1. JANSCULLY District Attorney

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JUL 1 9 2012

By , Deputy Clerk

1. Sacramento County 901 G Street
2. Sacramento, CA 95814-1858 Phone (916) 874-6279

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1. **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
2. **COUNTY OF SACRAMENTO**

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9 THE PEOPLE OF THE STATE OF CALIFORNIA,

1. Plaintiff,
2. vs.

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1. BRANDON ALLEN STRIBLING,
2. Defendant: 15

NO. 11F06401

PEOPLE'S OPPOSITION TO MOTION TO COMPEL DNA DATABASE SEARCH AND TESTING

DATE: July 19, 2012

DEPT: 9

##### 16 INTRODUCTION AND SUMMARY OF POSITION

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Defendant Stribling has filed a motion asking this Court to otder the Sacramento

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1. County District Attorney's Office to conduct an illegal and unauthorized search of the
2. State's DNA Database.
3. The DNA profile in question was developed by a private DNA laboratory in

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Northern California at the request of the Defense. The DNA analyzed purports to have

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1. originated on the surface of a black hooded sweatshirt found near the Defendant, who

#### was b abush in close proximity to a home invasion robbery that had occurred

1. minutes earlier. Defendant is charged with First Degree Robbery (Pen. Code, § 211 et.

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sec.) and other related charges. Upon discovering the sweatshirt and the detaining

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1. Defendant, the victim was transported to Defendant's location for a field show up.· The
2. victim was unable to conclusively identify Defendant and victim asked Sacramento

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Sheriff Deputies to have Defendant put on the sweatshirt. Deputies complied with the

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1. victim's request and the victim then identified Defendant as one of the perpetrators of the
2. robbery.
3. The Sacramento District Atttomey's Office elected not to test the black sweatshirt

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for DNA because it had no evidentiary value; in essence, the People elected not to test

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1. because: why test the sweatshirt for DNA when it is unknown how the sweatshirt has
2. been handled, and more importantly, when it is known that the Defendant was forced to
3. wear the sweatshirt? Because of where the sweatshirt was found, no other person,

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besides Defendant, could reasonably be associated with the sweatshirt, and since

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1. Defendant was forced to wear the sweatshirt, the presence of "Touch DNA" has little, if
2. any, evidentiary value. (However, it should be noted that gloves found rolled up inside
3. the sweatshirt, that Defendant was not compelled to put on, were tested and an

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unresolvable mixture of DNA was detected.)

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The Defense theory is, apparently, that Defendant just happened to be in the vicinity

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1. of the home invasion robbery, that Defendant just happened to be hiding behind a bush in
2. that vicinity, and that Defendant just happened to choose a bush that was near a sweatshirt

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that had both gloves and the victim's property rolled up inside of it. Therefore, in an

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effort to further a theory of Third Party Culpability, the Defense elected to test the

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1. sweatshirt for DNA with its own private lab to uncover the identity of the "true
2. perpetrator." That testing resulted in the discovery of multiple DNA profiles, none of

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* 1. which belong to Defendant. One male profile was found on the outside of the
	2. sweatshirt's center pocket and it is this profile that Defense is asking the Sacramento

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District Attorney to upload into the CODIS database for comparison.

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1. It is unclear why the additional fact of *who* that third party is matters to the defense,
2. as their argument does not lose any of its limited force with just the presence of the DNA
3. alone (e.g. -the presence of someone else's DNA means Defendant did not wear/own the

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sweatshirt, and therefore did not commit the robbery).

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1. It is plausible, that the DNA could be from an associate of the Defendant;from a
2. person who Defendant borrowed the sweatshirt from, or an Officer at the scene. As the
3. United States Supreme Court has recognized, "DNA testing alone does not always resolve

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a case. Where there is enough other incriminating evidence and an explanation for the

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15 DNA result, science alone cannot prove a prisoner innocent." *(District Attorney's Office*

16 *v. Osborne* (2009) 129 S.Ct. 2308, 2316.)

