S158528

SUPREME COURT COPY

SUPREME COURT NO. _____

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.	3rd Crim. No. C044703 (Sacramento County No. 00F06871)

SUPREME COURT
FILED

NOV 29 2007

Frederick K. Ohlrich Clerk

Deputy

APPEAL FROM THE SUPERIOR COURT OF SACRAMENTO COUNTY

THE HONORABLE PETER MERING, JUDGE PRESIDING

_____

PETITION FOR REVIEW (Three Issues),

ALTERNATIVE REQUEST TO GRANT AND HOLD (Two Issues),

PETITION FOR REVIEW TO EXHAUST STATE REMEDIES (Three Issues)

BY APPELLANT PAUL EUGENE ROBINSON
FOLLOWING THE PARTIALLY PUBLISHED DECISION OF THE COURT OF APPEAL, THIRD APPELLATE DISTRICT

_____

CARA DeVITO, Attorney at Law
State Bar no. 105579
PMB 834
6520 Platt Avenue
West Hills, CA 91307-3218
(818) 999-0456

Attorney for Appellant-Petitioner,
Paul Eugene Robinson

SUPREME COURT NO. _____

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.	3rd Crim. No. C044703 (Sacramento County No. 00F06871)

APPEAL FROM THE SUPERIOR COURT OF SACRAMENTO COUNTY

THE HONORABLE PETER MERING, JUDGE PRESIDING

PETITION FOR REVIEW (Three Issues),

ALTERNATIVE REQUEST TO GRANT AND HOLD (Two Issues),

PETITION FOR REVIEW TO EXHAUST STATE REMEDIES (Three Issues)

BY APPELLANT PAUL EUGENE ROBINSON
FOLLOWING THE PARTIALLY PUBLISHED DECISION OF THE COURT OF APPEAL, THIRD APPELLATE DISTRICT

TOPICAL INDEX

//

//

//

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASES

CONSTITUTIONS

STATE STATUTES

RULES OF COURT

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.	3rd Crim. No. C044703 (Sacramento County No. 00F06871)

PETITION FOR REVIEW, ALTERNATE REQUEST TO GRANT AND HOLD
and
PETITION FOR REVIEW TO EXHAUST STATE REMEDIES,

TO THE HONORABLE RONALD GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

On October 26 2007, the Third Appellate District filed a 55-page opinion in People v. Robinson, 3rd Crim. no. C044703, a copy of which is attached as Appendix A. Of the six issues resolved by that opinion, two issues embraced by Part I were ordered published, and four other issues discussed in Parts II through V were not. (People v. Robinson (2007) __ Cal.App.4th __, 67 Cal.Rptr.3d 392.)

Petitioner Paul Eugene Robinson seeks review of that opinion in three separate ways:

In Part I, petitioner seeks review of three issues: whether issuance of a John Doe arrest warrant can satisfy a statute of limitations; whether an unknown suspect's DNA profile satisfies the "particularity" requirement for an arrest warrant; and whether there truly is no remedy for an admittedly unlawful collection of

genetic material under the state DNA Act.

In Part II, with respect to two other DNA issues presented (whether the calculation of the "probability-of-match" statistic in a "cold hit" DNA case requires a Kelly prong one hearing, and whether that statistic properly was calculated in this case), not only are those identical issues before this Court at this time in People v. Nelson, dock. no. S147051, but the resolution of those issues in the Nelson case will be based on the trial court evidentiary hearing conducted in **this** case, the Robinson case (for the Robinson case had been the lead case on those issues at the trial court level, and this Court has taken judicial notice of approximately 2,500 pages of Clerk's Transcript and Reporter's Transcripts from this case, the Robinson case, in order to decide those issues in the Nelson case.)

As a petition for review was granted on these identical issues in People v. Nelson, and as they will be decided based on the record in **this** case, petitioner asks that this Court grant review of those issues and order action on it deferred ("grant and hold").

And in Part III, for the sole purpose of exhausting state remedies before presenting a claim for federal habeas corpus relief, petitioner seeks review of that same opinion as to three other issues.

STATUS OF REHEARING

Appellant filed a Petition for Rehearing, which was summarily denied on November 7, 2007, without modification of the opinion. A copy of the Order denying rehearing is attached as Appendix B.

JURISDICTION AND GROUNDS

As to the issues presented in Part I, this petition is filed pursuant to California Rules of Court, rule 8.500(b)(1), to secure uniformity of decision and to settle important question of law; this Court thus obtains jurisdiction under that rule.

As to the next two issues presented in Part III, by granting an earlier petition for review on identical issues this Court already recognized it has jurisdiction, to secure uniformity of decision and settle important questions of law.

Finally, as to the issues presented in Part III, those issues present no ground for review under rule 8.500(b)(1), and are filed solely to exhaust remedies for federal habeas corpus purposes. (O'Sullivan v. Boerckel (1999) 526 U.S. 838 [119 S.Ct. 1728].) But this Court would have jurisdiction under that rule to order review if it determines this case warrants it as to those issues.

PART I

REVIEW PETITION ISSUES PRESENTED and NECESSITY FOR REVIEW

Necessity for Review: As to each of the following three issues, review of this petition should be granted so that this Court may provide guidance in yet-undetermined areas of the law to the lower courts:

Issue no. 1: Consistent with the Fourteenth Amendment and our state constitution, can a "John Doe" complaint and arrest warrant timely "commence" a criminal action, and thereby satisfy the statute of limitations for a sexual offense?

Issue no. 2: Consistent with the Fourth Amendment and our state constitution, does a "John Doe" arrest warrant which describes the unknown suspect solely by his DNA profile satisfy the constitutional requirement of "particularity" - that is, particularly describing the person to be seized?

Issue no. 3: Consistent with the Fourth Amendment and our state constitution, where a court of appeal finds a clear constitutional violation in the unlawful way a defendant's blood was collected under the state DNA Act, what is the remedy?

STATEMENT OF THE CASE, AND FACTS

In August, 1994 Deborah L. was sexually assaulted; her assailant was unknown.

In December, 1998 appellant pled "no contest" to a misdemeanor charge. In 1999, while he was serving the county jail term imposed, jail personnel collected a blood sample from him pursuant to the state DNA Act. (Pen. Code, § 295 et seq.) There is no disagreement that this sample unlawfully was collected, for at the time appellant did not have any "qualifying" convictions. From this unlawful seizure appellant's DNA profile was developed, and entered into the offender database maintained by the California Department of Justice.

In February, 2000 Heather O. was sexually assaulted; her assailant was unknown.

In August, 2000 (four days before the six-year statute of limitations was set to expire on the Deborah L. case), the Sacramento County District Attorney filed a felony complaint to stop the running of that limitations period; it was a "John Doe" complaint, and described the unknown defendant by a 13-locus DNA profile developed from semen taken from Deborah L. after the crime. The next day an arrest warrant issued; the unknown suspect again was referenced solely by his DNA profile.

In September, 2000 a "cold hit" match was made between the DNA profile from the 1994 Deborah L. crime scene and appellant's DNA profile developed from the unlawful 1999 blood draw. Appellant was arrested and charged (counts 1-5).

In January, 2001 the DNA profile developed from crime scene evidence in the Heather O. case also matched to appellant's DNA profile; the People amended the complaint against appellant to add the Heather O. assault (counts 6-13).

Following a 68-day trial a jury "hung" on the Heather O. charges, but convicted petitioner as charged of the Deborah L. charges, finding "true" all special allegations.[1] Petitioner was sentenced to a total term of 65 years.

For purposes of this petition, petitioner otherwise adopts the statements of case and facts in the opinion of the Court of Appeal, and additional facts the Court sets out in the body of its opinion. (Appendix A, People v. Robinson, slip opin., pp. 5-7.)

SUMMARY OF ARGUMENT (PART I ISSUES)

Before the Third Appellate District petitioner argued, *inter alia*, that while as a general rule "John Doe" arrest warrants are permitted in California, they are not meant to circumvent statutes of limitation, and thus the "John Doe" arrest warrant here could not stop the statute from running. Alternately, petitioner argued that both the "John Doe" complaint and arrest warrant - both of

---

[1] The counts of which appellant was convicted were forcible oral copulation (count 1), forcible sodomy by foreign object (count 2), forcible rape by foreign object (count 3), and forcible rape (counts 4 and 5), with allegations that all five counts were committed while appellant was armed with and personally used a knife. (Pen. Code, §§ 261, subd. (a)(2); 288a, subd. (c)(2); 289, subd. (a)(1); 12022, subd. (b)(1); and 12022.3, subds. (a), (b).)
A mistrial was declared on the Heather O. charges, which later were dismissed on the People's motion.

which described the "John Doe" suspect in terms of that unknown suspect's 13-locus DNA profile -- were unconstitutional as they did not describe the suspect with "particularity." In either case, petitioner's convictions must be reversed, for if the complaint and warrant did not timely commence the action against him, his convictions of those offenses are time-barred by the statute of limitations, and void.

Petitioner also argued that collection of his blood under the state DNA Act was unlawful as he had not been convicted of any "qualifying" offenses; he argued the Fourth Amendment mandated suppression not only of the DNA profile developed from that blood draw and uploaded into the state's DNA database, but also the "fruit" of the database profile, which was the "cold hit" in the Deborah L. case.

The court of appeal rejected the first two arguments, finding a "John Doe" arrest warrant describing an unknown suspect by a DNA profile not only could timely commence an action, but also satisfied the "particularity" requirements of state law and the federal constitution. (Appendix A, People v. Robinson, slip opin., p. 19.)

It next found there was a Fourth Amendment violation in the manner in which the DNA Act was applied to appellant, but concluded there was no remedy for this constitutional violation as the exclusionary rule is inapplicable here. (Id., pp. 31-32, 36.)

The court of appeal therefore affirmed petitioner's convictions, but ordered the Abstract of Judgment be amended as to one typographical error in a count of conviction. (Id., at p. 55.)

For the following reasons this Court should grant review of all or any of the three issues addressed by petitioner in Part 1 of this petition.

ARGUMENT

I.

AS A MATTER OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND THE CALIFORNIA CONSTITUTION, THIS COURT SHOULD REFUSE TO PERMIT CIRCUMVENTION OF STATUTES OF LIMITATION BY A PROSECUTOR'S USE OF "JOHN DOE" COMPLAINTS OR ARREST WARRANTS TO TIMELY COMMENCE ACTIONS.

This issue protests on Fourteenth Amendment and state due process grounds the use of the "John Doe" complaint filed in this case, and a "John Doe" arrest warrant that issued, to timely commence this action against the then-unknown defendant and thereby stop the running of an about-to-expire statute of limitations. This circumvented the limitations period intended by our Legislature, and therefore denied petitioner due process under the Fourteenth Amendment and the state constitution.

A. The Five Offenses Arising From the August 25, 1994 Assault On Deborah L. All Are Governed By A Strict, Six-Year Statute of Limitations

Petitioner was convicted in this case only of offenses arising from the assault on Deborah L. Those charges included two counts of forcible rape, one count of forcible oral copulation and two counts of forcible sexual penetration by foreign object. All three 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).)

The applicable limitations period for these offenses is stated 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.

All three offenses occurred on August 25, 1994. To satisfy the statute of limitations, the prosecution on them had to commence by August 24, 2000; the charges otherwise would be barred by the statute of limitations. The "prosecution for an offense is commenced when ... [a] complaint is filed ... [or] [a]n arrest warrant is issued ...." (Pen. Code, § 804, subds. (b), (d).)

B. The Prosecution's Attempt To Use A "John Doe" Complaint and Arrest Warrant To Timely Commence The Case

During an evidentiary hearing on this issue Sacramento police detective Peter Willover testified he investigated the August 25, 1994 assault on Deborah L.; when the six-year limitations period was almost expired Detective Willover contacted the District Attorney's office, expressing concern and wanting something to be done before that statute ran.

On August 21, 2000 - a few days before the expiration of the six-year statute of limitations - Sacramento County deputy District Attorney Laurie Earl filed a five-count complaint in the Deborah L. case, naming a "John Doe" as defendant.[2] This complaint requested an arrest warrant issue for the John Doe defendant; the next day, August 22, 2000, Detective Willover filed a Statement of Probable

---

[2] In the caption page of that complaint, and repeated in all five counts charged, this "John Doe" was identified by a 13-locus DNA profile developed from the crime scene evidence. (*See*, Section II, *infra*.)

Cause in support of a "John Doe" arrest warrant, which issued that day ordering any peace officer in California to arrest forthwith "John Doe, a MB [i.e, male Black]."

During the evidentiary hearing Detective Willover agreed this arrest warrant based on a DNA profile could not be executed until a crime lab made a DNA "match" to an actual suspect. Instead, Detective Willover testified he sought the warrant, even though he knew it could not then be executed, because he "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." (R.T.1, p. 112.)

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

Two weeks later, on September 11, 2000 (after the statute of limitations would have expired), the DNA profile described in the complaint and arrest warrant "matched" petitioner's DNA profile, through a "cold hit." Detective Willover agreed this was the first date and time police knew who the donor was of crime scene evidence collected from the Deborah L. case. Petitioner was arrested that day on the John Doe warrant.

By September 19, 2000, an amended complaint was filed naming petitioner as the defendant in lieu of "John Doe"

C. Petitioner's Trial Court Challenges To This Prosecution, And the Court's Ruling On the Motion To Dismiss

When petitioner was arraigned on the first-amended complaint that substituted his name for "John Doe," his trial counsel objected on the ground that the original August 21, 2000 complaint was "invalid as well as unconstitutional, and a violation of the statute of limitations." (Aug. R.T.2, vol. 1, p. 1.[3])

Thereafter the defense filed a written motion to dismiss the first-amended complaint for lack of jurisdiction, arguing that the August, 2000 "John Doe" complaint and arrest warrant could not lawfully commence the action and satisfy the running of the statute of limitation, which expired before the September 15, 2000 amended complaint was filed naming petitioner as the defendant.

