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8 Attorney for Gregory William Montgomery

9 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO  
10

11 PEOPLE OF THE STATE OF  
12 CALIFORNIA

13 Plaintiff,

14 vs.

15 Gregory William Montgomery

16 Defendant

Case No.: 00F05623

Department No. 4/TBA

NOTICE OF MOTION AND MOTION  
TO SUPPRESS EVIDENCE PURSUANT  
TO PENAL CODE SECTION 1538.5

17  
18 Hearing Date: October 17, 2002 at 8:45 a.m.  
19 Opposition due: Five calendar days before hearing  
20 Moving party reply: Two days before hearing date.  
21 Trial date: n/a

22 TO: JAN SCULLY, DISTRICT ATTORNEY FOR SACRAMENTO COUNTY

23 PLEASE TAKE NOTICE that on October 17, 2002 at 8:45 a.m., or as soon  
24 thereafter as the matter may be heard, in Department 4/TBA of the above entitled court,  
25 defendant, Gregory William Montgomery, by and through his/her attorney, Michael R.  
26 Nelson, Assistant Public Defender, will move the court for an order directing that all  
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28

1 seized evidence described below and any fruits thereof be suppressed as evidence against  
2 the defendant in any criminal proceeding.

3  
4 The evidence to be suppressed consists of all tangible and intangible evidence  
5 obtained as the result of any illegal act including, but not limited to: Blood samples taken  
6 from the defendant on March 2, 1999 and August 28, 2000 and the results of any DNA  
7 testing on the defendant's samples as well as any "cold hit" with crime scene evidence in  
8 the DOJ DNA databank.

9  
10 This motion will be based on this notice, pleadings, records and files in this action,  
11 as well as all evidence, law, and argument presented at the hearing of this motion.

12  
13 DATED: August , 2009

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15 Respectfully submitted,

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18 Michael R. Nelson  
19 Assistant Public Defender  
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9 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO  
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11 PEOPLE OF THE STATE OF  
12 CALIFORNIA

13 Plaintiff,

14 vs.

15 GREGORY WILLIAM MONTGOMERY  
16

17 Defendant

Case No.: 00F05623

Department No. 4/TBA

POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION TO SUPPRESS  
EVIDENCE PURSUANT TO PENAL  
CODE SECTION 1538.5

18  
19 INTRODUCTION

20 This motion raises a unique question under Federal and California law regarding  
21 the reckless and reoccurring unconstitutional misuse of the California Department of  
22 Justice's DNA databank. In August of 1998, two women were sexually assaulted at the  
23 same in apartment complex in Sacramento County. After these assaults, Gregory  
24 Montgomery was arrested, but never charged, for an unrelated misdemeanor prowling  
25 charge in March of 1999. At that time the defendant was interviewed by law enforcement  
26  
27  
28

1 and then a blood sample was collected from him without his informed consent and under  
2 the false assertion that his blood was require to be taken under a DNA databank state law.  
3

4 Furthermore, the defendant’s DNA “profile” was then analyzed and entered into  
5 the DOJ DNA databank. The relevant DNA databank statutes require that the *collection,*  
6 *analysis and databank entry* of DNA may only be from persons who have been convicted  
7 of limited “qualifying offenses.” Gregory Montgomery was not in that group of  
8 “qualifying offenders.” As a consequence of this unlawful use of the DNA Databank, the  
9 defendant’s privacy rights under the Fourth Amendment of the United States Constitution  
10 were violated. Therefore, all blood samples, DNA testing and the “cold hit” linking Mr.  
11 Montgomery to the alleged sexual assaults in the present case must be suppressed.  
12  
13

#### 14 RELEVANT FACTS 15

16 On August 26, 1998, alleged victim Virginia B. was sexually assaulted in her  
17 home at the Fairways Apartments in Sacramento County. Then, on August 29, 1998 at  
18 the same apartment complex, a second woman, Deanna M., was also sexually assaulted.  
19 The description of the suspects in both assaults was the same, a heavy-set black male who  
20 wore a mask. During the investigation, DNA evidence was collected from Deanna M., a  
21 “profile” of which was entered into the ‘Convicted Offender DNA Data Bank’ which is  
22 maintained by DOJ and governed by Penal Code sections 295 et seq.  
23  
24

25 On March 2, 1999, Defendant Gregory William Montgomery was arrested, but  
26 never charged, for an unrelated violation of P.C. 647(i), prowling. After a two and a half-  
27 hour video taped interview with Montgomery, a blood sample was taken by law  
28

1 enforcement. During the interview with Detective Flaa, the defendant is administered a  
2 Voice Stress Analyzer during which time Montgomery's clothes are removed in part.  
3  
4 (23:16.) Detective Flaa also required Mr. Montgomery to put on his hat and sweat shirt  
5 with the hood up while he was photographed. During the interview the detective tries  
6 many tactics to get Montgomery to give a blood sample. Only late in the interview does  
7 the detective tell Montgomery that he wants him to give a blood sample in order to  
8 eliminate him as a suspect in sexual assaults at the Fairways apartments.  
9

10           However, no mention is ever made of DNA testing or how Montgomery's blood  
11 would be used to eliminate him as a suspect in those assaults. Detective Flaa attempts to  
12 get a blood sample from the defendant without explaining the reason for the draw or what  
13 will happen to the blood. Detective Flaa attempted to get a blood sample by using the  
14 Red Cross slogan "Give Blood" (7:19-25; 22:14-23) The assaults at the Fairways  
15 apartments were not mentioned by the detective until page 27 (out of 38) of the transcript.  
16 (27:16-18) Detective states that the rapes occurred in May or June of 1999.  
17  
18

19           Detective Flaa has the defendant sign a "consent form" for the blood draw.  
20 However that form relates to search of a vehicle and a house. The detective tries to  
21 modify the form to include a blood draw but he explains it in a garbled and confusing  
22 manner. Mr. Montgomery is merely told to "go ahead and initial that." (24:14-25:19;  
23 32:8-25) The form has been since been lost.  
24  
25

26           Det. Flaa tells Montgomery: "But **what I'm going to have to do is eliminate you.**  
27 The only way is to draw blood." (27:23-28:6) "That's why you have to go over to the jail  
28

1 to get your blood drawn. That's why I need the blood." (29:10-12.) After Montgomery  
2 asked how long the blood draw will take and expressed concern about being late for work

3  
4 Flaa stated:

5 "If you consent and don't give them a problem or something like that. And  
6 as soon as your blood is drawn I will call your boss . . . You want me to tell  
7 him that you've been . . . unavoidably detained. You want me to tell him  
8 you have been arrested?" (29:24-30:7)

9 Flaa also tells Mr. Montgomery that if he changes his mind about the blood draw  
10 then Flaa will get a search warrant and that will take most of the day and that he will have  
11 to sit there until that gets done. (R.T. 36: 13-21.) Flaa states: "If you refuse [to give the  
12 blood sample] I'm going to have to get a search warrant and then its' going to delay this."  
13 (37:7-9) As a parting comment Flaa tells the defendant: "Well, it's the easiest way to do  
14 it, you know, it really is. Okay." (38:24-25)

15  
16 After the detectives confusing explanation re: the taking of blood, Montgomery  
17 was transported to the Sacramento County Main Jail where to his greater confusion, he  
18 was informed that he must provide a "mandatory" blood sample for DOJ's DNA  
19 databank pursuant to Penal Code section 295 et seq. The Sacramento County Sheriff's  
20 Department then sent Montgomery's DNA/Blood sample to the California Department of  
21 Justice DNA Databank in Berkley California.

