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**FILED**

OCT 05 2020

EL DORADO COUNTY SUPERIOR COURT  
BY [Signature]  
(DEPUTY CLERK)

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF EL DORADO

In the Matter of:

MICHAEL GREEN.

Case No. PDL20200007

**RULING ON MOTION TO  
COMPEL PRODUCTION OF  
DISCOVERY**

The motion of the Michael Green ("Green") to compel the People to produce information related to the People's forensic genetic genealogy ("FGG") investigation came on regularly before the Court for hearing on September 17, 2020, before the Hon. Michael J. McLaughlin, in Department 4 of the above-captioned Court. Deputy District Attorney Jay S. Linden, Esq., appeared for the People. Deputy Public Defender Margaret Huscher, Esq., appeared for Green, who was also present in custody.

Having reviewed the moving, opposing and supplemental papers on the motion, and having heard oral argument, the Court took the matter under submission and now issues the following ruling:

**Background**

In genetic genealogy, a user, normally looking to trace their lineage or connect with unknown family members, sends in a DNA sample (such as a saliva sample) to a direct-to-consumer genetic database service like Ancestry.com. These

1 services provide the user with a genetic profile. The user will then upload the  
2 profile obtained from their chosen service to GEDmatch, a free open-source public  
3 aggregator that allows the user to match with people on many different sites, not  
4 only the particular service they initially chose. GEDmatch searches for sections of  
5 the user's chromosomes that match other users in the database and provides  
6 usernames and contact information for any genetic matches it finds, along with an  
7 estimation of how closely related the matches are. (Zabel, *The Killer Inside Us: Law, Ethics, and the Forensic Use of Family Genetics*, 24 Berkeley J. Crim. L. 47,  
8 49–50 (2019).)

10 Law enforcement officers follow the same procedure in uploading DNA to  
11 GEDmatch as do regular users in a FGG investigation, but instead of submitting  
12 their own genetic profiles to GEDmatch, officers submit DNA recovered from an  
13 unidentified crime suspect or victim, often left at a crime scene. GEDmatch then  
14 reports back a list of “hits” – users who share DNA with the unidentified target.  
15 Investigators examine those hits to try to ascertain the identity of the perpetrator  
16 of the crime. They work from the list of hits, running information through public  
17 record databases to grow family trees based on the original hits in an attempt to  
18 find leads which ultimately yield their target's identity. Investigators must then  
19 use other means to confirm that the DNA from the discovered target matches DNA  
20 found at the scene of the crime. (*Id.*, at 50.)

21 Law enforcement in the present case obtained a mixed contributor DNA  
22 sample from the nightgown of the victim, which included DNA from the victim and  
23 DNA from an unidentified male. A private forensic laboratory separated the  
24 unidentified male DNA and created a DNA profile of the unidentified male suspect  
25 (the “DNA profile”). Law enforcement then submitted the DNA profile to  
26 GEDmatch and obtained information about people who share DNA with the  
27 unidentified suspect. Through its FGG investigation, law enforcement ultimately  
28 identified Green as a possible suspect and surreptitiously obtained items from

1 Green's garbage that contained DNA, which DNA matched the DNA profile of the  
2 unidentified male suspect. Law enforcement then obtained a search warrant,  
3 arrested Green, and collected a DNA sample (saliva) from him, which matched the  
4 crime source DNA profile.

5 **Parties' Contentions**

6 Green argues that he is entitled to discover "1) The Match Detail Reports and  
7 Long-form Candidate Match Report for the hit(s) including partial hits and hits  
8 that are dispositioned to be nonmatching (even if the laboratory has dispositioned a  
9 profile as a hit); 2) data files; 3) communications with lab personnel; 4) validation  
10 summaries; 5) Laboratory Personnel; 6) Unexpected Results and Corrective  
11 Actions; and 7) the laboratory accreditations." (Minor's Motion to Compel, at 8:8-  
12 15.) In his supplemental brief, Green describes what he seeks to discover as "the  
13 *reports* that would have been generated regarding the processes used to develop  
14 the [crime source] DNA profile . . . , the *number of 'matches and data related to the*  
15 *matches'* between the crime source DNA and other people's DNA contained in the  
16 GEDmatch or other database and the *family tree* prepared by" law enforcement.  
17 (Minor's Suppl. Motion to Compel, at 3:11-15 [emphasis in original].) In minor's  
18 counsel's supplemental declaration, she again argues that the list of people  
19 identified through the FGG investigation as being related by DNA to Green is  
20 discoverable and may lead to exculpatory evidence, and she further argues that the  
21 report and other evidence of the efforts by the People's scientists to convert the  
22 mixed contributor DNA sample from the victim's nightgown into a useable DNA  
23 profile appropriate for uploading to GEDmatch is discoverable because there may  
24 have been errors in extracting and conversion process.