17 It is far from clear that the DNA profile at issue is attributable to the "putative

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perpetrator" of the crime- a firm prerequisite to uploading an unknown crime scene

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2. DNA profile into the Database. Furthermore, the Sacramento District Attorney is
3. prohibited from uploading the profile under FBI guidelines because there is not a proper
4. outsourcing agreement between Sacramento and the Defense lab (see attached

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Declaration from Mr. Rodzen).

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And even if the DNA profile at issue were searched and determined to be a

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1. "candidate match" to an offender profile, there is no law enforcement "source" laboratory
2. that could receive that information in order to verify the match and trigger DOJ's

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1. confirmation process of reanalyzing the offender sample and confirming identity with a
2. fingerprint comparison. Disclosing a candidate match DNA profile to the Defense lab, a

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civilian, private sector lab, would violate the rigid confidentiality restrictions built into

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1. state law and informing the constitutionality of the DNA Data Bank Program.
2. Finally, Defendant's arguments that he is constitutionally entitled to the requested
3. court order lack merit. The Prosecution's obligations under *Brady v. Maryland* (1963)

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373 U.S. 83 to provide all material exculpatory evidence to the accused does not extend to

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1. a DNA database search whose outcome is wholly unknown and wholly unpredictable.
2. (See, e.g., *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1049 *[Brady* requires
3. that defendant show DNA testing would be dispositive of identity].) Specifically,

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defendant cannot demonstrate a reasonable probability that if the database search is

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1. ordered, it would result in evidence that would lead to an acquittal.
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1 **POINTS AND AUTHORITIES**

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##### 3 I. STATE AND FEDERAL LAW PROHIBIT THE DNA DATABASE SEARCH SOUGHT BY DEFENDANT

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The statutory scheme, which carefully and exhaustively addresses the uses,

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1. restrictions, and operating parameters of the California Offender DNA Database (Pen.
2. Code§ 295 et seq.), precludes the database search sought by Defendant.

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##### A. Background: California's Convicted Offender DNA Database

1. California has collected blood and saliva specimens from statutorily enumerated
2. offenders for identification purposes since 1984. (See the former§ 290:2, added by Stats.

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1983, ch. 700, repealed and replaced by Pen. Code,§ 295 et seq.) The State's current

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1. DNA Data Bank Program is defined by the DNA and Forensic Identification Data Base
2. and Data Bank Act of 1998, as amended by Proposition 69 (Pen. Code, § 295 et seq. ["the
3. DNA Data Bank Act"]) which clarified and expanded previous law. *(Alfaro v. Terhune*

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(2002) 98 Cal.App.4th 492, 497-98 [discussing the evolution of DNA databases in

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1. California].) Every other state, as well as the Federal Government, also maintains a
2. convicted offender DNA database. *(Id.* at p. 505.)
3. California's DNA Data Bank Program is designed to "assist federal, state, and local
4. criminal justice and law enforcement agencies within and outside California in the

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expeditious and accurate detection and prosecution of individuals responsible for sex

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1. offenses and other violent crimes, the exclusion of suspects who are being investigated
2. for these crimes, and the identification of missing and unidentified persons " (Pen.

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Code,§ 295(c).) State law does not authorize the Data Bank Program to act as a

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1. convenient source of third party DNA profiles available to criminal defendants to trawl
2. through in furtherance of their trial defense theories.

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By law, the Departmentof Justice ("DOJ") DNA Laboratory is "responsible for the

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1. management and administration of the state's DNA data base and data bank identification
2. program ...." (Pen. Code,§ 295(g).) Under the DNA Data Bank Act, correctional
3. institutions probation departments, and county law enforcement agencies collect buccal

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swab samples from offenders who fall within the parameters set forth in Section 296.

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1. (Pen. Code § 296.l; see generally *People v. King* (2000) 82 Cai.App.4th 1363, 1369-
2. 1378, *Alfaro v. Terhune, supra,* 98 Cal.App.4th at pp. 492, 505-506, *People v. Adams*

12 (2004) 115 Cal.App.4th 243, 255-259, review denied (2004) 2004 Cal. LEXIS 3090, cert

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den (2004) 543 US 841 [finding the law passes state and federal constitutional scrutiny];

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1. see also *United States v. Kincade* (9th Cir. 2004) 379 F.3d 813, 835.) The DOJ's
2. Richmond DNA Laboratory receives the offenders' samples and, following rigorous
3. procedures, types them via polymerase chain reaction-based short tandem repeat (PCR-

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STR) DNA analysis. The result is a searchable DNA profile ofup to 15 loci useable for

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1. forensic identification purposes only. (See, e.g., *People v. Smith* (2003) 107 Cal.App.4th
2. 646, 654-657 [describing PCR-STR analysis]; *People v. Jackson* (2008) 163 Cal.App.4th
3. 313, 324-325 [describing the 15-locus testing kit].)

