U.S. Department of Justice

Criminal Division
Room 6746
950 Pennsylvania Avenue, N.W.

Domestic Security Section

Washington, D.C. 20530

Mr. Timothy D. Junkin, Esq.
The Casey Building
800 South Frederick Avenue
Suite 203
Gaithersburg, Maryland 20877
Via Fax: 301-987-0682

~~December 23, 2004~~
January 14, 2005

Re: USA v. Jeffrey R. MacDonald

Dear Mr. Junkin:

This letter will confirm our discussions and agreements reached at our meeting at the Department of Justice on January 12, 2005. Per our agreement, as my letter to you of December 23,2004 was used as the basis for our discussions, and agreements were reached in relation to the text of that letter, I have reprinted it to reflect our agreements. Where the original language was modified I have so indicted by strikeout and italics. Similarly , the substance of our various agreements with respect to specific issues is also set forth in italics below my previous discussion of those issues .

This is in reply to your letter of December 14, 2004 addressed to me and to Ms. Kimberly Murga of AFDIL. I am also in receipt of Ms. Murga's response to you of December 20, and , therefore, will only address those issues which pertain to the Government's position.

This letter will also serve to memorialize our telephone conversation of December 16, concerning DNA testing by AFDIL of tissue obtained from a liver biopsy of the late Gregg Mitchell. During our conversation you informed me that you had obtained permission from Gregg Mitchell's parents to have the University of Virginia Hospital send the tissue samples to AFDIL for DNA testing and comparison as a reference sample. I informed you that I had no objection to this procedure provided that the appropriate documentation authenticating the tissue was also provided. I will treat your verbal request for the Mitchell reference sample testing as an addition to your Sixth point, in response to Ms. Murga's prior question concerning the list of any individuals to be added to the existing list of reference samples to be tested , besides: Colette MacDonald, Kimberly MacDonald , Kristen MacDonald, Jeffrey MacDonald and Helena

Stoeckley. Is there anybody else besides Gregg Mitchell, Stoeckley and the four named members of the MacDonald family whose reference samples you want to submit or have compared?

In response to the above question, you stated that the defense does not intend to submit at this time exemplars for DNA testing ,in addition to those of Mitchell, Stoeckley and the members of the MacDonald family. You further indicated that there were additional individuals named by or associated with Stoeckley, (Cathy Perry for example) who had not yet been located, and whose exemplars might be submitted in the future.

At the completion of the testing of all the questioned and reference samples by AFDIL, and at AFDIL's request, I will seek a court order authorizing the Bureau of Prisons to take a reference blood sample from your client .

In reference to the above paragraph it was agreed that this matter could be handled by a consent motion. The defense agreed to do whatever was needed to facilitate the drawing of the blood sample. I explained that I believed that the BOP would require a court order to draw blood, but would explore that issue with the BOP. I further explained that my primary concern was the authentication of the blood sample, and having the shortest possible chain of identification between the drawing of the blood and its testing by AFDIL. Therefore, unless AFDIL was going to have someone present to witness the event, who would also take custody of the blood sample, it probably would require the participation of an FBI Agent who would take the sample to AFDIL. This prompted some further discussion about the feasability of sending the sample by FEDEX . I questioned whether it was permissible to send a biological sample via FEDEX, and in any case expressed my preference for hand delivery by a witness.

As a preliminary matter, before addressing the issues involving the testing of the specific exhibits, I want the record to reflect that I do not accept either the characterization in your letter of December 14 of the biological nature of certain items (i.e. that a fleck is in fact human blood or tissue) or the location at which an item was allegedly found. It is beyond the scope of this letter, but I wanted to make it clear that by addressing an issue regarding the testing of an AFDIL sample, I was not making any concessions for future litigation purposes as to the true nature of the item, or its evidentiary provenance.