22  
23  
24 On June 6, 2000, DOJ performed a DNA analysis on Montgomery's DNA where a  
25 "profile" was obtained using 9 STR loci. Then on June 7, 2000, The defendant's DNA  
26 "profile" was entered into the 'Convicted Offender DNA Database' in violation of Penal  
27 Code sections 295 et seq. Mr. Montgomery had never been convicted of a "qualifying  
28

1 offense,” nor was his DNA sample directly compared to the evidence from the crime  
2 scene in the present case prior to the ‘cold hit’ as is also mandated by the law governing  
3 the use of the databank. The defense also believes that DOJ illegally submitted the  
4 defendant’s DNA sample or profile to the FBI DNA Databank known as CODIS. DOJ  
5 has refused to voluntarily provide such information.  
6

7  
8 As a result, on June 15, 2000, DOJ reported that the defendant’s DNA could not  
9 be excluded from DNA taken from victim Deanna M. and the crime scene The DOJ  
10 Databank acknowledged that the collection, analysis and databank entry of the  
11 defendant’s DNA sample had violated California law but reported the ‘cold hit’ by  
12 claiming that the collection, analysis and databank entry was a “mistake” pursuant to  
13 Penal Code section 297(e). This claim of “mistake” by DOJ was not made with any  
14 documentation explaining how the violation was a “mistake” or why the verification  
15 came only *after* the ‘cold hit’ was discovered. This ‘cold hit’ caused law enforcement  
16 officers to arrest defendant Gregory William Montgomery on July 10, 2000 for the sexual  
17 assaults charged in the information.  
18  
19  
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21 Further, on August 28, 2000, the Honorable Tani Cantil-Sakauye, upon motion by  
22 the People, ordered the defendant to submit to further blood, saliva, hair and other testing  
23 for the purpose of comparing the defendant’s DNA with evidence from the crime scene.  
24 Prior to the Court making its order, the defendant objected to the taking of the biological  
25 samples and any testing on that material.  
26  
27  
28



1 committing an offense . . . 'These long-prevailing standards  
2 seek to safeguard citizens from rash and unreasonable  
3 interferences with privacy and from unfounded charges of  
4 crime. They also seek to give fair leeway for enforcing the  
5 law in the community's protection. Because many situations  
6 which confront officers in the course of executing their duties  
7 are more or less ambiguous, room must be allowed for some  
8 mistakes on their part. But the mistakes must be those of  
9 reasonable men, acting on facts leading sensibly to their  
10 conclusions of probability. The rule of probable cause is a  
11 practical, nontechnical conception affording the best  
12 compromise that has been found for accommodating these  
13 often opposing interests. Requiring more would unduly  
14 hamper law enforcement. To allow less would be to leave  
15 law-abiding citizens at the mercy of the officers' whim or  
16 caprice.'

17 (Gerstein v. Pugh (1975) 420 U.S. 103, 111, 112.)

18 After his “arrest,” Montgomery was given a Voice Stress Analyzer while his  
19 clothes are removed in part. Montgomery’s photo is taken with his sweatshirt hood up.  
20 The alleged “arrest” for a misdemeanor prowling arrest turned into an unlawful  
21 prolonged detention for the purposes of investigating the sexual assaults at the fairway  
22 for which there was not probable cause.

## 23 II.

24 DOJ HAD NO PROBABLE CAUSE TO BELIEVE THAT  
25 GREGORY MONTGOMERY HAD COMMITTED A  
26 “QUALIFYING OFFENSE” THAT WOULD JUSTIFY THE  
27 TESTING OR DNA DATABANK ENTRY OF HIS DNA.

28 In the California Supreme Court’s opinion in People v. McKay, the upheld the  
requirement that state law does guide the Constitutionality of an arrest when it comes to  
the State’s definition of the crime.

1 In Michigan v. DeFillippo (Citation omitted), the court stated that "whether  
2 an officer is authorized to make an arrest ordinarily depends, in the first  
3 instance, on state law." (Citation omitted.) This statement is as true as it is  
4 unremarkable-state law "is relevant to the validity of the arrest and search  
5 *only* as it pertains to the 'facts and circumstances' we hold constituted  
6 probable cause for arrest." (Citation omitted); accord, Ryan v. County of  
7 DuPage (7th Cir. 1995) 45 F.3d 1090, 1093 ["the legality under the Fourth  
8 Amendment of an arrest for violating state law depends on that law in the  
9 following sense: there must be probable cause to believe that a state crime  
10 has been committed"].)

11 (People v. McKay, *supra*, 27 Cal.4th, at 613.

12 Therefore, where the power to conduct a search exists only when there is probable  
13 cause that each element of a crime has been committed, DOJ needed probable cause to  
14 believe Greg Montgomery had been convicted of a "qualifying offense" under state law,  
15 P.C. 295 et seq.

16 Should the court rule that the arrest was without probable cause, then the  
17 subsequent taking of blood of Greg Montgomery must be suppressed as fruit of the  
18 poisonous tree under Wong Sun v. United States (1963) 371 U.S. 471, 484-487 [9  
19 L.Ed.2d 441, 83 S.Ct. 407].)

### 20 III.

21 ANY CONSENT TO THE TAKING OF BLOOD BY THE  
22 DEFENDANT WAS A MERE SUBMISSION TO  
23 AUTHORITY.

24 Gregory Montgomery's alleged consent to giving blood on March 2, 1999 was not  
25 the product of his free will but was nothing more than a submission to authority. The  
26 California Supreme Court in People v. James (1977) 19 Cal.3d 99, 106, has ruled that  
27 whenever the prosecution seeks to rely on consent as an exception to the warrant  
28

1 requirement, "the People [have] the additional burden of proving that the defendant's  
2 manifestation of consent was the product of his free will and not a mere submission to an  
3 express or implied assertion of authority. The voluntariness of the consent is in every  
4 case 'a question of fact to be determined in light of all the circumstances.' " (See also  
5 Schneckloth v. Bustamonte (1973) 412 U.S. 218, 227 [36 L.Ed.2d 854].)  
6

7  
8 "Where the circumstances indicate that a suspect consents because he believes  
9 resistance to be futile, or if any suggestion is made to the suspect that it would be unwise  
10 or fruitless to resist, the search cannot stand. Thus an apparent consent has been deemed  
11 involuntary when given in response to covert threats of official sanction." (People v.  
12 Valenzuela (1994) 28 Cal.App.4th 817, 832-833, citations omitted.) This is because "  
13 '[c]onsent' that is the product of official intimidation or harassment is not consent at all."  
14 (Florida v. Bostick, supra, 501 U.S. at 438 [115 L.Ed.2d 3891, 111 S.Ct. 2312].)  
15  
16