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**B. The DNA Profile Proffered by Defendant Is Ineligible For Searching**

1. **in the State DNA Database**
2. State law carefully circumscribes the origin of DNA profiles eligible for upload and
3. search in the State's DNA Database. The profile proffered by defendant does not qualify.

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"[O]nly" Department of Justice and certain "public law enforcement crime laboratories" may analyze crime scene DNA samples for comparison in the state Database. (Pen. Code, § 297, subd. (a)(l)-(2).) Specifically, Penal Code section 297 states that

[O]nly the following laboratories are authorized to analyze crime scene samples ... and to upload and compare those profiles against available state and national DNA ... databases in order to establish identity and origin of samples for forensic identification purposes ... :

1. The DNA laboratories of the Department of Justice that meet state and federal requirements, including the Federal Bureau of Investigation (FBI) Quality Assurance Standards, and that are accredited by an organization approved by the National DNA Index System (NDIS) Procedures Board.
2. Public law enforcement crime laboratories designated by the Department of Justice that meet state and federal requirements, including the FBI Quality Assurance Standards, and that are accredited by an organization approved by the NDIS Procedures Board.
3. (Pen. Code, § 297(a)(l), (2).) One narrow exception to these limitations exists, as set
4. forth in Section 297, subdivision (d). That provision states that qualified Department of 25

Justice and law enforcement crime labs have the "discretion" to upload and search a

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crime scene DNA profile generated by a private laboratory, but only if that private lab

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28 "meet[s] state and federal requirements, including the FBI Quality Assurance Standards,

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1 and [is] accredited by an organization approved by the NDIS Procedures Board." (Pen.

2 Code,§ 297(b).)

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The DNA profile in this case, however, was developed by:

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1. • A private laboratory;
2. • That does not meet FBI quality assurance standards because the Sacramento
3. County District Attorney does not have an outsourcing agreement with the

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Defense lab as required by Standard 17.

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1. Accordingly, the profile may not be searched in the Database. These statutory mandates
2. have been part of state law since January 1, 2007. (Stats 2006, ch. 170, § 2.)

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### C. Federal Requirements Prohibit the Requested Database Search

1. All 50· states operate state-level DNA database programs using search software
2. owned and licensed to them by the FBI. (See, e.g., Note, *Less Privacy Please, We're*

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*British: Investigating Crime with DNA in the UK and the US.* (2008) 31 Hastings Int'l

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1. & Comp. L. Rev. 487, 491.) As a condition of participation in the FBI's National DNA
2. Index System (NDIS), states agree to comply with a memorandum of understanding and
3. NDIS operational procedures set forth by the FBI and subject to enforcement through

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(federal) Office of the Inspector General audits of the state database programs. (See

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1. Audit Div., Office of the Insp. Gen., U.S. Dept. Justice, *Combined DNA Index System*
2. *Operational and Laboratory Vulnerabilities,* Audit Report 06-32, at pp. ii & fn. 2, 87
3. (May 2006) [<http://www.usdoj.gov/oig/reports/FBI/a0632/final.pdf>.](http://www.usdoj.gov/oig/reports/FBI/a0632/final.pdf)) Among the

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requirements that states must observe in uploading DNA profiles into the National DNA

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28 Index System (NDIS) is that "[a] laboratory submitting a DNA profile to the Forensic

1. Index at NDIS that is derived from forensic evidence, shall only offer those alleles that
2. are attributed to the putative perpetrator(s)." (FBI, *DNA Acceptance Standards* (2005) at

