IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

PAUL EUGENE ROBINSON,

Defendant and Appellant.

S158528

Third Appellate District, C044703
Sacramento County Superior Court No. 00F06871
The Honorable Peter Mering, Judge

RESPONDENT'S BRIEF ON THE MERITS

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

MICHAEL P. FARRELL
Senior Assistant Attorney General

STEPHANIE A. MITCHELL
Deputy Attorney General

DORIS A. CALANDRA
Deputy Attorney General

ENID A. CAMPS
Deputy Attorney General
State Bar No. 113183

455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5976
Fax: (415) 703-1234
Email: Enid.Camps@doj.ca.gov

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Constitutional Provisions

Statutes

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Other Authorities

TABLE OF AUTHORITIES (continued)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **PAUL EUGENE ROBINSON,** Defendant and Appellant.	S158528

ISSUES ON REVIEW

(1) Does the issuance of a "John Doe" complaint and arrest warrant timely commence a criminal action and thereby satisfy the statute of limitations?

(2) Does an unknown suspect's DNA profile satisfy the particularity requirement for an arrest warrant?

(3) What remedy is there, if any, for the unlawful collection of genetic material under the DNA and Forensic Identification Act Data Base and Data Bank Act of 1998 (Pen. Code, § 295 et seq.)?

STATEMENT OF THE CASE

On August 22, 2000, the Sacramento County District Attorney filed complaint No. 00F06871 against John Doe, an unknown male, described by a 13-locus DNA profile "with said Genetic Profile being unique, occurring in approximately 1 in sextillion of the Caucasian population, 1 in 650 quadrillion of the African American population, 1 in 420 sextillion of the Hispanic population." The complaint alleged one count of forcible oral copulation (Pen. Code, § 288a, subd. (c)(2)), two counts of penetration with a foreign object (Pen. Code, § 289, subd. (a)(1)), and two counts of rape (Pen. Code, § 261,

subd. (a)(2)) for crimes committed against Deborah L. on August 25, 1994. Use of and being armed with a deadly and dangerous weapon, a knife, was alleged as to each count. (Pen. Code, §§ 12022, subd. (b)(1), 12022.3, subds. (a) & (b).) (1 CT 20-30.)

Upon the filing of the complaint and a finding of probable cause, Magistrate Jane Ure issued an arrest warrant for John Doe, described in the complaint and the accompanying affidavit by his 13-locus DNA profile, with random match probabilities totaling in the quadrillions to sextillions. (1 ACT 1-41.)[1/]

On September 15, 2000, appellant Paul Eugene Robinson was arrested on the John Doe warrant. (1 CT 32-36.) The arrest occurred after a state DNA database program "cold hit" matched the DNA profile from the Deborah L. sexual assault to appellant's DNA identification profile described in the complaint and arrest warrant. A DNA sample had been collected from appellant on March 2, 1999, while appellant was in custody at Rio Cosumnes Correction Center ("RCCC") awaiting transfer to state prison after a parole revocation related to a July 8, 1996, conviction for nine counts of receiving stolen property and two counts of felony first degree burglary, for which appellant served a term of imprisonment. (1RT 157, 183-184, 294; 2RT 472-473; 5 CT 1234-1237, 1303-1317.) Appellant was on a three-year parole term commencing October 11, 1998 (1 RT 157; 5 CT 1234, 1304) for those felony crimes when he pled guilty to a November 18, 1998, misdemeanor prowling offense (Pen. Code, § 647h) on December 2, 1998, and had a parole hold placed on him. (5 CT 1235-1236, 1306.) At the time RCCC officers collected appellant's DNA database sample, however, felony burglary was not yet listed as a qualifying offense requiring DNA sample collection. Appellant's DNA sample was mistakenly thought necessary based upon other prior convictions

---

1. "ACT" refers to the augmented clerk's transcript.

for spousal abuse (a misdemeanor) and for a felony grand theft committed as a juvenile. (Appellant had been arrested for each of these offenses on other felony charges, i.e., spousal abuse/battery and robbery and assault was a deadly weapon.) (5 CT 1230-1232.)

On September 19, 2000, the People filed an amended complaint in which appellant Paul Eugene Robinson's name was substituted for that of John Doe. (1 CT 32-36.)

On November 20, 2000, appellant filed a motion to dismiss for lack of subject matter jurisdiction alleging the statute of limitations had expired prior to the filing of the amended complaint naming the appellant. (1 CT 39-58, 61-81, 83-91, 100-121, 126-141; 1 RT 88.)

On February 23, 2001, following a hearing, the court denied appellant's motion and found the warrant valid and the statute of limitations satisfied. (1 RT 128-137, 142.) The district attorney also had sought to establish that appellant's active parole status provided an alternative basis to arrest appellant after the DNA cold hit, but the Court did not permit the district attorney to pursue proof of this matter. (1 RT 80-81.)

On August 20, 2001, the Court of Appeal, Third Appellate District, denied appellant's March 30, 2001, Petition for Writ of Prohibition on the Motion to Dismiss for Lack of Jurisdiction. (1 CT 4.)

By a 13-count information filed August 23, 2002, the Sacramento County District Attorney charged appellant for sexual assault crimes committed against Deborah L.: one count of forcible oral copulation (count 1; Pen. Code, § 288a, subd. (c)(2)), two counts of penetration with a foreign object (counts 2 & 3; Pen. Code, § 289, subd. (a)(1)), and two counts of rape (counts 4 & 5; Pen. Code, § 261, subd. (a)(2)). Use of and being armed with a deadly and dangerous weapon, a knife, was alleged as to each count. (Pen. Code, §§ 12022, subd. (b)(1), 12022.3, subd. (a) & (b).) (1 CT 197-204.)

The information also alleged eight counts as to an additional victim, Heather O., consisting of one count of burglary (count 6; Pen. Code, § 459), three counts of penetration with a foreign object (counts 7-9; Pen. Code, § 289, subd. (a)(1)), two counts of forcible oral copulation (counts 10 & 11; Pen. Code, § 288a, subd. (c)(2)), one count of rape (count 12; Pen. Code, § 261 (a)(2)), and one count of sexual battery (count 13; Pen. Code, § 243.4, subd. (a)). The amended information also alleged 15 prior conviction allegations (Pen. Code, §§ 667, subd. (a), 667, subds. (b)-(i), 667.5, subd. (b), 1170.12). (1 CT 197-204.)

On December 2, a 68-day jury trial commenced. (1 CT 1-18.) The jury convicted appellant of the counts 1 through 5 (Deborah L.) sexual assault crimes and found true the special allegations attached to those counts, but it hung on the remaining counts, the offenses against Heather O., with a mistrial declared. (4 CT 1063-1067, 1086-1087; 20 RT 5837-5843, 5886.) The prior conviction allegations also were struck because they constituted crimes committed, after, not before, the commission of the Deborah L. offense. (*Robinson*, Typed Opn. pp. 2-3, fn.3.)

The probation report spelled out appellant's long criminal history as a juvenile and adult. Finding aggravating facts including appellant's recidivism and danger to society, the court sentenced appellant consecutively to the upper terms for each count and on the enhancements, imposing a total term of 65 years. (See 5 CT 1218-1259, 1260-1261; 1303-1395; 20 RT 5912-5921.)

On October 26, 2007, the Third Appellate District issued its opinion in *People v. Robinson*, No. C044703. Appellant's timely petition for review was filed on November 29, 2007.

On February 13, 2008, this Court granted review on the three issues

set forth above.[2/]

STATEMENT OF FACTS

Pre-Trial Hearing Facts

Deborah L. Crime And DNA Testing

In the early morning hours of August 25, 1994, Deborah L. was sexually assaulted by an unknown assailant who entered her bedroom and threatened her with a knife. Although Deborah L. immediately reported the sexual assault and police collected evidence relating to the attack, the assailant was not apprehended. (1 ACT, People's Exhs. 14-40.) Sacramento County police interviewed the victim and generated report No. 94-70626. (1 RT 34; 1 ACT People's Exh. 5, 14-40.) Detective Peter Willover, a 35-year veteran of the police force, was lead investigator. (1 RT 74-75.)

Deborah L. described her assailant as a black male adult but said at a subsequent interview he could be of Hispanic or African American descent. She said her assailant had a "medium black complexion," weighed approximately 180 pounds, and was about five-foot eight inches tall. (1 ACT 14-18; 1 RT 92.) She said he wore gloves and a hooded sweatshirt. He threatened to kill her, put a pillow over her head, and rubbed semen on her stomach after sexually assaulting her. (1 ACT, Exh. 5, pp. 14-16.)

In October 1994, the Sacramento County Crime Lab found the presence of semen on the victim's vaginal swabs, underpants, and a bed sheet. (1 ACT, 14-18; 1 RT 92.) DNA Analyst Jill Spriggs later performed PCR-STR DNA testing on a sperm fraction from the victim's vaginal swab and obtained a 13-

---

2. The Court also granted review on a fourth issue related to statistical evidence associated with DNA database cold hits, with briefing deferred pending the opinion in *People v. Nelson*, S147051, now decided. (See *People v. Nelson* (2008) 43 Cal.4th 1242.)

locus DNA profile. (1 ACT 17-18.) On August 21, 2000, Spriggs informed Detective Willover of the DNA testing and profile and of the probability of a random match with that same profile in the Caucasian (one in 21 sextillion), African American (one in 650 quadrillion), and Hispanic (one in 420 sextillion) populations. (1 ACT14-18; 1 RT 92.)

Based upon these facts and circumstances, and using the DNA profile generated by Spriggs from the crime scene evidence, Detective Willover prepared an arrest warrant for the perpetrator's arrest. In his supporting affidavit dated August 22, 2000, Detective Willover stated he had probable cause to believe that the sexual assault crimes against Deborah L. were committed by John Doe, an unknown male with Short Tandem Repeat (STR) Deoxyribonucleic Acid (DNA) Profile at the following Genetic Locations, using Cofiler and Profiler Plus Polymerase Chain Reaction (PCR) amplifications kits: D3S1358 (15,15), Dl68539 (9,10), THO1 (7,7), TPOX (6,9), CSFIPO (10,11), D7S820 (8,l1), vWa (18,19), FGA (22,24), D8S1179 (12,15), D21S11 (28,28), Dl8S51 (20,20), D5S818 (8,13), D13S317 (10,l1)." (1 ACT, pp.14-18; 1 RT 92.) In other words, the affidavit contained a summary of the police report and the Crime Lab's DNA testing results. (1 RT 34; 1 ACT 19-40.) Detective Willover reviewed and verified the DNA profile information contained in the affidavit with Criminalist Spriggs. (1 RT 76.) Detective Willover testified he used the DNA profile because it "was a definite, identifiable description of the person responsible for the crime" particularly given the random match probability statistical estimates associated with the evidence profile. (1 RT 101, 112.)

The Complaint And DNA Arrest Warrant

Subsequently, on August 22, 2000, shortly before expiration of the six-year statute of limitations, the Sacramento County District Attorney filed

complaint No. 00F06871 against John Doe, an unknown male, described by the 13-locus DNA profile obtained by Criminalist Spriggs when she analyzed the Deborah L. vaginal swab evidence. The complaint alleged one count of forcible oral copulation (Pen. Code, § 288a, subd. (c)(2)), two counts of penetration with a foreign object (Pen. Code, § 289, subd. (a)(1)), and two counts of rape (Pen. Code, § 261, subd. (a)(2)). Use of and arming with a deadly and dangerous weapon, a knife, was alleged as to each count. (Pen. Code, §§ 12022, subd. (b)(1), 12022.3, subds. (a) & (b).) (1 CT 20-36.)

Thereafter, on August 22, 2000, upon a finding of probable cause Sacramento County Magistrate Jane Ure signed the John Doe warrant that used the DNA profile generated from the Deborah L. sexual assault as the descriptive identification of the perpetrator sought for arrest. (1 RT 10-12, 26, 32, 99; see also 1 ACT 7-46.)

Deputy District Attorney ("DDA") Laurie Earl, who assisted in preparing the DNA warrant in this case, handled it as a "walk through" warrant. A "walk-through" warrant is one that is hand-carried to the magistrate for approval and issuance, and after a magistrate reviews and signs it, is hand-carried over to the county courthouse for immediate processing. (1 RT 3-4, 10.) DDA Earl and Detective Willover presented the warrant to Magistrate Ure. (1 RT 11-12, 76.) DDA Earl observed Judge Ure review all of the documents. (1 RT 11-12.) DDA Earl personally took the warrant to the main courthouse where the warrant processing unit is and gave it to a clerk who input it and activated it into the system on August 22, 2000. (1 RT 12, 55, 65.) Detective Willover immediately notified the police department's warrant section of the John Doe warrant's issuance. (1 RT 77.)

The arrest warrant included the warrant document, the complaint that DDA Earl drafted and a declaration that she signed, the affidavit signed by Sacramento Police Detective Peter Willover to support the probable cause for

the warrant, and a motion to request the sealing of the affidavit. (1 RT 3-11, 29, 34-35, 40, 73-76; 1 CT 30; see also 1 ACT 7-46.) All of these documents were held together by a jumbo paper clip. (1 RT 11.)

The face of the felony arrest warrant itself described the person to be arrested as "John Doe; male black, residence address, unknown, city Sacramento, zip 100000, X-reference number 3713514" and it had the warrant number on it. (1 RT 26-27.) Because of computer system limitations in terms of numbers of characters accepted, it was not possible to enter the DNA profile itself on the face of the warrant. (1 RT 29, 67-69.) However, the DNA profile, the complaint, the affidavit, and DDA Earl's signed declaration each listed the DNA profile. (1 RT 11, 14, 26.)

Sacramento Police Department clerk Gaylene Pel, who works in the Sacramento County Administrative Warrants Division responsible for "processing warrants, validating numbers, and targeting them for service," explained that although the DNA genetic profile identification information would not fit on the warrant summary sheet, pertinent information could be input into the computer's "remarks" section. (1 RT 38-39, 49, 51-52, 66-69.)

In this case, DDA Earl entered in the computer system's "Remarks" information related to the descriptive DNA profile: "Suspect identifiable by genetic profile in Sacramento Police Department report 94-70626. Contact SPD Detective Pete Willover, 264-7875 or Sacramento District Attorney's Adult Sexual Assault Unit, 874-6557." (1 RT 28-29, 32, 58-59, 64-65.)

As part of the standard warrant preparation, DDA Earl also created a unique cross-reference number ("x-ref") for the warrant and complaint. (1 RT 9-10, 16-17.) An "x-ref" number is an "identifying number" that encompasses all the data and information pertaining to a person, including warrants and reports. Warrants, including arrest warrants, and complaints in Sacramento County must contain an x-ref number to issue and activate the warrant for the

individual identified. (1 RT 9, 41-44.) Identifying information, which may include a name, date of birth, and physical description, is input before the x-ref number is generated. (1 RT 17-18.)

The complaint and the warrant each listed the same x-ref number and docket number. (1 RT 11, 15-16, 34-35, 51-53, 102-103.) If a detective or staff person typed the arrest warrant number in the computer, it "would generate the name John Doe with the cross-reference number, with the complaint number, and with the SPD report number." If a detective or staff person typed the case docket number in the computer, it would produce the "cross-reference number." If the cross-reference number were input, it would cross-reference the SPD report number and the warrant number, and it would indicate that there are "remarks" related to the particular individual who is subject to the warrant. (1 RT 34-35, 52-54.)

After looking at the "Remarks section," an officer would know to contact either the district attorney's office or Detective Willover for more information before he could make an arrest. (1 RT 36-37.)

Sacramento Police Department clerk Pel explained that Sacramento County has a Warrants Radio Unit that confirms warrants over the air and also over the telephone for officers and agencies. (1 RT 39, 59.) The Warrants Radio Unit can pull information up from the computer "in a matter of seconds" when they get calls, and it and the Records section operate 24 hours a day. (1 RT 55-56, 64, 82.)

Although once a warrant is activated in the county it is standard procedure to enter it into the state and nationwide wanted persons system, the warrant in this case was not put into the state or nationwide system or assigned for immediate execution because there was not enough required information on it, such as a date of birth. (1 RT 50-52, 60-61.)

If a patrol officer phoned or contacted Pel with respect to a John Doe,

male black and wanted to book an individual on that warrant, she would read verbatim to him/her the information contained in the "remarks" section which stated that suspect was identifiable by genetic profile, followed by the case SPD number and contact information including phone numbers. (1 RT 58-59, 64-65.) It is the practice in the Warrants Division to read the information under "remarks." (1 RT 70, 83-84.) Ms. Pel also would refer an inquiring officer to Records or the listed detective; Records would be able to get the referenced Sacramento Police Department report or read it to the officer. (1 RT 70, 83-85.) Pel also would be able to make the phone connection for the officer in the field to Detective Willover or DDA Earl. (1 RT 70-71.)

Both DDA Earl and Detective Willover agreed that no one would arrest a person on a DNA warrant without his/her first being advised by the crime lab that it had identified a person who had a DNA profile that matched the case DNA evidence profile. (1 RT 33, 83-85, 106-110.) Detective Willover stated that if an officer in the field contacted him after running the number and reading the remarks section, Detective Willover would have explained that there would be no one to arrest until there is a DNA hit. (1 RT 104-107.) Based upon the information in the warrant and as accessible by computer screen, DDA Earl said that an arresting officer was authorized to arrest the person with the DNA profile "that is listed on the affidavit, the complaint, the declaration and included in the Remarks column of the x-reference number." (1 RT 23, 32-33.)

Detective Willover maintained a copy of the police report and case investigation records in a binder that stayed on his desk for over six years. (1 RT 74.) Detective Willover had a pager and provided his home phone number to communications personnel so that he could be contacted if needed. (1 RT 75, 111.) His working copy of the report contained the DNA testing results for the case. (1 RT 77.) There was a copy of Criminalist Sprigg's DNA report in Detective Willover's report. (1 RT 77.)

The DNA Cold Hit And Appellant's Arrest

On September 15, 2000, less than one month after the John Doe, DNA Warrant was issued, Detective Willover received a message from the Department of Justice DNA Laboratory ("DOJ Lab") about a cold hit in the case and was informed by both the Sacramento County District Attorney's office and the DOJ Lab that the sexual assault evidence profile from the Deborah L. case was matched by the state's DNA Databank Program to appellant, Paul Eugene Robinson. (1 RT 78-79, 106-107.)

Detective Willover ran a records check on appellant and determined that he was currently out of custody and on active parole and that there were other warrants for appellant's arrest. (1 RT 80-81.) At Detective Willover's direction, appellant thereafter was arrested on September 15, 2000. Detective Willover booked appellant into county jail. (1 RT 81.)

Trial Facts

In addition to the charges involving Deborah L., *supra*, appellant was charged with the sexual assault of Heather O.

Heather O. Case: February 18, 2000

At approximately 6:00 a.m. on February 18, 2000, Heather O. was taking a shower in her apartment located at the Point West Apartment complex near Cal Expo when she was confronted by a Black male in her hallway. She described him as being 5'6" to 5'8", stocky build, approximately160 pounds and 20-25 years old. The assailant told the victim to "shut up," called her a "bitch," and threatened that he had a gun. (12 RT 3401-3404; 3418-3421, 3431, 3641.)

The man sexually assaulted Heather O. He told her he had been watching her and that he knew she left for work at 6:10 a.m. (12 RT 3422-

3427, 3431.) He asked if she got a notice about a Peeping Tom and admitted "He was that guy." (12 RT 3429.) When the police responded, they noticed that Heather O.'s bedroom phone had been unplugged and the screen to the dining room window was gone. (13 RT 3736-3737.)

Prior Uncharged Bad Acts

Prior bad acts also were alleged for the October 20, 1993, sexual assaults of 19-year-old Allana S. (11 RT 3006-3007, 3012-3013); the January 1994 sexual assault of 24-year-old Heather M. (13 RT 3650-3652); the May 6, 1994, sexual assaults of 24-year-old Paula F. (11 RT 3100-3106); the December 7, 1994, sexual assaults of 23-year-old Terry B. (13 RT 3628-3633); and the November 17, 1998, prowling conviction involving 24-year-old Jennifer M. (11RT 3186-3190).[3/]

---

3. Appellant's brief aptly acknowledges the timeline for these uncharged crimes as well as for appellant's incarceration for other crimes. (See AOB 7-16): "The parties stipulated that from November 1995 to October 1998, appellant was in custody, away from the Sacramento area. (RT 10, pp. 2894-2896.) ¶ *What the jury did not hear was that on July 8, 1996, appellant was convicted of several felony offenses and subsequently was incarcerated.* (C.T.2, pp. 1233-1234.) In October of 1998 [appellant] was released on parole for these offenses. . . . The parties further stipulated that from November 18, 1998 to July 1999 appellant again was in custody and away from the Sacramento area (R.T. 10, pp. 2894-2896.) ¶ What the jury did not hear was that on December 2, 1998, appellant pled no contest to, and was convicted of, a misdemeanor [prowling]. He was sentenced to a 60-day county jail term for that offense, *which violated his parole; [Appellant] was sentenced to serve seven months for the parole violation.* (C.T. 5, pp. 1236, 1237; R.T. 2, pp. 472-473.) On March 2, 1999, while appellant was incarcerated in county jail on this parole violation, a blood sample was collected from him for inclusion in the State [DNA] databank. (CT 2, pp. 547, 548; C.T.3, pp. 605, 606,;R.T. 1, p. 184.)" (AOB 12-14, italics added.)

Appellant's 1996 felony convictions included convictions for first degree burglary. (5 CT 1306-1308.) Thus, at the time appellant's DNA sample mistakenly was taken based upon a prior misdemeanor spousal abuse, and then

DNA evidence linked appellant to the Allana S. and Paula F. cases. (17 RT 4862, 4888, 4898.) Criminalist Mark Eastman who testified as an expert in forensic DNA analysis, including statistical interpretation, tested sexual assault evidence from both the Allana S. case and Paula F. cases. Using both the Profiler and the Cofiler kits to perform DNA testing, he found the sexual assault evidence tested in the Allana S. and Paula F. cases each matched appellant's known reference sample at 13 loci. (17 RT 4862-4899.) Criminalist Eastman testified that the likelihood of a random match with the sexual assault vaginal swab evidence sample in the Allana S. case was one in sextillion in the Caucasian population, one in 650 quadrillion in the African American population, and one in 33 sextillion in the Hispanic population. (17 RT 4882, 4889, 4891.) Although appellant's known reference sample matched the Paula F. sexual assault sample at 13 loci, Criminalist Eastman more conservatively estimated statistics associated with that sexual assault sample due to a low amplification of the sample at one locus: he estimated the likelihood of a random match with the Paula F. sexual assault sample as one in 200 quintillion in the Caucasian population, one in 15 quadrillion in the African American population, and one in 2 sextillion in the Hispanic population. (17 RT 4892-4899.)