In reference to the above paragraph you asked whether there were errors in your letter of December 14, 2004 in relation to the description of the locations at which evidence had been found. I explained that sometimes the exhibit descriptions by laboratory personnel, who had not been involved in the actual collection of the evidence, could, over time, lead to mistakes. By way of example, I referred to your description of AFIP 104A(1) "Hair taken from Colette's left hand/ arm area." As I explained this hair was actually collected from the shag rug in the master bedroom in the area which corresponded to the body outline of Colette MacDonald. The CID agents went back in mid-March 1970, principally to look for additional threads and yarns from

the pajama top, but also collected this hair among the debris from the area that corresponded to the outline of Colette's left hand and arm.

I further stated that unless a transcript reference supported your assertion of the origin of an exhibit, you may need to produce testimony to establish that something was found at a particular location. I also agreed with your suggestion that we attempt to resolve such issues in advance.

1. Testing of AFDIL Samples 97A(1), 71 A(1), 71 A(2), 71 A(3), 101A(1) , ~~101A(1)~~ and 101A(2)

As a starting point we don't know for a scientific fact that these flecks are in fact human blood, or otherwise of human origin, and, therefore, covered by the District Court's order. This is so because presumptive testing to determine that we are actually dealing with human blood debris is precluded because such testing might consume the sample. In any case AFIP (AFDIL/OAFME) does not have the capability to do presumptive testing. For the purposes of any future litigation, therefore, this letter should not be construed as agreement by the Government, in the absence of confirmation by presumptive testing, that any "fleck" in any of the vials, is in fact blood, blood debris or otherwise of human origin.

By my letter of September 21, 2004, I previously agreed with AFDIL's recommendation that these samples be tested, but requested that nuclear DNA testing be used before mitochondrial testing. My reasons for taking this position were my stated concerns about the susceptibility of the hyper-sensitive mitochondrial testing technique to reflecting the results of contamination, rather than authentic DNA. My other area of concern was , that as mitochondrial DNA sequences are not unique, it has a lesser capacity than nuclear DNA to inform as to the identity of the donor. My concerns are consistent with the Pros and Cons of mitochondrial versus nuclear DNA testing stated in Ms. Murga's response to your letter.

My position regarding your requested testing of AFDIL Samples 97A(1), 71 A(1), 71 A(2), 71 A(3), 101A(1) , and 101A(2) is as follows:

a. I will defer to AFDIL's best judgment as to how to proceed with the testing of these samples; and

b. the Government reserves the right to contest the validity of any inferences drawn from the results of the testing.

The agreement with respect to Samples 97A(1), 71A(1), 71A(2), 71A(3), 101A(1) and 101A(2) is that the defense agrees to proceed with the testing and the Government agrees that AFDIL will attempt mitochondrial testing prior to nuclear, if that is their best judgment of how

to test the samples.

2. The Testing of Samples 65A(1) and 65A(2)

Ms. Murga's letter of September 7, 2004 states with respect to the examination of Vial 65A:

"There were very small particles observed in the vial cap that were too small to discern. The vial also had additional particles that looked similar to the particles in the cap. The following samples were collected:

65A(1): A small white fleck that might be from the plastic from the vial cap
65A(2): A dark fleck that is extremely small.

The vial and vial cap would have to be swabbed to remove the remaining infinitesimally small particles.

It is AFDIL's recommendation that neither of the aforementioned samples is suitable for DNA testing."

The relevant background concerning the testing of the small white fleck , AFDIL Sample 65A(1), is as follows:

a. The white fleck does not have an appearance which is consistent with that of human blood;

b. When defense expert Dr. Terry Melton examined the contents of this vial in 1999, she did not identify the white fleck, whose presence was known to her, as an item which should under go presumptive testing[1];

c. Other than the reference in your letter to Sample 65A allegedly containing a piece of skin, there is no support in the record that this vial contained a piece of skin before it was tendered to AFDIL, in fact, the record created by those who have actually examined the vial's contents, is to the contrary;[2]

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[1]See Melton fax of 7/29/99: " In addition, on my notes from the vial opening I have noted that the vial 4 (Q135.1, AFDIL 65A) has some tiny dark flakes in it. Therefore, this material should also be tested for blood.