25 Green asserts that this information is discoverable under Rule 5.546 of the  
26 California Rules of Court, which provides for discovery in juvenile proceedings, and  
27 that the information is necessary because (i) he needs to know when, where, what,  
28 and how the investigation into him occurred so that he can evaluate whether the

1 delay in prosecution prejudiced his due process rights; (ii) he needs to know the  
2 identity of other possible DNA matches that surfaced through the FGG  
3 investigation, asserting that such information might be exculpatory and he has a  
4 right to interview all persons who may have committed the crime; and (iii) the FGG  
5 investigation may reveal Fourth Amendment search and seizure arguments.  
6 (Minor's Suppl. Motion to Compel, at 3:16-4:26.)

7 On the other hand, the People contend they are not obligated to produce any  
8 information provided by their FGG investigation because (i) the People do not  
9 intend to offer any such information against Green at trial and so is not  
10 discoverable under Penal Code § 1054.1, (ii) the information contains no  
11 exculpatory evidence that is material to Green's guilt or innocence and is not *Brady*  
12 material, and (iii) the information is protected from disclosure by the official  
13 information privilege, Evidence Code, § 1040. The People assert that the relevant  
14 DNA evidence is the comparison of the DNA sample from Green to the crime  
15 source DNA profile.

16 The People further argue that Green's request for discovery of the FGG  
17 investigation is premature and should not be considered prior to the transfer  
18 hearing. They argue the standard for discovery prior to a transfer hearing in  
19 juvenile court should be the same as the standard for discovery prior to a  
20 preliminary hearing in criminal court. The court agrees, but this does not preclude  
21 the court from considering the motion. Criminal courts have inherent authority to  
22 permit pre-preliminary examination discovery. (*Clinton K. v. Superior Court* (1995)  
23 37 Cal. App. 4<sup>th</sup> 1244, 1249). As preliminary hearings are the "closest relative" to a  
24 Welfare and Institutions Code section 707 hearing, by analogy then juvenile courts  
25 also have discretion to authorize discovery prior to a transfer hearing. (*Ibid.*)  
26 However, the court should not exercise that authority unless the discovery appears  
27 reasonably necessary and will not unduly delay or prolong the proceeding. (*Clinton*  
28

1 K., at 1249.) The court finds that Green's motion to compel is not premature and  
2 will consider the motion on its merits.

3 The burden in justifying discovery in juvenile proceedings is on the party  
4 seeking disclosure. (*Ibid.*)

5 **Criminal vs. Juvenile Discovery Statutes**

6 Penal Code § 1054.1(f) requires that, in criminal cases, the prosecution  
7 disclose to the defense, among other things, the results of physical or mental  
8 examinations and scientific tests and experiments if the prosecutor intends to offer  
9 same in evidence at trial. Rule 5.546(d) of the California Rules of Court provides  
10 that, in juvenile proceedings, the petitioner must, after timely request, disclose to  
11 the minor, as pertinent here, reports or statements of experts made regarding the  
12 pending matter including results of scientific tests, experiments, or comparisons.

