNP profile and information related to the STR analyses in discovery. If Defendant wishes to explore the theory that his DNA was planted on the Ka-Bar knife sheath, he is free to do so. But the family tree created by the FBI has no relevance to that theory.

Next, Defendant attacks an argument the State never made. He claims "the State argues that if the later STR testing is accurate then there is no reason to concern ourselves with how the State came to investigate Mr. Kohberger." (Obj. at p.4.) But for purposes of this motion, the accuracy of the STR testing is beside the point. The State referenced the STR testing in its motion to demonstrate the difference between the STR analyses and the SNP profile used to conduct IGG. The difference is not one of *degree* but of *kind.* The SNP profile (and IGG) was used to develop a lead, not to demonstrate substantive evidence of guilt. On the other hand, the STR analysis is substantive evidence the State intends to use at trial to prove its accusations against Defendant. As demonstrated in the figure below, the STR analyses and the IGG based on the SNP profile are distinct processes. The creation of the SNP profile and IGG have no effect whatsoever on the result of the STR analysis.

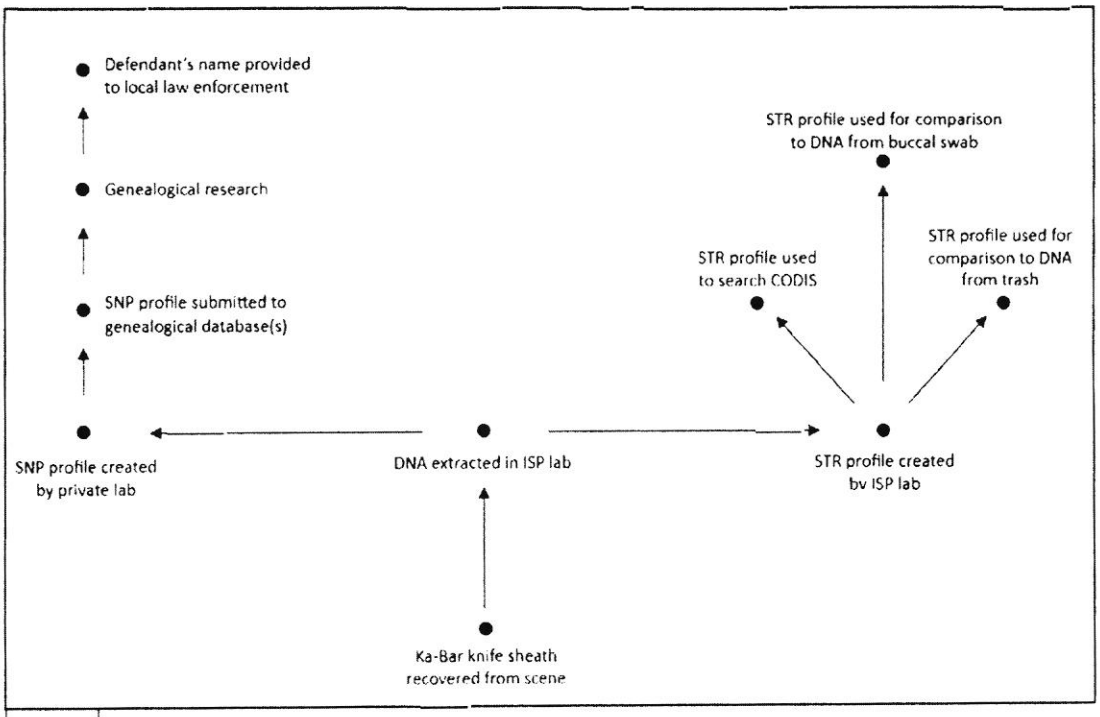

Figure 1

As Rylene Nowlin, the Laboratory Manager of the Idaho State Police Forensic Services Laboratory, explains in her affidavit filed contemporaneously with this Reply, "STR data and SNP data cannot be directly compared." (Nowlin Decl. ¶ 9.) When the lab does an STR analysis it "does not require submitting agencies to notify the laboratory how a suspect/subject was identified in a case" because "[h]ow a suspect/subject was identified has no effect on the laboratory analysis performed on the known reference sample from that individual." *Id.* ¶ 10. "It also has no impact on the statistical calculations performed when doing a direct comparison of the reference sample STR profile with the STR profile developed from the evidence sample." *Id.*

