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SUPREME COURT COPY

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February 25, 2009

SUPREME COURT
FILED

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Frederick K. Ohlrich Clerk

Deputy

Frederick K. Ohlrich
Court Administrator and Clerk of the Supreme Court
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102-4797

RE: *People v. Paul Eugene Robinson* – Supplemental Letter Brief
Sacramento Superior Court, Case No. 00F06871
Court of Appeal, Third Appellate District, Case No. C044703
Supreme Court of the State of California Case No. S158528

Dear Mr. Ohlrich:

The Court has directed the parties to brief the issue of the effect, if any, of *Herring v. United States* (2009) ____ U.S. ____[129 S. Ct. 695] ("*Herring*") on "whether the exclusionary rule applies to blood samples mistakenly collected from defendant Robinson by law enforcement for inclusion in our state DNA data base."

As a threshold matter, it is respondent's position that the exclusionary rule has no application to this case. The police did not violate Robinson's Fourth Amendment rights in taking a DNA database sample from him in March 1999 while he was in custody on a parole hold arising from a prior felony first-degree burglary conviction, following his December 1998 misdemeanor conviction. (See Respondent's Merits Brief, at pp. 2, 12, fn. 2, 75-90.)

Nonetheless, if this Court were to find a Fourth Amendment violation, it is clear that the exclusionary rule would not apply to DNA database samples collected from Robinson. That conclusion follows from *Hudson v. Michigan* (2006) 547 U.S. 586 ("*Hudson*"), the California Penal Code provisions expressly anticipating and excusing mistaken DNA sample collection, and the trial court's findings that show the DNA collection mistake in this case amounted to non-culpable negligence, at most. (See e.g., Cal. Pen. § 297, subds. (f) & (g); Cal. Pen. Code, § 298, subd. (c) [mistake provisions];

see 3 CT 728-738 [trial court findings].) *Herring* only confirms that the exclusionary rule is unavailable here. The sole remedy for mistaken sample collection is the one provided by the California Legislature in Penal Code section 299: expungement of the sample, as occurred in this case.

EVEN IF THERE WERE A FOURTH AMENDMENT VIOLATION IN THIS CASE, *HERRING* WOULD PROHIBIT EXCLUSION OF THE CHALLENGED EVIDENCE

A. The State Court May Not Exclude Relevant Evidence Unless Suppression of the Evidence is Compelled by the Federal Constitution as Defined by the United States Supreme Court

When a defendant in a criminal case seeks suppression of evidence obtained in a search or seizure based upon a constitutional violation, "a [California] court may exclude the evidence on that basis only if exclusion is also mandated by the federal exclusionary rule applicable to evidence seized in violation of the Fourth Amendment." (*In re Lance W.* (1985) 37 Cal.3d 873, 885-889, 896 (*"Lance W."*); *People v. Robles* (2000) 23 Cal.4th 789, 794, *People v. Ayala* (2000) 23 Cal. 4th 225, 254-255; see Cal. Const., art. I, § 28 subd.(d).) In *Lance W.* this Court explained that the United States Supreme Court defines the circumstances under which California courts apply the sanction of the federal exclusionary rule. (See *Lance W., supra,* 37 Cal.3d at pp. 881-882, citing *United States v. Leon* (1984) 468 U.S. 897, 908 (*"Leon"*):

> "The *Fourth Amendment to the United States Constitution* and *article I, section 13, of the California Constitution* extend similar protection against 'unreasonable searches and seizures.' . . . . [A]lthough state application of the exclusionary rule in criminal trials is essential to ensure that the guarantee of the Fourth Amendment is not an empty promise [citation omitted], the circumstances to which the federal exclusionary rule must be applied as a sanction in order to deter future unlawful conduct by police or other state agents are defined by the United States Supreme Court." (*Lance W., supra,* 37 Cal.3d at pp. 881-882.)

By virtue of California Constitution, Art.1, Section 28, subdivision (d), and *Lance W., supra,* 37 Cal.3d at pp. 885-889, *Herring* is applicable to this case.

B. Under the United States Supreme Court's Decision in *Herring*, the Exclusionary Rule Is Warranted Only Where the Police Conduct Is Sufficiently "Deliberate" and "Culpable"

The United States Supreme Court in *Herring* addressed the analytical framework for applying the exclusionary rule and found that non-culpable negligence by the police did not justify exclusion of evidence.

Herring involved a "negligent bookkeeping error" by a police employee whose failure to update computer records resulted in the defendant's unlawful arrest by a different agency relying upon a recalled warrant. The question before the Court was whether contraband found during a search incident to the unlawful arrest had to be excluded in a later prosecution. (*Herring, supra,* 129 S. Ct. at p. 698.) The United States Supreme Court held that where there is a Fourth Amendment violation, "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." (*Herring*, at p. 702.) In *Herring*, because the error did not rise to the level of "deliberate, reckless, or grossly negligent conduct,"or possibly "recurring or systemic negligence," the Court found that it was not the type of case to which the exclusionary rule should be applied. (*Herring*, at p. 702.) Instead, in upholding Herring's conviction, the Court found that "the error was the result of isolated negligence attenuated from the arrest." (*Herring,* at p. 698.)

