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10
 11 SUPERIOR COURT OF CALIFORNIA
 12 COUNTY OF LOS ANGELES

13 THE PEOPLE OF THE STATE OF CALIFORNIA,
 14
 Third Party in Interest,
 15
 v.
 16
 IVAN HILL,
 17
 Defendant.

KA064034

**OPPOSITION TO
 DEFENDANT'S MOTION TO
 COMPEL DISCLOSURE OF
 DNA DATABASE
 POSSESSED BY THE
 CALIFORNIA
 DEPARTMENT OF JUSTICE**

Date: July 28, 2006
 Time: 1:30 p.m.
 Dept: 106

22 INTRODUCTION AND SUMMARY OF POSITION

23
 24 On June 29, 2006, defendant Hill gave notice for the first time to the California
 25 Department of Justice ("DOJ") that he is seeking as discovery in this case a complete list of offender
 26 profiles maintained in the State's forensic identification DNA Database (Pen. Code, § 295 et seq.).
 27 In the alternative, defendant seeks to compel DOJ to conduct the first ever search of its offender
 28 database *against itself* and disclose information relating to any offender DNA profiles that "match

1 at 9 or more loci." (Def. Points & Auth., June 30, 2006, at pp. 1-2.)

2 Although this discovery request was initially made in November 2005, neither the
3 prosecution nor defense notified DOJ. As a result, this is the first opportunity DOJ has had to be
4 heard on the issue. Because the information sought is not case-specific, i.e., generated and
5 maintained by DOJ as part of its ongoing administrative function and not for the specific purpose
6 of investigating this case, DOJ qualifies as a third party in addition to its role as an investigating
7 agency. It possesses the concordant right to file its objections and be heard on the record. (See
8 *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1317-1318 [noting that CDC
9 assumed "hybrid status" as both an investigating agency and third party for purposes of discovery
10 because records sought that related both to its investigation and to its responsibilities as a distinct
11 government agency].)

12 DOJ objects to defendant's alternative requests on at least five grounds. First, the
13 requested information is protected by an absolute privilege of nondisclosure, conferred by multiple
14 state and federal statutory provisions. Neither *Brady v. Maryland* (1963) 373 U.S. 83, nor any other
15 constitutional principles trump these privileges or compel disclosure.

16 Second, the search defendant contemplates DOJ conducting has never been done, because
17 there is no forensic utility in searching the offender database against itself. To preform this
18 unprecedented search, DOJ would have to reprogram its computers to conduct over a *hundred and*
19 *twenty billion DNA profile comparisons*. DOJ staff would then have to isolate partially-matching
20 "individuals" as contemplated by the discovery request. This entire process would consume
21 potentially hundreds of DOJ staff hours and be unduly burdensome to DOJ.

22 Third, searching the offender database against itself would be such a massive undertaking
23 that it would jeopardize public safety in California by taking the State's CODIS ("Combined DNA
24 Index System") off-line and rendering it dysfunctional for actual law enforcement and crime-solving
25 purposes for at least a full week. Moreover, disclosing offender profiles in violation of statutory and
26 contractual provisions could jeopardize California's continuing ability to participate in CODIS.

27 Fourth, defendant's claim that DOJ's database is "necessary" for researching the accuracy
28 of statistical estimates (Def. Points & Auth., June 30, 2006, at p. 6) fails in light of the existence of

1 thousands of non-confidential, non-privileged, publically available multi-locus forensic DNA
2 profiles that could be used to conduct the same "research" into profile rarity estimates. There is
3 simply no need to use a law enforcement database for such redundant "research," especially because
4 a law enforcement database is far from a random sampling of population groups and thus ill-suited
5 to research.

6 Fifth, the information defendant seeks is wholly irrelevant to any issue that could be
7 litigated in this case. There is not, in fact, any "serious doubt" (Def. Points & Auth., June 30, 2006,
8 at p. 6) about the accuracy of traditional random match probability statistics based on the data from
9 the Arizona database. Searching the 65,493 Arizona offender profiles against each other represented
10 2,144,633,778 separate comparisons. Locating profiles that partially match at various genetic
11 markers when conducting well over a billion comparisons is not at all surprising. In fact, when one
12 considers factors such as kinship and ethnicity, the number of partially matching profiles in the
13 Arizona database was fully consistent with traditional population frequency estimates. Published
14 and peer-reviewed scientific literature supports this conclusion. The current size of California's
15 offender database, by extension, would entail well over a hundred and twenty billion separate
16 comparisons.

