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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs, **v.** **JOHN DAVIS,** Defendant.	**Case No:** **MCN 2122087/SCN 190226** **MOTION TO QUASH SUBPOENA DUCES TECUM; SUPPLEMENTAL POINTS AND AUTHORITIES RE. ASSERTION OF PRIVILEGE AND CONFIDENTIALITY** Date: February 3, 2006 Time: 1:30 p.m. Dept: 27

INTRODUCTION

Pursuant to the proceedings in this Court on January 31, 2006, the California Department of Justice ("DOJ") hereby moves for an immediate grant of relief denying defendant's discovery request to DOJ. DOJ submits the attached additional points and authorities in support of its Motion to Quash defendant's subpoena duces tecum requesting the State provide defendant with copies of the DNA profiles contained in the State's CAL-DNA database.

DOJ is statutorily and contractually prohibited from disclosing any DNA profile or other identification information collected and maintained as part of the State's DNA Data Bank

Program (Pen. Code, § 295 et seq.), except for a defendant's own profile to defense counsel. DOJ has asserted a valid and absolute privilege protecting the confidentiality of this law enforcement database. (See also *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 508 [recognizing confidentiality of DNA and forensic identification profiles and other identification information].)

Moreover, despite defendant's contentions otherwise, the Sixth Amendment's Confrontation Clause does not "trump the privilege" and even potentially authorize a defendant to conduct pretrial discovery of confidential law enforcement records in the form of DNA database profiles. Both United States and California Supreme Court precedent establish that the Confrontation Clause cannot be invoked to constitutionally compel pretrial discovery. Both *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, and *People v. Hammon* (1997) 15 Cal.4th 1117, recognize that a defendant's ability to question adverse witnesses does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.

Accordingly, DOJ requests this Court immediately quash the subpoena as a matter of law. There is no legal authority permitting further hearing on this matter.

POINTS AND AUTHORITIES

I. This Court Immediately Should Grant DOJ's Motion to Quash Because Defendant Is Precluded From Obtaining Confidential Law Enforcement Information in Pre-Trial Discovery Proceedings

A. California's DNA Database is Confidential and Explicitly Exempt from Disclosure in Discovery and By Subpoena

California's DNA Database is a statutorily -created and confidential law enforcement tool used to link forensic DNA profiles of qualifying convicted offenders such as defendant to matching DNA profiles from unsolved case evidence nationwide. (See Pen. Code, § 295 et seq.; *People v. King* (2000) 82 Cal.App.4th1363; *Alfaro v. Terhune*, *supra*, 98 Cal.App.4th 492.) The State's DNA Database program is administered by DOJ, and is part of the FBI's national CODIS (Combined DNA Index System) crime solving network. CODIS provides to each state the

common software and other infrastructure necessary to run the database pursuant to a Memorandum of Understanding with all participating states. California has signed such a Memorandum of Understanding with the FBI. The restricted use of and access to the profile and identification information contained in the database is a factor in assessing the program's constitutionality. (See *People v. King, supra*, 82 Cal. App.4th at pp. 1363, 1377, 1375, fn.6 [recognizing data bank's use limitations as part of the constitutional balancing analysis; *Alfaro v. Terhune, supra*, 98 Cal. App.4th at pp. 492, 507-508 ["The extent of the [data bank] intrusion is measured by reference to express limitations on the uses to which the specimens and samples may be put . . . ."]; *see also United States v. Kincade* (9th Cir. 2004) 379 F.3d 813, 837, and fn. 33 [observing that statutory confidentiality protections counter defense claim that "soon, if not already, scientists will request access to what would serve as [a] preexisting goldmine of DNA data for their research."].)

Several independent sources protect the confidentiality of information contained in the Cal-DNA Database, and prevent DOJ from releasing any of that information to defendant.[1] They include the following statutory and contractual provisions:

1. Penal Code Section 299.5

California Penal Code section 299.5 delineates the strict confidentiality of the State's DNA Database Program. It is comprehensive, clear and controlling: No DNA profile, no data bank or database information, and no database computer program or structure is available to a criminal defendant by way of subpoena or other discovery mechanism. (Pen. Code, § 299.5(h).) In its entirety, Section 299.5(h) reads as follows:

> Except as provided in subdivision (g) and in order to protect the confidentiality and privacy of database and data bank information, the Department of Justice and local public DNA laboratories shall not otherwise be compelled in a criminal or civil proceeding to provide any DNA profile or forensic identification database or data bank information or its computer database program software or structures to any person or party seeking such records or information whether by subpoena or discovery, or other procedural device or inquiry.