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p.3

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1. [<http://www.nlada.org/Defender/forensics/for](http://www.nlada.org/Defender/forensics/for) lib/Documents/1132070952.06/RF GN I
2. 3 NDIS Data Standards%252005 31 05.pdf>; see also FBI, *Quality Assurance*
3. *Standards for Forensic DNA Testing Laboratories* (2009) at p. 2

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[<http://www.fbi.gov/hq/lab/pdf/testinglab.pdf>](http://www.fbi.gov/hq/lab/pdf/testinglab.pdf) ["CODIS also compares crime scene

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1. evidence to DNA profiles from offenders, thereby providing investigators with the
2. identity of the putative perpetrator."].)
3. The NDIS requirement that only perpetrators' DNA profiles are eligible for

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searching is observed at th'.e state database level as well, because it is a fundamental

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1. premise for any DNA database's efficacy. As one court put it, "[a] database not only
2. allows for the rapid identification of the actual perpetrator, but also prevents
3. misidentification and, thereby, permits innocent individuals to be excluded, rapidly and

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without being forced to suffer the indignity of being suspected of crimes that they did not

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1. commit." *(United States* v. *Amerson* (2nd Cir. 2007)483 F.3d 73, 83.) Uploading
2. profiles whose attribution is unknown or based on speculation would result in "hits" of
3. unknown probative value, thus diluting the ability of the Data Bank Program to serve

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these state interests.

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1. That powerful state interest in identifying the culpable while excluding the innocen. t
2. is what gives meaning and significance to a DNA database "cold hit," and plays a central
3. role in the constitutionality, under the Fourth Amendment, of collecting warrantless,

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1. suspicionless DNA samples from criminal offenders. The court in *People v. Travis*
2. (2006) 139 Cal.App.4th 1271 summarized the prevalent reasoning as follows:

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1. [Courts assessing the constitutionality of DNA database collections consider]
2. the undeniable governmental interest "in crime prevention. It has interests in

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solving crimes that have been committed, in bringing the perpetrators to

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1. justice and in preventing, or at least discouraging, them from committing
2. additional crimes. The government also has an interest in ensuring that
3. innocent persons are not needlessly investigated-to say nothing of

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convicted-of crimes they did not commit. DNA testing unquestionably·

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1. furthers these interests. The ability to match DNA profiles derived from crime
2. scene evidence to DNA profiles in an existing data bank can enable law
3. enforcement personnel to solve crimes expeditiously and prevent needless

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interference with the privacy interests of innocent persons."

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18 (139 Cal.App.4th at p. 1285, quoting *People v. King* (2000) 82 Cal.App.4th 1363, 1375-

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1376.)

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1. Accordingly, California's DNA Database cannot and should not be used to search
2. DNA profiles whose crime-solving value is uncertain, and where a database match may
3. not actually identify the perpetrator. Those attributes aptly describe the profile that is the

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subject of this litigation. When weighed against the compelling evideiic.e against the

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1. Defendant described above and the tenuous nature of the Defense's theory about the
2. DNA found on the sweatshirt (including the location of that DNA), the interests of the

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* 1. State in maintaining the integrity of the CODIS database should be superior. It is no
	2. more likely that the DNA belongs to a random person who has touched the sweatshirt, as

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the person who wore the sweatshirt in the home invasion robbery. This is especially true

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1. given the profile is found on the outside surface of the outside pocket of the sweatshirt.
2. In fact, it is undisputed that Defendant actually did to wear the sweatshirt (at the field
3. show up) and his DNA was not even found in the areas tested. The profile, therefore, is

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not clearly attributable to the "putative perpetrator," and thus ineligible for searching in

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IO the state DNA database.

