EDMUND G. BROWN JR.
Attorney General

COPY

State of California
DEPARTMENT OF JUSTICE

SUPREME COURT COPY

455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102-7004

Public: (415) 703-5500
Telephone: (415) 703-5976
Facsimile: (415) 703-1234
E-Mail: Enid.Camps@doj.ca.gov

March 11, 2009

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 Reply Brief
Supreme Court of the State of California, Case No. S158528

Dear Mr. Ohlrich:

Respondent submits this letter in reply to defendant Robinson's opening letter brief on the effect 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."

INTRODUCTION

Herring confirms that the exclusionary rule is inapplicable to this case. In *Herring*, the United States Supreme Court addressed the analytical framework for applying the exclusionary rule, and found that non-culpable negligence by the police did not justify exclusion of evidence. The Court clarified that "an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus of applying the exclusionary rule." (See *Herring*, at pp. 698, 701-702.) In this case, the trial court's findings show the administrative errors made in qualifying Robinson for DNA database sample collection while he was in custody do not rise to the level of culpable conduct--deliberate, reckless, grossly negligent misconduct, or a similarly flagrant recurring or systemic negligence--that *Herring* requires as a threshold determination for applying the exclusionary rule. The trial court found that there "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 [DNA] sample to be obtained" (3 CT 728-729), and that law enforcement's errors were not systematic efforts to avoid the limits of the law (3 CT 737-738).

Robinson contends, however, that *Herring* "does not obviate the need in this case for application of the exclusionary rule." He advances three reasons: (1) "[I]n this case (unlike *Herring*), there was not a single careless error, but a cascading series of them indicative of a systemic breakdown"; (2) "[T]he 'arrest warrant' here (i.e, the order to draw blood) was not attenuated from the 'arrest' (i.e., the seizure of blood from appellant)"; and (3) "[T]he search in *Herring* was limited to the suspect's clothes and vehicle, whereas the seizure here occurred from appellant's very body." (Appellant's Opening Supplemental Letter Brief at pp. 1-2.)

Robinson's arguments lack merit. To advance his claims, Robinson relies on the faulty legal assumption that there was a Fourth Amendment violation in this case. He compounds that error with multiple unsupported factual interferences and allegations about the mistakes made by law enforcement in administratively qualifying him for DNA sample collection while he was lawfully in custody at Rio Cosumnes Correction Center (RCCC).

Equally striking, Robinson bypasses analysis of the core principles of culpability, deterrence, and the social cost of excluding reliable evidence, as required after *Herring* and *Hudson v. Michigan* (2006) 547 U.S. 586 (*Hudson*). Notably absent from Robinson's briefing also is discussion of facts pivotal to assessing the exclusionary rule's application here, including that: (1) the DNA Database Act anticipated sample collection mistakes and provided for the appropriate remedy of sample expungement rather than exclusion of evidence; and (2) the trial court's factual findings, based upon *all* of the evidence presented, are directly contrary to Robinson's position and show that the administrative mistakes in this case were nonsystemic and nonculpable. (See *Herring*, *supra,* 129 S. Ct. 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'"].)

A. There was no Fourth Amendment Violation that Triggers the Exclusionary Rule in this Case

The fact that there was no violation of Robinson's Fourth Amendment rights is a complete answer to the question of whether the exclusionary rule applies in this case. (See *Virginia v. Moore* (2008) ____ U.S. ____ 128 S.Ct. 1598, 1606-1608; *People v. McKay* (2002) 27 Cal.4th 601; *People v. Tillery* (1989) 211 Cal.App.3d 1569, 1580; Cal.

Const. Art. I, section 28 subd. (d).) As a convicted felony offender in custody when his sample was taken, defendant Robinson has no basis for claiming that the Fourth Amendment protected him from providing a DNA identification sample under the statute. A long line of state and federal courts nationwide uniformly have held that DNA collection from convicted offenders in custody passes Fourth Amendment scrutiny. (See, e.g., *People v. Travis* (2006) 139 Cal.App.4th 1271; *United States v. Kincade* (9th Cir. 2004) 379 F.3d 813, 818-820; *Jones v. Murray* (4th Cir. 1992) 962 F.2d 302); *People v. King* (2000) 82 Cal.App.4th 1363, 1368-1369 (*King*); *Alfaro v. Terhune*, (2002) 98 Cal.App.4th 492, 497-498, 505; *United States v. Wiekert* (1st Cir. 2007) 504 F.3d 1.) "By their commissions of a crime and subsequent convictions, persons such as appellant have forfeited any legitimate expectation of privacy in their identities . . . [and] any argument that Fourth Amendment privacy interests prohibit gathering information concerning identity from the person of one who has been convicted of a serious crime, or of retaining that information for crime enforcement purposes, is an argument that long ago was resolved in favor of the government." (See e.g., *King, supra*, 82 Cal.App.4th at p. 1375.)

