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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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SACRAMENTO COUNTY SUPERIOR COURT, No. 06F06871
THE HONORABLE PETER MERING, JUDGE PRESIDING

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

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REPLY BRIEF ON THE MERITS

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TOPICAL INDEX

Page

TABLE OF AUTHORITIES v

INTRODUCTION 1

ARGUMENT 3

I. **APPELLANT'S CONVICTIONS OF ALL FIVE COUNTS ARE VOID AND MUST BE VACATED AND DISMISSED, AS THE ACTION AGAINST HIM ON THOSE CHARGES WAS NOT TIMELY COMMENCED; SPEAKING IN THE VOICE OF OUR LEGISLATURE, THE CALIFORNIA LAW REVISION COMMISSION HAS ANNOUNCED THAT "ISSUANCE OF A 'DOE' WARRANT ... DOES NOT SATISFY THE STATUTE OF LIMITATIONS," AND AS A "JOHN DOE" WARRANT WAS THE ONLY WAY THE PEOPLE ATTEMPTED TO COMMENCE THIS ACTION, THE STATUTE OF LIMITATIONS RAN BEFORE APPELLANT WAS ARRESTED** ... 3

A. The People Failed To Address This Clear Directive By the Law Revision Commission 3

B. In Light Of the Law Revision Commission's Comment, For Purposes Of Satisfying A Statute Of Limitations It Is Irrelevant That California Law Allows "John Doe" Arrest Warrants To Issue When A Limitations Period Is **Not** About To Expire 5

C. The **Dabney, Danley** and **Davis** Cases Are Irrelevant, As Neither Wisconsin Nor Ohio Statutory Schemes Contain the Legislative Directive That "Issuance of a "Doe' Warrant ... Does Not Satisfy the Statute of Limitation," As California's Statutory Scheme Does 7

D. It Is Irrelevant That "Doe" Complaints Are Used To Commence **Civil** Actions, As Defendants In Criminal Cases Enjoy Additional Constitutional Protections 9

E. The "John Doe" Warrant Issued Here Simply Was Not Executable Until A "Cold Hit" Was Made; Thus It Unconstitutionally Extended The Statute of Limitations Indefinitely 11

F. The Legislative Intent Is To Narrow the Class Of Cases In Which the Statute Of Limitations May Be Extended By "John Doe" Warrants, Not Expand It 14

G. Conclusion 17

II. **FOR ALL THE REASONS SET FORTH BELOW, INCLUDING LEGISLATIVE INTENT AS DEMONSTRATED BY THE CALIFORNIA LEGISLATURE AND THE HISTORICAL IMPORTANCE OF THE FOURTH AMENDMENT, THIS COURT SHOULD JEALOUSLY GUARD STATE AND FEDERAL CONSTITUTIONAL PROTECTIONS EXTENDED TO CRIMINAL DEFENDANTS VIA THE PARTICULARITY REQUIREMENT FOR ARREST WARRANTS, AND REJECT THE "DNA WARRANT" EMPLOYED HERE** 18

A. It Takes Much More Than A "Reasonable Effort" To "Match" An Unknown Suspect's DNA Profile To A DNA Profile In A Known Offender Databank; And As DNA Profiles Are Not Truly "Unique," There Remains A Possibility That An Innocent Person Might Be Arrested By Mistake 19

B. A DNA Profile Requires Too Much Extrinsic Matter To Qualify As A Description Of An Unknown Suspect With "Particularity" 22

C. The Fact That Ohio and Wisconsin Permit "DNA Warrants" Is Not Dispositive, As Neither Appears To Have the Same Statutory Scheme As California For Defining "Identity" 24

D. It Is Irrelevant That Statutory and Decisional Law Recognize That DNA Identifies Individuals To A High Degree Of Certainty 26

E. The Prosecution In This Case Should Not Be Permitted To Obviate the Fourth Amendment Or Our State Constitution 27

//

//

//

III. **THE PARTIES AGREE THAT EXPUNGEMENT OF BLOOD SAMPLES MISTAKENLY COLLECTED UNDER THE DNA ACT IS ONE OF THE PROPER REMEDIES TO APPLY FOLLOWING AN ERRONEOUS COLLECTION, BUT APPELLANT CONTINUES TO MAINTAIN THAT REVERSAL OF HIS CONVICTIONS ALSO IS REQUIRED** ... 30

A. Section 299 Does Not Provide That the "Sole" Remedy for an Unlawful Collection Is Expungement of the Sample ... 31

B. Although the Statute Purports To Excuse Any "Mistake" In the Collection Of DNA Blood Samples, Our Legislature Cannot Legislate In A Way That Is Contrary To the Fourth Amendment Without Violating the Due Process Clause of the Fifth Amendment, Applicable to the States Through the Fourteenth Amendment ... 31

C. Appellant Did Not Forfeit His Fourth Or Fourteenth Amendment Rights Simply Because He Was In Custody When the Disputed Blood Sample Involuntarily Was Extracted From Him ... 36

D. It Is Irrelevant That Appellant Was Incarcerated (In Part), On A Parole Hold When the 1999 Sample Unlawfully Was Extracted ... 37

E. It Is Irrelevant That A DNA Collection Statute Of This Kind Has Never Been Held To Be Unconstitutional ... 41

F. Applying the Exclusionary Rule To Improper and Unlawful Collections Would Have An Appreciable and Necessary Deterrent Effect ... 42

G. Neither "Inevitable Discovery" Nor "Independent Source" Doctrines Rescue the Unlawful Seizure Here ... 44

H. Appellant Had No Say In Whether His Deepest Level Of Privacy Could Be Violated By An Unlawful Extraction Of Biological Material Intended For Genetic Testing; Accordingly, the Exclusionary Rule Is the Most Appropriate Remedy For the Constitutional Violation That Occurred Here ... 47

CONCLUSION 49

BRIEF LENGTH AND FORMAT CERTIFICATION 49

TABLE OF AUTHORITIES

FEDERAL CASES

Ferguson v. Charleston (2001)
532 U.S. 67 [121 S.Ct. 1281 34

Katz v. United States (1967)
389 U.S. 347 [88 S.Ct. 507] 28

Ker v. California (1963)
374 U.S. 23 [83 S.Ct. 1623] 32, 33

Malloy v. Hogan (1964)
378 U.S. 1 [84 S.Ct. 1489] 22

Mapp v. Ohio (1961)
367 U.S. 643 [81 S.Ct. 1684] 32, 33

Marron v. United States (1927)
275 U.S. 192 [48 S.Ct. 74] 29

Murray v. United States (1988)
487 U.S. 533 [108 S.Ct. 2529] 45, 47

Oregon v. Haas (1978)
420 U.S. 714 [95 S.Ct. 1215] 34

Sims v. Georgia (1967)
385 U.S. 538 [87 S.Ct. 639] 34

Skinner v. Railway Labor Executives' Ass'n (1989)
489 U.S. 602 [109 S.Ct. 1402] 34, 48

United States v. DiRe (1948)
322 U.S. 581 [68 S.Ct. 222 29

United States v. Duran-Orozco (9th Cir. 1999)
192 F.3d 1277 47

United States v. Marion (1971)
404 U.S. 307 [92 S.Ct. 455] 11

United States v. Mitchell (3rd Cir. 2004)
365 F.3d 215 13

United States v. Shaiber (9th Cir. 1990)
920 F.2d 1425 48

Warden v. Hayden (1967)
387 U.S. 294 [87 S.Ct. 1642] 28

Winston v. Lee (1985)
470 U.S. 753 [105 S.Ct. 1611] 36, 39, 48

Wolf v. Colorado (1949)
338 U.S. 25 [69 S.Ct. 1359] 32

Wong Sun v. United States (1963)
371 U.S. 471 [83 S.Ct. 407] 48

STATE CASES

Commission On Peace Officer Standards
and Training v. Superior Court (2007)
42 Cal.4th 278 16

General Motors Corp. v. Superior Court (1996)
48 Cal.App.4th 580 9

In re Demillo (1975)
14 Cal.3d 598 10

In re Schaefer (1933)
134 Cal.App. 498 [25 P.2d 490 28

People v. Adamson (1946)
27 Cal.2d 478, aff'd on other grounds,
Adamson v. California (1947)
332 U.S. 46 [67 S.Ct. 1972];
overruled on other grounds,
Malloy v. Hogan (1964)
378 U.S. 1 [84 S.Ct. 1489] 22