The law expressly anticipates that requests for database information would continue to be made

1. Other than, as noted in court, defendant's own DNA profile and associated data. (Pen. Code, § 299.5(g).)

by issuance of subpoenas[2], and in response, and ostensibly to curtail the unnecessary, repetitious and expensive hearings on the issue, it emphasized that such requests are prohibited as a matter of law.

California places such a premium on the protection and confidentiality of citizens' genetic information that state law sets forth severe criminal and civil sanctions for DOJ employees who violate the DNA Data Bank Program's strict nondisclosure restrictions:

> Any person who knowingly uses an offender specimen sample or *DNA profile collected pursuant to this chapter for other than criminal identification or exclusion purposes*, or for other than the identification of mission persons, or who knowingly discloses DNA or other forensic identification information developed pursuant to this section to an unauthorized individual or agency, for other than criminal identification or exclusion purposes, or for the identification of missing persons, in violation of this chapter, shall be punished by imprisonment in a county jail not exceeding one year or by imprisonment in the state prison.
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> * * *
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> If any employee of the Department of Justice knowingly uses a specimen, sample, *or DNA profile collected pursuant to this chapter for other than criminal identification or exclusion purposes*, or knowingly discloses DNA or other forensic identification

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2. For example, in 2002, Dr. Laurence Mueller executed declarations in both *People v. Montgomery*, Sacramento Superior Court No. 00F05623, and *People v. Brown*, Los Angeles Superior Court No. NA036413, in support of defense subpoenas requesting all DNA Database profiles. Dr. Mueller alleged those profiles were needed to conduct his own population statistics research that allegedly could show use of the generally accepted and legally settled product rule for calculating case statistical estimates is faulty if the database has a high frequency of 5 or 6-locus matches. The trial court in those cases quashed the subpoena.

Dr. Mueller is a perennial defense witness whose credibility has been questioned by many trial courts. (See *e.g, People v. Reeves* (2001) 91 Cal.App.4th 14, 37 [tria l court found Dr. Mueller to be "biased and not entirely credible"]; Moenssens (Fall 1990) 31 Jurimetric Journal at 87, 102, fn.60 [noting trial judge in *People v. Howard* (No. 99217 (Cal.1990) remarked on Dr. Mueller's "financial interest and shifty nature of his criticism"].)

In addition it is noteworthy that Dr. Mueller's claims to the database profiles have rested on a threadbare factual premise. The product rule has been exhaustively studied and approved for use in conjunction with DNA evidence (see e.g., *People v. Soto* (1999)21 Cal.4th 512; *People v. Reeves* (2001) 91 Cal.App.4th14). Likewise, random match probability estimates typically are generated from a 13-locus match with the *crime scene evidence profile*, and for good reason are taken from published studies having no relation to the convicted offender database. The State's convicted offender database is not used to generate the probability of a random match in the *general population*, particularly given the number of duplicate samples and the fact that a convicted offender database is not a "neutral" or "random" sampling by definition. The database match is used as probable cause to obtain a second confirmatory sample from the suspect and it is that sample which becomes the operative reference in the case.

> information developed pursuant to this section to an unauthorized individual or agency, for other than criminal identification or exclusion purposes or for other than the identification of missing persons, in violation of this chapter, the department shall be liable in civil damages to the donor of the DNA identification information in the amount of five thousand dollars ($ 5,000) for each violation, plus attorney's fees and costs. In the event of multiple disclosures, the total damages available to the donor of the DNA is limited to fifty thousand dollars ($ 50,000) plus attorney's fees and costs.

(Pen. Code, § 299.5(i)(1)(A), (i)(2)(A); emphasis added.)

California law also contains the following, equally explicit, language rendering DNA database computer programs and structures strictly confidential:

> In order to maintain the computer system security of the Department of Justice DNA and Forensic Identification Database and Data Bank Program, the computer software and database structures used by the DNA Laboratory of the Department of Justice to implement this chapter are confidential.

(Pen. Code, § 299.5(o).)