Though Defendant also asserts that it is "rather obvious[]" that subsection (b)(5) applies to the IGG information, he again fails to articulate how that follows from the language of the rule. (Obj. at 3.) Instead, Defendant criticizes as "puzzling" the State's assertion that (b)(5) does not require the State to disclose what investigators do with the results or reports from scientific experiments. (Obj. at 4.) Far from "puzzling," that conclusion is compelled by the plain language of the rule, which simply requires the disclosure of the results or reports themselves:

> On written request of the defendant, the prosecuting attorney must permit the defendant to inspect and copy *any results or reports* of physical or mental examinations, and *of scientific tests or experiments*, made in connection with the particular case, that are in the possession, custody or control of the prosecuting attorney or the existence of which is known or is available to the prosecuting attorney by the exercise of due diligence.

I.C.R. 16(b)(5) (emphasis added). Under Defendant's novel theory, this subsection would require the State to disclose everything down the investigative stream from a scientific

experiment, regardless of its relevance at trial. The authors of that subsection could have included that requirement but chose not to.

Defendant cites two additional subsections of Rule 16 that have no application to the IGG information by mentioning in passing that the IGG information "is covered by Rule 16(b)(6) (statements of prosecution witnesses) and (8) (police reports)." (Obj. at p.4.) The plain language of those rules forecloses his argument.

As the title of subsection (b)(6) implies, it only applies to statements of prosecution *witnesses*:

> On written request of the defendant, the prosecuting attorney must furnish to the defendant a written list of the names and addresses of all persons having knowledge of relevant facts who may be called by the state as witnesses at the trial, together with any record of prior felony convictions of any of them, that is within the knowledge of the prosecuting attorney. The prosecuting attorney must also furnish, on written request, the statements made *by the prosecution witnesses or prospective prosecution witnesses* to the prosecuting attorney or the prosecuting attorney's agents or to any official involved in the investigation of the case unless a protective order is issued as provided in subsection (l) of this rule.

I.C.R. 16(b)(6) (emphasis added). Defendant fails to explain how anyone involved in the IGG related to this case constitutes a "prosecution witness[]" or "prospective prosecution witness[]." And the State's motion makes clear why that cannot be the case: the State does not intend to present the IGG information at trial.

The plain language of subsection (b)(8) is equally problematic for Defendant:

> On written request of the defendant, the prosecuting attorney must furnish to the defendant *reports and memoranda* in *possession of the prosecuting attorney* that were made by a police officer or investigator in connection with the investigation or prosecution of the case.

I.C.R. 16(b)(8) (emphasis added). This subsection applies only to "reports and memoranda,"

and none of the records related to IGG fit that description. Even if the records constituted reports and memoranda, this subsection only applies to records "in the possession of the prosecuting attorney," I.C.R. 16(b)(8), and the State does not possess the FBI's records related to IGG.

B. Defendant does not have a constitutional right to discover all aspects of the investigation.

Defendant contends that a "massive investigation came to focus on him and him alone" and asserts that means he "has a right to discover . . . the investigation that led to him." (Obj. at p.7.) The context of his claim suggests he is asserting a constitutional right to discover anything and everything related to the investigation. But his asserted right finds no support in the decisions of the Idaho Supreme Court or the U.S. Supreme Court. *See, e.g.*, *State v. Horn*, 101 Idaho 192, 195, 610 P.2d 551, 554 (1980).

In *Horn*, the defendant moved for discovery that included records that fell outside of Rule 16. *Id.* The trial court eliminated the language in the discovery request that went beyond Rule 16 "and limited the discovery order to language paralleling I.C.R. 16." *Id.* The Idaho Supreme Court affirmed. *Id.* The court reasoned that "[t]he State has a constitutional duty to disclose to defendant exculpatory evidence material to the preparation of his case" but further found that "there is 'no constitutional requirement that the prosecutor make a complete and detailed accounting to the defense of all police investigatory work on a case.'" *Id.* (quoting *Moore v. Illinois*, 408 U.S. 786, 795 (1972)); *see also Dunlap v. State*, 141 Idaho 50, 64, 106 P.3d 376, 391 (2004) (echoing—in the context of a death penalty case—that "[t]here is no constitutional requirement that the prosecutor make a complete and detailed

accounting to defense of all police investigatory work on a case"). Defendant now erroneously claims he has the very right the Idaho Supreme Court first rejected in *Horn*—a right to discover every facet of the investigation into his alleged crimes. This Court should reject that already-rejected contention.

C. The Court can use the process explained in the State's motion to verify the IGG information does not contain exculpatory evidence.