Ed Salas, who participated in a number of crimes with appellant, also implicated appellant in a series of burglaries and sexual assaults that occurred in the early to mid-1990's in Sacramento apartment complexes. Salas admitted he assisted appellant by driving him to the Village Apartment complex at 1100 Howe, where appellant would enter women's apartments at early morning

---

verified based upon a juvenile offense, appellant also had *a felony first degree burglary conviction of record*. Ten months after appellant's March 2, 1999, sample collection, and while appellant was in custody on a parole hold, the State's DNA database program expanded to include first degree burglary as an offense qualifying for sample collection. (See Argument III (H), *infra*.)

hours. (12 RT 3518-3523.) Sexual assault victims Terry B. and Heather M. lived at the Village Apartments. (13 RT 3628-3633, 13 RT 3650-3652.) At one time appellant lived at the Village Apartments. (12 RT 3530.) Appellant sometimes returned with purses, jewelry, stereos and credit cards. (12 RT 3521-3522.) Appellant also told Salas about some things that happened at apartments around Cal Expo where victim Alanna S. lived. (11 RT 3006-3007, 3012-3013, 3572.) Salas further reported that appellant told him that he "fucked" one "bad bitch" that gave him a condom. (12 RT 3529.) Salas also had told the police about incidents at the Point West Place. (12 RT 3575.) Victim Heather O.'s apartment was located at the Point West Apartment. (12 RT 3401-3404, 3418-3421, 3431, 3641.)

Criminalist Easton tested a DNA reference sample from Salas and excluded Salas as a contributor to the DNA sexual assault evidence from both the Allana S. and Paula F. cases. (17 RT 4900.) He also tested DNA samples from appellant's two siblings and excluded them as possible contributors to the sexual assault samples tested and matched to appellant. (17 RT 4905.)

DNA Evidence

The DNA evidence in the case was contested at trial and highlighted by the defense at closing argument. (19 RT 5646-5679.) A stipulation (17RT 4930-4931, 4941) regarding appellant's sample in the State's DNA database was read to the jury:

> Before September 11th of the year 2000, Mr. Robinson's blood was collected, his DNA was tested, and his name and 13-locus profile were entered into a database maintained by the California Department of Justice. This database is commonly referred to as an offender database. ¶ There are a number of ways one can be placed into this database. The defendant Mr. Robinson was placed into the database based upon a juvenile offense which had occurred a number of years earlier. It is not relevant to these proceedings what the nature of that offense was. However, in order to avoid unfair speculation, this offense was not a

sexual offense, nor was it a burglary, nor was it a violent offense.

In September of 2000, at the time the California Department of Justice ran a database search that found a match between appellant's known reference sample and the Deborah L. crime scene sexual assault evidence, the database contained 20,421 offender profiles. (17 RT 4932-4937.) No offender DNA profile, other than appellant's, matched the Deborah L. crime scene sexual assault evidence. (17 RT 4936-4937.) As of the date of trial testimony in April 2003, the database contained approximately 200,000 offender profiles. Although the Deborah L. sexual assault crime scene evidence profile remained in the database at all times and was searched once per week against all offender profiles in the database, no offender sample other than appellant's was found to match the crime scene sexual assault evidence. (17 RT 4936-4940, 4945.)

At trial, DNA analysts from Sacramento County and the Department of Justice testified for the prosecution. Dr. Laurence Mueller testified for the defense.

Prosecution Witnesses

In August 2000, DNA analyst Jill Spriggs performed the DNA testing on Deborah L.'s evidence sample in the Sacramento County Crime Laboratory. (15 RT 4359.) Spriggs testified that as a result of DNA testing in this case, appellant could not be eliminated as the source of the semen sample collected from Deborah L. There was a 13-locus match between appellant's sample and the vaginal swab sample in the Deborah L. case. Spriggs had never heard of two people matching at 13 loci by coincidence or bad luck. She confirmed that when crime scene sample profiles have been searched at 13 loci in the national DNA Index System containing over one million profiles, there has never been a reported case of two different people matching a DNA evidence sample at 13 loci. (15 RT 4240-4243, 4256-4257, 4277, 4341, 4351-4353.)

She further testified that the probability of a random match with the Deborah L. crime scene sample was one in 650 quadrillion in the African American population, one in six sextillion for the Caucasian population, and one in 33 sextillion in the Hispanic population. (15 RT 4240-4243, 4256-4257, 4277.)

Jeannette Wallin, Senior Criminalist at the DOJ Lab, testified as an expert in DNA analysis, including the statistics. (15 RT 4409, 4451, 4480.) Wallin testified that in January and February 2001 the DOJ Lab also had received a request from the Sacramento Crime Lab to compare the Heather O. crime scene evidence samples with the Deborah L. crime scene evidence and appellant's reference sample. (15 RT 4489-4490, 4619.) Wallin testified that DOJ tests performed in 2001 and 2002 showed that appellant could not be eliminated as the donor of the "low level" DNA profile obtained from the Heather O. vaginal swab and underwear samples and that the Heather O. evidence sample, profiles were consistent with the sperm donor profile from the Deborah L. case and with appellant's known reference sample. (16 RT 4501-4503, 4664, 4795-4798.) Wallin estimated the probability of a random match between appellant's reference sample and the Heather O. underwear sample as one in 48 million Caucasians, one in 180,000 African Americans, and one in 93 million Hispanics. (16 RT 4535, 4632-4633.)

The jury apparently submitted numerous questions to the judge about the accuracy of DNA testing to which the witnesses responded. (15 RT 4352-4361, 4364; 17 RT 4802-4817.)

Defense Witness

The defense called Dr. Laurence Mueller, Professor of Ecology and Evolutionary Biology at the University of California, Irvine. (17 RT 4961-4970.) Dr. Mueller has never performed any DNA testing himself or worked

in a lab that does DNA testing, but he has studied the fruit fly. (17 RT 4988-5004, 5060-5062.)

Dr. Mueller explained the concept of a random match probability between samples and the use of the product rule. (17 RT 4988-5004.) He opined that "there is no way to say exactly how many people in any size population would have [a] . . . particular profile" and that "the statistic that's calculated for unrelated people will be different if you try to answer the same question for a relative." (17 RT 4991-4992). He said that the random match probability statistic focuses "on a chance a single person chosen from a random population will have that profile" but that "the statistic is clearly not intended to address the chance of matches in large groups of people." (17 RT 4997-4999.)

Dr. Mueller opined that statistics are different when a suspect is identified by a "cold hit," i.e., when a "profile gets compared to a database which is some collection of profiles from known people and one finds a match between the evidence profile and a person in this database." (17 RT 5052-5053.) In Mueller's opinion "the meaning and kind of statistic" in a cold hit case "is really different because we have taken a large group and found a match, we haven't taken a single person and found a match" and "that certainly as you look at larger groups of people the chance of coincidentally finding a match increases." (17 RT 5053-5055.)

With respect to databases used in calculating DNA match probability statistics, Dr. Mueller opined the FBI's population databases (i.e. the databases used in this case) are not random samples even though a "cornerstone of creating databases [used in product rule calculations] is that every member of the population you're interested in should be equally likely to be a member of your sample" so that "you guarantee that the sample ultimately will be representative of the whole population." (17 RT 5005-5008.) Dr. Mueller

further explained that "with two hundred people you can probably do a pretty good job estimating allele frequencies if we consider this a random sample," but that the tough problem to address with small, two-hundred person databases, such as the FBI and forensic labs use, is "the ability to look at independence in and between genetic markers." (17 RT 5015-5016, 5025-5026, 5217.) Dr. Mueller testified that a large population database would better enable scientists to test the assumptions underlying application of the product rule in DNA statistical estimates. (17 RT 5004-5006, 5015-5017.)

Dr. Mueller specifically rejected the notion that the large convicted offender databases could be examined to test product rule assumptions, opining that such databases would "not be a terribly useful database to look at those particular issues." (17 RT 5016-5017.) Dr. Mueller explained that while convicted offender databases "can be used as a tool for finding potential suspects," he did not think these databases can be used "as a tool for estimating frequencies." (17 RT 5057.) In Dr. Mueller's opinion a convicted offender database "automatically violates your assumption of randomness because it is not a sample of any population, and secondly, [because] we have multiple racial groups mixed together, they are not separated out according to racial group and we know that will also create problems." (17 RT 5015-5017, 5057.)

Dr. Mueller testified nonetheless that reports such as Arizona database match at nine of 13 loci between two individuals highlight the need to be cautious about extreme statistics, although Dr. Mueller was not aware whether the two persons from the Arizona database were related. (17 RT 5048-5050.) Dr. Mueller stated that his conclusions about the reliability of using the product rule in DNA cases comes primarily from his own statistical analysis of many United States databases, however, and in his opinion, "knowledge of the extent to which unrelated people might share . . . profiles is still at a rudimentary stage." (17 RT 5052-5053.)

It was Dr. Mueller's opinion that a match between DNA samples could be coincidental or just bad luck and that statistics are meaningless if there is human error in sample testing. (17 RT 4984-4987.)

On cross-examination, Dr. Mueller admitted that the National Research Council in its 1996 publication ("NRC II") generally rejects his views, endorses use of the product rule for estimating DNA random match probabilities, and has found appropriate the databases used for DNA population statistical estimates. (17 RT 5151, 5175-5177, 5203.) Dr. Mueller also acknowledged the NRC II had looked at a database of several thousand individuals (6,200 Caucasians, 4,300 African Americans, 1,200 Hispanics) and in performing 58 million profile (pair-wise) comparisons, found only two matches at four loci and no matches at five or six. (18 RT 5189-5190, 5293.) Dr. Mueller acknowledged he maintained his own website of about 20,000 DNA profiles (3,900 at the full 13-loci) and that when he searched his website to see if anyone matched appellant's profile, he found no matches at 13, 12, 11, 10, 9, 8 ,7, or 6 loci, although there was one 5 locus match to appellant's profile. (18 RT 5261-5266.) Dr. Mueller estimated that he has testified about 150 times in DNA cases. He acknowledged that in 15 percent of his professional time he has made on the order of $750,000 testifying for the defense in DNA cases from 1989 to 2002 and that he keeps all but one to two percent of this money, unlike Dr. Chakraborty, a renowned human population geneticist, who gives all money back to the university for research purposes. (18 RT 5146-5150, 5267-5271.)

SUMMARY OF ARGUMENT

The trial court properly denied appellant's claim that the court lacked personal jurisdiction over him due to an allegedly invalid and therefore untimely DNA John Doe arrest warrant. The criminal action was validly commenced because appellant was adequately described by his forensic DNA

identification profile in the complaint and warrant signed by the magistrate during the statutory period and because the warrant, as entered into the county system, would not permit the arrest of anyone not matching that DNA profile.

Authority for DNA Doe warrants does not entail conflicting statutes, nor does it offend state or federal constitutional principles. Upon a thorough evaluation of the facts and law, the trial court properly concluded: (1) The affidavit (including the DNA profile and accompanying DNA random match probability estimates) was incorporated into the arrest warrant; (2) Sacramento County Detective Willover had personal knowledge of the information contained in the affidavit and would execute the warrant only upon a DNA database match with the perpetrator's profile; (3) The DNA profile provided a sufficient legal description of the person to be arrested; and (4) The warrant otherwise met the Penal Code section 804, subdivision (d), and constitutional particularity requirements and, therefore, validly commenced the prosecution. (1 RT 133-135.) Because DNA evidence identifies individuals within a high probability of statistical certainty its use ensures that only the correct person is arrested. As the Court of Appeal held: "[A]n arrest warrant, which describes the person to be arrested by his or her DNA profile, more than satisfies the reasonable certainty standard because DNA is the most accurate and reliable means of identifying an individual presently available to law enforcement." (*People v. Robinson* (C044703) ["*Robinson*"], Typed Opn. p. 15.)

Moreover, despite appellant's contentions otherwise, the notion of stale claims is virtually inapplicable to reliable DNA evidence. The Legislature already has evidenced its intention that DNA evidence be used for identification purposes in criminal cases. (See Pen. Code, § 295 et. seq. [State's forensic DNA Database program].) In accordance with the recognized robustness of DNA evidence over time, the Legislature also specifically has enacted laws that show its approval of DNA as a basis for both extending the time within which

sexual assault offenses can be prosecuted [Pen. Code, § 803, subd. (g) [exception to statute of limitation in sexual assault cases where DNA evidence timely tested] and reconsidering old convictions (Pen. Code, § 1405 [postconviction DNA testing].) Section 804 subdivision (d) should be interpreted consistently with these enactments, in addition to its own broad mandate that encourages a practical, common sense contemporary approach, and defers to judicial expertise in determining whether an arrest warrant meets reasonable particularity requirements. Case law from other jurisdictions has upheld the use of DNA Doe warrants to commence criminal prosecutions and rejected arguments similar to the ones raised by appellant. (See *State v. Dabney* (Wis.App. 2003) 663 N.W. 2d 366 ("*Dabney*"); *State v. Danley* (Ohio Ct.Com.Pleas 2006) 853 N.E.2d 1224 ("*Danley*"); see also *State v. Davis* (Wis.App. 2005) 698 N.W.2d 823). Finally, an unnecessarily rigid interpretation of the particularity requirement for arrest warrants would limit the use of DNA Databases in crime solving, and create the legal anomaly that a DNA identification profile which is sufficient to sustain a conviction beyond a reasonable doubt, would be insufficient to commence a criminal based upon probable cause against the same defendant.

With respect to the Court's third issue on review, it is significant that the California Legislature already has anticipated and addressed the subject of mistaken DNA database sample collection from criminal offenders. In Penal Code sections 297 subdivisions (f) and (g), and Penal Code section 298 subd. (c) (3), the Legislature expressly has provided that mistaken sample collection should not invalidate an arrest, adjudication or conviction. In Penal Code section 298, subdivisions (c) (1) and (c) (2), the Legislature insulated from liability, agencies and personnel handling sample collection and data administration. The sole remedy for mistaken sample collection should be the one provided by the Legislature in Penal Code section 299: expungement of the

sample—as occurred in this case. This remedy is commensurate with the harm caused and is appropriate because there is no underlying Fourth Amendment violation committed in taking DNA database samples from convicted offenders while they are in custody. Appellant was in custody on a parole hold, was subject to a valid search and seizure condition, and had a prior felony first degree burglary conviction of record when his DNA sample was collected. It was not until ten months after appellant's sample was collected that first degree burglary was added to California's statutory list of offenses qualifying for DNA database sample collection. Even if appellant's 1999 DNA sample collection is considered a violation of the then-existing state statutory list mandating DNA sample collection for certain offenses, suppression of evidence is not a remedy available for violations of state laws that are more restrictive than provisions of the Fourth Amendment. (Cal. Const. Art.I, section 28 subd. (d); *Virginia v. Moore* (2008) _____U.S. _____, 128 S.Ct. 1598, 1606-1608 ("*Moore*"); *People v. McKay* (2002) 27 Cal.4th 601.) Because numerous state and federal cases already have found that DNA database laws mandating sample collection from all convicted felons comport with Fourth Amendment guarantees, it is clear that no Fourth Amendment violation occurred in this case upon which to predicate the suppression of evidence remedy appellant seeks. (See e.g., *People v. Travis* (2006) 139 Cal.App.4th 1271 ("*Travis*"); *United States v. Kincade* (9th Cir. 2004) 379 F.3d 813, 818-820 ("*Kincade*"); *Jones v. Murray* (4th Cir. 1992) 962 F.2d 302); see also *People v. King* (2000) 82 Cal.App.4th 1363, 1368-1369 ("*King*"); *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 497-498 ("*Alfaro*").)

Moreover, suppression of evidence is an inappropriate remedy for a mistaken DNA sample collection because as the Court of Appeal found, the deterrence value of suppressing the DNA in this case "is nil," and the legislature's purpose in limiting the statute's qualifying offense list was for

administrative reasons, and not for the benefit of individual offenders. (*See Robinson*, Typed Opn. pp. 31-36.) Likewise, the link between the DNA sample collection for crimes unrelated to this case and appellant's identification as the perpetrator of the Deborah L. sexual assault crimes is attenuated by appellant's own criminal actions unrelated to his sample collection. Finally, a second independent data bank sample was collected from appellant in 2002, based upon appellant's first degree burglary conviction.

The trial court's ruling denying appellant's suppression motion was sound and should be upheld. As fully set forth below, there is no cause to reverse appellant's conviction.

ARGUMENT

I.

AN ARREST WARRANT THAT SPECIFICALLY DESCRIBES A SUSPECT BY HIS FORENSIC DNA IDENTIFICATION PROFILE AND THAT RELIES ON A DNA DATABASE COLD HIT BEFORE THE WARRANT IS EXECUTED SATISFIES THE STATUTE OF LIMITATIONS AND OTHERWISE MEETS ALL STATE LAW AND CONSTITUTIONAL REQUIREMENTS

Appellant contends the state's filing of a DNA John Doe arrest warrant on August 22, 2000, did not validly commence the action against him within the applicable six-year statute of limitations for the August 25, 1994, sexual offenses against Deborah L. nor did it "particularly" describe him in a manner consonant with Fourth Amendment and state law requirements. (AOB 17-18, 27-29.) The DNA database cold hit[4/] linking appellant to the crime scene DNA occurred on September 11, 2000, and appellant was identified to law enforcement and arrested on September 15, 2000, 21 days after the then-existing statute of limitations would have expired on August 24, 2000, absent the DNA

---

4. The California Department of Justice DNA Data Bank program (Pen. Code, § 295 et seq.) is part of the FBI's Combined DNA Index System (CODIS) network that is designed to enable "federal, state, and local crime labs to exchange and compare DNA profiles electronically, thereby linking crimes to each other and to convicted offenders." (See http://www.fbi.gov/hq/lab/codis/brochures.htm; see also *Kincade*, *supra*, 379 F.3d at pp. 818-820.) The CODIS network works much the same way as fingerprint ID programs, i.e., utilizing computer comparisons that identify forensic unknowns (e.g., crime scene samples) by reference to a felony offender's known sample seized, analyzed and stored pursuant to State or Federal law. (*King*, *supra*, 82 Cal.App.4th at pp. 1368-1369; *Jones v. Murray*, *supra*, 962 F.2d at p. 302; Pen. Code, § 295, subd. (c); *Alfaro*, *supra*, 98 Cal.App.4th at pp. 497-498.) A DNA cold hit is a "match of a crime scene sample with a suspect identified through a database search." *United States v. Jenkins* (D.C. 2005) 887 A.2d 1013, 1017; *People v. Johnson* (2006) 139 Cal.App.4th 1135, 1146 fn. 13.)

warrant. (1 RT 78-81, 106, 110; 1 CT 41.) Both the trial court and the Court of Appeal properly rejected appellant's contentions.

A. Standard Of Review

Review of the jurisdictional[5] issue appellant raises ultimately relates to the magistrate's determination regarding the sufficiency of the warrant's description and commencement of action based upon the warrant. Because the resolution of these issues depends upon an analysis of the warrant and the circumstances surrounding its issuance, the standard of review governing search and arrest warrants[6] should apply:

> Whether the description [in a warrant] was sufficient is a question of law, which a reviewing court decides independently [citation], but the trial court determines the underlying facts, which determination is subject to the deferential substantial evidence standard of review. [Citation.] Courts have a "strong policy favoring search by warrant rather than upon other allowable basis." [Citations.] For this reason, when, as here, the police do obtain a warrant, that warrant is presumed valid. "Thus if the defendant attempts to quash a search warrant, as defendant here seeks to do, the burden rests on him." [Citation.] A defendant claiming that the warrant or supporting affidavit is inaccurate or incomplete bears the burden of alleging and then proving the errors or omissions. [Citations.]

(*People v. Amador* (2000) 24 Cal.4th 387, 393 ("*Amador*").)

---

5. It is well-settled that "any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction ...." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 291.)

6. The requirement of reasonable particularity applies to both search and arrest warrants. (*Wong Sun v. United States* (1963) 371 U.S. 471, 481, fn. 9; *People v. Sesslin* (1968) 68 Cal.2d 418, 424.) In determining the sufficiency of a warrant's description of the person to be seized, a court may consider case law derived from search warrant challenges. (*In re Larry C.* (1982) 134 Cal.App.3d 62, 66-67; *People v. Palmer* (1989) 207 Cal.App.3d 663, 668-669.)

B. The Trial Court Ruling

The trial court comprehensively analyzed the issues and rejected appellant's arguments:

> I think we're in agreement on the two issues.
>
> The first issue is, does this arrest warrant meet the particularity requirement of the constitution of both state and federal and [Penal Code Section] 804(d) so as to commence prosecution within the statute of limitations? [¶] And the second issue for the Court is, if that's decided, is the DNA profile then sufficient to legally describe the person for purposes of an arrest warrant?
>
> We know that the constitution, statute and case law, even old West versus Cabell and People versus Montoya all stand for the premise that the subject of an arrest warrant has to be described with, quote, "reasonable particularity," unquote. [¶] And I have come to the conclusion, based upon my analysis of this case, that the term "reasonable particularity" is an evolving, expanding concept. Certainly in West versus Cabell in 1894 it was a different concept than what it is today.
>
> And I would submit to you that the purpose of the particularity requirement in search warrants, as we all know, is to prevent overbroad, general searches and to leave nothing to the discretion of the officer.
>
> So that it appears that in an arrest warrant the purpose of the particularity requirement, as we have described here, is to prevent an abuse of the arrest process. It is to make sure that the warrant, to the best possible way – by word, by description, by science – described the person intended to be arrested. [¶] And in that regard, general descriptions fail. But I believe that a simple analysis of saying that this arrest warrant contains nothing on the face of the warrant issued by Judge Ure is hypertechnical. Because we know that the warrant, once it is submitted in the system, probably carries four screens, that it is not just that one page signed by Judge Ure or any magistrate. . . .
>
> In this case I know that the warrant was input into the system. My notes reflect that it did contain, within minutes of its access as the witness Pel indicated by phone or computer, that as soon as you access the face of that warrant, a second screen contained a directive, "Has

remarks."

It is the normal practice, it appears, and procedure for the warrant officer, Ms. Pel, to view the remarks which may contain valuable safety information for the officer and also identifiers.

The remarks of this particular arrest warrant states that John Doe was identifiable by genetic markers in a DNA profile. It gave a report number and two people who were on call basically 24 hours.