After an evidentiary hearing the trial court found the warrant was valid and could serve to commence the action within the meaning of Penal Code section 804, subdivision (d). (R.T.1, p. 135.) The court therefore denied the motion to dismiss. (R.T.1, p. 137.)

//

//

//

//

---

[3] There were two separate augmentations to the appellate record of reporters' transcripts in this case. The first augmentation, filed on November 4, 2004, is a three-volume set (pages 1-635), and will be referred to as "Aug. R.T.1," followed by either "vol. 1," "vol. 2," or "vol. 3." The second augmentation, filed on January 4, 2006, is a single volume (pages 1-38), and will be referred to as "Aug. R.T.2, vol. 1."

D. The Action Against Petitioner Lawfully Could Not Commence With the Filing Of A "John Doe" Complaint Or Arrest Warrant

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.)

But while "John Doe" warrants are permitted in California, they cannot commence an action and thereby satisfy a statute of limitations.

For Penal Code section 804, subdivision (d) establishes that the only way a warrant can commence an action is "provided the warrant names or **describes the defendant with the same degree of particularity** required for an indictment, information, or complaint." (Ibid; emphasis added.)

To petitioner's knowledge, none of the cases interpreting section 815 which have permitted John Doe warrants involved warrants that contained a DNA profile as the suspect's description, or found an action was timely commenced where a DNA profile was used as a descriptor in a warrant which issued **only** to satisfy a limitations period and stop the running of the statute.

In its opinion the court of appeal noted that "at least two courts in other jurisdictions have held that issuance of a John Doe/DNA arrest warrant is sufficient to toll the statute of limitations." (Appendix A, People v. Robinson, slip opin., p. 18, citing State of Wisconsin v. Dabney (2003) 264 Wis.2d 843 [663

N.W.2d 366], and State v. Danley (2006) 138 Ohio Misc.2s 1 [853 N.E.2d 1224].) Finding Wisconsin law to be similar to California law, the court of appeal in this case adopted the reasoning of the Dabney court and held that "an arrest warrant, which describes the person to be arrested by his DNA profile, satisfies the statute of limitations." (Appendix A, People v. Robinson, slip opin., pp. 18-19.)

But Wisconsin does not have the same Law Revision Commission Comments tc Penal Code section 804 (which appear at the end of that statute), and which provide in pertinent part that a John Doe warrant, whether containing a DNA profile or not, cannot by itself toll 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. Comm. com., Thompson/West Cal. Pen. Code (2006 Desktop Ed.), following § 804 at p. 453; emphasis added.)

As a Penal Code section 815 "John Doe" arrest warrant, by itself, could not toll the statute of limitations, petitioner's challenge therefore is that inclusion of the unknown suspect's DNA profile in the original, August 22, 2000 "John Doe" warrant in this case, still did not satisfy section 804, subdivision (d).

For when "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." (People v. Montoya, supra, 255 Cal.App.2d at 142-134; emphasis added.)

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.

E. Petitioner Has Suffered A Due Process Violation Requiring Reversal Of All Five (Void) Counts Of Conviction

In this case the People, at the very end of the limitations period, filed a "John Doe" complaint and obtained a "John Doe" arrest warrant, and thus were able (in Detective Willover's words), "Not so much as to stop the clock, **but to continue the availability of prosecution**," because "we would be able to identify the person **eventually**." (R.T., vol. 1, p. 112; emphasis added.)

During the hearing on petitioner's motion to dismiss, defense counsel argued the People should not be allowed to circumvent the Legislature's determination of what a limitations period should be by filing "John Doe" complaints within the statute of limitations

solely to "stop the clock" until the People are able to determine who their suspect is; counsel noted that this was a due process or fairness issue. (R.T., vol. 1, pp. 118-119.)

The United States Supreme Court and this Court agree that a defendant may be deprived of due process based on the lapse of time between commission of an offense and the filing of an accusatory pleading against him, as it deprives him of the right to a fair trial. (U.S. Const., Amends. V, XIV; Cal. Const., art. I, § 15; *see*, United States v. Marion (1971) 404 U.S. 307, 313, 325 [92 S.Ct. 455]; People v. Archerd (1970) 3 Cal.3d 615, 639-640; People v. Sobiek (1973) 30 Cal.App.3d 458, 470.)

The very concept of continuing the availability of a prosecution indefinitely not only defeats the purpose of statutes of limitation, but it also is in contradiction to due process rights. It defies the requirement embodied in federal constitutional law that a statute of limitations "provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." (United States v. Marion, supra, 404 U.S. 307, 322.)

So blatant an "end run" around legislative intent and due process should not be countenanced. When a failure to comply with the statute of limitations is raised on appeal, the judgment must be vacated if there is no evidence of substantial compliance with the limitations period. (People v. Zamora (1976) 18 Cal.3d 538, 573.) 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.) Here a "John Doe" complaint and warrant failed to timely commence the action against petitioner; thus the trial court lacked jurisdiction to proceed on any of the five counts charged in the Deborah L. incident. As a result, petitioner's convictions of those counts are void and must be dismissed. (In re Demillo (1975) 14 Cal.3d 598, 601; People v. Swinney (1975) 46 Cal.App.3d 332, 340.)

II.

A "JOHN DOE" COMPLAINT OR ARREST WARRANT CANNOT SATISFY THE "PARTICULARITY" REQUIREMENT OF THE FOURTH AMENDMENT AND THE CALIFORNIA CONSTITUTION, WHERE THEY IDENTIFY THE UNKNOWN DEFENDANT-SUSPECT SOLELY BY HIS DNA PROFILE.

This issue challenges the trial court's denial of petitioner's motion to dismiss this prosecution, on the ground that both the "John Doe" complaint and arrest warrant in this case deficiently referenced, described and identified the John Doe/defendant solely by his DNA profile, for a DNA profile does not "particularly" describe the person to be arrested, which both the United States and California Constitutions require.

A. The "Particularity Requirement Of the Federal and State Constitutions

Under both the federal and California constitutions, "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; Cal. Const., art. I, § 19; emphasis added.)

B. Descriptions Of the Unknown Suspect In the "John Doe" Complaint and Arrest Warrant In This Case

On August 21, 2000 the Sacramento County District Attorney's office filed a five-count complaint naming a "John Doe" as defendant. In the caption page of that complaint, and repeated in all five counts charged, this John Doe was identified only by the

following DNA profile, which had 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 Caucasion 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 praying that an arrest warrant issue for the John Doe/defendant identified by this DNA profile, repeating the above paragraph. (C.T.1, p. 30; R.T.1, p. 11.)

The next day, August 22, 2000, Sacramento County police detective Willover filed a Statement of Probable Cause in support of a John Doe arrest warrant. (Aug C.T.1, pp. 12-18 [Willover's Declaration] and 19-40 [police investigative reports as exhibits].) The Declaration referred to the suspect as "John Doe" and described him 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," with a "medium black complexion, of either Hispanic or African-American descent, and weighed about 180 pounds." (Aug C.T.1, pp. 15-16.)

This Declaration also stated that from semen recovered at the crime scene the unknown suspect's DNA profile had been developed. (Aug. C.T.1, pp. 16-17.) Willover declared 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 this arrest warrant did not repeat from the complaint filed a day earlier, were the statistics on how rare the DNA profile was. (See, Aug. C.T.1, pp. 17-18.)

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.) The only description of the defendant given was "John Doe," a M[ale] B[lack]." (Ibid.) The last page of the printed warrant stated, "Suspect identifiable by genetic profile in Sacramento Police Department report ... contact SPD Det. Pete Willover ... or Sacramento District Attorney's Adult Sexual Assault Unit ...." (Aug. C.T.1, p. 6.)

The deputy District Attorney who filed the John Doe complaint agreed at the evidentiary hearing on petitioner's motion to dismiss that, based solely on this arrest warrant, California peace officers would not have enough information about who to arrest,

without knowing the arrestee's DNA profile or without making a telephone call to her or Detective Willover. (R.T.1, p. 33.)

A Sacramento Police Department records clerk who also testified at the evidentiary hearing explained that in order to activate an arrest warrant, all identifying information (date of birth, race, sex, height, weight, hair color, eye color, and name), is necessary. (R.T.1, pp. 41, 44, 48.) All of it also is necessary for a local warrant to be entered into the statewide or national systems; without it the warrant cannot be entered. (R.T.1, pp. 50, 51.) Neither Sacramento County nor the state or nationwide computer programs have a field which would allow someone to enter a DNA profile for the subject of the warrant. (R.T.1, pp. 49, 52.)

As a result, the John Doe warrant in this case was never entered into the state or national systems. (R.T.1, pp. 52, 60-61.) As this clerk 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.)

In fact, Detective Willover himself admitted that, based on his 35 years of experience as a policeman, he would not arrest anyone from the face of the arrest warrant that issued; he agreed it would not be reasonable. (R.T.1, p. 102.) Until police had a DNA match there would be nobody to arrest; they would also need the DNA profile of the person about to be arrested. (R.T.1, pp. 103-104.) But Willover testified he sought and obtained the warrant, even though he knew he could not execute it, because he "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." (R.T.1, p. 112.)

C. Petitioner's Trial Court Challenges To This Prosecution, And the Court's Ruling On the Motion To Dismiss

When petitioner was arraigned on the first-amended complaint that substituted his name for "John Doe" his counsel objected, arguing the original August 21, 2000 complaint was "invalid as well as unconstitutional, and a violation of the statute of limitations." (Aug. R.T.2, vol. 1, p. 1.) Thereafter the defense filed a written motion to dismiss the first-amended complaint for lack of jurisdiction, arguing the August 21, 2000 "John Doe" complaint and August 22, 2000 arrest warrant could not lawfully commence the action and toll the running of the statute. (C.T.1, pp. 39-58.)

At the evidentiary hearing on this motion 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 analogizing to search warrants, the People contended that use of extrinsic evidence to interpret an arrest warrant is allowed. (R.T.1, pp. 122-123.)

The defense, in turn, argued that if the search warrant could not be executed until additional information was obtained from the

Berkeley crime lab, yet the warrant was entered into the local system anyway, an arrest warrant in the system that cannot be executed is an invalid warrant. (R.T.1, p. 127.)

The trial court decided that the "particularity" requirement for warrants was satisfied for any officer with a computer screen, as further information was readily available within minutes, based on the facts that (1) the "Remarks" section of the warrant itself notified peace officers that this particular John Doe was identifiable by genetic markers and two people were on call 24 hours a day to answer questions; and (2) after September 11, 2000, a supplemental report indicated that petitioner (who was named), was the match to the DNA profile. (R.T.1, p. 131.)

The court found the fact that this information was not on the face of the arrest warrant "is a distinction without a difference." (R.T.1, pp. 131-132.) It ruled that the warrant described petitioner with sufficient particularity, thus it was a valid warrant and could serve to commence the action within the meaning of Penal Code section 804, subdivision (d). (R.T.1, p. 135.) The court therefore denied the motion to dismiss. (R.T.1, p. 137.)

D. The Complaint and Arrest Warrant In This Case Both Were Invalid, As Both Depended On A DNA Profile As the "Description" Of The "John Doe" Suspect, Which Does Not Satisfy "Particularity" Requirements Under the Fourth Amendment Or the State Constitution

Penal Code section 804, subsection (b) (which establishes that the filing of a complaint satisfies a limitations period), and

subsection (d) (which establishes that the issuance of an arrest warrant also will do so), both contain "particularity" requirements; subdivision (d) states an arrest warrant can commence an action "provided the warrant names or **describes the defendant with the same degree of particularity** required for an indictment, information, or complaint." (Ibid; emphasis added.)

In its opinion the court of appeal found the particularity requirement was satisfied:

> "Neither section 804, subdivision (d), section 813, nor the state and federal constitutions specify or limit the *manner* or *criteria* for particularly describing a person. All that is required is 'reasonable certainty' that the person may be identified....
>
> "Nevertheless, in light of the astronomical rarity of an individual's DNA profile in the general population [Citation] and of defendant's particular 13-locus profile, it cannot be disputed that DNA analysis is as close to an infallible measure of identity as science can presently maintain. Given the mobility of our society, the availability of plastic surgery and other medical procedures and devices that may alter physical characteristics, and the growing problem of identity theft, unlike a DNA profile, all other identifying criteria are subject to theft, change, or alternation." (Appendix A, People v. Robinson, slip opin., pp. 16-17; italics in original.)

The court of appeal was wrong. For the 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 (1933) 134 Cal.App. 498, 499 [25 P.2d 490]; 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.)

From that perspective a John Doe warrant, standing alone, is insufficient to name a defendant with "particularity". (People v. Montoya (1967) 255 Cal.App.2d 137, 142 [a "warrant which merely identifies a defendant by the use of a fictitious name without any description whatsoever is void"].) Instead, the warrant should contain sufficient information to identify the suspect with reasonable certainty. (Ibid.) The same should be true for a complaint filed in order to toll a statute of limitations.

But 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.)

In short, when "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." (People v. Montoya, supra, 255 Cal.App.2d at 142-134; emphasis added.) Specifically, where 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." (Ibid.)