[2] See: USACIL Report R29 of 20 September, 1971, which states at ¶6, pp.2-3, that: "Reexamination of Exhibits D233 through D-239, D-256, E-4 and E-5 did not reveal the

d. In your letter of December 14, you have posed the question to Ms. Murga: "Could you not determine whether the white fleck is indeed plastic, or whether it is human skin, and if it is skin, proceed to test it?" AFDIL has responded that: "Dr. Finelli [Deputy Medical Examiner, OFAME] was unable to definitively determine if the particle was composed of skin or plastic (the sample was too small to discern). However, if this sample was determined to be that of human skin, it would be highly unlikely DNA results would be obtained due to its very small size."

e. By his letter of January 30, 2004, Mr. Cormier stated: "We also agree that flecks that are not consistent with the appearance of blood should not be aggregated with other flecks which are consistent with the appearance of blood, and should be tested separately if they are of human origin and are suitable for DNA testing";

f. The March 26, 1999 Order of the District Court states at page 2 that: "[t]he exhibits which are subject to this order are the existent and known sourced and unsourced hairs, blood stains, blood debris, tissue and body fluids specifically identified in the April 22, 1997 Affidavit of Philip G. Cormier No.2.";

g. Cormier Affidavit No. 2 at ¶ c, page 35, states that Exhibit D-236 [AFDIL 65A] "... contains an unsourced light brown, narrow, blood stained hair. See ¶¶ 36-39."; and

h. The hair in question originally from CID Exhibit D-236 (vial # 8) had been mounted on a slide in 1970 by USACIL, and was subsequently designated Sample 63A by AFDIL in 1999[3]. I have deferred to AFDIL on the testing of this hair.

In view of the points set forth above, it is my position that the white fleck in AFDIL 65A(1) should not be tested because it is not specifically identified in Cormier Affidavit No.2, its appearance is consistent with that of plastic which could be contaminated , its human

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presence of any skin particles."

[3] See discussion , at pp. 4-5 concerning the testing of Sample 63A.

origin cannot be otherwise determined definitively, and in any case AFDIL believes it is highly unlikely that the white fleck, even if could be determined to be human skin, will yield a DNA sequence.

The defense agrees that the white fleck in AFDIL 65A(1) will not be tested.

The testing of AFDIL 65A(2).

I defer to AFDIL's decision on whether Sample 65A(2) is suitable for any form of DNA testing.

As AFDIL had recommended that Sample 65A(2) was not suitable for testing, the defense agrees that it was not going to disagree with AFDIL's assessment, and therefore this sample will not be tested.

3. The Testing of Sample 63A(D236/Q138).

The biological origin of the hair on this slide could not be determined by AFIP's Office of the Armed Forces Medical Examiner (OAFME) in 2000. In addition AFDIL concluded that the hair is generally not suitable for DNA analysis, and, therefore, they would not be testing the hair on item 63A. See: Letter from Dr. Mitchell M. Holland , June 8, 2000. In Mr. Cormier's letter to me of September 13, 2000, he stated with respect to items 58A, 91A, and 63A (which had been determined by AFDIL to be unsuitable candidates for DNA testing) that once the testing on the other items has been completed , we will seek to have the court resolve the dispute over these other items, unless the parties can work out an agreement that is satisfactory to both sides. According to Mr. Cormier's letter of February 3, 2003, he contacted AFDIL and asked them to begin the process of reconsidering whether the three hairs previously deemed unsuitable for testing should be tested. On October 20, 2003, Ms. Murga wrote to inform Mr. Cormier that it was her understanding that AFDIL Specimen 63A still had an uncertainty as to its species of origin. She went on to state that: "AFDIL is willing to test this hair if a microscopist of your choice examines it and deems it of human origin. If this is a course of action both legal parties are interested in exploring, we will make arrangements to have the hair available."