The State's conscious and careful choice to enact iron-clad protection for information housed in its DNA Data Bank Program is sound policy. If offender DNA profiles were released to a criminal defendant or any other unauthorized recipient, DOJ would lose control of that information and would have no ability to safeguard it against unauthorized use. Likewise, a crucial law enforcement tool would be available to the criminal defense community including potentially unscrupulous experts, and criminals themselves, for examination, manipulation, and misuse. For example, a rapist or murderer potentially search for his own profile after committing his crime, and then take measures to avoid law enforcement if he located his own forensic DNA profile and thereby anticipated apprehension. Misuse and manipulation of the data by criminal defense experts could result in specious but time-consuming claims of partially-matching third-party perpetrators nationwide, thereby undermining the very purpose of the database—to promote the "expeditious and accurate detection" of persons responsible for crimes (Pen.Code, §295(c)) and narrow the scope of criminal investigations, thereby protecting innocent persons from unnecessary investigation. In the final analysis, the utility of California's DNA Data Bank Program depends upon its limitation to use by trained and accountable law enforcement professionals.

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2. Penal Code Sections 11075, 11076

Independent elements of state law protect the confidentiality of offender information used in the DNA Database, such as CII numbers:

> As used in this article, "criminal offender record information" means records and data compiled by criminal justice agencies for purposes of identifying criminal offenders and of maintaining as to each such offender a summary of arrests, pretrial proceedings, the nature and disposition of criminal charges, sentencing, incarceration, rehabilitation, and release. . . . Such information shall be restricted to that which is recorded as the result of an arrest, detention, or other initiation of criminal proceedings or of any consequent proceedings related thereto.
>
> * * *
>
> Criminal offender record information shall be disseminated, whether directly or through any intermediary, only to such agencies as are, or may subsequently be, authorized access to such records by statute.

(Pen. Code, §§ 11075, 11076.) CII numbers, while used in the DNA database, are the central organizing feature of criminal history record information in California, and as such are not subject to unauthorized disclosure.

3. Federal Law

Because California uploads the contents of its offender DNA database into the National DNA Index System, the State is subject to strict and inflexible federal disclosure restrictions as well. Federal law provides as follows:

> The [National DNA Index System] shall include only information on DNA identification records and DNA analyses that are . . .
> (3) maintained by Federal, State, and local criminal justice agencies . . . pursuant to rules that allow disclosure of stored DNA samples and DNA analyses only--
> (A) to criminal justice agencies for law enforcement identification purposes;
> (B) in judicial proceedings, if otherwise admissible pursuant to applicable statutes or rules;
> (C) for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which such defendant is charged; or
> (D) if personally identifiable information is removed, for a population statistics database, for identification research and protocol development purposes, or for quality control purposes.

42 U.S.C. § 14132(b).) As subdivision (3)(C) makes clear, the *only* database records that may be provided to a criminal defendant "for criminal defense purposes" are those relating to the DNA analysis done in conjunction with that particular case. (See also Privacy Act of 1974; New System of Records, 61 Fed. Reg. 37496 (July 18, 1996).

Moreover, the federal government has made clear that all personal identification

information found in NDIS is subject to these confidentiality protections, including "operational identifiers such as the Specimen No., Criminal Justice Agency Identifier, and DNA Personnel identifier," because "the identity of an individual could, under some circumstances, be ascertained with the disclosure of such numbers . . . ." (*Ibid.*)

The consequences to a state of unauthorized disclosure of database profiles or information are similarly obvious: "Access to the index established by this section is subject to cancellation if the quality control and privacy requirements described in subsection (b) [of Section 14132] are not met." (42 U.S.C. § 14132(c), emphasis added.; see also Privacy Act of 1974; New System of Records, 61 Fed. Reg. 37497 (July 18, 1996) ["[C]riminal justice agencies with direct access to NDIS must agree to adhere to national quality assurance standards for DNA testing, undergo semi-annual external proficiency testing, and restrict access to DNA samples and data. The NDIS will not accept DNA analyses from those agencies and/or DNA personnel who fail to comply with these standards and restrictions; and the NDIS Custodian is authorized to restrict access to and delete any DNA records previously entered into the system."].) Therefore, the continuing ability of California to submit offender and forensic DNA profiles to the National DNA Index System for searches against other states' data depends in part upon California's strict observation of the federal confidentiality standards articulated above.

Federal law thus parallels California law with great precision. (See Pen. Code, § 299.5(g) [only a defendant's DNA profile and associated information is available as discovery].) And, as Section 14132 and its interpreting regulations demonstrate, only state DNA information that is protected according to the confidentiality standards set forth is eligible for inclusion in the National DNA Index System.

4. CODIS Memorandum Of Understanding

As noted, California must comply with federal nondisclosure standards in order to maintain its membership in the National DNA Index System and to continue using CODIS software and computer structures as a licencee at the state level. This conditional relationship with the FBI – the federal government's CODIS administrator – is memorialized in the Memorandum of Understanding ("MOU") received into evidence in this case.