17 For those reasons, as set forth more thoroughly below, DOJ respectfully requests that
18 defendant's motion to compel discovery be denied.

19 ARGUMENT

20 I.

21 THE INFORMATION SOUGHT BY DEFENDANT IS PROTECTED BY
22 AN ABSOLUTE PRIVILEGE OF NONDISCLOSURE

23 A. California's DNA Database Is Confidential And Explicitly Exempt From Disclosure
24 In Discovery

25 California's DNA Database is a statutorily-created and confidential law enforcement tool
26 used to link forensic DNA profiles of qualifying convicted offenders such as defendant to matching
27 DNA profiles from unsolved case evidence nationwide. (See Pen. Code, § 295 et seq.; *People v.*
28 *King* (2000) 82 Cal.App.4th 1363; *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

1 Index System) crime solving network. Currently, California's offender database contains ove
2 490,000 offender profiles.¹¹

3 CODIS provides to each state the common software and other infrastructure necessary to
4 run the database pursuant to a Memorandum of Understanding with all participating states.
5 California has signed such a Memorandum of Understanding with the FBI. The restricted use of and
6 access to the profile and identification information contained in the database is a significant factor
7 in assessing the program's constitutionality. (See *People v. King, supra*, 82 Cal. App.4th at pp.
8 1363, 1377, 1375, fn.6 [recognizing data bank's use limitations as part of the constitutional
9 balancing analysis; *Alfaro v. Terhune, supra*, 98 Cal. App.4th at pp. 492, 507-508 ["The extent of
10 the [data bank] intrusion is measured by reference to express limitations on the uses to which the
11 specimens and samples may be put . . ."]; see also *United States v. Kincade* (9th Cir. 2004) 379
12 F.3d 813, 837, and fn. 33 [observing that statutory confidentiality protections counter defense claim
13 that "soon, if not already, scientists will request access to what would serve as [a] preexisting
14 goldmine of DNA data for their research."].)

15 Several independent sources protect the confidentiality of information contained in the
16 Cal-DNA Database, and prevent DOJ from releasing any of that information to defendant.¹² They
17 include the following statutory and contractual provisions:

18 **1. Penal Code Section 299.5**

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

24 Except as provided in subdivision (g) and in order to protect the confidentiality and
25 privacy of database and data bank information, the Department of Justice and local public
26 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

27 1. As of early July, 2006.

28 2. Other than defendant's own DNA profile and associated data. (Pen. Code, § 299.5(g).)

1 records or information whether by subpoena or discovery, or other procedural device or
2 inquiry.

3 The law expressly anticipates that requests for database information would continue to be made by
4 issuance of subpoenas², and in response, and ostensibly to curtail the unnecessary, repetitious and
5 expensive hearings on the issue, it emphasized that such requests are prohibited as a matter of law.
6 The type of database research defendant requests presumably would place DOJ in violation of the
7 law.

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

11 Any person who knowingly uses an offender specimen sample or *DNA profile collected*
12 *pursuant to this chapter for other than criminal identification or exclusion purposes*, or
13 for other than the identification of missing persons, or who knowingly discloses DNA or
14 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

15
16 3. For example, in 2002, Dr. Laurence Mueller executed declarations in both *People v.*
17 *Montgomery*, Sacramento Superior Court No. 00F05623, and *People v. Brown*, Los Angeles
18 Superior Court No. NA036413, in support of defense subpoenas requesting all DNA Database
19 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.

20 Dr. Mueller is a perennial defense witness whose credibility has been questioned by many
21 trial courts. (See e.g. *People v. Reeves* (2001) 91 Cal.App.4th 14, 37 [trial court found Dr. Mueller
22 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 shift nature of his criticism"].)

23 In addition it is noteworthy that Dr. Mueller's claims to the database profiles have rested on
24 a threadbare factual premise. The product rule has been exhaustively studied and approved for use
25 in conjunction with DNA evidence (see e.g., *People v. Soto* (1999) 21 Cal.4th 512; *People v. Reeves*
26 (2001) 91 Cal.App.4th 14). Likewise, random match probability estimates typically are generated
27 from a 13-locus match with the *crime scene evidence profile*, and for good reason are taken from
28 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.

1 the state prison.

