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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. PAUL EUGENE ROBINSON, Defendant and Appellant.	Supreme Court No. S158528

SUPREME COURT
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SACRAMENTO COUNTY SUPERIOR COURT, No. 00F06971
THE HONORABLE PETER MERING, JUDGE PRESIDING

REVIEW FROM THE DECISION ON DIRECT APPEAL OF THE
THIRD APPELLATE DISTRICT, No. C044703

OPENING BRIEF ON THE MERITS

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ISSUES FOR REVIEW
(Rule 8.520(b)(2)(A))

By a February 13, 2008 Order, this Court established the following three questions, and any issues fairly subsumed within them, as the issues to be briefed and argued:

"(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 Data Base and Data Bank Act of 1998 (Pen. Code, § 295 et seq.)?"

STATEMENT OF THE CASE

Appellant, Paul Eugene Robinson, was born on October 18, 1969. (C.T.5, p. 1218.) On July 11, 1985, when he was 16 years old and still a juvenile, he knocked a 14-year-old off a bicycle and took it. He was arrested for robbery and assault with a deadly weapon (Pen. Code, §§ 211, 245), but on August 5, 1985, the juvenile petition was sustained only as to a violation of felony grand theft, and he served 10 days in Juvenile Hall. (C.T.1, p. 1230.)

On July 14, 1994, when appellant was an adult, he was arrested for spousal abuse and felony battery (Pen. Code, §§ 273.5, subd. (a) and 242), but was convicted only of a misdemeanor violation of section 273.5. (C.T.5, p. 1232.)

In its opinion the court of appeal recognized that neither the juvenile adjudication nor the misdemeanor conviction were offenses "qualifying" appellant for blood collection under the DNA and Forensic Identification Data Base and Data Bank Act of 1998 (Pen. Code, § 295 *et seq.*) (People v. Robinson, slip opin., pp. 25, 26-27, 31.)

On January 1, 1999, the new DNA collection law went into effect. (R.T.1, p. 187.) On March 2, 1999, while appellant was incarcerated in county jail on a parole violation, a blood sample

was collected from him for inclusion in the databank, although he did not have any "qualifying" offenses. (C.T.2, pp. 547, 548; C.T.3, pp. 605, 606; R.T.1, p. 184.)

Meanwhile, between 1993 and 2000, a series of sexual assaults had taken place in Sacramento. The statute of limitations had already run on the earliest of these crimes. In late August, 2000, when the statute was about to expire on another, the investigating officer contacted the Sacramento County District Attorney's office to see if something could be done before that happened. (R.T.1, pp. 86-87, 94-95.)

At an evidentiary hearing a deputy District Attorney and this Detective admitted they respectively filed a "John Doe" complaint, and sought and obtained a "John Doe" arrest warrant, in which the unknown suspect was identified only by a DNA profile, even though the Detective knew he could not execute the warrant; they did so as the Detective "was aware that once a warrant is issued on a case, a statute of limitations would not expire as long as you showed due diligence," and "in my mind, I was hoping to be able to identify and prosecute the person who committed these crimes." (C.T.1, pp. 20-30; R.T.1, pp. 6-8, 11, 112.)

The Detective did so "[n]ot so much as to stop the clock, but **to continue the availability of prosecution.**" (R.T.1, p. 112; emphasis added.) He added "it was my opinion, with technology, we would be able to identify the person **eventually.**" (Ibid; emphasis added.)

The statute of limitations in that case would have expired on August 24, 2000. Instead, in September, 2000 the unknown suspect's DNA profile developed from crime scene evidence was compared to offender profiles in the state's DNA databank, and "matched" to appellant's unlawfully-collected DNA profile. (R.T.1, pp. 94-96; R.T.14, pp. 4006-4007; R.T.17, pp. 4934-4935.)

On September 15, 2000, appellant was arrested. (R.T.13, pp. 3810-3811.) On September 19, 2000 he was arraigned on a first-amended complaint that substituted his name for "John Doe." (1 Aug. R.T.1, p. 1.[1])

Before trial two issues were heavily litigated: whether a "John Doe" complaint and arrest warrant lawfully could commence an action and stop the running of a limitations period; and whether the arrest warrant in this case, which described the unknown suspect by his DNA profile, were invalid for failing to describe the suspect with "particularity." A third issue also was argued: an "as applied" challenge to the state's DNA collection act, based on the unlawful collection of appellant's blood in 1999, when he did not qualify for collection.

In May, 2003, after a 68-day jury trial, appellant was convicted of an August 25, 1994 sexual assault against Deborah L., including forcible oral copulation (count 1), forcible sodomy by

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[1] In this appeal there were two augmentations of reporters' transcripts to the appellate record. The first augmentation, filed on November 4, 2004, is a three-volume set (pages 1-635), and is referred to as "1 Aug. R.T." plus the volume number (1, 2 or 3). The second augmentation, filed on January 4, 2006, is a single volume (pages 1-38), and is referred to as "2 Aug. R.T.1."

foreign object (count 2), forcible rape by foreign object (count 3), and forcible rape (counts 4 and 5), all while armed with and personally using a knife.[2] (Pen. Code, §§ 261, subd. (a)(2); 288a, subd. (c)(2); 289, subd. (a)(1); 12022, subd. (b)(1); and 12022.3, subds. (a), (b).) (C.T.4, pp. 1063-1067.) He was sentenced to a term of 65 years, with 1,484 presentence custody credits (990 actual and 494 good-time/work-time days).[3] (C.T.5, pp. 1260-1261.)

In a direct appeal to the Third Appellate District (3rd Crim. No. C044703), appellant argued, *inter alia*, that this case was barred by the statute of limitations or, alternately, that the DNA "match" evidence should have been excluded or suppressed, based on the unlawful collection of his blood. In its October 26, 2007 published opinion the Third Appellate District rejected these and all other challenges, affirming appellant's conviction. (People v. Robinson (2007) (formerly pub. at 156 Cal.App.4th 508.)

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[2] Petitioner also was charged with a 2000 burglary and sexual assault against Heather O. (counts 6-13). (C.T.1, pp. 197-209; Aug. C T.1, pp. 147-160.) But the jury hung on those charges, and a mistrial was declared. (C.T.4, pp. 1063-1067, 1086-1087; R.T.20, pp. 5837-5843, 5886.) The counts later were dismissed on the People's motion. (C.T.1, p. 19; R.T.20, pp. 5934-5935.)

[3] The court imposed identical eight-year upper terms plus consecutive section 12022.3 five-year enhancements on all five counts, staying all other enhancements attached to those counts. Count 1 was made the base term while the subordinate terms and enhancements for counts 2, 3, 4 and 5 were ordered to run consecutively to the base term and its enhancement, and to each other. (C.T.18, p. 1260; R.T.20, pp. 5912-5915, 5920.)

STATEMENT OF APPEALABILITY

On August 4, 2003, appellant timely filed his notice of appeal from the judgment of conviction, which judgment finally resolved all issues between the parties, as authorized by Penal Code section 1237 and California Rules of Court, rule 8.308(a). (C.T.5, pp. 1285-1286.)

On October 26, 2007, the Third Appellate District issued its opinion in People v. Robinson, 3rd Crim. no. C044703. Thereafter appellant's petition for review to this Court was timely filed on November 29, 2007, pursuant to California Rules of Court, rule 8.500(e)(1).

On February 13, 2008, this Court granted review and specified the above-cited three issues as the matters to be briefed and argued.[4]

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[4] This Court also granted review on the following issue, but ordered briefing be deferred, pending consideration and disposition of a related issue in People v. Nelson, dock no. S147051: "Is the methodology for assessing the statistical significance of a 'cold hit' from a DNA database a novel scientific question requiring proof of general scientific acceptance under People v. Kelly (1976) 17 Cal.3d 24?"

The Nelson case was decided one week ago, on June 16, 2008. (People v. Nelson (2008) __ Cal.4th __ [__ Cal Rptr.3d __, 2008 WL 2404949].)

STATEMENT OF FACTS

Between 1993 and 2000, a series of sexual assaults took place in Sacramento. After a September, 2000 "cold hit" in the state's DNA databank suggested appellant was the suspect in the Deborah L. case, DNA testing was conducted on crime scene evidence and matches to appellant were made in the Heather O. case (in which charges were filed), and in cases involving Alanna S. and Paula F. (in which charges were barred by the statute of limitations). (R.T.16, pp. 4500-4501, 4584-4587; R.T.17, pp. 4884-4888, 4894-4898.)

Over appellant's objection, testimony about the Alanna S. and Paula F. cases, and about similar sexual assaults on Terry B., Heather M. and Jennifer M. (in which there were no DNA matches), were allowed as propensity evidence under Evidence Code section 1108. (C.T.4, p. 919; R.T.10, pp. 2801-2805.)

The Apartment Complex on Howe Avenue

From 1993 through 1995, appellant did not have a regular job; he was an odd-job car mechanic. (R.T.11, p. 3297.) From July through September, 1993, he lived in an apartment complex at 1100 Howe Avenue. (R.T.11, pp. 3287-3288, 3293.)

After appellant moved out, Ed Salas would drive him back to the complex and wait in the car for him. (R.T.12, pp. 3518-3520.) Appellant usually would be gone for an hour, and during that time would enter women's apartments, telling Salas that sometimes doors were open. Sometimes appellant came back with car stereos, purses, jewelry, and credit cards. (R.T.12, pp. 3521-3522, 3526-3527.)

The October, 1993 Assault on Alanna S.

In October, 1993, 19-year-old Alanna S. lived at 1582 Response Road (near Cal. Expo), and shared a bedroom with another girl; they had two other roommates in other bedrooms. They always left the apartment's sliding glass door open so their cat could go in and out. (R.T.11, pp. 3006-3009; 3012-3013.)

On October 20, 1993, Alanna S. awoke about 5:30 or 6:00 a.m. to find a man standing in the bedroom doorway. (R.T.11, pp. 3012-3013.) He was a stocky Black male, 5'7" to 5'9" tall and about 160 pounds. (R.T.11, pp. 3022-3023.) He called her a bitch and repeatedly told her not to look at him or scream. (R.T.11, pp. 3011-3014, 3016-3017.) He raped her, and seemed angered when she asked him to put a condom on.[5] (R.T.11, pp. 3020-3021.)

At trial Alanna S. testified that appellant's body type was similar to that of her attacker. (R.T.11, pp. 3042-3046.)

The January, 1994 Assault on Heather M.

In January, 1994, 24-year-old Heather M. lived in the complex on Howe. (R.T.13, pp. 3650-3652.)

On January 11, 1994, Heather M.'s boyfriend, who had spent the

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[5] Salas testified that in 1993 appellant once told him that at an apartment near Cal Expo, a woman gave appellant a condom and they had intercourse. (R.T.12, pp. 3529-3532.) Appellant added that at the time another woman was in another room. (R.T.12, p. 3563.)

The same day appellant told Salas this, Salas saw a composite on the news regarding a sexual assault; he went to the police and later pointed out the apartment complex near Cal Expo appellant had been to. (R.T.12, pp. 3533-3534.)

night, left around 6:15 a.m. The front door was locked, and the sliding glass door was locked with a pole securing it, but there was a sliding window in a second bedroom. (R.T.13, pp. 3653-3655, 3671.) Heather M. heard her bedroom door creak open. She saw a man standing in the doorway; he repeatedly called her a bitch, and told her not to look at him and to be quiet, or he would kill her. (R.T.13, pp. 3656-3658.) Heather M. estimated the man was six feet tall, weighed 200 pounds, and was between 20 and 25 years old. (R.T.13, pp. 3659-3660, 3668.)

The man ran away when Heather M. fought back. (R.T.13, pp. 3659-3660.) She tried calling 911 but there was no dial tone; the phone in the second bedroom was off the hook, and that bedroom's window was open. (R.T.13, pp. 3663-3664.) Heather M. then realized her purse was missing.[6] (R.T.13, p. 3665.)

The May, 1994 Assault on Paula F.

In May, 1994, 24-year-old Paula F. lived in a ground floor apartment at the Amherst condominiums, a multi-unit complex less than a mile away from the Howe complex. (R.T.11, pp. 3099-3104.) Each window had a security latch, her sliding glass door had a pole, and she kept a .38-caliber Smith and Wesson revolver in her night stand. (R.T.11, pp. 3105-3106.)

On May 6, 1994, she got up about 5:15 or 5:20 a.m. and took a shower. (R.T.11, p. 3106.) While she was in the shower she heard

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[6] Salas testified he drove appellant to the Howe apartments between 1:00 and 3:00 a.m., not around 6:00 a.m. (R.T.12, p. 3523.)

noises, and looked past the shower curtain to her bedroom, but did not see anything. (R.T.11, pp. 3109-3110.) But then the bathroom light went off. She opened the curtain and saw a man standing a few feet away, pointing a gun at her. He repeatedly called her a bitch, and told her to shut up or he would kill her. (R.T.11, pp. 3111-3113.)

She described this man as 5'8" or 5'9" tall with a stocky build; he was in his twenties. (R.T.11, pp. 3113, 3122.)