People v. Andrews (1989)
49 Cal.3d 200 13

People v. Axell (1991)
235 Cal.App.3d 836 13

People v. Brown (2001)
91 Cal.4th 623 13

People v. Carson (1970)
4 Cal.App.3d 782 4

People v. Diaz (1992)
3 Cal.4th 495 34

People v. Fletcher (1996)
13 Cal.4th 451. 34

People v. Gardner (1969)
71 Cal.2d 843 13

People v. Gonzales (1965)
235 Cal.App.2d Supp. 887 4

People v. Johnson (2006)
145 Cal.App.4th 895 16

People v. Montoya (1942)
255 Cal.App.2d 137 23

People v. Pizarro (1992)
10 Cal.4th 57 13

People v. Sanders (2003)
31 Cal.4th 318 .... 39, 41

People v. Sapp (2003)
31 Cal.4th 240 27

People v. Superior Court (Tench) (1978)
80 Cal.3d 665 45

People v. Superior Court (Zamudio) (2000)
23 Cal.4th 183 16

People v. Swinney (1975)
46 Cal.App.3d 332 10

State v. Dabney (Wis.App. 2003) 663 N.W.2d 366 .... 7, 8, 24, 26

State v. Danley (Ohio Ct.Com.Pleas 2006) 853 N.E.2d 1224 .... 7, 8, 24, 26

State v. Davis (Wis.App.2005) 698 N.W.2d 823 .... 7, 8, 24, 26

CONSTITUTIONS

U.S Const., Amend. IV .... *passim*

U.S Const., Amend. XIV .... *passim*

FEDERAL STATUTES

42 U.S.C. section 14132 44

18 U.S.C. section 1028 26

STATE STATUTES

Evid. Code, § 351.1 27

Evid. Code, § 795 27

(Former) Pen. Code, § 296.1. 38

(Former) Pen. Code, § 297. .... 31, 37

Pen. Code, § 295 *et seq* 1, 3

Pen. Code, § 296.1 38

Pen. Code, § 297. 30

Pen. Code, § 298 . ... 30, 32

Pen. Code, § 298.1 48

Pen. Code, § 299. .... 30, 31

Pen. Code, § 530.5 25

Pen. Code, § 530.55. 25

Pen. Code, § 803 .... 14, 15, 16

Pen. Code, § 804 .... 12, 24

Pen. Code, § 815 .... 5, 7, 9

Pen. Code, § 927 35

RULES OF COURT

California Rules of Court, rule 8.520(c) 49

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REPLY BRIEF ON THE MERITS

INTRODUCTION

In his Opening Brief on the Merits (hereinafter "AOB") appellant Paul Eugene Robinson demonstrated that the issuance of a "John Doe" complaint and arrest warrant cannot timely commence a criminal action, and thereby satisfy a statute of limitations; that an unknown suspect's DNA profile cannot satisfy state and federal constitutional "particularity" requirements for an arrest warrant; and that the only meaningful remedy for an unlawful collection of genetic material under color of Penal Code section 295 *et seq.* [illegible] suppression of the material collected and the fruits thereof.

In its opposition (hereinafter "RB"), the respondent State disagreed, contending that an arrest warrant which describes a suspect by his forensic DNA identification meets all state and federal constitutional standards and thus satisfies a statute of limitations; that use of a suspect's statistically rare DNA profile

as a means of describing, identifying or distinguishing him satisfies the particularity requirement for an arrest warrant; and that the sole remedy for any mistaken collection of DNA sample for the state databank is expungement of those samples.

For the following reasons the respondent ultimately is incorrect, and appellant's convictions in this case must be reversed.

ARGUMENT

I.

APPELLANT'S CONVICTIONS OF ALL FIVE COUNTS ARE VOID, AND MUST BE VACATED AND DISMISSED, AS THE ACTION AGAINST HIM ON THOSE CHARGES WAS NOT TIMELY COMMENCED; SPEAKING IN THE VOICE OF OUR LEGISLATURE, THE CALIFORNIA LAW REVISION COMMISSION HAS ANNOUNCED THAT "ISSUANCE OF A 'DOE' WARRANT ... DOES NOT SATISFY THE STATUTE OF LIMITATIONS," AND AS A "JOHN DOE" WARRANT WAS THE ONLY WAY THE PEOPLE ATTEMPTED TO COMMENCE THIS ACTION, THE STATUTE OF LIMITATIONS RAN BEFORE APPELLANT WAS ARRESTED.

In the first issue in his Opening Brief on the Merits, appellant demonstrated the trial court lacked jurisdiction to enter judgment against him on any of his five counts of conviction, for all five of those counts were barred by operation of the statute of limitations. They were time-barred because a complaint and an arrest warrant issued solely to toll the running of the limitations period were invalid, as they did not name appellant as the suspect, but were issued in the alternate name "John Doe," which the California Law Revision Commission has said "does not satisfy the statute of limitations." (Cal. Law. Rev. Com. com., West's Ann. Pen. Code (2008 Desktop Ed.), following § 804, p. 467.)

A. The People Failed To Address This Clear Directive By the Law Revision Commission

Nothing could be more clear than the dictate that "Issuance of a 'Doe' warrant ... does not satisfy the statute of limitations." (Ibid.) Yet the People buried this Law Revision Commission comment in a footnote of the Respondent's Brief; although citing the

paragraph in full, the People chose to highlight a different sentence of this paragraph, and completely ignored the fact that the Legislative intent is expressly stated, absolutely clear, and completely obviates the People's argument. (RB, at 35-36, fn. 9.)

Other than including the Law Revision Commission's comment in footnote 9, nowhere else in the People's opposition do the People even address this absolutely clear bar to "commencing" an about-to-expire-action in the unique way the prosecuting authority attempted in this case. In fact, the People rather puzzlingly assert that "Appellant cites no authority for the contrary and irrational conclusion that the Legislature's failure to expressly permit DNA Doe arrest warrants is evidence of a legislative intent to preclude their use to commence a criminal action" (RB, at 47), when appellant's Opening Brief on the Merits clearly posited that the Law Revision Commission both (1) spoke for our Legislature, and (2) expressly stated that Doe warrants do not satisfy a limitations period. (AOB, at 22-23.)

To the extent the Respondent's Brief therefore fails to rebut arguments raised by appellant's Opening Brief (regarding the legislative directive that issuance of a Doe warrant does not satisfy the statute of limitations), its failure must be judicially recognized as "raising at least an inference that [appellant's] contentions have merit." (People v. Carson (1970) 4 Cal.App.3d 782, 784-785, and cases cited therein; People v. Gonzales (1965) 235 Cal.App.2d Supp. 887, 889.)

B. <u>In Light Of the Law Revision Commission's Comment, For Purposes Of Satisfying A Statute Of Limitations It Is Irrelevant That California Law Allows "John Doe" Arrest Warrants To Issue When A Limitations Period Is **Not** About To Expire</u>

The People instead focused attention on the next sentence in this comment, that "If the name specified in the warrant is not the precise name of the defendant, it is sufficient that the name identifies the defendant with reasonable certainty." (RB, at p. 36, fn. 9.) And it argued that "The People's use of a John Doe complaint and arrest warrant to commence prosecution employed statutory procedures in existence for well over 100 years." (RB, at p. 33.)

But that is not in dispute; in his Opening Brief appellant acknowledged that "Doe" warrants are lawful in California (AOB, at p. 21.)

The key point for this appeal, however, is that while Doe warrants may lawfully **issue**, they **cannot** satisfy a statute of limitations. Our Law Revision Commission has said so: "**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**." (Emphasis added.) And nowhere in Penal Code section 815 (which provides for John Doe arrest warrants), or the comments to section 815, has our Legislature or the Law Revision Commission created an exception allowing John Doe arrest warrants to satisfy about-to-expire limitations periods.

It is beyond dispute that the sole reason the John Doe complaint and arrest warrant issued in this case was to stop the limitations period from running out. (R.T.1, p. 112.) It did not issue because the police had an actual suspect in mind and were about to arrest that man, whose physical description and location they knew, but whose name at that time still eluded them. And yet the latter scenario is that which is contemplated by section 815's authority to issue arrest warrants in the name of a "John Doe."

Thus the first portion of the respondent's opposition in this issue -- that the Doe warrant met all statutory requirements -- is irrelevant. No one is disputing that the correct form was used, or that Doe warrants are lawful in California. The question is whether they can be used as a prosecutorial tool, solely to stop an aged case from being time-barred by a limitations period.[1]

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[1] Recall, when Detective Willover contacted deputy District Attorney Anne Marie Schubert about this case, he did so to see if something could be done before the statute of limitations expired on thee charges. (R.T.1, pp. 86-87, 94-95.) Coincidentally, a few days earlier Schubert had read a wire service article in the *Sacramento Bee,* about a Milwaukee prosecutor who had filed a "John Doe" warrant against an unknown suspect in three rapes which were approaching Wisconsin's six-year statute of limitations. (http://www.aliciapatterson.org/APF2001/Delsohn/Delsohn.html)

In fact, there are WEB sites for the benefit of prosecuting agencies compiling published decisions in John Doe/DNA arrest warrants situations, including exemplar forms in fillable "pdf" format (Adobe Acrobat), for obtaining and filing John Doe warrants. (Http://www.denverda.org/DNA/John_Doe_DNA_Warrants.htm)

C. The **Dabney, Danley** and **Davis** Cases Are Irrelevant, As Neither Wisconsin Nor Ohio Statutory Schemes Contain the Legislative Directive That "Issuance of a "Doe' Warrant ... Does Not Satisfy the Statute of Limitation," As California's Statutory Scheme Does

A portion of the respondent's opposition to the first issue limned for review depends on Wisconsin decisions in State v. Davis (Wis.App.2005) 698 N.W.2d 823 and State v. Dabney (Wis.App. 2003) 663 N.W.2d 366, and an Ohio decision in State v. Danley (Ohio Ct.Com.Pleas 2006) 853 N.E.2d 1224, all approving the use of "John Doe" arrest warrants to timely commence criminal actions and thereby avoid the bar of about-to-expire statutes of limitation.[2] (*See*, RB, at pp. 37-39.)