B. There is No Evidence To Support Defendant's Theory that There is Culpable, Recurring and Systemic Error Throughout the State's DNA Database Program

The exclusionary rule establishes a remedy for flagrant, culpable violations of constitutional rights (*Herring supra,* 129 S. Ct. at pp. 698, 700-702), which can discipline and deter future police misconduct. The collection of Robinson's DNA identification sample while he was in custody as a convicted offender did not fall into this category. (See generally, *King, supra*, 82 Cal.App.4th at pp. 1372-1373.) The trial court correctly found no evidence of systemic, flagrant, or serious failures by law enforcement in implementing the State's DNA Database program as a whole. (See 1RT 156-299; 2RT 300-537, 3CT 728-737.) The lower court's findings are crucial in determining law enforcement's culpability for the mistake. (*Herring*, *supra,* 129 S. Ct. at p. 700.)

Instead of addressing these important findings, Robinson focuses upon two errors made with respect to the DNA database identification sample collected from him in 1999. He then illogically extrapolates that those errors show deliberate, flagrant, or reckless conduct that is so culpable, egregious, and recurring that it substantially infects the entire DNA database program. His theory is groundless. At issue here was an anticipated and understandable human error made in the interpretation, and implementation of a new complex law that significantly expanded DNA identification sample collection from convicted offenders, and that put heavy and unprecedented

burdens on law enforcement. Though Robinson claims otherwise (Appellant's Letter Brief at p. 6), law enforcement understood their new duties were "to identify and collect DNA samples from individuals *convicted* of certain crimes [who] were within our custody at the time prior to their release." (1RT 166; emphasis added; see also 1RT 202 ["the information I gave out was felony convictions"]; 1RT 208 [use of criminal record systems]; 1RT 216 [noting staff "were trained to look for felonies"].) At RCCC "a large number of staff were being used to review records and identify the qualified." (1RT 172.) However, in two instances law enforcement made a mistake. This does not equate to evidence of widespread and culpable error. In fact, as the trial court recognized, the errors were kept to a "very low level"—less than one percent. (3 CT 737.)

Further, as the trial court recognized, there was no flagrant disregard of statutory directives or constitutional requirements. It was just the opposite. Although the California Department of Justice had no statutory duty to verify that all samples received qualified for inclusion in the data bank at that time, the DOJ DNA lab nevertheless undertook the verification of submitted samples and implemented a system for holding samples until the sample verification process was completed. If the sample did not qualify, it would not be "typed." (1 RT 277-278, 281, 287, 290.) Ken Konzak, Laboratory Director for the state's DNA data bank, testified that, after the lab learned of the first mistaken collection of a non-qualifying sample, the lab "stopped the presses" i.e., "stopped all searches of the database and went back and literally checked tens of thousands of profiles." (1 RT 288-290.) As a result of the mistaken collection, the lab stopped all automated searches from June 2000 until the verification was completed. (1 RT 290, 2 RT 323.) Due to the confusion over collection from in-custody adult offenders for prior juvenile felony adjudications, DOJ also instituted a policy for "administrative reasons to make sure we don't repeat this kind of situation" and started accepting such samples only when the juvenile offender had a qualifying sexual assault offense and had been sent to CYA—a fact that is recorded on the criminal history rather than in a sealed record. (2 RT 368-369.) As the trial court found: "[T]hese folks [were] 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.)

C. A *Hudson/Herring* Analysis of Culpability and the Future Deterrence Value and Social Cost of Suppressing Evidence Precludes Application of the Exclusionary Rule in this Case

Even if a Fourth Amendment violation were found, a *Hudson/Herring* analysis would preclude application of the exclusionary rule, despite Robinson's claim to the contrary. Under *Hudson/Herring,* the value of exclusion is weighed through determinations of culpability, deterrence and the social cost of suppressing evidence.