The man ordered her into her bedroom where he orally copulated and digitally penetrated her. (R.T.11, pp. 3117-3118.) Then he raped her. He left, and she called 911. (R.T.11, pp. 3119-3121.) Her gun and purse were missing. (R.T.11, pp. 3122-3127.)

The August 25, 1994 Assault on Deborah L.
(Counts 1-5, Of Which Appellant Was Convicted)

In August, 1994, 25-year-old Deborah L. lived in a second-story apartment with a balcony. (R.T.10, pp. 2923-2931.) August 25, 1994 was a warm night, so she left the living room window open, although her bedroom window was closed. She woke before 6:00 a.m. (R.T.10, pp. 2932-2933.) She saw a Black male standing in the bedroom doorway; he said he was there to get "some pussy," and told her to be quiet or he would kill her. (R.T.10, pp. 2934-2937.) He called her a White bitch and brought a knife toward her chest; she instinctively grabbed it and her hand began to bleed. (R.T.10, pp. 2938-2939.)

Deborah L. described her assailant as light skinned, in his twenties, 5'7" to 5'8" tall and very stocky, weighing about 180

pounds. (R.T.10, pp. 2949-2951; R.T.13, pp. 3676-3679.)

This man orally copulated her and digitally penetrated her rectum and vagina before raping her; he repeatedly referred to her as a "White bitch" and threatened to kill her. As he approached ejaculation he withdrew, masturbated over her and rubbed his semen on her stomach. (R.T.10, pp. 2940-2948.)

He left; Deborah L. reached for the phone and saw that the line had been cut. (R.T.10, pp. 2952-2953.) She went to another room to call 911; while speaking to the emergency operator she looked out a window and saw the man standing next to some bushes by her building's laundry room. (R.T.10, pp. 2954-2955.) By the time police arrived the man was gone. Officers took Deborah L. to U.C. Davis Medical Center where she underwent a medical examination. Her hand required stitches. (R.T.10, pp. 2959-2963.)

Deborah L.'s purse, which had been in the kitchen, was missing. (R.T.10, pp. 2963-2965.)

At trial Deborah L. testified that appellant's body type was similar to that of her attacker. (R.T.10, pp. 2986-2989.)

The December, 1994 Assault on Terry B.

On December 7, 1994, 23-year-old Terry B. lived in an apartment in the Howe complex. At about 1:30 or 2:00 a.m., she was asleep; all the windows were closed. (R.T.13, pp. 3628-3633.) She awoke to find a man on top of her, punching her; he said he would kill her if she did not shut up. But she fought back, and screamed. (R.T.13, pp. 3634-3635.)

The man left. Burke shut her front door and called the police. (R.T.13, pp. 3636-3640.) She described her assailant as an African-American, about 5'5" or 5'6" tall. (R.T.13, pp. 3640-3645.)

November, 1995 to October, 1998

The parties stipulated that from November, 1995 to October, 1998, appellant was in custody, away from the Sacramento area. (R.T.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, 1998 he was released on parole for these offenses. (C.T.2, p. 1237.)

After appellant was released, he worked two jobs: at Michael's (a furniture company), and for Arbor (a landscaping company across the street from Michael's). For his job at Arbor, appellant wore a uniform. (R.T.11, pp. 3295-3296.) His jobs required him to be gone from 6:00 a.m. to 11:00 p.m.; his wife barely saw him as her work hours were 11:00 p.m. to 7:00 a.m. (R.T.11, p. 3297.)

The November, 1998 Incident Involving Jennifer M. (Appellant's Prior Misdemeanor Conviction)

In 1998, 26-year-old Jennifer M. lived with her two young children in an apartment complex; there was a patio next to the front door. (R.T.11, pp. 3186-3190.)

On November 17, 1998, she woke up between 5:00 and 5:30 a.m. and showered; then she looked out the window. (R.T.11, pp. 3192-3194.) There was a man right up against the window. She closed the

blinds and called 911. (R.T.11, pp. 3195-3196.)

She described this man as in his twenties, and "big." (R.T.11, p. 3204.)

She then opened her window and asked the man what he was doing there. Although there was no equipment near him the man said he was trying to remove a dangerous tree trunk. He was out there for about 30 minutes, walking back and forth between her window and another window. (R.T.11, pp. 3197-3200.)

Sacramento County sheriff's deputy Donald Judd responded to the 911 call. As he approached the bushes just past Jennifer M.'s apartment, he saw a man leaving the area. (R.T.11, pp. 3220-3224.) Judd grabbed the man's jacket but the man slipped out of it and outran Judd. The jacket had a logo that said "Arbor Care" with a small tree next to it. (R.T.11, pp. 3201-3204, 3225-3228.)

Judd's partner, Deputy Buford, investigated this landscaping company. The next day (November 18, 1998), Judd saw appellant at the station, and had no doubt appellant was the man he chased. (R.T.11, pp. 3229-3232.) Appellant was charged with misdemeanor loitering and prowling, and on December 2, 1998 pled no contest to that charge. (R.T.11, pp. 3248-3250.)

November 18, 1998 to July, 1999

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. He was sentenced to a 60-day county jail term for that offense, which violated his parole; he 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 databank. (C.T.2, pp. 547, 548; C.T.3, pp. 605, 606; R.T.1, p. 184.)

The February, 2000 Assault on Heather O.
(Counts 6-13, On Which the Jury Hung)

In February 2000, 30-year-old Heather O. lived less than two miles from the Howe complex, in a bottom-floor apartment with a sliding glass door to a patio. (R.T.12, pp. 3401-3404.) The door's latch sometimes did not hook in, so it looked like it was locked when it was not. (R.T.12, pp. 3411-3412.)

Around February 14 or 15, 2000, a notice about a "Peeping Tom" was taped to her front door. (R.T.12, pp. 3429-3430.) On February 18, 2000, she woke and began showering around 5:20 a.m. While in the shower she heard a door open and shut and music in her bedroom, but assumed it was her boyfriend and her radio alarm clock. She went into the bedroom, turned off her alarm, came out and saw a man standing in the hallway. (R.T.12, pp. 3413-3415.)

She described the man as African-American, 5'7" or 5'8" tall, with a stocky build. (R.T.12, pp. 3418-3419.)

The man told her that if she shut up, she would not be hurt, and ordered her into the bedroom. (R.T.12, pp. 3416-3419.) He

repeatedly called her a bitch and told her to stop crying. He digitally penetrated her vagina and rectum. (R.T.12, pp. 3422-3425, 3431.) He attempted to rape her, but was unable to. (R.T.12, pp. 3425-3426.) He told her he had been watching her and knew her name, and her and her boyfriend's work hours. He then orally copulated her vagina and rectum. (R.T.12, pp. 3427-3428, 3483.) He told her he was the Peeping Tom in the flyer, and that if she contacted the police he would kill her. (R.T.12, pp. 3429-3430.)

The man partially penetrated her vagina and ejaculated. (R.T.12, p. 3431.) He also touched her breasts with his hands and mouth. (R.T.12, pp. 3432-3433.)

Eventually he left. Heather O. locked the sliding glass door and called 911 from her cell phone as her bedroom phone was unplugged. In addition the screen to her dining room window was gone. (R.T.12, pp. 3433-3434, 3443-3445; R.T.13, pp. 3736-3737.)

Police took Heather O. to U.C. Davis Medical Center for an examination. (R.T.12, p. 3445.) She was unable to identify appellant in a live lineup, but at trial testified that his body type was similar to that of her attacker.[7] (R.T.12, pp. 3452-3455, 3458-3460; R.T.13, pp. 3746-3751.)

The DNA Evidence At Trial

What the jury did not hear was that in early September, 2000, appellant's 1999 blood sample was analyzed by the crime lab, and

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[7] At the time of the January 7, 2001 live lineup, appellant was 5'6" tall and weighed 190 pounds. (R.T.13, p. 3770.)

his DNA profile was entered in the convicted offender databank. (C.T.2, p. 547; C.T.4, p. 607.) On September 11, 2001, a "match" was made between the DNA profile developed from crime scene evidence in the Deborah L. case, and appellant's DNA profile developed from his 1999 blood sample. (R.T.2, pp. 329-331.)

At trial criminalist Jill Spriggs testified that the frequency of the DNA profile of the perpetrator in the Deborah L. case among African-Americans was one in 600 quadrillion (a number followed by 15 zeros); for Caucasians, one in 21 sextillion (a number followed by 21 zeros); and for Hispanics, one in 420 sextillion.[8] (R.T.14, pp. 4021-4023.)

DNA profiles developed from two samples in Heather O.'s sexual assault kit matched her boyfriend (with whom she had consensual sex), and excluded appellant as the donor. (R.T.15, pp. 4497-4499; R.T.16, pp. 4504-4506, 4572.) Certain alleles on a vaginal swab were consistent with appellant's DNA profile, however. (R.T.16, pp. 4500-4501.) Criminalist Jeanette Wallin testified that the statistical frequencies for this DNA profile are one in 180,000 African Americans, one in 48 million Caucasians, and one in 93 million Hispanics. (R.T.16, p. 4535.)

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[8] Spriggs noted that there are six billion people alive today in the entire world, with 250 million people in the United States. (R.T., vol. 14, p. 4021.) She further testified that for African-Americans the DNA frequency statistic she arrived at was 109 million times more than the total number of people alive today; for Caucasians it was 1 trillion times more; and for Hispanics it was 5 trillion times more. (R.T.14, pp. 4023-4024.)

ARGUMENT

I.

USE OF A "JOHN DOE" COMPLAINT OR A "JOHN DOE" ARREST WARRANT, TO TIMELY COMMENCE AN ACTION AND INDEFINITELY PRESERVE THE PEOPLE'S ABILITY TO PROSECUTE AN ACTION, UNCONSTITUTIONALLY WOULD CIRCUMVENT THE STATUTE OF LIMITATIONS AND DENY DEFENDANTS DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND THE CALIFORNIA CONSTITUTION, AN OUTCOME NOT INTENDED BY OUR LEGISLATURE.

For reasons expressed in this argument, the California Legislature has indicated a clear intent that neither a 'John Doe" complaint nor a "John Doe" arrest warrant can timely commence a criminal action and thereby satisfy a statute of limitations. Thus the trial court erred in denying appellant's motion to dismiss this prosecution on that ground. (*See*, C.T.1, pp. 39-58, 83-91, 92-99 [motion to dismiss]; (R.T.1, pp. 135, 137 [court ruling following evidentiary hearing].)

As will be shown below, a "John Doe" complaint was filed in this case, and a "John Doe" arrest warrant thereafter issued. Both were meant to timely commence the action against the then-unknown suspect in the Deborah L. assault, and thereby satisfy an about-to-expire statute of limitations. But this circumvented a limitations period intended by the Legislature, and denied appellant due process under the Fourteenth Amendment and the state constitution.

As neither the complaint nor the warrant timely commenced the action, the counts of which appellant was convicted were barred by the statute of limitations at the time an amended complaint alleging his true name was filed. Appellant's convictions and the judgment against him are void, and must be vacated and dismissed.

A. On the Recommendation of the California Law Revision Commission, Our Legislature Enacted a Six-Year Statute of Limitations for Each of the Three Kinds Of Offenses Committed Against Deborah L.

In 1981, in recognition of the fact "that piecemeal amendment over the years had produced a scheme that was confusing, inconsistent, and lacking in cohesive rationale," our Legislature referred the statutory scheme for criminal statutes of limitation to the Law Revision Commission for its comprehensive review. (People v. Frazer (1999) 21 Cal.4th 737, 743; *see*, Stats. 1981, ch. 909, § 3, p. 3443.)

Following the Law Revision Commission's comprehensive review, our Legislature in 1984 overhauled the entire limitations scheme by enacting a revised series of criminal statutes of limitations. That current scheme is set forth in Penal Code sections 799 through 805. (People v. Turner (2005) 134 Cal.App.4th 1591, 1594-1595; *see*, Stats. 1984, ch. 1270, §§ 1-2, pp. 4335-4337.)

This revised scheme reflects the primary recommendation of the Law Revision Commission that the length of a "limitations statute should generally be based on the seriousness of the crime." (17 Cal. L. Revision Com. Rep. (1984) p. 313.)

Appellant was convicted only of the offenses arising from the August 25, 1994 assault on Deborah L. Those charges included two counts of forcible rape (Pen. Code, § 261, subd. (a)(2)), one count of forcible oral copulation (Pen. Code, § 288a, subd. (c)(2)), and two counts of forcible sexual penetration by foreign object. (Pen. Code, § 289, subd. (a)(1).) (C.T.1, pp. 197-204.)

All three kinds of offenses are punishable by imprisonment for three, six, or eight years. (Pen. Code, §§ 264, subd. (a); 288a, subd. (c)(2); and 289, subd. (a)(1).) Thus the applicable limitations period for all three kinds of offenses is set forth in Penal Code section 800, which provides that prosecution for an offense punishable by imprisonment for eight years must be commenced within six years after the commission of the offense. (Ibid.)