But neither Wisconsin nor Ohio penal statutes contain any expression similar to the Law Revision Commission comment applicable here, which expressly and clearly provides that John Doe arrest warrants do not satisfy a statute of limitations, As a result, even though the "John Doe" warrant statutes in those states might be similar to Penal Code section 815 in California, the overall statutory schemes -- including the statutes describing limitations periods, and the comments to those sections -- are dissimilar, and therefore inapposite.

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Dabney, for example, suggests that absent a showing of an improper purpose by the prosecution or of having to defend against overly remote charges by a defendant, use of John Doe warrant to toll a limitations period is not improper.

Moreover, the respondent relies on corollary conclusions in all of these cases -- that no due process or other constitutional rights are violated by use of John Doe warrants to toll limitations periods -- by arguing that "No statutory provision or due process guarantee requires notice to the defendant that a complaint or arrest warrant has issued in his name." (RB, at p. 39.)

That is not entirely true; the exact words of the Law Revision Commission comment to section 804 suggest that there **is** a due process right to be apprised of the commencement of a criminal action:

> "Issuance of a "Doe' warrant does not **reasonably inform a person** that **he or she is being prosecuted** and therefore does not satisfy the statute of limitations." (Cal. Law. Rev. Com. com., West's Ann. Pen. Code (2008 Desktop Ed.), following § 804, p. 467; emphasis added.)

It appears that in its wisdom the California Law Revision Commission was not so much concerned that an officer executing a John Doe arrest warrant have sufficient notice of who his suspect was, but instead that the suspect have sufficient notice of the action against him or her; for the express reason it stated for why a "John Doe" arrest warrant does not commence a criminal action is that it does not inform "a person" that he or she "is being prosecuted."

If so, then the Law Revision Commission's comment thus provides another ground distinguishing any California case from the Wisconsin and Ohio cases in Davis, Dabney and Danley.

D. <u>It Is Irrelevant That "Doe" Complaints Are Used To Commence **Civil** Actions, As Defendants In Criminal Cases Enjoy Additional Constitutional Protections</u>

The respondent also argued that use of Doe complaints has long been held in civil cases not to circumvent the statute of limitations. (RB, at p. 39.) It noted that under a "relation back" policy in civil cases, an amended complaint alleging the true name can be filed after the original statute of limitations has run, "specifically so as to avoid the bar of the statute of limitations." (RB, at 40.) It therefore concluded that "There is no reason to interpret the criminal provisions as barring the use of a fictitious name with the reasonable substitution of a true name, when this is ascertained." (Ibid.)

Yet, as the respondent mentioned, civil plaintiffs who name "Doe" defendants in such complaints "do not have an unlimited time within which to determine the true names of the defendants." (Ibid., citing General Motors Corp. v. Superior Court (1996) 48 Cal.App.4th 580, 589.) However, the respondent suggests no such boundary be placed on the prosecuting authority in a criminal matter, as "constitutional protections against the institution of overly stale claims, like due process and speedy trial remedies protect the criminal defendant." (RB, at 40.)

In other words, unlike civil actions where one would expect fewer rather than greater constitutional protections, the respondent would have this Court find that in criminal cases where "John Does" are named, there should be an unlimited time within

which to determine their true names, and the defendants' only protection would be to demonstrate actual prejudice from any delay.

If this case did not involve a "John Doe" complaint and arrest warrant, the respondent would not even try to argue this position. For where a "regular" arrest warrant is unlawful and therefore fails to satisfy a statute of limitations, the law is simply that the prosecution cannot go forward, period. In re Demillo (1975) 14 Cal.3d 598, 601; People v. Swinney (1975) 46 Cal.App.3d 332, 340.) No showing of "prejudice" to the defendant would be necessary.

This Court therefore should not permit the respondent to shift the burden to appellant, by suggesting appellant somehow is required to show "prejudice arising during the period between the filing of the complaint and his arrest ..." before his due process claim is valid. (RB, at 40.) In fact, that is exactly what the respondent has argued: that because appellant's true name was discovered (via a "cold hit") within three weeks after the John Doe arrest warrant issued, he cannot allege any "prejudice arising during the period between the filing of the complaint and his arrest" (RB, at 41; *see also*, RB, at 42), even though the statute of limitations had run by the time the cold hit was made.

And so it is specious to say that appellant has not shown any prejudice from the minimal delay in this case, when in fact that delay, albeit minimal, made all the difference between the action against him being prosecuted or being forever time-barred.

Contrary to other suggestions by the respondent, this is **not** a speedy trial violation case arising under the Sixth Amendment.

(*See*, RB, at 41-42 and fn. 13.) It is not even a precomplaint delay case arising under the Fourteenth Amendment's due process protection. (*See*, RB, at 40-41, and 42 at fn. 13.) Instead, as it is a "denial of due process" challenge, the focus of this issue should not be on what happened to appellant after the John Doe complaint and arrest warrant issued, but what prompted the prosecuting authority to have those documents issue in the first place, and what the People intended to do with those documents, and whether that intent equated with a fair trial.

In that regard, Detective Willover candidly admitted that by having these documents issue he was hoping to toll the statute for an indefinite period, as he wanted "to continue the availability of prosecution ... eventually ...." (R.T.1, p. 112.) And that is antithetical to federal due process, as a statute of limitations must "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 (1971) 404 U.S. 307, 322 [92 S.Ct. 455].)

E. The "John Doe" Warrant Issued Here Simply Was Not Executable Until A "Cold Hit" Was Made; Thus It Unconstitutionally Extended The Statute of Limitations Indefinitely

The trial court in this case recognized that "much has been made of the fact that this warrant was virtually unserveable until there was a match or a cold hit on the DNA profile contained within the report." (R.T.1, p. 132.) The respondent conceded that the John Doe arrest warrant which issued here was not executable at the time

it issued, and possibly never would be: "Detective Willover stated that if an officer in the field contacted him after running the number ... Detective Willover would have explained that **there would be no one to arrest until there is a DNA hit.**" (RB, at p. 10, citing R.T.1, pp. 104-107; emphasis added.)

Clearly, the potential prosecution of this case therefore could extend indefinitely, until such time as a DNA hit were made. But what if no "cold hit" ever matched any defendant to this crime? Or what if Detective Willover and/or deputy District Attorney Anne Marie Schubert retired before a match were made?

To allow the kind of "John Doe" arrest warrant at issue in this case to toll a statute of limitations is to circumvent legislative intent. The four ways Penal Code section 804 provides for an action commenting (filing of an indictment or information; filing of a complaint; certifying a case to the Superior Court; or issuance of an arrest warrant), all presuppose the prosecuting authority will know who the suspect is.

But if "John Doe" arrest warrants based on DNA profiles were permitted to issue solely to satisfy a limitations period, even before the true identity of the suspect was known following a DNA match, then that is tantamount to saying "we don't know who committed this crime, but the limitations period should be satisfied before it runs out because we have evidence against whoever committed the crime."

Yet how is that any different from a crime in which evidence other than DNA has been developed, but still is insufficient to

pinpoint exactly who committed the crime before a statute of limitations runs? What if the evidence against an unknown suspect were his fingerprints, left at the scene of the crime? For California does not permit "John Doe" arrest warrants with fingerprint evidence attached to issue, even though fingerprints are more truly unique that DNA profiles.

It is untrue that DNA profiles are the best way of identifying any suspect. Identical twins have identical DNA. (People v. Brown (2001) 91 Cal.4th 623, 6238 at fn. 7; People v. Pizarro (1992) 10 Cal.4th 57, 68; People v. Axell (1991) 235 Cal.App.3d 836, 845.) Thus there could be at least two, and possibly as many as three, four or five, individuals with the exact same DNA profile.

But on the other hand, so far as has been researched and established, fingerprints are both unique and permanent; research conducted by the United States Army and other groups determined that even identical twins **do not have identical fingerprints**. (United States v. Mitchell (3rd Cir. 2004) 365 F.3d 215, 223.[3]) Thus, as several predecessor panels to this Court recognized, "Fingerprint evidence is the strongest evidence of identity ...." (People v. Andrews (1989) 49 Cal.3d 200, 211; People v. Gardner

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[3] For purposes of the recent federal prosecution in Mitchell, the FBI created a survey that was sent to the principal law enforcement agencies of all 50 states and the District of Columbia, as well as to the Royal Canadian Mounted Police and Scotland Yard; all 53 of these agencies unanimously agreed that they regard fingerprints as unique and permanent, and that none of them had ever found two individuals to have the same fingerprints. (United States v. Mitchell, *supra*, 365 F.3d at 223-224.)

(1969) 71 Cal.2d 843, 849.) And yet no one has attempted to satisfy a statute of limitations by appending to a "John Doe" warrant an as-yet-unknown suspect's truly unique fingerprints.