In the day of computer technology, pagers and cell phones, which is different from an analysis from 1894 and 1967, that information as to what those identifiers are were virtually available to any inquiring officer within seconds. [¶] I would also note that the report was available. To some extent we don't know whether that was available within an hour, a day. But it was a number contained, among other things, that contained the DNA profile. And as of September 11th, we know that report had a supplement which would have indicated that Paul Robinson's name was the match to the DNA profile.

It is my opinion that the particularity information was, therefore, available within minutes, if not moments, to the officer from the computer screen. [¶] That it was not on the face of the warrant itself as issued by Judge Ure but accessible within minutes or moments, to me, is a distinction without a difference. The purpose for that particularity requirement is that an officer does not arrest the wrong person or abuse the arrest process.

And in this particular case, there was [sic] sufficient limitations, and the remarks indicated who should be arrested.

I know much has been made of the fact that this warrant was virtually unservable until there was a match or a cold hit on the DNA profile contained within the report.

In my opinion, that as a further safeguard, that there would be less of an abuse of the process of arrest in this case because no reasonable officer would arrest any male black who refused to give his name, then call him John Doe and bring him in. That was brought out in the testimony, in my opinion, based upon Detective Willover's 35 years of experience.

So any deficiency in the face of the warrant, this Court finds, has been cured. And I believe, really, that the spirit of the Fourth Amendment and the particularity requirement is met in this particular case given the information readily available.

Moreover, the SPD report is essentially the affidavit. And certainly there is search warrant law that permits if there is a specificity deficit in the search warrant to use the affidavit. ([1 RT 129-132.) . . .

The second question raised by this case is whether or not the John Doe male black with a specific DNA profile does, in fact, describe a person with, quote, unquote, "reasonable particularity."

And as I stated, I think reasonable particularity means a different thing in this day and age than it did even as late as 1967.

In 1894 when the Cabell case was decided, which reiterated the Fourth Amendment and common law that an arrest warrant must be described with particularity, it is clear that they didn't have subject' driver's license and Social Security number. They didn't have that kind of information. They had a name.

Then as case and identification and people's identifiers evolved through the years, we have many numbers that identify us. But we're also learning that, even though defense counsel has raised contentions with the description of John Doe as Paul Robinson by his DNA profile, that given today's numerous crimes of identity theft, we know that numbers like driver's licenses, Social Security numbers, we know that credit card numbers can all be swiped and can be changed and amended to another person, and that those are not true numbers anymore in the society we live in. [¶] Given today's changing addresses of a mobile society, addresses aren't good either. Anyone can tell you when you go to serve a warrant or look in a computer system, there are three addresses.

Additionally, given today's cosmetic surgery choices, I know it can change body shape, face structure, hair, eyes. I don't know what, in fact, is a true identifier. But in my opinion, it certainly appears that, as of today, DNA is unalterable in the year 2001, and it appears to be the best identifier of a person that we have.

Based on what I heard about the input of information fields and computer systems, I don't think we've caught up to that concept yet.

But I would submit that it is the most accurate description we have to date.

I also think that that's inferred by the Legislature's change to the sex [assault crime] statute [of limitations] in [Penal Code section] 803, that is, we know – it is 802(h) [*sic* [Penal Code section] 803, subd. (h)] as you alluded to, Mr. Griffin – that as of January 1st, 2001, [there is] the statute of limitations for sex cases is now 10 years; and when DNA evidence is collected within two years of the offense, a statute of limitations period of one year from the date on which the identity of the suspect is conclusively established by DNA testing if later. [¶] So this concept of DNA testing seems to make the statute of limitations on sex cases, if you collect [*sic* analyze] that evidence within two years, it could be an indefinite period of time. It blows out of the water any chance that it is within 10 years.

So for this reason it appears that the Legislature recognizes its faith in DNA testing, its faith that DNA is a characteristic that is to be relied upon for purposes of extending the statute of limitations.

And also it seems to me that by doing that it has cleared up this process of the novel idea of using a John Doe warrant based on DNA or indicating the DNA to get to identifying a person for an arrest warrant.

In this case, by my calculation, the warrant was served on the defendant approximately six years and 21 days after the sexual assault of Jane Doe. . . .

This Court denies the defendant's motion to dismiss.

[1 RT 135-137.]

C. The Court Of Appeal Ruling

The Court of Appeal agreed with the trial court and held: (1) "[T]he statute of limitations for a sexual offense is satisfied when the prosecution is commenced within the period of limitations by the filing of an arrest warrant predicated upon the identification of the perpetrator by a DNA profile. (See *Pen. Code, § 804, subd. (d).*)." *(Robinson*, Typed Opn. p. 2); and (2) "[A]n

arrest warrant, which identifies the person to be arrested for a sexual offense by incorporation of the DNA profile of the assailant, satisfies the statutory particularity requirement of *section 804, subdivision (d)* read in the light of *section 813, subdivision (a)* and pertinent constitutional provisions." (*Robinson*, Typed Opn. p. 11, italics added.)

The court set forth the legal test for determining the sufficiency of a warrant's description as "whether the warrant provides sufficient information to identify the defendant with 'reasonable certainty.'" *(Robinson*, Typed Opn. pp. 15-16.) "Neither [Penal Code] section 804, subdivision (d), section 813, nor the state and federal constitutions specify or limit the *manner* or *criteria* for particularly describing a person," said the court. "All this is required is 'reasonable certainty' that the person may be identified." (*Robinson*, Typed Opn. p. 16, emphasis in original.) The court found "an arrest warrant, which describes the person to be arrested by his or her DNA profile, more than satisfies the reasonable certainty standard because DNA is the most accurate and reliable means of identifying an individual presently available to law enforcement." (*Robinson*, Typed Opn. p. 15.)

The court rejected appellant's contention that a warrant is insufficient for Fourth Amendment purposes if "an officer in the field cannot execute the warrant by visually identifying a suspect with his DNA profile in hand and must resort to [extrinsic] information outside of the warrant" before a suspect can be arrested. The court found: "Defendant confuses the requirements for issuance of a warrant with those necessary to execute one. Extrinsic evidence is always necessary to locate the suspect and confirm his identity in order to execute an arrest warrant. (*United States v. Doe* (3d Cir. 1983) 703 F.2d 745, 748 ["No matter how detailed the written description on a warrant is, extrinsic information will be necessary to execute it"].)" (*Robinson*, Typed Opn. pp. 17-18.) Likewise, the court found meritless appellant's contention that "a John

Doe/DNA arrest warrant to commence a prosecution circumvents the statute of limitations and therefore violates his rights under the *due process clauses of the state* and *federal Constitutions*." (*Robinson*, Typed Opn. pp. 19-21, italics added.) As the court observed with respect to appellant's failure to establish prejudice:

> Defendant has failed to establish prejudice for the three-week delay between August 25, 2000, when the statute of limitations was set to expire and September 15, 2000, the day he was arrested. Instead, he poses a number of hypothetical "what if" questions based upon the possibility that an individual with a DNA profile matching the one specified on the warrant may not be found for decades, impairing his ability to establish a defense. We need not address that possibility because it is not tendered by this case. Here, law enforcement officials promptly processed the crime scene the day of the crime, collected evidence, took a vaginal swab from the victim, and developed the assailant's DNA from that evidence within the period of limitations. Since defendant was arrested only three weeks after the period of limitations expired and his sole defense was to contest the reliability of the [DNA] statistical probability evidence, his ability to defend against the charges was not impaired by the passage of time.

(*Robinson*, Typed Opn. pp. 20-21.)

The Court of Appeal also cited with approval two out-of-state cases that reached the same conclusions about the validity of DNA John Doe arrest warrants to commence prosecution. (*Robinson*, Typed Opn. pp. 18-19, citing *Dabney*, *supra*, 663 N.W.2d 366 and *Danley*, *supra*, 853 N.E.2d 1224.)

D. The State's Use Of A Timely-Filed DNA John Doe Arrest Warrant Validly Commences A Criminal Action And Thereby Satisfies The Statute Of Limitations

Appellant claims the trial court committed reversible error in failing to find the prosecution time-barred under Penal Code section 804, subdivision (d). (AOB 17-18, 27-28.) Appellant relies upon the Law Revision Commission comments to section [Penal Code] 804 in arguing that "even though 'John Doe' warrants are permitted in California, they cannot satisfy the statute of limitations

or stop the running of an expiring limitations period." (AOB 23.) It is significant to appellant that state law "does not expressly provide that a 'John Doe' filing of any kind will commence an action if it identifies the unknown defendant by his or her DNA profile." (AOB 43, 47.) He contends the John Doe/DNA arrest warrant thus improperly "circumvented a limitations period intended by the Legislature, and denied appellant due process under the Fourteenth Amendment and state Constitution." (AOB 17, 25.) He also argues that a fundamental purpose of the statute of limitations – a "right to be free of stale claims" – is undercut by the use of a DNA Doe Warrant. (AOB 24.) With the exception of specific crimes such as murder, appellant claims "an indefinite delay of prosecution" defies "the requirement embodied in federal constitutional law that a statute of limitations 'provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced.'" (AOB 26-27.)

Appellant claims that the subsequent extension of the statute of limitations for sexual assault offenses where there is DNA evidence is significant only in that the deadlines imposed evidence the Legislature's intention "to continue strict statutory limitations for commencing prosecution of sexual offenses." (AOB 47.) Thus, appellant alleges, "our legislature has declined to place sexual offenders in perpetual jeopardy . . . and the prosecuting authority should not be permitted to utilize 'John Doe/DNA warrants' to extend the statute of limitations for even a single day. . . . " (AOB 46.)

As a result, appellant argues, the trial court lacked jurisdiction over the charges and his conviction must be vacated and dismissed. (AOB 28-29, 47.) Appellant's claims lack merit. The trial court properly denied appellant's claim that the court lacked personal jurisdiction over appellant due to an allegedly invalid and therefore untimely arrest warrant.

1. The DNA Doe Warrant Meets California Statutory Requirements For Commencing A Criminal Prosecution

The prosecution in this case was validly commenced on August 22, 2000, pursuant to Penal Code section 804, subdivision (d), and accompanying statutes, by the filing of Complaint No. 00F06871, naming John Doe, an unknown male, and the magistrate's issuance the same day[7] of an arrest warrant based on that complaint and describing appellant by his 13-locus DNA profile.

Penal Code section 804 provides that "prosecution for an offense is commenced when any of the following occurs: . . . (d) An arrest warrant or bench warrant is issued, provided the warrant names or describes the defendant with the same degree of particularity required for an indictment, information, or complaint." It is the finding of probable cause under section 804, subdivision (d), made by a neutral judicial officer that commences prosecution. (See *People v. Angel* (1999) 70 Cal.App.4th 1141, 1146; cf. *McDonald v. United States* (1948) 335 U.S. 451, 455 ["[T]he Fourth Amendment has interposed a magistrate between the citizen and the police. . . . so that an objective mind might weigh the need to invade [the citizen's] privacy in order to enforce the law."].)

The People's use of a John Doe complaint and arrest warrant to commence prosecution employed statutory procedures in existence for well over 100 years. Such procedures are intended to prevent a party from escaping criminal liability simply because the complainant does not know the

---

7. Penal Code section 813, subdivision (a), provides: "When a complaint is filed with a magistrate charging a felony originally triable in the superior court of the county in which he or she sits, if, and only if, the magistrate is satisfied from the complaint that the offense complained of has been committed and that there is *reasonable ground* to believe that the defendant has committed it, the magistrate shall issue a warrant for the arrest of the defendant, except that, upon the request of the prosecutor, a summons instead of an arrest warrant shall be issued." (Italics added.)

perpetrator's true name.

The requirements for naming a defendant in an arrest warrant are set forth in Penal Code section 815, which provides: "A warrant of arrest shall specify the name of the defendant or, if it is unknown to the magistrate, judge, justice, or other issuing authority, the defendant may be designated therein by any name. . . ." Similarly, Penal Code section 959 states with respect to an indictment, information, or complaint: "The accusatory pleading is sufficient if it can be understood therefrom: . . . 4. That the defendant is named, or if his name is unknown, that he is described by a fictitious name, with a statement that his true name is to the grand jury, district attorney, or complainant, as the case may be, unknown. . . ." Penal Code section 953 provides: "When a defendant is charged by a fictitious or erroneous name, and in any stage of the proceedings his true name is discovered, it must be inserted in the subsequent proceedings, referring to the fact of his being charged by the name mentioned in the accusatory pleading." (See also *Ernst v. Municipal Court* (1980) 104 Cal.App.3d 710, 718 ["The identity of the perpetrator of a crime is not a part of the corpus delicti [citations], and an individual may be charged under a fictitious name [citations]"]; cf. Fed. Rules Crim. Proc., rule 4 (c)(1).)

Consistent with these provisions, appellant's name initially was specified in the complaint and arrest warrant as John Doe, an unknown male. Upon discovery of his true name, it was inserted in the amended complaint shortly after the arrest warrant issued.

Appellant was arrested only after a DNA cold hit was made and that hit communicated to Detective Willover as contemplated by the warrant. (Cf. *United States v. Grubb* (2006) 547 U.S. 90 [anticipatory search warrant can be issued for items not then obtainable]; see also *Robinson,* Typed Opn. pp. 17-18 [noting distinction between requirements for issuing and executing a warrant].)

As the trial court observed, this procedure, while novel, met all statutory

and other legal requirements. In making its determination, the court also noted authorities permitting reliance on descriptive information not present on the face sheet of the warrant, but which was attached to, incorporated in, easily accessible to, or otherwise known to the officer. (1 RT 132-134.)[8/]

Appellant acknowledges the statutory provisions (AOB 20-23), but he nevertheless contends use of a DNA Doe arrest warrant to commence prosecution is impermissible. Despite his reference to Law Revision Commission Comment to Penal Code section 804, the Comment also supports the warrant issued here, consistent with other state statutory and case authorities.[9/] As the Comment and appellant correctly note, a "Doe" warrant

---

8. In light of the trial court's factual findings, and the deference on appeal accorded those findings, it appears appellant has waived any issue of whether the complaint and affidavit (containing the DNA profile and accompanying statistical random match probability estimate descriptive information) could be relied upon to provide the sufficient particularity lacking on the face of the warrant itself. As the trial court found, the warrant appropriately cross-referenced those documents. (*Robinson*, Typed Opn. p. 9, fn. 9 [noting trial court finding and that "the Fourth Amendment does not prohibit a warrant from cross-referencing other documents."]; cf. *Groh v. Ramirez* (2004) 540 U.S. 551, 557-558 ["We do not say that the Fourth Amendment prohibits a warrant from cross-referencing other documents."]; *People v. Peck* (1974) 38 Cal.App.3d 993, 1000; *People v. Moore* (1973) 31 Cal.App.3d 919, 925-927; *People v. Grossman* (1971) 19 Cal.App.3d 8, 12; *People v. MacAvoy* (1984) 162 Cal.App.3d 746, 755-758; *United States v. Gahagan* (6th Cir. 1989) 865 F.2d 1490, 1497, cert. denied (1989) 492 U.S. 918; *United States v. Espinosa* (9th Cir. 1987) 827 F.2d 604, 611, *cert. denied* (1988) 485 U.S. 968; *United States v. Hillyard* (9th Cir. 1982) 677 F.3d 1336, 1340; *United States v. Roche* (1st Cir. 1980) 614 F.2d 6, 8.) Appellant appears to contest only the constitutionality of using subsequent "cold hit" extrinsic evidence as a predicate to executing the warrant. Respondent addresses this concern *infra*.

9. The Law Revision Commission states:
Subdivision (d) continues the substance of portions of former Sections 800 and 802.5, but adds the limitation that the warrant specify the name of the defendant or describe the defendant with

standing alone is insufficient to name a defendant. As the Comment further notes, however, a warrant that identifies a defendant with reasonable certainty is sufficient.[10/] California cases that the Comment relies upon (see fn. 10 [referencing *People v. McCrae, supra*, 218 Cal.App.2d 725, 728-729, and *People v. Erving, supra*, 189 Cal.App.2d 283]) clarify the minimal "reasonable certainty" requirement attendant to Penal Code section 804, subdivision (d). (See also *Robinson*, Typed Opn. p. 14, fn. 12 [noting "The 'reasonable

---

> particularity. Issuance of a "Doe" warrant does not reasonably inform a person that he or she is being prosecuted and therefore does not satisfy the statute of limitations. *If the name specified in the warrant is not the precise name of the defendant, it is sufficient that the name identifies the defendant with reasonable certainty.* See, e.g., *People v. McCrae*, 218 Cal.App.2d 725, 32 Cal.Rptr. 500 (1963); *People v. Erving*, 189 Cal.App.2d 283, 11 Cal.Rptr. 203 (1961); cf. Sections 959(4), 960 (sufficiency of accusatory pleading). Nothing in subdivision (d) limits the constitutional due process and speedy trial requirements that the warrant be executed without unreasonable delay. See, e.g., *Jones v. Superior Court*, 3 Cal.3d 734, 478 P.2d 10, 91 Cal.Rptr. 578 (1970). . . .

(Cal. Law Revision Com. com., 50 West's Ann. Pen. Code (1985 ed.) foll. § 804, p. 210, italics added.)

10. The Comment cited *People v. McCrae, supra*, 218 Cal.App.2d at pages 728-729, in which the court held sufficient an indictment describing the defendant as "John Doe 'Bill' (Male Negro, 30-35 yrs., 5' 7"- 5' 10", 150-160 lbs., black hair, brown eyes)." The description matched that of the defendant and that given by the undercover officer who testified before the grand jury. The court found "no merit in the contention the accused was not adequately named or described so that he could be identified as the defendant herein." (*Ibid.*) The *McCrae* court relied on *People v. Erving, supra*, 189 Cal.App.2d 283, also cited in the Comment, in support of its ruling. In *Erving*, the indictment charged the defendant as Jane Doe and described her as "female Negro, 39 years, 5' 7", weight 165 lbs., olive complexion." The *Erving* court rejected the defendant's claim that the indictment did not adequately name or describe her, finding it not sustainable despite alleged discrepancies regarding the defendant's weight and skin tone. (*Ibid.*)

certainty' standard is similar to the requirement of [Penal Code] section 813, subdivision (a), that "there is *reasonable ground* to believe that the defendant" committed the offense described in the complaint. (Italics added.)"].) Moreover, because a DNA Doe arrest warrant also satisfies a coextensive or more demanding constitutional "particularity" requirement, it meets all state statutory warrant requirements. (See *infra*, Argument II.)[11/]

Penal Code section 804, subdivision (d), and accompanying statutes that address commencement of actions (see, e.g., Pen. Code, § 813, subd. (a)) support the court's exercise of jurisdiction over appellant within the defined statutory period. (Accord, *Dabney, supra,* 663 N.W. 2d at p. 366; *Danley, supra*, 853 N.E.2d 1224; *State v. Davis, supra,* 698 N.W.2d at p. 823 [upholding use of DNA Doe warrants to commence prosecution, and finding similar state law "particularity or reasonable certainty requirements" do not "absolutely require that a person's name appear in the complaint or warrant."].)

2. The Trial Court Properly Found The DNA Doe Warrant Did Not Violate Appellant's Due Process Rights

The Court of Appeal also properly rejected appellant's argument that use of a "John Doe/DNA arrest warrant to commence a prosecution circumvents the statute of limitations and therefore violates his rights under the due process clauses of the state and federal constitutions." (*Robinson*, Typed Opn. pp. 19-

---

11. As a practical matter, the Penal Code section 804, subdivision (d) "reasonable certainty" requirements are subsumed by the conceptually akin state and federal constitutional "particularity" requirement for warrants. (See, e.g., *Amador, supra*, 24 Cal.4th at p. 393; *People v. Montoya* (1967) 255 Cal.App.2d 137, 142 ("*Montoya*") [discussed *infra*]; see also *Robinson*, Typed Opn. p. 14 [noting "the period of limitations is strictly statutory [but] because section 804, read together with section 813, incorporates constitutional principles, we turn for guidance to those cases construing the Fourth Amendment particularity requirement."].) The trial and appellate courts in this case properly found DNA profile evidence is a valid identifier for Fourth Amendment purposes.

21.) Other courts considering Doe warrant issues have rejected due process claims similar to the one appellant raises here. Appellant neglects to address these cases. The cases persuasively demonstrate, consistent with California law, that nothing about the use of Doe warrants "irrebuttably" violates due process guarantees, as appellant argues. (AOB 17, 27.)

In *Dabney, supra*, 663 N.W.2d at pages 366 and 370 through 372 the Wisconsin Court of Appeals found the state's actions in the case did not nullify the statute of limitations. The court observed that the protection afforded by the statute of limitations is not a fundamental right of a criminal defendant, but a statutory right the primary purpose of which is to protect the accused from having to defend himself against charges of remote misconduct, and that purpose had not been violated in the case because the warrant was issued less than six years after the crimes. (*Ibid.*) The court also found that Wisconsin's amendments and extension to the statute of limitations for commencing sexual assault actions when DNA evidence is available supported, rather than undercut, the state's position that prosecution should be permitted to proceed when the state has analyzed the offender's DNA profile but has been unable to match it to a known DNA profile within the six-year statutory period. (*Ibid.)*

Finally, the Wisconsin Court of Appeal concluded that Dabney was not otherwise denied due process. The court stated that Dabney was not denied sufficient notice of the claim because a defendant is not entitled to specific notice that the State is issuing a complaint and seeking an arrest warrant. (*Dabney, supra*, 663 N.W.2d at pp. 370-372; accord *People v. Fitzgerald* (1997) 59 Cal.App.4th 932, 936 ["[T]he purpose of the charging document is to provide the defendant with notice of the *offense* charged]; Cal Pen. Code, § 952.)

The court also found that in order to show that the prosecutorial delay in filing the complaint violated his due process rights, the defendant had to

establish actual prejudice and that the delay arose as a result of an improper purpose, so as to afford the state a tactical advantage over him, and that Dabney had shown neither. (Accord, *State v. Davis*, *supra*, 698 N.W.2d at pp. 823, 831-832 [finding that in extending the statute of limitations for DNA evidence cases, the "legislature simply created another option and ensured that a defendant's rights would be protected by requiring prosecution within a reasonable time after a match was made"]; *Danley*, *supra*, 853 N.E.2d 1224 [listing constitutional safeguards such as state and federal speedy trial rights in protecting a defendant's interest in defending against charges where the basic facts have become obscured by passage of time."].)

