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CASE NO. CR 29-22-2805  
2023 June 22 4:36 P.M.  
CLERK OF DISTRICT COURT  
LATAH COUNTY  
BY gcm DEPUTY

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*Assigned Attorney:*

Anne C. Taylor, Public Defender, Bar Number: 5836  
Jay W. Logsdon, Chief Deputy Public Defender, Bar Number: 8759  
Elisa G. Massoth, Attorney at Law, Bar Number: 5647

**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 NUMBER CR29-22-2805**

**NOTICE OF FILING DECLARATION OF  
STEPHEN B. MERCER IN SUPPORT OF  
DEFENDANT'S THIRD MOTION TO  
COMPEL**

COMES NOW, Bryan C. Kohberger, by and through his attorney of record, Anne C. Taylor, Public Defender, and hereby files the attached Declaration of Stephen B. Mercer in support of the Defendant's Third Motion to Compel.

DATED this 22 day of June, 2023.

ANNE C. TAYLOR, PUBLIC DEFENDER  
KOOTENAI COUNTY PUBLIC DEFENDER

BY: gcm  
ANNE TAYLOR  
PUBLIC DEFENDER  
ASSIGNED ATTORNEY

## CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served as indicated below on the 22 day of June, 2023 addressed to:

Latah County Prosecuting Attorney –via Email: [paservice@latahcountyid.gov](mailto:paservice@latahcountyid.gov)

Elisa Massoth – via Email: [legalassistant@kmrs.net](mailto:legalassistant@kmrs.net)

Ingrid Batey – via Email: [ingrid.batey@ag.idaho.gov](mailto:ingrid.batey@ag.idaho.gov)

Jeff Nye – via Email: [jeff.nye@ag.idaho.gov](mailto:jeff.nye@ag.idaho.gov)



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## **DECLARATION OF STEPHEN B. MERCER**

1. The defense has retained me to determine what a reasonably competent criminal defense attorney would do to adequately investigate and understand DNA evidence, including forensic genetic genealogical DNA analysis and search ("FGGS") (also referred to as Investigative Genetic Genealogy ("IGG")), when representing a defendant in a criminal case. I have based my opinions on my training and experience as the (former) Chief Attorney of the Forensics Division at Maryland's Office of the Public Defender ("OPD") and Director of its statewide Litigation Support Group, and my professional and litigation experience as a legal practitioner, including casework in two FGGS/IGG matters.

2. I have included my resume with this declaration. To summarize, for much of my 28 years practicing law, I have been actively involved in litigation, training, and commentary related to issues arising at the intersection of DNA technology and the law. In 2003 I litigated the first constitutional challenge to Maryland's DNA databank. I later led the successful effort before the Maryland General Assembly and the D.C. Council to ban familial searching of DNA databanks. That litigation led to DNA training and opportunities to work closely with expert DNA scientists and tour forensic DNA laboratories (NIST, Bode, Maryland State Police, and Montgomery County Police). By 2005, I began collaborating with Maryland's Office of the Public Defender's (OPD) Forensics Division on postconviction DNA innocence cases and assisted with OPD's "DNA College" training for assistant public defenders. In 2010, the Public Defender recruited me to become the Chief Attorney of OPD's Forensics Division. In 2011, Governor Martin O'Malley appointed me to represent Maryland on the Education, Ethics, and Terminology (EET) Interagency Working Group, established to support the Subcommittee on Forensic Sciences (SoFS) and the Executive Office of the President on policies, procedures, and plans related to

forensic science at the local, state, and federal levels. In 2016, I addressed by invitation the President's Council of Advisors on Science and Technology about the admissibility and reliability of forensic science in criminal cases. I have also been invited to address the FBI's national CODIS symposium on the privacy and racial justice implications of familial searching of DNA databanks. I addressed these same topics by invitation before the American Academy of Forensic Sciences and the National Institute of Justice. In 2018, I addressed the American Academy of Forensic Sciences ("AAFS") (of which I am a member) on the topic of the application of genomics to forensic DNA analysis. I have been an Adjunct Professor at the David A. Clarke School of Law at the University of the District of Columbia, where I developed and taught a class on scientific evidence (2010-2018).