The MOU provides that the FBI may terminate the State's licence to use CODIS software and prevent the State from accessing NDIS if any contractual provision is violated. (MOU at pp. 2, 3.) Among those provisions is the admonishment that the State "will take reasonable precautions to prevent unauthorized persons from accessing the CODIS software," and abide by the disclosure restrictions set forth in 42 U.S.C. § 14132. (*Id.* at pp. 2, 3.) Defendant is asking that this Court order California to violate that contract, and expose itself to the dire consequences.

Expulsion from CODIS would mean that California would lose its ability to solve suspectless crime, which it currently does at the average rate of 1-2 "cold hits" per work day. Almost all cold hit cases involve sex or violent crimes such as this one. To date, California has recorded over 1800 cold hits by virtue of its Data Bank Program.

B. Evidence Code Section 1040(b)(1) Confers An Absolute Privilege Of Nondisclosure

Because defendant is demanding illegal disclosure of portions of the State's DNA database, DOJ possesses – and asserts – an absolute privilege of nondisclosure pursuant to Evidence Code section 1040(b)(1). Section 1040(b)(1) provides that

> A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and: (1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state . . . .

The California Supreme Court has recognized that Section 1040(b)(1) confers upon its holder "an absolute privilege if disclosure is forbidden by a federal or state statute." (*Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 123, overruled in part on other grounds by *People v. Holloway* (2004) 33 Cal.4th 96, 131; *Marylander v. Superior Court* (2000) 81 Cal.App.4th 1119, 1126, fn. 1; *Rubin v. Superior Court* (1987) 190 Cal.App.3d 560, 584.)

State and federal statutory schemes establish that the information contained in the State's DNA database and currently sought by defendant may not be disclosed. California's privilege is therefore absolute and cannot be defeated.

We ask this Court to respond appropriately in this case by quashing the defense subpoena in light of the law's confidentiality and use restrictions and the MOU in evidence in this case.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

C. DOJ's Absolute Privilege Is Not Overcome By Defense Assertions of Confrontation Clause And Due Process Rights

1. Confrontation Clause

Defendant has claimed that his Confrontation Clause rights trump the assertion of nondisclosure privileges by DOJ. He is wrong. Both the United States Supreme Court and the California Supreme Court have determined that the Confrontation Clause does not apply to pretrial discovery, nor does it create a constitutionally compelled rule of pretrial discovery.

A plurality of the Court in *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, held that the state did not violate the Confrontation Clause by refusing to disclose privileged child welfare agency records in response to a defendant's SDT. In doing so, the Court differentiated between restricting a defendant's reliance on information he possesses to impeach a witness, and preventing a defendant from gaining access to such information:

> The Pennsylvania Supreme Court apparently interpreted our decision in *Davis* to mean that a statutory privilege cannot be maintained when a defendant asserts a need, prior to trial, for the protected information that might be used at trial to impeach or otherwise undermine a witness' testimony. . . . .
>
> If we were to accept this broad interpretation of *Davis*, the effect would be to transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery. Nothing in the case law supports such a view. The opinions of this Court show that the right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination. See *California* v. *Green*, 399 U.S. 149, 157 (1970) ("[It] is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause"); *Barber* v. *Page*, 390 U.S. 719, 725 (1968) ("The right to confrontation is basically a trial right"). The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. Normally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses. *Delaware* v. *Fensterer*, 474 U.S., at 20. In short, the Confrontation Clause only guarantees "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id*., at 20 (emphasis in original).

480 U.S. at pp. 52-53 (footnote omitted), emphasis added.) Significantly, the defendant in *Ritchie* had sought exculpatory information concerning the primary complaining witness against him, which would have been far more valuable to the defense than the speculative and collateral information being sought here.

The conclusion reached in *Ritchie* was adopted and reiterated by the California Supreme Court in *People v. Hammon* (1997) 15 Cal.4th 1117. In *Hammon*, a criminal defendant also

sought disclosure of privileged records by way of SDT, claiming that the Confrontation Clause overrode the assertion of privilege. The court disagreed, and held that the confidential status of the documents was properly maintained:

> [D]efendant asks us to hold that the Sixth Amendment confers a right to discover privileged psychiatric information before trial. We do not, however, see an adequate justification for taking such a long step in a direction the United States Supreme Court has not gone. Indeed, a persuasive reason exists not to do so. When a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the trial court may be called upon, as in *Davis*, to balance the defendant's need for cross-examination and the state policies the privilege is intended to serve. . . . . Before trial, the court typically will not have sufficient information to conduct this inquiry; hence, if pretrial disclosure is permitted, a serious risk arises that privileged material will be disclosed unnecessarily.