The *Dabney* holdings and rationale are applicable here. No statutory provision or due process guarantee requires notice to the defendant that a complaint or arrest warrant has issued in his name. (See, e.g., Pen. Code, § section 815 [permitting issuance of an arrest warrant in a fictitious name]; accord, Rule 6(e)(4), Fed. R. Crim Proc. [permitting a district court to order that a timely-filed indictment be sealed until the defendant is in custody]; *United States v. Muse* (2nd Cir. 1980) 633 F.2d 1041, 1043-1044 (en banc), *cert. denied* (1981) 450 U.S. 984 [The "sealed indictment is timely even though the defendant is not apprehended and the indictment is not made public *until after the end of the statutory limitations period* [citations]" subject to a show of prejudice occurring during the period the indictment was sealed, or perhaps only during the post-limitation period the indictment was sealed]; *United States v. Richard* (1st Cir. 1991) 943 F.2d 115, 118-120; *United States v. Ramey* (4th Cir. 1986) 791 F.2d 317, 320-322; *United States v. Greer* (D. Vt. 1998) 178 F.R.D. 418, 429.)

Likewise, use of Doe complaints to satisfy the statute of limitations has long been authorized in civil cases and not been held to circumvent the statute of limitations. (See Cal.Code Civ. Proc., § 474; see *Marasco v. Wadsworth*

(1978) 21 Cal.3d 82, 85-86 [amendment substituting named defendant in place of Doe XI related back to filing date of original complaint, thereby defeating the bar of the statute of limitations]; *Smeltzley v. Nicholson Mgf. Co.* (1977) 18 Cal.3d 932, 936 ["'where an amendment is sought after the statute of limitations has run, the amended complaint will be deemed filed as of the date of the original complaint provided recovery is sought in both pleadings on the *same general set of facts*'"] [original italics]; cf. *Hawkins v. Pacific Coast Building Products* (2004) 124 Cal.App.4th 1497, 1503 ["[w]here an amendment does not add a 'new' defendant, but simply corrects a misnomer by which an 'old' defendant was sued," amendment relates back to original filing date].)

Like Code of Civil Procedure section 474, Penal Code sections 815, 953, and 959 have existed virtually unchanged since 1872. The provisions in the civil and criminal context are nearly identical with respect to instituting suit against a defendant by use of a fictitious name and substitution of the defendant's true name when it becomes known. This Court consistently has interpreted the civil provision to permit relation back to include the named defendant as of the date the complaint was filed, specifically so as to avoid the bar of the statute of limitations. There is no reason to interpret the criminal provisions as barring the use of a fictitious name with the reasonable substitution of a true name, when this is ascertained.

Moreover, although plaintiffs naming fictitious defendants do not have an unlimited time within which to determine the true names of the defendants (see *General Motors Corp. v. Superior Court* (1996) 48 Cal.App.4th 580, 589 [tracing history of CCP 474 to 1851]), constitutional protections against the institution of overly stale claims, like due process and speedy trial remedies, protect the criminal defendant.

A defendant alleging prejudicial pre-accusation delay may argue a

violation of his right to due process. (*United States v. Marion* (1971) 404 U.S. 307, 324; *People v. Archerd* (1970) 3 Cal.3d 615, 639-640; *People v. Nelson*, *supra*, 43 Cal. 4th at pp. 1254-1256 [Delay in bringing charges may, when accompanied by a showing of prejudice, violate due process].) Under California law, once a felony complaint has been filed, a defendant may argue a denial of his right to a speedy trial. (*People v. Martinez* (2000) 22 Cal.4th 750, 765-767.)[12/] In either case, the defendant is required to affirmatively demonstrate that the challenged delay has prejudiced his ability to defend against the charges. (*Id.* at pp. 766-767; see *People v. Archerd*, *supra*, at pp. 639-640; *People v. Nelson*, *supra*, at pp. 1255-1256 ["The ultimate inquiry in determining a claim based upon due process is whether the defendant will be denied a fair trial."].) Even after the right to speedy trial attaches, "no presumption of prejudice arises from delay after the filing of a complaint and before arrest or formal accusation by indictment or information [citation]; rather, in this situation a defendant seeking dismissal must affirmatively demonstrate prejudice [citation]." (*Martinez*, *supra*, 22 Cal.4th at pp. 755, 766-767; cf. *People v. Nelson*, *supra*, at p. 1250 [declining to adopt a rule of presumed prejudice in cases of long pre-accusation delay].) Appropriately, each of these determinations are made on a case-by-case basis.

Here, the felony complaint and arrest warrant were filed on August 22, 2000. By September 15, 2000, appellant's true name had been discovered and he was arrested. Appellant alleges no prejudice arising during the period between the filing of the complaint and his arrest, nor could he as a matter of fact. (See *People v. Martinez*, *supra*, 22 Cal.4th at pp. 765-767 [A "defendant charged with a felony may predicate a claimed speedy trial violation on delay

---

12. Under the federal Constitution, the speedy trial right does not attach upon the filing of a felony complaint, but only upon an arrest with continuing restraint or the filing of an indictment, an information, or a complaint charging a misdemeanor. (*People v. Martinez*, *supra*, 22 Cal.4th at p. 765.)

occurring after the filing of the complaint and before the defendant was held to answer the charge in superior court."].)[13/]

As the Court of Appeal observed with respect to appellant's failure to establish prejudice:

> Defendant has failed to establish prejudice for the three-week delay between August 25, 2000, when the statute of limitations was set to expire and September 15, 2000, the day he was arrested. Instead, he poses a number of hypothetical "what if" questions based upon the possibility that an individual with a DNA profile matching the one specified on the warrant may not be found for decades, impairing his ability to establish a defense. We need not address that possibility because it is not tendered by this case. Here, law enforcement officials promptly processed the crime scene the day of the crime, collected evidence, took a vaginal swab from the victim, and developed the assailant's DNA from that evidence within the period of limitations. Since defendant was arrested only three weeks after the period of limitations expired and his sole defense was to contest the reliability of the statistical probability evidence, his ability to defend against the charges was not impaired by the passage of time.

(*Robinson*, Typed Opn. pp. 20-21.)

Accordingly, because appellant cannot establish he was prejudiced from the delay in charging him by his name, rather than his DNA profile, there is no basis to find that the state's use of a DNA Doe warrant constituted a due process violation.

---

13. Appellant's claim fails equally under a due process or a speedy trial analysis. (See, e.g., *People v. Martinez*, *supra*, 22 Cal.4th at pp. 765-768 ["The "state constitution's speedy trial guarantee serves primarily the interest in fair adjudication, the very interest that the due process guarantee serves. Because in this situation the state Constitution's due process and speedy trial guarantees converge in protecting the same interests of the accused, we consider it entirely appropriate, and not a proper ground of objection, that courts use the same test to determine whether these constitutional rights have been violated."].)

3. DNA Doe Arrest Warrants Do Not Contravene The Intent Of The Legislature Or The Fundamental Purposes Of The Statute Of Limitations

Appellant likewise is incorrect that use of DNA Doe arrest warrants necessarily contravene the fundamental purpose of the statute of limitations to "be free of stale claims" as well as a legislative intent for "strict statutory limitations for commencing prosecution of sexual offenses." (AOB 24, 43, 47.)

Whether a stale claim in a criminal case is viewed as one where evidence has deteriorated or time has elapsed,[14] it is clear that the use of DNA Doe arrest warrants is consistent both with the Legislature's intent to continue the availability of prosecution when reliable DNA evidence exists, and with the fundamental premises of the statute of limitations.

California law makers have demonstrated through several legislative enactments that the concept of stale claims is virtually inoperative with respect to timely-processed DNA evidence. The California Legislature has passed numerous measures recognizing the accuracy and utility of DNA testing to establish identity as it relates to guilt or innocence.

California has collected blood and saliva specimens from convicted sex and violent offenders for identification purposes since 1984. (See former Pen.

---

14. Commentators have discussed the vagueness of the concept of stale claims. As one set of commentators note:

> Courts frequently say that one of the policies [of a statute of limitations] is to avoid the litigation of 'stale' claims. . . . In this context, 'stale' could mean any of the following: (a) evidence relevant to deciding the claim has deteriorated; (b) prevailing legal and cultural standards have changed since the underlying events occurred; (c) the defendant has altered his or her position and would be prejudiced by assertion of the claim; or (d) a very long period of time has elapsed between the underlying events and the filing of suit.

Ochoa, Tyler, T. and Wistrich, Andrew J. (1997) *The Puzzling Purposes of Statutes of Limitation,* 28 Pac. L. J. 453, 459 ("Ochoa and Wishtrich").

Code, § 290.2, added by Stats. 1983, ch. 700, repealed and replaced by Pen. Code, § 295 et seq.) In 1998, the California Legislature enacted a comprehensive DNA databank law – the *DNA and Forensic Identification Database and Data Bank Act of 1998* – to enable the state's databank program "to become a more effective law enforcement tool." (1999 Pen. Code, § 295, subd. (b)(3); see former Pen. Code, § 295 et seq., added by Stats. 1998, ch. 696, § 2, AB 1332, amended by voter initiative 2004; *Alfaro, supra*, 98 Cal.App.4th at pp. 504-505 ["The Act is lengthy and comprehensive."].) [15/]

In 2000, the Legislature passed Senate Bill 1342, adding Penal Code section 1405, which provides that convicted felons may move for performance of DNA testing under specified conditions. There is no time limitation for filing postconviction DNA testing motions. (Pen. Code, § 1405, added by Stats. 2000, ch. 821, § 1.)

Effective January 1, 2001, the California Legislature also explicitly amended Penal Code section 803 by adding subdivision (h), now (g), which extended the statute of limitations for all felony sex offenses described in Penal Code section 290, subdivision (a)(2)(A) to 10 years from the commission of the offense or one year from the date on which the identity of the suspect is conclusively established by DNA testing, whichever is later, provided the DNA analysis is conducted within specified time periods, i.e. two years from date of the offense for offenses committed after January 1, 2001; by January 1, 2004, for offenses committed prior to January 1, 2001. (Pen. Code, § 803, subd. (h) now (g), added by Stats. 2000, ch. 235, § 1; see also Pen. Code, § 801.1 subd.

---

15. In recognition of DNA as an accurate crime-solving tool, the state's DNA Database Program expanded again in 2004 upon voter initiative. (Pen. Code, § 295 et seq. as amended ["the *DNA Data Bank Act*"]) which clarified and augmented prior law. (*Alfaro, supra*, 98 Cal.App.4th at pp. 497-498 [discussing the evolution of DNA databases in California].) Every other state, as well as the federal government, also maintains a convicted- offender DNA database. (*Id.* at p. 505.)

(b) [renumbering/amending provision for 10-year statute of limitations for designated sex crimes].)

Thus, like the United States Congress (which essentially has abolished the statute of limitations for felony crimes where there is material DNA evidence),[16] the California Legislature has determined that DNA analysis is so probative of identity over time that it justifies expanding its DNA database program and extending the statute of limitations. (See generally, *Kincade, supra*, 379 F.3d 816-817 [noting broad provisions of the DNA Analysis Backlog Elimination Act of 2000, Pub.L.No. 106-546, 114 Stat. 2726 (2000), and 42 U.S.C. §§ 14135a(c)(1)-(2), (d)(1)-(2)]; see also 1 RT 135-137 [trial court opinion noting that California's abolition of statute of limitations for timely-tested DNA evidence from sexual assault cases evidences the Legislature's "faith that DNA is a characteristic that is to be relied upon for purposes of extending the statute of limitations."].)

Therefore, although staleness may loom as a factor when eyewitness testimony is crucial to an "old" sexual assault case, the evolution of California statutory laws compel a conclusion that such staleness cannot reasonably be presumed when DNA evidence reliably links a specific offender to a specific crime, such as in this case. Reliable DNA evidence directly addresses the primary "stale claim" justification for maintaining statutes of limitations in serious criminal cases, particularly the avoidance of inaccurate fact-finding caused by deterioration of significant evidence over time. (See generally Ochoa

---

16. The federal statute of limitations for cases involving DNA evidence provides: "In a case in which DNA testing implicates an identified person in the commission of a felony, no statute of limitations that would otherwise preclude prosecution of the offense shall preclude such prosecution until a period of time following the implication of the person by DNA testing has elapsed that is equal to the otherwise applicable limitation period." (18 U.S.C. § 3297.) The general limitation period for federal offenses (not including capital offenses) is five years. (See 18 U.S.C. § 3282.)

and Wishtrich at pp. 473-477.) California's legislative enactments are consistent with numerous court cases demonstrating that DNA evidence with accompanying statistical estimates provide significant objective evidence about the probable source of an evidence sample, independent of more fallible testimony, such as that provided by an eyewitness. (Cf. *People v. Soto* (1999) 21 Cal.4th 512, 516-517, 526-527 [rape victim identified her masked assailant as white, and defendant was Latino with a dark complexion]; *People v. Axell* (1991) 235 Cal.App.3d 836, 843-844 [various eyewitness descriptions of perpetrator]; see also *United States v. Bonds* (6th Cir. 1993) 12 F.3d 540, 547-548, 551, fn. 5 [Chinese co-defendant Yee misidentified as Hispanic, in case where defense was mistaken identity].)

Finally, although appellant complains that the Legislature has not specifically authorized DNA Doe arrest warrants, the law has never required express authorization for every matter within its purview. Rather, for the purpose of commencing criminal actions the Legislature has deferred to the court's expertise to decide whether a warrant meets the broadly defined, practical, and necessarily inclusive reasonable particularity or reasonable certainty standard. (See *People v. Montoya*, *supra*, 255 Cal.App.2d at p. 142; cf. *People v. Amador*, *supra*, 24 Cal.4th at p. 393 [test for determining the sufficiency of the warrant's description depends upon whether there is sufficient particularity to enable the executing officer to locate and identify the premises with *reasonable effort* and whether there is any *reasonable probability* that another premise might be mistakenly searched]; *Robinson*, Typed Opn. at pp. 13-14; Pen. Code, § 804, subd. (d), Pen. Code, § 813, subd. (a) [Magistrate shall issue arrest warrant only if "a [felony] complaint [has been] filed with a magistrate [and] the magistrate is satisfied from the complaint that the offense. . . . has been committed and that there is a *reasonable ground* to believe that the defendant has committed it . . . ."; (italics added .] The broad statutory language does not limit the manner or criteria for particularly

describing a person. As the Court of Appeal found, "Neither Penal Code section 804, subdivision (d), section 813, nor the state and federal constitutions specify or limit the *manner* or *criteria* for particularly describing a person. All that is required is 'reasonable certainty' that the person may be identified." (*Robinson*, Typed Opn. p. 16, original italics; cf. *People v. Amador*, *supra*, 24 Cal.4th at p. 393 [warrant affidavits interpreted in "common sense" and "realistic" rather than "hypertechnical" manner].) Use of standard DNA identification profiles is one way of particularly describing a person, one which identifies that person with "reasonable certainty" – sufficient to meet the statutory standard. (See Argument II, *infra*; see also 1RT 135-137 [trial court observation that DNA is the "best identifier of a person that we have," particularly given "today's cosmetic surgery choices [that] can change body shape, face structure, hair, eyes"].)

Appellant cites no authority for the contrary and irrational conclusion that the Legislature's failure to expressly permit DNA Doe arrest warrants is evidence of a legislative intent to preclude their use to commence a criminal action. Indeed, a statutory text, such as Penal Code section 804, subdivision (d), built around a requirement variously described as "reasonable certainty," "reasonable grounds," or "reasonable particularity" in accompanying statutes and case law, is more logically understood as evidencing a legislative green light for magistrates to issue warrants in accordance with contemporary policy and with an eye towards adjusting to changing circumstances. As one author notes:

> "Some statutory texts invite the judge to adjust to change. This occurs when the text is open-ended--for example, using such terms as 'reasonable,' 'unfair,' 'appropriate,' and 'unconscionable'." These texts give judges a 'common law' power to decide cases in accordance with contemporary policy, without pretending to put themselves into the shoes of the historical legislature to guess how those legislators would decide the case today."

(See Popkin, William, D., A Dictionary of Statutory Interpretation (2007), p. 23; cf. *Neel v. Magana, Olney, Levy, Cathcart & Gelfand,* (1971) 6 Cal.3d 176, 192, 194 [noting that "[p]roblems of the commencement, running, and tolling of limitation periods come frequently and regularly to the appellate courts, and the judiciary develops a kind of expertise in this area," and rejecting an invitation "to perpetuate an anachronistic interpretation of the statute of limitations"].)

Likewise, Penal Code section 804, subdivision (d) is not a statute that affirmatively presents an exhaustive list of specific characteristics necessary as a predicate for every arrest warrant, thereby even arguably pointing to a legislative intent to limit the manner of identifying individuals to be arrested. The maxim that "when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode" ("*expressio unius est exclusio alterius*") has no application to statutes like Penal Code section 804, subdivision (d), which do not utilize internal checklists of strictly defined elements. (See *Longview Fibre Company v. Rasmussen* (9th Cir. 1992) 980 F.2d 1307, 1312-1313 [noting the maxim "'is product of logic and common sense' properly applied only when it makes sense as a matter of legislative purpose."].)[17/]

Accordingly, the magistrate, the trial court, and the Court of Appeal all agreed that Penal Code section 804, subdivision (d), is properly interpreted by contemporary standards and that use of a suspect's DNA profile in an arrest

---

17. The "*expressio unius* principle describes what we usually mean by a particular manner of expression, but does not prescribe how we must interpret a phrase once written. Understood as a descriptive generalization about language rather than a prescriptive rule of construction, the maxim usefully describes a common syntactical implication. 'My children are Jonathan, Rebecca and Seth' means 'none of my children are Samuel.' Sometimes there is no negative pregnant: 'get milk, bread, peanut butter and eggs at the grocery' probably does not mean 'do not get ice cream.' (*Longview Fibre Company v. Rasmussen, supra*, 980 F.2d 1307 at pp. 1312-1313.)

warrant to commence a criminal action satisfies all statutory and constitutional concerns. The evidence presented at the hearing and the relevant authority governing search and arrest warrants, as well as the recognized use of DNA as a legitimate and generally accepted forensic identification tool, amply support the trial court's ruling. There is no cause to reverse appellant's conviction. The arrest warrant was valid and timely filed.

II.

USE OF A SUSPECT'S STATISTICALLY RARE DNA PROFILE AS A BASIS FOR DESCRIBING, IDENTIFYING, AND DISTINGUISHING THAT SUSPECT SATISFIES THE PARTICULARITY REQUIREMENT FOR AN ARREST WARRANT

Appellant claims that DNA/Doe complaints and arrest warrants cannot commence a criminal action and are legally invalid because they do not "'particularly' describe the person to be arrested and are not "reasonable to the circumstances" as the Fourth Amendment, the California Constitution, and Penal Code section 804, subdivision (d), require. (AOB 29, 35, 45.)[18/]

According to appellant, there apparently is a legally important distinction between a "description" and an "identification" of a suspect for Fourth Amendment purposes. (AOB 39-41.) Appellant argues "DNA is not 'description' of anyone . . . . It is merely an 'identifier,'[19/] the same way a

---

18. The issues in this section overlap with issues in Argument I. The summaries of the trial court and Court of Appeal opinions relevant to these issues are set forth in Argument I (B) and (C). The division of the Argument I and II analysis corresponds to the Court's questions on review.

19. In this regard, appellant apparently has modified his argument since his Court of Appeal brief. As the Court of Appeal opinion observed, appellant had claimed: "Defendant argues however, that a DNA profile is merely 'information about the genetic makeup of a human being; [and] is *not an identification* of that person'. . . ." (*Robinson*, Typed Opn. at p. 16; emphasis added.)

fingerprint or an ocular scan of a retina is an identifier . . . . [which] requires someone to analyze and interpret it before an identification can be made from it." (AOB 40.)[20/] In appellant's view, use of a DNA profile in an arrest warrant falls short for Fourth Amendment purposes because it does not show "how tall or heavy the suspect was, how old, what color his eyes, skin, or hair were, or even whether he was a male at all. . . . " (AOB 40-41.) Appellant therefore asserts "it is not 'reasonable under the circumstances' to pretend that a DNA profile can be used by officers in the field to identify a suspect." (AOB 40.)

In other words, appellant argues the DNA Doe arrest warrant is facially invalid because it could not be executed without resort to extrinsic evidence of a "cold hit" that is communicated from the state's DNA laboratory to local law enforcement after the lab determines there is a DNA profile match between the crime scene evidence and appellant's known sample. (AOB 38-43.) Appellant also criticizes the warrant because it "lacked the statistics [set forth in the complaint] that supplied meaning to the DNA profile" (AOB 37, 41) and because it "was never entered into the state or national systems . . . ." (AOB 44.) According to appellant, "for Fourth Amendment purposes extrinsic evidence cannot be used to make up the deficiencies of an insufficient arrest warrant." (AOB 42.)

Moreover, appellant contends that "[s]cience recognizes the fallibility of concluding that a DNA profile 'describes' anyone" because "in DNA analysis the only absolute certainty occurs when a suspect is excluded as the donor of a crime scene evidence sample. . . . " (AOB 41.) Appellant also argues the People at trial were "wrong . . . in stating that no description could

---

20. Appellant claims, "It is significant to note that the legislation establishing the DNA database in California is called the "DNA and Forensic Identification Data Base and Data Bank Act of 1998," **not** the 'DNA Description Act.'" (AOB 40, fn. 16, emphasis in original.)

better identify a person than his or her DNA profile" because "identical twins have the same genetic profile." (AOB 41.)

Appellant's claims lack merit.

A. The DNA Doe Warrant Meets Constitutional Particularity Requirements

In this case the arrest warrant specifically identified the John Doe suspect by his 13-locus DNA identification profile and was set up to be executed only upon a match to that specific profile by the Department of Justice DNA database program. The trial court properly held that the DNA Doe warrant met constitutional requirements because it provided a particular description and was circumscribed in its execution so as to "prevent an abuse of the arrest process." (1 RT 128-133.)

The Fourth Amendment to the United States Constitution guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (U.S. Const., amend. IV.) The purpose of the particularity requirement is to prevent general searches, to enable the determination of probable cause (*United States v. Spilotro* (9th Cir. 1986) 800 F.2d 959, 963) and to ensure that "nothing is left to the discretion of the officer executing the warrant." (*United States v. Hillyard*, *supra*, 677 F.2d at p. 1340, citing *Marron v. United States* (1927) 275 U.S. 192, 196.) "The specificity required in a warrant varies depending on the circumstances of the case and the type of items involved." (*United States v. Spilotro*, *supra*, 800 F.2d at p. 963; see *United States v. Hillyard*, *supra*, 677 F.2d at p. 1340.)