3. From 2010 until 2017, as the Chief Attorney of the Forensics Division at OPD and Director of its statewide Litigation Support Group, I was responsible for developing and implementing training and litigation support services for the agency's 550 assistant public defenders across all fields of forensic science. The Forensics Division conducted an annual "DNA College" to train assistant public defenders about the minimum practice standards for DNA cases. While at OPD, I routinely conducted case reviews with DNA scientists and assistant public defenders of DNA case files from the FBI, the Maryland State Police, Bode Technologies, and county laboratories (Montgomery County, Prince George's County, Baltimore County, Baltimore City, and Anne Arundel County). In 2016, the Maryland Judicial Training Institute invited me to assist with DNA training for judges. Later in 2017, I returned to private practice, focusing on criminal defense, postconviction and appellate litigation in Maryland and the District of Columbia, emphasizing forensic science issues.

4. My prior work at OPD is especially relevant to my review of the matter at hand because I was responsible for overseeing the training and litigation support for assistant public defenders in cases involving DNA evidence. My team trained OPD's assistant public defenders that, at a minimum, in a case involving DNA/forensic science evidence, the duty to investigate requires the attorney to (a) follow the evidence from the crime scene to the testing laboratory (including crime scene processing, the chain of custody, decisions to test, and searches of databases); (b) to know what documentation typically exists related to the testing of evidence (including the range of police reports, crime scene processing reports and documentation; (c) to review case-related communications about evidence testing; (d) to request crime lab documentation related to any forensic testing and report (including the laboratory's case file and standard operating protocols); (e) to identify any database search; and (f) to seek out assistance and litigation support (including expert support) when necessary to understand how to use the discovery to advance the theory of defense. Only when an attorney meets these minimum standards can the attorney make reasonable tactical decisions about challenging inculpatory DNA/forensic evidence and/or introducing exculpatory DNA/forensic evidence.

5. I was also responsible for overseeing the process for OPD's assistance public defenders to request expert services for their indigent clients. Under Maryland's Public Defender Act, OPD is required to provide "necessary expenses of legal representation[.]" MD. CRIM. PROC. CODE ANN. ("CP") § 16-210 (2013). The Act links the determination of "need" to the minimum constitutional standards by looking at factors such as the nature of a case, and the length and complexity of the proceedings. *Id.* at (c)(3). To that end, I developed and published (internally at

OPD), a manual that articulated when an attorney should request expert services.<sup>1</sup> At a minimum, an attorney should request expert services when there is a reasonable probability (1) that an expert would be of material assistance to the defense, and (2) that denial of expert assistance would result in a fundamentally unfair trial. “Assistance” includes preparing defense counsel to effectively investigate a case, obtain discovery, negotiate a plea, challenge the admissibility of evidence, cross-examine the prosecution’s experts, and present defense evidence and expert testimony. This standard does not require a *prima facie* showing of what counsel intends to prove at trial, nor must the factual basis for the defense expert’s opinion be undisputed. Still, there must be more than undeveloped assertions that the requested assistance would be helpful. In summary, counsel for a client may need to make a detailed, although not conclusive, showing to justify the retention of an expert.

6. It is a minimum practice standard for defense counsel’s investigation to obtain discovery of DNA testing of evidence regardless of the prosecuting authority’s decision to offer the DNA testing results as evidence at a hearing or trial. The minimum practice standard for investigating DNA evidence is rooted in the ABA Standards for Criminal Justice, Defense Function, Standard 4-4.1(a), which outlines the general responsibilities of a criminal defendant’s trial counsel regarding the duty to investigate. It states:

Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts

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<sup>1</sup> An indigent defendant’s constitutional right to expert assistance rests primarily on the due process guarantee of fundamental fairness. The leading case is *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985), where the Supreme Court reversed the conviction and death sentence of an indigent defendant after the trial court denied his request for a state-funded psychiatric examination. *Ake* held an indigent defendant whose sanity is seriously in question has a constitutional right of access to a psychiatric expert to prepare an effective defense based on his mental condition. *Id.* at 70. Other constitutional principles also support the appointment of an expert for an indigent defendant, including equal protection and the Sixth Amendment right to effective assistance of counsel. *See Ake*, 470 U.S. at 87 n.13.

relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admission or statements to the defense counsel of facts constituting guilt of the accused's stated desire to plead guilty.