Ultimately slide 63A was sent to defense expert, Dr. Peter De Forrest, for examination in his own laboratory. As reflected in his report of January 16, 2004, Dr. De Forrest stated:

> " The hair fiber is very small and un-pigmented. It is an intact telogen or sloughed off hair. It has a tapered and abraded tip. It is very fine (25 to 30 um diameter) and only about 6mm in length. It appears to be a very fine human limb hair, perhaps from a child. Because of its small size and lack of features, the conclusion of species is not definite. I'm not sure that I could reach a definitive conclusion in this regard, even if demounting were to be allowed."

On March 1, 2004, Ms. Murga wrote to Mr. Cormier in reference to Dr. De Forrest's examination report:

> "[I]t would be AFDIL's recommendation that this sample is not suitable for DNA analysis. The fact that the species determination has not been conclusive, in combination with the size of the hair (only 6mm in length), the very fine morphology of the hair, the age of the hair, coupled with it's potential to be the limb hair of a child, lends us to believe that this hair would probably yield no DNA through mitochondrial DNA typing."

Your letter of December 14, does not address the lack of a definitive conclusion by Dr. De Forrest's as to the species of the hair. Instead, you rely entirely on Dr. Melton's belief that there is a reasonable chance that a typing sequence could be obtained.

My position with respect to the testing of AFDIL Sample 63A is as follows:

a. I will defer to AFDIL's best judgment as to how to proceed with the testing of this sample;

b. in light of the uncertainty as to the species of the hair, the Government reserves the right to contest the validity of any inferences drawn from any test results; and

c. the Government further reserves the right to contest the provenance of this hair.

Both parties agreed to defer to the decision of AFDIL on whether or not to test Sample 63A. The defense further agreed not to contest AFDIL's decision if AFDIL believes testing is futile.

4. <u>The testing of Slide 91A(D237/Q137/GX 285)</u>

The history of Slide 91A is similar to that of Slides 58A(1) and 63A, in that it contains a hair which was initially deemed unsuitable for testing, but which upon reconsideration AFDIL agreed to test. By his letter of November 25, 2003 Mr. Cormier also identified for testing AFDIL Exhibit 91A- blood on fibers Q137.1 " Fibers from fingernail scrapings from Kristen MacDonald.

As reflected in my letter to AFDIL of January 8, 2004, Exhibits to the Affidavit of Philip

G. Cormier, No.2[4] reflect that CID Chemist Dillard O. Browning found a fiber in D237 that matched the cotton polyester fibers of the defendant's pajama top. According to the defendant's account he was not wearing his pajama top when he entered Kristen's bedroom. Therefore, the presence of a fiber from the defendant's pajama top under Kristen's fingernail is, in my view, highly probative of your client's guilt. I also wrote that whether or not the fiber currently mounted on AFDIL Exhibit 91 A is the same fiber to which Browning made reference would require microscopic examination.

On January 23, 2004, Ms. Murga responded to my letter of January 23, 2004 stating:

> "In reference to Exhibit 91A: This fiber mounted on a slide with a hair may pose several issues. To my knowledge, AFDIL has never made any attempt to remove the coverslip from a slide containing a fiber. While the chemicals added to a slide are meant to dissolve the adhesive used to bind the slide and coverslip, we have no experience as to the type of detrimental effects these strong solvents could pose on a 30 year old fiber. The solvents could very well dissolve the fiber in addition to the adhesive."
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> " Decontamination " of the fiber to remove the "red adhering material that appears to be blood" for DNA testing would most likely have to be done with the use of a swab. As previously stated in my letter to both counsels dated December 22, 2003, the introduction of swabs poses the same contamination issues whether used for hairs or fibers. Compounded with the contamination issues, swabbing this fiber (if it still exists after the coverslip is removed), could certainly alter the fiber's characteristics."
>
> "In regards to Exhibit 91A, it is AFDIL's recommendation that the fiber sample is not suitable for DNA testing, nor would it provide reliable results due to the susceptibility to contamination, in both previous handling and (if requested) present handling with the use of swabs. Even though the testing of the hair sample from Exhibit 91A was previously agreed upon by both parties, we cannot guarantee the fiber would be left in its current condition in an attempt to free the hair from the slide for mitochondrial analysis. AFDIL would have to perform a number of validation exercises to demonstrate the effects of strong solvents on 30 year- old fibers of similar origin to validate the procedure."