17 Cal.4th at p. 1127; see also *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 805, fn. 18 [acknowledging that the Confrontation Clause does not apply to pretrial discovery]; see also *State v. Dykes* (Kan. 1993) 847 P.2d 1214, [defense request to obtain copy of FBI's DNA database in order to effectively cross-examination of state's expert on DNA statistics was properly denied as speculative, irrelevant, and immaterial].)

In this case, *Ritchie* and *Hammon* are all the more applicable because defendant is not asking DOJ for information that is intended for cross-examination. Rather, the defense has made clear that it seeks access to California's offender DNA database in order to permit its own experts to use, study, and analyze the data. Thus, defendant seeks access to California's privileged material in order to create evidence for use during his own case-in-chief. As pointed out previously by DOJ, law enforcement need not "obtain evidence, conduct any tests, or 'gather up everything which might eventually prove useful to the defense.'" (*People v. Hogan* (1982) 31 Cal.3d 815, 851, quoting *People v. Watson* (1977) 75 Cal.App.3d 384, 400.) Certainly citation of the Confrontation Clause – a provision relating exclusively to cross-examination – is inapposite here.

Finally, even if this Court were to weigh defendant's assertion of Confrontation Clause rights against DOJ's assertion of privilege, it should do so in light of the undisputed evidence that defendant's experts have already received data from over 65,000 offenders in Arizona, and have access to well over 37,000 forensic DNA profiles as the result of the release of the Australian DNA database in conjunction with thousands of profiles contained in other published

databases. The later set of databases includes the publication of 17,000 forensic DNA profiles by Orchid Biosciences, Inc. (Einum and Scarpetta, *Genetic Analysis of Large Data Sets of North American Black, Caucasian, and Hispanic Populations at 13 CODIS STR Loci* (Nov. 2004) J. Forensic Sci., Vol. 49, No. 6 [Attached as Exhibit 1].) The fact that the defense has access to such a large volume of public research materials indicates that additional data from California's confidential database is far from "necessary." At the very least, the defense should be required to present its research findings based on examination of all publically-available records as part of its showing of relevance here. As Dr. Mueller himself stated in his public, non-sealed October 2005 declaration in this case, scientific studies based on information that is not "available for review by outside scientists . . . should not be used to produce scientific conclusions in the courtroom." (Decl. of L. Mueller, Oct. 13, 2005.)

2. Due Process

Defendant's claim that his due process rights overcome DOJ's statutory privilege is equally without merit.

The Due Process Clause right to pretrial discovery is otherwise known as the "*Brady*" obligation, in reference to *Brady v. Maryland* (1963) 373 US. 87. The Supreme Court in *Brady* held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Id.* at p. 87.) "Material" evidence, in turn, is defined as follows: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." (*United States v. Bagley* (1985) 473 U.S. 667, 682.)

By its very formulation, the *Brady* standard for disclosure is not met when the defendant relies on pure speculation to demonstrate its relevance. (See, e.g., *Hughes v. Johnson* (5th Cir. 1999) 191 F.3d 607, 629-630 [denying *Brady* claim as "purely speculative"].) Nonetheless, speculation infuses defendant Davis' claim throughout. Neither defendant nor any defense expert knows what kind of empirical evidence related to DNA statistics, if any, could be

discovered using California's law enforcement database. Defendant has not even made the effort to perform whatever research he deems important using publically available DNA databases. Any due process claim, as a result, is specious.

Furthermore, defendant has made no claim that California's DNA database contains evidence that his DNA profile does not match the profile left by the perpetrator at the crime scene. To the contrary, there is testimony that defendant's profile is the only one out of nearly 3,000,000 searched at the state and national levels that matches the perpetrator's. There is nothing exculpatory about that.

In sum, defendant's claims of Confrontation Clause and due process fail to carry any weight, let alone trump the multi-tiered and comprehensive statutory and contractual confidentiality provisions protecting California's database from disclosure.

CONCLUSION

For the reasons stated, in addition to the submission of all other written and oral argument presented by DOJ on this issue, DOJ respectfully requests that this Court quash defendant's subpoena and find the data requested by defendant privileged and not subject to disclosure.

Dated: February 2, 2006

Respectfully submitted,

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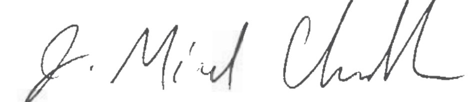

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