A DNA profile is information about the genetic makeup of a human being; it is not an identification of that person. Using the exact language of the original complaint and original arrest warrant - that the John Doe suspect in the Lamar assault had the following DNA Profile at the following 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 (8,11), vWa (18,19), FGA (22, 24), D871179 (12, 15), D21S11 (28,28), D18S51 (20, 20), D5S818 (8, 13), D13S317 (10, 11)."

Although a DNA profile may be probative of identity, by itself it does not actually "identify" 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.)

More importantly, 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 at 749.) 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.

E. Once Again, the Statute of Limitations Was Not Satisfied By the Constitutionally Insufficient Complaint or Arrest Warrant, And So the Deborah L. Charges Are Time Barred

Penal Code section 803 establishes that "Except as provided by this section, a limitation of time ... is not tolled or extended for any reason." It 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 Lamar charges, which thus were time-barred. Petitioner's convictions of them are void and must be dismissed. (In re Demillo (1975) 14 Cal.3d 598, 601; People v. Swinney (1975) 46 Cal.App.3d 332, 340.)

III.

THE COURT OF APPEAL INCORRECTLY CONCLUDED THERE WAS A WRONG WITH NO REMEDY, WHEN IT DETERMINED THE EXCLUSIONARY RULE WAS INAPPLICABLE TO AN ACKNOWLEDGED VIOLATION OF APPELLANT'S FOURTH AMENDMENT AND STATE CONSTITUTIONAL RIGHT TO BE FREE OF UNREASONABLE SEARCHES AND SEIZURES, BASED ON THE 1999 UNLAWFUL SEIZURE OF HIS BLOOD UNDER THE STATE DNA ACT, AT A TIME HE HAD NOT BEEN CONVICTED OF ANY "QUALIFYING" OFFENSES

In the trial court petitioner also moved to suppress all DNA-typing evidence developed from a blood sample taken from him in 1999, on the ground that he was mistakenly "qualified" for collection, thus his blood sample never should have been analyzed nor his DNA profile entered into the databank.[4]

The court of appeal wholly agreed that officials who collected petitioner's blood pursuant to the Act erroneously concluded petitioner had "qualifying" prior convictions. (Appendix A, People v. Robinson, slip opin., pp. 25, 26-27 ["neither [petitioner's] juvenile adjudication for grand theft nor [his] misdemeanor spousal abuse constitute qualifying offenses under section 296"]; 31 ["It is undisputed that at the time defendant's blood was collected he had not been convicted of any of the qualifying offenses"].)

But although the court of appeal agreed that the nonconsensual extraction of blood implicates rights protected by the Fourth Amendment (Appendix A, People v. Robinson, slip opin., p. 31), it

---

[4] In addition to the specific, "as applied" challenge to California's DNA Act raised in this section, petitioner also argued before the court of appeal that Penal Code section 295 et seq., **on its face** is unconstitutional. He repeats that argument in this petition, but in Part III simply to exhaust that issue for future federal review. (See, Part III(A), *infra*.)

decided "the exclusionary rule is inapplicable to suppress the evidence in this case," and therefore declined to address petitioner's contentions. (Id., at p. 25; *see also*, p. 31 ["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"].)

Specifically, 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.) The court of appeal 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.)

The court of appeal found the possibility of similar "good faith" 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"; as a result, "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"].)

The court of appeal is wrong. It circumvented its own finding that there was a Fourth Amendment violation here by disingenuously refusing to deal with the inevitable remedy.

For the Fourth Amendment requires not only the exclusion of all evidence directly obtained through its violation, but also the exclusion of evidence ("the fruit"), obtained as the result of the exploitation of an initial unlawful search and seizure. (Wong Sun v. United States (1963) 371 U.S. 471, 479, 488 [83 S.Ct. 407]; United States v. Shaiber (9th Cir. 1990) 920 F.2d 1425.)

This is so even if this case is viewed as a statutory violation only, for a statutory violation also can provide the grounds to suppress evidence. (People v. Otto (1992) 2 Cal.4th 1088.)

Petitioner's convictions therefore should be reversed, and this matter 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 analysis of that sample, the DNA profile subsequently developed, 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". (United States v. DeVita (9th Cir. 1975) 526 F.2d 81, 83; People v. McGaughran (1979) 25 Cal.3d 577, 581.)

PART II

REQUEST TO GRANT AND HOLD
and
ISSUE PRESENTED and NECESSITY FOR REVIEW

Issue 1: 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 and *People v. Leahy* (1994) 8 Cal.4th 587?

Issue 2: How should the statistical significance of a "cold hit" from a DNA database be calculated?

Request To Grant and Hold: In its opinion the court of appeal decided that no new scientific methodology is involved when using the "product rule" to calculate the statistical probability of a DNA "match" in "cold hit" cases, and that a "cold hit" from a DNA database is not subject to the Kelly test of admissibility when used merely as an investigative tool to identify a possible suspect. (Appendix A, People v. Robinson, slip opin., p. 46.)

These exact issues presently are before this Court in People v. Nelson, dock. no. SS147051, which also had been decided by the Third Appellate District, with the same result.

More importantly, this Court's decision in Nelson is going to be based on the record of the DNA hearing in **this** case - petitioner's case.

For in 2003 the Sacramento County Superior Court had several cases before it which raised the same "cold hit" DNA issues; those cases included this case and the Nelson case. The Sacramento County trial court consolidated all those cases for purposes of a Kelly hearing, to assess scientific opinion about the general acceptance of the statistical methodology for determining the significance of a match in a "cold hit" (or database search) case; **this** case, People v. Paul Eugene Robinson (Sacramento County Superior Court case no. 00F06871), became the "lead" case.

The trial court in the Nelson case took judicial notice of the two-month-long DNA hearing and trial court decision in **this** case; the Third Appellate District did as well. And after this Court granted review in the Nelson case on these two identical issues, it also agreed to take judicial notice of approximately 2,300 pages of motions, documents, and reporter's transcripts from the DNA hearing in **this** case, as there essentially was no separate DNA hearing in Nelson itself. (*See*, Cal. Sup Ct. Order of February 21, 2007, in Dock. no. S147051.)

As the two issues petitioner presents in Part II of this petition for review not only are identical to issues already before this Court in the Nelson case, but will be resolved by this Court based on the record in petitioner's case and not the record in the Nelson case, this Court should grant review of these two issues and order action on this cause deferred until disposition of the identical case already pending.

PART III

STATEMENTS OF FACTS AND LEGAL BASES OF THE EXHAUSTION CLAIMS

A. IN GENERAL, THE 1999 INVOLUNTARY COLLECTION OF PETITIONER'S BLOOD SAMPLE FOR INCLUSION IN THE CALIFORNIA DEPARTMENT OF JUSTICE'S CONVICTED OFFENDER DATA BANK VIOLATED HIS FOURTH AMENDMENT RIGHTS, FOR IN ITS FACE THE STATE DNA ACT IS UNCONSTITUTIONAL

In the trial court petitioner moved to suppress all DNA-typing evidence pursuant to Penal Code section 1538.5, arguing *inter alia* that the involuntary collection of his blood in 1999 pursuant to Penal Code section 295 et seq., while he was incarcerated for a parole violation, **in general** violated his rights under the Fourth Amendment to the United States Constitution and the California Constitution, article I, § 13, as the state DNA Act is unconstitutional on its face.

Petitioner recognizes that the general challenge raised in this section has been rejected by appellate courts in California (*see*, People v. Adams (2004) 115 Cal.App.4th 243; People v. King (2000) 82 Cal.App.4th 1363), and by the Ninth Circuit. (United States v. Kincade (9th Cir. 2004) 379 F.3d 813.)

But neither the United States Supreme Court nor this Court has yet ruled on this issue, and so petitioner raises it in order to preserve it for future review.

It is undisputed that a nonconsensual extraction of blood is an invasion of the rights protected by the Fourth Amendment. (Schmerber v. California (1966) 384 U.S. 757, 767 [86 S.Ct. 1826].) As a general rule, the question of whether a particular practice is

unreasonable (and thus violates an individual's Fourth Amendment rights), "'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" (Skinner v. Railway Labor Executives' Assn. (1989) 499 U.S. 602, 619.)

For the United States Supreme Court demands an individualized suspicion before the search of, or seizure from, an individual is "reasonable." (New Jersey v. T.L.O. (1985) 469 U.S. 325, 340 [105 S.Ct. 733].) It follows that before blood lawfully may be extracted nonconsensually from an individual, authorities must have probable cause to believe the intrusion into the suspect's body will reveal evidence of a crime being investigated. (People v. Scott (1978) 21 Cal.3d 284, 293.)

As there was no lawful basis upon which to involuntarily draw petitioner's blood in 1999, the trial court erred in denying petitioner's motion to suppress all evidence of DNA or genetic typing from that initial blood draw, based on an argument that Penal Code section 295 et seq. **in general** is constitutional.

B. PETITIONER WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL AND DUE PROCESS, WHEN THE PROSECUTION PRESENTED STATISTICAL MATCH-PROBABILITY EVIDENCE BY REFERENCE TO THREE MAJOR ETHNIC GROUPS, RATHER THAN BY PRESENTING THE FREQUENCY OF OCCURRENCE IN A GENERAL, NON-ETHNIC POPULATION.

Petitioner acknowledges this Court recently decided that, when a perpetrator's race is unknown, the statistical significance of a DNA match must be reported by the frequencies with which the suspect's DNA profile occur in **various** racial groups to which the perpetrator might belong. (People v. Wilson (2006) 38 Cal.4th 1237, 1240.) Thus it is relevant and therefore admissible to present the probability-of-match statistic with respect to the three most numerous population groups: Caucasian, Hispanic, and African-American. (Id, at 1250.)

In light of Wilson and principles of *stare decisis* (Auto Equity sales, Inc., v. Superior Court (1962) 57 Cal.2d 450), petitioner raises this issue to exhaust it for future federal review.

C. THE TRIAL COURT ERRED IN IMPOSING AN UPPER TERM IN VIOLATION OF UNITED STATES SUPREME COURT PRECEDENT AND THE SIXTH AND FOURTEENTH AMENDMENTS.

Appellant again acknowledges principles of *stare decisis*, this time with respect to this Court's recent decisions in People v. Black (2007) 41 Cal.4th 799, petition for certiorari filed (U.S.S.C. dock. no. 07-6140), and People v. Sandoval (2007) 41 Cal.4th 825.

Nevertheless, in accordance with the United States Supreme Court's decisions in Cunningham v. California (2007) 549 U.S. __ [127 S.Ct. 856] and Blakely v. Washington (2004) 542 U.S. 296 [124 S.Ct. 2531], it is a violation of a defendant's Sixth Amendment right to a jury trial for a court at the time of sentencing to impose an upper term of imprisonment based on findings made by the trial court, and not the jury, as occurred here.

CONCLUSION

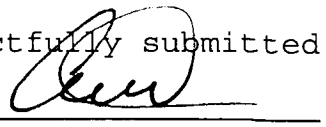
For the foregoing reasons petitioner Paul Eugene Robinson respectfully requests this Court grant review of the issues set forth in Part I, and make a decision on the merits after full briefing.

Petitioner also requests this Court "grant and hold" the issues presented for review in Part II.

Finally, Petitioner suggests this Court exercise its discretion to grant review of the issues set forth in Part III, and make a decision on the merits after full briefing.

Upon any or all such review, petitioner requests this Court reverse the judgment of the Court of Appeal, based on the arguments set forth herein.

Respectfully submitted,

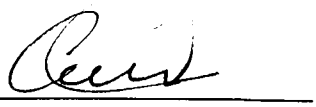


CARA DeVITO, Attorney at Law
State Bar no. 105579

Attorney for petitioner,
Paul Eugene Robinson

BRIEF LENGTH AND FORMAT CERTIFICATION

I certify that the foregoing Petition for Review, Alternate Request To Grant and Hold, and Petition for Review to Exhaust State Remedies, was produced on a computer using WordPerfect 12.0 in typeface Courier, pitch 12, and the word count of this computer program reflects the petition is 8,367 words long.



CARA DeVITO, Attorney at Law
State Bar no. 105579

Attorney for petitioner,
Paul Eugene Robinson

APPENDIX A

(People v. Robinson, (October 26, 2007), C044703)

Opinion

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. PAUL EUGENE ROBINSON, Defendant and Appellant.	C044703 (Super. Ct. No. 00F06871)

APPEAL from a judgment of the Superior Court of Sacramento County, Peter N. Mering, Judge. Affirmed.

Cara DeVito, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Bill Lockyer, Attorneys General, Mary Jo Graves, Dane R. Gillette, Chief Assistant Attorneys General, Gerald A. Engler, Senior Assistant Attorney General, Michael Chamberlain, Doris A. Calandra and Enid A. Camps, Deputy Attorneys General, for Plaintiff and Respondent.

---

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of Parts II through V of the Discussion.

In this appeal we hold that the statute of limitations for a sexual offense is satisfied when the prosecution is commenced within the period of limitations by the filing of an arrest warrant predicated upon the identification of the perpetrator by a DNA profile. (See Pen. Code, § 804, subd. (d).)[1]

Defendant Paul Eugene Robinson was convicted by a jury of one count of forcible oral copulation (§ 288a, subd. (c)(2)[2]; Ct. 1), two counts of penetration with a foreign object (§ 289, subd. (a)(1); Cts. 2-3), and two counts of rape (§ 261, subd. (a)(2); Cts. 4-5).[3]

---

[1] All further section references are to the Penal Code unless otherwise specified.

[2] The abstract of judgment erroneously designates this offense as a violation of section 288, subdivision (a)(2). We shall order that the abstract of judgment be amended to correct this error.