In view of the factors set forth above, of which neither the Fourth Circuit, nor Judge Fox, were aware, I don't agree with your conclusion that even if the fiber that is mounted on the slide with the human hair may be destroyed in the process, the human hair should be tested. I don't think, however, that the problem is insurmountable. As you indicated that you would seek

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[4]See Tab 11, page 197 and Tab 17, page 279.

further discussion with me on this point let me offer two alternative proposals:

The defendant will sign a stipulation to the effect that :

a. On or about March 9, 1970, CID Chemist Dillard O. Browning, while examining Exhibit D-237 (slide 91A), a vial which contained the fingernail scrapings from Kristen MacDonald's left hand, he found one microscopic piece of multi- strand polyester /cotton fiber identical to the polyester / cotton fiber of the defendant's pajama top, which fiber he mounted on a slide;

b. The Government is not required to produce the fiber identified by Browning in any court proceeding, because it was altered or destroyed in the process of removing a hair, also present on slide 91A (D237), for the purpose of conducting DNA testing of the hair, at the defendant's urging;

c. The defendant agrees that he can make no argument, or ask the fact finder to draw any inference, which is contrary to subparagraphs "a" or "b" above.

Alternatively, we can proceed as follows:

a. Slide 91A is sent to the FBI Laboratory for microscopic comparison of the fiber, without alteration of the slide, with the known fibers of the defendant's pajama top (GX 101/D210/Q12);

b. If the FBI Lab reports that the fiber does not match that of the defendant's pajama top, or some other exhibit from the crime scene, but it is merely an unidentified fiber, slide 91A will be returned to AFDIL and the removal of the hair from the slide and its DNA testing can proceed;

c. If the FBI Lab reports that the fiber on Slide 91A does match the composition of the defendant's pajama top, then the slide and pajama top exemplars fibers will be returned to AFDIL for subsequent examination by Dr. Peter De Forrest at his own laboratory, if he so chooses; ~~and~~

d. *If both parties' experts agree that the fiber matches the composition of the defendant's pajama top, then the defendant will sign a stipulation to that effect as described above, and the testing of the hair may proceed without bringing the matter before the Court; and*

~~d.~~e. The matter will be brought before Judge Fox for resolution, in the absence of *an* agreement by the parties *that the fiber in question matches the composition of the*

defendant's pajama top.

Subject to the changes made above to the Government's alternative procedure involving microscopic comparison of the fiber, the defense agrees to proceed with the alternative procedure.

5. The Re-testing of the Government's residual portions of Samples 112A(1) and 112A(2).

Sample 112A (1)

According to Ms. Murga's letter of December 20, 2004, mitochondrial testing of this sample has been successfully completed. Therefore, there is no reason to have AFDIL re-test the divisible portion which was previously returned to the FBI pursuant to the court's order.

The defense agrees that no further testing is required of the divisible portion of Sample 112A(1).

Sample 112A(2)[5]

The background on this hair is as follows:

Cormier Affidavit No. 2 at page 16,¶ (I) alleged that: " Exhibit D-229/Q96, the debris from the bedspread found on the floor of the master bedroom, contains one unsourced human hair from the pubic or body region which may or may not be bloodstained ." Subsequent examination of the original Q96 slide by the FBI revealed the presence of four hairs, one of which was a body hair without a root. In the process of demounting the hairs from the slide at AFDIL the four original hairs on the original Q96 slide were broken into nine fragments. Still further examination of the nine hair fragments by defense expert Dr. Peter De Forrest, and by the FBI Lab, established that Sample 112A(3)/Q96.3 was consistent with the description of the body hair found on the original Q96 slide. As you point out in your letter of December 14, and as Ms. Murga confirms in her letter of December 20, mtDNA testing was completed and successful typing was achieved on Sample 112A(3)/Q96.3. In other words, the hair which was specifically described in Mr.Cormier's Affidavit No. 2, and , therefore, the hair which was covered by the court's order, has been subjected to DNA testing successfully.