Thus this case had to "commence" by August 24, 2000 - or be forever barred.[9]

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[9] Coincidentally, on August 25, 2000 (the day after the limitations period in this case expired), the Legislature filed with the California Secretary of State an amendment to Penal Code section 803, adding subsection (g)(1)(A) and (B), to extend the statute of limitations in unknown-offender sex cases, so that a complaint now is timely if it is filed "within one year of that date on which the identity of the suspect is conclusively established by DNA testing...." (Stats. 2000, c. 235 (S.B. 1342; A.B. 1742); *see also*, C,T.1, pp. 54-57 [text of the Act to amend section 803].)

But this amendment to section 803, and the extension of the limitations period it permitted, is inapplicable to the six-year statute of limitations in this case for two reasons:

First, the amendment was not made effective until January 1, 2001, after the statute in this case already had run. (Stats. 2000, c. 235.)

Second, even if an August 25, 2000 approval by the Legislature meant the new limitations period could be immediately applied in this case, it is unconstitutional to extend a limitations period after the statute of limitations already has run, even though it is permissible to extend a statute of limitations during the pendency of the limitations period. (Stogner v. California (2003) 539 U.S. 607 [123 S.Ct. 2446].)

The August, 2000 amendment itself has since been amended, effective February 28, 2005. (Stats. 2005, c. 2, § 3 (S.B. 16), and Stats 2005, ch. 479, § 3 (S.B. 111); *see also*, current Penal Code section 803, subdivision (g), subparagraphs (1)-(2).)

B. According to the California Law Revision Commission (And Thus, By Extension, Our Legislature), The Statute of Limitations Applicable to the August 25, 1994 Assault On Deborah L. Cannot Be Satisfied By the Issuance of a "John Doe" Complaint Or A "John Doe" Arrest Warrant

By statute an action against a defendant can only "commence" in one of four ways; Penal Code section 804 provides that an action commences when "any of the following" occurs:

> "(a) An indictment or information is filed;
>
> "(b) **A complaint is filed** with an inferior court charging a public offense of which the inferior court has original trial jurisdiction.
>
> "(c) A case is certified to the Superior Court.
>
> "(d) **An arrest warrant ... is issued, provided the warrant names or describes the defendant with the same degree of particularity required for an indictment, information, or complaint.**" (Ibid; emphasis added.)

A few days before August 24, 2000 (when the limitations period for all five charges in the Deborah L. case expired), the prosecuting authority attempted to satisfy the statute of limitation, both by filing an August 21, 2000 complaint (C.T.1, pp. 20-29; R.T.1, p. 6, 7-8), and by causing an August 22, 2000 arrest warrant to issue. (Aug C.T.1, pp. 12-40.) This warrant ordered any peace officer in California to arrest forthwith "the defendant, named and described above." (Aug. C.T.1, p. 3.) The named defendant was "John Doe, a MB [Male Black]." (Ibid.)

Appellant will defer to Issue II, *infra*, his discussion of why the "John Doe" arrest warrant did not stop the running of the

statute of limitations, for failing to name or describe him "with the same degree of particularity required for an indictment, information, or complaint." (Pen. Code, § 804, subd. (d).) For purposes of appellant's discussion in this issue of his Opening Brief, however, it is clear that the prosecuting authority's attempt to satisfy the statute of limitations failed, for the very reason that the complaint and the arrest warrant both were in the name of defendant "John Doe," an unknown suspect.

It is true that Penal Code section 815 does permit a "John Doe" warrant to issue in California: "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 shall be designated therein by any name." (Ibid.) The question is whether our Legislature meant section 815 to coexist in harmony with section 804, so that the action against appellant lawfully could commence with the filing of a "John Doe" complaint or the issuance of a "John Doe" arrest warrant.

As in any case involving statutory interpretation, this Court's "fundamental task ... is to determine the Legislature's intent so as to effectuate the law's purpose." (People v. Murphy (2001) 25 Cal.4th 136, 142; White v. Ultramar, Inc. (1999) 21 Cal.4th 563, 572.)

To determine the legislative intent underlying Penal Code section 804, this Court need look no further than the California Law Revision Commission's comments to that section, as those comments are indicative of legislative intent:

> "Because the official comments of the California Law Revision Commission 'are **declarative of the intent** not only of the draftsman of the code **but also of the legislators who subsequently enacted it**' [citation], the comments are persuasive, albeit not conclusive, evidence of that intent." (Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2006) 40 Cal.4th 1, 13, quoting Bonanno v. Central Contra Costa Transit Authority (2003) 30 Cal.4th 139, 148; emphasis added.)

It is entirely appropriate to look to the Law Revision Commission's comments in order to determine legislative intent.[10] As this Court has noted, "Explanatory comments by a law revision commission are persuasive evidence of the intent of the Legislature in subsequently enacting its recommendations into law." (Conservatorship of Wendland (2001) 26 Cal.4th 519, 542, quoting Brian W. v. Superior Court (1978) 20 Cal.3d 618, 623.)

As a result, "judi ial deference to an administrative interpretation of a statute is extended if the interpretation is long standing, consistent, and if the interpretation was

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[10] By way of example, in 1956 the California Law Revision Commission was directed by our Legislature "to determine whether the law of evidence should be revised to conform to the Uniform Rules of Evidence ...." (7 Cal. Law Revision Com. Rep., Rec. & Studies, p. 3 (1965) (hereinafter 7 Cal. L.Rev. Com.).) "For each recommended Evidence Code section, the Commission provided a *Comment* which explained the section's purpose and its relation to other sections and discussed some potential problems of its meaning or application." (7 Cal. L.Rev. Com., p. 1007.)

The Legislature made some changes to the proposed Evidence Code, and then enacted it. (7 Cal. L.Rev. Com., pp. 923-928, 1007-1008.) Those sections changed by the Legislature were relabeled as a Comment by the legislative committee that authored the changes. (7 Cal. L.Rev. Com., p. 1008.) "The end result was that the Comment accompanying any given Evidence Code section **was intended to reflect legislative intent in enacting the section.**" (In re Peterson (2007) 156 Cal.App.4th 676, 688; emphasis added.)

contemporaneous." (People v. Cole (2006) 38 Cal.4th 964, 987; Sara M. v. Superior Court (2005) 36 Cal.4th 998, 1012.) Significantly for this case, the Law Revision Commission Comments to Penal Code section 804 have been in existence since 1984, when the statutory scheme was adopted (thus were "contemporaneous" with the enactment of section 804, and are of long standing); and they have remained consistent through all subsequent amendments and modifications of section 804.

Thus it is telling that the Law Revision Commission's comments to section 804 provide in pertinent part that a John Doe warrant cannot, by itself, satisfy a limitations period:

> "Subdivision (d) continues the substance of portions of former Sections ... but adds the limitation that the warrant specify the name of the defendant or describe the defendant with 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....**" (Cal. Law Rev. Com. com., West's Ann. Pen. Code (2008 Desktop Ed.), following § 804, p. 467; emphasis added. *See also*, 20 Cal. L.Rev. Comm. Rep., p. 2305 (1990).)

Nothing could be more clear: 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.

C. To Interpret This Any Other Way Unconstitutionally Would Allow the People An Indefinite Time To Prosecute Crimes (What the Investigating Detective In This Case Candidly Admitted He Was Trying To Do) And Would Deny Defendants State and Fourteenth Amendment Constitutional Rights To Due Process

A statute of limitations is the primary guarantee protecting

criminal defendants during the prearrest stage, from preaccusation delay and overly-stale charges. (United States v. Marion (1971) 404 U.S. 307, 322-323 [92 S.Ct. 455]; United States v. Ewell (1966) 383 U.S. 116, 122 [86 S.Ct. 773]; People v. Archerd (1970) 3 Cal.3d 615, 639.)

In California, the issuance of a proper (or lawful), arrest warrant may "commence" a criminal prosecution for purposes of the statute of limitations, without engaging the protection of the Sixth Amendment's speedy trial clause. (People v. Martinez (2000) 22 Cal.4th 750, 764-765.) Therefore, before an accused is arrested, his fair trial and due process rights under the state and federal Constitutions are what protect him against oppressive governmental action. (U.S. Const., Amend. XIV; Cal. Const., art. I, § 15; *see generally*, People v. Catlin (2001) 26 Cal.4th 81, 107.)

It is fundamental that the primary purpose of criminal statutes of limitation is to prevent prosecution when, through the unexcused lapse of time, it becomes difficult or impossible for a suspect to defend himself. As a result (in a case discussing the statute of limitation in a civil case), the United States Supreme Court has said that "[T]he right to be free of stale claims in time **comes to prevail over the right to prosecute them.**" (Telegraphers v. Railway Express Agency (1944) 321 U.S. 342, 349 [64 S.Ct. 582]; emphasis added.)

Under California law our Legislature is presumed to both know and to mean the consequences of its actions in enacting statutes. If a statute is clear, the plain meaning of the language governs,

as the Legislature is presumed to have meant what it said (People v. Superior Court (Zamudio) (2000) 23 Cal.4th 183, 192; People v. Johnson (2006) 145 Cal.App.4th 895, 904), and also is presumed to have intended reasonable results consistent with its apparent purpose.[11] (Commission On Peace Officer Standards and Training v. Superior Court (2007) 42 Cal.4th 278, 290.)

A fortiori, our Legislature's enactment of criminal statutes of limitation, which establish a "date certain" after which those crimes cannot be prosecuted, necessarily means our Legislature understood and accepted the fact that crimes not commenced within the statutory period would be barred from prosecution.

But in this case the prosecuting authority attempted to circumvent this legislative acceptance and intent. For during an evidentiary hearing on this issue, Sacramento police detective Peter Willover, who investigated the Deborah L. assault, admitted that when the six year limitations period was almost expired, he contacted the District Attorney's office seeking to do something before that happened. (R.T.1, pp. 86-87, 94-95.)

Detective Willover also admitted that he sought and obtained the "John Doe" arrest warrant, even though he knew he could not execute it, as he "was aware that once a warrant is issued on a

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[11] This is because statutory language "'has been lobbied for, lobbied against, studied, proposed, drafted, restudied, redrafted, voted on in committee, amended, reamended, analyzed, reanalyzed, voted on by two houses of the Legislature, sent to a conference committee, and, after perhaps more lobbying, debate and analysis, finally signed "into law" by the Governor.'" (Wasatch Property Management v. Degrate (2005) 35 Cal.4th 1111, 1117-1118.)

case, a statute of limitations would not expire as long as you showed due diligence," and "in my mind, I was hoping to be able to identify and prosecute the person who committed these crimes." (R.T.1, p. 112.)

He said he did so, "Not so much as to stop the clock, but **to continue the availability of prosecution**." (R.T.1, p. 112; emphasis added.) Tellingly, he added "it was my opinion, with technology, we would be able to identify the person **eventually**." (Ibid; emphasis added.)

But Detective Willover's hoped-for procedural loophole could not rescue the statute of limitations in this case.

Courts "must give statutes a reasonable construction which conforms to the apparent purpose and intention of the lawmakers." (Clean Air Constituency v. California State Air Resources Board (1974) 11 Cal.3d 801, 813.) In terms of statutory construction, provisions in a Code relating to the same subject matter must be harmonized to the extent possible; this Court has said that "An interpretation that renders related provisions nugatory must be avoided [citation]; each sentence must be read not in isolation but in light of the statutory scheme [citation]...." (Lungren v. Deukmejian (1988) 45 Cal.3d 727, 735.)

It is true that in the Penal Code, Chapter 2 ("Time of Commencing Criminal Actions"), establishes there are offenses, such as murder, for which our Legislature determined there would be no limitation upon the State's ability to prosecute such crimes. (Pen. Code, § 799.) But with the exception of those specifically-stated

and limited crimes, an indefinite delay of prosecution, and/or the ability to prosecute at any time, is wholly at odds with the concept and purpose of the various limitations periods set forth in Penal Code section 800 through 805 of Chapter 2, which immediately follow Penal Code section 799.

In light of this statutory scheme, it is abundantly clear that, with the exception of the crimes set forth in section 799, our Legislature never intended the People to be able to "continue the availability of prosecution" until the People "eventually" could identify an unknown perpetrator, as Detective Willover hoped. (R.T.1, p. 112.) To allow the construction appellant protests would defy 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." (United States v. Marion, *supra*, 404 U.S. 307, 322.)

Therefore, to avoid a due process violation, neither the August 21, 2000 filing of a John Doe complaint, nor the August 22, 2000 issuance of a John Doe arrest warrant, constitutionally could commence the action on the charges from the Deborah L. assault case, so as to render this prosecution timely

D. The Remedy Requires Reversal Of All Five Void Counts Of Conviction

The bar of the statute of limitations in criminal cases may be raised at any time, including during the direct appeal. (People v. Morris (1988) 46 Cal.3d 1, 13, fn. 4; People v. Zamora (1976) 18

Cal.3d 538, 562, fn. 24.) This is because "No person can be punished for a public offense, except upon a legal conviction in a Court having jurisdiction thereof." (Pen. Code, § 681.) If the trial court lacked jurisdiction to proceed on any of the five counts from the Deborah L. case, appellant's convictions of those offenses are void; the judgment must be vacated or reversed, and the charges dismissed. (In re Demillo (1975) 14 Cal.3d 598, 601; People v. Crosby (1962) 58 Cal.2d 713, 725; People v. Swinney (1975) 46 Cal.App.3d 332, 340.)