Though a criminal defendant has a constitutional right to discovery, that right is not infinite, and it does not encompass the IGG information. "Due process requires all material exculpatory evidence known to the State or in its possession be disclosed to the defendant." *Dunlap*, 141 Idaho at 64, 106 P.3d at 390. As the State explained in its motion, the IGG information is neither exculpatory nor material to guilt or punishment. The family tree built by the FBI merely pointed law enforcement to Defendant, and law enforcement followed that lead to develop the substantive evidence of guilt that was used for his arrest and that will be used at trial.

Defendant theorizes that the IGG process was "like a lineup where the government was already aware of who they wanted to target." (Obj. at 6.) Defendant's "rigged lineup" analogy defies logic. The purpose of a "rigged lineup" would be to use the flawed identification as evidence of the accused's guilt or to influence the witness to testify a certain way at trial, but here the State has not used and has no plans to use the IGG information to prove Defendant's guilt. And the IGG process could have no effect whatever on the STR analyses. (*See* Nowlin Decl. ¶ 10.) Moreover, as the DOJ Policy on IGG explains, the FBI can only use IGG after the investigating agency has pursued reasonable investigative leads

to solve the case and the perpetrator's identity remains unknown. *See* DOJ Policy at 4-5 & n.10.[1]

In any event, the State is not asking "this Court and Mr. Kohberger to assume" anything. (Obj. at 4.) If the Court finds that the IGG information is relevant to guilt or punishment, the State is simply asking for an opportunity to provide additional information to the Court in camera, so *the Court* can decide whether the information the State seeks to protect contains exculpatory information. *See State v. Hosey*, 132 Idaho 117, 119, 968 P.2d 212, 214 (1998) ("[I]t is desirable and proper to hold such a[n] [in camera] hearing before ordering or denying disclosure.").

D. The declarations submitted by Defendant do not make the IGG information discoverable.

In support of his Third Motion to Compel seeking much of the IGG information at issue here, Defendant submits two declarations. Neither of the declarations show that the IGG information falls within the scope of Rule 16 or Defendant's constitutional right to discovery. In fact, the Court should disregard much of the contents of those declarations as irrelevant and beyond the scope of the issues before the Court.

1. Declaration of Bicka Barlow

The Court should disregard Barlow's declaration as a poorly disguised legal brief submitted by a lawyer who is not counsel of record in the case. It is now well-established in Idaho that "testimony containing conclusions of law by an expert witness is generally inadmissible." *Ybarra v. Bedke*, 166 Idaho 902, 908, 466 P.3d 421, 427 (2020) (striking

[1] Available at https://www.justice.gov/olp/page/file/1204386/download.

"legal conclusions contained" in an expert declaration in a matter over which the Idaho Supreme Court exercised original jurisdiction). Barlow's declaration is indistinguishable from a legal brief. She cites, explains, and argues case law. (Barlow Decl. at pp.8-9.) She accuses the State of misreading a case.[2] *Id.* at 9. And she states as fact conclusions of law reserved for this Court. For example, Barlow's declaration states as fact that the IGG information in this case "clearly is *Brady* material," *id.* at 7, and that the "IGG search could yield a *relevant* and admissible statistic," *id.* at 10 (emphasis in original).

Setting aside the improper nature of Barlow's declaration, the declaration contains two primary assertions. Neither of the assertions support Defendant's attempt to discover the IGG information.

First, Barlow suggests the IGG information in this case could give Defendant additional investigative leads because "in some instances" the IGG process "leads to a pool of individuals rather than one specific individual." (Barlow Decl. at p.4.) She provides several examples of other cases where investigators supposedly had to "contact[] individuals for further family information" to narrow down the pool to a single individual. (Barlow Decl. at pp.4-5.) But the fact that investigators had to contact family members in other cases to develop the tip that led law enforcement to the defendant does not mean the FBI had to do so in this case. If anything, Barlow's theory supports the State's request for an in-camera hearing so *the Court* can decide whether the IGG information contains exculpatory information.

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[2] Curiously, Barlow accuses the State of misreading *People v. Johnson*—a case the State did not cite or reference.