[3] The jury also found true that defendant used and was armed with a knife during the commission of each offense. (Former §§ 12022, subd. (b(1) (Stats. 1993, ch. 660, § 26; ch. 611, § 30) and 12022.3, subds. (a) and (b) (Stats. 1993, ch. 299, § 2).)

By information, defendant was also charged with eight additional counts involving Heather O. for burglary (§ 459), foreign object penetration (§ 289, subd. (a)(1)), oral copulation (§ 288a, subd. (c)(2)), rape (§ 261, subd. (a)(2)), and sexual battery. (§ 243.4, subd. (a).) The jury was unable to reach a verdict on these charges, a mistrial was declared, and the charges were dismissed.

The information also charged defendant with 15 prior conviction enhancements. (§§ 667, subds. (a), (b)-(1), 667.5, subd. (b), and 1170.12.) Although neither party mentions the disposition of these allegations, our review of the record

A criminal offense is within the statute of limitations when the prosecution for the offense is commenced within the applicable period of limitations. The "prosecution for an offense is commenced when . . . [a]n arrest warrant . . . is issued [and] names or describes the defendant with the same degree of particularity required for an indictment, information, or complaint." (§ 804, subd. (d).) The charging provisions permit the use of a fictitious or John Doe name. (See also § 815 [arrest warrant].) However, for constitutional and statutory reasons "a 'John Doe' warrant must describe the person to be seized with reasonable particularity. . . . [¶] . . . [A fictitious name] 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 [Citation]." (*People v. Montoya* (1967) 255 Cal.App.2d 137, 142-143, fn. omitted, relying on *West*

---

discloses that the trial court impliedly struck them because the underlying convictions were entered after defendant committed the crimes against Deborah L., on the grounds they did not constitute prior convictions for purposes of sentence enhancements. (See *People v. Rojas* (1988) 206 Cal.App.3d 795, 802 ["to be subject to the five-year enhancement pursuant to section 667, subdivision (a), a defendant's prior serious felony conviction must have occurred before the commission of the present offense"].)

The trial court imposed an aggregate prison term of 65 years after selecting the upper term for all five counts and all five use enhancements. The court stayed imposition of sentence on the remaining enhancements.

v. Cabell (1894) 153 U.S. 78 [38 L.Ed. 643]; see also Cal. Const., art. I, § 13 ["a warrant may not issue, except on probable cause . . . particularly describing the . . . persons and things to be seized"]; § 813, subd. (a) [magistrate must find "reasonable ground" to believe defendant committed the offense].)

The offenses in this case occurred on August 25, 1994. On August 21, 2000, four days before the six-year statute of limitations (§ 800) was set to expire, the Sacramento County District Attorney filed a felony complaint against "John Doe, unknown male," describing the defendant by a 13-locus DNA profile developed from semen taken from the victim. The next day, an arrest warrant was issued incorporating the DNA profile. The warrant was executed on September 15, after defendant's name was obtained from a match between the 13-locus DNA profile of the perpetrator and his genetic profile entered into the state's DNA Databank.

On appeal, defendant contends that prosecution of his offenses was not commenced by the issuance of the arrest warrant because the warrant did not satisfy the particularity requirement of section 804, subdivision (d). In the published portion of the appeal we conclude that the DNA profile of the perpetrator of a sexual offense incorporated in an arrest warrant provides the particularity of identification of an

offender required by section 804.[4] (*People v. Montoya, supra,* 255 Cal.App.2d at pp. 142-144.)

We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In the early morning hours of August 25, 1994, 24-year-old Deborah L., the victim in this case, awoke to find defendant, a man she had never seen before, standing in her bedroom. He told her to be quiet and that he was there "to get some pussy." He was wearing garden gloves and holding a kitchen knife. When she started to scream, he called her a "white bitch" and threatened to kill her if she did not shut up.

He climbed on top of the victim and held a knife to her chest, cutting her finger when she attempted to grab it. Defendant then directed the victim to cover her face with a pillow and fondled her breasts, placed his mouth on her vagina, inserted his fingers in her vagina and rectum, and raped her. After losing and then regaining an erection, he raped her a second time, then withdrew his penis, ejaculated on her legs, and rubbed his semen all over her stomach.

---

[4] In the unpublished portion of the opinion we also reject the defendant's additional claims that the trial court committed reversible error by failing to suppress DNA evidence obtained in violation of his Fourth Amendment rights, admitting expert testimony concerning DNA statistical frequency analysis, and imposing upper terms of imprisonment in violation of his Sixth Amendment right to a jury trial under *Blakely v. California* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (hereafter *Blakely*).

When he was finished assaulting the victim, he put the gloves back on, dressed himself, and told her not to look at him or call the police or he would kill her. After he left, she called 911 and reported the attack. The police arrived shortly thereafter and the victim was transported to a medical facility where she was examined and a rape kit prepared. A vaginal swab tested positive for the presence of semen.

A few days later, Detective Willover of the Sacramento City Police Department interviewed the victim. At that time, she described her assailant as a black male adult who "sounded black," was about 25 pounds overweight with a round face, and approximately five feet eight inches tall. She informed Willover that during the attack, the assailant repeatedly told her he was Mexican or Chicano and while she thought he was black, he could have been either a dark Mexican or a light skinned black man.[5]

It was stipulated that defendant's blood was collected prior to September 2000, his DNA was tested and his 13-locus profile was entered into the offender database maintained by the California Department of Justice (DOJ).

In August 2000, Jill Spriggs, Assistant Director of the DOJ Crime Laboratory in Sacramento, developed a DNA profile of the assailant from the vaginal swab of the victim. Spriggs then requested Henry Tom, a DOJ DNA criminalist, to search the DOJ

---

[5] The record shows that defendant is African-American.

Convicted Offender Databank to determine whether the DNA profile of the assailant matched the DNA profile of any convicted offender in the databank. He entered the DNA profile of the evidentiary sample into the computer, ran a search that compared the profile to the DNA profile of all other entrants in the databank, and obtained a "cold hit," which is a match between the assailant's profile and the profile of a person previously entered into the databank. DOJ records disclosed the matching profile belonged to defendant and Tom sent the information to Spriggs.

After receiving that information, Spriggs conducted an independent DNA analysis using a blood sample obtained from defendant upon his arrest. Spriggs developed his DNA profile, compared it with the DNA profile of the evidentiary sample from the vaginal swab, found the two profiles matched along all 13 loci, and concluded they belonged to the same person.

Spriggs testified that once a profile is developed, a statistical calculation is performed to determine the frequency of that particular genetic profile in a random unrelated population. The probability of a 13-loci match as in this case is one in 650 quadrillion in the African American population, one in six sextillion in the Caucasian population, and one in 33 sextillion in the Hispanic population. There are no reported cases of two people matching at all 13 loci other than identical twins.

Defendant did not take the stand but contested the reliability of the statistical probability evidence. We shall discuss that evidence in more detail as pertinent in the discussion portion of our decision.

DISCUSSION

I.

John Doe/DNA Arrest Warrant

Defendant contends that issuance of a John Doe/DNA arrest warrant failed to toll the statute of limitations and that use of such a warrant to toll the statutory period violates his right to due process.[6]

We set forth the pertinent procedural background before addressing each claim.

A. Procedural Background

The governing period of limitations for the sexual offenses charged in this case is six years. (§ 800.)[7] Since the offenses were committed on August 25, 1994, the period of limitations was set to expire on August 25, 2000.

---

[6] The correct contention is that the prosecution was not commenced within the period of limitations. Tolling refers to the extension of the period of limitations for a reason set forth in section 803.

[7] The "prosecution for an offense punishable by imprisonment in the state prison for eight years or more shall be commenced within six years after commission of the offense." (§ 800.) The maximum sentence for the offenses for which defendant was convicted is eight years. (§ 288a, subd. (c)(2), § 289, subd. (a)(1), § 261, subd. (a)(2), § 264.)

On August 21, 2000, four days before that expiration date, the Sacramento County District Attorney filed a felony complaint against "John Doe, unknown male," described by a 13-locus DNA profile.[8] The next day, Detective Willover prepared and presented an arrest warrant which incorporated the DNA profile,[9] and a statement of probable cause to Magistrate Jane Ure, who signed it.

Three weeks later, on September 15, 2000, Detective Willover received a message from the Department of Justice DNA

---

[8] That profile is described as "Short Tandem Repeat (STR) . . . (DNA) Profile at the following Genetic Locations, using the COfiler and Profiler Plus Polymerase Chain Reaction (PCR) amplifications kits: D3S1358 (15, 15), D16S539 (9,10), TH01 (7,7), TPOX (6,9) CSF1PO (10,11), D7S820 (8,11) vWa (18,19), FGA (22,24), D8S1179 (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 . . . ."

[9] Defendant's DNA profile was not entered on the face of the warrant because the computer system would not allow that many characters to be entered within the limited space available. However, the Fourth Amendment does not prohibit a warrant from cross-referencing other documents and most Courts of Appeals have held that a court may construe a warrant with reference to a supporting affidavit if the warrant uses appropriate words of incorporation and the affidavit accompanies the warrant. (*Groh v. Ramirez* (2004) 540 U.S. 551, 557-558 [157 L.Ed.2d 1068, 1078; see also *People v. MacAvoy* (1984) 162 Cal.App.3d 746, 755-756.) The trial court found (1) the warrant appropriately cross-referenced the affidavit and complaint and the affidavit was incorporated by reference into the warrant. On appeal, defendant does not challenge the trial court's factual findings or legal conclusions.

Laboratory (DOJ Lab) that there was a cold hit match between the DNA profile obtained from the vaginal swab of the victim and the DNA profile of Paul Eugene Robinson, whose genetic profile had been entered in the state's DNA Databank Program. Willover ran a records check on defendant and determined that he was currently out of custody and on active parole and that there were other outstanding warrants for his arrest. The DNA arrest warrant apparently was amended to insert the defendant's name. It was executed by the arrest of defendant on September 15, 2000. A first amended complaint was filed four days later on September 19, 2000, naming Paul Eugene Robinson as the defendant.

Defendant moved to dismiss the first amended complaint for lack of jurisdiction. The trial court held an evidentiary hearing and denied the motion after finding that a DNA profile is the "most accurate description we have to date" and meets the constitutional and statutory requirements that the person to be arrested be particularly described.

B. Statute of Limitations

Defendant contends the trial court lacked personal jurisdiction over him because the six-year statute of limitations had expired by the time the amended complaint was filed. In his view, issuance of a John Doe arrest warrant with a DNA profile does not validly commence the prosecution because a genetic profile does not particularly describe the person to

be arrested and therefore fails to satisfy the statutory and constitutional particularity requirement.

Respondent contends this claim has no merit because a DNA profile is a generally accepted forensic identification tool that satisfies the particularity requirement. We agree with respondent and hold that an arrest warrant, which identifies the person to be arrested for a sexual offense by incorporation of the DNA profile of the assailant, satisfies the statutory particularity requirement of section 804, subdivision (d) read in the light of section 813, subdivision (a) and pertinent constitutional provisions.

We first clarify what is at issue. Defendant contends a John Doe/DNA arrest warrant is insufficient to toll the statute of limitations. (see fn. 6, *supra*.) He does not claim the warrant is unsupported by probable cause, the warrant was improperly executed, or that he was improperly arrested because he was not the person described in the warrant. Indeed at the time the warrant was executed, defendant's true name and identity were known to the officers and he was located using traditional methods of identification. Thus, defendant makes no claim that this arrest warrant was invalid on Fourth Amendment grounds. With this in mind we consider his claim.

Defendant appears to argue that the particularity requirement in section 804, subdivision (d), must be read in the light of the federal and state constitutions. With this we agree.

The statute of limitations for the offenses with which defendant was charged is codified in section 800. It provides that "prosecution for an offense punishable by imprisonment in the state prison for eight years or more shall be *commenced* within six years after commission of the offense." (Italics added.)

A felony prosecution is "commenced" when any one of the following events occurs: an indictment or information is filed (§ 804, subd. (a)), a case is certified to the superior court (*id.*, subd. (c)), or as was done in this case, "*[a]n arrest warrant or bench warrant is issued, provided the warrant names or describes the defendant with the same degree of particularity required for an indictment, information, or complaint.*" (*Id.*, subd. (d), italics added.)

With respect to the particularity required for naming the person to be arrested, an arrest warrant may describe the person to be arrested by a fictitious name (§ 815)[10] and, as noted above, must name the defendant with the same degree of particularity required for an indictment, information, or complaint (§ 804, subd. (d)), which may be filed using a

---

[10] Section 815 states in pertinent part: "A warrant of arrest shall specify the name of the defendant or, if it is unknown to the magistrate, judge, justice, or other issuing authority, the defendant may be designated therein by any name. . . ."

fictitious name. (§ 959, subd. 4; *Ernst v. Municipal Court of Los Angeles* (1980) 104 Cal.App.3d 710, 718.)[11]

However, the constitution and statutory scheme require that "a 'John Doe' warrant . . . describe the person to be seized with reasonable particularity." (*People v. Montoya, supra,* 255 Cal.App.2d at p. 142.) A fictitious name is the same as a John Doe name and is insufficient to identify anyone let alone with particularity. Thus, the California Constitution, article I, section 13, provides that "a warrant may not issue, except on probable cause . . . particularly describing the . . . persons and things to be seized." The Fourth Amendment to the United States Constitution contains a similar particularity requirement. (*West v. Cabell, supra,* 153 U.S. 78 [38 L.Ed. 643]; *Powe v. City of Chicago* (7th Circ. 1981) 664 F.2d 639.) "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 [Citation]." (*People v. Montoya, supra,* 255 Cal.App.2d at pp. 142-143, relying on *West v. Cabell, supra,* 153 U.S. 78 [38 L.Ed. 643] and Cal. Const., art. I, § 13.)