2 * * *

3 If any employee of the Department of Justice knowingly uses a specimen, sample, or DNA
4 profile collected pursuant to this chapter for other than criminal identification or
5 exclusion purposes, or knowingly discloses DNA or other forensic identification
6 information developed pursuant to this section to an unauthorized individual or agency,
7 for other than criminal identification or exclusion purposes or for other than the
8 identification of missing persons, in violation of this chapter, the department shall be
9 liable in civil damages to the donor of the DNA identification information in the amount
10 of five thousand dollars (\$ 5,000) for each violation, plus attorney's fees and costs. In the
11 event of multiple disclosures, the total damages available to the donor of the DNA is
12 limited to fifty thousand dollars (\$ 50,000) plus attorney's fees and costs.

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

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

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

14 (Pen. Code, § 299.5(o).)

15 The State's conscious and careful choice to enact iron-clad protection for information
16 housed in its DNA Data Bank Program is sound policy. If offender DNA profiles were released to
17 a criminal defendant or any other unauthorized recipient, DOJ would lose control of that information
18 and would have no ability to safeguard it against unauthorized use. Likewise, a crucial law
19 enforcement tool would be available to the criminal defense community, including potentially
20 unscrupulous experts. For example, misuse and manipulation of the data by criminal defense experts
21 could result in specious but time-consuming claims of partially-matching third-party perpetrators
22 nationwide, thereby undermining the very purpose of the database — to promote the "expeditious
23 and accurate detection" of persons responsible for crimes (Pen. Code, §295(c)) and narrow the scope
24 of criminal investigations, thereby protecting innocent persons from unnecessary investigation. In
25 the final analysis, the utility of California's DNA Data Bank Program depends upon the express
26 restriction that it be used in a specific manner, for specific purposes, and by specifically authorized
27 government personnel.

28

1 **2. Federal Law**

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

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

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

22 Moreover, the federal government has made clear that all personal identification
23 information found in NDIS is subject to these confidentiality protections, including "operational
24 identifiers such as the Specimen No., Criminal Justice Agency Identifier, and DNA Personnel
25 identifier," because "the identity of an individual could, under some circumstances, be ascertained
26 with the disclosure of such numbers . . ." (*Ibid.*)

27 Federal law thus parallels California law with great precision. (See Pen. Code, § 299.5(g)
28 [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.

29 **3. CODIS Memorandum Of Understanding**

30 California must comply with federal nondisclosure standards in order to maintain its
31 membership in the National DNA Index System and to continue using CODIS software and

1 computer structures as a licensee at the state level. This conditional relationship with the FBI – the
2 federal government’s CODIS administrator – is memorialized in a Memorandum of Understanding
3 (“MOU”) between California and the FBI.

4 The MOU provides that the FBI may terminate the State’s license to use CODIS software
5 and prevent the State from accessing NDIS if any contractual provision is violated. Among those
6 provisions is the admonishment that the State “will take reasonable precautions to prevent
7 unauthorized persons from accessing the CODIS software,” and abide by the disclosure restrictions
8 set forth in 42 U.S.C. § 14132. Defendant is asking that this Court order California to violate that
9 contract, and expose itself to the dire consequences. Those consequences will be discussed in more
10 detail below.

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

12 In response to defendant’s demand for illegal disclosure of portions of the State’s DNA
13 database, DOJ asserts an absolute privilege of nondisclosure pursuant to Evidence Code section
14 1040(b)(1). Section 1040(b)(1) provides that

15 A public entity has a privilege to refuse to disclose official information, and to prevent
16 another from disclosing official information, if the privilege is claimed by a person
17 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

18 The California Supreme Court has recognized that Section 1040(b)(1) confers upon its holder “an
19 absolute privilege if disclosure is forbidden by a federal or state statute.” (*Shepherd v. Superior*
20 *Court* (1976) 17 Cal.3d 107, 123, overruled in part on other grounds by *People v. Holloway* (2004)
21 33 Cal.4th 96, 131; *Marylander v. Superior Court* (2000) 81 Cal.App.4th 1119, 1126, fn. 1; *Rubin*
22 *v. Superior Court* (1987) 190 Cal.App.3d 560, 584.)

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

26 **C. DOJ’s Absolute Privilege Is Not Overcome By Defense Assertions Of Due Process**
27 **Rights**

28 Defendant’s claim that his due process rights overcome DOJ’s statutory privilege lacks

1 merit.