13 While the reciprocal discovery statutes applicable in adult criminal cases do  
14 not apply to juvenile delinquency proceedings (Pen. Code § 1054(e); *Robert S. v.*  
15 *Superior Court* (1992) 9 Cal. App. 4<sup>th</sup> 1417, 1420-1421), juvenile courts have  
16 discretion to make reciprocal discovery orders in delinquency proceedings  
17 consistent with the law governing discovery in criminal cases (*Robert S.*, 9 Cal.  
18 App. 4<sup>th</sup> at 1422). Juvenile courts have the same degree of discretion as a court in a  
19 criminal case to permit, upon a proper showing, discovery between the parties (*Joe*  
20 *Z. v. Superior Court* (1970) 3 Cal. 3d 797, 801). Of course, juvenile courts should  
21 also, then, have the same degree of discretion as a court in a criminal case to deny  
22 discovery.

23 To assist in determining whether juvenile courts exceed the bounds of their  
24 discretion in granting or denying discovery, appellate courts look to criminal cases  
25 addressing similar issues. (*Joe Z.*, at 801.) As the parties here have cited no juvenile  
26 case with discovery issues analogous to the case at bar, and the court has found none,  
27 the court will also turn to criminal cases addressing similar issues for guidance,  
28 discussed below.

1           **Brady Material**

2           The *Brady* [*v. Maryland* (1963) 373 U.S. 83] disclosure requirement applies to  
3 juvenile delinquency proceedings as well as criminal proceedings.” (*J.E. v. Superior*  
4 *Court* (2014) 223 Cal. App. 4th 1329, 1335.) To comply with *Brady*, the People must  
5 disclose exculpatory and impeachment evidence that is favorable to the accused  
6 and material on the issue of guilt or punishment. (*J.E.*, at 1334.)

7           **Official Information Privilege, Evid. Code § 1040**

8           Where the People assert the official information privilege, the court is  
9 obligated to conduct an *in camera* review of the requested discovery to consider  
10 whether there is a necessity for preserving the confidentiality of the information  
11 that outweighs the necessity for disclosure in the interest of justice. (*Michael P. v.*  
12 *Superior Court* (2001) 92 Cal. App. 4th 1036, 1043.)

13           With the consent of the counsel for both parties, the court held an *in camera*  
14 hearing on September 18, 2020. Investigator Joe Ramsey from the office of the El  
15 Dorado County District Attorney and Investigator Kirk Campbell from the office of  
16 the Sacramento County District Attorney appeared at the *in camera* hearing. Mr.  
17 Ramsey produced to the court his investigation binder, which included the  
18 following items: DNA lab report from the Sacramento County District Attorney’s  
19 office regarding DNA samples taken from Green’s garbage; audio CDs of witness  
20 interviews; DMV photographs of Green; Mr. Ramsey’s written investigation  
21 reports; search warrant; and Mr. Ramsey’s notes. Mr. Ramsey believed all these  
22 items had been previously produced to Green.

23           There were no documents or electronic files produced specifically relating to  
24 the FGG investigation, other than the DNA lab report. However, Messrs. Ramsey  
25 and Campbell explained to the court the process of their FGG investigation and the  
26 information saved in electronic format pertaining to the same, generally consisting  
27 of information about people who were identified through GEDmatch and other  
28 means as sharing DNA with Green, and the family tree developed therefrom.



1           Discussion

2           FGG investigation is a relatively new investigation technique. Whether  
3 information developed through an FGG investigation leading to a particular  
4 suspect is discoverable to the defense is a question that has not been the subject of  
5 reported case law. However, there are two cases that are analogous, in the court's  
6 opinion, one a reported California case from the Fifth District Court of Appeal and  
7 the other an unreported case from the United States District Court for the  
8 Northern District of Ohio.<sup>1</sup>

9           In the California case, *People v. Johnson* (2006) 139 Cal.App.4<sup>th</sup> 1135, the  
10 defendant, who was convicted of rape, challenged admission of DNA evidence. The  
11 appellate court held that a "cold hit" from a DNA database was not subject to the  
12 *Kelly-Frye*<sup>2</sup> standard of admissibility, at least when it was used merely to identify  
13 a possible suspect. (*Id.*, at 1141.) A DNA profile of the perpetrator was obtained  
14 from sperm cells left on the victim, which was submitted to CODIS, resulting in a  
15 "hit" on the defendant, who was in prison. A DNA sample was taken from the  
16 defendant, which matched the crime source DNA profile. (*Id.*, at 1143.) The  
17 criminologist determined that the profile obtained from the evidence item sperm  
18 fraction was estimated to occur at random in the general population in about one in  
19 130 quadrillion African-Americans, one in 240 quadrillion Caucasians, and one in  
20 4.3 quadrillion Hispanics. (*Ibid.*)