As you are aware, however, at the urging of the defense all nine hair fragments 112A(1)-

[5]This really should be a reference to Sample112B(2) , that is the divisible portion of 112A(2), returned to the Government pursuant to the Court's Order.

112A(9) have been subjected to DNA testing. To date this has resulted in the Department of Justice incurring costs of $22,500 just for DNA testing of Sample 112A. With respect to Sample 112A(2), the subject of the instant request, inconclusive mtDNA sequence information was obtained despite the use of 2.9 cm of the hair shaft. On March 1, 2004, Ms. Murga wrote to me concerning this sample.

> "Given the inconclusive results of hair 112A(2), it is highly unlikely an additional extraction (and consumption) of the remaining 2.9 cm of this hair would yield reportable results. The results obtained are most likely due to the age of the sample coupled with the absence of quality DNA present in this hair."

My position with respect to the testing by AFDIL of the divisible portion of Sample112A(2) previously furnished to the FBI , and now identified as Sample112B(2), is that I will not oppose the re- testing provided that: the defense agrees that there will be no further demands for the consumption, or return, of any portion of any sample which AFDIL has previously determined was not necessary for their testing purposes, and, therefore, constitutes the divisible portion of the sample reserved for the unrestricted use of the Government.

This issue involved a discussion of the divisibility portion of the court's order of March 26, 1999, and whether or not there were situations identical to 112A(2) involving other hairs.[6] It was agreed that the situation involving 112A(2) is unique. The concerns I expressed were with two other potential situations: the first would involve DNA results from AFDIL that the defense does not find favorable, which would then prompt a defense request for testing of the Government's divisible portion; the second hypothetical situation could involve DNA results from AFDIL which the Government wants validated by having its divisible portion tested by the FBI. As I explained, the language of the Court's March 26, 1999 order does not require the Government to return its divisibile portion of 112A(2) or in the event of either of the potential situations described herein[7].

The resolution of this issue was that the defense agreed to the Government's one time offer to have the divisible portion of 112A(2) a/k/a 112B(2) returned to AFDIL for testing. The defense further states that it has no intention of coming back to the Government for the testing of other divisible portions, absent totally unforseen circumstances.

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[6]I.e. the hair was divisible, but DNA testing of AFDIL's portion produced no DNA.

[7]"From each exhibit and exemplar capable of division, the laboratory shall retain such portion as is necessary for DNA testing, and shall retain the remainder to the Government which thereafter shall have unrestricted use thereof."

6. Additional Testing of Sample 48A Using Power Plex 16

For the reasons stated in ¶10, p.2 of Ms. Murga's letter of December 20, ("...using PowerPlex 16 would probably prove futile") , as well as the additional costs involved, I oppose additional nuclear testing using Power Plex 16.

It was agreed by both parties that, in light of Ms. Murga's comments in her letter of December 20, 2004, there would be no nuclear testing of Sample 48A using PowerPlex 16, but that the additional mtDNA extraction in progress would continue, and if successful , result in mtDNA testing of 48A.