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

11 By its very formulation, the *Brady* standard for disclosure is not met when the defendant
12 relies on pure speculation to demonstrate its relevance. (See, e.g., *Hughes v. Johnson* (5th Cir. 1999)
13 191 F.3d 607, 629-630 [denying *Brady* claim as "purely speculative"].) Nonetheless, speculation
14 infuses defendant's claim throughout. Neither defendant nor any defense expert knows what kind
15 of empirical evidence related to DNA statistics, if any, could be discovered using California's law
16 enforcement database. Defendant has not even made the effort to perform whatever research he
17 deems important using publically available DNA databases. Any due process claim, as a result, is
18 specious.

19 Furthermore, defendant has made no claim that California's DNA database contains
20 evidence that his DNA profile does not match the profile left by the perpetrator at the crime scenes.
21 To the contrary, defendant's profile is the only one out of more than three million searched at the
22 state and national levels that matches the perpetrator's. There is nothing exculpatory about that.

23 Accordingly, DOJ possesses an absolute and inviolable privilege of nondisclosure with respect
24 to all offender DNA database information not related to defendant himself. That privilege is not
25 overcome by speculative claims of due process, because there is no indication that the information
26 being requested is exculpatory or impeaching within the meaning of *Brady v. Maryland, supra*.

27
28

1 **D. DOJ's Absolute Privilege Is Not Overcome By Defense Assertions Of Confrontation**
2 **Clause Rights**

3 Defendant also claims that his Confrontation Clause rights trump the assertion of
4 nondisclosure privileges by DOJ. (Def. Points & Auth., June 30, 2006, at p. 3.) He is incorrect.
5 Both the United States Supreme Court and the California Supreme Court have determined that the
6 Confrontation Clause does not apply to pretrial discovery, nor does it create a constitutionally
7 compelled rule of pretrial discovery.

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

13 The Pennsylvania Supreme Court apparently interpreted our decision in *Davis* to mean
14 that a statutory privilege cannot be maintained when a defendant asserts a need, prior to
15 trial, for the protected information that might be used at trial to impeach or otherwise
16 undermine a witness' testimony. . . .

17 If we were to accept this broad interpretation of *Davis*, the effect would be to transform
18 the Confrontation Clause into a constitutionally compelled rule of pretrial discovery.
19 Nothing in the case law supports such a view. The opinions of this Court show that the
20 right to confrontation is a *trial* right, designed to prevent improper restrictions on the types
21 of questions that defense counsel may ask during cross-examination. See *California v.*
22 *Green*, 399 U.S. 149, 157 (1970) ("[It] is this literal right to 'confront' the witness at the
23 time of trial that forms the core of the values furthered by the Confrontation Clause");
24 *Barber v. Page*, 390 U.S. 719, 725 (1968) ("The right to confrontation is basically a trial
25 right"). The ability to question adverse witnesses, however, does not include the power to
26 require the pretrial disclosure of any and all information that might be useful in
27 contradicting unfavorable testimony. Normally the right to confront one's accusers is
28 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).

24 480 U.S. at pp. 52-53 (footnote omitted), emphasis added.) Significantly, the defendant in *Ritchie*
25 had sought exculpatory information concerning the primary complaining witness against him, which
26 would have been far more valuable to the defense than the speculative and collateral information
27 being sought here.

28 The conclusion reached in *Ritchie* was adopted and reiterated by the California Supreme

1 Court in *People v. Hammon* (1997) 15 Cal.4th 1117. In *Hammon*, a criminal defendant also sought
2 disclosure of privileged records by way of SDT, claiming that the Confrontation Clause overrode the
3 assertion of privilege. The court disagreed, and held that the confidential status of the documents
4 was properly maintained:

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

15 17 Cal.4th at p. 1127; see also *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 805, fn. 18
16 [acknowledging that the Confrontation Clause does not apply to pretrial discovery]; see also *State*
17 *v. Dykes* (Kan. 1993) 847 P.2d 1214, [defense request to obtain copy of FBI's DNA database in order
18 to effectively cross-examination of state's expert on DNA statistics was properly denied as
19 speculative, irrelevant, and immaterial].)

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

II.

**COMPLIANCE WITH DEFENDANT'S DISCOVERY REQUEST
WOULD BURDEN DOJ TO AN EXTREME AND UNDUE DEGREE**

DOJ's offender database currently contains more than 493,000 offender DNA profiles.

1 Approximately 10-15% of those represent duplicate submissions by the same offender.⁴ DOJ has
2 never searched its offender database against itself, because there is no forensic utility in doing so.
3 Law enforcement is aided only by comparison of offender profiles to unsolved crime scene profiles,
4 and by comparing crime scene profiles with each other.