In subsection I(C), *supra*, appellant noted that the Law Revision Commission's comment to section 804 inferentially voiced a concern that a "John Doe" warrant did not advise a person that he or she was being prosecuted. If notice to the suspect (not to law enforcement, but to the suspect), is the main concern of our Legislature -- which, again, is deemed to speak through the Law Revision Commission -- then it is irrelevant that the John Doe warrant in this case described the suspect by his DNA profile, for it is virtually certain that almost no one walking the earth today knows his or her DNA profile by heart.

F. The Legislative Intent Is To Narrow the Class Of Cases In Which the Statute Of Limitations May Be Extended By "John Doe" Warrants, Not Expand It

The respondent's final argument is that the use of John Doe warrants with DNA profiles appended to them do not contravene the intent of the Legislature, or the fundamental purpose of a statute of limitations. (RB, at 43-49.)

The People's primary argument is that our Legislature "has passed numerous measures recognizing the accuracy and utility of DNA testing to establish identity as it relates to guilt or innocence." (RB, at 43, and examples cited at pages 43-44; *see also*, RB, at 20.) The respondent also noted that by amendment Penal

Code section 803, former subdivision (h) (now subdivision (g)), was amended to extend the statute of limitations in sexual offenses from six years to either (1) 10 years, **or** (2) "one year from the date on which the identity of the suspect is conclusively established by DNA testing." (RB, at 44.)

As a result, the respondent concluded that our Legislature "has determined that DNA analysis is so probative of identity over time that it justifies expanding its DNA database program and extending the statute of limitations." (RB, at 45.)

But whether our Legislature intends to virtually abolish statutes of limitation in cases **after January 1, 2001** in which DNA evidence exists is not before this Court in this case; here, the first question is whether a "John Doe" arrest warrant issued in 2000 (before the amendment of Penal Code section 803), properly can satisfy a statute of limitations.

To the extent, however, that this amendment of section 803 may affect whether John Doe arrest warrants with DNA profiles attached will be lawful for crimes committed after January 1, 2001, appellant notes the following:

First, even this amendment of the Penal Code limitations period does not establish an indefinite period of time for a prosecuting authority to prosecute cases in which DNA evidence exists. To the contrary, in the amended statute the Legislature included requirements to ensure cases are investigated and processed quickly, by providing that for cases in which the offense was committed before January 1, 2001, the DNA evidence extending

the 10-year statute must have been analyzed for DNA type no later than January 1, 2004; and that for offenses committed after January 1, 2001, the DNA evidence extending the 10-year statute must have been analyzed for DNA type no later than two years from the date of the offense. (Pen. Code, § 803, subd. (g)(1)(A)-(B).)

As a result, for those cases in which an offender's DNA profile already is in a databank, the unknown suspect would be promptly identified within three or two years from the date of the offense, and far from allowing a virtually unlimited extension of the limitations period, the amended statute in fact sets out guidelines which result in such cases in identifying the suspect well within the otherwise 10-year statute of limitations.

Second, our Legislature is presumed to both know and to mean the consequences of its actions in enacting statutes, and is presumed to have meant what it said. (People v. Superior Court (Zamudio) (2000) 23 Cal.4th 183, 192; People v. Johnson (2006) 145 Cal.App.4th 895, 904.) It also is presumed to have intended reasonable results consistent with its apparent purpose. (Commission On Peace Officer Standards and Training v. Superior Court (2007) 42 Cal.4th 278, 290.) Thus, far from establishing a virtually unlimited limitations period whenever DNA evidence is gathered, the Legislature's amendment of section 803 instead reflects that our Legislature has contemplated the impact of DNA evidence on statutes of limitation, and has decided to extend or toll statutes of limitation in only a very narrow class of cases, and even then only under very strict procedural guidelines.

G. Conclusion

For the foregoing reasons, nothing rescued the John Doe arrest warrant in this case from being invalid; as a result, it could not lawfully stop the running of the statute of limitations on the only crimes in this case of which appellant was convicted, and those counts were time-barred by the time law enforcement determined that appellant was the "John Doe" suspect in this case.

II.

FOR ALL THE REASONS SET FORTH BELOW, INCLUDING LEGISLATIVE INTENT AS DEMONSTRATED BY THE CALIFORNIA LEGISLATURE AND THE HISTORICAL IMPORTANCE OF THE FOURTH AMENDMENT, THIS COURT SHOULD JEALOUSLY GUARD STATE AND FEDERAL CONSTITUTIONAL PROTECTIONS EXTENDED TO CRIMINAL DEFENDANTS VIA THE PARTICULARITY REQUIREMENT FOR ARREST WARRANTS, AND REJECT THE "DNA WARRANT" EMPLOYED HERE

In the second issue in his Opening Brief on the Merits, appellant demonstrated the trial court further lacked jurisdiction to enter judgment against him on any of his five counts of conviction, for the arrest warrant which purported to commence the action against him contained only a minimal description and a DNA profile of the then-unknown suspect, thus lacked constitutionally mandated "particularity." The five charges against appellant therefore remained time-barred by operation of the statute of limitations.

In opposition the respondent contended that because each individual's DNA profile is statistically rare, it satisfies the Fourth Amendment's particularity requirement for describing, identifying and distinguishing a suspect. (RB, at 49, 50-53.)

The fallacy of the respondent's argument is self-evident. On one hand it maintained that the DNA profile set forth in the arrest warrant, standing alone, provided a sufficient legal description of the person to be arrested (RB, at 59-63), yet that, on the other hand, the arrest warrant containing this DNA profile could not be misused as it would be executed only upon a DNA match with the perpetrator's profile. (RB, at 54.) The various contentions it made in support of its position are discussed below, *seriatim*.

A. <u>It Takes Much More Than A "Reasonable Effort" To "Match" An Unknown Suspect's DNA Profile To A DNA Profile In A Known Offender Databank; And As DNA Profiles Are Not Truly "Unique," There Remains A Possibility That An Innocent Person Might Be Arrested By Mistake</u>

The respondent's first argument is that current state and federal laws support using a DNA profile as a "descriptive identifier" on an arrest warrant for two reasons: (1) it takes only a "reasonable effort" to link a specific offender to the unknown suspect via a database search, and (2), given the accuracy of DNA evidence in matching unknown perpetrators to known offender samples in such databases, there is a reasonably probability that no one would ever be mistakenly arrested. (RB, at 53.)

Neither contention is availing.

First, as testimony in this case made abundantly clear, the testing required to match a developed DNA profile from crime scene evidence to a profile already existing in a databank still requires effort. A member of law enforcement still must contact criminalists who maintain the state (or federal) DNA databank and ask that the offender database be searched against any DNA profile developed from crime scene evidence; and it still takes some time to conduct that search. (<u>Cf</u>., R.T.17, pp. 4932-4936.)

Second and more importantly, however, as was discussed in section I(E), *supra*, in the case of identical births there will be two, three, four, or possibly even more people alive on Earth who share exactly identical DNA profiles, and thus there is a statistical probability that at some point, an innocent person will

mistakenly be arrested based solely on a DNA profile arrest warrant.

On June 17, 2008, the Boston Globe reported that the Centers for Disease Control had released figures indicating that nationally there are 3.2 twins born in every 100 live births, with Massachusetts having the highest percentage of twins at 4.5. (http://www.boston.com/lifestyle/family/articles/2008/6/17/massachusetts). One-third of these twin births are of identical twins, while triplets occur in one of every 8,000 deliveries. (http://www.tlcdrugpaternitytesting.com/subpage1.html, "Twins Of the World.") Thus identical multiple births are more common than one might think: at least one in every 100 births nationally. The Bureau of the Census estimates the U.S. population at 305,924,674. (http://www.census.giv/population/www/pop lock.us.html) The large number of identical twins in our population is self-evident.

Lest the Court think this argument is fanciful, there already are two cases on record in which police have been unable to successfully prosecute crimes, despite the ready availability of DNA evidence, because they cannot prove which of two twin brothers that biological material came from:

In Massachusetts identical twin Darrin Fernandez twice was tried for a break-in burglary in which the burglar left behind blood on a broken windowpane; the two juries that tried him both hung, as neither could agree that the DNA profile developed from that blood sample belonged to him and not twin brother Damien Fernandez. (http://www.msnbc.msn.com/id/15107587/page/3; *see also*,

http://www.boston.com/news/local/massachusetts/articles/2006/03/08/prior_rape_break_ins_allowed_in_third_trial/, as reported by Jonathan Saltzman in the *Boston Globe*.)

And in Michigan, identical twin Jerome Cooper has escaped prosecution for rape, despite DNA evidence linking him to that crime, because his twin brother Tyrone Cooper has the exact same DNA profile, raising a reasonable doubt as to which was the actual offender.[4] (http://www.cnn.com/2004/LAW/06/07/twins/index.html)

In fact, this conundrum already is reflected in the national *zeitgeist*: in the January 18, 2005 episode of the popular CBS television show "Law and Order: Special Victim's Unit" (in the episode entitled "Identity"), one of two identical twins murdered a doctor, but despite having DNA crime scene evidence police were unable to tell which twin committed the crime, effectively insulating both from prosecution.