##### 11 D. Statutory Disclosure Restrictions Would Prohibit the Routine t-'

**Processing of Any DNA Database Match that Occurs**

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1. Following each weekly DNA Database search at DOJ's Richmond facility,
2. potential, or "candidate" match profiles are electronically reported to the respective
3. source laboratories for comparison to the crime scene DNA data and confirmation that the

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"candidate" match is a valid investigative lead. Once that confirmation takes place, DOJ

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1. re-analyzes the physical sample collected from that offender as a quality control measure,
2. and verifies the offender's identity through a fingerprint database comparison. Only then
3. is the name of the matching offender reported back to the laboratory that uploaded the

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crime scene profile. In this case, however, the protocol described could not take place

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because there would be no public, law enforcement source laboratory to which the

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1. candidate match could be reported.
2. State law prohibits disclosure of the candidate profile to a non-law enforcement
3. entity. DNA profiles are "confidential" (Pen. Code, § 299.5, subd. (a)), and "shall be

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* 1. released only to law enforcement agencies ... " (§ 299.5, subd. (f)).1 As private citizens
	2. running a private laboratory, Defense lab may not lawfully receive notice of a candidate

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match in order to confirm its fit with the crime scene profile data. The only alternatives

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1. would be (1) to compel DOJ to process the candidate profile *as if it had* been designated a
2. true match by Defense lab, and then disclose the offender name to the prosecuting
3. attorney, or (2) disclose to the prosecuting attorney the offender name corresponding to

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the candidate match without confirming the offender profile and identity as laboratory

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1. important scientific checks and quality control measures in order to satisfy defendant's
2. fishing expedition. The reputation of the DNA Data Bank Program depends upon its

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adherence to rigorous scientific standards.

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1. Moreover, California Penal Code section 299.5, subdivision (h), f9rbids disclosure
2. . of an offender DNA profile or related information in response to a defense discovery
3. request:

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1. Except as provided in subdivision (g) [defendant's own DNA profile available
2. to defense counsel] and in order to protect the confidentiality and privacy of

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database and data bank information, the Department of Justice and local public

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1 The full text of Section 299.5, subdivision (f), is as follows: "DNA samples and DNA profiles

1. and other forensic identification information shall be released only to law enforcement agencies, including, but not limited to, parole officers of the Department of Corrections, hearing officers of
2. the parole authority, probation officers, the Attorney General's office, district attorneys' offices, and prosecuting city attorneys' offices, unless otherwise specifically authorized by this chapter.
3. Dissemination of DNA specimens, samples and DNA profiles and other forensic identification information to law enforcement agencies and district attorneys' offices outside this state shall be
4. performed in conformity with the provisions of this chapter."

A DOJ or other public laboratory could not act as a surrogate source lab for Defense lab, having

1. no knowledge of the scientific methods, protocols, and procedures employed by Defense lab, and



* 1. DNA laboratories shall not otherwise be compelled in a criminal or civil
	2. proceeding to provide any DNA profile or forensic identification database or

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data bank information or its computer database program software or structures

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1. to any person or party seeking such records or information whether by
2. subpoena or discovery, or other procedural device or inquiry.

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1. A court order issued in response to a defense request is simply a "procedural device,"
2. analogous to a subpoena, calculated to compel DOJ to provide DNA Data Bank
3. information to an unauthorized recipient. This statutory provision provides an equally

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compelling reason to deny defendant's motion.

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1. II. **DEFENDANT HAS NO CONSTITUTIONAL RIGHT TO COMPEL DOJ TO**
2. **CONDUCT A DNA DATABASE SEARCH**
3. Defendant argues that his federal due process rights pursuant to *Brady v. Maryland,*
4. *supra,* 373 U.S. 83 require that the demanded database search occur. He asserts that any

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criminal defendant has a right under the Sixth and Fourteenth Amendments to compel

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1. "the Federal Bureau of Investigation (FBI) and or the California Department of Justice"
2. to cooperate in a defense investigation into "a genetic link to the crime." (Def. Points &
3. Authorities, at p. 8.) In other words, when an accused wants access to a law enforcement

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DNA database, an accused gets access to a law enforcement DNA database. This is an

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1. untenable position, and contrary to controlling law. Defendant's arguments lack merit.
2. As a threshold point, it is well-established that the Due Process Clause does not
3. require law enforcement to use a particular investigatory tool. *(Arizona v. Youngblood*

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28 having no access to the electronic data generated in the course of Defense lab's testing.