The proper remedy in this case therefore is for this Court to order appellant's convictions of counts 1, 2, 3, 4, and 5 be reversed, vacated and dismissed.

II.

THE "PARTICULARITY" REQUIREMENT FOR AN ARREST WARRANT UNDER THE FOURTH AMENDMENT, OUR STATE CONSTITUTION, AND STATE STATUTORY LAW, IS NOT SATISFIED BY INCLUSION IN THE ARREST WARRANT OF AN UNKNOWN SUSPECT'S DNA PROFILE AS A "DESCRIPTION" OF THAT SUSPECT

Appellant established in Issue I, *supra*, that a Penal Code section 815 "John Doe" arrest warrant, by itself, cannot satisfy a statute of limitations and prevent a criminal prosecution from being time-barred.

In this section appellant further demonstrates that the "particularity" requirement of the Fourth Amendment to the United States Constitution, our state Constitution's article I, section 13, and Penal Code section 804, subdivision (d), was not met in this case by the prosecuting authority's use of the unknown suspect's DNA profile, as a description of the unknown suspect, in the "John Doe" complaint and "John Doe" arrest warrant. Thus the addition of a DNA profile to a "John Doe" warrant cannot provide a different basis for satisfying the statute of limitations on the Deborah L. charges.

A. The Federal and State Constitutional Requirement Of "Particularity" In An Arrest Warrant, And the Similar State Statutory Requirement When An Arrest Warrant Is Meant To Commence An Action And Satisfy A Statute Of Limitation

Aside from certain slight and unimportant differences, article I, section 13 of the California Constitution (formerly article I, section 19), essentially is identical to the Fourth Amendment of

the United States Constitution, and like the Fourth Amendment, it applies to warrants of arrest as well as search warrants. (In re Schaefer (1933) 134 Cal.App. 498, 499 [25 P.2d 490].)

The federal Constitution provides that:

> "no Warrants shall issue but upon probable cause, supported by Oath or affirmation, **particularly describing** the place to be searched and **the person** and things **to be seized.**" (U.S. Const., amend. IV; emphasis added.)

Our state Constitution similarly provides, so far as is pertinent, that:

> "no warrant shall issue, but on probable cause, supported by oath or affirmation, **particularly describing** the place to be searched and **the persons** and things **to be seized.**" (Cal. Const., art. I, § 13; emphasis added.)

Recall from Issue I, *supra*, that Penal Code section 804 provides just four conditions which will commence a criminal action and satisfy a limitations period, and that subsection (d) of that section establishes that the issuance of an arrest warrant will do so. But subdivision (d) contains a "particularity" requirement, so that a limitations period is satisfied only where:

> "[a]n arrest warrant ... is issued, **provided the warrant names or describes the defendant with the same degree of particularity** required for an indictment, information, or complaint."[12] (Ibid; emphasis added.)

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[12] In turn, a complaint requires "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." (Pen. Code, § 959, subd. (4).)

Subdivision (d), however, is tempered by constitutional requirements of "particularity" established by California and federal law. (U.S. Const., Amend. IV; Cal. Const., art. I, § 13.)

This requirement of identifying a person with reasonable certainty (or "particularity"), is a rule designed to protect personal liberty and to cause the arrest only of persons who are actual criminals, while minimizing the risk of error by the executing officer. (In re Schaefer, *supra*, 134 Cal.App. 498, 499; United States v. John Doe aka Carr (3rd Cir. 1983) 703 F.2d 745, 747.)

Thus the central protection of the Fourth Amendment's particularity requirement is to ensure that "nothing is left to the discretion of the officer **executing** the warrant." (Marron v. United States (1927) 275 U.S. 92, 196 [48 S.Ct. 74]; emphasis added; *see also*, People v. Amador (2000) 24 Cal.4th 387, 392.)

Therefore a "John Doe" warrant, or any warrant which merely identifies a defendant by the use of a fictitious name without any description whatsoever, is insufficient to name a defendant with "particularity," and thus is void under the Fourth Amendment and article I, section 13. (West v. Cabell (1894) 153 U.S. 78 [14 S.Ct. 752]; People v. Montoya (1967) 255 Cal.App.2d 137, 142.) For:

> "The principle of the common law, by which **warrants of arrest**, in cases criminal or civil, must **specifically name or describe the person to be arrested**, has been affirmed in the American constitutions; and by the great weight of authority in this country, **a warrant that does not do so will not justify the officer in making the arrest.**" (West v. Cabell, *supra*, 153 U.S. 78; emphasis added.)

Clearly the "John Doe" complaint and the "John Doe" arrest warrant did not "specifically name" appellant. According to West v. Cabell, the only other way the warrant could be valid was if those documents "specifically ... describe[d] the person to be arrested ...." (Ibid.)

As shown below, they did not do so.

B. The Minimal Physical Description Provided For the Unknown "John Doe" Suspect Did Not Describe Anyone With "Reasonable Certainty"

An arrest warrant should contain sufficient information to identify the suspect with reasonable certainty. (People v. Montoya, *supra*, 255 Cal.App.2d 137, 142.) But the complaint in this case contained no physical description whatsoever, as deputy District Attorney Laurie Earl chose not to put anything more detailed in the complaint she filed, in order not to lock in inconsistent information. (R.T.1, pp. 17-23.)

Detective Willover's Declaration, however (in support of the requested arrest warrant), described the suspect in traditional terms as a "black male adult, appearing to be in his twenties ... approximately 5'7" tall with brown eyes . wearing a dark blue hooded sweatshirt, dark baggy pants and cloth type gloves" (Aug. C.T.1, p. 15), and a "medium black complexion, of either Hispanic or African-American descent, and weigh[ing] about 180 pounds." (Aug C.T.1, p. 16.)

Even this amount of information was insufficient for purposes of the Fourth Amendment and California Constitution, however.

In People v. Montoya, *supra*, a challenged arrest warrant described the person to be seized in similar fashion, as "John Doe, white male adult, 30 to 35 years, 5 10 175 lbs. dark hair, medium build." (Id., 255 Cal.App.2d 137, 141.) Defendant Montoya argued this warrant was void as the description was general and did not contain any information by which he could be identified with reasonable certainty. (Id, at 142.) The People, in turn, argued that a warrant using any name was authorized by Penal Code section 815, and that the physical description provided was sufficient to meet constitutional standard. (Ibid.)

The reviewing court noted that "[w]here a name that would reasonably identify the subject to be arrested cannot be provided, then some other means **reasonable to the circumstances** must be used to assist in the identification of the subject of the warrant." (Id., at 142, citing United States v. Swanner (D.C.Tenn.1964) 237 F.Supp. 69, 71; emphasis added). The Montoya court added,

> "We hold, therefore, that when read with the constitutional provisions, section 815 does not obviate the necessity of describing the person to be arrested. **If a fictitious name is used the warrant should also contain sufficient descriptive material to indicate with reasonable particularity the identification of the person whose arrest is ordered.** [Citations]." (Id., at 142-143; emphasis added, footnote omitted.)

The court then turned "to the question of whether the description of defendant as a 'white male adult, 30 to 35 years, 5 10 175 lbs. dark hair, medium build' meets the constitutional requirement of 'reasonable particularity.'" (Id., at 143.) Analogizing to the requirements for sufficiency of descriptions in

search warrants, the court found;

> "The authorities agree that the constitutional requirement is not met where only characteristics of age, weight, height and race are mentioned. Although the warrant here also indicated that the person to be seized had dark hair, we think it was nevertheless too general a description. It could be applied to a great number of persons in a city the size of Oakland. Accordingly, we hold that the description of defendant in the warrant did not meet the constitutional requirement, and the warrant was void for that reason."[13] (Id., at 143.)

The same must hold true here. The generalized description in Detective Willover's Declaration of a 5'7", 180 pound twenty-something Black male "could be applied to a great number of person in a city the size of" Sacramento. (Id., at 143.) Thus the physical description of Deborah L'.s unknown assailant in the warrant "did not meet the constitutional requirement, and the warrant was void for that reason."[14] (Ibid.)

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[13] Similarly, an Indictment which charged "John Doe, a Chinese person, whose true name is to the Grand Jurors aforesaid unknown," showed the Grand Jurors were unable to identify the person they were indicting, thus was void for insufficiency of description. (United States v. Doe (N.D. Cal.1904) 127 F. 982, 983 ["with no other description of the defendant than this, it is not possible to say what particular Chinese person the grand jury intended to indict, and for this reason the Indictment is insufficient"].)

And in Martini v. State (1964) 200 Md. 609 [92 A.2d 456], a description referring to "a white man, 25 years of age," was held insufficient, as the court concluded there must be in the city of Baltimore about 18,000 persons who answered that description.

[14] Based on the weight of prior authorities, the Montoya court did decide that sufficient information in a warrant to permit a defendant's identification with reasonable certainty exists where the warrant states his occupation, personal appearance, peculiarities, place of residence or other means of identification. (Id., 255 Cal.App.2d at 142, citing Blocker v. Clark (1906) 126 Ga. 484 [54 S.E. 1022].)

C. At This Time, With the Technology Available, A DNA Profile Does Not "Describe" Anyone With the "Reasonable Certainty" Required For An Officer To Effect An Arrest; And the People Who Caused the Arrest Warrant To Issue In This Case Admitted That

Bearing in mind the Montoya court's directive, that when a name is not available to identify a suspect "some other means reasonable to the circumstances must be used to assist in the identification of the subject of the warrant" (id., 255 Cal.App.2d at 142-134), the key question is whether an unknown suspect's DNA profile describes that person with sufficient certainty, **and** is a means of description **"reasonable to the circumstances**," so that including it in an arrest warrant satisfies the "particularity" requirement of the Fourth Amendment, our Constitution's article I, section 13, and Penal Code section 804, subdivision (d).

The answer, clearly, is that a DNA profile does not satisfy the particularity requirement.

1. **Relevant Historical Facts**

When deputy District Attorney Laurie Earl filed the complaint naming "John Doe" as the defendant in the Deborah L. case, the caption page of that complaint (repeated in all five counts

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But the kind of descriptions which reviewing courts in the past have held contain sufficient identifying characteristics to meet the "particularity" (or "certainty") requirement, invariably involved physical descriptors such as sex, race, age, height, weight, and hair and eye color. (People v. McCrae (1963) 218 Cal.App.2d 725, 728-729; People v. Erving (1961) 189 Cal.App.2d 283.)

charged), stated this unknown John Doe could be identified by the following DNA profile developed from the crime scene evidence:

> "JOHN DOE, unknown male with Short Tandem Repeat (STR) Deoxyribonucleic Acid (DNA) Profile at the following Genetic Locations, using the Cofiler and Profiler Plus Polymerase Chain Reaction (PCR) amplification kits: D3S1358 (15,15), D16S539 (9,10), THO1 (7,7), TPOX (6,9), CSF1PO (10,11), D7S820 (8,11), vWa (18,19), FGA (22, 24), D871179 (12, 15), D21S11 (28,28), D18S51 (20, 20), D5S818 (8, 13), D13S317 (10, 11), with said Genetic Profile being unique, occurring in approximately 1 in 21 sextillion of the Caucasian population, 1 in 650 quadrillion of the African American population, 1 in 420 sextillion of the Hispanic population." (C.T.1, pp. 20-29; see, R.T.1, p. 11.)

Attached to this complaint was a Declaration by Earl praying that an arrest warrant issue for the "John Doe" identified by this DNA profile, repeating the above paragraph. (C.T.1, p. 30; R.T.1, p. 11.)

The next day, when Detective Willover filed a Statement of Probable Cause that including his Declaration in support of a "John Doe" arrest warrant (Aug C.T.1, pp. 12-18 and 19-40), his Declaration established that officers investigating the rape had collected and booked a bed sheet with a wet spot, and vaginal swabs collected from the rape victim at a hospital contained sperm, and that semen was recovered from all the items. (Aug. C.T.1, pp. 16-17.) It also established that Willover himself spoke with the DNA analyst in the county crime lab who developed the unknown suspect's DNA profile from that crime scene evidence (Aug. C.T.1, p. 17), and that,

> "Based upon these facts and circumstances, I believe that there is probable cause to believe that **John Doe**, unknown male with Short Tandem Repeat (STR) Deoxyribonucleic Acid (DNA) Profile at the following Genetic Locations, using the Cofiler and Profiler Plus Polymerase Chain Reaction (PCR) amplification kits: D3S1358 (15,15), D16S539 (9,10), THO1 (7,7), TPOX (6,9), CSF1PO (10,11), D7S820 (8,11), vWa (18,19), FGA (22, 24), D871179 (12, 15), D21S11 (28, 28), D18S51 (20, 20), D5S818 (8, 13), D13S317 (10, 11), did commit the following crimes against **Jane Doe** on August 25, 1994: ...." (Aug. C.T.1, pp. 17-18; emphasis in original.)