17 Although failure to advise a suspect of his right to refuse consent is not fatal to a  
18 finding of voluntariness, it is certainly a *factor* which the court must look at in assessing  
19 the voluntariness issue. (See People v. James, supra, 19 Cal.3d 99 and Schneckloth v.  
20 Bustamonte, supra, 412 U.S. at 227 [36 L.Ed.2d 854, 93 S.Ct. 2141].)  
21  
22

23 In evaluating whether an individual knew he had a right to refuse, the court may  
24 consider certain individual characteristics such as his age, his intelligence, and his race  
25 insofar as it is different from that of the law enforcement personnel. (See United States v.  
26 Mendenhall, supra, 446 U.S. 544 [64 L.Ed.2d 497, 100 S.Ct. 1870]; United States v.  
27  
28

1 Gonzalez, supra, 842 F.2d 748; and United States v. Moreno (9th Cir. 1984) 742 F.2d  
2 532.)

3  
4 In addition to the factors outlined above, the court should consider the physical  
5 environment in which consent was obtained; whether the encounter occurred in an open  
6 public place; and whether the suspect's movement was blocked at the time consent was  
7 obtained. (See Florida v. Bostick, supra, 501 US. 429 [115 L.Ed.2d 3891, 111 S.Ct.  
8 2312]; United States v. Gonzalez, supra, 842 F.2d 748; People v. Profit, supra, 183  
9 Cal.App.3d 849; and Florida v. Royer, supra, 460 U.S. 491 [75 L.Ed.2d 229, 103 S.Ct.  
10 1319].)

11  
12  
13 The videotape of the defendant's interview on March 3, 1999 with Sacramento  
14 County Sheriff's Detective David Flaa shows that the defendant was merely doing what  
15 the detective directed him to do. Most significantly, the defendant was told that if he  
16 refused his consent, his release would be delayed because the detective *would get a*  
17 *search warrant*, which according to the context of the conversation, would be issued  
18 without question. Montgomery has a right to change his mind up until the time of the  
19 taking of the blood. Flaa's statement regarding the warrant made it certain that  
20 Montgomery would not risk further delay if the warrant was a certainty.

21  
22  
23  
24 On July 10, 2000 Mr. Montgomery told Agent Pagaling that he submitted to a  
25 blood test on March 3, 2000 because he was told that he could not leave until the sample  
26 was given:  
27  
28

1 MONTGOMERY: Then he gave me a lie detector test, and then he told  
2 me he wanted me to go downtown to take a blood sample. He said, "**You**  
3 **take a blood sample and you can go.**"

4 (Transcript of statement of Gregory Montgomery taken by DOJ Agent Sharon Pagaling  
5 on July 10, 2000 (herein after TX) pages 18:16 -19:7.) This is consistent with both the  
6 statements of Detective Flaa and the fact the officer who drew the sample was doing so  
7 under the mandatory authority of P.C. 295 et seq.  
8

9 From this statement it is clear that the blood sample was taken under the duress of  
10 withholding his freedom until the sample was given. Montgomery was held for eight  
11 hours after giving two DNA samples and was never charged for any crime on May 2,  
12 1999. Furthermore, the circumstances surrounding the giving of the sample itself further  
13 show that his consent was a coerced submission to police authority.  
14

15  
16 When a prosecutor seeks to rely upon consent to justify the lawfulness of a  
17 search, he has the burden of proving that the consent was, in fact, freely and  
18 voluntarily given.] **This burden cannot be discharged by showing no**  
**more than acquiescence to a claim of lawful authority.**

19 (Bumper v. North Carolina (1968) 391 U.S. 543, 548-549. Emphasis added.)  
20

21 In Bumper the U.S. Supreme Court held that a homeowner's consent to search a  
22 house involuntary when it was given in response to an officer's false claim to have a  
23 warrant. In the present case, Gregory Montgomery's alleged consent was a submission to  
24 an officer's invalid claim to have authority to take his blood for DNA testing. The facts  
25 show that a sheriff's deputy took the defendant's blood under the mandatory authority of  
26 P.C. 296(c). The deputy overseeing the DNA extraction filled out a DOJ DNA Databank  
27 form and wrote that Mr. Montgomery's qualifying offense for obtaining a DNA sample  
28

1 and entering it into the databank was P.C. 273.5. Refusal to give the DNA sample will  
2 result in being prosecuted for a misdemeanor and confinement in the county jail for up to  
3 one year pursuant to Penal Code section 298.1. These circumstances show that Gregory  
4 Montgomery had no choice but to give a biological sample because the officer taking the  
5 samples was acting under a mandatory duty and was clearly not the product of the  
6 defendant's free will.  
7

8  
9 IV.

10 DOJ'S ILLEGAL USE OF MONTGOMERY'S DNA IN  
11 THEIR DNA DATABANK EXCEEDED ANY  
12 CONCEIVABLE SCOPE OF THE ALLEGED CONSENT.

13 Not only does the state bear the burden of proving that an alleged consent was  
14 voluntarily given, it must also "prove that a warrantless search was within the scope of  
15 the consent given" since "despite initial authorization [for a search]—whether by warrant,  
16 probable cause, or consent—police officers may exceed the boundaries of the power  
17 conferred upon them and create illegality for their actions." (People v. Harwood (1997)  
18 74 Cal.App.3d 460, 466-467.) This occurs in the context of a consent search when the  
19 search is limited by "the mutual understanding and reasonable expectations of the  
20 parties." (Ibid.)  
21

22  
23 In Florida v. Jimeno (1991) 500 U.S. 248 [114 L.Ed.2d 297, 111 S.Ct. 1801], the  
24 United States Supreme Court set forth the test for determining the scope of consent to  
25 search as follows:  
26

27  
28 The standard for measuring the scope of a suspect's consent under the  
Fourth Amendment is that of "objective" reasonableness—what would the

1 typical reasonable person have understood by the exchange between the  
2 officer and the suspect? . . . The scope of a search is generally defined by  
3 its expressed object. [. . .] **A suspect may of course delimit as he chooses  
the scope of the search to which he consents.**

4 (Florida v. Jimeno, *supra*, 500 U.S. at 251-252 [114 L.Ed.2d 297, 111 S.Ct. 1801],  
5 emphasis added.)

6  
7 In Ferguson v. City of Charleston (2001) 121 S.Ct. 1281, 532 U.S. 67, the United  
8 States Supreme Court held that a State, there in the form of a state run hospital, cannot  
9 obtain a biological sample for one stated purpose and perform scientific testing for which  
10 the individual had not received notice or given consent. In Ferguson a state hospital,  
11 working with the police, took urine tests from pregnant mothers under the guise of  
12 medical treatment and then turned those same patients who had tested positive for illegal  
13 drugs over to the police for arrest and prosecution. The Court articulated an important  
14 distinction from earlier cases such as Skinner v. Railway Executives Assn. (1989) 489  
15 U.S. 602, 621- 622.) in which drug testing was performed on railway employees because  
16 in such cases “there was no misunderstanding about the purpose of the test or the  
17 potential use of the test results, and there were protections against the dissemination of  
18 the results to third parties.” (Ferguson v. City of Charleston, *supra*, 121 S.Ct., at 1288.)