5 There is no legal authority for compelling DOJ to conduct an unprecedented test with its
6 government database in order to satisfy a wholly speculative defense theory. To the contrary, law
7 enforcement agencies need not take affirmative action to procure information the defense desires.
8 (*In re. Littlefield* (1993) 5 Cal.4th 122, 135.) As the California Supreme Court articulated, "the
9 prosecution has no *general duty* to seek out, obtain, and disclose all evidence that might be beneficial
10 to the defense." (*Id.*, emphasis in original.) As previously noted, law enforcement need not "obtain
11 evidence, conduct any tests, or 'gather up everything which might eventually prove useful to the
12 defense.'" (*People v. Hogan, supra*, 31 Cal.3d at p. 851, quoting *People v. Watson, supra*, 75
13 Cal.App.3d at p. 400.) In *Arizona v. Youngblood* (1988) 488 U.S. 51, 59, the Supreme Court
14 observed that due process is not threatened just because the police failed to employ a particular
15 investigatory tool. In other words, "the police do not have a constitutional duty to perform any
16 particular tests." (*Id.*)

17 Even if DOJ were to consider undertaking the offender database search contemplated by
18 defendant, or disclosing of a copy of all profiles in the database to defendant, the inevitable
19 consumption of time and staff resources required to follow through would render both options
20 impractical and prohibitively costly. Specifically:

- 21 • Conducting the search itself (i.e., more than 120 billion profile comparisons) would consume
22 more than 170 computer-hours. This means that California's CODIS system and software
23 would be off-line for at least a full week. No cold hits could be determined or reported. No
24 profiles could be uploaded into the state database. No profiles could be forwarded to the
25 National DNA Index System ("NDIS");

26
27
28 4. This determination is based upon DOJ review of CII numbers recorded on sample
submission cards. It is not based on a search of the database. DOJ retains duplicate profiles in its
offender database for quality control purposes.

- 1 ● An additional expenditure of anywhere from hundreds to thousands of hours would be required
- 2 to ensure the elimination of duplicate sample submissions. This is because comparing the
- 3 offender database against itself at any 9 loci (or any 10 loci, or any 11 loci, or any 12 loci, or
- 4 any 13 loci, or any 14 loci) would necessarily capture all existing duplicate samples and thus
- 5 result in anywhere between 49,000 and 74,000 new "matches" deposited into the "Match
- 6 Manager" software used by DOJ;
- 7 ● Were DOJ to attempt to provide a sanitized "copy" of the offender database, it would take
- 8 DOJ staff at least 20 hours to make an essential copy of the working database for data
- 9 preservation purposes before conducting the search;
- 10 ● Another 20 hours or more would be consumed by writing and testing the novel query and
- 11 reviewing the data for quality control purposes;
- 12 ● Another 12 hours or more would be required to redact identifying information;
- 13 ● Finally, as in the case of the database search, eliminating duplicate sample submissions from
- 14 the "copy" of the database provided to the defense would still require *hundreds to thousands*
- 15 *of hours* to complete.

16 In sum, compelling disclosure of the requested information would be extraordinarily
 17 onerous and burdensome to DOJ. As will be discussed below, the defense theory of relevance is
 18 without merit, and does nothing to counterbalance the inevitably severe burden to the State.

19 **III.**

20 **COMPLIANCE WITH DEFENDANT'S DISCOVERY REQUEST**
 21 **WOULD THREATEN PUBLIC SAFETY IN CALIFORNIA**

22 As noted, were DOJ to conduct the massive search of its offender database against itself
 23 (i.e., more than 490,000 profiles compared against more than 490,000 profiles), one of the most
 24 effective crime-solving tools available to California law enforcement would be rendered inoperative

25
 26 5. It would not be possible to provide a list of truly "anonymous" offender DNA profiles,
 27 as suggested by defendant. At the very least, some identifying information, such as a sample
 28 submission number, would be necessary to verify that the profiles represent different individuals.
 Moreover, if the defense were truly interested in population frequency statistics, it would want to
 know whether individuals who possess partially-matching DNA profiles are related to each other.
 Kinship affects the likelihood of shared alleles.

1 for at least a full week. To put this in context, DOJ's Data Bank Program recorded 164 "cold hits"
2 during the month of June 2006 alone. The majority of those cases represent previously unsolved
3 homicides and sexual assaults that now feature a named suspect. To disable California's capacity
4 to solve such cases for more than a week would likely have real and deleterious effects on public
5 safety in California.