In addressing a challenge to a search warrant, this Court has clarified that the test for determining the sufficiency of the description for constitutional

purposes is a "common sense" one and depends upon whether the subject of the warrant can be identified with reasonable effort and whether there is any reasonable probability of a mistaken search:

> "The test for determining the sufficiency of the description of the place to be searched is whether the place to be searched is described with sufficient particularity as to enable the executing officer to locate and identify the premises with *reasonable effort*, and whether there is any *reasonable probability* that another premise might be mistakenly searched." [Citation.] "In applying this test, we are mindful of the general rule that affidavits for search warrants must be tested and interpreted in a *common sense and realistic, rather than a hypertechnical, manner.*" [Citation.]

(*People v. Amador*, *supra*, 24 Cal.4th at p. 393 italics added.)

Accordingly, nothing in the Fourth Amendment or California jurisprudence per se limits the particularity requirement to anatomical descriptions set forth in the warrant, as appellant suggests.

Rather, as the trial court observed, the "reasonable particularity" is "an evolving concept" that can respond to technological advances in communication and identification techniques. (1 RT 129-130; cf. *United States v. Adjani* (9th Cir. 2006) 452 F.2d 1140, 1152 ["As society grows ever more reliant on computers as a means of storing data and communicating, courts will be called upon to analyze novel legal issues and develop new rules within our well-established Fourth Amendment Juris Prudence."].) In light of this Court's "realistic" approach to analyzing whether the particularity requirement is satisfied (*People v. Amador*, *supra*, 24 Cal.4th at p. 393) and given the effectiveness of DNA evidence for crime-solving purposes (see, e.g., http://www.fbi.gov/hq/lab/codis/clickmap.htm [as of August 2008, CODIS has recorded over 74,500 hits], it would be inappropriate to thwart the use of DNA identification profiles for use in an arrest warrant. (See also Ballot Pamp., Gen. Elec. (Nov. 2, 2004), text of Prop. 69, the DNA Fingerprint, Unsolved Crime and Innocence Protection Act (Pen. Code, § 295 et seq., eff. Nov. 3, 2004), §

II (Findings and Declarations of Purpose), p. 135 [http://vote2004.ss.ca.gov/voterguide/propositions/prop69text.pdf [recognizing that DNA typing is "the latest scientific technology available for accurately and expeditiously identifying, apprehending, *arresting*, and convicting criminal offenders and exonerating persons wrongly suspected or accused of crime."] (italics added.)

The trial court's finding with respect to the warrant's particularity both as to description and execution should be upheld for compliance both with statutory and constitutional requirements.

1. The DNA Profile Warrant As Entered Into The County's Warrant System Met All Requirements Pertaining To Sufficiency Of Description

State and federal law support the filing of the Doe warrant using a DNA profile as a descriptive identifier because: (1) The DNA profile is accessed and linked to a specific offender with "reasonable effort" through the DNA database program, and (2) The "reasonable probability" that another person would not be mistakenly arrested under that warrant is astronomically high, given the accuracy of DNA evidence in matching perpetrator and known offender DNA samples. (See *People v. Amador*, *supra*, 24 Cal.4th at p. 393 [stating criteria].)

In *People v. Montoya*, *supra*, 755 Cal.App.2d at pages 142 and 143, the court apparently reconciled statutory and constitutional guarantees and clarified that use of a fictitious name is permissible as long as the warrant also contains sufficient descriptive material to indicate with reasonable particularity the identification of the person whose arrest is ordered. (*Id.* at p. 137, did not cite *People v. McCrae, supra*, 218 Cal.App.2d 725, 728-729, or *People v. Erving*, *supra*, 189 Cal.App.2d 283 (see fn. 10, *supra*)), but found, for Fourth Amendment purposes, that a warrant's description of the defendant as "John Doe, white male adult, 30 to 35 years, 5' 10" 175 lbs. dark hair, medium build" was insufficient to describe the defendant with reasonable particularity because it could be applied to a great number of persons. (*Montoya* at pp. 141-143.)

Defendant Montoya's arrest was not found unlawful, however, despite the warrant's description, because the police who arrested him actually had more information than that specified in the warrant, i.e., that the defendant had a large mustache and was of Latin type, as well as the address of one of his associates. (*Id.* at p. 144.) Citing *People v. Montoya, supra,* 225 Cal.App.2d 137, 142-144, the Court of Appeal concluded that "the DNA profile of the perpetrator of a sexual offense incorporated in an arrest warrant provides the particularity of identification of an offender required by section 804." (*Robinson*, Typed Opn. pp. 4-5.)

In light of *Montoya*, and the statutory and constitutional requirements as defined in *Amador, supra*, appellant's claim that he was inadequately described in the warrant lacks support. In this case, the prosecution did not know appellant's true name, residence, occupation and the like (see *Montoya, supra,* at pp. 142-143), but it had his DNA profile. The descriptive DNA identification information was supplied in the affidavit and complaint and through the "Remarks" section of cross-referenced and easily accessible computer programs for executing county warrants.

As the hearing evidence conclusively established, Detective Willover knew that the person sought was identified by a DNA profile. He knew that an arrest could not be made until the person matching that profile was identified by name. He would have advised any officer that until a match was made, the warrant could not be executed. Moreover, the warrant was not assigned to any officer for execution, nor was it entered in the statewide or national systems, further limiting the possibility that any officer other than Detective Willover would attempt to execute the warrant. And, as the evidence further established, any officer accessing the warrant by computer would immediately have been alerted to the information limiting its availability for execution. (1RT 33, 36-37, 58-59, 64-65, 70-71, 83-85, 106-110.) Accordingly, based on the evidence properly considered as part of the warrant, and based on Detective Willover's

personal knowledge that the warrant could not be executed until a match was made, no reasonable probability existed that the wrong person would be arrested.

The courts below also properly rejected appellant's contention that a warrant is insufficient for Fourth Amendment purposes if "an officer in the field cannot execute the warrant by visually identifying a suspect with his DNA profile in hand and must resort to [extrinsic] information outside of the warrant" before a suspect can be arrested. (*Robinson*, Typed Opn. p. 15.) As the Court of Appeal found:

> Defendant confuses the requirements for issuance of a warrant with those necessary to execute one. Extrinsic evidence is always necessary to locate the suspect and confirm his identity in order to execute an arrest warrant. (*United States v. Doe* (3d Cir. 1983) 703 F.2d 745, 748 ["No matter how detailed the written description on a warrant is, extrinsic information will be necessary to execute it"].)

(*Robinson*, Typed Opn. pp. 17-18; cf. *United States v. Grubb*, *supra*, 547 U.S. 90 [When "an anticipatory warrant is issued, 'the fact that the contraband is not presently located at the place described in the warrant is immaterial, so long as there is probable cause to believe that it will be there when the search warrant is executed."].)

The trial court's determination under these circumstances that the warrant was valid comported with Fourth Amendment requirements.

2. Reasonable Particularity Does Not Require A Suspect Be Described By His Exterior Physical Characteristics Rather Than The More Accurate Identification Afforded By A DNA Identification Profile

A 13-locus DNA identification profile is one of the most accurate ways to describe a perpetrator, and is an improved and technologically advanced way of meeting an arrest warrant's particularity requirements. Just because prior to the availability of DNA profile evidence and computer accessible warrant

checks, eyewitness information and paper-only warrants have been the norm, does not mean that other types of identification techniques are constitutionally precluded. Appellant's claim that for constitutional purposes there is a significant distinction between a physical "description" and an "identification"[21] such that DNA "identifiers" cannot satisfy the Fourth Amendment's "particular description" requirement (AOB 39-41), is contrived at best.

The purpose of the description requirement is to *identify* the person to be arrested. (See *West v. Cabell* (1894) 153 U.S.78, 85 [The warrant must "truly name" the person to be arrested or "describe him sufficiently to *identify* him (italics added.)"] Particularity is required in the description so that the wrong person is not arrested. An identification is a precise form of description – and one that helps protect against general searches. (Cf. *Coolidge v. New Hampshire* (1971) 403 U.S. 443, 447 [particularity description designed to avoid specific evil of "general warrant" where the "problem is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings."].) As the Court of Appeal observed, "Neither [Penal Code] section 804, subdivision (d), section 813, nor the state and federal constitutions specify or limit the *manner* or *criteria* for particularly describing a person. All this is required is 'reasonable certainty' that the person may be identified." (*Robinson*, Typed Opn. p. 16, emphasis in original.) The Court of Appeal found, "DNA is the most accurate and reliable means of *identifying* an individual presently available to law enforcement." (*Robinson*, Typed Opn. p. 15, italics added; compare *People v. Marquez* (1992) 1 Cal.4th 553, 567-568 ["wrong" Gonzalo

---

21. The Black's Law Dictionary (4th Ed West Pub. 1968) definition of "identification" supports the use of "an identifier" for use in warrants: "Identification. Proof of identity; the proving that a person, subject, or article before the court is the very same that he or it is alleged , charged, or reputed to be; as where a witness recognizes the prisoner at bar as the same person whom he saw committing the crime . . . ."

Marquez mistakenly arrested on a warrant].) Thus, the Court of Appeal properly held that "an arrest warrant, which *identifies* the person to be arrested for a sexual offense by incorporation of the DNA profile of the assailant, satisfies the statutory particularity requirement of [Penal Code] *section 804, subdivision (d)* read in the light of *section 813, subdivision (a)* and pertinent constitutional provisions." (*Robinson*, Typed Opn. p. 11, italics addes.) The Court of Appeal, not appellant, has provided the proper framework for analysis.

Also unavailing is appellant's claim that DNA cannot reliably be used for identification purposes because identical twins share a DNA profile. This argument has no legal merit. First, a valid arrest warrant describing a person by his or her appearance is no less valid if the person has an identical twin. In any event, the particularity requirement does not demand complete precision or infallibility. (See *People v. Amador, supra,* 24 Cal. 4th 387, 392; *People v. Erving, supra,* 189 Cal.App.2d 283, 290 [two descriptive errors in the indictment do not deprive the court of jurisdiction].)

There is ample support for the trial and appellate courts' conclusion that a DNA profile is a specific forensic identification of a person sufficient to meet statutory and Fourth Amendment particularity requirements.

3. The Wisconsin And Ohio DNA Doe Warrant Decisions Support The Trial Court's Finding That A DNA Profile Is Valid For Identification Purposes

In *Dabney, supra*, 663 N.W.2d at pages 366 and 370 through 372, the Wisconsin Court of Appeals found that an arrest warrant and complaint which identified "the defendant/suspect as 'John Doe' with a specific DNA profile," satisfies the particularity and reasonable certainty requirements of Wisconsin law applicable to warrants.

Dabney is instructive here on both its parallel facts and law. Specifically, on December 4, 2000, three days before the six-year statute of limitations would have expired, the state charged John Doe #12 with a number

of sexual assault crimes committed on December 7, 1994, against a 15-year-old victim who had been waiting at a bus stop in Milwaukee. (*Dabney, supra*, 663 N.W. 2d at pp. 370-372.) The complaint and warrant included the DNA profile for the unknown male suspect which was developed from semen found in the saliva of the sexual assault victim. On March 14, 2001, after the statute of limitations for the crimes would have expired, the state filed an amended complaint against Dabney stating that a DNA profile match with Dabney had been found in the DNA databank on February 27, 2001, and reconfirmed on March 7, 2001.[22/]

The Wisconsin court rejected the defendant's claim that the original complaint and the arrest warrant did not satisfy the "reasonable certainty" identification requirements of Wis. Stat. § 968.04(3)(a)4, thereby depriving the court of personal jurisdiction over him. The court stated that "for purposes of identifying a 'particular person' as the defendant, a DNA profile is arguably the most discrete, exclusive means of personal identification possible." (*Id.* at pp. 370-372.)

Likewise, in *State v. Davis*, *supra*, 698 N.W. 2d at pages 823 and 831 to 32, the Wisconsin Court upheld a September 4, 2002, amended complaint naming as the defendant where a DNA Doe complaint and warrant were issued on August 30, 2000, using a DNA profile from a sexual assault crime committed September 10, 1994. In *Davis*, the Court found the action validly commenced by the Doe warrant because it "satisfied the reasonable certainty requirements for an arrest warrant and answered the 'who is charged' question required for a sufficient complaint." The defendant had objected on statutory grounds arguing the amended complaint did not relate back to a date preceding the statute of limitations because the complaint originally identified defendant

---

22. *Dabney* was the nation's second cold hit where a DNA Doe warrant was used to commence an action. This case was the first.

using an RFLP DNA profile, but the cold hit referred to in amended complaint was generated by PCR (STR) DNA methodology. (*Ibid.*)

The Ohio Court is in accord with the Wisconsin decisions. In *Danley*, *supra*, 853 N.E.2d 1224, on May 9, 2003, after a complaint was filed, an arrest warrant was issued within the original (though subsequently extended) six-year statutory period against a "John Doe" for a rape and aggravated robbery occurring on October 25, 1998. John Doe was not further identified by name, age, date of birth, Social Security number, or physical description, but his gender and a detailed DNA profile were listed. The court, citing *Dabney*, upheld the defendant's January 27, 2006, indictment finding the DNA Doe warrant complaint and arrest warrant validly commenced the criminal action against defendant.

Dabney, *Davis*, and *Danley* all rest on a solid foundation. Each of these decisions supports the magistrate's finding and the trial court's ruling in this case that a DNA profile reliably describes a person and narrows the execution of the warrant to a single individual.

4. Statutes And Case Law Recognize DNA Permits The Identification Of Individuals To An Exceedingly High Degree Of Certainty

Although appellant claims that a DNA profile cannot adequately describe a suspect for purposes of arrest, both the United States Congress and the California Legislature, as well as numerous other authorities, including the National Research Council, have recognized the identification function of DNA profile evidence and found DNA the most reliable form of identification currently available.

Specifically, the National Research Council in its 1996 Report observed:

> The technology for DNA profiling and the methods for estimating frequencies and related statistics have progressed to the point where the reliability and validity of properly collected and analyzed DNA data should not be in doubt. . . . . DNA typing, with its extremely high power

> to differentiate one human being from another, is based on a large body of scientific principles and techniques that are universally accepted. . . . If the array of DNA markers used for comparison is large enough, the chance that two different persons will share all of them becomes vanishingly small.

(Nat. Resource Council, The Evaluation of Forensic DNA Evidence (1996) ("NRC II") at pp. 2, 9; see *People v. Wilson* (2006) 38 Cal.4th 1237, 1243, fn. 1 [noting the Court has treated the NRC II report as "authoritative"]; *People v. Soto*, *supra*, 21 Cal.4th 512, 516-518 [finding DNA evidence admissible]; see also *People v. Reeves* (2001) 91 Cal.App.4th 14, 41-42; *Kincade*, *supra*, 379 U.S. 813, 818 [noting "the chance that two randomly selected individuals will share the same [DNA identification] profile are infinitesimal. . . . "].)

Recognizing the reliability of DNA evidence, in 1998, the California Legislature passed the *DNA and Forensic Identification Data Base and Data Bank Act of 1998* (*"DNA Act"*), significantly expanding the list of felony offenses subject to data bank collection. The DNA Act authorized a comprehensive state data bank program based upon DNA profile analysis and comparison for identification purposes – administered by the DOJ Lab, and coordinated with the FBI's CODIS program. (Stats.1998, ch. 696 (AB 1332), §2, 2000 Pen.Code § 295, subd. (d), 2000 Pen.Code § 296, subd. (a)(1); see fn. 4, *supra.*) The 13 DNA core loci used to identify appellant in the DNA Doe warrant are those designated by CODIS for use in nationwide computer matching of unsolved crime scene profiles to known identification samples from offenders.[23/]

---

23. Federal legislators have been equally clear about the evidentiary power of DNA typing technology. On December 11, 2000, the United States Congress passed the DNA Analysis Backlog Elimination Act of 2000, H.R. 4640, which states in Section 11, subdivision (a)(1), that "over the past decade, deoxyribo-nucleic acid testing (referred to in this section as 'DNA testing') has emerged as the most reliable forensic technique for identifying criminals when biological material is left at a crime scene."

(*Kincade, supra*, 379 F.3d. 813, 818-820; *People v. Nelson, supra*, 43 Cal.4th at p. 1258; see, e.g., NIJ Website: http://www.ncjrs.org/pdffiles1/nij/s1413apb.pdf referencing National DNA Index System (NDIS) Standards for Acceptance of DNA Data (Jan. 11, 2000), page 9, Table 4; USA Today, "FBI Activates 50-State DNA Database Tuesday," 1998 WL 5738654; *Nicholas v. Goord* (2nd Cir. 2005) 430 F.3d 652, 670 ["The junk DNA that is extracted [for forensic purposes] has, at present, no known function, except to accurately and uniquely establish identity."]; *People v. Johnson, supra*, 139 Cal.App.4th at pp. 1135, 1147 [observing that DNA profiles can possess an "astronomical" degree of rarity, resulting in "powerfully incriminating evidence"].)

In 2000, when the magistrate found probable cause to issue the arrest warrant in this case, the DNA Act specifically referenced use of DNA profiles for identification purposes and the function of the data bank in determining the origin of crime scene samples by DNA analytical comparison. Specifically, pursuant to the then operative law,[24] the DOJ Lab and other accredited laboratories were "authorized to analyze crime scene samples and other samples of known and unknown origin and to compare and check the forensic identification profiles, including DNA profiles, of these samples against available data banks and data bases [of qualifying offender profiles] in order to *establish identity and origin* of [the crime scene evidence] samples for *identification purposes*." (Former Pen. Code, § 297 (emphasis added).

Similarly, other provisions of the state's 2000 data bank law also referenced the identification component of the data bank. (See, e.g, Former Pen. Code, § 295, subd. (a): ["This chapter shall be known and may be cited as the DNA and Forensic *Identification* Data Base and Data Bank Act of 1998"];

---

24. Although the exact language of these provisions have been modified by subsequent amendments, the purpose of the data bank has not changed substantially, but only expanded in a manner consistent with the Fourth Amendment and evolving technology.

Former Pen. Code, § 295 subd.(b)(1) ["The Legislature finds and declares. . . DNA) and *forensic identification analysis* is a useful law enforcement tool for *identifying and prosecuting* sexual and violent offenders."]; Former Pen. Code, § 295.1 ["The Department of Justice shall perform DNA analysis and other forensic identification analysis pursuant to this chapter *only for identification purposes*."]; Former Pen. Code, § 299.5, subds. (b),(c),(e),(f)&(g) [setting forth confidentiality restrictions for "DNA and other forensic *identification* information"]; (emphasis added).

The state database would not be a "useful tool" for "identifying . . . sexual offenders" (Former Pen. Code, § 295, subd. (b)(1)) such as appellant if not DNA profile comparison was not a recognized and reliable means of identification within a statistical probability.

In evaluating the constitutionality of the state's data bank program, even before its expansion in 1998, the Court of Appeal in *King* found: "There is no question but that by providing an *effective means of identification*, DNA testing is an efficient means of promoting the governmental interests at stake." (*King*, *supra*, 82 Cal.App.4th at p. 1378 [italics added.].) Subsequently, in *Alfaro*, *supra,* the appellate court examined the parameters of the state's authority "to analyze specimens and samples 'in order to establish identity and origin of samples *for identification purposes*'" pursuant to Former Pen. Code, § 297, subdivision (a), of the Data Bank Act. (*Alfaro*, *supra*, 98 Cal.App.4th at pp. 492, 508, italics added.) The appellate court disagreed with the plaintiff who asserted that "identification purposes" is broad and vague enough to encompass almost any conceivable use of DNA information. The Court of Appeal, referring to the CODIS network, found: "The Act does not permit defendants to do more than standard and usual scientifically appropriate identification analyses with specimens, samples, and print impressions." (*Id.* at p. 508.)

Given the effectiveness of DNA data banks for crime-solving purposes, in 2004, California voters approved Proposition 69, the DNA Fingerprint,

Unsolved Crime and Innocence Protection Act (Pen. Code, § 295 et seq., eff. Nov. 3, 2004), again expanding the database law. That law expressly recognizes that DNA typing is "the latest scientific technology available for accurately and *expeditiously identifying, apprehending, arresting, and convicting* criminal offenders and exonerating persons wrongly suspected or accused of crime." (Ballot Pamp., Gen. Elec. (Nov. 2, 2004), text of Prop. 69, § II (Findings and Declarations of Purpose), p. 135 [http://vote2004.ss.ca.gov/voterguide/propositions/prop69text.pdf; italics added].) Section 295, subdivision (c), reiterates the fact that DNA technology is employed where the goal is the "accurate detection and prosecution" of criminal activity. It is consistent with the intent of the voters that DNA profile evidence be used for purposes of arrest, as set forth in the findings.

B. An Unnecessarily Rigid Interpretation Of The Particularity Requirement For Arrest Warrants Would Limit the Use Of DNA Databases In Crime Solving And Create The Legal Anomaly That A DNA Identification Profile That Is Sufficient To Sustain A Conviction Beyond A Reasonable Doubt Would Be Insufficient To Commence A Criminal Action Based Upon Probable Cause Against The Same Defendant

Finally, the utility of the databank as a crime solving tool should not be nullified, as appellant suggests, by an unnecessarily rigid interpretation of the particularity requirement for arrest warrants. California courts have found that the suspicionless, warrantless collection of database samples from convicted offenders comports with Fourth Amendment guarantees in part based upon the identification function of the database in crime solving. (See, e.g., *King, supra,* 82 Cal.App.4th at pp. 1369-1378; *Alfaro*, *supra*, 98 Cal.App.4th at pp. 505-506; *People v. Adams* (2004) 115 Cal.App.4th 243, 255-259 ("*Adams*"); *People v. Travis*, *supra*, 139 Cal.App.4th 1271; *People v. Johnson*, *supra*, (139 Cal.App.4th 1135; *see Kincade, supra*, 379 F.3d at pp. 813, 835.) Appellant's argument that DNA identification profiles inadequately describe a suspect is

legally and logically irreconcilable with the widespread legislative and judicial recognition in these Fourth Amendment cases that acknowledge the power of DNA profile evidence to identify and distinguish individuals

Likewise, it would thwart the use of DNA as the modern crime-solving tool the voters envisioned with Proposition 69 to prohibit law enforcement from using the very particular description provided by DNA profile evidence – *to commence prosecution* -- when DNA evidence alone is sufficient to *sustain a conviction.*[25/] (See, e.g., *People v. Soto*, *supra,* 21 Cal.4th at p. 512 [victim could not identify assailant; DNA match between semen stain on victim's bedspread and defendant's blood constituted sufficient evidence of identity]; *Roberson v. State of Texas* (Tex.Ct.App. 2000) 16 S.W.3d 156, 166-171 [court rejected the defendant's claim that DNA evidence alone was insufficient to prove his identity as the perpetrator of aggravated sexual assault]; *People v. Rush* (N.Y.Sup.Ct. 1995) 630 N.Y.S.2d 631, aff'd (1998) 672 N.Y.S.2d 362 [victim could not identify assailant at trial; DNA match between victim's anal and vaginal swabs and defendant's blood constituted sufficient evidence of identity]; *Springfield v. State* (Wyo. 1993) 860 P.2d 435 [victim unable to identify assailant in court; DNA match between semen on victim's panties and in her anus and defendant's blood constituted sufficient evidence of identity].) In other words, it is legally unsupportable to embrace appellant's apparent position that DNA profile evidence, which alone is sufficient to sustain a conviction against a defendant beyond a reasonable doubt, should be found legally insufficient to commence legal action against the same defendant based upon probable cause.