---

[11] Section 959 states in pertinent part, that "[t]he accusatory pleading is sufficient if it can be understood therefrom: [¶] . . . 4. That the defendant is named, or if his name is unknown, that he is described by a fictitious name, with a statement that his true name is to the grand jury, district attorney, or complainant, as the case may be, unknown."

This authority is embodied in the requirements of section 813, that the magistrate shall issue an arrest warrant only *if* "a [felony] complaint [has been] filed with a magistrate [and] the magistrate is satisfied from the complaint that the offense . . . has been committed and that there is *reasonable ground* to believe that the defendant has committed it . . . ." (§ 813, subd. (a); italics added.)[12] This procedure guarantees that a neutral judicial officer or body makes a finding of probable cause within the period of limitations. (*People v. Angel* (1999) 70 Cal.App.4th 1141, 1146.)

The length of the period of limitations is a matter for the Legislature's determination and it "could, if it wished, remove the statute of limitations entirely for child sexual abuse offenses, or for any other offense, provided only that this removal applied to future offenses or to offenses which were not time-barred when the removal was enacted." (*People v. Vasquez* (2004) 118 Cal.App.4th 501, 505.)

Thus, the period of limitations is strictly statutory. Nevertheless, because section 804, read together with section 813, incorporates constitutional principles, we turn for guidance to the cases construing the Fourth Amendment particularity requirement.

---

[12] The "reasonable certainty" standard is similar to the requirement of section 813, subdivision (a), that "there is *reasonable ground* to believe that the defendant" committed the offense described in the complaint. (Italics added.)

The purpose of the constitutional particularity requirement is to avoid general warrants by which anyone may be arrested (*Cabell v. West, supra*, 153 U.S. at p. 86 [38 L.Ed. at p. 645]; *In re Application of Schaefer* (1933) 134 Cal.App. 498, 499-500) in order to ensure "'nothing is left to the discretion of the officer executing the warrant.'" (*United States v. Hillyard* (9th Cir. 1982) 677 F.2d 1336, 1339.)

It is therefore well established that an arrest warrant, which merely identifies a defendant *solely* by use of a fictitious name is void. The warrant must "truly name" the person to be arrested or "describe him sufficiently to identify him." (*West v. Cabell, supra*, 153 U.S. at p. 85 [38 L.Ed. at p. 644; *In re Application of Schaefer, supra*, 134 Cal.App. at p. 499.) The test is whether the warrant provides sufficient information to identify the defendant with "reasonable certainty. [Citations.] This may be done by stating his occupation, his personal appearance, peculiarities, place of residence or other means of identification [Citation]." (*People v. Montoya, supra*, 255 Cal.App.2d at p. 142.) The particularity requirement does not however, demand complete precision. (*People v. Amador* (2000) 24 Cal.4th 387, 392.)

Applying these principles, we find an arrest warrant, which describes the person to be arrested by his or her DNA profile, more than satisfies the reasonable certainty standard because DNA is the most accurate and reliable means of identifying an individual presently available to law enforcement.

In passing the DNA and Forensic Identification Data Base and Data Bank Act of 1998 (DNA Act or Act) (§ 295 et seq.), the California Legislature found that "(DNA) and forensic identification analysis is a useful law enforcement tool for identifying and prosecuting sexual and violent offenders." (Former § 295, subd. (b)(1) [Stats. 1998, ch. 696, § 2]; see also *People v. King* (2000) 82 Cal.App.4th 1363, 1378 [finding there is no question but that DNA testing provides an efficient means of identification].) Similar findings have been made by all other states and the federal government, which have enacted DNA data base and data bank acts. (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 505; see Annot., Validity, Construction, and Operation of State DNA Database Statutes (2000) 76 A.L.R.5th 239, 252; and see 42 U.S.C. §§ 14131-14134.)

Defendant argues however, that a DNA profile is merely "information about the genetic makeup of a human being; [and] is not an identification of that person" that would enable an officer in the field to execute the warrant based solely on the DNA profile stated in the warrant. We see no legal merit in this argument.

Neither section 804, subdivision (d), section 813, nor the state and federal constitutions specify or limit the *manner* or *criteria* for particularly describing a person. All that is required is "reasonable certainty" that the person may be identified. Indeed, defendant concedes that while a DNA profile "may be probative of identity," it is not infallible. But

infallibility is not required for issuance of a warrant (*People v. Amador, supra,* 24 Cal.4th at p. 392) or a charging document. (*People v. Erving* (1961) 189 Cal.App.2d 283, 290 [two descriptive errors in the indictment do not deprive the court of jurisdiction].)

Nevertheless, in light of the astronomical rarity of an individual's DNA profile in the general population (*People v. Johnson* (2006) 139 Cal.App.4th 1135, 1153) and of defendant's particular 13-locus profile, it cannot be disputed that DNA analysis is as close to an infallible measure of identity as science can presently obtain. Given the mobility of our society, the availability of plastic surgery and other medical procedures and devices that may alter physical characteristics, and the growing problem of identity theft, unlike a person's DNA profile, all other identifying criteria are subject to theft, change, or alteration.

Defendant also contends that for Fourth Amendment purposes, extrinsic evidence cannot be used to make up the deficiencies of an insufficient arrest warrant. This argument is based on the fact an officer in the field cannot execute the warrant by visually identifying a suspect with his DNA profile in hand and must resort to information outside of the warrant.

We disagree. Defendant confuses the requirements for issuance of a warrant with those necessary to execute one. Extrinsic evidence is always necessary to locate the suspect and confirm his identity in order to execute an arrest warrant.

(*United States v. John Doe* (3d Cir. 1983) 703 F.2d 745, 748 ["No matter how detailed the written description on a warrant is, extrinsic information will be necessary to execute it"].)

Moreover, at least two courts in other jurisdictions have held that issuance of a John Doe/DNA arrest warrant is sufficient to toll the statute of limitations. In *State of Wisconsin v. Dabney* (2003) 264 Wis.2d 843 [663 N.W.2d 366] (*Dabney*), the court ruled that the DNA profile satisfied the reasonable certainty requirement for an arrest warrant in a case charging a sexual assault where the assailant was unknown to the victim and a DNA profile was subsequently developed from semen left by the assailant. Three days before the six-year statute of limitations was set to expire, the state filed a complaint charging "John Doe #12" with sexual assault. The caption of the complaint included the defendant's DNA profile. The same day, an arrest warrant for John Doe #12 was also issued. (663 N.W.2d at pp. 369-370.)

Under Wisconsin law, as in California, the statute of limitations is satisfied when the prosecution is commenced within the period of limitations. An action may be commenced by issuing an arrest warrant, which must identify the person to be arrested with "reasonable certainty." (*Dabney, supra,* 663 N.W.2d at pp. 370-371.) The Wisconsin court concluded, as have we, that "for the purposes of identifying 'a particular person' as the defendant, a DNA profile is arguably the most discrete, exclusive means of personal identification possible. 'A genetic

code describes a person with far greater precision than a physical description or a name.'" (*Id.* at p. 372; see also *State v. Danley* (2006) 138 Ohio Misc.2d 1, 5-6 [853 N.E.2d 1224, 1227].)

The court in *Dabney, supra,* 264 Wis.2d 843 [663 N.W.2d 366], also rejected the argument raised by defendant herein that a DNA profile fails to sufficiently identify the accused because a field officer cannot visually identify the suspect from a DNA profile. Although the court agreed that a police officer with a John Doe/DNA arrest warrant could not walk up to an individual and arrest him solely on the basis of his genetic profile, the court concluded that having to take the extra step of identifying the defendant "is not unique to a warrant based on DNA. No matter how well a warrant describes the individual, extrinsic information is commonly needed to execute it. If a name is given, information to link the name to the physical person must be acquired." (663 N.W.2d at p. 372.)

For these reasons, we hold that an arrest warrant, which describes the person to be arrested by his DNA profile, satisfies the statute of limitations.

C. Due Process

Defendant also contends that using a John Doe/DNA arrest warrant to commence a prosecution circumvents the statute of limitations and therefore violates his rights under the due process clauses of the state and federal constitutions.

Respondent argues this claim has no merit because defendant has failed to establish prejudice. We agree with respondent.

The statute of limitations protects criminal defendants during the prearrest and preaccusation stages (*United States v. Marion* (1971) 404 U.S. 307, 322-323 [30 L.Ed.2d 468, 479-480]) while due process protects criminal defendants *after* the statute of limitations has expired and before the right to a speedy trial has attached, i.e., before the defendant is arrested or a complaint is filed. (*People v. Martinez* (2000) 22 Cal.4th 750, 765, 767; *People v. Catlin* (2001) 26 Cal.4th 81, 107.)

To establish a due process violation, defendant must establish (1) the absence of any legitimate reason for delay and (2) prejudice. (*People v. Archerd* (1970) 3 Cal.3d 615, 640.) Prejudice may be shown by the loss of a material witness or other missing evidence or by a witness's fading memory caused by the lapse of time. (*Ibid.*)

Defendant has failed to establish prejudice for the three week delay between August 25, 2000, when the statute of limitations was set to expire and September 15, 2000, the day he was arrested. Instead, he poses a number of hypothetical "what if" questions based upon the possibility that an individual with a DNA profile matching the one specified on the warrant may not be found for decades, impairing his ability to establish a defense. We need not address that possibility because it is not tendered by this case. Here, law enforcement officials promptly processed the crime scene the day of the crime, collected

evidence, took a vaginal swab from the victim, and developed the assailant's DNA from that evidence within the period of limitations. Since defendant was arrested only three weeks after the period of limitations expired and his sole defense was to contest the reliability of the statistical probability evidence, his ability to defend against the charges was not impaired by the passage of time.

Accordingly, we reject his due process claim.

II.

Involuntary Collection of Defendant's Blood

Defendant claims the DNA evidence must be suppressed because it is the fruit of an unconstitutional collection of his blood. He raises both a facial and an as-applied challenge. We shall address each claim separately. Before doing so however, we first set forth an over-view of the governing statutory scheme.

A. Overview of the DNA Act

The DNA Act was added by Statutes 1998, chapter 696, section 2 and became effective January 1, 1999. (Cal. Const., art. IV, § 8, subd. (c)(1).) The Act has been amended several times since its original enactment. (Amended by Stats. 2002, ch. 916, § 1; Initiative Measure (Prop. 69, § III.1, approved Nov. 2, 2004, eff. Nov. 3, 2004); Stats. 2006, ch. 69, § 28, eff. July 12, 2006.) However, unless otherwise pertinent, we shall discuss and apply the law as originally enacted, which was

the law in effect at the time defendant's blood was drawn and analyzed.

The Act requires, inter alia, that any person who is convicted of a specified crime, referred to as a qualifying offense, must "provide two specimens of blood, a saliva sample, right thumbprints, and a full palm print impression of each hand for law enforcement identification analysis." (Former § 296, subd. (a)(1); Stats. 1998, ch. 696, § 2.) The DOJ, through its DNA Laboratory, is responsible for implementing the Act and managing and administering the state's DNA data base and data bank identification program. (Former § 295, subds. (d) and (e); Stats. 1998, ch. 696, § 2.) The Act requires the DOJ to (1) perform DNA analysis and any other forensic identification analysis of those items, (2) serve as a repository for those biological samples and (3) "store, compile, correlate, compare, maintain, and use DNA and forensic identification profiles and records . . . ." (Former § 295.1, subds. (a), (c); Stats. 1998, ch. 696, § 2.)

The responsibility for collecting blood and other biological samples and impressions from qualified offenders lies with state and local law enforcement and correctional officials (Former §§ 295, subd. (f)(1); 295.1., subds. (a) and (d); 296.1, subd. (a); Stats. 1998, ch. 696, § 2), a task that must be done "as soon as administratively practicable" regardless of the place of confinement. (Former § 296, subd. (b); Stats. 1998, ch. 696, § 2.)

The purpose of the data bank "is 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 these crimes, and the identification of missing and unidentified persons, particularly abducted children." (Former § 295, subd. (c); Stats. 1998, ch. 696, § 2.)

B. Facial Challenge

Defendant first contends the involuntary collection of his blood pursuant to the Act violated his state and federal constitutional rights against unreasonable searches and seizures. He recognizes that several appellate courts, including this court, have upheld the Act against this very claim but raises it to preserve future review by the California and United States Supreme Courts. Respondent argues this claim has no merit. We agree with respondent.

Rejecting the same claim in *Alfaro v. Terhune, supra,* 98 Cal.App.4th 492 at page 505, this court recognized that DNA data base and data bank acts have been enacted by the federal government and in all 50 states and that various constitutional challenges to these acts have been consistently rejected. Likewise, a similar challenge to its predecessor,[13] former

---

[13] Former section 290.2 required certain sex offenders to supply blood and saliva specimens and other biological samples

section 290.2, was also rejected. (See *People v. King, supra,* 82 Cal.App.4th 1363.)