The only thing Detective Willover did not repeat, from the complaint Earl had filed a day earlier, were statistics on how rare the unknown suspect's DNA profile was. (*See*, Aug. C.T.1, pp. 17-18.)

Based on Earl's and Willover's requests, on August 22, 2000, a felony arrest warrant issued ordering any peace officer in California to arrest forthwith "the defendant, named and described above." (Aug. C.T.1, p. 3.) But the only description of the defendant given was "John Doe, a MB" (presumably, a "Male Black"). (Ibid.)

The next day, on August 23, 2000, the police department printed out the arrest warrant.[15] (Aug. C.T.1, pp. 4-6.) On the last page of its printout the department stated, "Suspect identifiable by genetic profile in Sacramento Police Department report ... contact SPD Det. Pete Willover ... or Sacramento District

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[15] Earl agreed there was no description in this arrest warrant for height, weight, hair, or eye color. (R.T.1, pp. 30-31.) She explained that the DNA profile was not put on the face of the warrant because the computer system is not set up to take that many characters in the identifying information. (R.T.1, p. 29.)

Attorney's Adult Sexual Assault Unit ...." (Aug. C.T.1, p. 6.)

Earl admitted that, based solely on the arrest warrant actually printed out in this case, California peace officers would not have enough information about to who to arrest without either knowing the arrestee's DNA profile or calling her or Detective Willover. (R.T.1, p. 33.)

2. A DNA Profile Does Not "Describe" Anyone; It May "Identify" A Suspect, But Only After a Laboratory Match and a Technician's Analysis

It is this simple: the DNA profile set forth in the arrest warrant did not provide a sufficient legal description of "the person to be arrested" for an officer to execute that warrant. Instead, this arrest warrant containing a DNA profile could be executed only after a DNA match with the perpetrator's profile was made, and a suspect was **identified**. (*See*, R.T.14, pp. 3932-3934, 4061-4064 [a crime lab technician testified DNA must be extracted from the nucleus of a cell and subjected to a chemical reaction, electrophoresis, and a printout on a radiograph, before it can be analyzed visually and software that calculates match probabilities be applied to it].)

In other words, the 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.

By analogy to search warrants, this Court has clarified that a "common sense and realistic" test applies when determining the sufficiency of a warrant's description for constitutional purposes. (People v. Amador (2000) 24 Cal.4th 387, 393.) Is it realistic, and does common sense hold sway, to say that an arrest warrant cannot be executed unless and until a DNA match is made between the unknown suspect who is the subject of that warrant, and some as-yet-unidentified person? Or is it more realistic, and consonant with common sense, to admit that a DNA profile simply does not describe anyone in the way the Fourth Amendment to the United States Constitution expects?

The Fourth Amendment warrant requirement, as well as our own state Constitution and Penal Code section 804, subdivision (d), all demand that the person to be seized be **described** with sufficient particularity. But clearly a DNA profile does not "describe" anyone. To most people - including probably every peace officer in the United States - it is a meaningless string of alphanumeric codes.

No one reading the DNA profile set forth in the arrest warrant in this case could immediately interpret it and declare that it "described" a male of certain color complexion, certain height, with eyes and hair of a certain color. And conversely, no one looking right at appellant could "describe" appellant's DNA profile, even though by looking at him they already knew his sex, race, eye and hair color, and general height and weight.

So DNA is **not** a "description" of anyone. It is merely an "identifier," the same way a fingerprint or an ocular scan of a retina is an identifier. But it has something else in common with those other forms of identification: it requires someone to analyze and interpret it before an identification can be made from it.[16]

3. 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

The crux of the matter is this: in opposition to appellant's trial level Motion to Dismiss, the prosecution argued that "no description could better identify with reasonable certainty the person whose arrest is ordered than his or her DNA profile." (C.T.1, p. 70.)

But that is not true. A DNA profile is no more than information about the genetic makeup of a human being; it is not a description of that person. Using the exact language of the original complaint and original arrest warrant - that the John Doe suspect in the Deborah L. assault had certain DNA alleles at certain genetic locations - it is impossible to say 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: "D3S1358 (15,15), D16S539 (9,10), THO1 (7,7), TPOX (6,9), CSF1PO (10,11), D7S820

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[16] 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 1988," **not** the "DNA **Description** Act". (Stats. 1998, sc. 696 (AB 1332), § 2.)

(8,11), vWa (18,19), FGA (22, 24), D871179 (12, 15), D21S11 (28,28), D18S51 (20, 20), D5S818 (8, 13), D13S317 (10, 11)."

The People were wrong for another reason, in stating that no description could better identify a person than his or her DNA profile, for in a case of multiple birth any identical twin, triplet, quadruplet, etc., will have exactly the same genetic makeup as his or her identical siblings. Unlike fingerprints, in the case of identical twins, etc., a DNA profile is not unique to one single individual in the whole world.

Science recognizes the fallibility of concluding that a DNA profile "describes" anyone. For in DNA analysis the only absolute certainty occurs when a suspect is **excluded** as the donor of a crime scene evidence sample; if someone is **included** as a suspect, it does not mean he is the culprit. (R.T.14, pp. 4062-4063.) It means only that he might be the suspect, and a statistic is then needed to help a trier of fact assess how likely it is that any one else would have the same DNA profile. (R.T.5, pp. 1338-1339.) But the warrant in this case lacked the statistics that supplied meaning to the DNA profile.

And so while a DNA profile may be probative of identity, by itself it does not actually describe anyone. No policeman in the field trying to execute an arrest warrant could be expected to make an arrest based on a DNA profile only, for that officer would have no way to confirm the suspect he was trying to arrest had the same DNA profile as that which was reflected by the warrant, without taking a biological sample from his suspect and sending it to a

crime lab for analysis. That is not an identification by means "reasonable to the circumstances." (People v. Montoya, *supra*, 255 Cal.App.2d at 142-134.)

Indeed, during oral argument on appellant's trial level Motion to Dismiss, the People conceded that "the method by which a DNA warrant is going to be executed will be solely based on extrinsic information. There is no dispute, **the only method to identify that person is information that comes from Berkeley** that there has been, in fact, a DNA hit." (R.T.1, p. 122; emphasis added.)

But for Fourth Amendment purposes, extrinsic evidence cannot be used to make up the deficiencies of an insufficient arrest warrant. (United States v. John Doe aka Carr, *supra*, 703 F.2d 745, 749.) The validity of the warrant must be tested from the identifying information on the face of the warrant, and testimony about the intention of the issuing officer cannot be considered in determining whether the defendant was, in fact, intended to be the subject of the warrant. (West v. Cabell, *supra*, 153 U.S. 78; *see also*, United States v. Swanner (D.C. Tenn. 1964) 237 F.Supp 69, 71 [the subjective knowledge or intention of the executing officer lends no support to the warrant, and its validity must be tested from the identifying information on its face].)

Appellant is not contending that evidence of a DNA profile cannot be used at a trial to prove a defendant's identity for purposes of a conviction; obviously it can so be used.

But when evidence of a DNA profile is introduced at trial expert testimony accompanies it, to explain how a DNA match is

achieved and what the statistical significance of that match is. In the real world, a policeman seeking to execute an arrest warrant containing no more of a description of his suspect than the suspect's DNA profile will not have an expert alongside him to confirm that the person he seeks to arrest is the person described by DNA profile in the warrant. In the real world, the original "John Doe" complaint and arrest warrant are invalid because, even with the extrinsic evidence of the DNA profile added to them, a reasonable peace officer in Sacramento still would not know which "Black male" the John Doe warrant authorized him to arrest.

Significantly, Penal Code section 803, which establishes that "Except as provided by this section, a limitation of time ... is not tolled or extended for any reason," makes no provision for tolling or extending any statute of limitations when either a John Doe complaint is filed or a John Doe arrest warrant issues; nor does it 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.

Thus the addition of a DNA profile to the "John Doe" complaint and warrant here neither satisfied federal or state constitutional concerns, nor commenced the action on the Deborah L. charges.

4. Even Members Of the Prosecuting Authority Agreed the "DNA Warrant" Could Not Be Executed

Recall, deputy District Attorney Earl admitted that California peace officers would not have enough information to know who to

arrest, from the arrest warrant actually printed out in this case, unless they called her or Detective Willover. (R.T.1, p. 33.)

In that regard, Sacramento Police Department records clerk Gaylene Pel, who processes warrants, testified at an evidentiary hearing and explained that in order to activate a warrant, all identifying information is necessary, including "Date of birth, race, sex, height, weight, hair color, eye color, identifying information, name." (R.T.1, pp. 41, 44, 48.) All of it also is necessary for a local warrant to be entered into statewide or national systems. (R.T.1, p. 50.) Without such information a warrant cannot be entered into local, state or national systems (R.T.1, p. 51), thus the John Doe warrant in this case was never entered into the state or national systems, as it lacked requisite criteria.[17] (R.T.1, pp. 52, 60-61.)

In addition, no officers were assigned to execute the warrant and arrest this "John Doe," because the warrant did not have enough identifying information. (R.T.1, pp. 54, 66.) As Pel explained, it, "There would be really nothing for us to do. There is not enough information here to go forward with any of the record checks." (R.T.1, p. 52.)

And Detective Willover himself admitted that, based on his 35 years of experience as a policeman, he would not arrest anyone from

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[17] Neither Sacramento County, nor the state or nationwide computer programs, have any field allowing anyone to enter the "DNA profile" for the subject of a warrant. Pel therefore assumed that, for a local warrant, that information would go under the "Remarks" section. (R.T.1, pp. 49, 52.)

the face of the arrest warrant that issued; he agreed it would not be reasonable. (R.T.1, p. 102.) Instead, he sought and obtained the warrant strictly to keep the statute of limitations from expiring. (R.T.1, p. 112.)

D. Our Legislature's Actions Make Clear That It Is Irrelevant That Appellant Was Arrested Only One Month After The "John Doe/DNA Warrant" Was Filed, For This Action Already Was Time-Barred When Appellant Was Arrested, And No Procedure For Extending the Limitations Period Had Been Approved; Thus Appellant Has Suffered A Due Process Violation

Appellant has demonstrated that a DNA profile on a search warrant is constitutionally insufficient as a description of a suspect, because it does not "particularly" describe the person to be arrested, and is not "reasonable to the circumstances." Due to these defects, neither the complaint filed in this case nor the warrant that issued could commence the action and thereby stop the statute of limitations from running out on August 24, 2000.

Thus the five counts of which appellant was convicted already were barred by the statute of limitations at the time an amended complaint alleging his true name as the defendant was filed in September, 2000.

It is true that appellant was identified and arrested only one month after the "John Doe/DNA" complaint and arrest warrant were used in an attempt to stop the running of the statute and commence the action against him. It may be tempting to conclude that this additional one-month delay beyond the statutory six years could not

have harmed appellant's chance to defend himself against the Deborah L. charges, and therefore there could be no due process violation in allowing this prosecution to go forward.

But appellant was identified as quickly as he was because he was a felon whose DNA profile already was in the databank. What if the unknown suspect in the Deborah L. assault had not been in the criminal justice system? How long would it take in that case for due process to be offended by an indefinite extension of the strict statute of limitations? Or as defense counsel pointed out, "What if they didn't get a match for the next 40 years?" (R.T.1, p. 120.)

If a prosecuting authority is permitted to satisfy a statute by filing a "John Doe" complaint or having a "John Doe" arrest warrant issue, even if such a complaint or warrant included an unknown suspect's DNA profile, how long past the point where that limitations period otherwise would have expired will the prosecuting authority be allowed (in Detective Willover's words), "to continue the availability of prosecution ... eventually"? (R.T.1. 1, p. 112.)

The answer is, the prosecuting authority should not be permitted to utilize "John Doe/DNA warrants" to extend a statute of limitations for even a single day. For by establishing a limitations period for sexual offenses, our Legislature has declined to place sexual offenders in perpetual jeopardy, as it has done for murder. (*See*, Pen. Code, § 799 [there is no statute of limitations for prosecuting a murder charge punishable by life in prison with the possibility of parole].)

Our Legislature instead has established strict deadlines on how long a prosecuting authority has to collect and analyze biological evidence for DNA analysis. (*See*, Penal Code section 803, subd. (g), subparagraphs (1)-(2). [18]) By doing so our Legislature clearly indicated its intent to continue strict statutory limitations for commencing prosecution of sexual offenses.

Moreover, unlike the federal government and certain states, our Legislature has **not** chosen to enact a statute which would permit or implement a "DNA indictment" process against unknown offenders. (*See*, 18 U.S.C. § 3282, subd. (b) [permitting federal authorities to utilize DNA Indictments]; *accord*, Ark. Code Ann. § 5-1-109, subd. (b)(1)(B)(I)-(j); Del. Code Ann., tit. 11, § 3107, subd. (a); Mich. Comp. Laws, § 767, subd. (2)(b); N.H. Rev. Stat. Ann., § 592-A:7(II).)