ABA Standard for Criminal Justice, Defense Function, Standard 4-4.1 (3d ed. 1993). Relatedly, the ABA has promulgated a set of Criminal Justice Standards on DNA Evidence in 2007 that requires the pretrial production of DNA discovery. Standard 4.1 (Disclosure) provides:

- (a) The prosecutor should be required, within a specified and reasonable time prior to trial, to make available to the defense the following information and material relating to DNA evidence:
  - (i) laboratory reports as provided in Standard 3.3;
  - (ii) if different from or not contained in any laboratory report, a written description of the substance of the proposed testimony of each expert, the expert's opinion, and the underlying basis of that opinion;
  - (iii) the laboratory case file and case notes;
  - (iv) a curriculum vitae for each testifying expert and for each person involved in the testing;
  - (v) the written material specified in Standard 3.1(a);
  - (vi) reports of all proficiency examinations of each testifying expert and each person involved in the testing, with further information on proficiency testing discoverable on a showing of particularized need;
  - (vii) the chain of custody documents specified in Standard 2.5;
  - (viii) all raw electronic data produced during testing;
  - (ix) reports of laboratory contamination and other laboratory problems affecting testing procedures or results relevant to the evaluation of the procedures and test results obtained in the case and corrective actions taken in response; and
  - (x) a list of collected items that there is reason to believe contained DNA evidence but have been destroyed or lost, or have otherwise become unavailable;
  - (xi) material or information within the prosecutor's possession or control, including laboratory information or material, that would tend to negate the guilt of the defendant or reduce the punishment of the defendant.

ABA Criminal Justice Standards (DNA Evidence), Standard 4.1 (Disclosure).

7. The minimum practice standard for a competent defense counsel to obtain and review discovery applies to Forensic genetic genealogical DNA analysis and search (“FGGS”) and Investigative Genetic Genealogy (“IGG”). FGGS/IGG involves testing biological identification evidence from the crime scene or a targeted person to develop a genomic DNA profile and searching the results in private ancestry databases. The laboratory ranks the search results by centimorgan (“cM”). A centimorgan is a unit of genetic measurement that describes how much DNA and the length of specific segments of DNA are shared between a GED DNA profile in the database and the GED DNA profile from crime scene evidence or a targeted person of interest. FGGS/IGG also involves a genealogical investigation by law enforcement based on the ranked matches found in the database searches to clarify the family tree of interest and potentially identify the branch populated by the source of the crime scene DNA evidence.

8. The scope of discovery provided by the prosecution in the FGGS/IGG cases I have worked on included kinship assessments from searches of genealogy databases and law enforcement’s genealogical investigative findings to clarify a family tree and further target persons of interest. The discovery included information about law enforcement’s genealogical investigations of the top-ranked matches and persons of interest targeted for DNA sampling or further investigation. The discovery also included sample description information; chain of custody information; amplification, fragmentation, and precipitation details; hybridization information; DNA input levels; and consumption of sample details. The prosecuting authorities provided the discovery upon my request.

9. In general, the FGGS/IGG discovery is essential to the defense because, among other reasons, the discovery (a) includes the results of DNA testing of crime scene evidence; (b) provides match information from database searches and potential suspect information from law



enforcement's genealogical investigation; (c) may identify the branch or branches of the family tree of interest that are consistent with the amount of DNA shared between the source of the crime scene DNA and the known person(s) in the database; (d) identifies the public and private DNA databases searched by law enforcement and the ranking of results; (e) reveals the number of third parties who law enforcement may have targeted for covert, consensual, or warrant-based DNA collection; (f) may identify the number of putative perpetrators identified through FGGS/IGG; (g) reveal whether law enforcement collected DNA samples from every putative perpetrator; (h) may describe the manner in which law enforcement collected DNA samples from targeted individuals; and (i) is necessary for the defense to be able to identify and consult with an expert. Therefore, under the minimum standards of practice for defense counsel investigating forensic DNA evidence, it is crucial for a reasonably competent attorney to obtain the FGGS/IGG discovery.