Herring thus clarifies that the objective culpability of the police conduct is an important component in analyzing whether the exclusionary rule applies to a Fourth Amendment violation. "Our cases establish that . . . suppression is not an automatic consequence of a Fourth Amendment violation. Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct . . . " (*Herring*, *supra*, 129 S. Ct. at pp. 698; see also *id.* at p. 700 [the lower court's conclusion that the error was "negligent" and not "reckless or deliberate" is "crucial to our holding that this error is not enough by itself to require 'the extreme sanction of exclusion.'"].) Citing *Leon*, 468 U.S. at p. 911, the Court observed, "'an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus' of applying the exclusionary rule." (*Herring*, at pp. 701-702.)[1]

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[1] The Court in *Herring* recognized that trial courts may not apply the exclusionary rule without evaluating issues of both culpability and deterrence. Accordingly, after *Herring* and *Hudson, supra*, 547 U.S. 586, the continuing validity of California case law mandating exclusion of evidence for Fourth Amendment violations

C. The Federal Constitution, as Interpreted in *Herring*, Does Not Permit Imposition of the Exclusionary Rule in this Case

Even if there were a Fourth Amendment violation in this case—although none occurred—it is clear, based upon the reasons set forth in Respondent's Merits Brief, as reinforced by *Herring*, that this is not a case in which the exclusionary rule may be applied to suppress relevant and reliable DNA identification evidence. (See Respondent's Merits Brief at pp. 66-82, 91-101.) The alleged constitutional violation was at most a negligent and non-systemic one that was attenuated from appellant's arrest, and any potential deterrent effect from exclusion of the evidence would be insubstantial and insufficient to outweigh the attendant social cost.

Here, the errors made in qualifying Robinson for DNA database sample collection bear none of the hallmarks of deliberate or flagrantly abusive misconduct, the deterrence of which lies at the core of the exclusionary rule.[2] There was no deliberate or tactical choice to commit error for the purpose of obtaining an unauthorized DNA database

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regardless of the culpability of the police conduct at issue should be reevaluated. (See *Herring, supra,* 129 S. Ct. at pp. 698, 704 ["In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system [citation omitted], we conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way'."].) *Herring* emphasizes the culpability of the conduct, rather than other factors such as the fact of error or the status of the erring actors. *Hudson, supra*, makes clear that suppression of evidence is the "last resort," not the "first impulse," and the exclusionary rule's "'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." (*Hudson, supra,* 547 U.S. at p. 591.)

[2] There is a significant distinction between flagrant and abusive misconduct which directly results in an individual's arrest and which underscores the need for the exclusionary rule, and a mistake that results in an incarcerated offender providing a buccal (cheek) swab sample for an identification record —which can later be expunged, if necessary. In assessing whether the exclusionary rule applies in this case, the trial court properly distinguished mistaken DNA sample collection from cases where there are record-keeping errors that result in serious consequences of arrest, custody time, or dangerous entry into a home: A mistaken collection of a DNA sample "does not involve the arrest, apprehension, [or] taking into custody of the person" because the person "is already in custody." (3 CT 735.)

sample so that Robinson could be arrested for the sexual assault crimes charged. (See *People v. Ayala, supra*, 23 Cal. 3d at p. 255-256 [deferential substantial evidence standard applicable to trial court's ruling on historical facts].) Rather, the trial court's finding establishes, at most, that there was non-culpable negligence, attenuated from Robinson's ultimate arrest by law enforcement in this case.

Specifically, the trial court found that the state's newly-enacted DNA database law, Penal Code section 295 et seq., was constitutional and that "the motivation" for the collection of Robinson's database sample "was a good faith belief, possibly based on a negligent analysis by someone, that the defendant was a qualified offender and that the law directed his sample to be obtained." (3 CT 728-729.) The trial court also concluded that law enforcement's errors were not systematic efforts to avoid the limits of the law. (3 CT 737-738.) Rather, consistent with the database statute's mistake provision, the court found the errors "inevitable in this process." (3 CT 736.) In conjunction with these factual findings, the court stated that it was impressed that the California Department of Justice, which administers the database program, "took significant steps to review their whole system" including to "stop their processing until a form of review was conducted" upon learning of a previous sample collection error in another Sacramento case. (3 CT 736.) The trial court also found that the Department of Justice had made "serious efforts to try to evaluate their system" and that its post-mistake conduct showed "that these folks are not out there trying to get as much blood as they can [or] trying to expand their base by overlooking issues of qualification." (3 CT 736-737.) The court found that the Department of Justice, although "not perfect," acted in a "responsible" and "conscientious" manner in "trying to keep their errors to a very low level"—less than one percent. (3 CT 737.)