19  
20 The California Supreme Court has also limited the taking of blood to situations  
21 where there is a clear indication evidence will be found:

22  
23 In People v. Scott (citation omitted) we held, “[a] warrantless invasion of  
24 the body must be incident to a valid arrest [citation] and may occur only  
25 under a limited range of exigent circumstances. These circumstances  
26 include the need to prevent loss or destruction of evidence, or the existence  
27 of a medical emergency. [Citations.]” (Citation omitted.) Although “blood  
28

1 tests for alcohol, performed under medical conditions, have been  
2 consistently upheld as routine, minor, and highly reliable" (id., at p. 292),  
3 the decision to draw a blood sample "must be founded on a 'clear indication'  
4 that such evidence will be found." (*Ibid.*)

5 Here, the purported justification for the invasion of defendant's body was to  
6 test for the existence of drugs or alcohol *in light of the possibility that*  
7 *defendant might make some statements.* The police observed no indication  
8 that defendant was under the influence of drugs or alcohol, nor did they  
9 have reason to suspect he might decide to talk. We therefore disagree with  
10 the trial court's finding that the blood was lawfully drawn.

11 (People v. Siripongs (1988) 45 Cal.3d 548, 568-569.)

12 In Mr. Montgomery's case, there was both a misunderstanding about the purpose  
13 and nature of the test as well as its potential use. Neither DNA nor entry into a databank  
14 was never mentioned when Detective Flaa interviewed Montgomery in March of 1999.

15 Furthermore, assuming that the court were to find that Gregory Montgomery  
16 consented to having his DNA analyzed, he did not consent to the illegal act of having his  
17 DNA tested and the profile entered into a databank in violation of Penal Code section  
18 297(b). "[T]here can be no power to consent to an act forbidden by law, and such a  
19 consent is illegal and void." Sayadoff v. Warda (1954) 125 Cal.App.2d 626, 630. (See  
20 also Bowers v. Hardwick (1986) 478 U.S. 186.)

21 Certainly in P.C. 295 et seq. the California Legislature does not allow DOJ to  
22 build up the DNA databank with the profiles of persons who did not qualify but had  
23 consented. The legislature has limited the entry into the databank to convicted offenders;  
24 there is no discretion to allow non-qualifying offenders into the database.  
25  
26  
27  
28

V.

THE ILLEGAL USE OF GREGORY MONTGOMERY'S  
DNA VIOLATES THE FOURTH AMENDMENT.

The obtaining, analysis and entry into the DOJ and CODIS databanks of the defendant's DNA raises Federal Constitutional privacy interests. First the private medical information that DNA may provide makes a DNA test more than a mere identification test such as fingerprinting or photography of an arrestee. As the repository for DNA samples, DOJ and outside agencies may perform research or disclose private medical information of Gregory Montgomery and other persons in the databank.

Secondly, Penal Code sections 295 et seq. have strict privacy protections written into them in order to avoid private DNA information from being used in research. Therefore a violation of California law when a person's DNA is taken, analyzed and a profile is entered in to the databank, as well as stored in DOJ's repository, raises serious potential for violation of Fourth Amendment Privacy.

Thirdly, DOJ's DNA databank procedures and policies, which are promulgated at the direction of PC 295 et seq., may raise privacy violations through their poor drafting or administration, thereby exposing a person to further publication of private medical facts. DOJ and the prosecutor have refused to voluntarily provide copies of the databank's policies and procedures.

Finally, the fact that statutes and policies are *not* being followed by DOJ, as is evidenced by DOJ entering the DNA profiles of "non-qualifying offenders" DNA into the databank shows that privacy violations are still at risk because of such failures by DOJ.

1 **U.S Constitutional Privacy**

2 The Fourth Amendment to the United States Constitution prohibits unreasonable  
3 searches and seizures. The drawing of blood samples invades the body itself. Normally, a  
4 warrant supported by probable cause is required before agents of the state can seize the  
5 blood of an individual. As the United States Supreme Court held in the pivotal case of  
6 Schmerber v. California (1966) 384 U.S. 757, 769-770:  
7

8  
9 “The interests in human dignity and privacy which the Fourth Amendment  
10 protects forbid any such intrusions on the mere chance that desired  
11 evidence might be obtained.”

12 Schmerber held that state officials can dispense with the warrant requirement only  
13 where there are exigent circumstances, and only where there is probable cause to believe  
14 evidence tying the defendant to the crime being investigated would be obtained by the  
15 seizure of the defendant’s blood. (*Id.*, at 770-771.) The rule in Schmerber remains the  
16 law, with only narrow exceptions. As the United States Supreme Court observed in  
17 Winston v. Lee (1985) 470 U.S. 753, 760, the forced extraction of blood from an  
18 individual violates that person’s “most personal and deep-rooted expectations of  
19 privacy.” The Ninth Circuit has held that Schmerber “governs all searches that invade  
20 the interior of the body . . .” (Fuller v. M.G. Jewelry (9th Cir. 1991) 950 F.2d 1437,  
21 1449.)  
22  
23  
24

25 The California Supreme Court similarly requires probable cause to believe that the  
26 intrusion of a suspect’s body will reveal evidence of a crime being investigated. (People  
27 v. Scott (1978) 21 Cal.3d 284, where a warrant authorizing bodily intrusion is sought, the  
28 issuing authority must first find probable cause to believe *the intrusion will reveal*

1 *evidence of crime*. The warrantless drawing of blood from a suspect is an unreasonable  
2 search and seizure where the asserted justification is not factually supported. (People v.  
3 Siripongs, *supra*, 45 Cal.3d at 568-569 [asserted justification was testing for the presence  
4 of drugs or alcohol in case the defendant gave a statement, but there was no indication the  
5 defendant was under the influence or that he intended to give a statement].)

6  
7  
8 Moreover, genetic analysis of the body fluids obtained by law enforcement is far  
9 more invasive of privacy interests than identification procedures such as fingerprinting.  
10 There is a lesser expectation of privacy in those personal characteristics that “a person  
11 knowingly exposes to the public . . .” (Katz v. United States (1967) 389 U.S. 347.) The  
12 Fourth Amendment does not protect what a person knowingly exposes to the public, such  
13 as facial characteristics, handwriting, voice, and fingerprints. (United States v. Dionisio  
14 (1973) 410 U.S. 1.) Fingerprinting is not a serious intrusion on privacy, since it  
15 “involves none of the probing into an individual’s life . . . that marks . . . [a] search.”  
16 (Davis v. Mississippi (1969) 394 U.S. 721, 727.) Fingerprinting “may constitute a much  
17 less serious intrusion upon personal security than other types of searches and detentions.”  
18 (Hayes v. Florida (1985) 470 U.S. 811, 814. See also Whalen v. Roe (1977) 429 U.S.  
19 589, 599.)

20  
21  
22  
23  
24 In Skinner v. Railway Labor Executives’ Assn. *Supra*, 489 U.S. at 616, the United  
25 States Supreme Court recognized that “It is not disputed, however, that chemical analysis  
26 of urine, like that of blood, can reveal a host of private medical facts about an employee,  
27 including whether he or she is epileptic, pregnant, or diabetic.” Both California and  
28

1 Federal Appellate Courts have recognized the Fourth Amendment Privacy implications of  
2 testing of a person's blood:

3  
4 It also is true that even less intrusive methods of collecting samples, and the  
5 ensuing chemical analysis of such samples to obtain physiological data,  
6 implicate Fourth Amendment privacy interests.