As a result, since the People have not made the required showing of compliance with the statute of limitations, the judgment must be vacated or reversed. (People v. Crosby (1962) 58 Cal.2d 713, 725.) The proper remedy is for this Court to order appellant's convictions of counts 1, 2, 3, 4, and 5 be reversed, vacated and dismissed. (In re Demillo (1975) 14 Cal.3d 598, 601; People v. Swinney (1975) 46 Cal.App.3d 332, 340.)

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[18] These subparagraphs (enacted after the DNA testing in this case), establish that a criminal complaint may be filed within one year of the date on which the identity of a suspect is conclusively established by DNA testing, provided that biological evidence collected in connection with the crime is analyzed for DNA type no later than January 1, 2004 for offenses occurring before January 1, 2001, or within two years of offenses committed after January 1, 2001. (Pen. Code, § 803, subd. (g)(1),(2).)

III.

TO AVOID A DENIAL OF APPELLANT'S FOURTH AMENDMENT AND CALIFORNIA CONSTITUTIONAL RIGHTS TO BE FREE OF UNREASONABLE SEARCHES AND SEIZURES, THE PROPER REMEDY FOR THE UNLAWFUL 1999 INVOLUNTARY COLLECTION AND DNA ANALYSIS OF APPELLANT'S BLOOD REQUIRES HIS CONVICTIONS BE REVERSED, HIS DNA PROFILE BE REMOVED FROM THE STATE DATA BANK, AND THE BLOOD SAMPLE BE DESTROYED

Effective January 1, 1999, the DNA and Forensic Identification Data Base and Data Bank Act of 1998 (hereinafter "the Act"), required, *inter alia*, that any person convicted of specified crimes must provide blood and saliva samples, and thumbprint and handprint impressions, for law enforcement identification analysis. (Former Pen. Code § 296, subd. (a)(1); Stats. 1998, ch. 696, § 2.)

Pursuant to the original version of the Act, appellant's blood was involuntarily collected in 1999 and his DNA profile developed for inclusion in the convicted offender database. (R.T.17, p. 4930.) This DNA profile later "matched" the DNA profile of the unknown offender developed from crime scene evidence in the Deborah L. case, and led police to appellant. (R.T.17, pp. 4934-4935.)

In the trial court appellant moved under Penal Code section 1538.5 to suppress all DNA-typing evidence, arguing his rights under the Fourth Amendment to the United States Constitution and the California Constitution, article I, § 13, were violated by the involuntary collection of his blood pursuant to Penal Code section 295 *et seq.*, on both facial and as-applied grounds. (C.T.2, pp. 545-600; *see*, p. 557.)

There is no dispute that, at the time appellant's blood was collected, he had not been convicted of a "qualifying" offense under the then-existing version of the Act. (People v. Robinson, slip opin., at pp. 25, 26-27, 31.) But Penal Code section 295 *et seq.* does not provide a remedy for a violation of its provisions. (*Cf.*, People v. Otto (1992) 2 Cal.4th 1088, 1097-1098 [noting a federal statute prohibiting unlawful wiretaps provides its own suppression sanction].)

And so the question is, does the exclusionary rule apply to this violation? (Hudson v. Michigan (2006) 547 U.S. 586, 586-587 [126 S.Ct. 2159] [where a statutory violation gives rise to a Fourth Amendment violation, the only issue is whether the exclusionary rule is appropriate].)

A. The Fourth Amendment, And Our Constitution's Article I, Section 13, As Applied To Penal Code Section 295, *et seq.*

As noted in Issue II, *supra*, Article I, section 13 of the California Constitution essentially parallels the Fourth Amendment of the United States Constitution. [19] (In re Schaefer (1933) 134 Cal.App. 498, 499 [25 P.2d 490].) In pertinent part, the federal and state Constitutions provide that:

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[19] Of course, the Fourth Amendment was made applicable to the states through the Fourteenth Amendment. (Mapp v. Ohio (1961) 367 U.S. 643 [81 S.Ct. 1684].) As a result, federal constitutional standards generally govern the review of claims in California, that evidence is inadmissible because it was obtained during an unlawful search. (Cal. Const., art. I, § 28, subd. (d); People v. Woods (1999) 21 Cal.4th 668, 674.)

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...." (U.S. Const., amend. IV.)
>
> and,
>
> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated;..." (Cal. Const., art. I, § 13.)

"As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" (Vernonia School Dist. 47J v. Acton (1995) 515 U.S. 646, 652 [115 S.Ct. 2386].) Clearly, the same is true of the California Constitution, as its language is nearly identical to the Fourth Amendment; moreover, the federal "reasonableness" standard is the same under the Fourth and Fourteenth Amendments. (Ker v. California (1963) 374 U.S. 23, 33 [83 S.Ct. 1623].)

What is reasonable, of course, "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." (United States v. Montoya de Hernandez (1985) 473 U.S. 531, 537 [105 S.Ct. 3304].)

It is beyond dispute that a compulsory, nonconsensual extraction of biological samples constitutes a search and seizure subject to Fourth Amendment protection. (*See*, Skinner v. Railway Labor Executives' Assn. (1989) 489 U.S. 602, 616 [109 S.Ct. 1402]; Schmerber v. California (1966) 384 U.S. 757, 767 [86 S.Ct. 1826]; Loder v. City of Glendale (1997) 14 Cal.4th 846, 867.)

With respect to biological evidence obtained pursuant to Penal Code section 295 *et seq.*, however, reviewing courts in California

have found that compulsory blood draws under the Act are reasonable and do not violate the Fourth Amendment, as they serve legitimate purposes. (*See*, People v. Adams (2004) 115 Cal.App.4th 243; People v. King (2000) 82 Cal.App.4th 1363.) The same is true of federal courts interpreting the federal DNA collection statute. (United States v. Kincade (9th Cir. 2004) 379 F.3d 813.)

But in all of those cases the defendants therein had prior convictions "qualifying" them for genetic collection.

Here, by contrast, a Fourth Amendment violation occurred. As appellant did not have a qualifying conviction at the time his blood was collected under the Act, the Act was inapplicable to him, and the collection was unlawful. For the warrantless drawing of blood from a suspect is an unreasonable search and seizure if an asserted justification is not factually supported. (People v. Siripongs (1988) 45 Cal.3d 548, 568-569; *see also*, New Jersey v. T.L.O. (1985) 469 U.S. 325, 340 [105 S.Ct. 733]) [an individualized suspicion of wrongdoing generally is required before a seizure can be constitutional].)

B. The Exclusionary Rule Is the Appropriate Remedy To Apply, As the Unlawful Blood Collection Was the "But-For" Cause Of Obtaining the Objected-To DNA Evidence, And the Privacy Interest Protected By the Fourth Amendment (In Not Having the Surface Of One's Skin Broken), Is Not "Too Attenuated" From That Unlawful Act

Historically the exclusionary rule of Mapp v. Ohio, *supra*, 367 U.S. 643, has been applied to unlawful state searches or seizures that violate the Fourth Amendment. The question is whether it

applies in the context of this case; as demonstrated in the following subsections, it clearly does.

1. The Court Of Appeal's Rationale For Finding the Exclusionary Rule Did Not Apply Here

Although the court of appeal agreed that the nonconsensual extraction of appellant's blood implicated rights protected by the Fourth Amendment (People v. Robinson, slip opin., at p. 31), it decided "the exclusionary rule is inapplicable to suppress the evidence in this case." (Id., at p. 25.) And so it said "We need not decide whether the unauthorized collection of defendant's blood under the circumstances of this case violated his Fourth Amendment rights because suppression of the DNA evidence is not required." (Id., at p. 31.)

The court of appeal reasoned that as the exclusionary rule is a judicially-created remedy designed to deter illegal searches and seizures, it is not "a personal constitutional right of the party aggrieved." (Id., at 32.) It applied a balancing test in which the "exclusionary rule is 'applicable only where its deterrence benefits outweighs its "substantial social costs,"'" (id., at 32-33), and decided "the deterrence value of suppressing the evidence is nil" as "there was no egregious police misconduct involving willful malfeasance." (Id., at 33.)

As demonstrated below, the court of appeal was wrong.

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2. In General, the Exclusionary Rule's Deterrence Benefits Outweigh the "Societal Cost" Of Excluding Evidence When An Unlawful Act Was the "But-For" Cause Of Obtaining the Evidence, And Suppression Would Serve the Interest Protected by the Constitutional Guarantee That Was Violated

It is true that the High Court has rejected "[i]ndiscriminate application" of the exclusionary rule.[20] (United States v. Leon (1984) 468 U.S. 897, 908 [104 S.Ct. 3405].) And "[w]hether the exclusionary sanction is appropriately imposed in a particular case ... is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" (Id., at 906, quoting Illinois v. Gates (1983) 462 U.S. 213, 223 [103 S.Ct. 2317.)

But the High Court has held the exclusionary rule to be applicable "where its remedial objectives are thought most efficaciously served." United States v. Calandra (1974) 414 U.S. 338, 348 [94 S.Ct. 613]. That is, "where its deterrence benefits outweigh its 'substantial social costs.'" (Pennsylvania Bd. of

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[20] Earlier United States Supreme Court cases had suggested an unlimited scope for the exclusionary rule. (*See*, Mapp v. Ohio, *supra*, 367 U.S. at 655 ["all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court"]; and Whiteley v. Warden, Wyo. State Penitentiary (1971) 401 U.S. 560, 568-569 [91 S.Ct. 1031] (same).)

But more recent cases rejected that approach. (*See*, Arizona v. Evans (1995) 514 U.S. 1, 13 [115 S.Ct. 1185] ["In *Whiteley*, the Court treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule to evidence secured incident to that violation. Subsequent case law has rejected this reflexive application of the exclusionary rule"].)

Probation and Parole v. Scott (1998) 524 U.S. 357, 363 [118 S.Ct. 2014, quoting United States v. Leon, *supra*, 468 U.S. at 907.)

Exclusion may not be premised solely on a constitutional violation that was a "but-for" cause of obtaining evidence, but it may be ordered where the illegal action was both the but-for cause of obtaining evidence **and** is not too "attenuated" to justify exclusion.[21] (Hudson v. Michigan, *supra*, 547 U.S. 586, 586-587.)

Significantly for this case, attenuation can occur not only when the causal connection between the unlawful search or seizure and the obtaining of evidence is remote, but also when suppression would not serve the interest protected by the constitutional guarantee violated. (Ibid.)

3. In This Case, the Unlawful Blood Draw Was the "But-For" Cause Of Objected To Evidence Being Obtained; And the Privacy Interest Protected By the Fourth Amendment (In Not Having One's Skin's Surface Broken) Is Not Too Attenuated From That Unlawful Blood Collection To Overcome Governmental Interest In Gathering Genetic Material As Evidence

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[21] As an example, the interests protected by the knock-and-announce rule (human life and limb, property, privacy, and dignity of the sort that can be offended by a sudden entrance), are not obviated by violation of the rule, as no one has a privacy interest in preventing a search warrant from being executed; thus the privacy interests were too attenuated to compel exclusion of the evidence. (Hudson v. Michigan, *supra*, 547 U.S. at 586-587.)

As another example, where an illegal warrantless arrest was made inside a house, the exclusionary rule did not require suppression of a statement taken from the defendant outside his house, as the warrant requirement for an arrest in a home protects the home, not the defendant from making incriminating statements after being arrested. (New York v. Harris (1990) 495 U.S. 14, 20 [110 S.Ct 1640].)

In this case the legitimate governmental interest at issue is, of course, collecting blood and saliva samples for identification purposes, which is designed to "assist federal, state and local criminal justice and law enforcement agencies within and outside California in the expeditious **detection and prosecution of individuals** responsible for sex offenses and other violent crimes, the exclusion of suspects who are being investigated for those crimes, and the identification of missing and unidentified persons ...." (Pen. Code, § 295, subd (c); emphasis added.)

Juxtaposed against that in the required balancing test is the fact that the 1999 forced extraction of appellant's blood violated his "**most personal and deep-rooted expectations of privacy** ." (Winston v. Lee (1985) 470 U.S. 753, 760 [105 S.Ct. 1611]; emphasis added.) "One can think of few subject areas more personal and more likely to implicate privacy interests than that of one's health or genetic makeup." (Norman-Bloodsaw v. Lawrence Berkeley Laboratory (9th Cir. 1998) 135 F.2d 1260, 1269.)

So a compelled intrusion into the body is deemed a Fourth Amendment search implicating one's privacy expectations. (Schmerber v. California (1966) 384 U.S. 757, 767-768 [86 S.Ct. 1826] [blood draw for alcohol content analysis in a suspected DUI situation].)