Robinson seeks to punish law enforcement for the mistaken collection of his sample, rather than for any future deterrence of Fourth Amendment violations. This is not the purpose of the exclusionary rule. *Hudson/Herring* refocuses analysis of the exclusionary rule away from the one-dimensional, error-centered analysis offered by Robinson and to a consideration of the real deterrence value and social cost of excluding evidence.

Robinson fails to acknowledge that both the Legislature (in 1998) and the People (in 2004) included within the DNA Database Act a provision governing the consequences of sample collection mistakes[1] – thereby recognizing that the criminal justice system is better served by deterring and stopping criminal offenders, than by deterring collection of minimally-intrusive DNA identification samples from offenders in custody. Underlying the mistake provision and the Database Act's accompanying limitation of liability provisions are two salient points. First, the California Legislature did not—and still does not—view a mistaken collection from a non-qualifying criminal offender as an unreasonable search or a culpable error. Second, the list of offenses qualifying the offender for DNA collection was limited for administrative purposes only, and not because lawmakers thought that seizure of DNA samples from only those offenders listed in the former Penal Code section 296 would constitute reasonable searches. In other words, the limitation of the qualifying offense list was not to benefit any non-qualifying defendant or affirmatively exempt entire classes of convicted offenders from collection; rather, it was to accommodate the administrators of the data bank program, i.e., the Department of Justice. (See 1999 Pen. Code § 295, subd. (d); see

---

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

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

(Proposition 69 clarifying amendments to the mistake provisions are in italicized text.)

also 1 RT 277.) Thus application of the exclusionary rule to mistaken sample collection would be the kind of disproportionate remedy disapproved in *Hudson*, which compels a better fit between the violation and the purpose of the rule violated. (See *Hudson*, *supra*, 126 S.Ct at p. 2169, fn. 2 [citing the "plain statement" in *New York v. Harris* (1990) 495 U.S. 14, 20, "that the reason for a rule must govern the sanctions for the rule's violation"].)

Nor does Robinson address the other significant facts that show the exclusion of evidence in this case has little deterrence value with respect to future DNA sample collection from offenders like him. He does not address the facts that: (a) the People in 2004 significantly expanded the database program to include all felony offenses committed by an adult or by a juvenile, while minimizing the intrusiveness of DNA collection through use of buccal (cheek) swabs instead of blood draws; (b) in 2001, when DOJ became aware that Robinson's sample was collected by mistake, DOJ acted responsibly and reviewed its operations to help prevent mistakes in the future; and (c) law enforcement already has sufficient incentive to process only qualifying samples because it would affect the DOJ laboratory's accreditation status and its access to CODIS software that links California to national crime-solving networks. (See Pen. Code, § 295, subd. (h) (4) [requiring quarterly report updates as to laboratory accreditation and CODIS membership status].) For systemic malfeasance, the DOJ DNA lab could be expelled from CODIS. (2 RT 265, 397; see also 42 U.S.C §§ 14132(c), 14135e(c) [law enforcement access to the federal index may be cancelled for failure to meet the quality control and privacy requirements of federal law]; 42 U.S.C. §14132(d)(2)(A) [state access to CODIS is conditional on expungement procedures for non-qualifying samples].)

Likewise, the social cost of suppressing evidence for mistakes in DNA sample collection from criminal offenders in custody is not "worth the price paid by the justice system." (See *Herring, supra*,129 S. Ct. at p. 702.) The State unquestionably has a legitimate interest in ensuring that reliable DNA evidence is presented to the trier of fact in a criminal trial. "Indeed, the exclusion of unreliable evidence is a principal objective of many evidentiary rules. See, *e.g.*, Fed. Rule Evid. 702; Fed. Rule Evid. 802; Fed. Rule Evid. 901; see also *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)." (Cf. *United States v. Scheffer* (1998) 523 U.S. 303, 309.) Generally, identification evidence is an unworthy candidate for application of the exclusionary rule because it is too important to suppress, particularly when there is an administrative error that resulted in its collection which does not call into question the reliability of the evidence. (*United States v. Farias-Gonzalez* (11th Cir. 2009) 2009 U.S.App.Lexis 2060 *18 fn. 8, 21 Fla. L. Weekly Fed. C. 1438 ["application of the exclusionary rule to identity-related evidence has high social cost . . . ."];

Sanchez-Llamas v. Oregon (2006) 548 U.S. 331, 349 ["We require exclusion of coerced confessions both because we disapprove of such coercion and because such confessions tend to be unreliable."]; see also *United States v. Crews* (1980) 44 U.S. 463.)