7. General Conditions to Agreement

The offers, concessions, and positions by the Government set forth above in paragraphs 1-6 above, pertaining to the testing, or re-testing , of the specific AFDIL samples, are all subject to agreement by the defendant to each of the following general conditions set forth below:

a.. The offers or concessions set forth above in paragraphs 1-6 above constitute an all inclusive offer which must be either accepted or rejected in toto[8];

The defense agrees to this condition.

b. The additional testing requested in the defense letter of December 14, subject to the AFDIL response of December 20, constitutes agreement by the defense that the further testing as described in the Government 's letter of December 23, 2004, *which includes the DNA testing of the reference sample of Gregg Mitchell, and this letter*, represents the totality of the DNA testing which remains to be performed by virtue of the orders Court of Appeals and the District Court, respectively, of October 17,1997, December 11, 1998, March 26,1999, April 14, 1999, and May 18, 1999 ;

The defense agrees to this condition.

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[8] In view of the issues of costs and prioritization, *infra* ¶¶ "f" and "g", this doesn't mean the defense is required to have each item described in ¶¶ 1-5 above tested by AFDIL, but it does mean that the defense knowingly and voluntarily waives the right to any future testing of any such item which it chooses not to have tested by AFDIL. See 18 U.S.C.§3600(a)(3)(A)(i),(ii).

c. The defendant agrees not to file any other motion for DNA testing, ~~pending~~ *prior to* the completion of the instant testing , and the filing of the report with the District Court by AFDIL reflecting the results of that testing;

With the further clarification by the Government that this provision does not preclude the defense from ever filing a motion for DNA testing under the Innocence Protection Act (IPA), the defense agrees to this condition. By this clarification the Government makes no concession with respect to the merits of any future motion which may be filed under the IPA.

d. The defendant agrees to the completion of the DNA testing by AFDIL of all of the remaining questioned samples and exemplars, as described in paragraphs 1-6 above, and further agrees not to seek any form of bifurcated testing by any third party or other laboratory;

The defense agrees to this condition, provided that AFDIL can complete the remaining testing in a reasonable period of time, and AFDIL does not indicate that significant circumstances (e.g. the war in Iraq) will preclude them from completing the testing.

e. The defense agrees to accept without complaint the additional time which will be required for AFDIL to complete the testing of the additional questioned samples and exemplars;

This condition is acceptable to the defense.

f. Unless the defense is willing to prioritize the remaining questioned and reference/exemplar samples to be tested , so as to keep the costs to the Justice Department within the $75,000 previously obligated to AFDIL, or agrees to pay for the testing, the defense acknowledges that completion of all the projected evidence and reference samples will substantially exceed the $75,000 figure in the

Reimbursement Agreement[9];

The defense does not agree to pay for any of theDNA testing, and , therefore, acknowledges that completion of the testing of all the projected evidence and reference samples will substantially exceed the $ 75,000 figure in the Reimbursement Agreement.

g. The defense ~~further agrees~~ *has been informed* that the undersigned ~~will~~ *can*not be required to request AFDIL to test samples which will incur costs to the Department of Justice in excess of the $75,000 amount in the Reimbursement Agreement, unless , and until, authorization has been obtained from the appropriate authority within the Department of Justice[10]; and

Subject to the changes reflected above, the defense agrees to this condition.

h. The defense further agrees that the Department of Justice reserves the right, consistent with the March 26, 1999 Order of the District Court, to seek reimbursement for the full amount of any costs and expenses incurred in this phase of the litigation.

The defense agrees to this condition.

If these offers and conditions are acceptable to the defendant, please so indicate by letter. I will be on leave until January 3, 2005, but upon receipt of your acceptance, I will begin the

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[9]See Murga letter of December 20, 2004 concerning incurred and projected costs. The cost to date has been $58,500; the projected costs to complete testing of the Evidence and Reference Samples is, respectively, $17,000 and $16,500. Therefore, the projected costs which exceed the $75,000 which has been obligated is $17,000.

[10] I agree to make a good faith effort to obtain the necessary authorization , but I do not have such authorization at this time.

steps and processes necessary to effect the completion of the testing.

Sincerely,

Brian M. Murtagh
Trial Attorney

cc: AUSA Eric Evenson
John De Pue
Ms. Kimberly Murga , AFDIL

Seen and Agreed to.

Timothy D. Junkin
Counsel for Jeffrey R. MacDonald