Unlike Hudson v. Michigan, *supra*, 547 U.S. 586, in which the privacy interest in being undisturbed in one's home was too attenuated to compel exclusion following a knock-notice rule violation (as no one has a privacy interest in preventing a search warrant from being executed), everyone has a privacy interest in

preventing a physical intrusion below their body's skin surface:

> "[I]t is obvious that this physical intrusion, **penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable.** The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests." (Skinner v. Railway Labor Executives' Ass'n, *supra*, 489 U.S. 602, 616-617; emphasis added.)

Moreover "[t]he interests in human dignity and privacy which the Fourth Amendment protects **forbids any such intrusions on the mere chance that desired evidence might be obtained.**" (Schmerber v. California, *supra*, 384 U.S. 769-770; emphasis added.)

And so under the circumstances presented here, there not only is a clear "but-for" relationship between the unlawful blood draw and the DNA "match" evidence produced at trial, but suppression also would serve the interest protected by the constitutional guarantee violated (i.e., the Fourth Amendment guarantee against "unreasonable" searches or seizures).

For everyone has a right to be free from compulsory and involuntary blood draws, so long as no statute establishes a legitimate governmental reason requiring blood collection (such as, for example, the societal need to test railroad employees for mental impairment occasioned by drug or alcohol ingestion in Skinner v. Railway Labor Executives' Ass'n, *supra*, 489 U.S. 602.)

With respect to the relevant statutory scheme in this case, however, while extracting genetic material from persons properly convicted of qualifying felony offenses may serve a societal need, forcing a person who has not been convicted of a qualifying felony

to submit to an involuntary blood extraction under the Act means not only that the Fourth Amendment guarantee against "unreasonable" searches or seizures has been violated, but it also means that suppression of any evidence so obtained will serve the interest protected by the constitutional guarantee violated.

4. The Fact That Genetic Collections Under the Act Are Meant To Help Solve Unsolved Crimes Augurs In Favor Of Applying the Exclusionary Rule Here

It is no answer to say that the warrantless, suspicion-less collection under the Act which occurred here should not be suppressed, on the ground that collection under the Act is undertaken to detect and solve crimes, and no one has a protected interest in having crime go undetected.

For although it is true that in certain circumstances the United States Supreme Court has upheld warrantless and suspicion-less searches, it has done so when those searches were conducted for purposes **other than the solving and punishing of crimes**. (*See*, e.g., Board of Education v. Earls (2002) 536 U.S. 822 [122 S.Ct. 2559] [urine testing of students, before allowing them to participate in extracurricular activities, was upheld as necessary to prevent health and safety risks from drug use]; Vernonia School District 47J v. Acton (1995) 515 U.S. 646 [115 S.Ct. 2386] [same]; National Treasury Employees Union v. Raab (1989) 489 U.S. 656 [109 S.Ct. 1384] [same as to U.S. Customs employees, to ensure their fitness to handle firearms and interdict drugs].)

The High Court also permits suspicionless searches in certain roadway checkpoint programs, to promote sobriety, prevent entry of contraband, or deter illegal immigration. (Michigan Department of State Police v. Sitz (1990) 496 U.S. 444 [110 S.Ct. 2481]; United States v. Montoya de Hernandez (1985) 473 U.S. 531 [105 S.Ct. 3304]; United States v. Martinez-Fuerte (1976) 428 U.S. 543 [96 U.S. 3074].) And it approved limited searches for administrative purposes without individualized suspicions, such as residential building code inspections to prevent hazardous conditions. (Camara v. Municipal Court (1967) 377 U.S. 523 [87 S.Ct. 1727].)

But in most other instances the High Court has refused to allow generalized programs conducted solely for the collection of evidence for criminal law enforcement purposes. (Indianapolis v. Edmond (2000) 531 U.S. 32, 37 [121 S.Ct. 447] [acknowledging the ongoing requirement of "individualized suspicion," but confirming that suspicion-less searches may be upheld if conducted under a program designed to serve "special needs, beyond the normal need for law enforcement".) Thus a "'**general interest in crime control**' as justification for a regime of suspicionless" acts still is not allowed. (Id., at 43, quoting Delaware v. Prouse (1979) 440 U.S. 648, 659 [99 S.Ct. 1391]; (emphasis added).)

In Ferguson v. Charleston (2001) 532 U.S. 67 [121 S.Ct. 1281], the challenge was to a state hospital program that tested pregnant women for drug use and made available to police the results of those tests if a woman tested positive twice. (Id., at 72.) The High Court noted that although a significant goal of the program

was to aid women with drug abuse problems, "the immediate objective of the [suspicionless] searches was to generate evidence *for law enforcement purposes.*" (Id., at 83; italics in original.) And so, as the High Court emphasized,

> "In none of our previous special needs cases have we upheld the collection of evidence for criminal law enforcement purposes .... the extensive entanglement of law enforcement cannot be justified by reference to legitimate needs." (Id., at 84, fn. 20.)

Thus Edmond and Ferguson establish that the "special needs" doctrine applies to a **narrow** category of cases, which qualify for an exception to the Fourth Amendment's customary requirements only because they involve programs or activities "not designed to serve the ordinary needs of law enforcement." (National Treasury Employees Union v. Von Raab (1989) 489 U.S. 656, 679 [109 S.Ct. 1384].)

In this case, however, two of the four stated purposes of the Act are to (1) "detect," and (2) "prosecut[e] ... individuals responsible for sex offenses and other violent crimes ...." (Pen. Code, § 295, subd (c) [the other two purposes being exclusion of suspects, and identifying missing and unidentified persons].) As the genetic collections allowed under the Act must be narrowly applied (insofar as the focus of the Act is on obtaining evidence for investigating and solving crimes), and as there was no lawful basis under the Act upon which to involuntarily draw appellant's blood in 1999, the remedial purpose of the exclusionary rule is well served by applying it here.

C. Application Of the Exclusionary Rule For the Constitutional Violation In This Case Is Unaffected By the Fact That the Unlawful Blood Collection And DNA Analysis Stemmed From Several "Good Faith" Mistakes, As There Remains A Deterrent Value To Suppression Under the Circumstances Presented Here

In its opinion the court of appeal found the unlawful genetic collection in this case resulted from "good faith" mistakes, but that as the possibility of similar mistakes being made in the future has been reduced by subsequent amendments expanding the Act's definition of qualifying offenses (which now "all but eliminates the likelihood that biological specimens will be mistakenly collected or analyzed"), "no deterrent effect would be achieved by excluding evidence obtained from a sample mistakenly collected under an earlier version of the Act...." (Id., at 34; *see also*, p. 36 ["the purpose and interests protected by the Act will not be served by suppression. Suppressing the evidence would achieve no deterrent value ... although it would have significant social costs"].)

For the following reasons, however, the court of appeal is incorrect. Mistakes in this case all were made by law enforcement personnel or law enforcement "adjuncts," thus there is a substantial deterrent value to suppressing the evidence.

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1. The United States Supreme Court's Development Of a "Good Faith" Exception To the Exclusionary Rule

In a trilogy of cases the United States Supreme Court recognized a so-called "good faith" exception to the exclusionary rule: United States v. Leon (1984) 468 U.S. 897 [104 S.Ct. 3405]; Illinois v. Krull (1987) 480 U.S. 340 [107 S.Ct. 1160]; and Arizona v. Evans (1995) 514 U.S. 1 [115 S.Ct. 1185].

Those cases began with the premise that the exclusionary rule is "a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect." (Id., at 10.) Since its primary purpose is to deter future unlawful police conduct (and thereby effectuate the Fourth Amendment's guarantee against unreasonable searches and seizures), its application has been "restricted to those situations in which its remedial purpose is effectively advanced." (Illinois v. Krull, *supra*, 480 U.S. at 347.)

But the court of appeal's conclusion in this case, that the exclusionary rule is not warranted as it would not result in appreciable deterrence of unlawful actions, is incorrect. Instead, it will have the deterrent effect of preventing the kind of sloppy implementation of criminal procedures described immediately below; and will force police departments to act more responsibly in the future, when departmental personnel must learn new criminal procedures, and then train and supervise departmental "adjuncts" in carrying out those procedures.

2. Facts Demonstrating the Inadequate Training Of the Deputy Sheriff and Police "Adjuncts" In This Case, Who Were Tasked With Enforcing Collection Under the Act; And the Inadequate Supervision By That Deputy, Which Led To Mistakes Made In This Case

Recall that in January, 1999, while appellant was in county jail serving misdemeanor and parole violation terms, the newly reenacted DNA collection law went into effect. (R.T.1, p. 187.)

At a pretrial evidentiary hearing, Bill Phillips, who is the Director of the Department of Justice's crime laboratory's Bureau of Forensic Services, testified that he was the only person who made the initial presentations about the new law to various law enforcement agencies. (R.T.1, pp. 220-221, 223.) Phillips believed the issue of who was required to give a sample (sexual and violent predators **only**) was very clear from his presentation. (R.T.1, p. 227.)

To decide whether an inmate had a qualifying offense, Phillips instructed everyone to use the automated criminal history system ("CLETS"), that the Department of Justice manages. (R.T.1, p. 225.) They were not to use, for example, something the court provided at the time of an inmate's entry into the system. (R.T.1, p. 226.)

In February, 1999 Lawrence Ortiz, a deputy sheriff at the Rio Cosumnes Correctional Center (the branch jail for Sacramento County), and others met with detective Gary Bettenhausen of the Sex Offender Registration Detail. (R.T.1, pp. 162-166.) The discussion focused on persons who were sex offenders or convicted of violent felonies. (R.T.1, p. 166.) Ortiz and the others were given a copy

of the Assembly Bill. (R.T.1, p. 167.) But Ortiz read only portions of the statute, and an accompanying memo. (R.T.1, p. 193.)

Phillips admitted that not until July, 1999 did he send around a memo explaining that, for a juvenile offender to qualify, the offender had to have sustained a conviction rather than a juvenile adjudication. (R.T.1, p. 229.) Ortiz therefore believed that, in March, 1999, he could collect a sample from someone with only a juvenile adjudication. (R.T.1, p. 175.)

Record clerks were tasked with identifying the individuals in custody who qualified, but not all of the record clerks were present at the February, 1999 meeting. (R.T.1, p. 169.) Some people were sick; others had days off. (R.T.1, p. 170.)

And so on an as-needed basis Ortiz verbally instructed record clerks on what to look for; he did so first by gathering the staff who were on-site at the time his meeting ended, and then by passing information on after shift changes. He could not say that all the staff dealing with collection samples received his briefing on the new law. (R.T.1, pp. 169-170, 203.)

Although Ortiz knew that any person from whom blood was collected had to have been convicted of a qualifying offense and not just have been arrested for a qualifying offense, staffers were told to concentrate on qualifying **charges** in an inmate's criminal history, and the charges in that inmate's **active case** (i.e., "**the cases [they] were currently in custody on**"]. (R.T.1, p. 170; emphasis added.)

In addition, even though Ortiz understood that only felony offenses qualified, from the outset there was some doubt in his mind as to whether certain misdemeanors also qualified. (R.T.1, p. 194.) There was also a "gray area" as to what qualified as a juvenile offense. (R.T.1, p. 195.) Staffers were unsure what were qualifying offenses. (R.T.1, p. 174.)

As a result, this project at first was "borderline chaos." (R.T.1, p. 172.)

Ortiz does not know who, between February, 1999 and March 2, 1999, qualified appellant for collection based on his **misdemeanor** Penal Code section 273.5 offense. (R.T.1, pp. 182-184.) But on March 2, 1999, while appellant was incarcerated at the jail on his parole violation, a blood sample was collected from him for inclusion ir the convicted offender databank. (R.T.1, p 184.)

The blood was drawn by jail nurse Deborah Steed, who did so under Ortiz's supervision. (R.T.1, pp. 163-164, 180.) At the time appellant's blood was drawn, Ortiz relied on the person filling out the collection form and did not re-check whether appellant had a qualifying offense. (R.T.1, pp. 178-180, 184-185.)

The county crime lab received appellant's blood sample on March 5, 1999; the qualifying offense was stated as Penal Code section 273.5. (R.T.1, pp. 295, 297.)

When this blood sample was submitted to the Richmond DNA laboratory's database section, it underwent a verification process to confirm appellant's offender status; around July 26, 1999, staffer Kim Meade reviewed appellant's card. (R.T.2, pp. 307-308.)

She realized appellant's section 273.5 conviction was not a qualifying offense. (R.T.1, p. 299.) She therefore looked at appellant's rap sheet and saw a Penal Code section 245 **charge**, which was marked as a juvenile offense. But Meade assumed it was a qualifying offense and qualified appellant anew. (R.T.1, pp. 299-300; R.T.2, p. 310.)

In early September, 2000 – without anyone confirming Meade's assumption that this juvenile charge qualified appellant for inclusion in the offender database -- appellant's 1999 blood sample was analyzed by the crime lab, and appellant's resulting DNA profile was entered in the convicted offender databank. (C.T.2, p. 547; C.T.4, p. 607.) On September 11, 2001, a "match" was made between the DNA profile developed from crime scene evidence in the Deborah L. case, and appellant's DNA profile developed from his 1999 blood sample. (R.T.2, pp. 329-331.)