7 (People v. King (2000) 82 Cal.App.4th 1363, 1370.)

8 The constitutionally protected privacy interest in avoiding disclosure of  
9 personal matters clearly encompasses medical information and its  
10 confidentiality. (Citations omitted.) Although cases defining the privacy  
11 interest in medical information have typically involved its disclosure to  
12 "third" parties, rather than the collection of information by illicit means, it  
13 goes without saying that **the most basic violation possible involves the**  
14 **performance of unauthorized tests--that is, the non-consensual**  
15 **retrieval of previously unrevealed medical information** that may be  
16 unknown even to plaintiffs. These tests may also be viewed as searches in  
17 violation of Fourth Amendment rights that require Fourth Amendment  
18 scrutiny . . . . One can think of few subject areas more personal and more  
19 likely to implicate privacy interests than that of one's health or genetic  
20 make-up. Doe, 15 F.3d at 267 ("Extension of the right to confidentiality to  
21 personal medical information recognizes there are few matters that are quite  
22 so personal as the status of one's health");

23 (Norman-Bloodsaw v. Lawrence Berkeley Laboratory (1998) 135 F.3d 1260,  
24 1269. Emphasis added.)

25 Genetic analysis will yield highly sensitive information that can not only be used  
26 for identification purposes, but in an era of rapidly expanding scientific knowledge, may  
27 also document medical and other conditions in which Gregory Montgomery (and other  
28 individuals whose DNA has been illegally entered into DOJ's DNA databank) have a  
29 privacy interest.

30 Six of the 9 STR Loci that DOJ used in attempting to make a match of Mr.  
31 Montgomery's DNA with that of the crime scene in the present case are capable of

1 yielding private medical information of any person whose blood is analyzed for that  
2 genetic information. (Please see Exhibits A and B, the declarations of Dr. Paul R. Billings  
3 and Dr. Donald E. Riley.) The existence or non-existence of a medical condition violates  
4 the privacy of anyone subject to DNA testing. For example, the knowledge that a person  
5 is predisposed or even free from a serious illness in important information that can effect  
6 a person's medical, social, employment and financial future.  
7  
8

9           While the stated purpose of criminal DNA databanks may be solely  
10 identification of the perpetrator of the crime, the reality of the situation is  
11 that DNA information evidence is very different from fingerprints and  
12 raises unique and serious issues. Even minute samples of biological  
13 materials can be used to extract vast amounts of personal information. A  
14 drop of blood or a strand of hair, for example, contains enough DNA for  
15 thousands of genetic tests. Not only can tissue or DNA samples identify  
16 individuals, but they can also be used to produce information related to  
17 heredity, genetic history, disease resistance, drug use, paternity and other  
18 personal issues. This information can be misused . . . .

19           The compiling of the information in the databanks, as well as the  
20 subsequent issues of access, control, etc, if not done properly and with  
21 appropriate continuous oversight can seriously compromise individual  
22 privacy and threaten personal autonomy. Few laws regulate access to these  
23 databanks or prohibit the unethical use of the information they contain.  
24 Once databases are established, it is inevitable that there will be pressures  
25 to extend limited inclusion to other groups of people and also to allow  
26 access to the databank to an increasing number of individuals and  
27 institutions who claim that they have a "need" for the information  
28 contained therein . . . .

          With the advent of ever more detailed Single Nucleotide  
Polymorphism maps of human chromosomes and the national haplotype  
mapping program recently announced by the National Center for Human  
Genome Research at the National Institutes of Health, it is reasonable and  
likely to assume that all the so-called "anonymous" loci that have been  
historically used to perform DNA based identification methods will also be  
associated with health and/or disease related risks . . . .

(Excerpts from the Declaration of Dr. Paul Billings, Exhibit A.)

1 ***The Structure of California DNA Databank Law is Based on Constitutional Privacy***  
2 ***Grounds.***

3 In the present case, Gregory Montgomery’s DNA sample was illegally collected,  
4 analyzed and entered into the DOJ DNA databank even though the defendant had not  
5 been convicted of a “qualifying” offense. Such a violation of California’s Databank Law  
6 requires suppression of the DNA results.  
7

8  
9 First of all the databank cannot be used to run against crime scene evidence.

10 Samples obtained from a suspect **shall only** be compared to samples taken  
11 from the criminal investigation for which he or she is a suspect and for  
12 which the sample was originally taken either by court order or voluntarily.

13 (Penal Code section 297(b).)

14 In the present case, since Gregory Montgomery was apparently a random suspect  
15 in the Fairway Apartment assaults, his DNA may only have been directly compared to  
16 the crime scene evidence rather than using the databank. DOJ had a legal duty to ensure  
17 that a sample taken for comparison to a specific case does not end up in the databank.  
18

19 Also, it is undisputed that Gregory Montgomery had never been convicted of a  
20 crime that would allow law enforcement to obtain, analyze or enter a DNA profile into  
21 the Convicted offender DNA databank. Penal Code section 296 strictly limits the  
22 collection, analysis and entry into the databank:  
23

24  
25 Any person who is convicted of, or pleads guilty or no contest to, any of the  
26 following crimes, or is found not guilty by reason of insanity of any of the  
27 following crimes, shall, regardless of sentence imposed or disposition  
28 rendered, be required to provide two specimens of blood, a saliva sample,  
right thumbprints, and a full palm print impression of each hand for law  
enforcement identification analysis . . .

1 (Penal Code section 296(a).)

2  
3 Mr. Montgomery had been previously convicted of only a misdemeanor violation  
4 of Penal Code section 273.5 and not a qualifying felony P.C. 273.5 pursuant to section  
5 296(a)(1)(D).

6  
7 As a consequence of the illegal databank entry of his sample and the ‘cold hit,’  
8 Montgomery’s detention, arrest or possible future conviction based on the illegal  
9 databank match must “invalidated” or suppressed:

10  
11 The detention, arrest, wardship, or conviction of a person based upon a data  
12 bank match or data base information is not invalidated if it is later  
13 determined that the specimens, samples, or print impressions were obtained  
or placed in a data bank or data base by mistake.

14 (Penal Code section 297(f).)

15 In People v. Otto (1992) 2 Cal.4th 1088, the California Supreme Court held that a  
16 statutory violation are grounds to suppress evidence. As in Otto, Penal Code section  
17 297(e) has language that requires suppression as a penalty for violation of its terms.  
18 While the statute violated in Otto, 18 U.S.C. 2515 was a federal statute, the Privacy rights  
19 of the Fourth Amendment of the U. S. Constitution are implicated by California Penal  
20 Code sections 295 et seq. The whole structure of the DNA databank statues, the policies  
21 and procedures for operation of the databank as well as DOJ’s refusal to release any  
22 information about the operation of the databank further shows that the language of P.C.  
23 297(e) raises Federal Constitutional Privacy rights.  
24  
25  
26  
27  
28

1 **Fourth Amendment Privacy Concerns Raised by Confidentiality Protections of**  
2 **Californian Databank Statutes.**

3 The United States Supreme Court recognizes a States power to define the  
4 circumstances when a police conduct is illegal and suppressible:  
5

6 The States are not thereby precluded from developing workable rules  
7 governing arrests, searches and seizures to meet 'the practical demands of  
8 effective criminal investigation and law enforcement' in the States,  
9 provided that those rules do not violate the constitutional proscription of  
10 unreasonable searches and seizures and the concomitant command that  
11 evidence so seized is inadmissible against one who has standing to  
12 complain.