No match between DNA profiles is unique, and a DNA match does not necessarily mean the samples from which profiles were obtained came from the same person. DNA profiles therefore do not provide the highest and best evidence "describing" a suspect.

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[4] In fact, Orchid Cellmark -- the bioscience company that developed and markets the most commonly used DNA testing kit, including the kit used in this case -- tested the Cooper brothers' DNA, looking at over 100,000 DNA characteristics for minute genetic differences that might have occurred after the egg split, creating twins (i.e., mutations). But the company found that if these minute differences do exist, it was not able to pinpoint them with the technology currently available. (http://www.wzzm13.com/news/news-article.aspx?storyid=40986).

B. <u>A DNA Profile Requires Too Much Extrinsic Matter To Qualify As A Description Of An Unknown Suspect With "Particularity"</u>

The respondent's second argument is that "nothing in the Fourth Amendment or California law per se limits the particularity requirement to anatomical descriptions set forth in the arrest warrant," (or "exterior physical characteristics"), and that "reasonable particularity" of a suspect's description is "'an evolving concept' that can respond to technological advances in communication and identification techniques." (RB, at 52, 55.)

This contention fails for two reasons.

First, as discussed in section I(E), *supra*, a fingerprint is an even more unique and thus discriminating way of describing a person; and fingerprint analysis as a means of identifying, arresting and prosecuting suspects routinely has been employed in California since the 1940's. (<u>People</u> v. <u>Adamson</u> (1946) 27 Cal.2d 478, 495, aff'd on other grounds, <u>Adamson</u> v. <u>California</u> (1947) 332 U.S. 46 [67 S.Ct. 1972]; overruled on other grounds, <u>Malloy</u> v. <u>Hogan</u> (1964) 378 U.S. 1 [84 S.Ct. 1489].)

Thus, in the more than 60 years since, there has been ample time for the technological advances in using fingerprints for identification to "evolve" to a point where the use of crime scene fingerprints also could be appended to arrest warrants, to "describe" an unknown suspect with "particularity." Yet appellant is unaware of any cases approving such an approach or, for that matter, even attempting it.

And second (as appellant's Opening Brief noted), that is because where a name that would reasonably identify an unknown suspect cannot be provided, "some other means **reasonable to the circumstances** must be used to assist in the identification of the subject of the warrant." (AOB, at 33, citing People v. Montoya (1942) 255 Cal.App.2d 137, 142; emphasis added.) For the same reason that it is **unreasonable** to attach a crime scene fingerprint to an arrest warrant to "identify" an unknown suspect, it is equally as unreasonable to attach a DNA profile of the unknown suspect developed from crime scene evidence.

For while both might "identify" the suspect, neither serves the purpose of "describing" that suspect, without more. There also must be either a fingerprint or a DNA sample from the person who has been developed as a suspect, followed by a fingerprint expert or criminalist's determination that a match has been made.

Significantly, in the case of a fingerprint match all that is needed are two prints and the expert's analysis confirming they match. But in the case of the DNA sample much more is required -- the entire laborious process of extraction, amplification, electrophoresis, quantification, etc., before a criminalist can compare the autorads, declare a match, and statistically determine how rare that match is.

Therefore, use of a DNA profile on an arrest warrant is not "reasonable under the circumstances."

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C. The Fact That Ohio and Wisconsin Permit "DNA Warrants" Is Not Dispositive, As Neither Appears To Have the Same Statutory Scheme As California For Defining "Identity"

The respondent's third point is that Wisconsin and Ohio, both of which have penal statutes similar to California's with respect to the issuance of arrest warrants, have found that warrants describing an unknown John Doe suspect by a specific DNA profile satisfy particularity and reasonable certainty requirements. (RB, at 57-59, citing State v. Davis (Wis.App.2005) 698 N.W.2d 823, State v. Dabney (Wis.App. 2003) 663 N.W.2d 366, and State v. Danley (Ohio Ct.Com.Pleas 2006) 853 N.E.2d 1224, all discussed in section I(C), *infra*.)

In section I(C), *infra*, appellant already distinguished these three decision, all of which had approved the issuance of "John Doe" arrest warrants to stop the running of about-to-expire limitations periods, as neither Ohio nor Wisconsin's statutory schemes included the express prohibition against using "John Doe" warrants to satisfy statutes of limitation, as California's statutory scheme does (via the Law Revision Commission comment to Penal Code section 804.)

Appellant now notes that the other aspect of these decisions -- that arrest warrants with DNA profiles included in lieu of a more traditional descriptions of the suspects -- also is inapplicable to California law, as neither the Ohio nor Wisconsin statutory schemes contain the same definition of "identity" as California does.

In that regard Penal Code section 530.5, prohibiting the false personation of another (more colloquially known as "identity theft"), is a relatively new crime in California, having become effective only on January 1, 1998. (*See*, Stats. 1997, c. 768 (A.B. 156), § 6.)

The definition of "personal identifying information" under that statute is set forth in Penal Code section 530.55, and was not added until January 1, 2007. (*See*, Stats. 2006, c. 522 (A.B. 2886), § 3.) Thus our Legislature clearly could have included a DNA profile as one of the **statutory identifiers** of an individual had it chosen to do so, but it did not, even though it included other, more difficult to obtain "biometric data" about individuals:

> "For purposes of this section, 'personal identifying information' means:
>
> "Any name, address, telephone number, health insurance identification number, taxpayer identification number, school identification number, state or federal driver's license, or identification number, social security number, place of employment, employee identification number, professional or occupational number, mother's maiden name, demand deposit account number, checking account number, PIN (personal identification number) or password, alien registration number, government passport number, date of birth, **unique biometric data including fingerprint, facial scan identifiers, voiceprint, retina or iris image, or other unique physical representation**, unique electronic data including information identification number assigned to the person, address, or routing code, telecommunication identifying information or access device, information contained in a birth or death certificate or credit card of an individual person, or an equivalent form of identification." (Pen. Code, § 530.55, subd. (b); emphasis added.)

And so, rather amazingly, our Legislature has chosen to define the biometric identifiers of individuals to include not only their unique fingerprints and voiceprints, but also their facial, retinal and iris scans, yet by inference has chosen not to include DNA profiles as identifiers of individuals, even though it would appear to be easier to obtain and misuse someone's DNA (which can be gotten off the saliva from a discarded soda can or cigarette), than it would be to duplicate their retinal scan.[5]

Thus as California's statutory scheme appears to intentionally exclude DNA profiles as statutory identifiers of an individual, the reasoning underlying the Davis, Dabney and Danley cases is inapposite, as none of those decisions was called upon to address a similar limitation on "personal identifying information" from its respective state's own statutory scheme.

D. It Is Irrelevant That Statutory and Decisional Law Recognize That DNA Identifies Individuals To A High Degree Of Certainty

The respondent's fourth contention is that numerous authorities recognize that DNA profile evidence is "the most reliable form of identification currently available." (RB, at 59.)

Although appellant has maintained in both his Opening Brief and this brief that fingerprint evidence is, in fact, the most

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[5] Section 530.55, subdivision (b) appears to be patterned on 18 U.S.C. section 1028, subdivision (d)(7)(A)-(D); in subsection (d)(7)(C), which defines "biometric data" for purposes of federal prosecutions, the federal government has not seen fit to include a DNA profile as a statutory identifier of an individual either.

unique and reliable evidence available, he does not dispute that for purposes of trial, DNA "match" evidence is highly probative of who committed a crime. (*See*, AOB, at 41 ["while a DNA profile may be probative of identity, by itself it does not actually describe anyone"].) But that does not mean, *a fortiori*, that DNA profile evidence therefore should be used for purposes of arrest, as the respondent maintained. (RB, at 63.)

For if a DNA profile is a means of identification only, and is not a "description" of a person within the purview of the Fourth Amendment or our state Constitution's "particularity" requirement, then without more it cannot and should not be used on an arrest warrant to effect an arrest. This is consistent with Fourth and Fourteenth Amendment (due process) jurisprudence, which recognizes that other investigative and forensic tools cannot, in fact, be used for unique reasons. (*See*, Evid. Code, §§ 795 [the testimony of a witness who has undergone hypnosis is severely limited], and 351.1 [evidence that a defendant took a polygraph test violates California law]; People v. Sapp (2003) 31 Cal.4th 240, 299 [same].)

As a result, although DNA "match" evidence may be probative at trial, a DNA profile without a "match" to a known suspect should not be substituted for the descriptive information traditionally demanded by the "particularity" requirement.

E. The Prosecution In This Case Should Not Be Permitted To Obviate the Fourth Amendment Or Our State Constitution

The respondent's final point is that this Court should not

insist on "an unnecessarily rigid interpretation of the particularity requirement for arrest warrants," as it would "limit the use of the DNA database in crime solving" and "thwart the use of DNA as [a] modern crime solving tool ....". (RB, at 21, 63, 64.)

But that is akin to arguing that this Court should not insist on a rigid interpretation of the Fourth Amendment itself, because its pesky constitutional protections hamper law enforcement agencies from making as many arrests and obtaining as many convictions as possible.