Second, Barlow argues that the IGG information "could" provide Defendant with a Database Match Probability statistic, which she states would be relevant and admissible. She supports this proposition with *United States v. Jenkins*, 887 A.2d 1013 (D.C. Ct. App. 2005), a case that had nothing to do with IGG and that, ironically, demonstrates a fatal flaw in Barlow's declaration.[3] The *Jenkins* court did not hold that the DMP statistic was relevant and admissible. On the contrary, the holding in *Jenkins* was that the trial court erred by deferring to an outside expert on whether the DMP statistic was relevant: "Determining what evidence is and is not relevant is a hallmark responsibility of the trial judge and that responsibility is not appropriately delegated to parties outside the court." *Id.* at 1025. Now, as a "part[y] outside the court," Barlow dictates to this Court that a DMP statistic would be a "*relevant* and admissible statistic." (Barlow Decl. at p.10 (emphasis in original).) The Court should reject Barlow's attempt to hijack its role in determining the relevance and admissibility of evidence.

Barlow's DMP statistic theory has other problems as well. Her own source of authority explains that "[t]he [DMP] answers the question: 'What is the chance/probability of obtaining a match by searching this particular database'?" *Jenkins*, 887 A.2d at 1024. But the FBI does not search genealogical databases in the IGG process for the purpose of finding "a match." The FBI is looking for *relatives* of the contributor of the DNA found at

[3] *Jenkins* was a case in which the defendant was found as a "cold hit" in a database. Barlow makes the logical jump that a DMP statistic in an IGG case should be treated the same as a DMP statistic in a "cold hit" case with no explanation. Rather, she supports her logical jump by simply asserting that she has "spoken with a number of experts" who say that it is so. At least in Idaho, we call that "hearsay." I.R.E. 801(c).

the crime scene. Or, as Barlow herself puts it, "[t]he comparisons in such a database do not yield an identification of someone identical the [sic] uploaded SNP data; rather it would identify possible relatives who might be in the database." (Barlow Decl. at p.4.)

Moreover, Barlow's DMP statistic theory presupposes that how law enforcement first became aware of Defendant is relevant to guilt or punishment—an assertion flatly rejected by courts that have actually addressed whether IGG information must be disclosed. *See, e.g.*, *In the Matter of: Michael Green*, Case No. PDL20200007, Ruling on Motion to Compel Production of Discovery (Sup. Ct. Cal. Oct. 5, 2020)[4] ("The People are not obligated to provide its preliminary search of the genealogy databases for possible matches, which is investigatory in nature and is not exculpatory or material to [the defendant's] defense."); *People v. Simien*, Case No. 21FE018495, Order Denying Defense Motion for Discovery (Sup. Ct. Cal. May 5, 2023)[5] ("The testing that produced the SNP profile and law enforcement's use of that profile to identify defendant as a suspect is simply irrelevant to guilt or punishment.").

2. Declaration of Stephen B. Mercer

The thrust of Mercer's declaration is that the State should be required to disclose the IGG information because, under the ABA Standards for Criminal Justice, defense attorneys have "the duty to investigate." (Mercer Decl. ¶ 6.) But the standard he cites belies his claim. It does not hold itself out as a standard on what should be disclosed by the State, but instead indicates that the defense attorney's investigation "should include efforts to secure

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[4] Attached to State's Motion for Protective Order as Exhibit A.
[5] Attached hereto as Exhibit B.

information in the possession of the prosecution and law enforcement." *Id.* Were the mere assertion that a defense attorney has a duty to investigate sufficient to compel disclosure of the IGG information in this case, it would be sufficient to compel disclosure of anything and everything in the State's possession in every case. *But see* I.C.R. 16; *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("We have never held that the Constitution demands an open file policy . . . .").

Mercer also cites an ABA standard that indicates prosecutors should turn over certain DNA evidence. (Mercer Decl. ¶ 6.) But he fails to identify which category of information he believes encompasses the IGG information in this case. None of the categories of information in the ABA standard call for the disclosure of family trees created through the IGG process.

Moreover, Mercer cites no authority to suggest the standards on which he relies govern discovery in Idaho, *but see State v. Ish*, 166 Idaho 492, 510, 461 P.3d 774, 792 (2020) (explaining "Idaho Criminal Rule 16 governs discovery in criminal proceedings"), and the U.S. Supreme Court has already rejected the argument that the ABA standards are coterminous with the U.S. Constitution. *See Kyles*, 514 U.S. at 436-37.

CONCLUSION

For the reasons stated above and in the State's Motion for a Protective Order, the State asks this Court to enter an order protecting the IGG information or, in the alternative, for an in-camera hearing to present information related to the IGG information so this Court can decide whether the IGG information contains exculpatory information.

RESPECTFULLY SUBMITTED this 14 day of July, 2023.