Not until after the "cold hit" was reported did the Sacramento County District Attorney's Office obtain a copy of appellant's juvenile adjudication record, and learn that although appellant had been **charged** as a juvenile with a qualifying offense, the petition was sustained only (i.e., appellant was not "convicted"), and then only as to a non-qualifying offense. (C.T.4, pp. 607-608.)

3. Deputy Ortiz Had No Good Faith Basis For Relying On the Form Requiring A Blood Draw

An officer's reliance on a probable-cause determination made by someone else, and on the technical sufficiency of the warrant

that issues, must be objectively reasonable. (United States v. Leon, *supra*, 468 U.S. 897, 918, 922.) Thus "it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." (Id., at 922-923; footnote omitted.)

In light of the foregoing, the good faith exception to the exclusionary rule does not apply, "Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' [Citation.] (Id., at 923.) And "depending on the circumstances of the particular case, a warrant may be so facially deficient ... that the executing officers cannot reasonably presume it to be valid." (Ibid.)

Therefore, the good faith exception does not apply where an officer knows, or should know, fatal inadequacies of a warrant he is executing. (People v. Bailey (1992) 11 Cal.App.4th 1107, 1114 ["The affidavit here lacks sufficient indicia of probable cause so as to make reliance upon it unreasonable," and "The actions of the officers may have been well meant and they may have been acting in subjective good faith, but their conduct was not 'objectively reasonable' under the *Leon* guidelines"].)

Applying the principle of objective reasonableness to this case, based on Deputy Ortiz's own testimony it is abundantly clear he failed to exercise reasonable professional judgment in executing "the warrant" (i.e., in carrying out the mandate of the collection form), by drawing appellant's blood. As the primary officer trained

to execute these collection "searches" at the jail, Ortiz was in a unique position to understand the questionable underpinnings of the collection form in appellant's case.

For although Ortiz was responsible for training his staffers in the requirements of the new collection law, he himself read only portions of the statute, and portions of an accompanying memo. (R.T.1, p. 193.) And he conceded that he could not say all the staff dealing with collection received his *ad hoc* briefing on the new law. (R.T.1, pp. 169-170, 203.)

Moreover, although Ortiz knew that any person from whom blood was collected had to have been **convicted** of a qualifying offense, he nevertheless told his staffers to concentrate on qualifying **charges** in criminal histories. (R.T.1, pp. 170, 171-172.) And he relied on the person filling out the collection form and did not re-check whether the prisoner in question actually had a qualifying offense. (R.T.1, pp. 178-180, 184-185.)

These four actions by Ortiz were practically a recipe for ensuring an error would occur. At the time he supervised the March, 1999 collection of appellant's blood sample, he was in a position to assess the validity of the "search warrant" (i.e., the DNA collection form), and in a better position than the unknown staffer who signed that form to know the infirmities of its underpinnings.

For by then Ortiz was aware of the problems surrounding the collection process, which he himself described as "borderline chaos". (R.T.1, p. 172.) He also was aware by then that staffers had a lot of questions about what offenses qualified, and that

there was a lot of confusion about qualifying offenses. (R.T.1, pp. 173-174, 194-195.) Ortiz therefore cannot claim reasonable reliance under Leon when he was aware of such problems

4. Even Good Faith Mistakes Are Subject To the Exclusionary Rule, As the Deterrent Effect Of That Rule Applies Equally To "Adjuncts" Of Law Enforcement

In People v. Ramirez (1983) 34 Cal.3d 541, this Court held that an arrest based on a warrant that was subsequently found to have been recalled was unlawful, and that evidence seized incident to that arrest must be suppressed. (Id., at 547.) "Because the recall of the warrant was, or should have been, within the 'collective knowledge' of the police, we cannot permit the arresting officer to rely with impunity on his fellow officers' errors of omission, but must impute their accurate knowledge to him." (Ibid.)

Recently, in People v. Willis (2002) 28 Cal.4th 22, this Court considered whether federal constitutional principles required the suppression of evidence discovered by a state parole officer and police during a warrantless search conducted under the erroneous belief, derived from the "parole book" the police department was provided with every month, that the defendant was on parole. (Id. at 25-26.) This Court recognized that under Leon, Krull and Evans "application of the exclusionary rule depends on the source of the error or misconduct that led to the unconstitutional search and whether, in light of that source, the deterrent effect of exclusion is sufficient to warrant that sanction." (Id., at 35.)

This Court concluded that the exclusionary rule applied regardless of whether the source of the error was the state parole officer or a CDC data entry clerk (id., at 38), and held the parole officer was an adjunct to the law enforcement team, as he authorized the search, directed the police to carry it out, and conducted the search with the police.[22] (Id. at pp. 39-40.)

As a result, application of the exclusionary rule was more likely to alter police behavior than in Leon, Krull, and Evans, because neither the parole agent nor the police officer, who were not in the field dealing with an unfolding situation when the police officer first received information about the defendant and consulted the parole officer, made any further attempt to verify the information on the parole list before going to the defendant's motel and entering his room without a warrant. (Id., 42-43.)

Parallel circumstances exist in this case, where Deputy Ortiz (who was responsible for training support staff on requirements of the collection law), made no attempt to verify the support staff

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[22] This Court concluded that even if the error was attributable to a CDC data entry clerk, the exclusionary rule would still apply because clerks responsible for preparing and updating parole lists intended for distribution to police and other law information officers are adjuncts to the law enforcement team. (People v. Willis, *supra*, 28 Cal.4th at 43-45.)

In reaching this conclusion, this Court upheld the collective knowledge principle announced in People v. Ramirez (1983) 34 Cal.3d 541, which provides that since law enforcement officers collectively are responsible for keeping official channels free of outdated, incomplete and inaccurate warrant information, if a law enforcement agency is the source of erroneous information, the police cannot invoke the good faith exception to the exclusionary rule for evidence obtained in searches that are based on that bad information. (People v. Willis, *supra*, 28 Cal.4th at 45-46.)

were correct in their conclusions about who blood should be drawn from under the act. This is analogous to People v. Ferguson (2003) 109 Cal.App.4th 367, in which the reviewing court found the exclusionary rule applicable where police relied on a dispatcher's erroneous confirmation that the defendant was on probation.[23] (Id., at 371-372, 377.)

In each of those cases, police relied on information the courts determined was imputable to the law enforcement agency, or provided by parole or probation officers who were acting as adjuncts to law enforcement. Significantly, in People v. Willis, *supra*, this Court recognized that where a parole officer acts as an adjunct of law enforcement, the threat of exclusion can be expected to alter the behavior of both the parole officer and the police officer. (Id., 28 Cal.4th at 40-43.)

Willis teaches that the prosecution bears the burden of establishing that the actions of the source of the error were objectively reasonable. (Id., 28 Cal.4th at 37-38.) That showing cannot be made in this case, where Deputy Sheriff Ortiz's own understanding of the Act was imperfect (as he did not bother to read all of it), and his training of his staff was inadequate (as

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[23] In Ferguson the Third Appellate District also concluded that, due to the particular role of the probation department's clerical staff in entering and maintaining the type of records the police relied upon, the staff was also an adjunct to the law enforcement team. (People v. Ferguson, *supra*, 109 Cal.App.4th at 376 ["the probation department's employees have significant responsibilities with respect to record keeping and the dissemination of information. Their activities support and benefit not only the probation officers, but other law enforcement agencies"].)

he failed to ensure that people who did not hear his initial explanation eventually were told what to do, so that everyone was "on the same page"); and his supervision of the record clerks who ultimately determined which inmates should be scheduled for a collection was nonexistent.

Thus the deterrent effect of the exclusionary rule should apply equally to jail or prison personnel tasked with carrying out the blood collection directives of the Act, since failure to apply the exclusionary rule would increase greatly the temptation to use the broad authority extended by the Act to circumvent the Fourth Amendment. (People v. Ferguson, *supra*, 109 Cal.App.4th at 375.) For the reason the United States Supreme Court, in Mapp v. Ohio, *supra*, decided to apply the federal exclusionary rule to the states in the first place, was because experience showed that alternative methods of enforcing the Fourth Amendment's requirements had failed. (Id., 367 U.S. at 651-653.) The same recognition was expressed by a predecessor panel of this Court. (People v. Cahan (1955) 44 Cal.2d 434, 447 [in which Chief Justice Traynor wrote, "Experience [in California] has demonstrated, however, that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures"].)

As a result, the remedial purpose of the exclusionary rule is well served by applying it here, to the seizure of appellant's blood by public authorities primarily engaged in law enforcement. (*See*, Elkins v. United States (1960) 364 U.S. 206, 217 [80 S.Ct. 1437] [the purpose of the exclusionary rule is "to deter - to

compel respect for the constitutional guaranty ... by removing the incentive to disregard it"].)

Thus the good faith exception to the exclusionary rule cannot rescue the unlawful 1999 blood draw.

E. Appellant was Substantially Prejudiced By the Evidence Obtained Through the Unlawful Blood Draw; Thus Reversal Of His Five Convictions Is Required

As the unlawful 1999 seizure of appellant's blood, and the resulting DNA profile developed from that blood draw, violated appellant's federal constitutional rights pursuant to the Fourth Amendment, and as the evidence derived from the blood draw and DNA analysis were admitted into evidence at appellant's trial, appellant's convictions must be reversed unless the admission of that evidence was harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 U.S. 18, 24 [87 S.Ct. 824].)

That showing cannot be made here.

First, without the DNA evidence which led to the "cold hit" match, the People would not have known appellant was implicated in the Deborah L. assault; absent the September, 2000 "cold hit", the People would not have had a suspect to charge.

Second, after the People charged appellant with that assault and took him to trial, they were able to present at trial an expert witness who testified to the staggering unlikelihood that the DNA profile of anyone randomly selected from the population also would have coincidentally "matched" the crime scene evidence sample's DNA profile. (R.T.14, pp. 4021-4023.) The staggering statistic for this

likelihood-of-match probability was a direct result of appellant's DNA profile, which in turn was a direct result of the blood draw.

Third, without the DNA evidence the People would not have known appellant's DNA profile implicated him in similar assaults against other women, whose testimony was admitted against him at trial as Evidence Code section 1108 "propensity" evidence; and appellant's jury was instructed it could use such evidence to find appellant had a propensity to commit this kind of sexual assault. (*See*, C.T.4, pp. 989-990, 992 [CALJIC Nos. 2.50.01 and 2.50.1].)

Thus the 1999 blood draw led police to appellant as a suspect, provided statistically staggering circumstantial evidence that he was the person who assaulted Deborah L., and provided additional circumstantial evidence that he committed a series of similar crimes in the same area.

Underscoring how important the DNA evidence was to the People's case, the prosecutor referred to it six times during her opening statement (1 Aug. R.T.3, pp. 605, 619, 622-623 [four times]), and six times in her closing argument. (R.T.19, pp. 5571, 5577, 5578, 5590, 5776; and R.T.20, p. 5787.)

One final indication of how critical DNA evidence was to the People's overall case is that, vis-a-vis the Deborah L. counts (counts 1 through 5), where a full 13-locus profile was developed, the jury convicted appellant; but in the charged Heather O. case (counts 6 through 13), where one of two samples from her sexual assault kit excluded appellant (R.T.15, pp. 4497-4499; R.T.16, pp. 4504-4506, 4572), the jury was unable to reach an agreement and

hung on all charges (C.T.4, pp. 1063-1067, 1086-1087; R.T.20, pp. 5837-5843, 5886), even though the other sample was consistent with appellant's DNA profile. (R.T.16, pp. 4500-4501.)

Reversal of appellant's five counts of conviction therefore is required. This matter should be remanded to the trial court with directions that it vacate its order denying petitioner's suppression motion, and instead enter a new order granting that motion and excluding all evidence about the 1999 blood draw, the DNA profile subsequently developed from that sample, the "cold hits" between petitioner's DNA profile and the DNA profiles developed from evidence in unsolved crimes, and the profile-frequency statistics of such "cold hits". (People v. McGaughran (1979) 25 Cal.3d 577, 581.)

CONCLUSION

For the foregoing reasons appellant Paul Eugene Robinson respectfully requests this Court reverse his convictions, and either order the charges be dismissed with prejudice (as they are barred by the statute of limitations), or else order his suppression motion be granted and all DNA evidence be excluded.

Respectfully submitted,

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BRIEF LENGTH AND FORMAT CERTIFICATION

I, Cara DeVito, counsel for Paul Eugene Robinson, certify pursuant to the California Rules of Court, rule 8.520(c)(1), that the word count for the foregoing Opening Brief On the Merits is 18,878 words, excluding the tables, this certificate, and any attachment permitted. This document was prepared in WordPerfect 12, and this is the word count generated by that program.

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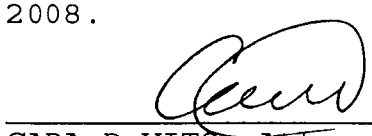

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On June 23, 2008, I served the within Opening Brief on the Merits (appellant Paul Eugene Robinson), on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Summerlin, Nevada, addressed as follows:

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