21           In reaching its conclusion, and as relevant to the present case, the appellate  
22 court found that the database search to identify a potential suspect "merely  
23 provides law enforcement with an investigative tool, not evidence of guilt." (*People*  
24 *v. Johnson*, at 1150.) The court went on to hold that "the means by which a  
25 particular person comes to be suspected of a crime – the reason law enforcement's  
26

27 <sup>1</sup> Unreported federal court cases may be cited in California as persuasive authority.  
28 (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 940.

<sup>2</sup> *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C.Cir.1923) 293 F. 1013.

1 investigation focuses on him – is irrelevant to the issue to be decided at trial, i.e.,  
2 that person's guilt or innocence, except insofar as it provides *independent* evidence  
3 of guilt or innocence.” (*Ibid.*) The court went on to say:

4 [T]he fact that here, the genetic profile from the evidence sample  
5 (the perpetrator's profile) matched the profile of someone in a  
6 database of criminal offenders, does not affect the strength of  
7 the evidence against appellant. The strength of the evidence  
8 against him (at least in terms of the DNA evidence) depends  
9 upon the confirmatory match between *his* profile and that of the  
10 perpetrator, and the calculation of the frequency of the  
11 perpetrator's profile in the relevant population. That population  
12 is the population of possible perpetrators, not the population of  
13 convicted offenders whose DNA has been entered into CODIS.  
14 The fact appellant was first identified as a possible suspect  
15 based on a database search simply does not matter.

16 (*Id.*)<sup>3</sup>

17 The same rationale applies, in this court's opinion, where the suspect is first  
18 identified through an FGG investigation using public genealogy databases. The  
19 fact that GEDmatch reported a list of “hits” – users who share DNA with the crime  
20 source DNA profile – does not affect the strength of the evidence against Green.  
21 The strength of the evidence against Green in terms of the DNA evidence depends  
22 upon the confirmatory match between his DNA profile and that of the crime source  
23 DNA profile, and the calculation of the frequency of the crime source DNA profile  
24 in the relevant population. The fact Green was first identified as a possible suspect  
25 based on a database search does not matter.

26 The FGG investigation did not identify Green as a suspect, but rather  
27 pointed law enforcement to candidates derived from the genealogy database that  
28 came close to matching the crime source DNA profile. From there, law enforcement  
used other investigatory tools to identify Green as a potential suspect. As stated by  
the California Appellate Court:

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<sup>3</sup>The appellate court analogized the DNA database search to computerized database searches for fingerprint matching, referencing *People v. Farnam* (2002) 28 Cal.4th 107. (*People v. Johnson, supra*, 139 Cal. App. 4th at 1152.)



1 [P]olice used CODIS to narrow the range of potential candidates  
2 whose genetic profiles might match that of the evidence sample  
3 (the perpetrator's profile), after which the prosecution relied on  
4 scientifically accepted techniques to show the jury that  
5 appellant's genetic profile matched that of the perpetrator, and  
6 the astronomical rarity of that profile in the population of  
7 possible perpetrators.

8 (*People v. Johnson*, 139 Cal. App. 4th at 1153.)

9 The case from the federal district court in Ohio applies these same principles  
10 but is factually closer to the present case. In *U.S. v. Johnson* (N.D. Ohio 2011) 2011  
11 WL 4729966, the defendant was indicted with one count of bank robbery. Police  
12 investigating the robbery collected as evidence a baseball cap worn by the  
13 perpetrator that was dropped as he fled the bank. A forensic scientist created a  
14 DNA profile from DNA found on the hat, which profile was run through CODIS for  
15 possible matches. After reviewing the returned "hits," the scientist determined  
16 there was only one hit that could not be excluded as a potential match to the DNA  
17 profile, and that belonged to the defendant. Law enforcement obtained a DNA  
18 sample from the defendant, which matched the DNA from the hat. The scientist  
19 then calculated the expected frequency of occurrence of the DNA profile from the  
20 hat as 1 in 3,928,000 unrelated individuals. (*Id.*, at p. 1.)

