SUPREME COURT COPY

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March 10, 2009

Honorable Frederick Ohlrich
Court Administrator and Clerk of the Supreme Court
California Supreme Court
Earl Warren Building
350 McAllister Street
San Francisco, CA 94102-3600

Re: People v. Paul Eugene Robinson
Cal Supreme Court dock. no. S158528
3rd Crim. App. no. C044703
Sacramento County no. 00F06871

Dear Mr. Ohlrich:

On February 11, 2009, the Court ordered the parties in this case to file simultaneous Reply letter-briefs, no later than March 11, 2009, on the impact on this case (if any), of Herring v. United States (2009) ___ U.S. ___ [129 S.CT. 695].

Therefore, on behalf of appellant Paul Eugene Robinson, please convey the following to the Court:

The Respondent's Initial Arguments

The respondent's letter-brief prefaced any discussion of Herring by reminding this Court of four arguments made in its Respondent's Brief on the Merits. (Resp. Letter Brief, at p. 1.) Specifically, it noted:

1) Its position is that no Fourth Amendment violation occurred, as the State took the DNA database sample from appellant "while he was in custody on a parole hold arising from a first-degree burglary conviction, following his December 1998 misdemeanor conviction." (Resp. Letter Brief, at p. 1.)

2) If there is a Fourth Amendment violation, the exclusionary rule does not apply to the DNA database samples collected from appellant (and expungement of the samples is the only remedy), for three reasons:

- The United States Supreme Court's holding in Hudson v. Michigan (2006) 547 U.S. 586

- Penal Code sections 297, subdivisions (f) and (g), and 298, subdivision (c) (the "mistake provisions')' and,

- The trial court's findings that reflect the mistaken collection of DNA in this case was non-culpable negligence. (*See*, Resp. Letter-Brief, at pp. 1, 5-7.)

With the exception of the Hudson case, appellant already addressed these arguments in his Reply Brief on the Merits. (RBOM, at pp. 34-35, 37-39.)

As for Hudson (a drug suppression case), the Supreme Court said only that suppression under the exclusionary rule was not automatic for a violation of the "knock-and-announce" rule; that decision did not concern itself with whether a higher standard applies when the unlawful seizure is directly from a person's body.

And its analysis of why exclusion does not apply to every seizure violation is largely repeated in Herring (i.e., that its deterrence benefit must outweigh its substantial social costs, etc.)

The Respondent's Analysis of **Herring**

In light of the California Constitution and In re Lance W. (1985) 37 Cal.3d 873, the respondent noted (and appellant agrees), that exclusion of evidence developed from the erroneously-collected blood sample must be mandated by federal Fourth Amendment law, as defined by the United States Supreme Court. (Resp. Letter-Brief, at p. 2.) There is no disagreement on that point.

The respondent then contended that in Herring the High Court found that "non-culpable negligence by police did not justify exclusion of evidence," and that exclusionary rule is warranted only where police conduct is "deliberate" and "culpable." (Resp. Letter-Brief, at p. 3.)

To a certain extent appellant agrees. The High Court certainly found that the police culpability is a significant factor, and that the fact that the error in the case before it was "negligent, but ... not ... reckless or deliberate ... is crucial to our holding that this error is not enough by itself to require 'the extreme sanction of exclusion.'" (Herring, 129 S.Ct. 695, 700.)

But note that the Supreme Court did not say police had to be both culpable **and deliberate**, as the respondent's letter-brief suggested; instead, the Supreme Court indicated that a "reckless" error -- something more than a merely negligent error -- also might be "crucial" to any decision. (Ibid.)

In fact, in Herring "the error was the result of isolated negligence attenuated from the arrest." (Id., at 698.) Here, by contrast, appellant has demonstrated in his Opening and Letter-Briefs that there was more than one isolated error, and that institutionalized chaos led to a system-wide series of errors.

The respondent, on the other hand, argued that the violation in this case "was at most a negligent and non-systemic one that was attenuated from appellant's arrest ...." (Resp. Letter-Brief, at p. 4.)

The fallacy of that position is reflected by two facts.

First, the respondent referred to the violation here in the singular, as though it were a single, isolated incident: "a negligent and non-systemic one." (Ibid.)

But we know that, at a minimum, in this case there were two separate, erroneous decisions to "qualify" appellant for blood collection, yet neither ground for collection was authorized by the collection statute in existence at that time. (R.T.1, pp. 295, 297, 299-300; R.T.2, p. 310.)

So the errors here was neither "isolated" nor indicative of problems that are "non-systemic."

And second, the error in unlawfully collecting appellant's blood was not attenuated from his later arrest for the serial rapes; instead, the unlawful blood collection was the evidence from which his DNA profile was developed, and it was that DNA profile which was used to identify appellant as the person to be arrested by the already-issued "John Doe/DNA arrest warrant". (R.T.2, pp 329-331.)

The respondent, however, also suggested that no deliberate choice was made to obtain an unauthorized DNA database sample here (Resp. Letter-Brief, at pp. 4-5), and attempted to minimize the unlawful seizure by suggesting that taking a buccal (cheek) swab is less intrusive than arresting a suspect. (Id., at p. 4, fn. 2.)

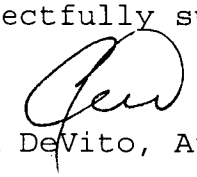
But recall, in this case a **blood** sample was taken from appellant, not a buccal swab. And the Supreme Court has found that a forcible,

nonconsensual extraction of a person's blood violates his "most personal and deep-rooted expectations of privacy." (Winston v. King (1985) 470 U.S. 753, 760 [105 S.Ct. 1611].)

The respondent did not address whether the seizure of biological material from appellant's very body affects the determination of whether the police conduct here was more culpable or reckless than mere negligence.

And again, appellant ask this Court to bear that distinction in mind, when deciding whether it makes a difference if an error results in a seizure of evidence from a suspect's body rather than from the suspect's "person".

Respectfully submitted,



Cara DeVito, Attorney at Law

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PROOF OF SERVICE BY MAIL

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

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

On March 10, 2009, I served the within Letter-Brief in Reply (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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I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice these would be deposited with the U.S. Postal service on that same day with postage thereon fully prepaid at Summerlin, Nevada, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this affidavit.

I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of California, and that this Proof of Service was executed at Summerlin, Nevada, on March 10, 2009.

Cara DeVito