Finally, use of the DNA warrant to commence action significantly

---

25. See *United States v. Ventresca* (1965) 380 U.S. 102, 107-108 ["While a warrant may issue only upon a finding of 'probable cause,' this Court has long held that the term "probable cause"... means less than evidence which would justify condemnation."].)

promotes the Fourth Amendment's overall purpose—to "prevent general searches." (*Spilotro*, *supra*, 800 F.2d at p. 963; see also *Coolidge v. New Hampshire* (1971) 403 U.S. 443, 467; *People v. Rogers* (1986) 187 Cal.App.3d 1001, 1006.) A warrant based upon DNA evidence is the single best tool to narrow the search for a perpetrator and to guard against the government's arbitrary invasions of privacy of innocent persons by focusing law enforcement's attention on a single individual. As the Court of Appeal in *King* observed:

> The government also has an interest in ensuring that innocent persons are not needlessly investigated – to say nothing of convicted – of crimes they did not commit. [fn. omitted] DNA testing unquestionably furthers these interests. The ability to match DNA profiles derived from crime scene evidence to DNA profiles in an existing data bank can enable law enforcement personnel to solve crimes expeditiously and *prevent needless interference with the privacy interests of innocent persons.*

(See *King*, *supra*, 82 Cal.App.4th at pp. 1375-1376 [italics added].

Accordingly, the complaint and arrest warrant that described appellant by his DNA profile was more than adequate to identity him with reasonable certainty under Penal Code section 815 and related authorities, and for constitutional purposes. Indeed, that the DNA profile did, in fact, specifically identify appellant, and only appellant, attests to the legal sufficiency of the DNA profile as a method that reasonably identifies the subject to be arrested. The warrant should be upheld by this Court.

III.

THE SOLE REMEDY FOR "MISTAKEN" COLLECTION OF DNA DATABASE IDENTIFICATION SAMPLES FROM CRIMINAL OFFENDERS IS THE EXPUNGEMENT OF SAMPLES AS SET FORTH IN PENAL CODE SECTION 299 – A PART OF THE STATE'S CONSTITUTIONAL DNA DATA BANK ACT

Appellant asserts that a remedy for mistaken sample collection is imperative. (AOB 48-49, 51, 56-57, 60.) According to appellant, the mistaken qualification of appellant as a person subject to DNA data bank sample collection in 1999 requires the exclusion of all DNA evidence at trial, suppression of the cold hit, and reversal of the conviction. (AOB 48-49, 51, 56-57, 60, 72-74 .) A blood sample for DNA analysis was taken from appellant on March 2, 1999, while he was in custody at the RCCC on a parole hold for first degree burglary crimes committed in 1996. Appellant also was in custody at RCCC by virtue of his December 2, 1998, conviction for loitering and prowling (1 RT 157, 5 RT 3248-3250; 5 CT 1234, 1304;) for which he received a 60-day sentence. Under the state's 1999 DNA Data Bank Act, all persons in custody or on probation or parole with a qualifying felony conviction or adjudication of record were subject to DNA data bank collection. (See Penal Code, § 296.1, subds. (a)-(g).) In 1999, at RCCC, it was believed that appellant was qualified for DNA data bank collection based upon a mistake in determining that he had suffered a prior felony conviction for spousal abuse (Pen. Code, § 273.5), when in fact he had a misdemeanor spousal abuse conviction. The California DOJ DNA Lab, which had instituted (non-mandatory) procedures for verifying qualifying offenses for submitted samples, saw the error but also mistakenly qualified appellant based on a prior felony assault with a deadly weapon (Pen. Code, § 245) juvenile adjudication. Sealed records later showed appellant had suffered a felony grand theft juvenile adjudication – a non-qualifying offense.

Appellant's claim that his mistaken DNA sample collection compels the

suppression of all DNA evidence against him lacks merit. No remedy is warranted other than expungement of his original database sample, which occurred in this case.

A. Standard Of Review

On appeal of a trial court's denial of a Penal Code section 1538.5 motion to suppress evidence, this Court must review the evidence in the light most favorable to the trial court's determination. This Court must uphold any factual findings, express or implied, that are supported by substantial evidence, but it must independently assess, as a question of law, whether the challenged search or seizure conforms to the constitutional standard of reasonableness. (*People v. Williams* (1988) 45 Cal.3d 1268, 1301; *People v. Leyba* (1981) 29 Cal.3d 591, 596-597.)

"'Pursuant to article I, section 28, of the California Constitution, a trial court may exclude evidence under Penal Code section 1538.5 only if exclusion is mandated by the federal Constitution.'" (*People v. Hoag* (2000) 83 Cal.App.4th 1198, 1208, quoting *People v. Banks* (1993) 6 Cal.4th 926, 934; accord, *In re Lance W.* (1985) 37 Cal.3d 873, 896.)

B. Facts: The Mistaken Determination Of Appellant As A Qualifying Offender

In 1999, Deputy Sheriff Lawrence Ortiz worked at RCCC and was responsible for housing assignments for incoming prisoners. (1 RT 163.) In February 1999, soon after the state's new DNA Data Bank law was enacted, he took on an assignment to assist in the collection of blood samples pursuant to that law. At a meeting, Deputy Ortiz learned about the new data bank law and the need for the institution to collect DNA samples from individuals convicted of certain crimes prior to release from custody. (1 RT 163-166.) The meeting also was attended by records officers tasked with assisting the identification of qualifying in-custody offenders subject to collection. (1 RT 169.) After that

meeting, Deputy Ortiz instructed staff or records officers "on what to look for." (1 RT 169-170.) Deputy Ortiz discussed system capabilities to look for qualifying charges and how to handle those currently in custody. (1 RT 169-170.) He considered implementation of the law a complex process. (1 RT 171-172.) "In the haste to identify and complete the [collection] kits, a large number of staff were being used to review records and identify the qualified." (1 RT 172.) Various staff members were confused as to what offenses qualified. (1 RT 174.) When an inmate raised a question as to whether he qualified for collection, Deputy Ortiz would stop the process and research it himself and show the inmate the rap sheet if the deputy determined the inmate had a qualifying offense. (1 RT 174-175.) If someone other Deputy Ortiz filled out the information card that was part of the DNA Data Bank collection kit, Deputy Ortiz would not double check the qualifying offense but would rely on the determination made by staff. (1 RT 180.) Deputy Ortiz did not know who qualified appellant for collection on the Penal Code section 273.5 offense, but he believed that staff knew that only felony offenses qualified because that was the information he was providing and they were trained to look for felonies. (1 RT 181-183, 203, 216.) Appellant's sample was taken on March 2, 1999; appellant signed the collection card (1 RT 185, 294), and Deputy Ortiz signed the form. (1 RT 188.)

The DOJ DNA lab, in its self-initiated procedure for reverifying qualifying offenses associated with samples, caught the mistaken qualification of appellant based upon the misdemeanor Penal Code section 273.5 spousal abuse offense. (1 RT 297, 299; 2 RT 303.) DOJ Office Assistant Kim Meade from the Latent Print Section in Sacramento had experience checking criminal histories and worked full time in verifying qualifying offenses for the Lab. (1 RT 378-381.) Ms. Meade caught the original mistaken authorization but accepted appellant as a qualifying offender based on what appeared to be (but what was not) a Penal Code section 245 adjudication appellant had sustained

as a juvenile. (1 RT 299; 2 RT 359-361, 381, 389.) She understood that offense – as a felony – to be a qualifying offense under the database law. (2 RT 381, see former Pen. Code, § 296, subd. (a)(1)(f); see also former Penal Code, 2000 § 296.1, subd. (c) [juvenile collections].) Ms. Meade had reviewed the submitted information and has used appellant's rap sheet in the Automated Criminal History System. (1 RT 299-300.) As juvenile records are sealed, the DOJ DNA lab was unable to access them at that point. (2 RT 382.) The Latent Print Section also confirmed appellant's identity by way of fingerprint comparison. Having apparent confirmation of a qualifying juvenile adjudication, Ms. Meade returned the file to Mr. Elgart, who cleared it for searches on July 27, 2000. (2 RT 322-323.) If a sample is the subject of a cold hit, the lab undertakes another administrative review to ensure that no error was made in processing, that no samples were switched, and to confirm the underlying qualifying offense. (2 RT 292-293.)

Subsequently, a second sample was taken from appellant on September 4, 2002, after the data bank law was expanded (AB 673) to include first degree burglaries. (2 RT 317, 424.) The sample was received by the lab on September 9, 2002, and entered into the data bank on November 22, 2002. (2 RT 422.)

Department of Justice Criminalist Manager Bill Phillips testified that effective December 1998, he was the laboratory's implementation manager for AB 1332, the new data bank law, which became effective January 1, 1999. (1 RT 220-222.) As part of his responsibilities, Mr. Phillips trained law enforcement personnel regarding what they needed to do to provide samples and discussed the process for identifying qualifying offenses. (1 RT 223-225.) Starting in January 1999, he was attempting to contact about 600 law enforcement agencies. (1 RT 224, 227.) Mr. Philips made about 37 presentations the first year. (1 RT 227.) There was training on qualifying offense for juveniles, but there also remained confusion about whether samples from juveniles could be collected. (1 RT 229, 244.)

Ken Konzak, Laboratory Director for the state's DNA data bank testified that the state's DNA data bank program in 2002 had about 250,000 samples collected, with 235,000 "typed," and another 20,000 samples waiting to be administratively qualified before input into the database. (1 RT 249-250, 271.) In September 2000, at the time of the cold hit in this case, the data bank had received about 154,000 samples and about 120,000 samples in the backlog that had not been analyzed. (2 RT 441.) The new data bank law represented a big expansion in terms of crimes that qualified and there was a lot of detail to be learned and new systems to be implemented. (1 RT 272-272, 282-283.)

Although DOJ did not have an affirmative statutory duty to verify that all samples received qualified for inclusion in the data bank, the DOJ DNA lab nevertheless undertook the verification of submitted samples and implemented a system for holding samples until the sample verification process was completed. If the sample did not qualify, it would not be "typed." (1 RT 277-278, 281, 287, 290.) Mr. Konzak testified that after the lab learned of the first mistaken collection of a non-qualifying sample, the lab "stopped the presses" i.e., "stopped all searches of the database and went back and literally checked tens of thousands of profiles." (1 RT 288-290.) As a result of the mistaken collection, the lab stopped all automated searches from June 2000 until the verification was completed. (1 RT 290, 2 RT 323.) Due to the confusion over collection from in-custody adult offenders for prior juvenile felony adjudications, DOJ instituted a policy for "administrative reasons to make sure we don't repeat this kind of situation" of accepting collection from only those juvenile offenders who since November of 2000 have qualifying juvenile offenses for sex crimes and who have been sent to CYA. (2 RT 368-370.) Referral to CYA is recorded on the criminal history. (2 RT 368-369.)

According to Mr. Konzak, if DOJ had a systematic and intentional policy of entering non-qualifying profiles into CODIS, the sanction for it could be expulsion from the national crime solving network. (2 RT 265, 397.)

Mr. Konzak further testified that the limits on the types of offenses subject to collection was one that arose from the physical limitations in processing samples. The lab was not capable of analyzing the greater numbers of samples that would come from an all-felons database law. (1 RT 277.)

C. The Trial Court Ruling

The trial court denied appellant's motion to suppress the DNA evidence after a hearing and arguments that took place from December 4, 2002, through December 11, 2002. (1 RT 156-299; 2 RT 300-537.) The court found the state's newly enacted DNA data base law, Penal Code section 295 et seq., was constitutional and that "the motivation" for the collection of appellant's data base sample "was a good faith belief, possibly based on a negligent analysis by someone, that the defendant was a qualified offender and that the law directed his sample to be obtained." (3 CT 728-729.)

The court found the DNA data bank program, as a whole, to have a legitimate law enforcement purpose and that the officer collecting the DNA sample attempted to enforce that law. (3 CT 730.) The court relied upon the Data Bank Act's provision excusing "mistakes" in collection as grounds for concluding the Legislature "did not contemplate . . . exclusion of evidence" as an appropriate remedy for mistakes of this kind. (3 CT 730-731.)

Analyzing the evidence, the court first found appellant did not have a "Fourth Amendment right [to object to the collection of his DNA sample] . . . because the search was pursuant to . . . [his] parole condition." (3 CT 731.)[26] However, the court made an alternative ruling in case it was "wrong on its first ruling." (3 CT 731.)

---

26. That the trial court misspoke and said it was "excluding" the evidence instead of suppressing the evidence is clear from the context of the transcript as well as the court reporter's own "[sic]" citation in the transcript on this point. (3 CT 731.)

The court also found that the "Fourth Amendment good faith exception will allow for some level of error in judgment in complex matters and interpretation of complex matters" (3 CT 735) and the mistaken qualification of appellant as an offender subject to data bank sample collection was the type of mistake covered by the *United States v. Leon* (1984) 468 U.S. 307 good faith exception. (3 CT 733.) Specifically, the trial court distinguished this case requiring the clerks "to interpret nuances of laws such as what offense qualify under a complex . . . [statute such as Penal Code section] 296 or whether a crime is necessarily a wobbler" from those cases involving record-keeping type errors, which require little judgment and are not excused. (3 CT 733.) The court compared the confusion about interpreting the data bank statute to the confusion in the court system in sorting out the Three Strikes law as a basis for finding it inappropriate to have a "zero tolerance" rule for the kinds of interpretational errors that were made in the collection of appellant's first sample. (3 CT 733.) The court also distinguished this case from cases where there are inexcusable record-keeping errors, finding that the record-keeping error cases result in the serious consequences of arrest and custody time or potentially dangerous entry into homes due to a ministerial failure to update police records. In contrast, a mistaken collection of a DNA sample "does not involve the arrest, apprehension, [or] taking into custody of the person" because the person "is already in custody." (3 CT 735.)

The court found the Data Bank Act's mistake provision excused the errors of Officer Ortiz and DOJ's Kim Meade in qualifying appellant for sample collection in 1999, as they were the kind of mistakes contemplated by the Legislature and were not systematic efforts to avoid the limits of the law. (3 CT 737-738.) The court described the sample collection at RCCC as a case where there is "to some degree an emergency pressure" of trying to quickly comply with a newly enacted complex law and having to do a "hurry-up job since people are being released everyday and the statute says before they're

released you're to take these samples." (3 CT 735.) The court also found that DOJ employee, Ms. Meade, attempted to do her job to review the documentation and did find that the Penal Code section 273.5 as a misdemeanor was not a basis for collection. (3 CT 735.) The court found Ms. Meade "proceeded to review the record and determined to her understanding" that the juvenile Penal Code section 245 offense would qualify as a felony, although she was in error. (3 CT 735-736.) The court found Ms. Meade also "was dealing with a reasonably new law and the heavy pressure" attendant to implementing it. (3 CT 736.) The court found the errors "inevitable in this process." (3 CT 736.)

The court stated it was impressed by the fact that DOJ "took significant steps to review their whole system" including to "stop their processing until a form of review was conducted" upon learning of a previous sample collection error in another Sacramento case. (3 CT 736.) The court observed that the Department of Justice made "serious efforts to try to evaluate their system," that it "modified the kinds of juvenile entries they would take as a matter of policy to avoid mistakes, and that thereby they "greatly reduced the number of juvenile entries that they might receive limiting them to CYA type cases, which shows that these folks are not out there trying to get as much blood as they can [or] trying to expand their base by overlooking issues of qualification." (3 CT 736-737.) Though the court found DOJ acted "in a not perfect manner," it did act in a "responsible" and "conscientious" manner in "trying to keep their errors to a very low level" – less than one percent. (3 CT 737.)[27/]

---

27. The court was not persuaded, however, that the People had established a case for the inevitable discovery of appellant's sample because they did not establish a significant likelihood that a latter sampling would occur. (3 CT 738-739.)

D. The Court Of Appeal Ruling

The Court of Appeal rejected appellant's claim that taking DNA samples violated appellant's Fourth Amendment rights. (*Robinson*, Typed Opn. pp. 5, fn. 4, 24 [relying inter alia on *Alfaro*, *supra*, 98 Cal. App.4th pp. 505-506 [finding DNA Act serves "compelling governmental interests"].)

The Court of Appeal also rejected appellant's "as-applied" challenge that the DNA evidence against him must be excluded because his sample was taken "based upon two offenses officials erroneously concluded were qualifying offenses." (*Robinson*, Typed Opn. p. 25.) Because the Court of Appeal found that "the exclusionary rule is inapplicable to suppress the evidence in this case," it declined to address whether appellant's sample was properly collected pursuant to a valid parole condition or its admissibility under the inevitable discovery doctrine. (*Robinson*, Typed Opn. p. 25.)

Noting that the "exclusionary rule is 'applicable only where its deterrence benefits outweigh its 'substantial social costs," the Court of Appeal found the deterrence value of suppressing the DNA in this case "is nil" and that the Legislature's purpose in limiting the statute's qualifying offense list was for administrative reasons, not for the benefit of individual offenders. (See *Robinson*, Typed Opn. pp. 31-36.) Specifically, the Court of Appeal observed in part:

> First, there was no egregious police misconduct involving willful malfeasance. To the contrary, as the trial court found, state and local officials were attempting to act in a responsible and conscientious manner in an effort to implement the mandates of a complex law while carrying out the daunting task of collecting and analyzing thousands of biological samples 'as soon as administratively practicable. . . ." (Former § 296, subd. (b); Stats. 1998, ch. 696, § 2.) [¶] Moreover, the definition of a qualifying offense has been expanded and simplified . . . .to include *any felony*, whether committed by a juvenile or an adult . . . .[and] no deterrent effect would be achieved by excluding evidence obtained from a sample mistakenly collected under an earlier version of the [DNA] Act when the same search would be lawful under the current law." [¶] The

> deterrent value of suppression is also diminished by federal law, which sanctions noncompliance with federal standards for [the federally administered database program] CODIS . . . .¶ Last, suppression of the evidence will not serve the statutory purpose of former section 296 . . . [which limited the statutory list of qualifying offenses] to specified violent felonies . . . to ease the administrative burden on those who were responsible for implementing the Act, not to benefit individual offenders. . . .¶ In sum, we find the officials who were responsible for mistakenly collecting defendant's blood did so as a good faith effort to comply with the new law, there are no incentives to collect blood samples beyond the scope of the statute, and the purpose and interests protected by the Act will not be served by suppression. Suppressing the evidence would achieve no deterrent value under these circumstances although it would have significant social costs . . .

(See *Robinson*, Typed Opn. pp. 31-36, italics added.)

E. Because The California Legislature Already Has Specified That No Remedy Other Than Sample Expungement is Appropriate For Mistaken DNA Database Sample Collection, It Would Be Contrary To Public Policy And Frustrate The State's Public Safety Programs For The Judiciary To Provide A Different Remedy To Criminal Offenders

The only appropriate remedy for a simple mistaken sample collection is the one authorized by statute: sample expungement as set forth in Penal Code section 299. There should be no other remedy afforded a criminal offender such as appellant who, while in custody, provides a DNA identification sample to law enforcement, even though none of his criminal convictions of record are specifically listed in the State's DNA Database statute as qualifying offenses mandating DNA sample collection. Both the state statute at issue as well as state and federal case law support this conclusion. The statutory program, by its explicit terms, ties collection mandates to specific offenses only for administrative purposes, not to benefit criminal defendants, and excuses sample collection mistakes. (See *infra*, discussing Pen. Code, § 297, subds. (e) & (f) [DNA Database mistake provision]; see also Pen. Code, § 298, subd. (c).)

Where the Legislature already has determined that no remedy other than

sample expungement is appropriate for a mistaken sample collection, it would encroach upon the Legislature's perogatives for the judiciary to authorize a different remedy, regardless. (Cf.*Kraus v. Trinity Management Servs.* (2000) 23 Cal. 4th 116, 313, fn. 14 ["The court's inherent equitable power may not be exercised in a manner inconsistent with the legislative intent underlying a statute . . . "]; *United States v. Forrester* (9th Cir. 2008) 512 F.3d 500, 512 [statutory text and "general reluctance to require suppression in the absence of statutory authorization" cited as factors in finding suppression of evidence inappropriate].)

1. Penal Code Sections 297 And 298 Reflect A Legislative Assessment That Evidence Suppression Is Not An Appropriate Remedy For DNA Database Sample Collection Mistakes

California DNA Database law anticipates, addresses, and accounts for simple mistakes in sample collection, and it has explicitly provided for only one remedy: expungement of the mistaken sample. (See Pen. Code, § 299). Pursuant to state statute, every convicted offender who is incarcerated and has a qualifying offense of record must provide a DNA sample. (See 2008 Pen. Code, § 296, subd. (a) ["The following persons shall provide buccal swab samples, right thumb prints, and a full palm print impression of each hand. . . for law enforcement identification purposes . . . ."].) Significantly, in addition, part of the state's statutory program is a "mistake provision" that excuses simple mistakes made by law enforcement and data entry personnel in implementing the State's DNA database program.

At the time of appellant's 1999 sample collection, the "mistake" provision of data bank law read as follows:

> The limitation on the types of offenses set forth in subdivision (a) of Section 296 as subject to the collection and testing procedures of this chapter is for the purpose of facilitating the administration of this chapter. The detention, arrest, wardship, or conviction of

> a person based upon a data bank match or data base information is not invalidated if it is later determined that the specimens, samples, or print impressions were obtained or placed in a data bank or data base by mistake.

(*Ibid.*; Pen. Code, § 297, subd. (e).)

In Proposition 69, the 2004 DNA Fingerprint, Unsolved Crime and Innocence Protection Act, Penal Code section 297, subdivisions (e) & (f), the California voters both adopted and clarified the mistake provision:[28/]

> (e) The limitation on the types of offenses set forth in subdivision (a) of Section 296 as subject to the collection and testing procedures of *this* chapter is for the purpose of facilitating the administration of this chapter *by the Department of Justice, and shall not be considered cause for dismissing an investigation or prosecution or reversing a verdict or disposition.*
>
> (f) The detention, arrest, wardship, adjudication or conviction of a person based upon a data bank match or . . . *database* information is not invalidated if it is . . . determined that the specimens, samples, or print impressions were obtained or placed *or retained* in a data bank or . . . *database* by mistake.