6 Further, were DOJ to report the results of that search to the defense in this case, or were DOJ
7 to simply provide a "copy" of its offender database to the defense, the State would be in violation
8 of a number of state and federal statutory nondisclosure provisions, as well as the California-FBI
9 MOU. The potential consequences could be severe: "Access to the index established by this section
10 is subject to cancellation if the quality control and privacy requirements described in subsection (b)
11 [of Section 14132] are not met." (42 U.S.C. § 14132(c), emphasis added.; see also Privacy Act of
12 1974; New System of Records, 61 Fed. Reg. 37497 (July 18, 1996) ["[C]riminal justice agencies
13 with direct access to NDIS must agree to adhere to national quality assurance standards for DNA
14 testing, undergo semi-annual external proficiency testing, and restrict access to DNA samples and
15 data. The NDIS will not accept DNA analyses from those agencies and/or DNA personnel who fail
16 to comply with these standards and restrictions; and the NDIS Custodian is authorized to restrict
17 access to and delete any DNA records previously entered into the system."].)

18 Therefore, the continuing ability of California to submit offender and forensic DNA profiles
19 to the National DNA Index System for searches against other states' data depends in part upon
20 California's strict observation of the federal confidentiality standards articulated above. Expulsion
21 from CODIS would jeopardize California's ability to solve suspectless crime, which in June it
22 accomplished at average rate of more than 7 "cold hits" per work day.

23 IV.

24 **DEFENDANT'S EXPERTS DO NOT NEED DATA FROM**
25 **CALIFORNIA'S DNA DATABASE; THEY HAVE ACCESS TO**
26 **THOUSANDS OF NON-CONFIDENTIAL DNA PROFILES**

27 Defendant's theory of relevance is that access to California's offender database (or a list
28 of all offender profiles that match at nine or more loci) "will provide empirical evidence to
demonstrate that statistics that will be offered by the prosecutor are inappropriate because the

1 likelihood of a coincidental match is much higher than the prosecution offered statistics suggest.
2 (Def. Points & Auth., June 30, 2006, at p. 7.) If what defendant is seeking is "empirical" data with
3 which to conduct new studies of the rarity of forensic profiles, his expert(s) already have access to
4 extensive DNA profile data sets. There is no "necessity" to violate state and federal confidentiality
5 protections and place California's entire Data Bank Program in constitutional jeopardy just so
6 defense experts can conduct redundant and ill-founded "research."

7 By way of illustration, and to assist defendant in his quest for "empirical evidence," the
8 following are several sources of extensive STR profile data:

- 9 • <http://www.fbi.gov/hq/lab/fsc/backissu/july1999/budowle.htm> [FBI publication containing link
10 to 959 13-locus genotypes for various population groups];
- 11 • Einum and Scarpetta, *Genetic Analysis of Large Data Sets of North American Black,
12 Caucasian, and Hispanic Populations at 13 CODIS STR Loci* (Nov. 2004) *J. Forensic Sci.*, Vol.
13 49, No. 6 [indicating the availability of at least 17,000 13-locus genotypes];
- 14 • Weir, et al., *Allele Frequency Data for Profiler Plus Loci in Australia* (Sept. 2004) *J. Forensic
15 Sci.*, Vol 49, No. 5 [indicating the availability of more than 12,000 9-locus genotypes].

16 Thus, defendant's experts have more than adequate data with which to conduct new
17 "studies" concerning the rarity – or lack thereof – of STR alleles in human populations. There is
18 simply no compelling justification for using a privileged law enforcement database as a research tool.

19 Further, California's offender DNA database is ill-suited as a source of population
20 frequency data. Not only does the Database contain tens of thousands of duplicate offender profiles,
21 but the virtual certainty of substantial patterns of real but unrecorded familial relationships among
22 offenders would skew any attempt to view these data as representing a true random sample of human
23 populations. This is because related persons are more likely to share alleles in accord with general
24 principles of genetic inheritance.