21 Citing *Brady* and Rule 16 of the Federal Rules of Criminal Procedure,<sup>4</sup> the  
22 defendant filed a motion seeking, as does Green here, access to information  
23 regarding other potential matches identified through the CODIS database,  
24 identified by defendant as "Match Detail Reports." (*Ibid.*) Defendant argued the  
25 reports were evidence of other suspects connected to the robbery and were, thus,  
26 favorable and material to his defense. (*Id.*, at p. 2.) Defendant further argued that  
27 his expert should be permitted to review the reports to determine if law  
28 enforcement's scientist erred in excluding any of the potential matches. (*Ibid.*) The

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<sup>4</sup> Rule 16 of the Federal Rules of Criminal Procedure is sufficiently similar to Penal Code § 1054.1 to analogize *U.S. v. Johnson* to the present case. More specifically, both Rule 16(a)(1)(F) and Penal Code § 1054.1(f) require that the prosecution disclose to the defense the results of physical or mental examinations and scientific tests and experiments if the prosecutor intends to offer same in evidence at trial.

1 prosecution argued, as here, that the non-matching CODIS hits were outside the  
2 scope of statutory discovery requirements and were not *Brady* material because  
3 they were not exculpatory or relevant to defendant's defense. (*Ibid.*) More  
4 specifically, the prosecution argued

5 that the earlier CODIS hits are an investigatory technique used  
6 to find potential suspects, similar to calls to a police tip-line, and  
7 are not evidence that is relevant or material to [defendant's]  
8 guilt or innocence. Specifically, the Government argues that  
9 evidence of other possible matches or suspects is not  
10 discoverable by [defendant] unless he can demonstrate some  
11 "plausible nexus" linking the other suspects to the crime.  
12 Otherwise, the Government asserts whether or not other  
13 possible matches exist in the CODIS database is not relevant or  
14 material to [defendant's] guilt or innocence.

15 (*Id.*, at p. 3.)

16 The Ohio federal court agreed, finding that the CODIS database search  
17 merely provided law enforcement with an investigative tool, not evidence of guilt,  
18 citing *People v. Johnson* (2006) 139 Cal.App.4th 1135. (*U.S. v. Johnson, supra*, at p.  
19 3.) The court held "that the fact that the DNA swab collected from the baseball cap  
20 may inculcate someone else in the database is not exculpatory or favorable to [the  
21 defendant's] defense" (*Id.*, at p. 4), citing the "strength of the evidence" passage  
22 from *People v. Johnson, supra*, 139 Cal.App.4th at 1151.<sup>5</sup>

23 The court continued, stating: "whether or not the analyst erred at the  
24 investigatory stage of his DNA analysis has no bearing on the strength of the DNA  
25 evidence against [the defendant] consisting of the direct comparison of his DNA  
26 with the DNA extracted from the hat." (*Ibid.*)

27 The evidence that is material to the guilt or innocence of [the  
28 defendant] is the testing that followed the CODIS search, which  
29 directly compared a fresh swab of the [the defendant's] DNA

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30 <sup>5</sup> The passage was previously cited: "The strength of the evidence against him (at least in  
31 terms of the DNA evidence) depends upon the confirmatory match between *his* profile and  
32 that of the perpetrator, and the calculation of the frequency of the *perpetrator's* profile in  
33 the relevant population. That population is the population of possible perpetrators, not the  
34 population of convicted offenders whose DNA has been entered into CODIS. The fact  
35 appellant was first identified as a possible suspect based on a database search simply does  
36 not matter." (*U.S. v. Johnson, supra*, at p. 4.)

1 with DNA profile collected at the crime scene. Indeed, it is only  
2 this evidence that the Government intends to present at trial.  
3 There is “no constitutional requirement that the prosecution  
4 make a complete and detailed accounting to the defense of all  
5 police investigatory work on a case.” *Moore [v. Illinois]*, 408 U.S.  
6 [786,] 795 (1972). The Government has already provided [the  
7 defendant] with the hat and the results of [the criminologist’s]  
8 comparison of [the defendant’s] DNA with that of the sample  
9 obtained from the baseball cap—nothing compels it also to  
10 provide its preliminary search of the CODIS database for  
11 possible matches, which is investigatory in nature and is not  
12 exculpatory or material to [the] defense.