(Italics added; see also Pen. Code, § 298, subd.(c)(3) [Department of Justice and local law enforcement failure to comply with Chapter "shall not invalidate an arrest, plea, conviction, or disposition"]; Proposition 69, Pen. Code, § 295, subd. (b)(3) [Act necessary "*in order to clarify existing law* and to enable the State's DNA Forensic Identification Database and Data Bank Program to become a more effective law enforcement tool"] [emphasis added.].)

Notably, in conjunction with the "mistake provision," the Legislature also included an express limitation on liability for mistakes in implementing the database law, so that causes of action against law enforcement personnel and agencies did not improperly accrue to criminal offenders. (See Pen. Code, § 298, subd. (c)(1) [no civil or criminal liability for collecting samples when done in accordance with standard professional practices]; See Pen. Code, § 298,

---

28. The Proposition 69 clarifying amendments to the mistake provisions are shown in italicized text.

subd. (c)(2) [no civil or criminal action against any law enforcement agency or the Department of Justice for a mistake in placing an entry in a data bank or database].)

Moreover, the Legislature determined a remedy commensurate with mistake, and that sole remedy is Penal Code section 299 sample expungement.

Underlying the mistake provision, and the Database Act's accompanying limitation of liability provisions are two salient points. First, the California Legislature did not – and still does not – view a mistaken collection from a non-qualifying criminal offender as an unreasonable search. Second, the list of offenses qualifying the offender for DNA collection was limited for administrative purposes only, and not because lawmakers thought that seizure of DNA samples from only those offenders listed in the former Penal Code section 296 would constitute reasonable searches. In other words, the limitation of the qualifying offense list was not to benefit any non-qualifying defendant or affirmatively exempt an entire classes of convicted offenders from collection, rather it was to accommodate the administrators of the data bank program, i.e., the Department of Justice. (See 1999 Pen. Code § 295, subd. (d) ["The Department of Justice, through its DNA laboratory, shall be responsible for the management and *administration* of the state's DNA data base and data bank identification program. . . ." (italics added)].)

The mistake provision also was a recognition that at the time the Legislature originally passed the Data Bank Act, the Department of Justice DNA Laboratory had a significant backlog of samples and could not handle a more comprehensive data bank program. (See "*Dangerous Delay on DNA,*" San Francisco Chronicle, Oct. 19, 1999.) As DOJ DNA Data Bank Director Konzak testified, the limit on the types of offenses subject to collection was one that arose from the physical limitations on processing samples. In 1999, the laboratory just was not capable of analyzing the greater numbers of samples that would come from an all-felons database law. (1 RT 277.) The Legislature

further recognized the difficulty of administering a statewide program of this magnitude as well as the unprecedented amount of coordination necessary between law enforcement agencies to implement it. Accordingly, the law provides that a mistake in the taking of a sample or the entry of a DNA profile into the DNA database, and even a delay in expunging a sample (Pen. Code, § 299, subd. (c)) will not invalidate a subsequent search result.

That both the Legislature in the 1999 Act and the People in Proposition 69 passed an expanded DNA Data Bank Act with a mistake provision being a significant part of the law is further evidence that society is not prepared to recognize that an offender in custody has a privacy right to be exempt from identification testing. (See 1999 and 2004 Data Bank Act, Pen. Code, § 297, subds. (e) & (f); *King, supra*, 82 Cal.App.4th at p. 1375 ["By their commissions of a crime and subsequent convictions, persons such as appellant have forfeited any legitimate expectation of privacy in their identities . . . [and] any argument that Fourth Amendment privacy interests prohibit gathering information concerning identity from the person of one who has been convicted of a serious crime, or of retaining that information for crime enforcement purposes, is an argument that long ago was resolved in favor of the government."].)

The Legislature's intent to ensure that minimally intrusive DNA identification samples are collected from criminal offenders so that one of the state's premier public safety programs can operate effectively should be given deference by the judiciary in considering whether a remedy beyond that provided by statute is appropriate. Recognizing the importance of its public safety program in stemming recidivist crime, the Legislature clearly did not want to burden law enforcement and collection personnel with the specter of inmate lawsuits resulting from foreseeable glitches that can occur in implementing a statewide program of almost unmatched enormity and complexity. (See DOJ Pen. Code, § 295 subd. (h)(4) Website at http://ag.ca.gov/bfs/pdf/quarterly_rpt.pdf [over 1 million samples in

California's DNA Database Program].)

Accordingly, application of the exclusionary rule or other judicially-crafted remedy is particularly inappropriate when, as here, the express statutory interest being protected is an administrative one – to limit the numbers of samples collected due to funding, resources, and sample backlog concerns – rather than to excuse certain classes of convicted offenders from identification testing that facilitates their detection for crimes committed. (See *Hudson*, *supra*, 126 S.Ct at p. 2169, fn. 2 [citing the "plain statement" in *New York v. Harris* (1990) 495 U.S. 14, 20, "that the reason for a rule must govern the sanctions for the rule's violation"].) If the Legislature had wanted to structure a remedy that included the suppression of "hits" based on DNA profile comparisons with non-qualifying samples, it could have provided that remedy in the statute. That it did not reflects sound legislative policy that the prosecution of criminal offenses be permitted to go forward, and not be defeated by anticipated error in the collection of DNA database identification samples from criminal offenders. (Cf. *Alfaro*, *supra*, 98 Cal.App.4th at p. 511.) ["The presumption of constitutionality that must be accorded legislative acts requires that a legislative act be deemed to have been enacted on the basis of any state of facts supporting it that reasonably can be conceived."].)

This case presents precisely the kind of situation the mistake provision was designed to address. There is no basis for this Court to provide appellant a remedy, beyond that provided by statute, for the mistaken collection.

2. The Time, Place And Manner Of Collecting DNA Data Base Identification Samples From A Criminal Offender In Police Custody Undercut The Argument That A Remedy – Other Than Expunging The Mistaken Sample From the Database – Is Appropriate For Mistaken Collection Of A DNA Sample

The time, place and manner of collecting DNA database identification samples from a criminal offender in police custody also undercut the argument

that a remedy – other than expunging the mistaken sample from the database (Pen. Code, § 299) – is appropriate for simple mistaken collection of a DNA sample. DNA collection by buccal (cheek) swab (now required) or even blood sample is legally recognized as a minimally intrusive inconvenience. (See, e.g., *King, supra*, 82 Cal.App.4th at pp.1377-1378 [citing *Skinner v. Railway Labor Executives' Assn.*, (1989) 489 U.S. 602, 625, noting that "the intrusion occasioned by a blood test is not significant," that "*Schmerber* thus confirmed 'society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's privacy and bodily integrity," and that incarcerated individuals "already are subject to blood tests for purposes of testing for AIDS"]; cf. *Johnetta J. v. Municipal Court* (1990) 218 Cal.App. 3d 1255, 1277-1278 ["*Skinner* has relegated blood testing to a realm of lesser protection under the Fourth Amendment."].) It is likewise legally significant that DNA database samples are taken from persons in police custody, such as appellant, who have lost any expectation of privacy in their identity by virtue of their felony arrests or their criminal convictions. (*King, supra*, 82 Cal.App.4th at p. 1375.) The sample is taken by trained personnel. (See Pen. Code, § 298, subd. (b)(2) & (3).) That the mistake in collection may result from misreading computer generated rap sheet records or misunderstanding the law does not mean collection mistakes should be afforded the same treatment as cases where such errors result in the immediate arrest of a person with a full expectation of privacy. Despite appellant's suggestion otherwise (AOB 68-72), there is a legally significant distinction between a mistake that results in an individual being arrested and a mistake that results in an incarcerated felon providing a buccal (cheek) swab sample for an identification record —which can later be expunged, if necessary. (Compare *People v. Ramirez* (1983) 34 Cal.3d 541, 543-544 [defendant arrested on recalled warrant]; *People v. Willis* (2002) 28 Cal. 4th 22 [parole search after termination of parole supervision].) The trial court correctly distinguished mistaken DNA sample collection from

cases where there are inexcusable record-keeping errors that result in serious consequences of arrest, custody time, or dangerous entry into a home: A mistaken collection of a DNA sample "does not involve the arrest, apprehension, [or] taking into custody of the person" because the person "is already in custody." (3 CT 735.)

Moreover, the connection between the mistaken sample collection and a past or future crime committed by the sampled inmate is too attenuated, in any event, to justify a remedy, other than Penal Code section 299 expungement for mistaken collection. The collection of a DNA sample during police custody is not temporally or logically connected to the commission of a prior criminal act or future criminal act. (Cf. *People v. Griffin* (1976) 54 Cal.App.3d 532 [error to suppress identification evidence resulting from mug shots of defendant after he was unlawfully arrested]; *People v. Rosales* (1987) 192 Cal.App. 3d 759 [even if detective lacked probable cause to arrest defendant, fingerprint evidence obtained during defendant's booking was admissible under inevitable discovery doctrine]; *United States v. Ceccolini* (1978) 435 U.S. 268, 273-274; *People v. Frazier* (Mich. 2007) 733 N.W.2d 713 ["Attenuation can occur when the causal connection is remote, or 'when interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained."].) As appellant, himself, has pointed out, there needs to be a perpetrator's DNA profile from a crime, along with a reference DNA profile of record from the suspect before any arrest can be made through a DNA database cold hit: "[T]he arrest warrant with the DNA profile, even when taken as a whole with the affidavit underlying the warrant, still was useless in terms of pinpointing a suspect without something more: a living, breathing, suspect's DNA profile which 'matched' the profile of the unknown 'John Doe' in the arrest warrant." (AOB 38.)

Accordingly, the sole remedy appropriate for a DNA sample collection mistake such as the one that occurred in this case is that provided for by statute

– Penal Code section 299 sample expungement. The circumstances surrounding DNA database sample collection from offenders in custody and the attenuation between sample collection and use of the sample to solve other past or future crimes do not support imposition of any other remedy for mistaken collection.

F. Application Of Judicially-Created Remedies Such As The Exclusionary Rule Are Not Appropriate Because It Is Not A Violation Of The Fourth Amendment To Collect DNA Identification Database Samples From Criminal Offenders While They Are In Custody

California courts may not suppress evidence unless suppression is mandated by the United States Constitution. (Cal. Const. art. I, § 28, subd. (d).) Even if appellant's 1999 DNA sample collection is considered a violation of state statute[29/] and the state law's express statutory remedies are considered insufficient, application of the exclusionary rule, as appellant urges, is inappropriate. Federal constitutional remedies such as the exclusionary rule are not available for violations of state laws that, like California's 1999 DNA Database Act, are more restrictive than the Fourth Amendment requires. (*Moore*, *supra*, 128 S.Ct. at pp. 1606-1608; see also *People v. McKay*, *supra*, 27 Cal.4th at p. 608; *People v. Tillery* (1989) 211 Cal.App.3d 1569, 1580 ["Where, despite statutory violations, the search is 'reasonable' in the constitutional sense, exclusion of the evidence is not warranted."].) Only if the collection of a DNA sample from appellant while he was in custody (on a parole hold for his felony first degree burglary crimes) violated the federal Constitution, would the exclusionary rule even *potentially* apply to suppress the "cold hit" evidence linking appellant to other crimes he committed. (*Arizona*

---

29. It is arguable that although collection of appellant's sample exceeded the statutory list, it did not actually violate the statute which anticipates, addresses, and accounts for sample collection outside of the list. (See Argument III (E), *supra*.)

v. Evans (1995) 514 U.S. 1, 13-14 ["[T]he issue of exclusion is separate from whether the Fourth Amendment has been violated . . . and exclusion is appropriate only if the remedial objectives of the rule are thought most efficaciously served. . . . "].) As the United States Supreme Court has recognized, "[I]t is not the province of the Fourth Amendment to enforce state law." (*Moore, supra*, 128 S. Ct. at pp. 1606-1608; see *People v. McKay, supra,* 27 Cal.4th at pp. 601, 608.) Otherwise, as that Court recognized, it "would often frustrate rather than further state policy." (*Id.*)[30] In this case, application of the exclusionary rule would be inappropriate both because there was no Fourth Amendment violation when appellant's sample was collected in 1999 while he was in custody on a parole hold for a felony conviction, and because it would not "further state policy" to suppress the evidence.

1. There Is No Fourth Amendment Violation Upon Which To Predicate Application Of The Exclusionary Rule Because Collection Of Appellant's Sample While He Was In Custody Comported With Fourth Amendment Guarantees

There is no Fourth Amendment violation upon which to predicate application of the exclusionary rule. Collection of appellant's DNA sample was consistent with Fourth Amendment guarantees because: (a) appellant was on

---

30. In *Moore*, the court observed:

> "Virginia chooses to protect individual privacy a dignity more than the Fourth Amendment requires, but it also chooses not to attach to violations of its arrest rules the potent remedies that federal courts have applied to Fourth Amendment violations. Virginia does not, for example, ordinarily exclude from criminal trials evidence obtained in violation of its statutes. [Citations]. Moore would allow Virginia to accord enhanced protection against arrest only on pain of accompanying that protection with federal remedies for Fourth Amendment violations, which include the exclusionary rule. . . . [The Fourth] amendment does not require the exclusion of evidence obtained from a constitutionally permissible arrest."

(*Moore, supra*, 128 S.Ct, at pp. 1606, 1608.)

parole with a valid search condition when his DNA sample was collected, and (b) the collection of appellant's DNA sample was constitutional under the totality of the circumstances.

a. Appellant's DNA Database Sample Was Lawfully Taken Pursuant To A Parole Search Condition While Appellant Was In Custody On A Parole Hold

There was no Fourth Amendment violation of appellant's rights upon which to predicate application of the exclusionary rule because in 1999 appellant was a parolee in custody on a parole violation and subject to a valid search and seizure condition when law enforcement collected his DNA sample. In reviewing the evidence, the trial court expressly found appellant did not have a "Fourth Amendment right [to object to the collection of his DNA sample] . . . because the search was pursuant to . . . [his] parole condition." (3 CT 731.)

While the Fourth Amendment protects citizens from arbitrary and unreasonable searches and seizures (*People v. Souza* (1994) 9 Cal.4th 224, 229), it does not prohibit a police officer from conducting a suspicionless search of a parolee that has been authorized by state law. (*Samson v. California* (2006) 547 U.S. 843.) Under the Fourth Amendment "totality of the circumstances" approach, a parolee's privacy interest is outweighed by the state's substantial interest in supervising parolees back into the community and combating recidivism. (*Id.*) Appellant's history as a parole violator, his placement in a custody facility for parole violators, and the facts related to appellant's parole status, support the warrantless seizure of appellant's DNA sample pursuant to the parole search condition. The hearing transcript (1 RT 157, 182-185) and a certified copy of appellant's chronological history in the California state prison system placed into evidence, as well as the probation report (5 CT 1234-1236, 1279, 1303-1308) confirm appellant's status as a parolee in 1999. The record also confirms Deputy Ortiz's knowledge of appellant's parole status prior to collecting a DNA sample. (*People v. Sanders*

(2003) 31 Cal.3d 318; 1 RT 183-185.[31] The district attorney offered into evidence People's Exhibit 15 ("a certified copy of a search and seizure waiver that was signed by [appellant] on October 11th, 1998, for a period of three years") and Exhibit 16 (appellant's "969(b) packet indicating that at the time in 1999 that he was on parole"). These exhibits were admitted into evidence (5 CT 1279) and are part of the record. (5 CT 1303-1317.)

The DNA Data Bank Act of 1999 contemplated use of DNA identification information by parole officers and officials for purposes of parole supervision. Specifically, as of January 1, 1999, the law provided: "DNA and other forensic identification information shall be released only to law enforcement agencies, including, but not limited to, parole officers of the Department of Corrections, hearing officers of the parole authority. . . ." (Pen. Code, § 299.5, subd. (e).) Likewise, it was a misdemeanor (now a felony) for any person to knowingly disclose "DNA or other forensic identification information developed pursuant to this section to an unauthorized individual or agency, or for other than identification purposes or *purposes of parole or probation supervision* . . . ." (Pen. Code, § 299.5, subd. (f); emphasis added.) Plainly, identification information can be useful for purposes of parole supervision so that law enforcement can assess the efficacy of its rehabilitative

---

31. Appellant arrived at RCCC on December 3, 1998, after pleading guilt to a prowling violation. (1 RT 183; 5 CT 1235-1236, 1306.) Appellant was also in custody on a "parole hold." At intake, the information on the master list of transfers indicated appellant had a Penal Code section 647h crime and a Penal Code section 3056 parole hold. (1 RT 183-184.) In 1999, Penal Code section 3056 provided as follows: "Prisoners on parole shall remain under the legal custody of the department and shall be subject at any time to be taken back within the enclosure of the prison." Deputy Ortiz relied upon the form that contained the notation with the Penal Code section 3056 parole hold for collection of appellant's DNA sample. (1 RT 184-185.) Thus, Deputy Ortiz as well as the other officials at RCCC knew that appellant was a parolee prior to appellant's DNA sample being taken. Deputy Ortiz also believed that appellant had a qualifying offense. (1 RT 185.)

efforts and to best protect the public. (See *People v. Reyes* (1998) 19 Cal.4th 743, 752.) Sample collection pursuant to appellant's search condition satisfied a legitimate state need for parole supervision and thus comported with the Fourth Amendment.

b. Appellant's Sample Was Lawfully Taken Within The Statutory Framework Of The State's DNA Database Program

The Fourth Amendment reasonableness balancing test, and not Penal Code section 296 – California's statutory list of offenses qualifying for DNA database collection – provides the appropriate framework for determining whether the state violated a defendant's constitutional rights in collecting a DNA sample. "The touchstone of the Fourth Amendment is reasonableness." (*United States v. Knights* (2001) 534 U.S. 112, 118-119.) In assessing the constitutionality of a DNA data bank program, "all the circumstances" that comprise the program must be considered together, in context. (See generally *Knights, supra,* 534 U.S. at p. 122; *Terry v. Ohio* (1968) 392 U.S. 1, 19.)[32/]

---

32. It is clear that the appropriate analysis to be employed in testing the constitutionality of the DNA Data Bank Act is the traditional Fourth Amendment "balancing test" analysis undertaken by California courts and many others to affirm the constitutionality of DNA database laws. This approach is in line with both the California and United States Supreme Court's use of the balancing/totality of the circumstances test for determining the constitutionality of a search or seizure. (See, e.g., *Samson v. California, supra,* 126 S.Ct. 2193; *People v. Sanders, supra,* 31 Cal.4th 318, 333.) In *Samson, supra,* the United States Supreme Court upheld California's warrantless, suspicionless searches of out-of-custody parolees. The California Court of Appeal decisions upholding California's data bank program are consistent with *Samson*. See, e.g., *King, supra,* 82 Cal. App.4th at p. 1376-1378 , *Adams, supra,* 115 Cal. App. 4th at pp. 255-256; see also *Kincade, supra,* 379 F.3d at pp. 822-832 .) An analysis of DNA sample collection pursuant to State constitutional requirements does not differ. (See *Alfaro, supra,* 98 Cal.App.4th at p. 509 [noting "the balancing process required by our state constitutional right of privacy is precisely the same process that other jurisdictions have applied in upholding the validity of DNA data base and Data bank acts."].)

"DNA database and data bank acts have been enacted in all 50 states, as well as the federal government." (*Alfaro*, *supra*, 98 Cal.App.4th at p. 505.) The collection of DNA samples from offenders in custody, "[l]ike the collection of fingerprints . . . is an administrative requirement to assist in the accurate identification of criminal offenders." (Pen. Code, § 295, subd. (d); see also *Rise v. Oregon* (9th Cir. 1995) 59 F.3d 1556, 1159-1560 [comparing DNA collection for law enforcement identification purposes to fingerprints taken at booking]; *King*, *supra*, 82 Cal.App.4th a p. 1374 [upholding the constitutionality of the State's DNA database program and finding "As to convicted persons, there is no question but that the state's interest extends to maintaining a permanent record of identity to be used as an aid in solving past and future crimes, and this interest overcomes any privacy rights the individual might retain."].) Collecting identification information from convicted offenders "assist[s] federal, state and local criminal justice and law enforcement agencies within and outside California in the expeditious and accurate detection and prosecution of individuals responsible for sex offenses and other crimes [and] . . . exclusion of suspects who are being investigated for these crimes . . . ." (Pen. Code, § 295, subd. (c); see also *Alfaro*, *supra*, 98 Cal.App.4th at p. 511 ["if the validity of a statute depends on the existence of a certain state of facts, it will be presumed that the Legislature has investigated and ascertained the

---

Moreover, California courts specifically have rejected the "special needs" analysis appellant references (AOB 58-59), and have distinguished the cases he relies upon. (See, e.g., *People v. Adams*, *supra,* 115 Cal App.4th at pp. 255-256 [distinguishing *Ferguson v. Charleston* (2001) 532 U.S. 67 and *Indianapolis v. Edmond* (2000) 531 U.S. 32)].) Each of the special needs cases appellant cites in support of his constitutional argument (AOB 57-59) are applicable to persons with a full expectation of privacy. Reasonableness "balancing" cases provide the proper standard for assessing warrantless, suspicionless database searches from criminal offenders with a diminished expectation of privacy. (See *Samson*, *supra*, 126 S.Ct. 2193; *United States v. Weikert* (1st Cir. 2007) 504 F.3d 1, 11-14.)

existence of that state of facts before passing the law"].) To date, California's database program has recorded over 6,000 cold hits to other unsolved crimes. (See Dept. of Justice, website: http://ag.ca.gov/bfs/pdf/quarterly_rpt.pdf)

For DNA data bank programs, the operative facts for the constitutional analysis include the diminished expectation of privacy of the criminal offender, the minimal intrusion of sample collection, the scope of the search as limited by the statute's use and disclosure restrictions (see, e.g., Pen. Code, § 295.5 [confidentiality of samples and forensic information and criminal and civil and criminal liability for intentional unauthorized use or disclosure of DNA database profiles and information]), the place in which the search is conducted, and the "compelling" government interest served by collection of identification information. (See *King, supra*, 82 Cal.App.4th at p. 1377; see *Alfaro, supra*, 98 Cal.App.4th at p. 506 ["compelling" interest specified]); see also e.g. *Kincade, supra*, 379 F.3d at pp. 838-839 ["The interests furthered by the federal DNA Act are undeniably compelling."].)