25 Finally, the defense proposition to conduct "research" in the context of a single criminal
26 case represents a wholesale corruption of the scientific method. As a predicate of its admissibility,
27 defendant would have to lay the foundation for any "evidence" that the extensive record of scientific
28 consensus concerning random match probability statistics, currently reflected in peer-reviewed

1 publications and nationwide appellate case law, has in fact shifted.⁶ (See *People v. Venegas* (1998)
2 18 Cal.4th 47, 53 ["[I]f a published appellate decision in a prior case has already upheld the
3 admission of evidence based on [a *Kelly* prong one] showing, that decision becomes precedent for
4 subsequent trials in the absence of evidence that the prevailing scientific opinion has materially
5 changed."].) To demonstrate such a radical and groundbreaking revelation about a longstanding
6 scientific premise would require significant and sustained peer-reviewed, published research. It
7 could not be done otherwise, and certainly unpublished and unreviewed "research" done by defense
8 experts in the adversarial setting of a criminal prosecution would bear none of the hallmarks of
9 scientific legitimacy, validity, or general acceptance required by California law. (See *People v. Kelly*
10 (1976) 17 Cal.3d 24.)

11 Accordingly, there is no basis for providing defendant access to a privileged law
12 enforcement database because any defense "findings" offered as a result would be inadmissible as
13 a matter of law.

14 V.

15 **DEFENDANT'S THEORY OF RELEVANCE IS FUNDAMENTALLY**
16 **FLAWED**

17 Defendant's theory of relevancy underlying his request to use California's offender DNA
18 Database as a research tool is based entirely on a false premise; namely, that the data concerning
19 partially-matching DNA profiles in Arizona's offender database "cast serious doubt on the accuracy"
20 of the traditional and generally accepted DNA profile frequency statistics will be offered by the
21 prosecutor. (Def. Points & Auth., June 30, 2006, at pp. 5-6.) To the contrary, the data from Arizona
22 does not conflict with the years of judicially recognized consensus in the forensic scientific
23 community regarding the frequency with which forensic DNA profile alleles appear in human
24 populations.

25 The prosecution's statistics will be in the form of "random match probability" estimates
26 generated through application of the "product rule." This is "the statistical probability that the DNA
27

28 6. The body of case law discussing the scientific consensus regarding traditional random
match probability statistics and the product rule is discussed in Section V, below.

1 profile of a person, selected at random from the relevant population, would contain the same pattern
 2 of alleles represented in the evidence sample. . . . Databases have . . . been developed to determine
 3 population frequencies of the various alleles that may be detected using PCR." (*People v. Reeves*
 4 (2001) 91 Cal.App.4th 14, 31.) Once population frequencies have been determined for each locus,
 5 a calculation is made regarding "the probability that a person at random would have the same
 6 combination of matches at all loci. "The most straightforward means of making this calculation is
 7 through application of the "product rule." . . . "The essence of the product rule is the multiplication
 8 of individual band probabilities to arrive at an overall probability statistic expressed as a simple
 9 fraction, such as 1 in 100,000." . . . Thus, the product rule is simply the multiplication of
 10 frequencies found at each locus studied. The result is a probability statistic that reflects the overall
 11 frequency of the complete DNA profile. It is often quite small." (*Reeves, supra*, 91 Cal.App.4th at
 12 p. 31, internal citations omitted.)

13 The product rule has long been generally accepted in the forensic DNA scientific
 14 community for use in evaluating the rarity of a given forensic DNA profile developed using
 15 PCR-based technology. (*Reeves, supra*, 91 Cal.App.4th at pp. 38-42; *People v. Soto* (1999) 21
 16 Cal.4th 512, 541; *People v. Johnson* (2006) 139 Cal.App.4th 1135, 1149; see also *Smith v. State*
 17 (Ind. 1998) 702 N.E.2d 668, 673-674; *State v. Jackson* (Neb. 1998) 582 N.W.2d 317, 325; *People*
 18 *v. Pope* (Ill.Ct.App. 1996) 672 N.E.2d 1321, 1327-28; *Commonwealth v. Rosier* (Mass. 1997) 685
 19 N.E.2d 739, 743-744; *U.S. v. Gaines* (S.D.Fla. 1997) 979 F.Supp. 1429, 1441; *U.S. v. Shea* (D.N.H.
 20 1997) 957 F.Supp. 331, 341-343; *U.S. v. Lowe* (D.Mass. 1996) 954 F.Supp. 401, 418-419.)

21 Despite national recognition by the judiciary of the scientific validity of traditional random
 22 match probability estimates, defendant claims that they are rendered "inaccurate and misleading .
 23 . . based on information obtained from a convicted offender database maintained by the Arizona
 24 Department of Public Safety." (Def. Points & Auth., June 30, 2006, at p. 5.) The Arizona data,
 25 however, were not generated using any of the random match probability estimate procedures
 26 described above. Where a random match probability describes the probability that one person,
 27 chosen at random from a given population, will coincidentally possess *the actual, specific,*
 28 *perpetrator's DNA profile at every available locus*, the Arizona data merely asks whether any

1 profile(s) in the database partially matches any other profile. These are qualitatively different
2 questions, and the qualitatively different answers have no bearing on each other.