The Fourth Amendment exists as a protection for the **people** against intrusive government actions; it does not exist to assist the government in apprehension and prosecution of criminals. (U.S. Const., Amend. IV ["**The right of the people to be secure in their persons, houses, papers, and effects**, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, ... particularly describing ... the persons or things to be seized"]; emphasis added.) It thus appears that the Framers of the Constitution intended, if anything, that any interpretation of Fourth Amendment protections err on the side of a person seized by a warrant, and not on the side of the agency obtaining or executing it.[6]

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See also, Warden v. Hayden (1967) 387 U.S. 294, 304 [87 S.Ct. 1642]["We have recognized that the principal protection of the Fourth Amendment is the protection of privacy ...."]; Katz v. United States (1967) 389 U.S. 347, 353 [88 S.Ct. 507]["The Amendment thus protects people, not places"]; and In re Schaefer (1933) 134 Cal.App. 498, 499 [25 P.2d 490] [the "particularity" requirement is a rule designed to protect personal liberty].)

In fact, the United States Supreme Court has made clear that the particularity requirement of the Fourth Amendment exists to **limit** the scope of a search warrant. (Marron v. United States (1927) 275 U.S. 192, 196 [48 S.Ct. 74].) No less should be true for the scope of an arrest warrant when the "particularity" of its definition of the person to be seized is at issue.

An arrest warrant "is not made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." (United States v. DiRe (1948) 322 U.S. 581, 595 [68 S.Ct. 222] [describing the Fourth Amendment standard for a search warrant].) This Court therefore should not be persuaded to relax the protections extended over the years to criminal defendants under the Fourth Amendment, simply because the role of law enforcement will be easier, and more arrests can be made, without them.

III.

THE PARTIES AGREE THAT EXPUNGEMENT OF BLOOD SAMPLES MISTAKENLY COLLECTED UNDER THE DNA ACT IS ONE OF THE PROPER REMEDIES TO APPLY FOLLOWING AN ERRONEOUS COLLECTION, BUT APPELLANT CONTINUES TO MAINTAIN THAT REVERSAL OF HIS CONVICTIONS ALSO IS REQUIRED

In his Opening Brief on the Merits appellant demonstrated that the Fourth Amendment requires the remedy for the unlawful 1999 involuntary collection and 2000 DNA analysis of appellant's blood be reversal of his five current counts of conviction, with the addition that his DNA profile be removed from the state data bank and the blood sample be destroyed, as the "exclusionary rule" is the appropriate remedy to apply.

Although the respondent agreed appellant had no convictions qualifying him for blood sample collection at the time the 1999 sample was taken (RB, at 66), and also agreed that expungement of the samples is required by state statutory law (RB, at 21), it argued that expungement is the sole applicable remedy, as our Legislature has provided that mistaken sample collection should not invalidate an arrest or conviction. (RB, at 21, 75, 78 and 82-83, citing Pen. Code, §§ 297 subds. (f), (g); 298, subd.(c)(3); and 299.) It also argued several other reasons why the exclusionary rule is inappropriately applied here, including theories of "inevitable discovery" and "independent source." (RB, at 97-101.)

For the following reasons the respondent is incorrect.

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A. <u>Section 299 Does Not Provide That the "Sole" Remedy for an Unlawful Collection Is Expungement of the Sample</u>

Penal Code section 299, subdivision (a), provides that:

> "A person whose DNA profile has been included in the data bank pursuant to this chapter shall have his or her DNA specimen and sample destroyed and searchable database profile expunged from the data bank program ... if the person has no past or present offense or pending charge which qualifies that person for inclusion ...."

But by its own terms section 299 does not establish that it is the exclusive remedy for an unlawful collection; it is silent on whether any unlawfully-obtained sample can be used in evidence against an individual before that sample is expunged, or whether any convictions or other evidence obtained through exploitation of the unlawfully-obtained sample are subject to the exclusionary rule.

B. <u>Although the Statute Purports To Excuse Any "Mistake" In the Collection Of DNA Blood Samples, Our Legislature Cannot Legislate In A Way That Is Contrary To the Fourth Amendment Without Violating the Due Process Clause of the Fifth Amendment, Applicable to the States Through the Fourteenth Amendment</u>

The respondent contended that in 1999 (when this unlawful sample erroneously was taken from appellant), the then-existing version of the collection act specifically provided that the conviction of someone based on a databank match is not invalidated if the samples were placed in the databank or data base by mistake. (Former Pen. Code, § 297, subd. (e), now section 297, subds. (e)

and (f); *see also*, Pen. Code § 298, subd. (c) [same].)

The question therefore is whether this state-created statutory exception to the Fourth Amendment can excuse, on the basis of "mistake," the unlawful warrantless 1999 search in this case. The answer is, it cannot, without denying appellant his Fifth and Fourteenth Amendment rights to due process.

The federal "reasonableness" standard is the same under the Fourth and Fourteenth Amendments. (Ker v. California (1963) 374 U.S. 23, 33 [83 S.Ct. 1623].) The Fourth Amendment's prohibition against unreasonable searches and seizures therefore is enforceable against the States through the Fourteenth Amendment, by application of the same standard prohibiting unreasonable searches and seizures as defined in the Fourth Amendment. (Mapp v. Ohio (1961) 367 U.S. 643, 646-647, 657 [81 S.Ct. 1684].)

Thus for more than half a century the United States Supreme Court has recognized that the "reasonableness" standard is carried forward when Fourth Amendment's proscriptions are enforced against the states through the Fourteenth Amendment:

> "The security of one's privacy against arbitrary intrusion by the police - which is at the core of the Fourth Amendment - is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause....
>
> "Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such [unauthorized] police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment." (Wolf v. Colorado (1949) 338 U.S. 25, 27-28 [69 S.Ct. 1359].)

As a result, in state trials the reasonableness of a search is, in the first instance, a substantive determination to be made by the trial court from the facts and circumstances of the case, as guided by the fundamental criteria of the Fourth Amendment. (Ker v. California, *supra*, 374 U.S. at 33.) But a state court's findings of reasonableness "are respected only insofar as consistent with federal constitutional guarantees." (Ibid.)

State court determinations thus are not insulated against examination by federal courts, particularly in cases involving federal constitutional rights. (Id., at 33-34.) Therefore,

> "The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet the practical demands of effective criminal investigation and law enforcement in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain." (Id., at 34.)

As a result, no state-created law permitting the admissibility of evidence can stand if the exclusion of that evidence is mandated by the Fourth Amendment; otherwise, the state defendant has suffered a denial of due process under the Fourteenth Amendment. For just as the Fourth Amendment's "reasonableness" standard is applicable to the states through operation of the Fourteenth Amendment, so too is the Fourth Amendment's sanction of exclusion of any evidence seized in violation of its prohibitions. (Mapp v. Ohio, *supra*, 367 U.S. at 646-647, 657.)

Therefore it does not matter that, as the respondent pointed out, "the California Legislature did not -- and still does not -- view a mistaken collection from a non-qualifying criminal offender as an unreasonable search." (RB, at 78.) Instead, what matters is whether the United Sates Supreme Court regards a mistaken collection of biological material as an unreasonable search. For under the Supremacy Clause of the United States Constitution the High Court is the final arbiter of federal constitutional law. (People v. Fletcher (1996) 13 Cal.3th 451, 470 at fn. 6, citing Oregon v. Haas (1978) 420 U.S. 714, 719 [95 S.Ct. 1215]; Sims v. Georgia (1967) 385 U.S. 538, 544 [87 S.Ct. 639]; People v. Diaz (1992) 3 Cal.4th 495, 569.)

In that regard, as the Opening Brief noted (at pp. 56 and 58-59), the High Court not only has found that compelled blood samples so infringe the expectation of privacy that society is prepared to recognize the privacy interest involved as "reasonable" (Skinner v. Railway Labor Executives' Ass'n (1989) 489 U.S. 602 [109 S.Ct. 1402]), but that the Court also already has invalidated improper collection of biological samples. (Ferguson v. Charleston (2001) 532 U.S. 67 [121 S.Ct. 1281] [drug tests conducted on pregnant women].)

Therefore, no matter how innocent a mistake may have been made in collecting appellant's blood in 1999, or in analyzing that blood in 2000 and entering his DNA profile into a database, if the blood was not lawfully drawn under California law, then it was seized in violation of appellant's Fourth and Fourteenth Amendment rights.

There is no debate in this case that appellant's blood sample was collected, analyzed, and submitted to the databank at a point in time when appellant did not meet the lawful definition of a person who qualified for DNA collection; thus appellant's blood was unlawfully seized under California law.

It does not matter if the seizure was due to a "mistake", or that present California law (as well as the law in existence in 1999), would excuse such a mistake.

For the California legislature does not have the power to excuse seizures of evidence that are unlawful under the Fourth Amendment, nor to legislate exceptions to the Fourth Amendment, nor to suspend anyone's rights under the Fourth or Fourteenth Amendments. Or as defense counsel put it while arguing the suppression motion, "The legislature can't save a constitutional violation by a statute." (R.T.2, p. 488.)