13 (*U.S. v. Johnson, supra*, at 4.)

14 The court noted that the defendant “presented no evidence that the  
15 eliminated profiles can otherwise be linked to the crime he is accused of  
16 committing. A mere possibility that the information might help the defense does  
17 not establish that this evidence is material.” (*Ibid.*)

18 The court finds no distinction between the above analysis of CODIS database  
19 searches leading law enforcement to focus on a particular person as a suspect and a  
20 public genealogy database search leading law enforcement to focus on Green. The  
21 analysis set forth in *People v. Johnson* and *U.S. v. Johnson* should apply with  
22 equal force to these juvenile delinquency proceedings.

23 In criminal cases, the court retains wide discretion to protect against the  
24 disclosure of information that might unduly hamper the prosecution or violate  
25 some other legitimate governmental interest. (*Joe Z., supra*, 3 Cal. 3d at 804.) “[A]  
26 defendant in a criminal case must furnish better cause for discovery than a ‘mere  
27 desire for the benefit of all information which has been obtained by the People in  
28 their investigation of the crime.’” (*Ibid.*) “The juvenile courts should possess a like  
degree of discretion in determining the extent to which they will permit pretrial  
discovery in delinquency proceedings.” (*Ibid.*)

As in the above cases, the evidence that is material to Green’s guilt or  
innocence is the testing that followed the FGG investigation, which directly  
compared a fresh swab of Green’s DNA with the DNA profile collected from the  
victim’s nightgown. It is only this evidence that the People intend to present at

1 trial. The People are not obligated to provide its preliminary search of the  
2 genealogy databases for possible matches, which is investigatory in nature and is  
3 not exculpatory or material to Green's defense. Green has presented no evidence as  
4 a part of his motion or supplemental filings that tend to show that the persons  
5 identified through GEDmatch who share DNA with Green can otherwise be linked  
6 to the crime he is accused of committing. A mere possibility that the information  
7 might help the defense does not establish that this evidence is material.

8 Based on the foregoing, the court finds that the FGG investigation  
9 information is not discoverable to Green under *Brady* or Penal Code § 1054.1,  
10 except as follows:

11 The court finds that the following DNA evidence is discoverable as real  
12 evidence and must be produced by the People to Green, to the extent it has not  
13 already done so:

14 (a) Any remaining extract from the victim's nightgown containing the  
15 mixture of victim and unknown male DNA;

16 (b) All reports and other information pertaining to the analysis of the raw  
17 data and the scientific approaches applied by criminologists and/or private  
18 forensic laboratories engaged by law enforcement to deconvolve the DNA  
19 mixture to create the DNA profile of the unknown male suspect; and

20 (c) All reports of comparison of Green's DNA with that of the crime source  
21 DNA profile.

22 Green has a right to have his experts conduct their own tests and review of  
23 such information to prove whether the unspecified male DNA profile was reliable or  
24 whether there were any errors in conversion of the mixed contributor DNA sample  
25 into a useable crime source DNA profile appropriate for uploading to GEDmatch.

26 The People are not obligated to discover to Green the requested Match Detail  
27 Reports, long-form Candidate Match Reports, family tree information, lists of  
28

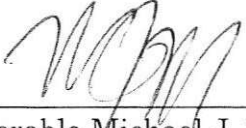
1 people identified through the FGG investigation as being related by DNA to Green,  
2 or any other information from its FGG investigation except as set forth above.

3 Considering this finding, the People's argument that the FGG investigation is  
4 protected from disclosure by the official information privilege is moot.

5 The motion to compel discovery of genetic genealogy information is denied, in  
6 part, and granted, in part, as set forth above.

7 **IT IS SO ORDERED.**

8  
9 Dated: 10/5/2020

  
\_\_\_\_\_  
Honorable Michael J. McLaughlin  
Judge of the Superior Court

Michael J. McLaughlin