13 (Ker v. California (1963) 374 U.S. 23; 34.)

14 In People v. McKay (2002) 27 Cal.4th 600, at page 608, the California Supreme  
15 Court, in dicta, states that in order for a violation of a state law to constitute grounds to  
16 suppress evidence a “defendant must show as an initial matter that [law enforcement’s]  
17 compliance with *state* procedure is pivotal to the validity of an arrest under the *federal*  
18 Constitution.”

19 However, California exercises its lawful authority to define the scope of what is  
20 reasonable under the Fourth Amendment. Penal Code section 853.5 limits an officer’s  
21 power of taking into custody a person who has been stopped for committing only an  
22 infraction “Only if the arrestee refuses to sign a written promise, has no satisfactory  
23 identification, or refuses to provide a thumbprint or fingerprint may the arrestee be taken  
24 into custody.” The Ninth Circuit has ruled that a violation of California law is grounds for  
25 suppression of evidence:  
26  
27  
28

1 In this case, the State of California has abjured the authority to execute  
2 custodial arrests for offenses so minor that they are designated as  
3 infractions. California Penal Code § 836 (1985) enables a peace officer to  
4 "without a warrant, arrest a person ... [w]he never he has reasonable cause  
5 to believe that the person to be arrested has committed a public offense in  
6 his presence." The scope of the arrest is restricted, however, by California  
7 Penal Code § 853.5 (1985), which provides that: In all cases ... in which a  
8 person is arrested for an infraction, a peace officer shall only require the  
9 arrestee to present his driver's license or other satisfactory evidence of his  
10 identity for examination and to sign a written promise to appear. Only if the  
11 arrestee refuses to present such identification or, refuses to sign such a  
12 written promise may the arrestee be taken into custody.

13 Thus, under California law, the arresting officers were without legal  
14 authority to take appellants into custody for the infraction of operating  
15 without a valid business license in violation of Santa Ana Municipal Code §  
16 21-6. See also People v. Williams, 3 Cal.App. 4th 1100, 1105 n. 1, 5  
17 Cal.Rptr.2d 59, 61 n. 1 (1992) ("Only if the arrestee refuses to present  
18 written identification or to sign the written promise to appear may he be  
19 taken into custody" under Cal. Penal Code § 853.5).

20 Given the state's expression of disinterest in allowing warrantless arrests for  
21 mere infractions, we conclude that a custodial arrest for such an infraction  
22 is unreasonable, and thus unlawful, under the Fourth Amendment. Since the  
23 custodial arrest of appellants was invalid, the search should not have been  
24 exempted from the warrant requirement of the Fourth Amendment as a  
25 search incident to lawful arrest. Absent some other basis justifying the  
26 search, the evidence seized from appellants was unlawfully obtained, and  
27 should have been suppressed.

28 (U.S. v. Mota (9th Cir. 1993) 982 F.2d 1384; 1388; see also, United States v. Di  
Re (1948) 332 U.S. 581, 589.)

In writing the DNA databank law, the California Legislature was obsessive in  
attempting to protect the privacy and confidentiality of both persons who would and who  
should not fall within its provisions. Woven throughout the whole chapter entitled "DNA  
and Forensic Identification database and Data Bank Act of 1998" are fastidious  
safeguards to ensure Privacy. For example the law limits access for scientific research:

1 It is not a violation of this section to disseminate statistical or research  
2 information obtained from the offender's file, the computerized data bank  
3 system, any of the DNA laboratory's data bases, or the full palm print file,  
4 provided that the **subject of the file is not identified and cannot be  
5 identified from the information disclosed . . .**

6 Penal Code section 299.5 (i.)

7 In order to maintain the computer system security of the Department of  
8 Justice DNA and forensic identification data base and data bank program,  
9 the computer software and data base structures used by the DNA  
10 Laboratory of the Department of Justice to implement this chapter are  
11 **confidential.**

12 (Penal Code section 299.5 (k.) Emphasis added.)

13 Disclosures of DNA information described in Penal Code section 299.5(g) are  
14 punishable as a misdemeanor. See also Penal Code section 299 (duty to expunge for  
15 reversed convictions or acquittals); 295(e) and (f) (screening mandates to ensure only  
16 qualifying offenders in database) as well as section 297(b) (limit on direct comparison of  
17 crime scene evidence to suspect's DNA;) P.C. 299.6 (limits on data sharing;) and P.C.  
18 299.7 (confidentiality of the disposal of DNA and biological samples.) These laws  
19 attempt to ensure that only qualifying offenders are subject to the privacy infringements  
20 of the databank. All of these sections read together demonstrate the California  
21 Legislature's overwhelming intent to preserve the Constitutional privacy of a person's  
22 private DNA information.

### 23 ***Additional Risks Raising Privacy Violations***

24 Despite the attempt to preserve an individual's Fourth Amendment rights, the  
25 legislature has also acknowledged the risks of disclosure of private medical information  
26 during the operation of the databank. The fact that DOJ acts as a repository for biological  
27  
28

1 and DNA samples creates a risk that those specimens will be subject to unauthorized  
2 research, testing or disclosure by DOJ or outside agencies.

3  
4 The DNA Laboratory of the Department of Justice shall serve as a  
5 **repository for blood specimens** and saliva and other biological samples  
6 collected, and shall analyze specimens and samples, and store, compile,  
7 correlate, compare, maintain, and use DNA and forensic identification  
8 profiles and records related to the following:

9 (1) Forensic casework.

10 (2) Known and evidentiary specimens and samples from crime  
11 scenes or criminal investigations.

12 (3) Missing or unidentified persons.

13 (4) Offenders required to provide specimens, samples, and print  
14 impressions under this chapter.

15 (5) Anonymous DNA records used for training, research, statistical  
16 analysis of populations, or quality control.

17 (Penal Code section 295.1(c). Emphasis added.)

18 DNA and other forensic identification information shall be released only to  
19 law enforcement agencies, including, but not limited to, parole officers of  
20 the Department of Corrections, hearing officers of the parole authority, and  
21 district attorneys' offices, at the request of the agency, except as specified in  
22 this section. Dissemination of this information to law enforcement agencies  
23 and district attorneys' offices outside this state shall be performed in  
24 conformity with the provisions of this section. This information shall be  
25 available to defense counsel upon court order made pursuant to Chapter 10  
26 (commencing with Section 1054) of Title 6 of Part 2.

27 (Penal Code sections 299.5 (f).)