3 To illustrate: The "random match probability" of someone having a specific, particular
4 birthday (e.g., March 27, or October 5, or June 16, etc.) is approximately 1/365 (i.e., selecting a
5 person at random, and assuming that birthdays are equally distributed among all dates of the year.)
6 Thus, all individual birthdays have a rarity of 1/365. But, it is a very different question to ask
7 whether two or more people in a group share *any birthday*. That is analogous to the query put to the
8 Arizona database. The answer involves comparing every person's birthday to every other person's
9 birthday -- or every DNA profile to every other DNA profile. It turns out that in a group of only 23
10 people, 253 such comparisons are performed and as a result there is a better than 50% chance that
11 at least two of them will share a birthday. (See, e.g.,
12 <http://mathforum.org/dr.math/faq/faq.birthdayprob.html>.) Nonetheless, the rarity of a particular
13 birthday remains 1/365.

14 If one were to apply this type of "pairwise comparison" search (i.e., every item compared
15 against every other item) to DNA databases of various sizes, some illuminating results are as
16 follows:

- 17 • In a database of only 1178 offenders, there is a better than 50% chance of at least two sharing
18 a DNA profile with 1/1 million random match probability;
 - 19 • In a database of only 37,234 offenders, there is a better than 50% chance of at least two sharing
20 a DNA profile with 1/1 billion random match probability;
 - 21 • The search of the Arizona DNA database involved approximately 2.1 billion profile
22 comparisons;
 - 23 • A search of California's DNA Database would involve over 121 billion profile comparisons.
- 24 Given that the number of profile comparisons done in the Arizona database search is radically
25 divergent from the one comparison described by a random match probability statistic, and knowing
26 that the Arizona results includes partial matches between siblings and other related individuals,
27 defendant has no factual basis for his assertion that the Arizona data is significant empirical evidence
28 of shortcomings in traditional random match probability statistics.

1 While defendant offers no expert opinion or published scientific reference to support his
2 argument, published, peer-reviewed scientific literature does exist that contradicts his claims. In
3 2004, Dr. Bruce Weir published an article in the Journal of Forensic Science that examined the
4 statistical probabilities of matching and partially-matching STR profiles in databases. (Wier,
5 *Matching and Partially-Matching DNA Profiles*, J. of Forensic Sci. (Sept. 2004) Vol. 49, No. 5.)
6 Dr. Weir concluded that "[a]s offender databases grow . . . high degrees of matching are to be
7 expected." He found that a pair of profiles matching at any nine of the 13 CODIS loci is expected
8 in databases as small as 4,400-7,700 people, and also cautioned that "[a] high degree of allele sharing
9 between pairs of profiles suggests relatedness." (*Ibid.*) Thus, not only is the Arizona data consistent
10 with Dr. Weir's general conclusions, but the fact that the kinship associations among the Arizona
11 database profiles are unknown renders those data relatively uninformative.

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CONCLUSION

For the reasons set forth above, in addition to any argument offered at the hearing on this matter, the Department of Justice respectfully requests that defendant's motion to compel discovery be denied.

Dated: July 13, 2006

Respectfully submitted,

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DECLARATION OF SERVICE BY FACSIMILE AND MAIL

Case Name: **PEOPLE v. IVAN HILL**

No.: **KA064034**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business. My facsimile machine telephone number is (415) 703-5898.

On July 13, 2006. I served the attached **OPPOSITION TO DEFENDANT'S MOTION TO COMPEL DISCLOSURE OF DNA DATABASE POSSESSED BY THE CALIFORNIA DEPARTMENT OF JUSTICE** by transmitting a true copy by facsimile machine, pursuant to California Rules of Court, rule 2008. The facsimile machine I used complied with Rule 2003, and no error was reported by the machine. Pursuant to rule 2008(e)(4), I caused the machine to print a record of the transmission, a copy of which is attached to this declaration. In addition, I placed a true copy thereof enclosed in a sealed envelope with postage thereof fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 13, 2006, at San Francisco, California.

Susan Chiang
Declarant


Signature

pos fax & mail.rpd

BILL LOCKYER
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