Therefore, former Penal Code section 927, subdivision (e) (now subdivision (f)), cannot rescue the unlawful and unconstitutional 1999 blood draw or 2000 blood analysis in this case. Indeed, as applied, former subdivision (e) (now (f)), is unconstitutional as it (1) allows the admission into evidence of unlawfully seized evidence, (2) does not require that such evidence be excluded, and (3) does not require the reversal of any conviction obtained by unlawful evidence.

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C. Appellant Did Not Forfeit His Fourth Or Fourteenth Amendment Rights Simply Because He Was In Custody When the Disputed Blood Sample Involuntarily Was Extracted From Him

The respondent next contended that because "persons in police custody, such as appellant, ... have lost any expectation of privacy in their identity by virtue of their felony arrests or criminal convictions," and the statute provides that collection occurs only when a person is in custody, then "collection mistakes should [not] be afforded the same treatment as cases where such errors result in the immediate arrest of a person with a full expectation of privacy." (RB, at 81.)

But the United States Supreme Court already has found that forced extractions of biological samples invade a individual's "most personal and deep-rooted expectations of privacy" (Winston v. Lee (1985) 470 U.S. 753, 760 [105 S.Ct. 1611]), without distinguishing whether or not the individual is in custody.

The respondent then added that "A mistaken collection of a DNA sample 'does not involve the arrest, apprehension, [or] taking into custody of the person" because the person "already is in custody." (RB, at 82.) However, the expungement remedy for mistakes upon which the respondent's entire opposition is grounded itself provides that "The detention, arrest, wardship, **or conviction** of a person based upon a data bank match or data base information is not invalidated if it later is determined that the specimens, samples, or print impressions were obtained or placed in a data bank or data

base by mistake." (Former Pen. Code, § 297, subd. (e); emphasis added.)

And so the proper remedy to apply here must concern itself not only with the mere arrest, apprehension or taking into custody of a suspect (which appellant agrees may be insignificant if the suspect already is in custody); it also must account for any subsequent **conviction** of that person, which is the evil that occurred here, and which is irrelevant to whether or not that person already was in custody.

And so appellant's custody status at the time the sample was extracted from him is immaterial to whether or not the exclusionary rule must be applied to this Fourth Amendment violation, for even if an incarcerated individual has a diminished expectation of privacy, he does not forfeit all of his constitutional protections at the cell door.

D. <u>It Is Irrelevant That Appellant Was Incarcerated (In Part), On A Parole Hold When the 1999 Sample Unlawfully was Extracted</u>

The respondent further argued that "there was no Fourth Amendment violation when appellant's sample was collected in 1999 while he was in custody on a parole hold for a felony conviction ...." (RB, at 84.) The People also contend that the database sample lawfully was taken because appellant was in custody on a parole hold at the time, thus it was taken pursuant to a parole search condition. (RB, at 84-85.)

This contention is unavailing.

First, there was no statutory provision for a DNA sample collection from appellant in 1999, simply because he was a parolee or on probation; at that time the DNA collection law still required that any parolee or probationer **be on parole or probation for a "qualifying" offense** before samples could be collected from them. (Former Pen. Code, § 296.1, subd. (d), as enacted by Stats. 1998, ch. 696 (AB 1332), § 2 ["Any person, including any juvenile, who comes within the provisions of this chapter **for an offense set forth in subdivision (a) of Section 296, and who is on probation or parole**, shall be required to provide two specimens of blood, a saliva sample, and thumb and palm print impressions as required pursuant to this chapter ..."]; emphasis added.[7])

Second, while there may have been decisional authority in 1999 permitting suspicionless searches of parolees and probationers, those kinds of searches traditionally included a "pat-down" of the parolee or probationer himself, plus searches of his or her home, car, handbag, etc. They have **not** traditionally included anything so intrusive as a blood draw or the collection of buccal cell or saliva samples, as were required here for the DNA databank. To the contrary, recall from the immediately preceding section that a

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[7] Not until this section was amended by voter initiative in 2004 (Prop. 69, § 4, effective November 3, 2004), was it changed to provide (as it now does), that samples are to be collected from any parolee or probationer, whether or not their current probation or parole offense "qualifies" them, so long as they have a qualifying offense in their past. (Pen. Code, § 296.1, subd. (a)(3)(A)(i)-(ii).)

forced extraction of appellant's blood violated his "most personal and deep-rooted expectations of privacy." (Winston v. Lee, *supra*, 470 U.S. 753, 760.) Thus the collection of biological samples in 1999 should not be considered part of a "normal" search condition imposed at that time on parolees and probationers.

Third, contrary to the respondent's assertion that the appellate record inferentially reflects Deputy Ortiz knew appellant was a parolee at the time the blood sample unlawfully was extracted (RB, at 85-86), the record instead more strongly suggests that the corrections personnel who drew his blood did not know he was on parole at the time they did so, and thus did not rely on any parole search condition (as discussed on the next page).

This is significant because after the suppression hearing in this case, this Court held that a warrantless search cannot be justified as a parole search **if the police do not know of the suspect's parole status when they conduct the search.** (People v. Sanders (2003) 31 Cal.4th 318, 332-333.) "[T]his result flows from the rule that whether a search is reasonable must be determined based upon the circumstances known to the officer when the search is conducted ...." (Id., at 332.) In other words, if an officer conducting a warrantless search is unaware of a parole search condition, that condition cannot be used to make the search valid:

> "But our reasoning in *Reyes* does not apply if the officer is unaware that the suspect is on parole and subject to a search condition. Despite the parolee's diminished expectation of privacy, such a search cannot be justified as a parole search, because the officer is not acting pursuant to the conditions of parole." (Id., at 333.)

In this case, recall that appellant had been committed to the jail in December, 1998 for two reasons: he was sentenced to serve a term for a new misdemeanor conviction stemming from the Mathis prowling incident, and that prowling conviction violated his parole from his earlier, 1996 first-degree burglary conviction (which was not, at that time, an offense "qualifying" him for blood collection). Thus in March, 1999 he was serving both a misdemeanor term of imprisonment as well as a revocation-of-parole term. (C.T.5, pp. 1236, 1237; R.T.2, pp. 472-473.)

Appellant's blood was physically drawn by jail nurse Deborah Steed, who did so under the supervision of Deputy Ortiz. (R.T.1, pp. 163-164, 180.) There is no indication in the record, however, that Steed or Ortiz made any attempt to determine, in 1999, whether appellant was incarcerated for a new offense or a parole violation. Instead, Deputy Ortiz testified several times at the suppression hearing that in March, 1999 (when appellant's blood was drawn), he (Ortiz) relied on the person filling out the collection form and did not re-check whether the prisoner in question had a qualifying offense. (R.T.1, pp. 178-180, 184-185.)

The only inference that can be drawn from this record is that when Steed and Ortiz drew appellant's blood in 1999, they had no idea whether or not he was subject to a parole search condition. They did not act because they thought they were conducting a parole search; to the contrary, they acted because, based on a piece of paper handed them, they believed a new state law unrelated to parole supervision mandated they collect appellant's blood.

In other words, Steed and Ortiz acted because of the form they were handed, not because of any parole search condition. As a result, as they did not know appellant was on parole at the time they drew his blood and did not act under the authority of the parole search condition, the People cannot rely on that parole search condition to excuse the warrantless 1999 search and "seizure." (People v. Sanders, *supra*, 31 Cal.4th at 332-333.[8])

E. It Is Irrelevant That A DNA Collection Statute Of This Kind Has Never Been Held To Be Unconstitutional

The respondent further argued that all courts which have been asked to review collection statutes have found them constitutional under the Fourth Amendment. (RB, at 87-90.) But that is a red herring. Although appellant petitioned this Court to review the DNA collection statute on both a "facial" and an "as applied" basis, this Court granted review only of the "as applied" challenge, limiting its review to "What remedy is there, if any, for the unlawful collection of genetic material under the DNA and Forensic Identification Data Base and Data Bank Act of 1998 (Pen. Code, § 295 et seq.)?" (February 13, 2008 Order, Issue III for review.)

The respondent appears to have included this argument simply to contend that appellant's sample was "lawfully taken within the

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8

In fact, in People v. Sanders this Court noted that prohibiting this type of unreasonable search (i.e., a search of a parolee absent any knowledge that a parole search condition exists), serves the purpose of the exclusionary rule, which is to deter future police misconduct. (Id., 31 Cal.4th at 324, 334.)

statutory framework" of the collection program (RB, at 87), but we already know that's not true. Absent a "qualifying" conviction in 1999, the collection act in 1999 did not apply to appellant, and so any collection taken under color of that law was unlawful; thus the cases holding California's collection act **in general** is constitutional are inapposite, as appellant's claim in this issue is that his Fourth Amendment rights were violated **as applied.**

F. Applying the Exclusionary Rule To Improper and Unlawful Collections Would Have An Appreciable and Necessary Deterrent Effect

Assuming there was an unconstitutional collection, the respondent argued in the alternative that appellant "has not overcome ... the high obstacle of showing that excluding a mistakenly collected DNA sample has 'deterrence benefits' that outweigh the 'substantial societal costs'...." (RB, at 92.)

To the contrary, appellant has shown this, in his Opening Brief. (JOB, at 68-72.)