We concluded that "[i]n view of the thoroughness with which constitutional challenges to DNA data base and data bank acts have been discussed, there is little we would venture to add. We agree with existing authorities that (1) nonconsensual extraction of biological samples for identification purposes does implicate constitutional interests; (2) those convicted of serious crimes have a diminished expectation of privacy and the intrusions authorized by the Act are minimal; and (3) the Act serves compelling governmental interests. Not the least of the governmental interests served by the Act is 'the overwhelming public interest in prosecuting crimes *accurately*.' [Citation.] A minimally intrusive methodology that can serve to avoid erroneous convictions and to bring to light and rectify erroneous convictions that have occurred manifestly serves a compelling public interest. We agree with the decisional authorities that have gone before and conclude that the balance must be struck in favor of the validity of the Act." (*Alfaro v. Terhune, supra,* 98 Cal.App.4th at pp. 505-506; see also *People v. Adams* (2004) 115 Cal.App.4th 243, 255-259.)

Because defendant has failed to provide us with a reason to reconsider our decision in *Alfaro,* we reject his claim.

---

prior to being released from custody. (Stats. 1993-1994, 1st Ex. Sess., ch. 42, § 1, p. 8735.)

C. As-Applied Challenge

County and state officials collected and analyzed a sample of defendant's blood pursuant to the Act based upon two offenses officials erroneously concluded were qualifying offenses. Defendant contends this unauthorized collection and analysis of his blood violated his Fourth Amendment rights. Respondent counters that the evidence is admissible because defendant's blood was properly collected pursuant to a valid parole condition and consent, the exclusionary rule is inapplicable under the circumstances of this case, and the evidence is admissible under the inevitable discovery doctrine.

We agree with respondent that the exclusionary rule is inapplicable to suppress the evidence in this case. Because we so hold, we do not address the parties' other theories.

1. Standard of Review

The trial court's ruling on a motion to suppress evidence under section 1538.5 involves mixed questions of fact and law. (*People v. Williams* (1988) 45 Cal.3d 1268, 1301.) On appeal from a denial of a motion to suppress, we review the evidence in the light most favorable to the trial court's determination and uphold any factual findings, express or implied, that are supported by substantial evidence. We independently assess questions of law (*ibid.*) and evidence may be excluded under section 1538.5 only if exclusion is mandated by the federal Constitution. (*People v. Banks* (1993) 6 Cal.4th 926, 934; *In re Lance W.* (1985) 37 Cal.3d 873, 896.)

2. Statutory and Factual Background

Former section 296, subdivision (a)(1) describes the offenders subject to collection of specimens, samples, and print impressions: "[a]ny person who is convicted of, or pleads guilty or no contest to, any of the following crimes, . . . regardless of sentence imposed or disposition rendered . . . ." (Stats. 1998, ch. 696, § 2.) Among the listed offenses is felony spousal abuse (§ 273.5) and felony assault (§ 245). (§ 296, subd. (a)(1)(D) and (F).) Also subject to the collection requirements is "[a]ny person . . . who is *convicted* of a felony offense of assault or battery in violation of Section . . . 245 . . . , and who is committed to . . . any institution under the jurisdiction of the Department of the Youth Authority where he or she was confined . . . ." (§ 296, subd. (a)(2), italics added.) A juvenile adjudication is not a conviction. (Welf. & Inst. Code, § 203; *In re Bernardino S.* (1992) 4 Cal.App.4th 613, 618.)

Turning to defendant's relevant criminal history, his rap sheet, which was introduced into evidence, shows that in 1985 when he was a juvenile, a petition alleging a violation of felony grand theft was sustained and he was ordered to participate in a juvenile work project. In 1994, he was convicted of spousal abuse. Although that offense is punishable as a misdemeanor or a felony (§ 273.5, subd. (a)), defendant was convicted of a misdemeanor. Thus, neither the juvenile

adjudication for grand theft nor the misdemeanor spousal abuse constitute qualifying offenses under section 296.

Defendant's criminal career continued and on December 2, 1998, he was convicted of two misdemeanors and his parole was revoked on a prior conviction for first-degree burglary. He was sentenced to county jail for the misdemeanors and returned to custody for seven months on the parole revocation. He served time for the misdemeanors and the revocation at Rio Consumes Correctional Center (RCCC), a county facility that housed approximately 1,700 inmates.

On January 1, 1999, while defendant was at RCCC, the DNA Act went into effect. Bill Phillips, Director of the DOJ crime laboratory's Bureau of Forensic Services and chief toxicologist for DOJ, was given full responsibility for implementing the new data bank law. To that end, he worked with a deputy attorney general and began training law enforcement personnel on compliance procedures for collecting the required biological specimens and identifying qualifying offenses. Personnel were advised to use CLETS, DOJ's automated criminal history system, to determine whether the prisoner had a qualifying offense. Phillips also developed an informational bulletin that delineated the qualifying offenses for juveniles although confusion remained as to whether samples could be collected for juvenile adjudications. In Phillips' view, the DNA Act was a "very difficult law to understand . . . ." Moreover, because the Act greatly expanded the number of individuals subject to

DNA analysis[14] resulting in 60,000 samples in the first year, it was very complicated to administer in the beginning.

In February 1999, a meeting was held for RCCC officials to inform them of their collection obligations under the new Act. Deputy Sheriff Lawrence Ortiz, Jr. was assigned to assist in that task. He held a meeting to train records officers on how to identify qualified offenders. For the staff who did not attend that meeting, he provided training and information on an as-needed basis. The staff was advised that only certain felony offenses constituted qualifying offenses and an offense in a prisoner's criminal history was designated as a felony or a misdemeanor. However, there was a good deal of confusion about what constituted a qualifying offense particularly with respect to juvenile adjudications. As a result, Ortiz advised staff to err on the side of caution and treat adjudications as non-qualifying offenses if they resulted in a juvenile hall disposition only.

Because of the enormity and complexity of the task, Ortiz felt implementing the new program was beyond him to some degree. In the beginning, it was chaotic and he and his staff were all under a great deal of pressure to quickly identify the offenders and complete the collection kits provided by the DOJ.

---

[14] Compare former section 290.2 (Stats. 1993-1994, 1st Ex. Sess., ch. 42, § 1, p. 8735) with former section 296 (Stats. 1998, ch. 696, § 2.)

According to the procedures used at RCCC, records personnel first identified which prisoners had a qualifying offense. After a prisoner was identified as a qualified offender subject to collection, a DNA Testing Requirement form was completed that specified the prisoner's qualifying offense. Defendant was identified as a qualified prisoner. His DNA testing form indicated he had been convicted of spousal abuse under section 273.5, but did not specify whether the offense was a felony or a misdemeanor.

A sample of defendant's blood was drawn on March 2, 1999, and delivered to the DOJ laboratory on March 5, 1999. The blood sample was submitted to the DOJ's DNA laboratory's data base section where it underwent a verification process to confirm his convicted offender status.

Subsequently, in June 1999, Phillips stopped all searches of the data base to verify "tens of thousands" of federal profiles after discovering in an unrelated case, that one profiled offender had only been convicted of a misdemeanor violation of section 273.5. Although there was no statutory requirement for DOJ to conduct this check, it did so in an "attempt to do the best we could to follow the statute."

The following month, Kim Meade, a DOJ employee, caught the mistaken qualifying offense on defendant's testing form. When she noticed his conviction for spousal abuse (§ 273.5) was only a misdemeanor, she looked for another possible qualifying offense on his rap sheet and saw an assault with a deadly

weapon. (§ 245.) The rap sheet indicated the offense resulted in a juvenile adjudication with a disposition to juvenile hall. Meade had not been trained that juvenile adjudications did not constitute qualifying offenses under the Act and mistakenly concluded the offense was a qualifying felony.

Meade also erred in concluding the adjudication was for felony assault (§ 245) rather than for felony grand theft, a non-qualifying felony. This error was made in part because it involved a juvenile adjudication. As a result, the record was sealed and the rap sheet did not display the adjudicated disposition. Meade could only see the top of the rap sheet "which indicates 211 and 245 to Juvenile Hall", so she mistakenly concluded defendant had been convicted of felony assault (§ 245) and qualified his blood sample on July 26th based upon that offense. (Former § 296, subd. (a)(1)(F); Stats. 1998, ch. 696, § 2.)

Defendant moved to suppress all DNA evidence resulting from that blood sample. The trial court denied his motion, finding defendant was subject to a parole search and in the alternative, that the evidence is admissible under the good faith exception doctrine. (*United States v. Leon* (1984) 468 U.S. 897 [82 L.Ed.2d 677] (*Leon*).) As to the latter theory, the court found (1) the motivation for collecting defendant's blood was a good faith belief he was a qualified offender and the personnel who made the mistakes acted in a responsible and conscientious manner in an effort to keep their errors to a very low level,

(2) the mistake was made because staff was under pressure to immediately implement a newly enacted law that was complex and confusing, and (3) the physical intrusion was minimal because defendant was already in custody.

3. Analysis

It is undisputed that at the time defendant's blood was drawn and later analyzed, he had not been convicted of any of the qualifying offenses. Thus, the DNA Act did not authorize collection or analysis of his blood at that time. Moreover, the nonconsensual extraction of blood implicates the rights protected by the Fourth Amendment of the United States Constitution. (*Schmerber v. California* (1966) 384 U.S. 757, 767 [16 L.Ed.2d 908, 918].) However, the privacy rights of those who are incarcerated are significantly reduced (*Hudson v. Palmer* (1984) 468 U.S. 517, 530 [82 L.Ed.2d 393, 405]) with respect to their identities (*People v. King, supra,* 82 Cal.App.4th at pp. 1374-1375) and their bodies (*Bell v. Wolfish* (1979) 441 U.S. 520, 558 [60 L.Ed.2d 447, 481]) and, as discussed in Part B, collection of a prisoner's blood under the DNA Act does not per se violate a prisoner's Fourth Amendment rights. (*Alfaro v. Terhune, supra,* 98 Cal.App.4th at pp. 505-506; *People v. Adams, supra,* 115 Cal.App.4th at pp. 255-259.)

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. The purpose of the Fourth Amendment's

prohibition against unreasonable searches and seizures is to "'"safeguard the privacy and security of individuals against *arbitrary* invasions by government officials."'" (*People v. Reyes* (1998) 19 Cal.4th 743, 750.) Because the invasion is accomplished by the illegal search or seizure, exclusion of the evidence does not cure the violation and the government's use of evidence obtained as a result of that violation does not itself violate the Constitution. (*Pennsylvania Board of Probation v. Scott* (1998) 524 U.S. 357, 362 [141 L.Ed.2d 344, 351] (*Scott*).)

Rather, the exclusionary rule is a judicially created remedy designed to safeguard Fourth Amendment rights by deterring illegal searches and seizures. It is not a personal constitutional right of the party aggrieved. (*United States v. Calandra* (1974) 414 U.S. 338, 348 [38 L.Ed.2d 561, 571]; *Leon, supra*, 468 U.S. at p. 906 [82 L.Ed.2d at pp. 687-688].) Thus, the rule does not proscribe admission of illegally seized evidence in all proceedings or against all persons. (*Scott, supra*, 524 U.S. at p. 363 [141 L.Ed.2d at p. 351].) As the Supreme Court recently cautioned, "[s]uppression of evidence . . . has always been our last resort, not our first impulse." (*Hudson v. Michigan* (2006) __U.S.__ [165 L.Ed.2d 56, 64].)

The exclusionary rule is "applicable only where its deterrence benefits outweigh its 'substantial social costs.'" (*Scott, supra*, 524 U.S. at p. 363 [141 L.Ed.2d at p. 351].) In taking that measure, we first consider the value of deterrence, which is dependent upon the strength of the incentive to commit

the forbidden act. (*Hudson v. Michigan, supra*, ___ U.S. at p. ___ [165 L.Ed.2d at p. 67]; *Leon, supra*, 468 U.S. at p. 906 [82 L.Ed.2d at pp. 687-688].) The deterrent value is then weighed against the social costs of excluding reliable, probative evidence. Those costs include compromising the truth, finding process and allowing many guilty defendants who would otherwise be incarcerated to escape the consequences of their actions. (*Scott, supra*, 524 U.S. at p. 364 [141 L.Ed.2d at p. 352]; *Hudson v. Michigan, supra*, __U.S. at p. __ [165 L.Ed.2d at p. 64].) The court has been cautious when expanding the rule and has "'repeatedly emphasized that the rule's "costly toll" . . . presents a high obstacle for those urging [its] application.' [Citation]." (*Ibid.*)

The deterrence value of suppression is said to be outweighed when law enforcement officers have acted in good faith, their transgressions were minor (*Leon, supra*, 468 U.S. at pp. 907-908 [82 L.Ed.2d at pp. 688-689]), or the constitutional interests that were violated are not served by suppression of the evidence. (*Hudson v. Michigan, supra*, ___ U.S. at p. [165 L.Ed.2d at p. 65] [exclusionary rule inapplicable where knock-notice requirement violated]; *Scott, supra*, 524 U.S. at p. 364 [141 L.Ed.2d at p. 352] [exclusionary rule inapplicable in parole revocation hearings].)

Here, the deterrence value of suppressing the evidence is nil. First, there was no egregious police misconduct involving willful malfeasance. To the contrary, as the trial court found,

state and local officials were attempting to act in a responsible and conscientious manner in an effort to implement the mandates of a complex law while carrying out the daunting task of collecting and analyzing thousands of biological samples "as soon as administratively practicable . . . ." (Former § 296, subd. (b); Stats. 1998, ch. 696, § 2.)

Moreover, the definition of a qualifying offense has been expanded and simplified, thereby reducing the possibility of similar mistakes in the future. Effective November 3, 2004, the voters adopted Proposition 69, which expanded the definition of a qualifying offense to include *any felony*, whether committed by a juvenile or an adult and whether suffered by conviction or juvenile adjudication. (§ 296, subd. (a)(1), amended by Initiative Measure; Prop. 69, III.I.) Because the broad scope of this amendment 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 when the same search would be lawful under current law.