Considering these factors, California courts have found that DNA database sample collection is constitutional under the Fourth Amendment. (See, e.g., *King, supra*, 82 Cal.App.4th at pp. 1363, 1369-1378; *Alfaro, supra*, 98 Cal.App.4th 492; *People v. Adams, supra*, 115 Cal.App.4th at pp. 255-259; *Travis, supra*, 139 Cal.App.4th 1271.) In *Travis, supra*,139 Cal.App.4th 1271, 1289-1290, the Court of Appeal, referencing *King and Alfaro, supra*, specifically upheld California's current law that provides for collection of samples for all felony offenses. (*Id.* ["We agree with the reasoning in *Adams*, *Alfaro*, and *King*, and decline to depart from the overwhelming weight of authority in this state and other jurisdictions that has given universal approval to DNA collection statutes. We conclude that the trial court's order did not violate defendant's *Fourth Amendment* or privacy rights." (Italics added)].)

Thus, California appellate courts already have found constitutional the collection of samples from convicted offenders such as appellant, who are in

custody and who have a felony offense (e.g., first degree burglary) of record. The holdings of *Alfaro, King, Adams, Travis,* and other California cases affirming that these programs are constitutional under the Fourth Amendment are in accord with a virtually unanimous body of federal and out-of-state case law, upholding DNA database laws.[33/] There is no reason for this Court to depart from this state and national consensus. Under the totality of the circumstances balancing test, the DNA sample collection from appellant was constitutionally reasonable, as was subsequent use of the sample in linking appellant to a series of sexual assaults. (Cf. *People v. Baylor* (2002) 97 Cal.App.4th 504, 508-509 [holding that a legally obtained DNA sample could be used in the subsequent investigation of unrelated cases via databasing].)

Accordingly, because the collection of appellant's sample did not constitute a Fourth Amendment violation, there also is no basis upon which to exclude the DNA evidence in this case predicated upon a remedy associated with federal constitutional violations. (*Moore, supra*, 128 S. Ct. at pp. 1604-1605.)

---

33. See, e.g., *DNA Database Statutes*, 76 A.L.R.5th 239 (annotating various decisions concerning DNA database constitutionality); *People v. McCray* (2006) 144 Cal.App.4th 258; [balancing test]; *People v. Johnson, supra,* 139 Cal.App.4th 1135; *Kincade, supra*, 379 F.3d 813, 835; *Rise v. Oregon, supra,* 59 F.3d 1556; see also *United States v. Weikert, supra*, 504 F.3d at pp. 11-14; *United States v. Conley* (6th Cir. 2006) 453 F.3d 674; *United States v. Kraklio* (8th Cir. 2006) 451 F.3d 922; *Word v. United States Prob. Dep't* (D.S.C. 2006) 439 F. Supp. 2d 497 (balancing test); *Velasquez v. Woods* (5th Cir. 2003) 329 F.3d 420, 421 ("Every circuit court to consider this issue has held that the collection of DNA samples from felons pursuant to similar statutes does not violate the Fourth Amendment."); *United States v. Sczubelek* (3rd Cir. 2005) 402 F.3d 175; *Jones v. Murray, supra*, 962 F.2d 302; *Johnson v. Quander* (D.C. 2005) 370 F.Supp.2d 79; *State v. O'Hagen* (N.J.Super. 2005) 881 A.2d 733; *Illinois v. Peppers* (Ill.Ct.App. 2004) 817 N.E.2d 1152; *Washington v. Surge* (Wash.Ct.App. 2004) 94 P.3d 345.

G. The Exclusionary Rule Is Not An Appropriate Remedy For The Collection Of Appellant's Sample, Even Assuming a Constitutional Violation

Appellant also is incorrect in suggesting that application of the exclusionary rule is mandated in this case, even assuming the error was of constitutional dimension. (AOB 51.) Despite appellant's suggestion otherwise, a Fourth Amendment violation is not "synonymous with application of the exclusionary rule to evidence secured incident to that violation." (*Hudson v. Michigan* (2006) ___U.S.___, 126 S.Ct 2159, 2163-2164 ("*Hudson*"); accord *Reyes, supra,* 19 Cal.4th at p. 755-756; see also *United States v. Smith* (6th Cir. 2008) 536 F.3d 306, 311-312 ["because *Hudson* already says that the exclusionary rule does not apply to individuals with the greatest and most legitimate expectations of privacy, it necessarily does not apply to those with the least"]; *United States v. Planells-Guerra* (U.S.D.C., Utah 2007) 509 F.Supp.2d 1000, 1010-1011 [rationale of *Hudson* applicable to warrantless searches].)

In *Hudson v. Michigan*, the United States Supreme Court reiterated its rejection of "[i]ndiscriminate application" of the exclusionary rule, holding it applicable only "where its deterrence benefits outweigh its 'substantial social costs.'" (See *Hudson, supra,* 126 S.Ct. 2159, 2163-2169 [exclusionary rule not an appropriate remedy for a knock-and-announce violation], citing *United States v. Leon, supra*, 468 U.S. 897, 908, *Pennsylvania Bd. of Probation and Parole v. Scott* (1998) 524 U.S. 357, 363; accord, *Reyes, supra,* 19 Cal.4th at pp. 755-756.) The U.S. Supreme Court found exclusion may not be premised on the fact that a constitutional violation was a "but-for" cause of obtaining the evidence, and it reaffirmed that the Fourth Amendment does not require "adoption of every proposal that might deter police misconduct." (*Hudson, supra,* 126 S.Ct. 2159, 2163-2169.) Rather, the Court clarified that suppression of evidence is the "last resort," not the "first impulse," and the exclusionary

rule's "'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." (*Id.*; see also *California v. Greenwood* (1988) 486 U.S. 35, 44-45 [noting that Court does not apply the exclusionary rule indiscriminately where transgressions of law enforcement officers have been minor "because the magnitude of the benefit conferred on . . . .guilty defendants [in such circumstances] offends basic concepts of the criminal justice system."].)

In accordance with *Hudson*, appellant has not overcome, as required, the high obstacle of showing that excluding a mistakenly collected DNA sample has "deterrence benefits" that outweigh the 'substantial social costs' of excluding relevant identification evidence and the release of a dangerous criminal – appellant – into society. Nor could appellant make this showing on either the facts or the law. (See *Hudson, supra,* 126 S. Ct. at p. 2166 ["Next to these "substantial social costs" we must consider the deterrence benefits, existence of which is a necessary condition for exclusion."]; see also, e.g., *United States v. Planells-Guerra, supra,* 509 F.Supp.2d 1000, 1012-1013 [noting "more than mere deterrence is necessary for the exclusionary rule to apply . . . the deterrence benefits must outweigh the high social costs of excluding evidence."].) As more fully set forth below, the evidence should not be suppressed.[34/]

---

34. The exclusionary rule is "a nonconstitutional 'prudential' measure designed to deter illegal police conduct," and "has been held not to apply to a number of situations regardless of whether the underlying search itself was unconstitutional." (See *Reyes, supra,* 19 Cal. 4th at pp. 755-756.) "No substantial deterrent benefit is gained by applying it to conduct already completed," notwithstanding a constitutional violation. (*Id.*)

1. Suppression Of Evidence Would Have No Future Deterrent Effect Because Law Enforcement Officers And DOJ Acted In Good Faith In Implementing A Complex New Law

On the facts, this is not a case of egregious police misconduct with future deterrence value with respect to sample collection practices. The facts as found by the trial court show the mistake in this case was not a product of willful or systematic malfeasance. Rather, the record shows a good faith mistake of officers and personnel faced with the daunting and time-sensitive task of implementing a new chapter of the Penal Code regarding DNA Data Bank collection and making mistakes of fact in attempting to sort through and implement it. Understanding the verification of samples from adults with qualifying juvenile adjudications of records proved particularly difficult, and obtaining record verification was obstacle-laden.

Specifically, in this case, as the trial court found, the law enforcement agents authorizing appellant's sample collection on March 2, 1999, subjectively believed they were under a legal duty to take appellant's sample. They were attempting to implement the newly enacted and complex DNA Data Bank Act, which as of January 1, 1999, mandated sample collection from in-custody convicted offenders with qualifying felony offenses of record. (See 3 CT 728-729; 1999 Pen. Code, § 296.1, subds. (c) & (d); compare *United States v. Leon, supra,* 468 U.S. at p. 919 [exclusion is proper "'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional. . . .'"].) The trial court also saw the sample collection at RCCC as one involving "to some degree an emergency pressure" and having to do a "hurry-up job since people are being released everyday." (3 CT 735.) The court compared the confusion about implementing the new chapter of laws about DNA data bank sample collection to the confusion in the court system in sorting out the Three Strikes law. As such, the trial court found it inappropriate to have a "zero tolerance" rule for the

kinds of interpretational errors that were made in the collection of appellant's sample. (3 CT 733; see also, *United States v. Planells-Guerra*, *supra*, 509 F.Supp.2d at p. 1013 [noting the exclusionary rule "does not always apply to situations where a police officer himself has misunderstood the law, as in *Hudson* where the officer misunderstood the legal requirements for knock-notice].)

Moreover, the trial court was impressed with DOJ's subsequent initiative to reduce if not nearly eliminate mistakes by taking "significant steps to review their whole system" including to "stop their processing [of samples for search] until a form of review was conducted." (3 CT 736-737; cf. *Arizona v. Evans, supra*, 514 U.S. at pp.15-16 [in rejecting application of the exclusionary rule, court noted subsequent efforts by court clerks "to search their files to make sure that no similar mistakes had occurred"].) After learning that an unqualified sample had been analyzed, the Department of Justice undertook a thorough review of its own verification processes to assure that only qualified samples would be analyzed and uploaded and, in the meantime, stopped sample uploading while tens of thousands of sample submissions were reviewed. In addition, to prevent mistakes in assessing juvenile adjudications, DOJ adopted a policy narrowing its acceptance of samples based upon juvenile adjudications.[35/] The court observed that the Department of Justice not only

---

35. Beginning in November 2004, Proposition 69 authorized collection of samples from juveniles adjudicated under Section 602 of the Welfare and Institutions Code for committing any felony offense. (Pen. Code, § 296, subd. (a)(1).

Prior to that, a provision of the 1999 law supported an interpretation that the law included juvenile offenders beyond those required to register as sex offenders under Penal Code section 290. (See, e.g., 1999 Pen. Code § 296.1 (subds. (a), (b), (c), (d).) In 2000, the Legislature attempted to bring more clarity to the statute by amending Penal Code section 296.1, subdivision (c), to provide for sample collection when "(1) "the person has been convicted or adjudicated a ward of the court in California of a qualifying offense described in subdivision (a) of Section 296 or * * * has been convicted or had a

made "serious efforts to try to evaluate their system," but it also "modified the kinds of juvenile entries they would take as a matter of policy to avoid mistakes" and that thereby DOJ "greatly reduced the number of juvenile entries that they might receive limiting them to CYA type cases." In the court's view, this showed that law enforcement was "not out there trying to get as much blood as they can [or] trying to expand their base by overlooking issues of qualification." (3 CT 736-737.) The court found DOJ acted in a "responsible" and "conscientious" manner in "trying to keep their errors to a very low level" (3 CT 737.) Accordingly, the facts of this case do not compel a conclusion that future misconduct is likely or that mistaken collection would be best "deterred" by application of the exclusionary rule.

2. Suppression Of Evidence Would Have No Future Deterrent Effect Because The Data Bank Act Was Expanded To Include Sample Collection For All Adult And Juvenile Felony Offenses

Likewise, no deterrent effect is achieved by excluding evidence from a mistaken sample collection on grounds it was illegal, when subsequently the same search became legal by virtue of the data bank law's expansion. Less than two years after appellant's 1999 DNA sample was collected, and while appellant was pending trial on this case, the Legislature expanded the Data Bank's statutory list of qualifying offenses to include first degree burglary[36] and thus provided a new and independent basis for collecting appellant's sample. Continuing the process of data bank expansion, on November 2, 2004,

---

disposition rendered in any other court, including any state, federal, or military court, of any offense that, if committed or attempted in this state, would ****have been punishable as an offense described in subdivision (a) of Section 296. . . ." (Underlines indicate change.)

36. Effective January 1, 2002, the Legislature expanded the data base law to include additional felonies including residential burglary. (Former Pen. Code, § 296, subd. (a)(1)(J), added by Stats. 2001, ch. 906 § 1.)

California voters approved Proposition 69, which further amended, clarified, and broadened the scope of the DNA Data Bank Act by, among other things, authorizing collection of DNA samples from all persons, including juveniles, convicted or adjudicated for a felony offense and from certain felony arrestees. (Pen. Code, § 295 et seq. ["Proposition 69"], effective Nov. 3, 2004; see, e.g., *People v. Travis* (2006) 139 Cal.App.4th 1271, 1289-1290 [holding that warrantless collection of a DNA sample from *all felons* pursuant to the expanded state authorizing legislation is constitutional].) The broad scope of the 2004 data base law diminishes the likelihood of mistaken collection sample by local agencies (or the alleged need for the exclusionary rule). Under Proposition 69, local agencies no longer need to sort through, interpret and make judgments about case application of the 1999's law limited list of qualifying offenses.

In addition, the intrusion occasioned by sample collection under Proposition 69 is even more benign than it already was in 1999, as science and the law have progressed to permit sample collection by buccal (cheek) swab, instead of blood in most instances. (See 2004 Pen. Code, §§ 295, subd. (e), 296, subd. (a) .) The collection of a minimally intrusive cheek swab DNA sample, even by mistake, would hardly qualify as a the type of major police misconduct compelling the grave counterbalance of the exclusionary rule, particularly when the law also provides for expungement of non-qualifying samples. (Pen. Code, § 299, subd. (a).)

3. Federal Law Providing Sanctions For Substantial And Recurring Errors And Mandating Annual Audits Ensures The State's Data Bank Meets All Program Requirements

Furthermore, no additional outside deterrence is necessary in any event because DOJ faces grave sanction if the lab had a systematic failure in its sample qualification process. (See *Hudson, supra,* 126 S. Ct. at p. 2166 ["additionally, the value of deterrence also "depends upon the strength of the

incentive to commit the forbidden act."].) For malfeasance, the DOJ DNA lab could be expelled from CODIS, the national crime solving network that supplies the software to the data bank necessary for conducting computer searches of DNA profile evidence. (2 RT 265, 397; see also 42 U.S.C §§ 14132(c), 14135e(c) [law enforcement access to the federal index may be cancelled for failure to meet the quality control and privacy requirements of federal law]; 42 U.S.C. §14132(d)(2)(A) [state access to CODIS is conditional on expungement procedures for non-qualifying samples].) Annual audit procedures ensure that participating laboratories such as DOJ, adhere to CODIS requirements, including use and disclosure restrictions. (See NDIS Laboratory Audits and External Proficiency Testing: Operational Procedures (FBILab2003); http://wwwfbi.gov/hq/lab/codis/qualassur.htm; 42 U.S.C. § 14131 (a)(1) [requiring standards for quality assurance (audits)].) Accordingly, the lab already is formally deterred from processing non-qualified samples.

Thus, under any analysis there is no cause to reverse appellant's conviction based upon a theory of mistaken sample collection.

H. The Independent Source Doctrine And Inevitable Discovery Doctrine Both Apply Because A 2002 Amendment To The DNA Data Base Law Authorized The Collection Of A Separate DNA Sample From Appellant Resulting In A Cold Hit Linking Appellant To The Sexual Assault Crimes

Even if collection of appellant's DNA sample in 1999 was a federal constitutional error, a change in the data base law authorized the collection of an independent and separately admissible sample from appellant in 2002 by virtue of his first degree burglary conviction. (See *People v. Boyer* (2006) 38 Cal.4th 412, 448-449 ("*Boyer*"); *People v. Weiss* (1999) 20 Cal.4th 1073, 1078.)[37/]

---

37. Although the district attorney raised the issue as one of inevitable discovery, respondent raises the issue as subject to the independent source

The doctrine of independent discovery applies to evidence "initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality." (*Murray v. United States* (1988) 487 U.S. 533, 537, 542.) As the California Supreme Court has explained:

> Evidence need not be suppressed as "fruit of the poisonous tree," though actually procured as the result of a Fourth Amendment violation against the defendant, if it inevitably would have been obtained by lawful means in any event. . . . Moreover, suppression is not necessarily required *even if* the evidence would not have come to light *but for* an infringement of the defendant's Fourth Amendment rights. . . . [¶] . . . "The question is whether the evidence was obtained by the government's exploitation of the illegality or whether the illegality has become attenuated so as to dissipate the taint." . . . [¶] Relevant factors in this "attenuation" analysis include the temporal proximity of the Fourth Amendment violation to the procurement of the challenged evidence, the presence of intervening circumstances, and the flagrancy of the official misconduct.

(*Boyer*, 38 Cal.4th at pp. 448-449 (internal citations omitted).)

"The inevitable discovery doctrine, with its distinct requirements, is in reality an extrapolation from the independent source doctrine." (*Murray v. United States, supra,* 487 U.S. at p. 539; accord, *People v. Robles* (2003) 23 Cal.4th 789, 800.) "Under the inevitable discovery doctrine, illegally seized evidence may be used where it would have been discovered by the police through lawful means." (*People v. Robles, supra*, 23 Cal.4th at p. 800.)

In this case, while appellant was not a qualifying offender for purposes

---

doctrine as well. As the California Supreme Court has stated: "Granting, as we do, the prosecution's burden of proof on issues of attenuation, including inevitable discovery. (See, e.g., *Nix, supra,* 467 U.S. 431, 447; *Dunaway v. New York* (1979) 442 U.S. 200, 204, we may nonetheless resolve such issues on appeal, even if not explicitly litigated below, if their factual bases are fully set forth in the record. (E.g., *People v. Robles* (2000) 23 Cal.4th 789, 801, fn. 7; *People v. Clark* (1993) 5 Cal.4th 950, 993, fn. 19; *Green v. Superior Court* (1985) 40 Cal.3d 126, 137-138 (lead opn. of Kaus, J.).)" (*People v. Boyer, supra,* 38 Cal.4th at pp. 412, 449.)

of the State's convicted offender database in March 1999, he would have become a qualifying offender on January 1, 2002, when Penal Code Section 296, subdivision (a), was amended to add first degree burglary to the list of enumerated offenses that qualify the offender for DNA collection. (Pen. Code, § 296, subd. (a)(1)(J), added by Stats. 2001, ch. 906, § 1.)[38/] Appellant had been convicted of first degree burglary in 1996. Beginning January 1, 2002, through May 25, 2002, if appellant's sample had not been collected and flagged on his rap sheet as collected (1 RT 281-282), CDC inevitably would have collected appellant's sample while he was in its custody and supervision finishing the term on his 1996 first degree burglary conviction. (See 5 CT 1306-1306.) CDC's own records indicate that on June 29, 1999, appellant was "reviewed for compliance with PC 296" (5 CT 1308) evidencing CDC's review of offender records for DNA data bank sample collection purposes. CDC had a specific statutory duty to collect samples from convicted offenders housed in its institutions with qualifying offenses of record (see 1999 Pen. Code, § 296.1, subd. (c)) as well as specifically from parolees who are returned to custody (see 1999 Pen. Code, § 296.1, subd. (g)). Likewise, parolees who were not in custody had samples taken at Sacramento branch jails. Deputy Ortiz testified that RCCC processed DNA data bank samples of persons referred to the facility by parole agents. (1 RT 209-210.)

The DNA Data Bank's expansion (10 months after the original sample collection) to include first degree burglary and appellant's concurrent status as a returned-to-custody incarcerated felon on his first degree burglary conviction

---

38. In addition, following the "cold hit" in September 2000, identifying appellant as a suspect in the Deborah L. sexual assault crimes, a second (non-data base) sample was taken from appellant after his arrest and this sample was separately analyzed and used as case evidence.

parolee are intervening circumstances attenuating any taint from the initial violation.

Accordingly, appellant's DNA would have been compared to the case evidence from the sexual assaults at issue, and appellant inevitably would have been identified as possessing an identical DNA profile to that of the perpetrator in the Deborah L. case. (Cf. *Oregon v. Elstad* (1985) 470 U.S. 298, 309; *People v. Samayoa* (1997) 15 Cal.4th 795, 831 [an improperly *Mirandized* (but voluntary) confession does not "taint" a subsequent, properly *Mirandized* confession.].)

In fact, the original data base sample taken by mistake was removed from the database by DOJ soon after the cold hit because it did not qualify for inclusion. (2 RT 347-348.) Thereafter a second data base sample was taken from appellant while in he was in custody on September 4, 2002, apparently pending trial in this case. The sample was received by the DOJ DNA Lab on September 9, 2002. It was analyzed and entered into the database on November 22, 2002, with a hit made to that second data bank sample on November 27, 2002. (2 RT 347-348, 422-425.)

This situation falls generally within the scope of both the independent source and the inevitable discovery doctrines, which preclude the suppression of evidence. Although a mistake in the collection of DNA data bank sample from appellant "began a process that culminated in the acquisition of the evidence sought to be excluded," i.e., a cold hit between appellant's confirmatory sample and the crime scene evidence, the cold hit, itself, was not fruit of the fact that appellant's sample was collected in 1999 when he was on parole, rather than in 2002 . (Cf. *Hudson, supra*, 126 S. Ct at p. 2169, citing *New York v. Harris*, *supra*, 495 U.S. at p. 20.)

In any event, whether appellant was prejudiced by the evidence is not an issue in this case (AOB 72), because there was no predicate constitutional violation in taking appellant's DNA database identification sample. Despite

appellant's contentions otherwise, there is no basis upon which to reverse his conviction.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: October 29, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

MICHAEL P. FARRELL
Senior Assistant Attorney General

STEPHANIE A. MITCHELL
Deputy Attorney General

DORIS A. CALANDRA
Deputy Attorney General

ENID A. CAMPS
Deputy Attorney General

Attorneys for Respondent

SF2008400622
40282647.wpd

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 32495 words.

Dated: October 29, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

ENID A. CAMPS
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Paul Eugene Robinson*** No.: **S158528**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On October 29, 2008, I served the attached **RESPONDENT'S BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Cara DeVito
Attorney at Law
PMB 834
6520 Platt Avenue
West Hills, CA 91307-3218
(2 copies)

County of Sacramento
Gordon D. Schaber Downtown Courthouse
Superior Court of California
720 9th Street
Sacramento, CA 95814-1398

The Honorable Jan Scully
District Attorney
Sacramento County District Attorney's Office
P.O. Box 749
Sacramento, CA 95814-0749

Third Appellate District
Court of Appeal of the State of California
Filing Office
900 "N" Street, Room 400
Sacramento, CA 95814

Central California Appellate Program
2407 J Street, Suite 301
Sacramento, CA 95816

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 29, 2008, at San Francisco, California.

J. Wong
Declarant

J Wong
Signature