But in support of its position the respondent argued that suppression would have no future deterrent effect because (1) the law enforcement personnel who collected this sample acted in good faith (RB, at 93-95), and (2) the Data Base Act has since been expanded to include sample collection for all adult and juvenile felonies. (RB, at 95-96.)

To the contrary, the record clearly reflects that the particular law enforcement personnel who collected and then approved this sample for analysis and inclusion in the databank all

were careless in one way or another (i.e., an unknown person at the jail who first "qualified" appellant based on a non-qualifying misdemeanor offense; nurse Steed and Deputy Ortiz, who collectively extracted the unlawful sample; and lab staffer Meade, who re-qualified appellant based on a non-qualifying juvenile adjudication). Their negligence cannot be overcome by a protestation that they acted in good faith.

And second, even assuming appellant's sample lawfully could have been taken in 2002 (after the list of qualifying offenses expanded to include his 1996 first-degree burglary), by that point any prosecution for the five counts of conviction at issue here would have been time-barred; so appellant has suffered significant prejudice from the mistaken collection.

Moreover there still remain certain offense for which collection is not required (primarily misdemeanors). Thus the expansion of the list of qualifying prior convictions may diminish, but does not obviate, the possibility of other mistaken sample collections in future. As a result, the deterrent value of the exclusionary rule continues to have validity when the rule is applied to the kind of collection error that occurred here.

Finally, the respondent also argued that no "additional outside deterrence" is necessary, even if the DOJ lab has a "systematic failure in its sample qualification process," because the lab could be expelled from the national CEDIS network "for malfeasance," which is enough of a deterrent. (RB, at 96-97.) This argument fails for several reasons.

First, "malfeasance" isn't defined, and so it is unclear what kind of lab error(s) would have to occur before the deterrent punishment of exclusion from CODIS would apply.

Second, if (as occurred here), two different, trained clerks, whose job it was to determine (or double-check) whether any prior conviction "qualified" a defendant for collection under California law, could not recognize non-qualifying offenses when presented with them, then it is highly unlikely that anyone unfamiliar with California law, who would be conducting the annual CEDIS audit procedures of the DOJ labs, would notice such mistakes.

And third, so long as the state contains an expungement requirement for non-qualifying samples, it appears it will be allowed to remain in CODIS no matter how egregious any unlawful collection of biological samples may be. (*See*, 42 U.S.C. § 14132, subd. (d)(2)(A).)

G. Neither "Inevitable Discovery" Nor "Independent Source" Doctrines Rescue the Unlawful Seizure Here

The respondent's final argument stems from the fact that a change in the case law permitted a lawfully qualified sample collection from appellant by 2002. (RB, at 97.) Specifically, in 2002 another sample was taken from appellant based on his by-then-qualifying offense of first-degree burglary (which appellant committed in 1996, but which was not a "qualifying' offense in 1999); and the results of this sample were entered into the system in November, 2002. (RB, at 69.)

From these facts the respondent extrapolates that appellant's DNA eventually would have been compared to the biological sample from the Deborah L. case, and he would have been identified as possessing an identical DNA profile to that of the perpetrator in that case. (RB, at 100.) As a result, the respondent concludes that "there is no basis upon which to reverse his convictions." (RB, at 101.)

But evidence that was the product of an unlawful intrusion may be used only as long as a separate and distinct evidentiary trail led to the **same place**. (Murray v. United States (1988) 487 U.S. 533 [108 S.Ct. 2529]; *see also*, People v. Superior Court (Tench) (1978) 80 Cal.3d 665.) And here (as explained in Sections I and II, *supra*), the statute of limitations for the Deborah L. offenses ran on August 25, 2000.

As a result, even if appellant would have been "identified" some time after November, 2002 as the likely assailant in that case, he could not have been prosecuted for those offenses, because by then they would have been time-barred. Thus, for purposes of determining whether appellant's current counts of conviction must be reversed, any "inevitable discovery" or "independent source" doctrines cannot rescue the unlawful blood draw in this case.

This argument fails for another reason. The trial court made a specific finding that the "inevitable discovery" doctrine did not apply as the People did not meet their burden of proving a "significant likelihood" that any later sampling of appellant's blood would have taken place, despite the amendment to the

collection law; the trial court specifically noted that the People had not shown the parole authority had implemented any kind of systematic review to ensure that everyone who qualified under the law was, in fact, being sampled. (R.T.2, pp. 535-536.)

In that regard, there was no testimony at the suppression hearing that after January 1, 2002, the Department of Justice (or any other law enforcement agency), made any organized attempt to review prior files and contact those persons who had not before, but did now, qualify for collection. Thus there is no showing in the appellate record that appellant's blood "inevitably" would have been lawfully sampled for DNA testing.

Instead, the evidence showed not only that appellant's blood was not immediately re-sampled after January 1, 1002, but to the contrary, that nothing happened for several months, until **after** the August 14, 2002 preliminary hearing. Not until September 9, 2002 (after appellant already had been bound over for trial), was a second blood sample finally taken from him. (R.T.2, pp. 317-318, 342.)

It is abundantly clear that this second blood draw in 2002 was performed as a formality, precisely to salvage the fruits of the unlawful first sample in 1999. But by analogy, when an original, defective warrant renders unlawful a search performed in accordance with it, in order for a subsequent search to be excused under the "inevitable discovery" doctrine the government agency must prove not only that probable cause existed in the absence of the tainted evidence, but also that the decision to seek the warrant was not

prompted by the unlawfully viewed evidence. (Murray v. United States, *supra*, 487 U.S. at 542-544; United States v. Duran-Orozco (9th Cir. 1999) 192 F.3d 1277, 1281.)

The People have not shown that here, and thus (as the trial court correctly concluded), the "inevitable discovery" doctrine does not salvage the admissibility of the unlawfully seized 1999 blood sample, or its 2000 "search" (i.e., the DNA analysis performed in 2000).

H. Appellant Had No Say In Whether His Deepest Level Of Privacy Could Be Violated By An Unlawful Extraction Of Biological Material Intended For Genetic Testing; Accordingly, the Exclusionary Rule Is the Most Appropriate Remedy For the Constitutional Violation That Occurred Here

At the time appellant's blood was drawn in March, 1999, he was an inmate in the county jail, where he had been incarcerated since December, 1998. (R.T.1, p. 184; R.T.2, pp. 472-473.) As appellant had been imprisoned for four months by the time his blood was drawn he surely understood that he had less freedom, and his actions were far more circumscribed, than any unimprisoned person in the "outside" world.

In addition, Deputy Ortiz was present when appellant's blood physically was drawn by jail nurse Steed. (R.T.1, pp. 163-164, 180.) Although Ortiz did not testify that he was in uniform at the time, a fair inference from the record would be that a deputy sheriff stationed at the county jail, who was in the jail because he was on duty and performing his official functions, would have

been wearing his uniform and likely was armed in some manner.

And if appellant was advised of anything, it would have been the penal consequences to him if he refused to allow his blood to be drawn, for a separate statute served to criminally punish his noncompliance with the collection law. (Pen. Code, § 298.1.[9])

Appellant was truly helpless, and unable to protest the unlawful seizure in this case, which was a "physical intrusion, penetrating beneath the skin ..." (Skinner v. Railway Labor Executives' Ass'n, *supra*, 489 U.S. 602, 616), and which violated his "most personal and deep-rooted expectations of privacy." (Winston v. Lee, *supra*, 470 U.S. 753, 760.) Thus only application of the exclusionary rule is the appropriate remedy for appellant, and others like him, who wrongfully are compelled under color of law to surrender the secrets of their genetic makeup.

Accordingly, suppression of the DNA evidence, including the "match" to the crime scene evidence in the Deborah L. case, and all the other discovery to which that match led police (including the subsequent discovery of appellant's likely involvement in other cases), is required. (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.)

9

Penal Code section 298.1 provides that any person who refuses to give a DNA sample required by the statute after notice, is guilty of a misdemeanor punishable as a separate offense by both a fine or imprisonment, or both; or if the person already is imprisoned (as appellant was), then he is punishable "by sanctions for misdemeanors according to a schedule determined by the Department of Corrections." (Pen. Code, § 298.1, subd. (a).)

CONCLUSION

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

Respectfully submitted,

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Attorney for appellant,
Paul Eugene Robinson

BRIEF LENGTH AND FORMAT CERTIFICATION

I, Cara DeVito, counsel for Paul Eugene Robinson, certify pursuant to the California Rules of Court, rule 8.520(c)(1), that the word count for the foregoing Reply Brief On the Merits is 11,719 words, excluding the tables, this certificate, and any attachment permitted. This document was prepared in WordPerfect 12, and this is the word count generated by that program.

I certify under penalty of perjury under the laws of the State of California that foregoing is true and correct. Executed at Summerlin, Nevada on December 22, 2008.

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PROOF OF SERVICE BY MAIL

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On December 22, 2008, I served the within Reply Brief on the Merits (appellant Paul Eugene Robinson), on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Summerlin, Nevada, addressed as follows:

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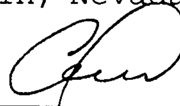

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