28 Nothing in this chapter shall limit or abrogate any existing authority of law  
enforcement officers to take, maintain, store, and utilize DNA or forensic  
identification markers, blood specimens, saliva samples, or thumb or palm  
print impressions for identification purposes.

(Penal Code section 300.)

1           The testing and memorialization of DNA and other genetic information constitutes  
2 both a search and an invasion of privacy; the statute’s purported authorization of  
3 unspecified “genetic typing analysis” in addition to DNA analysis potentially permits  
4 unlimited exploration and use of genetic information for any purpose deemed a “law  
5 enforcement purpose.”  
6

7  
8           These risks are real in light of the Department of Justice’s track record in using  
9 “verification process” for preventing non-qualifying offenders’ DNA from entering the  
10 databank only after a ‘cold hit’ is discovered. Other unknown security failures may be  
11 hidden within the sole knowledge of DOJ and its DNA databank. Litigation of a  
12 suppression motion must necessarily require public disclosure of personal genetic  
13 information that DOJ is required to keep private. (P.C. 299.5(g).) Despite this fact, DOJ  
14 has refused to voluntarily provide information that would show how their verification  
15 process worked in this case or in other mistake cases. This is an acknowledgement of the  
16 Federal Privacy concerns in the databank statutes.  
17  
18

19  
20 ***CODIS***

21  
22           The possibility that the California Department of Justice forwarded Gregory  
23 Montgomery’s DNA information to the FBI’s DNA databank named CODIS raises other  
24 grounds for suppression in the present case. Title 42 U.S.C.A. 14132 entitled "Index to  
25 facilitate law enforcement exchange of DNA identification information" which governs  
26 the type of DNA information that may be entered in to CODIS states in relevant part:  
27  
28

1 The Director of the Federal Bureau of Investigation may establish an index  
2 of--

3 (1) DNA identification records of persons convicted of crimes;

4 (2) analyses of DNA samples recovered from crime scenes;

5 (3) analyses of DNA samples recovered from unidentified human remains;  
6 and

7 (4) analyses of DNA samples voluntarily contributed from relatives of  
8 missing persons.

9 As in the California Penal Code section 296 and 297, the Federal statute limits the  
10 entry of DNA samples into CODIS to be from convicted persons, none of which include  
11 misdemeanor spousal abuse.  
12

13 Further, the DNA databank statutes appear to require DOJ to forward samples  
14 such as Gregory Montgomery's.  
15

16 Once a federal data bank is established and accessible to the Department of  
17 Justice, the Department of Justice DNA Laboratory shall, upon the request  
18 of the United States Department of Justice, forward the samples taken  
19 pursuant to this chapter, with the exception of those taken from suspects  
20 pursuant to subdivision (b) of Section 297, to the United States Department  
21 of Justice DNA data bank laboratory. The samples and impressions  
22 required by this chapter shall be taken in accordance with the procedures  
23 set forth in subdivision (f) of Section 295.

24 (Penal Code section 296.1(f).)

25 Any evidence relating to DOJ providing CODIS with any DNA related  
26 information of Gregory Montgomery, Paul Eugene Robinson or any person whose DNA  
27 sample was obtained, submitted analyzed or placed into the DNA Databank without  
28 having first been convicted of a qualifying offenses. See also People v. Otto supra, 2

1 Cal.4th 1088, where violation of a federal statute 18 U.S.C. 2515 formed the basis for  
2 suppression of evidence.

3  
4 VI.

5 THE COLLECTION, ANALYSIS AND DATABANK  
6 ENTRY OF MR. MONTGOMERY'S DNA DID NOT  
7 CONSTITUTE A LEGAL "MISTAKE."

8 In the present case, the People and DOJ have claimed that the collection, analysis  
9 and entry of the defendant's DNA profile into the databank was a "mistake." This  
10 question raises two concerns. First, how do we define mistake and secondly, what facts  
11 show DOJ's behavior in the present case and other "mistake" cases is or is not consistent  
12 with a mistake?  
13

14 The exclusionary language of Penal Code section 297(f) which saves a match of a  
15 suspect's DNA sample that is illegally in the databank from invalidation or suppression  
16 occurs when the collection or entry is by "mistake." This saving language needs  
17 definition and analysis. When DOJ determined that Mr. Montgomery's DNA produced a  
18 'cold hit' with the evidence in the above case, the baldly claimed that the collection,  
19 analysis and entry of the sample was a 'mistake.' The fact that this conclusion of  
20 "mistake" was made by a DOJ/DNA databank employee, without *any* facts or  
21 investigation, demonstrates that it is a mere attempt to cover the violation than to  
22 determine the source of the failure.  
23  
24  
25

26 The analysis regarding whether the violation of the databank law in the present  
27 case was a mistake can be determined by referring to the law of mistake. Furthermore, as  
28

1 a testament of the fact that the invalidation rule of P.C. section 297 is consistent with  
2 Fourth Amendment principals, an analysis can be made under the “good faith” doctrine  
3 that applies to warrants. Under either analysis, the circumstances of the taking, analysis  
4 and databank entry of the defendant’s DNA show that law enforcement’s actions cannot  
5 be held to be a “mistake.” It is also the defense’s contention that further discovery in this  
6 area will support that conclusion. Again, as stated above, the burden of proving a  
7 “mistake” is on the People.  
8

9  
10 Mistake may be defined in light of California Civil Code section 1577, entitled  
11 “Mistake of Fact,” which states in relevant part:  
12

13 Mistake of fact is a mistake, **not caused by the neglect of a legal duty** on  
14 the part of the person making the mistake, and consisting in:

- 15 1. An unconscious ignorance or forgetfulness of a fact past or present,  
16 material to the contract; or,
- 17 2. Belief in the present existence of a thing material to the contract, which  
18 does not exist, or in the past existence of such a thing, which has not  
19 existed.

20 (Civil Code section 1577; emphasis added.)

21 A mistake which is caused by **neglect of a legal duty** cannot be a "mistake of  
22 fact" for which relief may be had in equity. Roller v. California Pacific Title Ins. Co.  
23 (1949) 92 Cal.App.2d 149. Under California Law a mistake does not occur if a person is  
24 acting in ignorance of a duty imposed by law. From the officer who took the blood  
25 sample to the DOJ employees who analyzed the DNA and entered the profile into the  
26 databank everyone failed to verify that the sample provided by Mr. Montgomery did not  
27 belong in the Databank.  
28

1 As a result, the process whereby the Defendant' sample was taken by the sheriff's  
2 department, submitted to DOJ, analyzed, maintained, submitted to the DOJ Databank and  
3 CODIS and then only after the 'cold hit' was made did DOJ discover that the sample had  
4 been illegally submitted in violation of California law. As the same flagrant violation of  
5 California law has occurred *again* in Sacramento County within a year of the Gregory  
6 Montgomery's 'cold hit' in the case of Paul Eugene Robinson, there is a basis to believe  
7 that any privacy rights established by statute or DOJ's own policies and procedures are  
8 not being followed. Without full discovery of all related security failures of DOJ's DNA  
9 Databank in order to dispute a claim by the prosecution of "mistake" under P.C. 297(e).  
10 Clearly if DOJ is employing a "verification process" to screen which samples are being  
11 obtained, analyzed and entered into the databank only after a 'cold hit' is found, this  
12 cannot be a "mistake." Such a procedure of verifying that DNA is taken from a qualifying  
13 offender only *after* a match is made violates a legal duty and must be designed to ignore  
14 the truth of whether a sample qualifies for entry.  
15  
16  
17  
18

19 The DNA laboratory procedures **shall confirm** that the offender **qualifies**  
20 **for entry** into the DNA data bank **prior** to actual entry of the information  
21 into the DNA data bank.