Likewise, the collection of DNA identification information from a convicted offender in custody, such as Robinson, is necessarily attenuated in time, place, and manner from use of that identification information to subsequently link the defendant to other unrelated crimes he has independently committed. (Cf. *Hudson, 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."]; *People v. Brendlin* (2008) 45 Cal.4th 262, 265; cf. *People v. Griffin* (1976) 59 Cal.App.3d 532 [error to suppress identification evidence resulting from mug shots of defendant after he was unlawfully arrested][2].) The seizure of a DNA sample for database purposes pursuant to the DNA Act is attenuated from Robinson's subsequent prosecution for sexual assault crimes by virtue of Robinson's own independent acts.

Moreover, the fact that Robinson was still in prison for felony burglary, and became legally required to provide a DNA database identification sample to law enforcement as of January 1, 2002, when the Database Act was amended to include first degree burglary, attenuates any taint from the mistaken collection. (Cf. *People v. Brendlin, supra,* 45 Cal.4th at p. 265.) Were Robinson in prison today under the same circumstances as he was in 1999, it is clear that collection of his sample would be both constitutionally and statutorily permissible. Accordingly, this is not the type of case that *Herring* or *Hudson* would validate as properly subject to the exclusionary rule.

---

[2]This is the correct citation for the case. Respondent apologizes for the typographical error in Respondent's Merits Brief. Respondent also would like to clarify that approximately three years after the DNA Forensic Identification Data Base and Data Bank Act of 1998 was passed (eff. Jan.1,1999), the Act was amended to include first degree burglary. Thus, beginning January 2002, there was about a five-month period in which Robinson was required to provide a DNA sample while he was in CDC custody, serving the rest of his sentence on a 1996 first degree burglary conviction. It appears the reason his sample was not collected in 2002 was that it already had been flagged on his rap sheet as collected (in March 1999). (See Respondent's Merits Brief at pp 98-99.) When Robinson's second sample was finally taken at CDCR on September 4, 2002, the statutory amendments adding first degree burglary as an offense qualifying for sample collection had been in effect for over eight months. Notations about a 10-month time period were incorrectly inserted in Respondent's brief and should be disregarded.

CONCLUSION

The high social cost of excluding reliable DNA identification evidence that links a serial sex offender with the crimes he commits is vastly disproportionate to the minor intrusion occasioned by taking a DNA buccal swab sample from an individual while he is lawfully in police custody. The exclusionary rule is an inappropriate remedy for a nonculpable administrative mistake that results in collecting a reliable DNA identification sample from a felony offender in custody.

EDMUND G. BROWN JR.
Attorney General of California
DONALD E. DENICOLA
Deputy Solicitor General
DORIS A. CALANDRA
Deputy Attorney General

ENID A. CAMPS
Deputy Attorney General
State Bar No. 113183
Attorneys for Respondent

EAC:jw

2Drobinsonreplyletterbriefdenicolaeditmarch10.wpd
SF2008400622

CONCLUSION

The high social cost of excluding reliable DNA identification evidence that links a serial sex offender with the crimes he commits is vastly disproportionate to the minor intrusion occasioned by taking a DNA buccal swab sample from an individual while he is lawfully in police custody. The exclusionary rule is an inappropriate remedy for a nonculpable administrative mistake that results in collecting a reliable DNA identification sample from a felony offender in custody.

EDMUND G. BROWN JR.
Attorney General of California
DONALD E. DENICOLA
Deputy Solicitor General
DORIS A. CALANDRA
Deputy Attorney General

ENID A. CAMPS
Deputy Attorney General
State Bar No. 113183
Attorneys for Respondent

EAC:jw

2Drobinsonreplyletterbriefdenicolaeditmarch10.wpd
SF2008400622

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Paul Eugene Robinson***

No.: **S158528**

I declare:

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

On **March 11, 2009**, I served the attached **SUPPLEMENTAL LETTER REPLY 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:

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

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

Third Appellate District
Court of Appeal of the State of California
621 Capitol Mall, 10th Floor
Sacramento, CA 95814

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

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **March 11, 2009**, at San Francisco, California.

M. Otanes
Declarant

Signature

SF2008400622
20189418.doc