The deterrent value of suppression is also diminished by federal law, which sanctions noncompliance with federal standards for CODIS, the federal data bank that includes information on DNA profiles maintained by federal, state, and local criminal justice agencies. (42 U.S.C. § 14132(b)(3).) State access to CODIS is conditioned on prompt expungement from

the index of non-qualifying samples (42 U.S.C. § 14132(d)(2)(A)) and a person who knowingly discloses, obtains or uses an unauthorized sample is subject to criminal penalties. (42 U.S.C. § 14135e(c).)[15] Annual audit procedures further ensure compliance with CODIS requirements by participating laboratories. (42 U.S.C. § 14132(b)(2)(B).)

Last, suppression of the evidence will not serve the statutory purpose of former section 296. As originally enacted, the scope of the qualifying offenses was limited to specified violent felonies. (Former § 296, subd. (a); Stats. 1998, ch. 696, § 2.) The purpose of this limitation was to ease the administrative burden on those who were responsible for implementing the Act, not to benefit individual offenders. Thus, former section 297, subdivision (e) states, "[t]he limitation on the types of offenses set forth in subdivision (a) of Section 296 as subject to the collection and testing procedures of this chapter is for the purpose of facilitating the administration of this chapter. The detention, arrest,

---

[15] The Director of the California DNA Data Bank Laboratory testified that in order for law enforcement agencies in a state to participate in CODIS and have access to that data base, the state must sign a memorandum of agreement and a designated official must be appointed to administer the state database. As Director, Kenneth Konzak is responsible for ensuring that all participants use correct procedures and comply with CODIS requirements, and is required to remove a laboratory from the system if its data is not of sufficient quality or otherwise fails to meet CODIS standards. Failure to comply with CODIS standards may in extreme cases result in loss of the right to participate in the national index.

wardship, or conviction of a person based upon a data bank match or data base information is not invalidated if it is later determined that the specimens, samples, or print impressions were obtained or placed in a data bank or data base by mistake." (Stats. 1998, ch. 696, § 2.)

Consistent with this Legislative pronouncement, Kenneth Konzak, Director of the California DNA Data Bank Laboratory, testified that the limitation on the type of offenses subject to collection was to accommodate the DOJ's physical limitations in processing samples. That is because in 1999, DOJ's laboratory was not capable of analyzing the greater number of samples that would have come from an all-felon data base law. However, once the new program was established and operational, the Legislature broadened the list of qualifying offenses. (See former § 296, subd. (a)(1)(J); Stats. 2001, ch. 906, § 1.)

In sum, we find the officials who were responsible for mistakenly collecting defendant's blood did so as a good faith effort to comply with the new law, there are no incentives to collect blood samples beyond the scope of the statute, and the purpose and interests protected by the Act will not be served by suppression. Suppressing the evidence would achieve no deterrent value under these circumstances although it would have significant social costs. (*Hudson v. Michigan, supra,* ___ U.S. at p. ____ [165 L.Ed.2d at p 65].) Accordingly, we find the trial court properly denied defendant's motion to suppress the evidence.

III.
Evidence of Statistical Methodology For Determining DNA Probability Was Properly Admitted Under *Kelly/Frye*

Statistical evidence was introduced at trial to explain the rarity of the DNA match between the evidentiary sample and defendant's blood sample taken upon his arrest. The statistical calculation was arrived at by applying the modified product rule. (MPR.)

Defendant contends the DNA evidence was erroneously admitted under *Kelly/Frye*,[16] because there is no generally accepted statistical method for calculating the probability of a DNA match when a suspect is identified by means of a "cold hit."[17] A cold hit is a match obtained by comparing the DNA profile derived from an evidentiary sample with the DNA profile of an individual included in an offender data base. Defendant asserts there is a deep division among the experts on how to calculate the chance that a cold hit match is coincidental. Respondent contends the MPR is admissible under *Kelly/Frye* because it is generally accepted in the relevant scientific

---

[16] *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*) and *Frye v. United States* (D.C.Cir. 1923) 293 F. 1013, 1014 (*Frye*).

[17] This issue is presently before the California Supreme Court in *People v. Nelson* (2006) 142 Cal.App.4th 696, review granted November 15, 2006, a Sacramento case, which incorporated by judicial notice the record in this case and was decided adversely to the defendant.

community to calculate the statistical frequency of a match between two DNA profiles.

We agree with respondent and hold that the evidence of the MPR and its application in this case were properly admitted.

A. General Legal Principles

The *Kelly/Frye* test for determining the admissibility of evidence based upon a new scientific technique requires the proponent of the evidence to establish (1) the method is reliable (2) the witness furnishing the testimony is qualified, and (3) the correct scientific procedures were used in the particular case at hand. (*Kelly, supra,* 17 Cal.4th at p. 30.)

On a first prong *Kelly/Frye* challenge, reliability is established by showing the technique is "'sufficiently established to have gained general acceptance in the particular field in which it belongs.'" (*Kelly, supra,* 17 Cal.3d at p. 30, italics omitted; *Frye, supra,* 293 F. at p. 1014.) The test does not require unanimity of views in the scientific community. "'"General acceptance" under *Kelly* means a consensus drawn from a typical cross-section of the relevant, qualified scientific community.' [Citation.]" (*People v. Soto* (1999) 21 Cal.4th 512, 519.)

The resolution of each of the other *Kelly-Frye* prongs is reviewed under the abuse of discretion standard, giving great deference to the determinations of the trial court. (*People v. Venegas* (1998) 18 Cal.4th 47, 91.)

B. Overview of DNA Analysis

Almost all cells in the human body contain DNA that underlies each person's genetic makeup. (*People v. Soto, supra,* 21 Cal.4th at p. 519.) A person's individual genetic traits are determined by the sequence of base pairs of certain chemical components in his or her DNA molecules and except for identical twins, no two human beings have identical sequences of all base pairs. (*Id.* at p. 520.)

In most portions of DNA, the sequence of base pairs that are responsible for shared human traits is the same for everyone. In other regions however, the sequence of base pairs varies from person to person, resulting in individual traits. (*People v. Barney* (1992) 8 Cal.App.4th 798, 805-806.) In addition to the DNA sequences that determine a person's genetic traits, human DNA also includes sequences that serve no known genetic function and are more likely to be variable or polymorphic. (*People v. Soto, supra,* 21 Cal.4th at p. 520.) Each variation in a base-pair sequence is called an allele. These variations in the non-functional base-pair sequences at the polymorphic DNA locations (loci) enable forensic scientists to identify individuals. (*Id.* at p. 521.)

DNA analysis involves a three-step process. First, the characteristics of a suspect's genetic structure are identified. This structure is referred to as the DNA profile. Second, the profile is compared with the DNA profile developed from a

biological sample taken from a crime scene.[18] If the two profiles match, they are subjected to a third step, which is a statistical analysis to determine the frequency with which the matching profile occurs in the general population. (*People v. Barney, supra,* 8 Cal.App.4th at p. 805.)

Defendant's challenge is to the third step of the DNA analysis, the statistical calculation performed to determine the probability that a person chosen at random from the relevant population would have a DNA profile matching that of the evidentiary sample. That probability is usually expressed as a fraction -- i.e., the probability that one person out of 100,000 people would match the DNA profile of the evidentiary sample. (*People v. Soto, supra*, 21 Cal.4th at p. 523.)

To determine the statistical probability, scientists calculate how frequently each pair of bands produced by one probe is found in a target population. (*Barney, supra,* 8 Cal.App.4th at p. 809.) The calculation is made by using one or more population data bases containing measurements of the DNA fragments of several hundred persons at each of the identified loci. The samples come from measurements derived from varied sources including blood banks, hospitals, clinics, genetics

---

[18] While a nonmatch of alleles between the DNA profile of a crime scene sample and that of a suspect conclusively eliminates the suspect as the source of the crime scene sample, each match between alleles from the suspect raises the possibility that he is the perpetrator. (*People v. Soto, supra*, 21 Cal.4th at pp. 520-521.)

laboratories, and law enforcement personnel. (*People v. Soto, supra*, 21 Cal.4th at p. 523.)

The various methods for developing and comparing two DNA profiles have been approved as generally accepted under *Kelly/Frye*. (*People v. Axell* (1991) 235 Cal.App.3d 836, 860; *People v. Hill* (2001) 89 Cal.App.4th 48, 57-58.) Likewise, there is general acceptance in the scientific community for using the product rule to determine the statistical probability of a DNA match. (*People v. Venegas, supra,* 18 Cal.4th at pp. 84-90 [MPR]; *People v. Soto, supra*, 21 Cal.4th at p. 541 [unmodified product rule].)[19]

The MPR is applied first to determine the allelic frequency at each locus, and then to determine the alleles' combined frequency at all loci. (*People v. Soto, supra*, 21 Cal.4th at p. 525.) "The 'frequency' of one or more alleles is the statistical probability that it or they will be found in the DNA of a randomly selected member of the population from which the database is derived." (*Id.* at p. 525, fn. 15.)

With these principles in mind, we turn to the evidence presented at the hearing and at trial.

---

[19] The MPR, which is used by all forensic laboratories, makes a reasonable adjustment for population substructure. The modification acts to select random match probability figures most favorable to the accused from the scientifically based range of probabilities. (*Soto, supra*, 21 Cal.4th at p. 515.)

C. Factual and Procedural Background

Defendant filed a pretrial motion to exclude all DNA evidence. While he conceded that DNA testing methodology passed muster under *Kelly, supra*, 17 Cal.3d 24, he argued that application of the rule to a cold hit match has never been endorsed by an appellate court and is unreliable.

A lengthy evidentiary hearing was conducted at which five expert witnesses testified, three for the prosecution and two for the defense. Dr. Ranajit Chakraborty, Director of the Center for Genome Information at the University of Cincinnati College of Medicine and a renowned expert in human population genetics (see *People v. Soto, supra*, 21 Cal.4th at p. 527, fn. 20) testified that the MPR was used in this case to calculate the statistical frequency of the DNA match between the evidentiary sample and the blood sample taken from defendant.

According to Dr. Chakraborty, forensic laboratories worldwide agree that the random match probability statistic, which is calculated by using the MPR, is the appropriate method for explaining to the jury the rarity of a genetic profile from a crime scene sample matched to the defendant's genetic profile. He found nothing new or novel about using the MPR in cold hit cases. This is because when the rarity of a DNA profile is estimated, the common practice is to calculate the statistical probability based upon the *evidentiary* profile and the question is how rare is that profile. The MPR answers that question by calculating the frequency of the evidentiary profile in the

human population after dividing the population into various racial and ethnic groups. Because the rarity of the evidentiary profile does not change, it does not matter how the matching profile is found, whether by using a database search resulting in a cold hit or by using traditional methods of investigation that lead to a suspect who then provides a biological sample for DNA analysis.

Nor did Dr. Chakraborty see any controversy in the scientific literature over the use of the MPR in cold hit cases. He explained that the reason for the alleged confusion stems from the failure of some scientists to identify the question being asked when discussing statistics for cold hit cases. Two questions may be asked after a database search. The first asks "what is the rarity of the DNA profile . . . [or] what frequency is expected to occur in the [general] population." That question is answered by the MPR, which gives the random match probability. A second question asks "what is the probability of finding such a DNA profile in the database searched." The answer to that question is determined by multiplying the random match probability by the size of the relevant database. The fact different questions produce different answers does not indicate there is a controversy concerning the validity of one of the answers.

Dr. Chakraborty's testimony was confirmed by the three other experts who testified that the common practice is to use the random match probability calculation to determine the rarity

of the evidentiary sample. This practice is used whether or not the suspect was identified by a database search.

The defense experts held the view that the random match probability test should not be used where a cold hit is obtained through a convicted offender database. Dr. Dan Krane, an associate professor of biological science at Wright State University testified that there is a fundamental difference between a cold hit case and an ordinary probable cause case. This is because it is reasonable to assume there would be many related individuals within a convicted offender database and that assumption would be incongruous with the assumptions necessary for calculating random match probability.

Dr. Laurence Mueller, a population geneticist and evolutionary biologist who frequently appears as a defense witness at *Kelly* hearings (see e.g. *People v. Soto*, *supra*, 21 Cal.4th at p. 529), testified there is no consensus among scientists regarding the proper statistics to employ following a cold hit match. Although the MPR directly addresses the factual scenario in a probable cause case, it does not do so in a cold hit case because the cold hit suspect is chosen out of a limited group rather than from a random selection of the general population.[20] Since the statistic calculates the rarity of a

---

[20] Dr. Mueller also noted that the chance of finding a match in a cold hit case increases as the group size increases. However, under this theory, a suspect would benefit from a cold

random match, it is inapplicable to determine the frequency of a match based upon a limited database. Dr. Mueller concluded the only relevant question in a cold hit case is how efficient the investigation was and the MPR does not assist in answering that question.[21]

The trial court denied defendant's motion concluding there is general acceptance in the scientific community for using the random match probability test to calculate the rarity of a DNA profile in a cold hit case. The court found that a clear majority of scientists in the field both in numbers, distinction, and qualification, favor the use of that test. The court rejected the views of the two defense experts, finding they are of the old school and their position is not "one of substantial scholarly importance."

D. Analysis

In *People v. Johnson, supra,* 139 Cal.App.4th 1135, the defendant raised the same claim raised by defendant herein. There, as in this case, a cold hit match was used to identify the defendant as a possible suspect. Independent DNA analysis on a new reference sample was conducted subsequent to the cold

---

hit match because such matches are found from limited databases that are vastly smaller than the general population.