10. I reserve the opportunity to update my opinions based on new information.

I AFFIRM UNDER THE PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

<u>Stephen Mercer</u>	<u>6/22/2023</u>
Stephen B. Mercer	Date

**STEPHEN B. MERCER**  
**RAQUINMERCER LLC**  
50 West Montgomery Ave., Ste. 200  
Rockville, Maryland 20850  
(301) 880-9250; [Steve@RaquinMercer.com](mailto:Steve@RaquinMercer.com)

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**EDUCATION**

**The District of Columbia School of Law**, Washington, D.C.  
Juris Doctor, May 1994. *Magna cum laude*

**Syracuse University**, Syracuse, N.Y.  
B.A. English, May 1984

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**PROFESSIONAL EXPERIENCE**

**RaquinMercer LLC**, Rockville, Maryland (2017 to present)  
Founding partner of criminal defense law firm representing clients in the federal and state courts for Maryland and the District of Columbia at trial, on appeal, and in post-conviction proceedings. A focused area of my practice are cases involving forensic science issues and offering advanced DNA/forensic science consulting services for clients and attorneys.

**Office of the Public Defender**, Baltimore, Maryland (2010-2017)  
Chief Attorney of the Forensics Division/Director, Litigation Support Group. Responsible for development and implementation of training and litigation support services in the area of forensic science disciplines to statewide public defender agency with 550 assistant public defenders. Identified and litigated forensic science issues with special impact on indigent criminal defendants. Supervised forensic staff attorneys and support staff.

**Education, Ethics, and Terminology Interagency Working Group (EET IWG) 2010-2012**  
Maryland State representative to EET IWG. Primary objective of EET IWG was to identify a uniform code of professional responsibility for forensic science practitioners and to consider improvements in undergraduate and graduate degree programs and continuing education programs for forensic science practitioners and the legal community.

**Stephen B. Mercer, Esq., P.C.**, Rockville, MD (2007-2010)  
Represented clients in serious felony criminal trials, appeals, and post-conviction proceedings in federal and state courts in Maryland and the District of Columbia, with a primary focus on cases involving forensic science issues.

**Sandler & Mercer, P.C.**, Rockville, MD (1997-2007)  
Partner in law firm representing clients in the areas of criminal defense, commercial litigation, governmental torts, personal injury, business law, employment law, and family law.

**Stephen B. Mercer**, Silver Spring, MD (1995-1997)  
Solo practitioner representing clients in the areas of misdemeanor criminal trials, commercial litigation, and employment law.

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**ACADEMIC POSITIONS**

**David A. Clarke School of Law at the University of the District of Columbia**, Washington, D.C. (2002-2020)

# STEPHEN B. MERCER

## *CURRICULUM VITAE*

May 28, 2022

PAGE 2 of 2

Adjunct Faculty Member. Developed an advance evidence course to be taught in the Fall, 2010, semester titled *Forensic Science in Civil and Criminal Trial*. Also taught *Death Penalty and the Law*, and a course on the Uniform Commercial Code (negotiable instruments and secured transactions).

**David A. Clarke School of Law at the University of the District of Columbia**, Washington, D.C. (1999-2000)

Adjunct Instructor for legal writing course.

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### **BAR ADMISSIONS**

Maryland State Bar Association, 1995 to present.

District of Columbia Bar Association, 1997 to present.

United States Supreme Court; U.S. Court of Appeals for the Fourth Circuit and D.C. Circuit.

U.S. District Courts of Maryland, D.C., Colorado, and Western District N.Y.

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### **PROFESSIONAL MEMBERSHIPS AND ACTIVITIES**

Education, Ethics, and Terminology (EET) Interagency Working Group (2011).

American Academy of Forensic Science, Jurisprudence section (2010).

Maryland Office of the Public Defender, *DNA College* (instructor) (2008 to 2015).

National Association of Criminal Defense Attorneys (1999 to present).

Maryland Criminal Defense Lawyers Association (1999 to present).

Montgomery County Bar Association (1996 to present).

Prince George's County Bar Association (2017 to present).

Whitman Walker Legal Clinic, Volunteer (1992 to 2004).

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### **PUBLICATIONS**

Stephen B. Mercer, Jessica Gabel, *Shadow Dwellers, The Under-regulated World of State and Local DNA Databanks*, NYU ANNUAL SURVEY OF AMERICAN LAW, 69 N.Y.U. Ann. Surv. Am. L. 639 (2014).

*A Preventable Tragedy?*, THE WASHINGTON POST, Op-Ed, July 2008, co-author.

*Maryland's DNA Databank*, THE MARYLAND BAR JOURNAL, Nov./Dec. (2004), co-author.

*Viatical Settlements*, AIDS PRACTICE MANUAL (The District of Columbia Bar Public Services Corporation), co-author 1996 to 2000.

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