William W. Thompson, Jr.
Prosecuting Attorney

Jeff Nye
Special Assistant Attorney General

CERTIFICATE OF DELIVERY

I hereby certify that true and correct copies of the REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER was served on the following in the manner indicated below:

Anne Taylor
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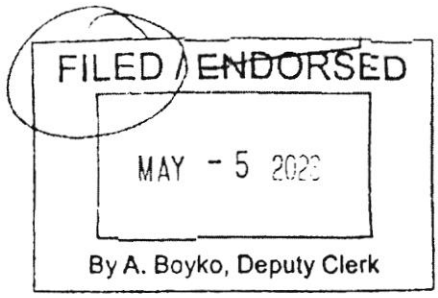
☐ Mailed
☑ E-filed & Served / E-mailed
☐ Faxed
☐ Hand Delivered

Dated this 14th day of July, 2023.

Kirk Dorman



SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

The People of the State of California,

Plaintiff,

v.

JD SIMIEN,

Defendant.

Case No. 21FE018495 Dept. 40

ORDER DENYING DEFENSE MOTION FOR DISCOVERY

In this case, the prosecution employed "Investigative Genetic Genealogy" to identify defendant as the alleged perpetrator of the charged offenses. Defendant seeks discovery of "any and all DNA discovery obtained from any and all private genetic genealogy databases that led to the capture of the Defendant. Specifically, anything from GEDmatch, Fulgent Labs and Parabon or any other private familial testing database." Defendant asserts this discovery must be provided under Penal Code section 1054.1,[1] the Fifth and Fourteenth Amendments of the United States Constitution and article I, section 30 of the California Constitution. The People counter by arguing the materials are not relevant and are protected from disclosure by Evidence Code section 1040.

The Court finds defendant is not entitled to the discovery he requests. The information

[1] All future statutory references are to the Penal Code unless otherwise noted.

sought is not relevant; therefore, the People are not obligated to provide it under either section 1054.1 or the due process clause of either the federal or state constitution. Because the discovery is not relevant, the Court does not need to decide whether it is also privileged under Evidence Code section 1040.

I. Background

In their motion filed January 24, 2023, the People, in broad strokes, describe the genealogical investigation that lead them to identify defendant as a suspect in this case. The process starts with submitting to a laboratory for testing the DNA of the unknown suspect left at the crime scene. The laboratory produces a genetic profile ("SNP" profile) that is then uploaded to publicly accessible DNA databases. The hope is that the public databases will connect the SNP profile to the suspect or a relative. With a list of relatives in hand, law enforcement utilizes traditional investigative techniques to identify the suspect.

As noted above, defendant seeks discovery of "any and all DNA discovery obtained from any and all private genetic genealogy databases" that led to his capture. The Court interprets this request to mean defendant wants all possible information from the laboratory that produced the SNP profile and the search parameters and results from any public or private DNA database used by law enforcement. Defendant maintains he is entitled to this information under the following authorities:

(1) Section 1054.1, subdivision (c), which requires the prosecutor to disclose "[a]ll relevant real evidence seized or obtained as a part of the investigation of the offenses charged." Defendant argues this case is analogous to a familial search of the Combined DNA Index System (CODIS) and in those cases the People are "required" to send a letter notifying the defendant that an " 'investigative lead' " has been found. According to defendant, in those cases the "lab then turns over all the DNA testing done that substantiates" the lead. Defendant would have these requirements apply to leads generated by a private database.

(2) *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) compels the prosecution to provide favorable evidence to the accused. In addition to arguing the requested information could contain something exculpatory, defendant interprets *Brady* to mean he is entitled to any evidence that

tends to indicate a third party may be the culprit of the alleged offenses.

II. Statutory Discovery Rights

In 1990, voters approved Proposition 115. The initiative reformed discovery rights in criminal cases by codifying a series of statutes (§ 1054 et seq.) that " 'governs the scope and process of criminal discovery' in this state." (*People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28, 46.) One of the stated purposes of the new statues is to "provide that no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States." (§ 1054, subd. (e).) Under section 1054.1, a prosecuting attorney must disclose specified items, including "all *relevant* real evidence seized or obtained as a part of the investigation of the offenses charged." (Italics added.)

Evidence is only relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequences to the determination of the action." (Evid. Code, § 210.) Evidence that is not relevant is inadmissible. (Evid. Code, § 350.) "In determining whether evidence has a tendency to prove a material fact, it must be determined whether it 'logically, naturally, and by reasonable inference' establishes the fact. [Citation.] A trial court has wide discretion in determining the relevance of evidence." (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1174.)