[21] The purpose of the *Kelly/Frye* test is to ensure the scientific technique is reliable. By contrast, relevancy is a legal question to be determined by the court (Evid. Code, §§ 210 and 350) and as the Supreme Court has found, the statistics for a range of groups is surely relevant. (*People v. Wilson* (2006) 38 Cal.4th 1237, 1245.)

hit and at trial, the prosecution relied on scientifically-accepted DNA analysis to establish defendant's identity as the perpetrator. (*Id.* at p. 1143.) The court rejected the defendant's argument on two grounds; (1) no new methodology is involved when using the product rule in cold hit cases (*id.* at p. 1155) and (2) a cold hit from a DNA database is not subject to the *Kelly/Frye* test of admissibility when used merely as an investigative tool to identify a possible suspect. (*Id.* at p. 1141.)

We agree with the *Johnson* court on both points and conclude defendant has failed to establish that application of the MPR constituted error. First, as the court in *Johnson* concluded and the trial court found below, application of the MPR to a cold hit match satisfies *Kelly/Frye* because the majority of the relevant scientific community, both in numbers, distinction, and qualifications, support the use of the rule. The existence of a few dissenters does not negate the clear consensus of the majority. (*People v. Guerra* (1984) 37 Cal.3d 385, 418; *People v. Hedgecock* (1990) 51 Cal.3d 395, 409.) Indeed, the reason for this consensus is apparent. As Dr. Chakraborty testified, the MPR is applied to the DNA profile of the *evidentiary* sample, not to the DNA profile of the data base entry.

Second, the statistical calculation evidence admitted on the question of guilt was not based upon the cold hit match but rather on a blood sample obtained from defendant upon his arrest. It was from this new blood sample that Jill Spriggs

conducted a full three-step DNA analysis, comparing the DNA profile of the evidentiary sample with the DNA profile from defendant's new blood sample. While evidence of the cold hit match was introduced into evidence, it was offered merely to establish the investigative lead and did not serve as the basis for the statistical probability evidence that was introduced at trial. For these reasons, we reject defendant's claim.

IV.
DNA Statistical Estimates
For a Range of Ethnic and Racial Databases

Defendant contended in his opening brief that the trial court erred when it admitted statistical evidence relating to three major ethnic groups because such evidence lowers the prosecution's burden of proof. In his reply brief, he concedes that *People v. Wilson, supra,* 38 Cal.4th 1237, which was decided after he filed his opening brief, resolves this question against him but asks for a ruling to preserve the question for federal review. As defendant recognizes, we are bound by the decision in *Wilson* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455) and therefore reject his claim of error.

When determining the significance of a genetic match between crime scene blood and defendant's blood, the MPR discussed in Part III calculates the frequency or odds that a random person from the relevant population would have a similar match.

In *Wilson, supra,* 38 Cal.4th 1237, the court considered whether the frequency of such a match may be calculated using

different racial and ethnic groups. (*Id.* at p. 1239.) The court explained that because the odds of a DNA match vary with different racial and ethnic groups, forensic scientists maintain separate databases for different population groups and separately calculate the odds for each group. The Supreme Court held that "'[w]hen the perpetrator's race is unknown, the frequencies with which the matched profile occurs in various racial groups to which the perpetrator *might* belong are relevant for the purpose of ascertaining the rarity of the profile.'" (*Id.* at p. 1240.)

In the case at bench, the statistical probability of the DNA match was calculated using three different racial or ethnic groups, namely African-American, Caucasian, and Hispanic. This was proper under *Wilson* because the victim was unable to definitively identify the race of her assailant. Although she described him as a black male adult who "sounded black," she told Detective Willover the assailant repeatedly told her he was Mexican or Chicano and while she thought he was black, he could have been either a dark Mexican or a light skinned black man. Accordingly, we find the evidence was properly admitted under *Wilson*.

V.
Imposition of the Upper Term
Under *Blakely* Was Proper

Relying on *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*), *Blakely, supra,* 542 U.S. 296 [159 L.Ed.2d 403], and *Cunningham v. California* (2007) 549 U.S. __

[166 L.Ed.2d 856] (*Cunningham*)], defendant argues that his rights to due process and a jury trial were violated when the trial court imposed the upper term of imprisonment on each count and each enhancement based upon facts not admitted or found by the jury.

Because respondent filed his brief prior to the decision in *Cunningham*, he relies on *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*) as controlling authority. (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455.) He also argues that *Apprendi* and its progeny do not require resentencing because the trial court imposed the upper term based upon defendant's recidivism, a factor not implicated by that line of cases. Respondent does not address the separate question relating to imposition of the upper term of imprisonment on the enhancements.

We hold that the trial court properly imposed the upper term for the five convictions and the enhancements.

A. Procedural Background

Defendant was convicted of five sexual assault offenses punishable by imprisonment in state prison for three, six, or eight years (§§ 264, 288a, subd. (c)(2), 289, subd. (a)(1)) and the jury found true the enhancement allegation that he used a deadly weapon in the commission of each of those offenses. The use of a weapon is punishable by an additional three, four, or five year term. (Former § 12022.3, subd. (a), Stats. 1993, ch. 299, § 2, p. 2047.)

The trial court imposed the upper eight-year term on each count and the upper five-year term for each use enhancement and ordered that each count and each enhancement run consecutively. (Former § 12022.3, subd. (a); Stats. 1993, ch. 299, § 2, p. 2047.)[22]

Before imposing the upper term of imprisonment on each count, the trial court recounted defendant's criminal history and found he had "numerous violations of the law going back to juvenile days. . . . So we have evidence throughout that his crimes are repetitive, his crimes are numerous, and they are of increasing seriousness. And throughout this period of course on many of these crimes he has been on probation and continues to commit crime, and of course he was on parole in '98 when he went back to his activities."

The reason given by the court for imposing the upper term on the use enhancement was the victim's vulnerability and the defendant's pattern of violent conduct which the court found indicated he is a serious danger to society. The court concluded by stating it had found more than adequate aggravating factors to justify imposition of the upper term as to each count and each use enhancement.

---

[22] Defendant does not challenge imposition of consecutive sentences.

B. Analysis

Construing the Sixth and Fourteenth Amendments to the United States Constitution, the United States Supreme Court held in *Apprendi, supra,* 530 U.S. 466 [147 L.Ed.2d 435] that "[o]ther than the fact of a *prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490 [147 L.Ed.2d at p. 455], italics added.) Under this rule, the "statutory maximum" is the maximum sentence the trial court may impose based solely on the facts reflected in the jury verdict or admitted by the defendant. (*Blakely, supra,* 542 U.S. at p. 303 [159 L.Ed.2d at p. 413.)

In selecting the term of imprisonment, the California Determinate Sentencing Law (DSL) requires the trial court to "order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (§ 1170, subd. (b).) In *Black I, supra,* 35 Cal.4th 1238, the California Supreme Court held that "the upper term is the 'statutory maximum' and a trial court's imposition of an upper term sentence does not violate a defendant's right to a jury trial under the principles set forth in *Apprendi*, *Blakely*, and *Booker*." (*Id.* at p. 1254.)[23]

---

[23] *United States v. Booker* (2005) 543 U.S. 220 [160 L.Ed.2d 621].

The United States Supreme Court recently rejected the holding in *Black I* finding that because an upper term sentence under California's DSL may be imposed *only* when the trial judge finds an aggravating circumstance (see former § 1170, subd. (b))[24] it is the middle term, not the upper term, that is the relevant statutory maximum under *Apprendi* and *Blakely*. (*Cunningham, supra*, 549 U.S. at p. ___ [166 L.Ed.2d at p. 873].) The high court concluded that the DSL violates *Apprendi's* bright-line rule "[b]ecause circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt . . . ." (*Ibid.*)

Nevertheless, imposition of the upper term in this case does not implicate *Apprendi* and its progeny because the trial court found defendant had numerous prior convictions, and as stated, the fact of a prior conviction is exempt from the rule in *Apprendi*. (*Apprendi, supra*, 530 U.S. at p. 490 [147 L.Ed.2d at p. 455].)

That finding alone removes this case from the concerns stated in *Apprendi* and *Blakely* because the California Supreme Court has recently held that, "if one aggravating circumstance has been established in accordance with the constitutional requirements set forth in *Blakely*, the defendant is not 'legally

---

[24] In response to *Cunningham, supra*, the Legislature amended section 1170, subdivision (b), effective March 30, 2007. (Stats. 2007, ch. 3, § 2.)

entitled' to the middle term sentence, and the upper term sentence is the 'statutory maximum.'" (*People v. Black* (2007) 41 Cal.4th 799, 813, fn. omitted. (*Black II*).) Since defendant's criminal history established at least one aggravating circumstance that independently satisfied Sixth Amendment requirements and rendered him eligible for the upper term, imposition of the upper term did not violate his Sixth Amendment right to jury trial. (*Id.* at pp. 818-820.)

Defendant also challenges the trial court's exercise of discretion by arguing that prior to imposing sentence, the court discussed the underlying facts of the charged offenses, as well as the facts of the uncharged offenses[25] and the offense for which a mistrial was declared, and concluded defendant was a sophisticated serial rapist.

It is true the trial court made these remarks. It is also clear from the record that the trial court recognized it could not punish defendant for crimes for which he was not convicted nor could it sentence him based upon speculation. Because the trial court's stated reasons were sufficient and properly based upon defendant's lengthy criminal history, all other statements

---

[25] The prosecution introduced evidence that defendant committed sexual assaults against four other young women during the period between October 20, 1993 and December 7, 1994, and on November 17, 1998, was convicted of prowling in a case involving a 24-year-old.)

made by the court were superfluous and harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Nor did imposition of the upper term on the use enhancements violate the proscription of *Apprendi* and *Blakely*. Sentence on the use enhancements was imposed under former section 12022.3, the version in effect when defendant committed the charged offenses. (See Stats. 1993, ch. 299, § 2, p. 2047.) That version states as follows: "For each violation or attempted violation of Section 261, 262, 264.1, 286, 288, 288a, or 289, and in addition to the sentence provided, any person shall receive the following: [¶] (a) *A three-, four-, or five-year enhancement if the person uses a firearm or a deadly weapon in the commission of the violation.* [¶] (b) A one-, two-, or three-year enhancement if the person is armed with a firearm or a deadly weapon. The court shall order the middle term unless there are circumstances in aggravation or mitigation. The court shall state the reasons for its enhancement choice on the record at the time of the sentence."

In sum, under the statute, the trial court has discretion to impose any one of the three stated terms of imprisonment when the defendant is found to have *used* a deadly weapon, as the jury found here. The statute does not specify any presumptive term of imprisonment that sets the relevant statutory maximum within the meaning of *Blakely*. By contrast, when the defendant is found to have been *armed* with a deadly weapon, the trial court's task is similar to that under the DSL. It must impose the

middle term *unless* it finds circumstances in aggravation or mitigation, making the middle term rather than the upper term the relevant statutory maximum. (*Cunningham, supra*, ____ U.S. at p. ____ [166 L.Ed.2d at p. 873].)

Because the trial court imposed the upper term under former section 12202.3, subdivision (a) for the use of a deadly weapon, it had discretion to impose the upper term without having to make any factual findings to support its sentencing choice. Since *Apprendi* and *Blakely* do not prohibit that exercise of discretion, we find no error and reject defendant's claim.

DISPOSITION

The superior court is directed to correct the abstract of judgment to reflect that defendant was convicted of violating Penal Code section 288a, subdivision (c)(2) and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment of conviction is affirmed.

BLEASE, Acting P. J.

We concur:

HULL, J.

BUTZ, J.

APPENDIX B

(Order Denying Rehearing (November 7, 2007), C044703)

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

THE PEOPLE,
Plaintiff and Respondent,
v.
PAUL EUGENE ROBINSON,
Defendant and Appellant.

C044703
Sacramento County
No. 00F06871

BY THE COURT:

Appellant's petition for rehearing is denied.

Dated: November 07, 2007

BLEASE, Acting P.J.

---

cc: See Mailing List

PROOF OF SERVICE BY MAIL

State of California)
) ss.
County of Los Angeles)

I am employed in the County aforesaid; I am over the age of eighteen (18) years and not a party to the within action; my business address is PMB 834, 6520 Platt Avenue, West Hills, CA 91307-3218.

On November 28, 2007, I served the within Petition for Review, etc., 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:

Office of the Clerk (Original + 13 copies)
California Supreme Court
300 So. Spring Street
Los Angeles, CA 90013-1233

Clerk, Court of Appeal
Third Appellate District
Library and Courts Building
914 Capitol Mall, Room 100
Sacramento, CA 95814

Enid Camps, Supervising Deputy
California Attorney General
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-7004

Central California Appellate Program
2407 "J" Street
Suite 301
Sacramento, CA 95816-4806

Clerk, Hon. Peter Mering
Sacramento County Superior Court
720 9th Street
Sacramento, CA 95814

Anne Schubert, Deputy
Sacramento County District Attorney
901 G Street
Sacramento, CA 95814

David Lynch, Deputy
Sacramento County Public Defender
700 "H" Street
Suite 0270
Sacramento, CA 95814

Mr. Paul E. Robinson, V-01865
2-11-240-Up
C.S.P. Solano
P.O. Box 4000
Vacaville, CA 95696

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice these would be deposited with the U.S. Postal service on that same day with postage thereon fully prepaid at Summerlin, Nevada in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Proof of Service was executed at Summerlin, Nevada on November 28, 2007.

Cara DeVito