22 (Penal Code section 298(b)(4). Emphasis added.)  
23

24 Defendant's sample was analyzed and then entered into the databank on June 6  
25 and 7, 2000, over 6 months after section 298(b)(4) was enacted. DOJ failed to follow that  
26 portion of the law without excuse. There is no justification for why in June of 2000 there  
27 was no verification of Montgomery's "qualification" for databank entry. The form that  
28

1 the Sheriff's department sent to DOJ requesting databank entry merely stated that P.C.  
2 273.5 was the qualifying offense. Even assuming that DOJ only had to read the form as  
3 their act of verification, P.C. 273.5 is only a qualifying offense if a felony. It was  
4 mandated by law to determine the severity of the offense before performing analysis or  
5 entry into the databank. Further, the confirmation anticipated by section 298 must be  
6 more that merely reading the piece of paper sent to DOJ.  
7  
8

9 Furthermore, both DOJ and the Sacramento County Sheriff's department are  
10 mandated to establish policies and regulations to prevent the type of privacy violations  
11 that have occurred in Sacramento County.  
12

13 The Department of Justice DNA Laboratory . . . shall adopt policies and  
14 enact regulations for the implementation of this chapter, as necessary, to  
15 give effect to the intent and purpose of this chapter, and to ensure that data  
16 bank blood specimens, saliva samples, and thumb and palm print  
17 impressions are collected from **qualifying offenders** in a timely manner . .

18 (Penal Code section 295(e). Emphasis added.)

19 When the specimens, samples, and print impressions required by this  
20 chapter are collected at a county jail . . . the **county sheriff or chief**  
21 **administrative officer of the county jail . . . shall be responsible for**  
22 **ensuring all of the following:**

23 (B) The requisite specimens, samples, and print impressions are collected  
24 as soon as administratively practicable after a **qualifying offender** reports  
25 to the facility for the purpose of providing specimens, samples, and print  
26 impressions.

27 (Penal Code section 295(f)(1)(B). Emphasis added.)  
28

1           Such information, as well as evidence of other failures by to follow the databank  
2 law and procedures may show a system of pattern of action by DOJ that may undermine  
3 claims of “mistake” or accident and an indifference to the law.  
4

5           A mistake must not just constitute an error, but must be reasonable and committed  
6 in good faith. In United States v. Leon (1984) 468 U.S. 897 [82 L.Ed.2d 677], the United  
7 States Supreme Court established the so-called good faith rule and held that **objectively**  
8 **reasonable good faith** reliance by police officers on a facially valid search warrant,  
9 which was issued by a detached and neutral magistrate but was later determined to be  
10 lacking in probable cause, does not require suppression of evidence seized pursuant to  
11 that warrant.  
12

13  
14           Although Leon itself dealt with law enforcement’s good faith reliance on a search  
15 warrant, its principles have been extended to cover situations in which law enforcement,  
16 in good faith, relies upon a statute authorizing a search, such statute later being declared  
17 unconstitutional (see Illinois v. Krull (1986) 480 U.S. 340, and in which law enforcement  
18 relies upon an arrest warrant later determined to be invalid (see People v. Palmer (1989)  
19 207 Cal.App.3d 663).  
20  
21

22  
23           More recently, the courts have begun expanding Leon principles to the area of  
24 clerical errors. Generally, the courts have held that good faith reliance will save a search  
25 that is based upon the error of court personnel, as opposed to law enforcement personnel.  
26 If the court determines that law enforcement is responsible for the clerical error, Leon is  
27 of no avail. (See e.g., Miranda v. Superior Court (1993) 13 Cal.App.4th 1628. See also  
28

1 Arizona v. Evans (1995) 514 U.S. and People v. Downing (1995) 33 Cal.App.4th 1641,  
2 1656-1567.)

3  
4 In the instant case, the alleged “mistake” analysis and entry of the sample made  
5 was on the part of highly trained law enforcement personnel who were acting under  
6 detailed duties imposed by statute and DOJ’s own written procedures, not some court  
7 clerk.  
8

9 Finally, the illegal entry of Gregory Montgomery’s DNA profile into the DOJ  
10 databank resulting in the ‘cold hit’ is the sole basis for the arrest and charges against him.  
11 The Sacramento County Sheriff’s department took the defendant’s blood, sent it to DOJ  
12 but never followed up to see if it had been sent to the right place and what the results  
13 were. There is no basis to say that if there was no ‘cold hit’, the law enforcement officials  
14 in Sacramento County would have done anything to follow up on Mr. Montgomery’s  
15 case and eventually have the DNA analysis completed to exclude or include him as a  
16 suspect through the blood sample. As a result the actions by law enforcement in this case  
17 violate the Fourth Amendment, the exclusionary rule requires the suppression of all  
18 evidence. (Wong Sun v. United States (1963) 371 U.S. 471, 484-487 [9 L.Ed.2d 441, 83  
19 S.Ct. 407].) Thus, the “fruit of the poisonous tree,” as well as the tree itself, must be  
20 excluded. (Nardone v. United States (1939) 308 U.S. 338, 341 [84 L.Ed.2d 307, 6 S.Ct.  
21 266].) Such fruit includes any DNA testing of blood taken from Mr. Montgomery under a  
22 court order made by Judge Cantil-Sakauye on August 28, 2000 and any re-testing of the  
23 defendant’s blood in the possession of DOJ. Such testing and re-testing are the product of  
24  
25  
26  
27  
28

1 the initial illegal taking, analysis, databank entry and ‘cold hit’ and would not have been  
2 otherwise discovered. In this case there must be a consequence to DOJ’s failure to  
3 maintain the DNA databank in a lawful way.  
4

5 Defendant meets this burden by showing that the police acted illegally, and that  
6 the challenged evidence “has been come at by exploitation of that illegality . . . “ (Wong  
7 Sun v. United States, *supra*, 371 U.S. at 488 [9 L.Ed.2d 441, 83 S.Ct. 407].) Once the  
8 defendant has made this showing, the burden shifts to the prosecution to prove that the  
9 evidence is admissible since the taint of the illegality has been “purged.” (Alderman v.  
10 United States (1969) 394 U.S. 165, 183 [22 L.Ed.2d 176, 89 S.Ct. 961].)  
11  
12

13 CONCLUSION

14 Pursuant to Penal Code section 1538.5, the defense respectfully moves that the  
15 evidence obtained in the present case be suppressed since it was obtained as a result of a  
16 warrantless search and there was no justification excusing the lack of a warrant.  
17  
18

19 DATED: August , 2009

20 Respectfully submitted,

21  
22 \_\_\_\_\_  
23 Michael R. Nelson  
24 Assistant Public Defender  
25  
26  
27  
28