III. Due Process Discovery Rights

In addition to the discovery rights conferred by section 1054 et seq., defendants retain a right to discovery under the due process clause. "The prosecutor's duties of disclosure under the due process clause are wholly independent of any statutory scheme of reciprocal discovery. The due process requirements are self-executing and need no statutory support to be effective. Such obligations exist whether or not the state has adopted a reciprocal discovery statute. Furthermore, if a statutory discovery scheme exists, these due process requirements operate outside such a scheme. The prosecutor is obligated to disclose such evidence voluntarily, whether or not the defendant makes a request for discovery." (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 378.) Under the due process clause, the prosecution must disclose evidence that is both "favorable to the accused" and "material either to guilt or to punishment ... ." (*Brady v. Maryland* (1963) 373

U.S. 83, 87 (*Brady*).)

"Favorable evidence is evidence that the defense could use either to impeach the state's witnesses or to exculpate the accused." (*People v. Ayala* (2000) 23 Cal.4th 225, 279; *In re Sassounian* (1995) 9 Cal.4th 535, 544 ["Evidence is 'favorable' if it either helps the defendant or hurts the prosecution"].) Evidence is material " 'when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'" (*Turner v. U.S.* (2017) 582 U.S. 313, 324.) A "reasonable probability" of a different result is one in which the withholding of the evidence "undermines confidence in the outcome of the trial." (*U.S. v. Bagley* (1985) 473 U.S. 667, 678.)

IV. Discussion

a. Penal Code section 1054 et seq.

Defendant asserts he is entitled to the requested discovery under section 1054.1 because it constitutes "relevant real evidence." However, defendant never explains why the information is relevant. On page six of defendant's motion to compel (filed Feb. 22, 2023), he invokes section 1054.1 and raises the possibility he may want to call witnesses involved in the "genealogical testing." What witnesses would he call? The scientist that tested the crime scene DNA and produced the SNP profile? Employees from the DNA database website? Defendant fails to proffer a theory by which these potential witnesses would undermine any element of the charges of the credibility of the People's witnesses. For example, assume the laboratory that produced the SNP profile made a mistake. How does that information help defendant? Similarly, if law enforcement spoke with relatives who will not be testifying at trial, how does disclosing those statements aid defendant? Defendant does raise the possibility of a third-party culpability defense, but how the requested discovery is relevant to that claim is not adequately explained. (*People v. Hall* (1986) 41 Cal.3d 826, 833 [third-party culpability claim must be based on more than pure speculation].)

Defendant also argues he is entitled to the discovery because he would have received similar discovery had the prosecution received a CODIS hit. Defendant does not cite any statute, regulation or case law to support his assertion. The Court's own searches were unproductive. Defendant's failure to provide the authority he claims compels the People to provide similar

discovery in a CODIS case prevents the Court from analyzing the potential application of that authority to the present case.

b. Due Process Discovery

Defendant invokes *Brady* and its progeny, but he does not produce a theory that the requested discovery is favorable and material. Likewise, the Court fails to envision a scenario in which the materials defendant seeks could be either exculpatory or useful to impeaching a prosecution witness. The Court's conclusion that the evidence is irrelevant leads to the natural conclusion that it is also immaterial under *Brady*.

V. Disposition

The relevant DNA testing in this case includes the testing of the crime scene sample, the discarded DNA, and the reference sample. The testing that produced the SNP profile and law enforcement's use of that profile to identify defendant as a suspect is simply irrelevant to guilt or punishment. The analogy to an informant case does not advance the defendant's argument because neither the private laboratory nor the DNA database website pointed the finger at defendant. But the analogy is not entirely off base. "A mere informer has a limited role. 'When such a person is truly an informant he simply points the finger of suspicion toward a person who has violated the law. He puts the wheels in motion which cause the defendant to be suspected and perhaps arrested, but he plays no part in the criminal act with which the defendant is later charged. [Citation.] His identity is not ordinarily necessary to the defendant's case ... ." (*People v. McShann* (1958) 50 Cal.2d 802, 808.) At most, the private laboratory and any website law enforcement utilize merely pointed a finger of suspicion. Defendant is not entitled to their identity or other materials. Defendant's motion to compel is DENIED.

DATED: 5/5/23

HON. STEVE WHITE
JUDGE OF THE SUPERIOR COURT