Moreover, as set forth in Respondent's Merits Brief, the administrative collection of Robinson's DNA database identification sample while he was in custody on a parole hold was attenuated from Robinson's subsequent arrest for unrelated sexual assault crimes. (See *Hudson v. Michigan, supra,* 547 U.S. 586, 592 ["[E]xclusion may not be premised on the mere fact that a constitutional violation was a 'but-for' cause of obtaining evidence."]; cf. *People v. Brendlin* (2008) 45 Cal.4th 262, 265 ["discovery of an outstanding arrest warrant prior to a search incident to arrest constitutes an intervening circumstance that may—and, in the absence of purposeful or flagrant police misconduct, *will*—attenuate the taint of the antecedent unlawful traffic stop."].)

Further, there can be no deterrence value in excluding the DNA database forensic identification evidence. A 2002 amendment to the database law added first degree burglary as a qualifying offense for DNA sample collection and authorized an independent and separately admissible sample from Robinson. Further, Proposition 69,

effective November 3, 2004, subsequently expanded the database law to include DNA sample collection for all adult and juvenile felony offenses. (See Respondent's Merits Brief at pp. 43-44, 97-100.)

Finally, the DNA database law's provisions reflect that the Legislature weighed the deterrent effect and social cost of excluding reliable DNA identification evidence collected by mistake and determined, as a matter of statute and policy, to prohibit exclusion. (See, e.g., Pen. Code, § 297, subd. (e) and subd. (f) [conviction not invalidated by mistaken DNA sample collection]; Pen. Code, § 298, subd. (c)(1) [no civil or criminal liability for collecting samples when done in accordance with standard professional practices]; Pen. Code, § 298, subd. (c)(2) [no civil or criminal action against any law enforcement agency or the Department of Justice for a mistake in placing an entry in a data bank or database]; Pen. Code, § 298, subd.(c)(3).) To justify suppression, any alleged incremental benefits of deterrence must outweigh the substantial social costs of exclusion—i.e., letting guilty and possibly dangerous defendants go free, which "offends basic concepts of the criminal justice system." (See *Herring, supra*, 129 S.Ct. at pp. 700-701 [citing *Leon, supra,* 468 U.S. at pp. 908-910, and *Illinois v. Krull* (1987) 480 U.S. 340, 352-353]; cf. *United States v. Farias-Gonzalez* (11th Cir. 2009) 2009 U.S.App.Lexis 2060 *18 fn.8 ["application of the exclusionary rule to identity-related evidence has high social cost . . . ."].)

Here, as recognized by both the Legislature, and subsequently by the People in Proposition 69 [ballot measure clarifying and expanding Pen. Code, § 295 et. seq], the insubstantial deterrent effect of exclusion would not outweigh the high social cost of excluding identity-related evidence and letting dangerous serial sex offenders, such as Robinson, back on the street. Likewise, bypassing the Legislature's and the People's express intent to excuse mistakes in the collection of DNA identification database samples from convicted incarcerated offenders, such as Robinson, would not comport with the United States Supreme Court's limitation that the exclusionary rule applies only as "a last resort." (See *Hudson, supra*, 547 U.S. at p. 591.)

The Court of Appeal, also employing a *Herring/Hudson*-type analysis, found no culpable malfeasance by law enforcement and concluded that there was no deterrent value in suppressing the evidence and that exclusion would entail significant social costs:

> First, there was no egregious police misconduct involving willful malfeasance. To the contrary, as the trial court found, state and local officials were attempting to act in a responsible and conscientious manner in an effort to implement the mandates of a complex law while carrying out the daunting task of collecting and analyzing thousands of biological

samples 'as soon as administratively practicable. . . .'' (Former § 296, subd. (b); Stats. 1998, ch. 696, § 2.) [¶] Moreover, the definition of a qualifying offense has been expanded and simplified . . . to include any felony, whether committed by a juvenile or an adult . . . [and] no deterrent effect would be achieved by excluding evidence obtained from a sample mistakenly collected under an earlier version of the [DNA] Act when the same search would be lawful under the current law.'' [¶] The deterrent value of suppression is also diminished by federal law, which sanctions noncompliance with federal standards for [the federally administered database program] CODIS . . . .¶ Last, suppression of the evidence will not serve the statutory purpose of former section 296 . . . [which limited the statutory list of qualifying offenses] to specified violent felonies . . . to ease the administrative burden on those who were responsible for implementing the Act, not to benefit individual offenders. . . .¶ In sum, we find the officials who were responsible for mistakenly collecting defendant's blood did so as a good faith effort to comply with the new law, there are no incentives to collect blood samples beyond the scope of the statute, and the purpose and interests protected by the Act will not be served by suppression. Suppressing the evidence would achieve no deterrent value under these circumstances although it would have significant social costs . . . (See *Robinson*, Typed Opn. pp. 31-36.)

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Accordingly, *Herring* reinforces and independently supports the conclusion that, even if there were a Fourth Amendment violation, the exclusionary rule may not be extended to the collection of the DNA database identification samples in this case. The sample collection error was a non-culpable one and the social cost of exclusion would be far too great in comparison to any possible deterrence value of suppressing the evidence.

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DECLARATION OF SERVICE BY U.S. MAIL

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No.: **S158528**

I declare:

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

On February 25, 2009, I served the attached **SUPPLEMENTAL LETTER BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 25, 2009, at San Francisco, California.

J. Wong
Declarant

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Signature

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