1. (1988) 488 U.S. 51, 58-59.) Law enforcement need not obtain evidence; "conduct any
2. particular tests," or '"gather up everything which might eventually prove useful to the

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defense."' *(People v. Hogan* (1982) 31 Cal.3d 815, 851, *quoting People v. Watson* (1977)

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1. 75 Cal.App.3d 384,400; see also *People v. Daniels* (1991) 52 Cal.3d 815.) The
2. principles underlying *Brady v. Maryland, supra,* do not run to the contrary.
3. The Due Process Clause right to pretrial discovery is otherwise known as the

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*"Brady"* obligation, in reference to *Brady v. Maryland,* supra, 373 US. 87. The Supreme

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1. Court in *Brady* held that "the suppression by the prosecution of evidence favorable to an
2. accused upon request violates due process where the evidence is material either to guilt or
3. to punishment, irrespective of the good faith or bad faith of the prosecution." *(Id.* at p.

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87.) In tum, evidence is "material" "only if there is a reasonable probability that, had the

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1. evidence been disclosed to the defense, the result of the proceeding would have been
2. different. A 'reasonable probability' is a probability sufficient to undermine confidence
3. in the outcome." *(United States v. Bagley* (1985) 473 U.S. 667, 682.) Thus defendant

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bears the burden of demonstrating that the DNA Database actually contains "favorable

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1. evidence" that "could reasonably be taken to put the whole case in such a different light
2. as to undermine confidence in the verdict' [Citation.]" *(In re Brown* (1998) 17 Cal.4th
3. 873, 887; see also *Richardson v. Superior Court, supra,* 43 Cal.4th at p. 1049 *[Brady*

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requires that defendant show DNA testing would be dispositive of identity].) Applied in

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a pretrial context, this standard assumes that the evidence is not disclosed and the

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26 defendant is convicted.

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1. By its very formulation, the *Brady* standard for disclosure is not met when the
2. defendant relies on pure speculation to demonstrate its relevance. (See, e.g., *Hughes v.*

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*Johnson* (5th Cir. 1999) 191 F.3d 607, 629-630 [denying *Brady* claim as "purely

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1. speculative"]; *Murphy v. Johnson* (5th Cir. 2000) 205 F.3d 809, 814 [conclusory or are
2. purely speculative allegations do not support a *Brady* claim].) Nonetheless, speculation is
3. the only possible basis for Defendant's requested court order. There is no reason to

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know, let alone to suspect, that the profile on the outside surface of an outside pocket of a

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1. sweatshirt (1) is attributable to a person in.the database, and (2) whose identity exculpates
2. defendant. As discussed above, the fact that another person touched the outside of the
3. sweatshirt at some undetermined point in time neither negates nor conflicts with the

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strong evidence that Defendant was in possession of the sweatshirt and committed the

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##### CONCLUSION

* 1. For the reasons set forth above, in addition to any argument offered at the hearing

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on this matter, the People respectfully request that Defendant's motion for a court-ordered

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5 DNA database search be denied.

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7 DATED: July 19, 2012

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Respectfully Submitted,

JAN SCULLY DISTRICT ATTORNEY



MATT CHISHOLM

Deputy District Attorney Elder Abuse Unit



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2. lsupe:rvise the forensic biology/DNA unit of the Sacramento County. driine

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,ilat:a y¢ndorJabotatocy-shall not.initiate- analysis --f9r:th ,:wur.pqs¢ ofgen, .ottln

DNA datalliatrilaybe;enter in CODI$ f$tdJ7,; .1):;

1. Without tile.fl®µip.e;it d:prl.◊t.Jip.ptovaf of theteohnicai:spedficatioiis·of the oui:soutcin:g agreement andior documented approval.of acceptance ofownerslup of d1e DNA data by the NDIS' participating:laboratory's t ,bliical]eader. our laboratory shall not upload or acc pt DN.Adata fo:r uplo.:td to CODlS from any vendor laboratory *<:>t* agency {Std 17;;3);

Our labo toryWotild be required-to conduct a documented; on-site visit befol,"e

#### the vendotlaboratocy performs.casework (Std 17.7);

10. None ofthese req ireme:nts have been:met. Therefore, we cannot accept.DNA data fro1ll a vendor laborator)".an:d upload that data into CODIS .

I declare under penalty of perjurytl:iat the bove js true -and cortect to ilie bestof my

#### knowledge..

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